

**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]

The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

ORDERED: The attached and incorporated Recommended Decision is hereby adopted in its entirety.

ORDERED: The Vulnerable Persons' Central Register shall take action in conformity with the attached Recommended Decision, specifically the Decision section.

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: March 19, 2018
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject
William Burke, Esq.

**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:

Jean T. Carney
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
4 Burnett Boulevard
Poughkeepsie, NY 12601
On: [REDACTED]

Parties:

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

[REDACTED]

By: William Burke, Esq.
O'Neil & Burke, LLP
135 North Water Street
Poughkeepsie, NY 12601

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for psychological abuse and 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 psychological abuse and 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 psychological abuse and/or neglect when you raised your voice to and directed derogatory language toward a service recipient.

These allegations have been SUBSTANTIATED as Category 3 psychological abuse and Category 3 neglect pursuant to Social Services Law § 493(4)(c).

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

4. The facility, located at [REDACTED], is an Individualized Residential Alternative (IRA), for adults with developmental disabilities, and is operated by the

¹ Allegation 1 was unsubstantiated on [REDACTED].

[REDACTED]

New York State Office for People With Developmental Disabilities (OPWDD) which is a provider agency that is subject to the jurisdiction of the Justice Center. (Justice Center Exhibit 12; Hearing testimony of Justice Center Investigator [REDACTED] [Investigator [REDACTED]])

5. At the time of the alleged abuse and neglect, the Subject was employed by OPWDD as a Developmental Aide 2 (DA2), also known as the House Manager. The Subject had worked in the [REDACTED] from 2007 until [REDACTED] 2014, and her normal shift was from [REDACTED] [REDACTED] (Hearing testimony of Subject)

6. At the time of the alleged abuse and neglect, the Service Recipient was an elderly woman, and had been a resident of the facility for approximately five years. The Service Recipient had relevant diagnoses of schizoaffective disorder, obsessive-compulsive disorder, and mild intellectual disability. (Justice Center Exhibits 9 and 19)

7. On the afternoon of [REDACTED], shortly before the end of her shift, the Subject was in the kitchen with the evening shift DA1 when the Service Recipient entered the kitchen to receive her medications. The Service Recipient was upset, yelling about an incident at her day program where a peer had called the Service Recipient a “fat butt”. (Justice Center Exhibits 11, 12, and 28; Hearing testimony of Subject)

8. The Service Recipient’s Behavioral Support Plan (BSP) states that the Service Recipient “needs encouragement from staff to look at the bright side of life. Whenever she complains about people, places and things, staff should offer some positive take on the situation.” (Justice Center Exhibit 19)

9. In response to the Service Recipient’s complaints about being called a name, the Subject reminded the Service Recipient that she sometimes says hurtful and offensive things to people as well, and that now she knows what it feels like to be called a name. The Service Recipient

and the Subject engaged in this circular conversation for several minutes, during which time the Service Recipient called the Subject a racial slur. The interaction became heated such that the Subject's tone and volume caused staff in the living room to admonish the Subject. Staff in the living room called her name approximately 5 times, saying "[REDACTED], enough". Simultaneously, the DA1 told the Subject to stop engaging with the Service Recipient in that manner. The Subject eventually heeded her co-workers and disengaged. (Hearing testimonies of Investigator [REDACTED] and Subject; Justice Center Exhibits 9, 12, 14, 15, 16, and 28)

10. That evening, the Service Recipient did not exhibit any adverse effects from the confrontation, but the next day she reported to staff that she did not want the Subject to take her to her day program, and that she was afraid that the Subject might hit her. The Service Recipient continued to express fear of the Subject after the incident, alleging that the Subject always yells at her. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 9, 10, 11, 12, 15, 16, and 20)

11. Prior to this incident, the Subject was formally counseled regarding a lack of sensitivity in speaking to service recipients. (Justice Center Exhibit 22)

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 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])

Psychological abuse and neglect are defined by SSL § 488(1) as:

(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.

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

If the Justice Center proves the alleged abuse and/or 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 abuse and/or neglect cited in the substantiated report constitutes the category of abuse and/or neglect as set forth in the substantiated report.

If the Justice Center did not prove the abuse and/or 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 neglect, described as “Allegation 2” in the substantiated report. The Justice Center has not established by a preponderance of the evidence that the Subject committed psychological abuse, described as “Allegation 2” in the substantiated report.

In support of its substantiated findings, the Justice Center presented several documents obtained during the investigation, as well as an audio recording of witness interviews. (Justice Center Exhibits 1-28) The investigation underlying the substantiated report was conducted by

Investigator [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and provided no other evidence.

Allegation 2 - Neglect

In order to sustain an allegation of neglect, the Justice Center must prove that the Subject was a custodian who owed a duty to the Service Recipient, that she breached that duty, and that her breach either 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 parties do not dispute that the Subject was a custodian as defined in SSL § 488(2). The dispute concerns whether the Subject breached a duty to the Service Recipient, and if so, whether that breach either resulted in or was likely to result in a serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

Pursuant to the Service Recipient's BSP, when the Service Recipient complained of her peer calling her a name, the Subject had a duty to encourage the Service Recipient to look at the "bright side of life", and offer a "positive take on the situation". (Justice Center Exhibit 19) Instead, the Subject pointed out that the Service Recipient had also made hurtful and offensive comments to other people. Rather than calming the Service Recipient down, the Subject's remarks escalated the Service Recipient's agitation, and the Subject compounded the error by continuing to engage with the Service Recipient. The record reflects that the evening shift manager told the Subject to stop approximately five times before the Subject heeded. (Justice Center Exhibit 16) The Subject testified at the hearing that she did not hear anyone tell her to stop until another staff in the living room called her name. (Hearing testimony of Subject) Both statements are credible, because if the

Subject was engaged in a heated discussion with the Service Recipient, she would likely not hear anyone else. The Subject testified that the Service Recipient had called her a highly charged racial slur several times during this conversation, which also lends credence to the witnesses' statements that the Subject continued to berate the Service Recipient despite being told to stop. The Subject's remarks and subsequent discourse were inconsistent with the Service Recipient's BSP and therefore breached the Subject's duty to the Service Recipient.

Additionally, the Subject had a duty to know and understand the Service Recipient's BSP. During the Subject's interrogation, she clearly did not fully understand the Service Recipient's triggers and how to re-direct the Service Recipient when triggered.

Finally, the Subject's breach resulted in a protracted impairment of the Service Recipient's physical, mental or emotional condition. The Service Recipient reported to staff the following day that she was afraid of the Subject, and that she did not want the Subject to drive her to program. The Service Recipient was interviewed one week after the incident, and a month after that. At both interviews, the Service Recipient continued to express fear of the Subject. Furthermore, there was no evidence in the record to indicate that the Service Recipient had expressed fear of the Subject prior to this incident. Therefore, it may be inferred that the Service Recipient suffered a protracted impairment as a result of the Subject's conduct. (Justice Center Exhibits 15 and 20)

Finally, the Subject's breach was likely to result in such an impairment, based on the Service Recipient's targeted behavior of stuffing toilets as a way of regulating and expressing the Service Recipient's discomfort and anxiety. This is a long-standing behavior that is triggered when the Service Recipient feels either angry, or upset, or frustrated. (Justice Center Exhibit 19) The Subject's remarks and continued escalation were likely to trigger this behavior, and consequently could result in a significant impairment of the Service Recipient's physical, mental or emotional

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 neglect 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 or 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.

Allegation 2 – Psychological Abuse

In this case, to sustain an allegation of psychological abuse, the Justice Center must establish that the Subject's conduct was either intentional or reckless; and caused a substantial diminution of the Service Recipient's emotional, social or behavioral development or condition supported by a clinical assessment.

Social Services Law defines "intentionally" and "recklessly" as having the same meaning as provided in New York Penal Law § 15.05. (SSL § 488[16]) Under New York State Penal Law, a person acts "intentionally" with respect to a result or conduct when a person has a "... conscious objective ..." to cause a result or engage in such conduct. (PL §15.05[1]) Under New York Penal Law, 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." (PL §15.05[3])

The record does not reflect that the Subject acted either intentionally or recklessly when she responded to the Service Recipient's complaint of being called a name by her peer. The Subject

was interrogated by a representative from OPWDD on [REDACTED], and again by Investigator [REDACTED] on [REDACTED]. In both interrogations, the Subject explained that her intent was to re-direct the Service Recipient, but that she may not have made her point. In addition, the Subject was unable to describe the relevant provisions in the Service Recipient's BSP regarding how to calm the Service Recipient down when she was upset. (Justice Center Exhibits 9, 12, and 28) Consequently, the Subject acted neither intentionally, with a conscious objective to cause distress to the Service Recipient; nor recklessly, consciously disregarding a substantial and unjustifiable risk to the Service Recipient.

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

DECISION:

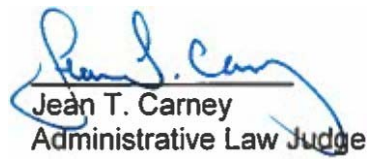
The request of [REDACTED] that the substantiated report dated [REDACTED] be amended and sealed is denied.

The Subject has been shown by a preponderance of the evidence to have committed neglect.

The substantiated report is properly categorized as a Category 3 act.

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

DATED: February 28, 2018
Schenectady, New York



Jean T. Carney
Administrative Law Judge