

**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  
AFTER  
HEARING**

**Adjud. Case #:**

**[REDACTED]**

Vulnerable Persons' Central Register  
Justice Center for the Protection of People with  
Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
Appearance Waived

Justice Center for the Protection of People with  
Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
By: Juliane O'Brien, Esq.

**[REDACTED]**

By: Nicole Murphy, Esq.  
Fine, Olin and Anderman, LLP  
39 Broadway, Suite 1910  
New York, New York 10006

██████████  
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 Offense 1 of the report "substantiated" on ██████████, ██████████ dated and received on ██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect and psychological abuse.

Offense 1 of the substantiated report is properly categorized as a Category 3 act.

The request of ██████ ██████ that Offense 2 of the report "substantiated" on ██████████, ██████████ dated and received on ██████████ be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed abuse (obstruction of reports of reportable incidents).

NOW THEREFORE IT IS DETERMINED that the record of this report shall be retained in part by the Vulnerable Person's 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 22, 2015  
Schenectady, New York

A handwritten signature in black ink, appearing to read "David Molik", written over a horizontal line.

David Molik  
Administrative Hearings Unit



## JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and/or 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 report "substantiated" on [REDACTED], [REDACTED] [REDACTED], dated and received on [REDACTED] of abuse and/or neglect by the Subject against a Service Recipient.

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

### **Offense 1**

It was alleged that on [REDACTED] at [REDACTED], located at [REDACTED] [REDACTED], while acting as a custodian, you committed neglect and/or psychological abuse when you approached a service recipient and asked him to make false allegations of abuse and/or neglect against evening shift custodians.

This allegation has been SUBSTANTIATED as Category 3 neglect and/or psychological abuse pursuant to Social Services Law § 493.

### **Offense 2**

It was alleged that on [REDACTED] at [REDACTED], located at [REDACTED] [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you failed to report an incident of neglect and/or psychological abuse involving a service recipient.

This allegation has been SUBSTANTIATED as Category 3 abuse (obstruction of



9. Based on the Service Recipient's disclosure, DA-II [REDACTED] completed an OPWDD Form 147 Reporting Form and reported the incident to the Justice Center. (Justice Center Exhibit 4)

10. On [REDACTED], OPWDD Internal Investigator [REDACTED] interviewed the Subject with respect to the Service Recipient's disclosure to DA-II [REDACTED]. The Subject denied that she had approached the Service Recipient and requested that he make false allegations about the evening shift staff members and she provided a diametrically opposed version of events. The Subject told OPWDD Internal Investigator [REDACTED] that on the morning of [REDACTED], the Service Recipient had approached the Subject and told her that DA-II [REDACTED] had asked him to make false allegations about the Subject and [REDACTED], DSA [REDACTED]. The Subject had not reported that alleged conversation to anyone prior to her disclosure of it to OPWDD Internal Investigator [REDACTED]. (Justice Center Exhibit 19 and Justice Center Exhibit 21)

### **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 abuse and/or 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)(c)(f) and (h):

"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.

"Obstruction of reports of reportable incidents," which shall mean conduct by a custodian that impedes the discovery, reporting or investigation of the treatment of a service recipient by falsifying records related to the safety, treatment or supervision of a service recipient, actively persuading a mandated reporter from making a report of a reportable incident to the statewide vulnerable persons' central register with the intent to suppress the reporting of the investigation of such incident, intentionally making a false statement or intentionally withholding material information during an investigation into such a report; intentional failure of a supervisor or manager to act upon such a report in accordance with governing state agency regulations, policies or procedures; or, for a mandated reporter who is a custodian as defined in subdivision two of this section, failing to report a reportable incident upon discovery.

"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 psychological abuse, obstruction of reports of reportable incidents and neglect:

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 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 the prohibited act described as Offense 1 in the substantiated report. Specifically, the evidence establishes that the Subject committed an act of neglect under SSL § 488(1)(h) as her conduct breached her custodial duty and resulted in a “serious or protracted impairment of the... mental or emotional condition of a service recipient.”

The evidence further establishes, with respect to Offense 1, that the Subject committed an act of psychological abuse under SSL § 488(1)(c) by “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...”

The Justice Center did not establish by a preponderance of the evidence that the Subject committed the prohibited act described as Offense 2 in the substantiated report, being a failure to report a reportable incident under SSL § 488(1)(f).

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-21) The investigation underlying the substantiated report was conducted by OPWDD Internal Investigator ██████████ ██████████, who together with Development Assistant II (DA-II) ██████████ and Psychologist II ██████████ testified at the hearing on behalf of the Justice Center.

The Subject and DSA ██████████ testified at the hearing on the Subject's behalf. The Subject provided no further documentary evidence at the hearing.

Regarding Offense 1, the Justice Center relied primarily on the Service Recipient's consistent and repeated version of events. On ██████████, the Service Recipient told DA-II ██████████ that the Subject approached him that morning, complained about the evening shift staff members and asked the Service Recipient to tell the “higher ups” at the facility that they were troublemakers and that they caused problems at the house. The Service Recipient's

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disclosure was recorded by DA-II ██████████ in the OPWDD Form 147 dated ██████████  
██████████, in her handwritten statement dated ██████████ and in her typed and signed  
statement dated ██████████. (Justice Center Exhibits 4, 11 and 12)

Both of DA-II ██████████ written statements also noted that the Service Recipient  
expressed fear that the Subject would be angry at him and that the Service Recipient was visibly  
upset by the situation. (Justice Center Exhibits 11 and 12)

DA-II ██████████ hearing testimony was that on ██████████, the Service  
Recipient came to her office, asked to speak with her, and closed the door. The conversation that  
followed was entirely consistent with her written records concerning her ██████████  
exchange with the Service Recipient. DA-II ██████████ testified further that the Service  
Recipient expressed that he was “scared” of the Subject. (Hearing testimony of DA-II ██████████  
██████████)

OPWDD Internal Investigator ██████████ Investigative Report indicates that on  
██████████, he interviewed the Service Recipient and that during that conversation, DA-  
II ██████████ version of the Service Recipient’s disclosure to her was corroborated by him.  
OPWDD Internal Investigator ██████████ Investigative Report indicates that the Service  
Recipient confirmed that he was approached by the Subject, that she said negative things about  
the facility evening shift staff members and that she wanted him to tell the “higher ups” that the  
evening shift staff members were “troublemakers and no good.” (Justice Center Exhibit 5)

OPWDD Internal Investigator ██████████ Investigative Report further indicates  
that the Service Recipient told him that the Subject’s “conversation with him made him feel  
trapped and not good about the situation. [The Service Recipient] advised that he did not want to  
tell a lie.” (Justice Center Exhibit 5)

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OPWDD Internal Investigator ██████████ Investigative Report further indicates that on ██████████, subsequent to questioning the Subject about the incident, he conducted a second interview with the Service Recipient on the same date and that the Service Recipient reiterated his earlier account of the ██████████. (Justice Center Exhibit 5)

OPWDD Internal Investigator ██████████ testified that on both occasions when he spoke to the Service Recipient, he began by reviewing the concept of truthfulness with the Service Recipient, who demonstrated an understanding of the importance of telling the truth. He further testified that on both occasions, the Service Recipient clearly stated that the Subject had approached him, that the Subject spoke negatively about the evening staff and that the Subject requested that he make false allegations against the evening staff. OPWDD Internal Investigator ██████████ testified that during the ██████████ interview, the Service Recipient was adamant that he was telling the truthful account of the incident and that the Service Recipient said that he was “not surprised” by the fact that the Subject’s version of events was so different than his as she “likes to tell lies.” (Hearing testimony of OPWDD Internal Investigator ██████████ ██████████)

The Psychological Impact Statement dated ██████████, indicates that Psychologist II ██████████ interviewed the Service Recipient on that date and that the Service Recipient:

... stated that DA ██████████ asked him to make allegations against other staff members except for her and ██████████. He stated he did not respond to her and prepared himself for the day. He also stated that he informed ██████████ [House Manager] what had occurred... He stated that he does not trust DA ██████████ and does not want to be in her care because she is mean/threatening and tells stories about others. (Justice Center Exhibit 18)

Psychologist II ██████████ testified that before he began his ██████████ interview of the Service Recipient, he discussed the issue of truthfulness with him in order to ensure that he would receive a truthful account of the incident from the Service Recipient. Psychologist II

██████████ testified that he also worded the same type of question four or five different ways to gauge the consistency and truthfulness of the Service Recipient's answers. (Hearing testimony of Psychologist II ██████████)

Psychologist II ██████████ testified that he found the Service Recipient's account to be truthful and that he believed him. Psychologist II ██████████ testified further that the Service Recipient indicated to him that he felt fearful of and threatened by the Subject. (Hearing testimony of Psychologist II ██████████)

The Subject's defense was twofold. Her position, when she was questioned by OPWDD Internal Investigator ██████████ and when testifying, was that she never asked the Service Recipient to fabricate allegations against other staff members. Conversely, the Subject asserted that she had been the victim of just such a scheme and that the Service Recipient had come to her and told her that other staff members had requested that he fabricate allegations against her. (Justice Center Exhibit 5 and Hearing testimony of ██████████, Subject)

OPWDD Internal Investigator ██████████ Investigative Report indicates that on ██████████, he interviewed the Subject. She continually denied the Service Recipient's version of the incident and repeatedly told OPWDD Internal Investigator ██████████ that "...it was the [Service Recipient] that actually approached her telling her that ██████████ wanted him to say bad things about her and ██████████." (Justice Center Exhibit 5)

The Subject testified that on the morning of ██████████, while she was preparing medication near the bathroom, the Service Recipient approached her and told her that DA-II ██████████ and the other evening shift staff members wanted him to tell lies about her and that he further stated that "I'm not going to do it. Don't say anything to anyone about it." (Hearing testimony of ██████████, Subject)

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The Subject's witness, DSA ██████████ had been questioned by OPWDD Internal Investigator ██████████ on ██████████, regarding a separate allegation. Both her testimony and her statements contained in the Investigative Report were not relevant to the specific issue in this case, as she was not present at the time that the Subject and the Service Recipient spoke on ██████████ █ ██████████, and had no direct information regarding that communication.

Aside from arguing that the allegation was fabricated by the Service Recipient and that the situation was actually the reverse, the Subject's counsel also argued that the Service Recipient had a history of making false allegations against staff members, thereby attempting to impeach his credibility.

The Service Recipient had made a prior allegation against DA-II ██████████, which was unsubstantiated based on the fact that the Service Recipient had misunderstood something that DA-II ██████████ had said to him. That allegation was not a deliberate fabrication, but the function of the Service Recipient's mistaken perception. (Hearing testimony of DA-II ██████████ ██████████)

There was also an allegation made by an anonymous caller against Psychologist II ██████████, complaining that Psychologist II ██████████ had yelled at the Service Recipient and another facility resident. It is unclear if the Service Recipient was the person who made the allegation. Ultimately, that allegation was unsubstantiated and Psychologist II ██████████ ██████████ returned to the facility and his work with the Service Recipient. (Hearing testimony of Psychologist II ██████████)

The Subject's denials and her counsel's submissions were not persuasive. Although the Service Recipient's credibility was brought into question, his statements to DA-II ██████████,

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OPWDD Internal Investigator ██████████ and Psychologist II ██████████ were clear, consistent and credible.

The Subject's denial of the incident, together with her competing version of events was nonsensical. While the Service Recipient had no reason to fabricate the incident, the Subject was motivated to prevaricate and deny by her desire to preserve her reputation and her employment status.

Accordingly, it is found that the Subject did approach the Service Recipient on ██████████ ██████████, wherein she spoke negatively about the evening shift staff members and requested that the Service Recipient report fabricated complaints about them.

Having determined that the Subject committed the act as alleged, the next question is whether her conduct constitutes neglect and/or psychological abuse. Although there was no evidence of a "serious" impairment of the Service Recipient's mental or emotional condition, the Service Recipient did continue to have negative feelings stemming from the ██████████ incident. In fact they were occurring over four months later, on ██████████, the date of the Service Recipient's interview with Psychologist II ██████████, upon which the Psychological Impact Statement was based. This clearly establishes that the Subject's conduct did cause a "protracted" impairment of the Service Recipient's mental or emotional condition as set out in SSL § 488(1)(h).

Accordingly, in the final analysis, based on all of the evidence, it is concluded that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed an act of neglect under SSL § 488(1)(h) as her conduct breached her custodial duty and resulted in a "... protracted impairment of the... mental or emotional condition of a service recipient."

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Furthermore, DA-II ██████████, OPWDD Internal Investigator ██████████ and Psychologist II ██████████ all noted and testified that the Subject's aforementioned conduct caused the Service Recipient feelings of discomfort. The Psychological Impact Statement (Justice Center Exhibit 18), which constitutes a clinical assessment, specifically indicates that the incident "... did and has made a negative impact upon [the Service Recipient]."

Accordingly, in the final analysis, based on all of the evidence, it is concluded that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed an act of psychological abuse under SSL § 488(1)(c) by "... 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..."

Moreover, based upon the totality of the circumstances, the evidence, the testimony presented and the governing legislation, it is determined that the category of the affirmed substantiated neglect and/or psychological abuse described as Offense 1 in the substantiated report was properly substantiated as a Category 3 act. A substantiated Category 3 finding of abuse and/or 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.

Regarding Offense 2, the allegation that the Subject committed abuse by failing to report a reportable incident, the Subject's contention that the Service Recipient disclosed a reportable incident to her has already been discredited in the foregoing analysis of Offense 1. The incident was found to have been fabricated by the Subject. Although the Subject intentionally made a

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 false statement during an investigation, she cannot be found to have committed abuse for failing to report an incident which she fabricated and therefore had no “reasonable cause” to believe occurred.

Accordingly, in the final analysis, based on all of the evidence, it is concluded that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed an act of abuse (obstruction of reports of reportable incidents) by failing to report an incident of neglect and/or psychological abuse involving the Service Recipient under SSL § 488(1)(f), as alleged in Offense 2.

**DECISION:**

The request of ██████ ██████ that Offense 1 of the report "substantiated" on ██████████, ██████████ dated and received on ██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect and psychological abuse.

Offense 1 of the substantiated report is properly categorized as a Category 3 act.

The request of ██████ ██████ that Offense 2 of the report "substantiated" on ██████████, ██████████ dated and received on ██████████ be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed abuse (obstruction of reports of reportable

incidents).

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

DATED: September 3, 2015  
Plainview, New York



Sharon Golish Blum, Esq.  
Administrative Law Judge