

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

████████████████████

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AFTER
HEARING**

Adjud. Case #:

██████████

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: Jennifer DeStefano, Esq.

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By: Brad A. Smith, Esq.
3927 Pratt Avenue
Bronx, New York 10466

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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 the substantiated report dated ██████████, ██████████, received and dated ██████████ 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.

NOW THEREFORE IT IS DETERMINED that 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)(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: October 13, 2015
Schenectady, New York



David Molik
Administrative Hearings Unit

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

████████████████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before: Jean T. Carney
Administrative Law Judge

Held at: Adam Clayton Powell State Office Building
163 West 125th Street
New York, New York 10027
On: ██████████

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.

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By: Brad A. Smith, Esq.
3927 Pratt Avenue
Bronx, New York 10466

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 "substantiated" report dated [REDACTED], received and dated [REDACTED] of abuse and/or neglect by the Subject of a Service Recipient (Justice Center Exhibit 1).
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 neglect when you engaged in aggressive and unwelcome horseplay with a service recipient, which included teasing him, grabbing him and hitting him in his abdomen.

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 (Justice Center Exhibit 3).
4. The facility, located at [REDACTED], is a residential facility for children with emotional and educational needs and is licensed by the

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Office of Children and Family Services (OCFS), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center (Hearing testimony of Investigator ██████████
██████████).

5. At the time of the alleged neglect, the Subject had been employed by ██████████ since ██████████ 2010 as a Teacher's Assistant; and was assigned to ██████████ (Hearing testimony of Subject).

6. At the time of the alleged neglect, the Service Recipient was a youth with a history of unspecified trauma, recently placed in the facility and residing in ██████████ (Subject Exhibit B).

7. On the morning of ██████████, as the residents were getting ready for school, the Service Recipient showed some sneakers to his peers (Justice Center Exhibit 4). They began to tease him, telling him that the sneakers looked unauthentic (Subject Exhibit B). The Service Recipient then turned to the Subject and another staff person, ██████████, for their opinions (Subject Exhibit B, and Justice Center Exhibit 13B).

8. After some more banter, the Service Recipient took his sneakers and put them away in his room. ██████████ followed the Service Recipient out of view of the cameras, and placed the Service Recipient in a headlock from behind (Justice Center Exhibit 7, Subject Exhibits A, and B).

9. The Subject did not intervene until he saw ██████████ lean back, lifting the Service Recipient off the floor while still holding him in a headlock. During the ensuing scuffle he was accidentally hit in the face by the Service Recipient, who then received an injury to his abdomen before ██████████ released the Service Recipient from the headlock (Justice Center Exhibits 4, and 7).

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10. During the investigation it became clear that staff routinely engaged in roughhousing and horseplay. None of the staff persons present during this incident called it in to the VPCR. In fact, the Subject initially denied the allegations against ██████████, as well as denying the allegations against himself (Subject Exhibit B). ██████████, who was the supervisor of ██████████, minimized the incident in his interview with Investigator ██████████ (Subject Exhibit B). The incident was brought to the attention of the Justice Center only after the Service Recipient's mother called the facility to complain about her son's mistreatment, approximately two weeks later (Hearing testimony of Investigator ██████████).

11. On ██████████, the Service Recipient was seen by the facility nurse; but refused to make any statement regarding the incident (Justice Center Exhibit 5). Likewise, the Service Recipient was reluctant to cooperate with the investigation, and left the interview with Investigator ██████████ when she began to write up his statement (Justice Center Exhibit 8, and hearing testimony of Investigator ██████████).

12. A video recording purporting to be the relevant period of time¹ shows the residents and staff gathering in the hallway, walking in and out of the camera's view. The Service Recipient is followed off camera by a staff person identified as ██████████; and the Subject heads after them shortly thereafter. Then Supervisor ██████████ is seen walking ██████████ rapidly down the hall with one hand on ██████████ shoulder and the other holding ██████████ hand behind his back. ██████████ looks up at the camera a couple of times, and speaks to someone off camera in the direction of where the Service Recipient had gone. The Service Recipient then appears on camera, rubbing his abdomen, looking subdued (Justice Center Exhibit 13B).

13. ██████████ has developed a Residential Department Manual that is given to employees. This manual sets forth in particularity how to maintain boundaries, and clearly states

¹ The recording is date-stamped ██████████; but it is not time-stamped.

that roughhousing or horseplay is prohibited (Justice Center Exhibit 10).

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 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)(h) to include:

"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 neglect, which is defined as follows:

Category three is abuse or neglect by a custodian that is not otherwise described in categories one and two.

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, as in this matter, a Category 3 finding of neglect is upheld, the Subject shall not be placed on the staff exclusion list, and the report shall be sealed after five years.

If the Justice Center did not prove the abuse and/or neglect by a preponderance of evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has established by a preponderance of evidence that the Subject committed a prohibited act, described as “Allegation 1” in the substantiated report. The act committed by the Subject constitutes neglect.

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In support of its substantiated findings, the Justice Center presented a number of documents and a video recording obtained during the investigation (Justice Center Exhibits 1-14). The investigation underlying the substantiated report was conducted by OCFS Investigator ██████████, who testified at the hearing on behalf of the Justice Center.

The Subject testified on his own behalf and provided several documents (Subject Exhibits A and B). In addition, ██████████ testified at the hearing on behalf of the Subject.

The Justice Center proved by a preponderance of the evidence that the Subject committed neglect as defined in SSL §488(1)(h). Specifically, the evidence establishes that the Subject breached his duty to the Service Recipient by engaging in aggressive and unwanted horseplay.

From the video recording, it is clear that the standard of behavior between staff and resident have become so blurred, that they are barely distinguishable (Justice Center Exhibit 13A and 13B). The Staff have a responsibility to maintain order, to lead by example, and to set the standard for appropriate behavior in this facility (Justice Center Exhibit 10). Instead, the video shows children throwing themselves against the wall, punching staff and each other; while the staff laugh and check their cell phones (Justice Center Exhibit 13B).

The Service Recipient is a child with a history of trauma, and he had been placed in ██████████ through no fault of his own (Subject Exhibit B). He described being placed in a headlock which was unwanted and unwarranted under the circumstances (Justice Center Exhibit 7, Subject Exhibits A and B). Things escalated quickly, and the Service Recipient was injured by a blow to his abdomen (Justice Center Exhibits 4 and 7). His allegations were corroborated by another resident of the program who gave a statement to the investigator (Justice Center Exhibits 4 and 7).

During the course of the investigation, it appeared that ██████████ had a culture of

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engaging in horseplay that routinely became physical (Hearing testimony of Investigator ██████████
██████████). It was justified as a means of bonding with the residents, but in fact, was prohibited under the Residential Department Manual (Justice Center Exhibit 10).

In his defense, the Subject denies the allegations and contends that he was attempting to intervene when he saw that the horseplay was getting out of hand. He further contends that if the Service Recipient was struck in the abdomen, it was accidental; and the Service Recipient gave no indication of being hurt after the incident (Hearing testimony of Subject).

However this Administrative Law Judge finds these arguments unpersuasive. The Subject breached his duty to the Service Recipient first by failing to intervene when ██████████ placed the child in a headlock (Hearing testimony of ██████████). From that moment, the Subject neglected the Service Recipient. Not only was that type of physical behavior prohibited by ██████████ policy; it also was foreseeable that the Service Recipient could have been injured by such behavior. In fact, the Service Recipient was injured when the Subject finally intervened (Justice Center Exhibit 5, 10, 13B, and hearing testimony of Investigator ██████████).

In weighting recorded and written witness statements against conflicting hearing testimony, the Administrative Law Judge needs to consider several factors, including: (1) the circumstances under which the statements were originally made; (2) information bearing on the credibility of the person who made the statement, and his or her motive to fabricate; (3) the consistency and degree of inherent believability of the statements, the degree of detail provided in the statement, the completeness of the interviewers questions; and (4) the credibility assessed to any sworn hearing testimony, including the self-serving motivation of the subject to testify in a manner favorable to him or her.

Initially, both the Subject and ██████████, who testified on the Subject's behalf at the

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hearing, denied that any horseplay or roughhousing took place (Subject Exhibit B). When they testified at the hearing, they admitted that ██████████ placed the Service Recipient in a headlock and that they intervened when things escalated (Hearing testimony of ██████████, and hearing testimony of Subject). ██████████ testimony in particular downplayed the severity of the incident and his role in condoning that behavior (Hearing testimony of ██████████). On the other hand, the video tends to corroborate the Service Recipient's allegations that the Subject either kned him, or struck him in the abdomen²; and this allegation is corroborated by another resident (Justice Center Exhibit 13B).

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 level 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.

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.

² The incident occurred out of the range of the camera, so the video only shows the events leading up to the incident and the aftermath of the incident. After the incident, the video shows the Service Recipient holding his abdomen and leaning against the wall, not smiling.

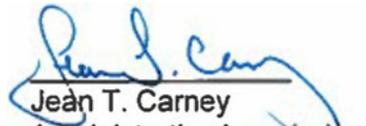
DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED], received and 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: September 2, 2015
Schenectady, New York


Jean T. Carney
Administrative Law Judge