

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

In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AND ORDER
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: Juliane O'Brien, Esq.

[REDACTED]
[REDACTED]
[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 ██████████ that the substantiated report dated ██████████
██████████, ██████████ 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 3 act.

NOW, THEREFORE, IT IS DETERMINED that the record of this report
shall be retained by the Vulnerable Persons' Central Register, and will be
sealed after five years pursuant to SSL § 493(4)(c).

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: July 29, 2016
Schenectady, New York



David Molik
Administrative Hearings Unit

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

In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

Gerard D. Serlin
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
333 East Washington Street
Syracuse, New York 13202
On: [REDACTED]

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
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New York State Justice Center for the Protection
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161 Delaware Avenue
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By: Juliane O'Brien, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

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], [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 2¹

It was alleged that on or about [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you directed derogatory language at a service recipient.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493(4)(c)

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

4. [REDACTED] (the Facility), located at [REDACTED], is a medium secure residential facility for male youths who are adjudicated

¹ Allegation 1 was ultimately unsubstantiated.

as Juvenile Delinquents, and is operated by the New York State Office of Children and Family Services (OCFS), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged neglect, the Subject was employed by the OCFS as a Youth Division Aide-3 (YDA). The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. The Service Recipient's Individual Intervention Plan dictated that when the Service Recipient is in crisis, staff should provide undivided attention by showing involvement with him, speaking about topics of interest to him and using direct appeal techniques. (Justice Center Exhibit 6)

7. The OCFS Supervision of Youth Policy dictates specifically that staff "... provide physical and psychological safety for youth by establishing and maintaining appropriate structure with clear limits, rules, expectations and positive social norms", and requires that staff "Interact respectfully with youth..." and "Refrain from any form of behavior that might provoke a youth..." (Justice Center Exhibit 9, pp 4-5)

8. On [REDACTED], the Subject was working on Unit [REDACTED] of the facility, where the Service Recipient had been assigned. There were two phones located in the common area of Unit [REDACTED], but only one of those two phones had incoming call capabilities. Service recipients were limited to ten-minute phone calls. (Hearing testimony of Justice Center Investigator [REDACTED] [REDACTED])

9. On [REDACTED], at an unknown time, but possibly around dinnertime, while in the common area of Unit [REDACTED], the Service Recipient spoke by phone with his mother and with his

■
 aunt.² During this conversation, the Service Recipient learned that his cousin, ■
 ■, had been murdered ■.
 (Hearing testimony of Justice Center Investigator ■) At approximately the same
 time, service recipient-2 may have been using the second phone on Unit ■ to call other facility
 units. (Justice Center Exhibit 12: Recorded audio interview with the Service Recipient)

10. A staff member from Central Unit arrived at Unit ■ and advised the Subject of
 service recipient-2's use of the phone to call other units. As a result, the Subject attempted to end
 service recipient-2's phone call. (Justice Center Exhibit 12: Recorded audio interview with the
 Service Recipient) Additionally, the staff member from Central Unit attempted to end the Service
 Recipient's phone call.³ (Hearing testimony of the Subject and Justice Center Exhibit 12:
 interrogation of the Subject) The Service Recipient told the Subject and another staff member to
 quiet down and may have told the Subject, using derogatory language, to stop trying to control
 service recipient-2's phone call. Ultimately, one or more staff members, including the Subject,
 did attempt to end the Service Recipient's phone call. (Justice Center Exhibit 12, Recorded
 interview with service recipient-2 and Hearing testimony of the Subject)

11. The Service Recipient then directed vulgar language toward the Subject. (Justice
 Center Exhibit 12, Recorded interview with the Service Recipient and service recipients-1 and 2)
 The Subject responded to the Service Recipient by saying either "Fuck your dead" cousin or "Fuck
 your dead" brother. (Justice Center Exhibit 12, Recorded interview with service recipients-1 and
 2) The Service Recipient then approached the Subject in a threatening manner (Justice Center
 Exhibit 12, Recorded interview with the Service Recipient and service recipients-1 and 2 and

² The record is unclear as to whether this was two separate phone conversations or one phone conversation.

³ The record was not clear. It may have been YDA ■, or it may have been another staff member from Central
 Unit.

interrogation of the Subject), at which time the Service Recipient was physically stopped from doing so either by service recipients-1 and 2 or by YDA [REDACTED]. (Justice Center Exhibit 12, Recorded interview with service recipients-1, 2, and interrogation of the Subject)

12. Later that evening, after 10:00 p.m., the Service Recipient reported to facility staff person [REDACTED] who was the Administrator on Duty (AOD), from 10:00 p.m. onward that, while he was on the phone with his mother, the Subject stated to the Service Recipient “Suck my dick and fuck your dead cousin.” (Hearing testimony of Justice Center Investigator [REDACTED] and Justice Center Exhibit 5)

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 neglect that such act or acts constitute.

APPLICABLE LAW

The Justice Center is responsible for investigating allegations of 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 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 neglect of a person in a facility or provider agency is defined by SSL § 488 (1) h, 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 3, which is defined as follows:

(c) Category three is abuse or neglect by custodians that is not otherwise described in categories one and two. Reports that result in a category three 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 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 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 the act described in Allegation 2 of the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-12) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center. The Subject testified in his own behalf and provided no other evidence.

Justice Center Investigator [REDACTED] interviewed service recipient-2. During that interview, service recipient-2 provided the Investigator with the names of three other service recipients who he claimed were present. The Investigator did interview two of the identified service recipients, but did not attempt to interview the third service recipient who was identified by the Service Recipient as being present during the relevant time. (Hearing testimony of Justice Center Investigator [REDACTED] and Justice Center Exhibit 12, Recorded interview with the Service Recipient)

Additionally, the common area of Unit [REDACTED], like all other facility common areas, is subject to video camera recording with no audio recording. Although a video recording of incident was available to the Investigator for eight days after the incident, during which time the investigation commenced, a copy of the video was not secured by the Investigator largely because it was not offered him by the facility. (Hearing testimony of Justice Center Investigator [REDACTED])

Justice Center Investigator [REDACTED] did not attempt to interview any other staff members who may have had relevant information, including YDA [REDACTED], who was identified as being present during the incident, or AOD [REDACTED], to whom the Service Recipient first

reported the allegation. (Hearing testimony of Justice Center Investigator [REDACTED])

Justice Center Investigator [REDACTED] did speak with the Service Recipient's mother, who confirmed that the Service Recipient was upset during the telephone call, but she did not allege, suggest or provide any details about a conversation or argument that had occurred in the background between the Service Recipient and anyone else, let alone the Subject or another staff member. During his interview, the Service Recipient advised him that service recipient-1 and service recipient-2 were present on Unit [REDACTED] during the phone call. (Hearing testimony of the Justice Center Investigator [REDACTED])

The Service Recipient's Recorded Statement

The Service Recipient was interviewed by Justice Center Investigator [REDACTED] on [REDACTED]. During this interview, the Service Recipient stated that on an unknown date the Subject said to him: "Fuck your dead cousin, you and your moms can suck a dick." The Service Recipient alleged that this was witnessed by YDA [REDACTED] and another unidentified staff member. (Justice Center Exhibit 12, Recorded interview with the Service Recipient)

The Service Recipient stated that he was close to swinging at the Subject, moved closer to him, blacked out and started crying. The Service Recipient stated that he was then removed from Unit [REDACTED].

While the Service Recipient and each of the other service recipients interviewed provided somewhat differing accounts of the events leading up to the Subject's derogatory comments, they described the material allegations in a manner largely consistent with one another.

It should be noted that portions of the recorded audio interview (Justice Center Exhibit 12) with the Service Recipient, which characterize the events leading up to the Subject allegedly making these derogatory comments, are difficult to decipher.

During the interview, the Service Recipient told Justice Center Investigator [REDACTED] that, on the day of the incident, service recipient-2 had been using a phone located on Unit [REDACTED], calling other units in the facility and talking to other service recipients. The Service Recipient told him that the Subject mistakenly believed that he was on the phone with service recipients from another unit. He also told Justice Center Investigator [REDACTED] that it is possible that, when the Subject entered the room, service recipient-2 was on the other phone with a service recipient from another unit. The Subject then said something to service recipient-2 about being on the phone and the Service Recipient said something to the Subject questioning why you have to be on our “dick?” meaning, why you are always trying to control us?

At some time during this exchange, the Service Recipient was speaking on the telephone. The Service Recipient stated that he had been on the phone with his aunt. The Service Recipient also acknowledged that the telephone that he had been using was not capable of calling other units and was connected directly to Central Unit. The Subject may have said something to the Service Recipient about being on the telephone, though this is not entirely clear from the recorded interview with the Service Recipient. The Service Recipient, and possibly another service recipient, may have made derogatory comments about the Subject loud enough for the Subject to hear.

According to the Service Recipient, it was at that point that the Subject allegedly said to the Service Recipient, “Well your mother sucks dick.” The Service Recipient then stated that he proclaimed aloud that he was going to hang up the phone as soon as possible and attack the Subject. The Service Recipient hung up the phone and said, “Fuck your daughter and fuck you too” to the Subject. The Subject then said, “Fuck your dead cousin.” The Service Recipient stated that at that point he “blacked out” and attempted to attack the Subject.

The Service Recipient alleged that a number of service recipients were present, but only identified two service recipients by name.

Service Recipient-1

Service recipient-1 was interviewed by Justice Center Investigator [REDACTED]. (Justice Center Exhibit 12: Recorded interview with service recipient-1) He stated that the Service Recipient was speaking on one of the Unit [REDACTED] phones in the common area, but he did not know with whom the Service Recipient was speaking. A staff member from Central Unit arrived on Unit [REDACTED] and said something to the Subject. The Subject then said “something” to the Service Recipient, which triggered the Service Recipient, but he did not know what was said. The Service Recipient ended the phone call and approached the Subject. Service recipients-1 and 2 held the Service Recipient “back.” The Subject then called the Service Recipient a “fucking pussy and said something about his dead brother.” The Service Recipient started crying and the response team came. Under questioning, service recipient-1 said he did not know what the Subject said about the Service Recipient’s brother, but then he said, “I think he said ‘Fuck your dead brother.’” Service recipient-1 provided the names of three other service recipients who were present during the incident.

After listening to and considering service recipient-1’s recorded interview, (Justice Center Exhibit 12), service recipient-1’s statement on the material issues is credited evidence. Service recipient-1’s statement is largely corroborated by service recipient 2’s statement and the statement of the Service Recipient.

Service Recipient -2

Service recipient-2 was interviewed by Justice Center Investigator [REDACTED]. (Justice Center Exhibit 12: Recorded interview with service recipient-2) He stated that the Service

Recipient was talking on the phone about his dead cousin. The Subject was talking with another staff member from Central Unit. The Service Recipient asked the Subject to stop talking so loudly and said he was on the phone talking about his dead cousin. The Subject then said, "Fuck your dead cousin." After listening to, and considering service recipient-2's recorded interview (Justice Center Exhibit 12), service recipient-2's statement on the material issues is credited evidence. Service recipient-2's statement is largely corroborated by the service recipient-1's statement and the statement of the Service Recipient.

The Subject's Statement and Testimony

The Subject was interviewed by Justice Center Investigator [REDACTED] at the time of the investigation. (Justice Center Exhibit 12, Recorded interrogation of the Subject) The Subject provided the following characterization of events during his interrogation.

The Subject told Justice Center Investigator [REDACTED] that service recipients are limited to ten-minute phone calls and that after the Service Recipient exceeded this time limit, the Subject advised the Service Recipient that he needed to get off the phone. The Service Recipient became angry and stated to the Subject: "you are trying to run the unit." In addition, the Service Recipient also stated that the Subject: "was going too hard to the rules." The Subject responded that he was just "doing his job." The Service Recipient started to "come at" the Subject and he was stopped by YDA [REDACTED]. A code was called, which means the response team was summoned to Unit [REDACTED].

During the interrogation, and again during hearing testimony, the Subject stated that he made no derogatory comments to the Service Recipient during this incident. The Subject's hearing testimony was essentially identical to the recorded statements that he provided to Justice Center Investigator [REDACTED] during the interrogation. Having considered and observed the

Subject's hearing testimony, the ALJ presiding over the hearing does not find the Subject's hearing testimony on this issue to be credible.

There is much evidence that, if gathered, likely would have been probative. The Subject argued this point well. Nonetheless, the audio recorded statements of the Service Recipient and service recipients -1 and 2, though somewhat different in their accounts, are more similar than not, and are consistent in the allegation that the Subject stated to the Service Recipient "Fuck your dead cousin", or "brother." Additionally, having listened to and considered the recorded statements, the statements of the Service Recipient and service recipients-1 and 2 are credited evidence. To the contrary, the Subject's hearing testimony is not credited evidence.

A preponderance of the evidence has been described as just enough evidence to make it more likely than not that, the fact seeking to be proven is true. It generally means that a particular fact, issue or element is supported by the greater part of the believable and reliable evidence, not in terms of the number of witnesses, but in terms of its quality, the weight and the convincing effect it has. The evidence that supports the finding must be of such convincing quality as to outweigh any evidence to the contrary. In other words, a preponderance of the evidence is based on the more convincing evidence and its probable truth or accuracy, and not on the amount of evidence.

One way to determine whether there is a preponderance of the evidence is to ask whether it is more likely true than not true that the custodian abused or neglected the service recipient. In other words, if the Justice Center can show that the version of facts that supports the finding of abuse or neglect is more likely than not to have occurred, then the preponderance standard has been met.

In this case, it is more likely than not that, while the Service Recipient was in a much-

heightened emotional state, the Subject said to the Service Recipient, “Fuck your dead cousin” or “brother”. The Subject’s words served only to worsen the situation and ultimately to provoke the Service Recipient to charge after the Subject.

The Subject agitated the Service Recipient while he was in an emotionally heightened state and this action is contrary to the Service Recipient’s Individual Intervention Plan (Justice Center Exhibit 6) and the OCFS Supervision of Youth Policy that requires that staff members interact respectfully with youth and refrain from any form of behavior that might provoke a youth. (Justice Center Exhibit 9, pp 4-5) The Subject’s actions were a clear breach of his duty to the Service Recipient. The Service Recipient became so enraged that he charged after the Subject and had to be held back and, therefore, the Subject’s breach was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

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.

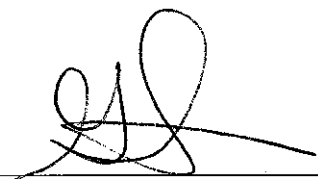
The report will remain substantiated and the next question to be decided is whether the substantiated report constitutes the category of neglect set forth in the substantiated report. Based upon the totality of the circumstances, the evidence presented and the witnesses’ statements, it is determined that the substantiated report is properly categorized as a Category 3 act.

DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED], [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 3 act.

This decision is recommended by Gerard D. Serlin, Administrative
Hearings Unit.

DATED: June 28, 2016
Schenectady, New York


Gerard D. Serlin, ALJ