

**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: Thomas Parisi, Esq.

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By: Constance R. Brown, Esq.
CSEA, Inc.
143 Washington Avenue
Capitol Station Box 7125
Albany, New York 12224

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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 ██████████ ██████████, ██████████ be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed psychological abuse.

NOW, THEREFORE, IT IS DETERMINED that the record of this report shall be amended and sealed by the Vulnerable Persons Central Register, pursuant to SSL § 493(3)(d).

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: Schenectady, New York
April 6, 2016



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:

John T. Nasci
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Office Building
333 East Washington Street
Syracuse, New York 13202
On: ██████████

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for psychological abuse. 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 by the Subject of 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 the [REDACTED], located at [REDACTED], while acting as a custodian, you committed psychological abuse when you approached a service recipient and attempted to involve him in problems you were having with other staff, which had a lasting negative impact, evidenced by fear, stress and anxiety, and supported by a psychological clinical assessment.

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

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

4. The facility, located at [REDACTED], is an [REDACTED] for adult individuals with developmental

██████████

disabilities, and is operated by the New York State Office for People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (See Hearing testimony of OPWDD Internal Investigator ██████████, DSA ██████████, and the Subject)

5. At the time of the alleged psychological abuse, the Subject was employed by the OPWDD as a Direct Support Assistant (DSA) and had been employed by the OPWDD for thirteen years. (See Hearing testimony of the Subject)

6. At the time of the alleged psychological abuse, the Service Recipient was a thirty-three year old male who had been a resident of the facility for ten years. The Service Recipient is an adult with diagnoses of mild intellectual disability and impulse control disorder, NOS. The Service Recipient is a high functioning individual who has a job at the ██████████, has a deejay business and is involved with the ██████████ Fire Department. (See Justice Center Exhibits 10 and 11)

7. ██████████ is a raised ranch style house with an upper and lower level. At the time of the alleged psychological abuse, the Service Recipient was one of five Service Recipients of varying levels of developmental disabilities residing at the ██████████. Of the five Service Recipients at the ██████████, the Service Recipient was the highest functioning and, as a result, was very energetic and required the most attention by staff. (See Hearing testimony of DSA ██████████ and the Subject)

8. At the time of the alleged psychological abuse, the Service Recipient's target behaviors included attention seeking behaviors/perseveration and impulse control. One of the procedures outlined for managing the Service Recipient's targeted behaviors was a directive that staff "refrain from expressing personal opinions whenever possible" in the presence of the

Service Recipient. (See Justice Center Exhibit 11 page 4) Additionally, the Service Recipient has a reward plan which includes a “bottom of the evening” meeting which is held in a private place in the [REDACTED] for twenty minutes at some point after 7:00 p.m. each evening. The meeting involves a one-on-one discussion, between the Service Recipient and staff of the Service Recipient’s choice, concerning the Service Recipient’s attention seeking and perseveration behavior during the day. During the meeting, staff is required to rate the Service Recipient’s behavior for the day as “poor,” “fair” or “good” and then give the Service Recipient a card indicating the rating. Also, as part of the Service Recipient’s reward plan, in the event that the Service Recipient earns no “poor” ratings for ten consecutive days, he is rewarded with an outing of his choice, which must take place within seventy-two hours of achieving ten such ratings. (See Justice Center Exhibits 11; and Hearing testimony of DSA [REDACTED] and the Subject)

9. On [REDACTED], the Subject worked her normal [REDACTED] shift at the [REDACTED]. The only other staff on duty with the Subject was Staff A. Later that day and before dinner, the Subject was in the kitchen on the second floor of the [REDACTED] with the Service Recipient preparing dinner. On that day, the Service Recipient was starting his new goal of assisting with the preparation of dinner and clean-up after dinner. While the Subject and Service Recipient were in the kitchen, Service Recipient A and Service Recipient B were in the adjacent living room, Service Recipient C was in the sunroom (also adjacent to the kitchen), Service Recipient D was in her bedroom at the end of the hall from the kitchen, and Staff A was on the lower level of the [REDACTED]. During the dinner preparation, Service Recipient A (who was not allowed in the kitchen) came to the kitchen door several times and was told by the Subject each time to return to the living room. Also during dinner preparation, Service Recipient B yelled several times from his living room seat that he needed help changing the CD that he was

██████████ listening to. In response to Service Recipient B's yelling, the Subject told him that he would need to wait a minute. (See Justice Center Exhibit 15; Justice Center Exhibit 17: Subject Interrogation; and Hearing testimony of the Subject)

10. On ██████████, at some point after 7:00 p.m. the Subject facilitated the Service Recipient's one-on-one "bottom of the evening" meeting in the Service Recipient's bedroom, during which no one else was present. In the meeting, the Service Recipient told the Subject that he was upset about Service Recipient A going back and forth between the living room and the kitchen, and about Service Recipient B yelling from the living room for help with his CD. The Service Recipient also told the Subject that Staff A should be upstairs helping out. Finally, the Service Recipient told the Subject: "Just so you know, ██████████, every time you leave the room, ██████████ is jotting something down on paper and you're going to be turned in." (See Hearing testimony of the Subject) In response to the Service Recipient's statements, the Subject told the Service Recipient not to worry about these issues because it was not his concern if something was going on between two of the facility staff. (See Hearing testimony of the Subject)

11. On ██████████, the Service Recipient had a behavioral incident at the ██████████ ██████████ in which he threw a chair and used profanity. As a result, the ██████████ requested that ██████████ staff come and remove the Service Recipient from the ██████████. (See Justice Center Exhibits 12 and 14) ██████████ Staff B drove to the ██████████ and retrieved the Service Recipient. While returning to the ██████████ from the ██████████, Staff B asked the Service Recipient why he was so upset, to which the Service Recipient responded that he acted out because the Subject "was trying to get him involved in staff issues in the house", the Subject "wanted him to be a witness that 2 staff were in the office together [o]n ██████████," and the Subject "always complains about the other staff in front of him." (See Justice Center Exhibit 7)

12. An Impact of Psychological Abuse Assessment was prepared on [REDACTED] by [REDACTED], Psychologist II which contains the conclusion that: “The alleged incident of psychological abuse, does appear to have caused a substantial diminution of the emotional, social, and/or behavioral development or condition of [the Service Recipient].” (See Justice Center Exhibit 14)

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 psychological abuse 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). Psychological Abuse under SSL § 488(1)(c) is defined as:

"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.

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

If the Justice Center proves the alleged psychological abuse, 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 psychological abuse cited in the substantiated report constitutes the category of psychological abuse as set forth in the substantiated report.

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

DISCUSSION

The Justice Center has not established by a preponderance of the evidence that the Subject committed the act described as “Offense 1” in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation (See Justice Center Exhibits 1-16), as well as an audio recording of an interview of the Service Recipient and the interrogation of the Subject,

both conducted by the OPWDD Internal Investigator [REDACTED]. (See Justice Center Exhibit 17) The investigation underlying the substantiated report was conducted by the OPWDD Internal Investigator [REDACTED], who was the only witness to testify at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and presented one witness, DSA [REDACTED], who testified on the Subject's behalf.

The Justice Center contends that the Subject discussed with the Service Recipient problems she was having with other staff in the house and asked the Service Recipient to be a witness to the activities of other staff in the house. The Justice Center further contends that, as a result of the alleged discussion, the Service Recipient experienced a substantial diminution of his emotional, social, and/or behavioral development or condition, as evidenced by the Service Recipient's behavioral incident that occurred the day after the alleged discussion took place.

The Subject denied the Service Recipient's allegations in her interrogation and at the hearing. The Subject also maintained that during her facilitation of the Service Recipient's "bottom of the evening" one-on-one session, the Service Recipient attempted to initiate a conversation with her about staff issues, which she rebuffed by telling the Service Recipient that it was none of his concern.

Evidence presented by the Justice Center in support of the allegations consists of the audio interview of the Service Recipient by the OPWDD Internal Investigator [REDACTED] (See Justice Center Exhibit 17), the statement of Staff B contained in Form OPWDD 147 in which Staff B paraphrases the Service Recipient's statements to him (See Justice Center Exhibit 7), and the Impact of Psychological Abuse Assessment in which the psychologist paraphrases the Service Recipient's statements to her (See Justice Center Exhibit 14).

For the following reasons, the Service Recipient's statements are not credited evidence.

First, the three statements made by the Service Recipient, which are included in the record, contain inconsistencies. In his statement as reported by Staff B on Form OPWDD 147, the Service Recipient states that the Subject "always complains about other staff in front of him." (See Justice Center Exhibit 7) However, in his statement to OPWDD Internal Investigator [REDACTED] he stated that this was the first time the Subject said something like this to him. (See Justice Center Exhibit 17: audio recording of interview of the Service Recipient)

Additionally, in OPWDD Internal Investigator [REDACTED] interview of the Service Recipient, the Service Recipient stated that the Subject said to him "I want you to be my witness, if it gets reported, that I want you to be my witness" (See Justice Center Exhibit 17: audio recording of interview of the Service Recipient) and in Form OPWDD 147, Staff B recorded that the Service Recipient reported to him that Subject wanted the Service Recipient "to be a witness that 2 staff were in office together [o]n [REDACTED]." However, the Impact of Psychological Abuse Assessment contained nothing about the Subject talking to the Service Recipient about being a witness for her. (See Justice Center Exhibit 14) If the Service Recipient had reported, to the psychologist who prepared the assessment, that the Subject attempted to engage him as a witness of a staff dispute, certainly the psychologist would have included that information in the assessment. However, no such statement was reported by the psychologist, and the psychologist was not available at the hearing to ensure a complete record on this issue.

Additionally, the record contains convincing evidence of the Service Recipient's tendency to fabricate. DSA [REDACTED]¹ testified that the Service Recipient fabricates regularly and that his fabrications are part of his attention seeking behavior. As an example of the Service

¹ The record reflects that [REDACTED] is a DSA employed by the OPWDD who worked the ensuing shift at the [REDACTED] on [REDACTED].

Recipient's tendency to fabricate, [REDACTED] related an incident in which she was with the Service Recipient on an outing to the hairdresser. After returning to the [REDACTED] from the outing, the Service Recipient told staff at the [REDACTED] that the hairdresser wanted to go out with him and that she may have asked him out. However, the hairdresser had only smiled at the Service Recipient. In another instance, after DSA [REDACTED] was at the grocery store with the Service Recipient, the Service Recipient reported to staff at the [REDACTED] that he had seen his parents, when in fact he had not. (See Hearing testimony of DSA [REDACTED]) Additionally, the Subject testified that she took the Service Recipient on a deejay gig at a college and stayed one-on-one with the Service Recipient the entire time. After returning to the [REDACTED] from the outing, the Service Recipient told [REDACTED] staff that a college girl passed him her telephone number, when all she did was smile at him. (See Hearing testimony of the Subject)

The record also contains uncontroverted evidence that the Service Recipient has a history of making false allegations against staff. DSA [REDACTED] testified that she was investigated about allegations made by the Service Recipient that she denied him sugar. She testified further that the Service Recipient is allotted a certain daily amount of sugar in his "condiment tray," that he used all the sugar in his allotment, that he requested more from her, and that she denied him. DSA [REDACTED] testified that she was cleared of any wrongdoing. She also testified that the Service Recipient waited until the next day to report the incident. (See Hearing testimony of DSA [REDACTED])

The record also contains uncontroverted evidence that it is not unusual for the Service Recipient to pit [REDACTED] staff against one another. (See Hearing testimony of the Subject) The Subject's testimony is supported by other evidence in the record, including the Service Recipient's Behavioral Support Plan which indicates that the Service Recipient's targeted

behaviors include the Service Recipient's struggle to understand social cues and attempts to engage others in back and forth exchanges. The Behavior Support Plan continues on to describe the Service Recipient's lack of impulse control as including "picking on/teasing peers/staff in a mean spirited manner." (See Justice Center Exhibit 11) Additionally, the Service Recipient's Individualized Service Plan states that "when [the Service Recipient] wants something badly, he will become anxious and misread communications or sometimes distort information in an attempt to get the result he wants." (See Justice Center Exhibit 10)

After considering all of the evidence in the record, it is determined that the Service Recipient's statements are not credited evidence.

In contrast, having had the opportunity to hear and view the live witness testimony of DSA [REDACTED] and the Subject, the Administrative Law Judge presiding over the hearing finds the testimony of both witnesses to be credible. Additionally, the Subject's testimony was consistent with her prior statements to the OPWDD Internal Investigator [REDACTED]. Consequently, the testimony of DSA [REDACTED] and the Subject is credited evidence.

In order to prove psychological abuse, the Justice Center must first establish that the Subject acted intentionally or recklessly by verbal or non-verbal conduct toward the Service Recipient. (See NYS SSL§488(1)(c)). The Service Recipient's statements purporting to establish that the Subject acted intentionally or recklessly by discussing staff issues with the Service Recipient were determined to be non-credited evidence. As a result, the Justice Center's evidence is insufficient to establish that the Subject acted intentionally or recklessly by verbal or non-verbal conduct toward the Service Recipient. Evidence in the form of the Impact of Psychological Abuse Assessment, in which a psychologist opines that the Service Recipient suffered a substantial diminution of his emotional, social, and/or behavioral development or

condition, is irrelevant and non-probative since the assessment was apparently solely based on the Service Recipient's statements which have been deemed unreliable and are not credited evidence.

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 the psychological abuse alleged. The substantiated report will be amended and sealed.

DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED], [REDACTED] be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed psychological abuse.

This decision is recommended by John T. Nasci, Administrative Hearings Unit.

DATED: March 25, 2016
Schenectady, New York



John T. Nasci, ALJ