

**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 ██████████
██ as it relates to Allegation 2, be
amended and sealed is denied. The Subject has been shown by a
preponderance of the evidence to have committed neglect.

Allegation 2 of the substantiated report is properly categorized, as a
Category 3 act.

The request of ██████████ that the substantiated report dated ██████████
██ as it relates to Allegation 3, be
amended and sealed is denied. The Subject has been shown by a
preponderance of the evidence to have committed neglect.

Allegation 3 of 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 this report for the Category 2 finding shall be
retained by the Vulnerable Persons' Central Register, and will be sealed
after five years pursuant to SSL § 493(4)(b).

NOW, THEREFORE, IT IS DETERMINED that the record of this report regarding the Category 3 finding 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: September 26, 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

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before:

John T. Nasci
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
333 East Washington Street, Room 115
Syracuse, New York 13202
On: ██████████

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

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.

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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 2¹

It was alleged that on [REDACTED], at the [REDACTED] located at [REDACTED], while acting as a custodian, you committed neglect when you failed to use proper de-escalation techniques and directed inappropriate, derogatory and/or threatening language at service recipients, and threw a chair around within their range of hearing.

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

Allegation 3

It was alleged that on [REDACTED], at the [REDACTED] located at [REDACTED], while acting as a custodian, you committed neglect when you failed to use proper de-escalation techniques and directed inappropriate, derogatory and/or threatening language at a service recipient, and threw a chair in his direction.

¹ Allegation 1 was unsubstantiated prior to the date of the hearing.

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, the [REDACTED] of the [REDACTED] located at [REDACTED] is a non-secure residential treatment facility for male youth who have been placed outside of their home by Family Court, and is licensed by the New York State Office of Children and Family Services (OCFS), which is an agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of [REDACTED] Justice Center Internal Investigator)

5. At the time of the alleged neglect, the Subject was employed by the [REDACTED] as a Residential Counselor (RC) and had been employed by the facility for approximately three years. (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2) and a mandated reporter.

6. At the time of the alleged neglect, the following Service Recipients were residents of [REDACTED] and were present in the cottage: Service Recipient 1 who was eighteen years old and had been a resident of the facility for approximately two years; Service Recipient 2 who was seventeen years old and had been a resident of the facility for approximately two years; Service Recipient 3 who was sixteen years old and had been a resident of the facility for approximately one year; Service Recipient 4 who was fifteen years old and had been a resident of the facility for approximately one year; and Service Recipients 5; and 6, whose ages and durations of residence at the [REDACTED] were not included in the record. The Service Recipients were all male juveniles who were placed in the [REDACTED] by Family Court. (Justice Center Exhibits 12, 22 and 24)

7. [REDACTED] is a two story structure and, at the time of the alleged neglect, the Service Recipients' bedrooms were located on the second floor. On the first floor, there was a centrally located dining room with four walls. Progressing counterclockwise, the entrance to the staircase to the second floor was in one corner of the room, an entrance to the laundry room was in the next corner, a wall telephone was in the next corner and an entrance to the kitchen was in the final corner. The dining room was approximately fifteen feet wide by fifteen feet long and contained a square table measuring approximately five feet long and five feet wide which was placed against the wall between the wall telephone and the kitchen entrance. There were six chairs which were positioned tightly to the table, two chairs on each of the three exposed sides of the table. (Hearing testimony of [REDACTED], Justice Center Internal Investigator, and Justice Center Exhibit 28)

8. On Saturday [REDACTED], the Subject and another RC, Staff A, were the only staff working at [REDACTED]. At approximately 7:00 p.m. that evening, after returning from the recreation hall, the Subject instructed the Service Recipients to perform their house chores. Service Recipients 2, 3 and 4 went upstairs to their bedrooms and did not comply with the Subject's direction. Staff A was upstairs and did nothing to encourage the three Service Recipients to comply with the Subject's directives. (Justice Center Exhibits 6, 7 and 18; and Hearing testimony of the Subject)

9. The Subject watched Service Recipients 1, 5 and 6 do their house chores on the first floor and after completing their chores, Service Recipients 5 and 6 went upstairs. The Subject was upset that Service Recipient 3 would not do his chores and he started yelling from the base of the stairs for him to come downstairs and do his chores. (Justice Center Exhibits 8, 10, 12, 15, 16 and 17)

10. The Subject then heard a loud thump or banging from upstairs and told Service Recipient 1 to go upstairs and into his room until things calmed down, which he did. The Subject then went upstairs and found that Staff A was with Service Recipient 3 in Service Recipient 3's bedroom with the door shut, contrary to facility policy. While the Subject was upstairs, he called out to Staff A, in the presence or within hearing range of the Service Recipients: "Don't bother coming out, it's too late, you're only going to baby the kids like you always do," "I'm sick of this shit," and "I'm calling support, obviously I have no support from you, [you're] too busy babying the residents." (Hearing testimony of the Subject and Justice Center Exhibit 8)

11. Service Recipient 3 and the other Service Recipients came out of their bedrooms into the hallway where the Subject was standing. Service Recipient 3 was very upset at the Subject and attempted to physically assault the Subject. Service Recipient 2 held Service Recipient 3 back and Staff A then escorted Service Recipient 3 back to his bedroom. (Justice Center Exhibits 6, 8, 15, 16 and 18)

12. The Subject told Service Recipient 4, who was standing in the hallway, to go to his room until things were settled. Service Recipient 4 responded to the Subject by saying that he did not like the way the Subject had spoken to Service Recipient 3. The Subject told him that it was none of his business and he needed to calm down. The Subject then said "This is how you guys are going to repay all the nice things I have done for you?" Service Recipient 4 became more defiant by speaking disrespectfully to the Subject and threatening to fight the Subject. The Subject was very upset and started walking down the stairs. (Justice Center Exhibits 8 and 15, and Hearing testimony of the Subject)

13. As the Subject was walking down the stairs, Service Recipient 4 started taunting the Subject calling him a "pussy" and demanding that he come back upstairs and fight him. The

Subject responded to the Service Recipient by telling him that if he (the Subject) fought him then he would be a “pussy.” The Subject was enraged and continued down the stairs. (Justice Center Exhibits 8, 11, 15 and 17; and Hearing testimonies of Service Recipient 1 and the Subject)

14. The Subject entered the dining room from the stairs and found Service Recipient 1 walking toward the telephone on the far side of the room. Service Recipient 1 took the telephone receiver off the hook and started dialing the telephone number for the support team. The Subject went across the room and around the table to where Service Recipient 1 was and told him to hang up the telephone, which Service Recipient 1 did. Service Recipient 1 then walked away from the telephone and past the Subject, who remained behind the table. (Justice Center Exhibit 28)

15. Once Service Recipient 1 had passed the Subject, the Subject grabbed a chair from the far side of the table with both hands, raised the chair over his head with the chair legs pointed away from him and threw the chair in the direction of Service Recipient 1. When the Subject threw the chair, Service Recipient 1 was about four feet away from him. Service Recipient 1 reacted by backing away and moving to the Subject’s left to get out of the trajectory of the chair and, at the same time, raised his right hand up reflexively to prevent the chair from hitting him. The chair hit the floor directly in front of Service Recipient 1 about three feet from him, bounced and went into the stairwell. Service Recipient 1 then exited the dining room via the stairway entrance. (Justice Center Exhibit 28)

16. After Service Recipient 1 had exited the dining room, the Subject walked to the opposite corner of the dining room near the staircase entrance, picked up the chair which he had just thrown, and threw it back across the room where it bounced off the floor, hit another chair, went over and across the corner of the table and landed on the floor in the opposite corner of the dining room near the telephone. The Subject then walked to the opposite corner of the room,

picked up the chair and placed it under the table where it was before he first threw it. There were no Service Recipients present in the dining room when the Subject threw the chair the second time. (Justice Center Exhibit 28)

17. Staff A called Support because she and Service Recipients 2, 3, 4 and 5 heard what sounded like the Subject throwing chairs and punching walls. (Justice Center Exhibits 10, 12, 15, 16 and 18) The Support staff arrived shortly thereafter and removed the Subject from the cottage. (Justice Center Exhibits 6, 8, 12, 15, 16 and 18; and Hearing testimonies of Service Recipient 1 and the Subject)

18. After the incident, [REDACTED], [REDACTED] Director met with Service Recipients 2, 1 and 3, to determine the effects of the incident on them. Service Recipient 2 expressed feelings ranging from guilt (for starting the incident by annoying the Subject) to full responsibility for the incident. Service Recipient 1 began having suicidal thoughts after the incident, felt chronically unsafe and was sick of all the drama. Following the incident, Service Recipient 3 engaged in acts of self-harm more frequently than his norm, his behaviors became moody, unstable and somewhat unpredictable, and he wanted to discuss the incident in every individual therapy session since the incident occurred. (Justice Center Exhibit 24 and Hearing testimony of [REDACTED] [REDACTED] Director)

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 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)(h), to include:

"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 Categories (2) and (3), 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.

(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(s) 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 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 the acts, described in “Allegation 2” and “Allegation 3” 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 through 27) The Justice Center also presented a video-only recording of a portion of the alleged incident. (Justice Center Exhibit 28) The investigation underlying the substantiated report was conducted by Justice Center Internal Investigator [REDACTED], who testified at the hearing on behalf of the Justice Center. [REDACTED] [REDACTED] Director for [REDACTED] also testified on behalf of the Justice Center.

The Subject testified in his own behalf and presented Service Recipient 1 who testified on the Subject's behalf.

Allegation 2

The Justice Center contends that the Subject committed neglect by failing to use proper de-escalation techniques, by directing inappropriate, derogatory and/or threatening language at the Service Recipients and by throwing a chair around within the range of hearing of the Service Recipients.

In order to prove neglect, the Justice Center must first establish that the Subject's conduct breached his custodian's duty to the Service Recipient. (SSL § 488(1)(h)) The record reflects that among the Subject's various duties as a Residential Counselor were the supervision of residents and the prevention of crises. (Hearing testimony of [REDACTED] Justice Center Internal Investigator) The record also reflects that the Subject breached these duties, not only by failing to de-escalate the Service Recipients, but also by making improper and inappropriate statements in the presence of the Service Recipients, including using foul language and complaining about his co-worker, which resulted in the further escalation of the Service Recipients' poor behavior. The record further reflects that the Subject was extremely upset and enraged in the presence of the Service Recipients. Finally, the record reflects that the Subject acted out his frustrations and rage by throwing a chair two times in the dining room, which was heard by the Service Recipients who were present in the cottage. Consequently, the Subject has been sufficiently shown to have breached his custodian's duty to Service Recipients 1, 2, 3, 4, 5 and 6, all of whom were present in the cottage at the time of the incident.

The Justice Center must next establish that the Subject's breach of duty resulted in or was likely to result in physical injury or serious or protracted impairment of the physical, mental or

emotional condition of the Service Recipient. (SSL § 488(1)(h)) The record reflects that Service Recipients 2, 1 and 3 all suffered serious emotional impairment, including Service Recipient 2 blaming himself for the incident, Service Recipient 1 having suicidal ideations and Service Recipient 3 physically harming himself, as a result of the Subject's conduct. Although no evidence was offered concerning the effects of the Subject's conduct on Service Recipients 4, 5 and 6, no such evidence is necessary to prove neglect. Based on the severity of the Subject's conduct and the evidence of its negative effect on Service Recipients 2, 1 and 3, it is concluded that serious impairment of the emotional condition of Service Recipients 4, 5 and 6 was likely to occur from the Subject's breach of duty.

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 in Allegation 2. The substantiated report will not be amended or sealed.

Although the report will remain substantiated, 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 Allegation 2 of the substantiated report is properly categorized as a Category 3 act.

Allegation 3

The Justice Center contends that the Subject committed neglect by failing to use proper de-escalation techniques, directing inappropriate, derogatory and/or threatening language at Service Recipient 1 and throwing a chair in the direction of Service Recipient 1.

As stated above, the Subject has been shown to have had a duty to properly supervise the Service Recipients and prevent crises. The Subject breached this duty when he failed to de-escalate

the Service Recipients and instead made improper and inappropriate statements, such as complaining about his co-worker, in the presence of the Service Recipients, including Service Recipient 1. The Subject's breach of duty resulted in the serious impairment of Service Recipient 1's emotional condition. Furthermore, the record reflects that, when the Subject threw a chair, he did so with total disregard for the safety of Service Recipient 1 who the Subject knew was only a few feet away from at the time, and that the chair came close to hitting Service Recipient 1. Consequently, it has been sufficiently established that the Subject's breach of duty was likely to result in physical harm to Service Recipient 1.

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 in Allegation 3. The substantiated report will not be amended or sealed.

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of neglect set forth in the substantiated report. A Category 2 substantiation requires a finding that the Subject's conduct seriously endangered the health, safety or welfare of the Service Recipient. Because the record reflects that the Subject threw a chair in the direction of Service Recipient 1 while the Subject was in an enraged state, it is concluded that the Subject's conduct seriously endangered Service Recipient 1's safety. Therefore, based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that Allegation 3 of the substantiated report is properly categorized as a Category 2 act.

Category 2 conduct shall be elevated to Category 1 conduct when such conduct occurs within three years of a previous finding that such custodian engaged in Category 2 conduct.

Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years.

DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] as it relates to Allegation 2, be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.


Allegation 2 of the substantiated report is properly categorized, as a Category 3 act.

The request [REDACTED] that the substantiated report dated [REDACTED] [REDACTED], as it relates to Allegation 3, be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

Allegation 3 of the substantiated report is properly categorized, as a Category 2 act.

This decision is recommended by John T. Nasci, Administrative Hearings Unit.

DATED: September 23, 2016
Schenectady, New York



John T. Nasci, ALJ