

**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  
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: Jacqueline Seitz, 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 [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 psychological abuse.

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 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 19, 2017  
Schenectady, New York

  
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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

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**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

[REDACTED]

Before:

David Molik  
Supervising Administrative Law Judge

Held at:

Eleanor Roosevelt State Office Building  
4 Burnett Blvd.  
Poughkeepsie, New York 12601  
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

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

[REDACTED]  
[REDACTED]  
[REDACTED]

### **JURISDICTION**

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse. 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 abuse by the Subject of a Service Recipient.

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

#### **Allegation 1**

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed psychological abuse when you yelled at and directed derogatory language at a service recipient.

This allegation has been SUBSTANTIATED as Category 2 psychological abuse 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 foster care boarding home for male youth, and is licensed 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 abuse, the Subject was employed by the [REDACTED]

[REDACTED] as a Child Care Worker and had worked for the [REDACTED]

[REDACTED]. (Justice Center Exhibit 18)

6. At the time of the alleged abuse, the Service Recipient was sixteen years old and had been a resident of the facility for approximately eight months. The Service Recipient is a young person who suffers from self-esteem and neglect issues. (Justice Center Exhibits 11 and 19)

7. Around 8:00 p.m. of [REDACTED], the Service Recipient and three other service recipients were allowed to throw a football around outside the foster care boarding home. The Subject had warned the service recipients five times to move away from his car, which was parked close by. During this time the Subject's car was hit at least one time by the football, which resulted in damage to the vehicle. (Justice Center Exhibits 2, 6, 11, 12, 13, 14, 17, and 18; Hearing testimony of the Subject; Hearing testimony of the OCFS Institutional Abuse Supervisor [REDACTED] [REDACTED])

8. After this, the Subject was observed confronting the Service Recipient. Specifically, the Subject was seen yelling at the Service Recipient, cursing at him and stating, "that's why your family doesn't love you...", and, "if you keep this up at this rate...you will be nothing." A statement from one of the service recipients indicates that the Subject also said, "fuck you, you're a pussy..." to the Service Recipient. (Justice Center Exhibits 6, 11, 12, 13, 14)

9. The Service Recipient was observed to be visibly upset, crying, and cursing. The other three service recipients took him for a walk to calm him down. (Justice Center Exhibits 11, 12, 13, 14 and 17)

10. Staff A observed these interactions and heard the yelling, but could not make out most of the words. Staff A did hear the Subject complain about his car. She also observed the three service recipients comfort the Service Recipient.

11. The Subject testified that upon observing the damage to his car, the Subject went outside to confront the Service Recipient. He admits he was upset and yelled at the Service Recipient. He also admits that he repeated the curse words that the Service Recipient said to him. Specifically, that he was a “bitch and a pussy.” Finally, he testified that he told the Service Recipient that you are just going to push those who care about you away. (Justice Center Exhibits 2 and 18; Hearing testimony of the Subject)

12. In an undated letter, the Service Recipient was evaluated by a Licensed Master Social Worker (LMSW) who concluded that this incident could have a profound impact on the Service Recipient’s social, emotional and psychological well-being. That the Service Recipient suffers from self-esteem and neglect issues. He struggles with trusting relationships and has a difficult time with a sense of belonging. The incident could set the Service Recipient back in his trust of his caregivers, building relationships with adults and his self-worth. Additionally, the Service Recipient was still very upset and hurt about the incident. The LMSW concluded that the Service Recipient could suffer a substantial diminution of his emotional, social, or behavioral development as a result of the Subject’s conduct. (Justice Center Exhibit 19)

### **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.

- Pursuant to Social Services Law § 493(4), the category of abuse 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 psychological abuse of a person in a facility or provider agency is defined by SSL § 488(1)(c):

(c) "Psychological abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by verbal or non-verbal conduct, a substantial diminution of a service recipient's emotional, social or behavioral development or condition, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor, or causing the likelihood of such diminution. Such conduct may include but shall not be limited to intimidation, threats, the display of a weapon or other object that could reasonably be perceived by a service recipient as a means for infliction of pain or injury, in a manner that constitutes a threat of physical pain or injury, taunts, derogatory comments or ridicule.

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 alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of abuse as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged abuse, 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 abuse cited in the substantiated report constitutes the category of abuse as set forth in the substantiated report.

If the Justice Center did not prove the abuse 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 1” 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 1-19) The investigation underlying the substantiated report was conducted by the OCFS Investigator [REDACTED], who was not available to testify. OCFS Institutional Abuse Supervisor [REDACTED], 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.

In order to sustain an allegation of psychological abuse, the Justice Center must show that the Subject was acting as a custodian, and engaged in conduct that was either reckless or intentional, and caused a substantial diminution of a service recipient’s emotional, social, or behavioral development or condition as supported by an assessment performed by certain



professionals, including but not limited to a licensed master social worker, or causing the likelihood of such diminution. (SSL § 488(1)(c))

In this case, the Subject was employed by a facility or provider agency and therefore was a custodian as that term is defined in SSL § 488(2).

The Justice Center proved that around 8:00 p.m. of [REDACTED], the Service Recipient and three other service recipients were allowed to throw a football around outside the foster care boarding home. The Subject had warned the service recipients five times to move away from his car, which was parked close by. During this time the Subject's car was hit at least one time by the football, which resulted in damage to the vehicle. (Justice Center Exhibits 2, 6, 11, 12, 13, 14, 17, and 18; Hearing testimony of the Subject; Hearing testimony of OCFS Institutional Abuse Supervisor [REDACTED])

After this, the Subject was observed confronting the Service Recipient. Specifically, the Subject was seen yelling at the Service Recipient, cursing at him, and stating, "that's why your family doesn't love you...", and, "if you keep this up at this rate...you will be nothing." One of the service recipients indicates that the Subject also said, "fuck you, you're a pussy..." to the Service Recipient. (Justice Center Exhibits 6, 11, 12, 13, 14)

By losing his temper with the Service Recipient, yelling at him, using curse words, indicating that he would never amount to anything, and that his family does not love him, telling him "fuck you" and "you're a pussy," the Subject engaged in reckless conduct. SSL § 488(16) indicates that the word "recklessly" has the same meaning as provided in New York Penal Law § 15.05. Under New York Penal Law § 15.05(3), a person acts "recklessly with respect to a result or to a circumstance" when the person is "aware of and consciously disregards a substantial and unjustifiable risk that such result will occur." The Subject had worked with the Service Recipient

for a significant period of time. He was aware of his behaviors and triggers. Engaging in such conduct created an unjustifiable risk of impairment to the Service Recipient's emotional, social, or behavioral development or condition. (Justice Center Exhibits 11, 12, 12, 14, 17, and 19)

Produced into evidence was a clinical assessment performed by a licensed Master Social Worker. Although this assessment does not say that the Service Recipient suffered any diminution of his emotional, social or behavioral development or condition, it does state that this incident could have a profound impact on him. (Justice Center Exhibit 19)

The Subject testified that upon observing the damage to his car, the Subject went outside to confront the Service Recipient. He admits he was upset and yelled at the Service Recipient. He also admits that he repeated the curse words that the Service Recipient said to him. Finally he testified that he told the Service Recipient that you are just going to push those who care about you away. (Justice Center Exhibits 2 and 18; Hearing testimony of the Subject)

Although there is some discrepancy in the actual words that were stated by the Subject, he does admit that he did swear and yell at the Service Recipient. As an admission is the strongest form of proof, these admissions lend a strong credence to the Justice Center's case.

The Justice Center has proven that by swearing at and degrading the Service Recipient, the Subject acted recklessly and caused the likelihood of the substantial diminution of his emotional, social, or behavioral development or condition.

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 abuse alleged. 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 abuse set forth in the substantiated report. The

Service Recipient was struggling with many issues including self-esteem and neglect issues. His foster father had recently closed his foster home to the Service Recipient after having lived with the Service Recipient for twelve years. He also stated that he was no longer going to adopt him. Therefore, the statements and actions of the Subject were likely to have a profound effect on the Service Recipient. 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.

A Category 2 act under this paragraph shall be elevated to a Category 1 act when such an act occurs within three years of a previous finding that such custodian engaged in a Category 2 act. 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], [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed psychological abuse.

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

This decision is recommended by David Molik, Administrative Hearings Unit.

**DATED:** April 17, 2017  
Schenectady, New York



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David Molik  
Administrative Hearings Unit