

**STATE OF NEW YORK  
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE  
WITH SPECIAL NEEDS**

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In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**FINAL  
DETERMINATION  
AFTER HEARING**

**Adjud. Case #:**

[REDACTED]

Vulnerable Persons' Central Register  
New York State Justice Center for the Protection  
of People with Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
Appearance Waived

New York State Justice Center for the Protection  
of People with Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
By: Laurie Cummings, Esq.

[REDACTED]

By: Rebecca A. Schenk, Esq.  
Legal Aid Society of Westchester County  
150 Grand Street, Suite 100  
White Plains, New York 10601

[REDACTED]

The Findings of Fact and Conclusions of law are incorporated from the Recommendations of the presiding Administrative Law Judge's Recommended Decision.

**ORDERED:** The request of [REDACTED] that the substantiated report dated [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

The substantiated report is properly categorized as a Category 2 act.

NOW, THEREFORE, IT IS DETERMINED that reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years. The record of these reports shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(b).

This decision is ordered by David Molik, Director of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

**DATED:** April 8, 2016  
Schenectady, New York

A handwritten signature in dark ink, appearing to read "David Molik", written over a horizontal line.

David Molik  
Administrative Hearings Unit

**STATE OF NEW YORK  
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE  
WITH SPECIAL NEEDS**

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In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

---

**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

[REDACTED]

Before:

Jean T. Carney  
Administrative Law Judge

Held at:

Office of Children and Family Services  
Spring Valley Regional Office  
11 Perlman Drive  
Spring Valley, New York 10977  
On: [REDACTED]

Parties:

Vulnerable Persons' Central Register  
New York State Justice Center for the Protection  
of People with Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
Appearance Waived

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150 Grand Street, Suite 100  
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### **JURISDICTION**

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for neglect. The Subject requested that the VPCR amend the report to reflect that the Subject is not a subject of the substantiated report. The VPCR did not do so, and a hearing was then scheduled in accordance with the requirements of Social Services Law (SSL) § 494 and Part 700 of 14 NYCRR.

### **FINDINGS OF FACT**

An opportunity to be heard having been afforded the parties and evidence having been considered, it is hereby found:

1. The VPCR contains a "substantiated" report dated [REDACTED] of neglect by the Subject of a Service Recipient.

2. The Justice Center substantiated the report against the Subject. The Justice Center concluded that:

#### **Allegation 2<sup>1</sup>**

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you made sexually accusatory and derogatory comments to a service recipient.

This allegation has been SUBSTANTIATED as Category 2 neglect pursuant to Social Services Law § 493(4)(b).

3. An Administrative Review was conducted and as a result the substantiated report was retained.

4. The facility, located at [REDACTED] is a residential treatment facility operated by [REDACTED] and licensed by the Office of Children and Family Services (OCFS), which is a facility or provider agency that is subject to

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<sup>1</sup> The first allegation was unsubstantiated.

the jurisdiction of the Justice Center.

5. At the time of the alleged neglect, the Subject was employed by [REDACTED]

[REDACTED] as a Milieu Therapist. (Justice Center Exhibit 6)

6. At the time of the alleged neglect, the Service Recipient was 13 years old, and had been a resident of the facility for 11 months. The Service Recipient is an adolescent female with diagnoses of mood disorder and ADHD. (Justice Center Exhibit 10)

7. During the afternoon of [REDACTED], the Service Recipient engaged in a verbal altercation with another service recipient. The two girls exchanged insults, then the Subject said to the Service Recipient, "At least she does not suck dick and swallow cum." (Justice Center Exhibits 6, 17, 19, and 27)

8. The incident occurred in a common area of [REDACTED] where the Service Recipient lived, and was witnessed by several other service recipients and staff. The Service Recipient became upset, and left the residence along with two other service recipients. The other service recipients came back inside when directed by staff; but the Service Recipient left the campus and went down the road toward a busy thoroughfare. Two staff members got into an agency van and found her about 20 minutes later at a gas station. The Service Recipient agreed to return to campus with staff. (Hearing testimony of OCFS Investigator [REDACTED], Justice Center Exhibits 6, 17, 18, and 27)

9. The Service Recipient has been described by her therapist as a sensitive child with a weak sense of self. She has a history of running away and engaging in self-injurious behavior. The Service Recipient expressed feeling ashamed and embarrassed by the Subject's comments, but ultimately was able to work through it with her therapist. (Justice Center Exhibits 8, and 16)

### **ISSUES**

- Whether the Subject has been shown by a preponderance of the evidence to have committed the act or acts giving rise to the substantiated report.
- Whether the substantiated allegations constitute abuse and/or neglect.
- Pursuant to Social Services Law § 493(4), the category of abuse and/or neglect that such act or acts constitute.

### **APPLICABLE LAW**

The Justice Center is responsible for investigating allegations of abuse and/or neglect in a facility or provider agency. (SSL § 492[3][c] and 493[1] and [3]) Pursuant to SSL § 493(3), the Justice Center determined that the initial report of abuse and neglect presently under review was substantiated. A “substantiated report” means a report “... wherein a determination has been made as a result of an investigation that there is a preponderance of the evidence that the alleged act or acts of abuse or neglect occurred...” (Title 14 NYCRR 700.3[f])

The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1), to include:

- (h) "Neglect," which shall mean any action, inaction or lack of attention that breaches a custodian's duty and that results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient. Neglect shall include, but is not limited to: (i) failure to provide proper supervision, including a lack of proper supervision that results in conduct between persons receiving services that would constitute abuse as described in paragraphs (a) through (g) of this subdivision if committed by a custodian; (ii) failure to provide adequate food, clothing, shelter, medical, dental, optometric or surgical care, consistent with the rules or regulations promulgated by the state agency operating, certifying or supervising the facility or provider agency, provided that the facility or provider agency has reasonable access to the provision of such services and that necessary consents to any such medical, dental, optometric or surgical treatment have been sought and obtained from the appropriate individuals; or (iii) failure to provide access to educational instruction, by a custodian with a duty to ensure that an individual receives

access to such instruction in accordance with the provisions of part one of article sixty-five of the education law and/or the individual's individualized education program.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 2, which is defined as follows:

- (b) Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one finding shall be sealed after five years.

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject committed the act or acts of abuse neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of neglect as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

If the Justice Center proves the alleged neglect, the report will not be amended and sealed. Pursuant to SSL § 493(4) and Title 14 NYCRR 700.10(d), it must then be determined whether the act of neglect cited in the substantiated report constitutes the category of neglect as set forth in the substantiated report.

If the Justice Center did not prove the neglect by a preponderance of the evidence, the substantiated report must be amended and sealed.

### **DISCUSSION**

The Justice Center has established by a preponderance of the evidence that the Subject committed an act, described as “Allegation 2” in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-28) The investigation

underlying the substantiated report was conducted by OCFS Investigator [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center. The Subject neither testified in her own behalf nor provided any other evidence.

The Justice Center proved by a preponderance of the evidence that the Subject committed neglect by making sexually explicit and derogatory comments to the Service Recipient. Specifically, the evidence establishes that the Subject was acting as a custodian on the afternoon of [REDACTED]. The Subject breached her duty to the Service Recipient when she told the Service Recipient that at least the other service recipient did not “suck dick and swallow cum”. (Justice Center Exhibits 6, 17, 19, and 27) The Subject should have known that such language was likely to result in a serious or protracted impairment of the Service Recipient’s physical, emotional, or mental condition.

As a Milieu Therapist, the Subject must abide by certain ethical principles promulgated by [REDACTED]. Milieu Therapists are responsible for creating a safe, supportive, and therapeutic environment. The [REDACTED] Residential Department Manual specifically requires respectful communication and interactions with the service recipients, using appropriate language at all times. The Subject was aware of these requirements, having signed the Statement of Ethics on [REDACTED] (Justice Center Exhibits 12, and 13)

In addition, the Subject had been working with the Service Recipient for several months, and should have been familiar with her Individual Crisis Management Plan (ICMP) which states that the Service Recipient has a history of verbal aggression, running away, and self-injurious behavior. The ICMP also states that the Service Recipient responds well to active listening. (Justice Center Exhibit 8) Active listening is a technique taught in Therapeutic Crisis Intervention (TCI) training, a protocol implemented at [REDACTED]. (Justice

Center Exhibit 14) The Subject had been trained in TCI in [REDACTED] and was due for her annual refresher at the time of the incident. (Justice Center Exhibit 11)

By making this sexually explicit and derogatory remark to the Service Recipient in front of her peers and other staff, the Subject violated [REDACTED] policy and ethical principles. One of the other service recipient's remarked to the investigator that if such a comment had been said to her, she would not feel safe around the Subject. This other service recipient met with the investigator 11 days after the incident, and she was still visibly upset. (Hearing testimony of OCFS Investigator [REDACTED], and Justice Center Exhibit 19)

Given the Service Recipient's history of running away and self-harm, it is understandable that she would go off campus after this incident. The Service Recipient told the investigator that she ran away to show the Subject that she was not a follower, and could do bad things on her own. (Justice Center Exhibit 17) Furthermore, the Service Recipient did not have permission to travel off campus by herself because of her history of engaging in risky behavior. (Justice Center Exhibit 6) Therefore it was likely that leaving the campus would result in a serious or protracted impairment of the Service Recipient's physical, mental or emotional condition. Indeed, when she was found about 20 minutes later, she was on a heavily travelled road at a gas station, not far from the [REDACTED] Parkway. (Hearing testimony of OCFS Investigator [REDACTED], Justice Center Exhibits 18, and 25)

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed the neglect alleged. The substantiated report will not be amended or sealed.

Having established that the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse or neglect set forth

in the substantiated report. The fact that the Service Recipient spent significant time in therapy working through the shame and embarrassment that she felt as a result of the Subject's remark indicates that the Service Recipient suffered a serious or protracted impairment to her emotional and mental condition. Running away from campus with the stated intent of doing something bad, coupled with her history of self-injury, made it likely that the Service Recipient would suffer a serious physical injury. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report is properly categorized as a Category 2 act.

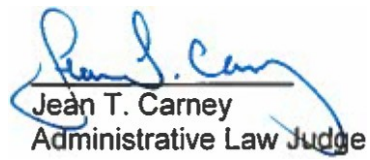
**DECISION:**

The request of [REDACTED] that the substantiated report dated [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

The substantiated report is properly categorized as a Category 2 act.

This decision is recommended by Jean T. Carney, Administrative Hearings Unit.

**DATED:** April 1, 2016  
Schenectady, New York



Jean T. Carney  
Administrative Law Judge