

**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: **August 10, 2018**
 Schenectady, New York



David Molik
Administrative Hearings Unit

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

**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:

Sharon Golish Blum
Administrative Law Judge

Held at:

Adam Clayton Powell Jr. State Office Building
163 West 125th Street
New York, New York 10027
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: Nicole Murphy, Esq.

[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] of neglect by the Subject of a Service Recipient.
2. The Justice Center's Report of Substantiated Finding concluded that:

Allegation 1

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you directed inappropriate statements and/or gesture toward 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. The facility, located at [REDACTED], is 57 bed voluntary residence that is operated by [REDACTED], which is licensed by the New York State Office of Mental Health (OMH) and is, therefore, a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of [REDACTED]
[REDACTED])

5. At the time of the alleged neglect, the Service Recipient was a verbal female adult whose issues included substance abuse, noncompliance with medication and medical assessments, poor hygiene, leaving the facility without her prescribed medication, and behavioral outbursts. (Justice Center Exhibit 7) The Service Recipient was diagnosed with psycho-affective disorder [REDACTED]. (Hearing testimony of [REDACTED] [REDACTED])

6. At the time of the alleged neglect, the Service Recipient had been absent from the facility without her medication for approximately one week and facility staff had been instructed to telephone Emergency Medical Services (EMS) to transport the Service Recipient to a hospital for psychiatric evaluation when she returned to the facility. (Hearing testimony of the Subject)

7. At the time of the alleged neglect, the Subject was employed at the facility as a Case Aide. (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

8. On [REDACTED], the Subject was on duty at the facility with Case Aide 1. At approximately 11:40 a.m., the Service Recipient returned to the facility seeking money to use the facility payphone. Case Aide 1, who was in the facility lobby, telephoned EMS. The Subject, who had been upstairs in the facility, entered the first floor lobby. Shortly thereafter, an ambulance arrived at the facility and the Service Recipient, who was still on the first floor, became extremely agitated. The Service Recipient attempted to spit at and bite the Subject and Case Aide 1, who locked themselves in a nearby staff office. The facility custodian, who had been in the basement, entered the lobby and, after the Service Recipient grabbed his arm and attempted to bite him, he retreated downstairs. In the meantime, one of the Emergency Medical Technicians (EMTs), who had all gone outside in retreat, telephoned the police for assistance. The Service Recipient then left the first floor and went somewhere upstairs in the facility. After the police arrived at the

facility, and while they were engaged in a verbal disagreement with the Subject, the Service Recipient reentered the lobby and calmly agreed to go to the hospital. (Hearing testimony of the Subject)

9. As the Service Recipient, EMTs and police officers exited the facility, the Subject held the front door open for them and, as the Service Recipient passed her, the Subject stuck out her tongue at the Service Recipient and said, "I ain't gonna take your shit." (Justice Center Exhibit 9)

10. The Service Recipient, who had already walked past the Subject, reacted by turning around and moving in the Subject's direction. The Subject immediately retreated into the facility, closing the door behind her. Some of the police officers redirected the Service Recipient, who turned back around and continued to walk toward the ambulance. The Subject then exited the facility and followed the Service Recipient and the others to the ambulance. (Justice Center Exhibit 16)

11. While outside, near the ambulance, the Subject directed further inappropriate statements toward the Service Recipient, despite the requests of the police officers and EMTs that she remove herself from the situation. It was determined at the hospital that it was necessary to sedate the Service Recipient, as she had remained agitated by the Subject's conduct. (Justice Center Exhibit 9)

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 allegation constitutes 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 neglect of a person in a facility or provider agency is defined by SSL § 488(1)(h) as:

"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.

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 of neglect alleged in the substantiated report that is the subject of the proceeding and that such act constitutes 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 act of neglect described in Allegation 1 of the substantiated report.

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-17) The investigation underlying the substantiated report was conducted by [REDACTED]

[REDACTED], who testified at the Hearing.

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

The Justice Center relied primarily on EMT 1's email to the facility Program Director dated [REDACTED] (Justice Center Exhibit 9), the facility Program Director's summary of his [REDACTED] interview of the Service Recipient (Justice Center Exhibit 11), the facility Program Director's summary of his [REDACTED] interview of the facility Custodian (Justice Center Exhibit 10) and a video recording of the incident (Justice Center Exhibit 16).

The Subject testified that at no time did she direct any inappropriate statements or gestures toward the Service Recipient and that the gesture and comment made by her as the Service Recipient passed her, which can be observed on the video recording (Justice Center Exhibit 16), was the Subject speaking to other service recipients and to the EMTs to find out which hospital the Service Recipient was being transported to, information she required for the facility records. The Subject testified that while she did follow the Service Recipient and the others to the ambulance thereafter, it was only to obtain the police officers' and EMTs' badge numbers, which was also necessary for the facility records. The Subject testified that, while they were waiting for the police, the EMTs "felt antagonized" by the Subject's request for their badge numbers, which

the Subject reiterated was needed for the facility records. The Subject testified that after the police arrived at the facility, the officers became frustrated with her due to her refusal to divulge confidential information about the Service Recipient and her reluctance to comply with their demand that she go upstairs alone to attempt to bring the Service Recipient downstairs. The Subject testified that the content of EMT 1's email dated [REDACTED] (Justice Center Exhibit 9), complaining about the Subject's inappropriate conduct, was untrue and that it must have been fabricated by EMT 1 in retaliation for the Subject's insistence that the EMTs provide their badge numbers. The Subject's Request for Amendment received [REDACTED] (Justice Center Exhibit 2) provides an account of events that is consistent with the Subject's testimony.

EMT 1's email to the facility Program Director dated [REDACTED] (Justice Center Exhibit 9), which was sent on the date of the incident, provides a detailed and persuasive narrative which indicates that, as the Service Recipient, EMTs and police officers exited the facility and the Service Recipient passed her, the Subject stuck out her tongue at the Service Recipient and said, "I ain't gonna take your shit;" that the Service Recipient reacted by turning around and moving in the Subject's direction; that the Subject immediately retreated into the facility, closing the door behind her, as the police officers redirected the Service Recipient, who turned back around and continued to walk towards the ambulance; that the Subject then exited the facility and followed the Service Recipient and the others to the ambulance; that while outside, near the ambulance, the Subject directed further inappropriate statements toward the Service Recipient, despite the requests of the police officers and EMTs that she remove herself from the situation; and that the Service Recipient was sedated at the hospital, as she had remained agitated by the Subject's conduct.

While the facility Program Director's summaries of his [REDACTED] interviews of the Service Recipient (Justice Center Exhibit 11) and the facility custodian (Justice Center Exhibit 10) do not have much independent evidentiary value, as each is an unsigned summary of another

person's account, they are helpful insofar as they corroborate the substance of EMT 1's email (Justice Center Exhibit 9). The facility Program Director's summary of his [REDACTED] interview of the Service Recipient (Justice Center Exhibit 11) indicates that, although the Service Recipient did not report it when questioned at first, she did, ultimately, state that the Subject "put her tongue in [the Service Recipient's] face." The facility Program Director's summary of his [REDACTED] interview of the facility custodian (Justice Center Exhibit 10) indicates that the custodian did not see the incident, but that the Subject had been "rude" with the Service Recipient earlier. Both of these summaries are supportive of EMT 1's evidence and, therefore, enhance its credibility.

While the video recording of the incident (Justice Center Exhibit 16) could support either the Subject's or EMT 1's account of events from watching the Subject alone, a revealing detail is observable in the annoyed and disgusted expressions on the faces of two of the police officers when they looked backwards at the Subject, as they walked away from her, after the incident at the door. It is obvious that the Subject must have said or done something that caused them to react as they did, which further supports EMT 1's evidence.

Lastly, the Subject had the obvious motivation of protecting her reputation and her employment status to prevaricate and deny that the incident occurred, while EMT 1 had no plausible motive to have taken the trouble to compose a lengthy email for the purpose of fabricating her account of the incident. The Subject's denial of the allegation and her defense that the allegation was retaliatory and fabricated by EMT 1 is not credited evidence. Accordingly, it is found that the Subject stuck out her tongue at and directed inappropriate statements toward the Service Recipient.

To sustain an allegation of neglect, the Justice Center must prove by a preponderance of the evidence that the Subject's conduct breached her duty to the Service Recipient. The Subject's duty to communicate supportively and respectfully when speaking to service recipients is a basic

and commonsense responsibility that the Subject acknowledged being aware of when she signed her acknowledgment on the [REDACTED] Code of Conduct (Justice Center Exhibit 15) and on the Justice Center Code of Conduct (Justice Center Exhibit 17). It is clear that the Subject breached this duty during the [REDACTED] incident.

Having established that the Subject did breach her duty to the Service Recipient, another issue is whether 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. The Service Recipient was cooperatively and calmly walking to the ambulance before the Subject stuck out her tongue at and directed an inappropriate statement toward her. The Service Recipient reacted to the Subject's conduct by becoming extremely agitated for a significant period of time after the incident and required sedation at the hospital. Accordingly, it is found that the Subject's breach of duty did result in a serious and protracted impairment of the Service Recipient's mental and emotional condition.

The report will remain substantiated and the last issue to be determined 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. A substantiated Category 3 finding of neglect will not result in the Subject's name being placed on the VPCR Staff Exclusion List and the fact that the Subject has a Substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject to disclosure pursuant to NY SSL § 496(2). This report will be sealed after five years.

DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED]

[REDACTED] of neglect by the Subject of the Service Recipient be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

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

This decision is recommended by Sharon Golish Blum, Administrative Hearings Unit.

DATED: August 3, 2018
Plainview, New York



Sharon Golish Blum, Esq.
Administrative Law Judge