

**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]

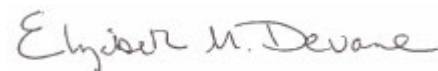
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

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 Elizabeth M. Devane, ALJ, of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: November 30, 2020
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Robert DeCataldo, Esq.
Colm Ryan, Esq.
Robert Hussar, Esq.
[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:

Juliane O'Brien
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
409 State Street
Schenectady, New York 12305

On:

[REDACTED]
and [REDACTED]

Parties:

New York State Justice Center for the Protection of
People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Matthew Klimasauskas, Esq. and
Robert DeCataldo, Esq.

[REDACTED]

By: Colm Ryan, Esq.
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Barclay Damon LLP
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Albany, New York 12207

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 1

It was alleged that on or about [REDACTED], while away from [REDACTED], located at [REDACTED], you committed Neglect against/to a Service Recipient.

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

The investigation revealed that the Subject directed inappropriate language toward the Service Recipient.

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

4. The facility, [REDACTED], located at [REDACTED], is a

residential program on campus that provides various therapeutic services to service recipients and their families. (Hearing testimony of Subject) The facility provides 24-hour supervised treatment and care 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] (Investigator))

5. At the time of the alleged neglect, the Subject had been employed by the facility for thirty-two years. (Hearing testimony of the Subject) At the time of the alleged neglect, the Subject's position was the Program Manager for Campus and Community Residence Programs. (Hearing testimony of Subject) The Subject's duties consisted of, but were not limited to, oversight of the residential staff, programming in the community residence programs and the residential treatment facility. (Hearing testimony of Subject) The Subject was also trained in and was a trainer of the Therapeutic Crisis Intervention (TCI) program; which is a crisis prevention and intervention model designed to teach staff how to help service recipients learn constructive ways to handle crisis. (Hearing testimony of Investigator and Subject; Justice Center Exhibit 9) The Subject was a custodian as that term is defined in Social Services Law § 488(2).

6. At the time of the alleged neglect, the Service Recipient was a twelve-year old female. (Hearing testimony of Investigator; Justice Center Exhibit 12) The Service Recipient had experienced significant trauma in her life; specifically, there were substance abuse issues in the home, her mother passed away and the Service Recipient was placed with an Aunt. (Hearing testimony of Subject) She was assaultive in the home, which led to her being placed into care in a different facility prior to her placement at the facility in or about [REDACTED], through a Persons In Need of Supervision (PINS) petition. (Hearing testimony of Subject; Justice Center Exhibits 8 and 11) The Service Recipient's placement at the facility had recently been extended

for a year. (Justice Center Exhibit 16)

7. On [REDACTED], at approximately 10:45 a.m., the Subject entered the facility to assist with an OCFS walkthrough and observed that all three staff members did not have their required facility work shirts on. (Hearing testimony of Investigator and Subject; Subject Exhibit C) The Subject approached Staff 1¹, Staff 2² and Staff 3³ and asked them to put their facility work shirts on. (Hearing testimony of Subject; Subject Exhibit C) Staff 1 reported he never received a shirt; Staff 2 and Staff 3 reported that their shirts were dirty at home. (Hearing testimony of Subject; Subject Exhibit C) At this time, there was only one service recipient⁴ present in the facility. (Hearing testimony of Subject; Subject Exhibit C)

8. The Subject returned to her office and informed her Supervisor⁵ that the three staff working that morning were not wearing their facility shirts. (Hearing testimony of Subject; Subject Exhibit C) The Supervisor instructed the Subject to inform the three staff members that they needed to wear the facility work shirts, and if they did not have them with them, they would have to go home to change. (Hearing testimony of Subject; Subject Exhibit C)

9. At approximately 11:45 a.m., the Subject returned to the facility to provide staff coverage so that Staff 3 could go home to get her facility work shirt. (Hearing testimony of Subject) At this time, some of the service recipients were present as they had a half-day of school. (Hearing testimony of Subject) Once she arrived, she was verbally attacked by the Service Recipient. (Hearing testimony of Investigator and Subject; Justice Center Exhibits 6-7, 11; Subject Exhibits C-D) The Subject attempted to deescalate the Service Recipient, which was unsuccessful.

¹ Staff 1 refers to [REDACTED].

² Staff 2 refers to [REDACTED].

³ Staff 3 refers to [REDACTED].

⁴ [REDACTED].

⁵ [REDACTED] was the Director of Residential Programs at the time of the alleged neglect. (Hearing testimony of Subject)

(Hearing testimony of Subject; Subject Exhibit C) The Subject stated to the Service Recipient that she would make calls to place the Service Recipient “somewhere else.” (Justice Center Exhibits 7, p. 3 and 11, p. 2)

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 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 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...” (14 NYCRR § 700.3(f))

The neglect of a person in a facility or provider agency is defined by SSL § 488(1), as follows:

- (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 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 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 an act described as “Allegation 1” in the substantiated report. Specifically, the evidence establishes that the Subject committed neglect.

In support of its substantiated findings, the Justice Center presented several documents

obtained during the investigation. (Justice Center Exhibits 1-11; 15-19) The investigation underlying the substantiated report was conducted by the Investigator, who was the only witness who testified on behalf of the Justice Center at the hearing. The Subject testified in her own behalf, presented seven documents (Subject Exhibits A through G) and called the following witnesses: [REDACTED] (Staff 5) and [REDACTED] (Supervisor), both testified in-person; as well as [REDACTED] and [REDACTED], Licensed Mental Health Counselor (Counselor), both testified over video conferencing equipment.

To prove neglect, the Justice Center must establish by a preponderance of the evidence that the Subject's actions, inaction or lack of attention breached a duty that 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))

Here, there is no dispute regarding the Subject's status as a custodian under SSL § 488(2). The Subject was employed by the facility as Program Manager for Campus and Community Residence Programs for an agency licensed by OCFS and therefore was custodian pursuant to the statute.

There is also no dispute regarding the Subject's duty to the Service Recipient. The Subject acknowledged that part of her job duties and her TCI training is a proactive approach, with a focus on the awareness of the service recipients and their environment, to manage their stress and emotions. (Hearing testimony of Subject) The Subject further testified that when a service recipient is in crisis, she is trained to decrease stimulation and attempt to bring the service recipient's behavior back to baseline. (Hearing Testimony of Subject) In addition, the Subject also had a duty to follow the provider agency's Code of Conduct to conduct herself in a manner that supports high ethical standards. (Hearing testimony of Investigator; Justice Center Exhibits

10 and 19)

The issue in this case is whether the Subject breached her duty when she made a threatening statement to the Service Recipient and, if so, whether said breach 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 Subject testified that on [REDACTED], when she entered the facility to assist with staff coverage so Staff 3 could go home to change into her required facility work shirt, she was verbally assaulted by the Service Recipient. (Hearing testimony of Subject) The Subject testified that she used TCI techniques in an attempt to de-escalate the Service Recipient, but was unsuccessful. (Hearing testimony of Subject) The Subject testified that she looked towards Staff 2 for some type of support, but he just remained seated at the table nearby while the Service Recipient was in a “dysregulated” state. (Hearing testimony of Subject) Ultimately, the Subject realized she was the target of the Service Recipient’s aggression, so she created some space by leaving the area and going into the office. (Hearing testimony of Subject) The Subject testified that she did not threaten to move or place the Service Recipient somewhere else. (Hearing testimony of Subject)

The evidence provided by the Justice Center is strictly in the form of hearsay. Hearsay is admissible in administrative proceedings and an administrative determination may be made solely based upon hearsay evidence under appropriate circumstances. *People ex rel Vega v. Smith*, 66 NY2d 130 (1985); *Eagle v. Patterson*, 57 NY2d 831 (1982); *300 Gramatan Avenue Associates v. State Division of Human Rights*, 45 NY2d 176 (1978). But, the reliability of such statements must be weighed and tested carefully as the declarant is unavailable to be cross examined⁶. Factors to

⁶ Despite the Subject’s assertion that such deprived the Subject her right to cross-examine the witnesses against her, the Subject could have subpoenaed these various witnesses for this purpose. In fact, numerous witnesses did testify on behalf of the Subject; however, the only witness (Staff 2) who was present and heard the statement at issue in this proceeding was, in fact, not subpoenaed. *Matter of Anderson*, 199 AD2d 708, 710 (3d Dept. 1993). Further, this ALJ

be considered in evaluating the reliability of hearsay include the circumstances under which the statements were made, information bearing upon the credibility of the utterer and his or her motive to fabricate, and the consistency and degree of inherent believability of the statements.

It is determined that the statements relied upon by the Justice Center are deemed to be credible. There is ample corroboration in the record inasmuch as, among other things, the Service Recipient consistently recounted the statement made by the Subject while being questioned on different dates by various individuals. (Hearing testimony of Investigator; Justice Center Exhibits 6-7, 11) Specifically, after the incident, the Service Recipient disclosed to Staff 5 and the Supervisor that the Subject had threatened to move the Service Recipient from the facility. (Justice Center Exhibit 7, pp. 3-4) In addition, when Staff 4⁷ entered the facility for her shift that evening, she observed the Service Recipient “distraught and crying at the table.” (Justice Center Exhibit 7, p. 3) The Service Recipient disclosed to Staff 4 that the Subject “threatened” her by stating that she was going to “get her kicked out” of the facility. (Justice Center Exhibit 7, p. 3) Further, Staff 2 reported that he was present at the time and heard the Subject state to the Service Recipient that she was going to make some telephone calls to place her “somewhere else.” (Justice Center Exhibit 7, p. 3; Justice Center Exhibit 11, p. 2) During the course of the investigation, the Subject denied that she made a remark about moving the Service Recipient out of the program. (Justice Center Exhibits 6-7, 11) When confronted about the shift log note written by Staff 2, she claimed it was “wrong” and “out of context.” (Justice Center Exhibits 6-7; 11; Subject Exhibit D) However, during cross-examination, the Subject asserted that she never stated during her interview that what Staff 2 wrote on the incident report was taken out of context, despite the summaries of

denied the Subject’s request to subpoena the Service Recipient. *Matter of Charlotte MM*, 159 AD3d 1081, 1082 (3d Dept. 2018).

⁷ Staff 4 refers to [REDACTED].

the Investigator and the [REDACTED] Investigator⁸. (Hearing testimony of Subject; Justice Center Exhibit 6, pp. 2-3, Justice Center Exhibit 7 p. 5 and Justice Center Exhibit 11 p. 4) Therefore, the consistent statements of the Service Recipient, coupled with the statement of Staff 2, who was present when said statement was made, is considered sufficient corroboration and will be credited over the Subject's self-serving testimony. *See Matter of Eddie Z.B.*, 117 AD3d 1041, 1042-1043 (2d Dept. 2014).

Based on the above, the credible evidence in the record establishes that, on [REDACTED], the Subject stated to the Service Recipient that she would make calls to place the Service Recipient "somewhere else." (Justice Center Exhibit 7, p. 3; Justice Center Exhibit 11, p. 2) The evidence also establishes that, as a result of this statement, the Service Recipient became upset, was observed "distraught and crying", was scared and worried that another placement would hinder her discharge from the facility. (Justice Center Exhibit 7, p. 3; Justice Center Exhibit 11, p. 2) Additionally, the Clinical Supervisor of the facility testified that a threat to move a service recipient from placement is prohibited from a therapeutic standpoint because it could illicit fear, anger and trauma. (Hearing testimony of Counselor) Thus, the threatening statement made by the Subject to the Service Recipient resulted in and was also likely to result in serious or protracted impairment of the mental or emotional condition of the Service Recipient. *Matter of Kelly*, 161 AD3d 1344 (3d Dept. 2018)

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.

Since the report will remain substantiated, the next question to be decided is whether the

⁸ [REDACTED].

substantiated report constitutes the category of neglect as 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.

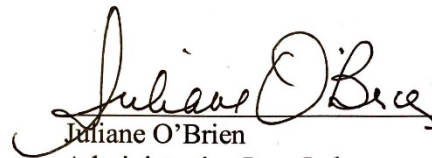
A Substantiated Category 3 finding of neglect will not result in the Subject's name being placed on the VPCR Staff Exclusion List and the fact that the Subject has a Substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject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

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 Julianne O'Brien, Administrative Hearings Unit.

DATED: November 12, 2020
Schenectady, New York


Julianne O'Brien
Administrative Law Judge