

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

In the Matter of the Appeal of

[REDACTED]

Pursuant to Section 494 of the Social Services Law

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Adjudication Case No.:

[REDACTED]

Parties:

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.

[REDACTED]

By: Nicole Murphy, Esq.
Fine, Olin & Anderman, LLP
39 Broadway
Suite 1910
New York, New York 10006-3006

PROCEDURAL HISTORY

On [REDACTED], the New York State Justice Center for the Protection of People with Special Needs (Justice Center) substantiated an allegation of neglect against [REDACTED] (the Subject). As per the substantiated report:

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian (DDSCTA 1), you committed acts of neglect when you breached your duty towards multiple service recipients by failing to use appropriate and professional language in their presence.

This offense has been SUBSTANTIATED as a Category 3 offense pursuant to Social Services Law § 493. *Justice Center Exhibit 1.*

The Subject requested an administrative review, and the Justice Center Administrative Appeals Unit affirmed the substantiated report. On [REDACTED], a hearing was held, and on January 14, 2016 the Administrative Law Judge (ALJ) issued a Recommended Decision after Hearing, recommending that the allegation of neglect be unsubstantiated. That recommended decision is rejected by the Executive Director, and the following constitutes the final determination pursuant to 14 NYCRR 700.13.

FINDINGS OF FACT

On [REDACTED], the Subject, while in a classroom with several other staff members and service recipients, learned that she and the other staff on duty were being mandated to work the next shift. In discussing this news with another staff member, the Subject stated "that's really retarded." One of the service recipients present in the classroom, Service Recipient A, heard the Subject's remark and jumped up from his desk, exclaiming that the Subject had called him "retarded." The Subject told Service Recipient A that she had not been speaking to him, but Service Recipient A remained agitated and left the room. *Hearing testimony of the subject and Justice Center Exhibit 32.* In the recommended decision, the ALJ incorrectly cited

the Subject's Hearing Testimony and Justice Center Exhibit 32 in finding that Service Recipient A, while leaving the classroom, stated he would have the Subject "put out." Although another staff member alleged that Service Recipient A made such a remark (*Justice Center Exhibit 29*), at no point in her interrogation or her testimony did the Subject assert that Service Recipient A stated he would have her "put out" as he left the room.

Upon leaving the classroom, Service Recipient A reported to the facility's deputy director that the Subject had called him a "retard." *Justice Center Exhibit 13*. Later that same day, the deputy director also received a call from Service Recipient B, who alleged that, in a different incident, the subject had called him "a retard," among other slurs. *Justice Center Exhibit 4*. The Subject denies directing the word at Service Recipient A or using the word in the presence of Service Recipient B. *Hearing testimony of the subject and Justice Center Exhibit 32*.

DISCUSSION

The Executive Director finds that the Justice Center has established, by a preponderance of the evidence, that the Subject committed neglect, and that this neglect was properly categorized as a Category 3 offense. By her own admission, the Subject stated "that's really retarded" to express her negative opinion of mandated overtime, and she did so in the presence of service recipients with developmental disabilities. The Subject also acknowledges that Service Recipient A heard this remark and immediately reacted by jumping up from his desk and exclaiming that the Subject had called him "retarded." *Hearing testimony of the subject and Justice Center Exhibit 32*.

Under Social Services Law § 488(1)(h), neglect is defined as "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.” By using the word “retarded” as she did, in the presence of service recipients, the Subject breached the duty she owed to those service recipients. Not only was such language in such a context inappropriate and unprofessional, as found in the substantiated report, but it was disparaging and offensive to the very service recipients for whom the Subject had been entrusted to care. The likelihood that such language would result in serious or protracted impairment of the physical, mental or emotional condition of a service recipient is evidenced by the reaction of Service Recipient A, who immediately jumped up and expressed offense at the Subject’s language. *Hearing testimony of the subject and Justice Center Exhibit 32.* The harm of such language, particularly in such a setting, is further demonstrated by the fact that the Subject herself speculated that Service Recipient A may have assumed she was talking about him. *Justice Center Exhibit 32.*

In recommending the allegation of neglect be unsubstantiated, the ALJ looked to the respective allegations made by Service Recipient A and Service Recipient B. Although both service recipients alleged that the Subject had directed the word “retarded” or “retard” at them, the ALJ found neither service recipient to be credible. Furthermore, the ALJ concluded that the evidence corroborated the Subject’s account that she said the word to another staff member, concerning mandated overtime, not to or about a service recipient.

The Executive Director does not make a determination that the Subject directed the word “retarded” at either Service Recipient A or Service Recipient B, as such a finding is neither necessary nor relevant to the substantiated report here. The allegation of neglect, as substantiated against the Subject, states only that the Subject “fail[ed] to use appropriate and professional language” in the “presence” of “multiple service recipients.” *Justice Center Exhibit 1.* The conduct to which the Subject admits is sufficient to substantiate this allegation. As the

ALJ acknowledges in the recommended decision, the Subject failed to use appropriate and professional language in the presence of service recipients when she said the word "retarded" as admitted. Although the ALJ argues this failure did not breach the Subject's custodial duty because the word was not directed at a service recipient, the Executive Director rejects that argument. The Subject's use of the word "retarded" around service recipients with developmental disabilities was grossly inappropriate, and it evoked an immediate negative reaction from Service Recipient A. The Subject's conduct breached her custodial duty, and resulted in or was likely to result in serious or protracted impairment of the physical, mental or emotional condition of a service recipient.

Accordingly, it is hereby:

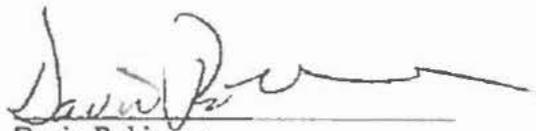
ORDERED

The request of [REDACTED], to amend and seal the substantiated report dated [REDACTED], [REDACTED], is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect, based on her failure to use appropriate and professional language in the presence of service recipients. This substantiated report was properly categorized as a Category 3 offense.

It is therefore 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 Social Services Law § 493(4)(c).

This determination is ordered by Davin Robinson, Chief of Staff, who has been designated by the Executive Director to make such determinations.

Dated: April 21, 2016
Delmar, New York


Davin Robinson
Chief of Staff

**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**

Adjudication 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:

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.

[REDACTED]

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

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], [REDACTED] of neglect by the Subject of multiple service recipients.

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

Offense 2¹

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian (DDSCTA 1), you committed acts of neglect when you breached your duty towards multiple service recipients by failing to use appropriate and professional language in their presence.

This offense has been SUBSTANTIATED as a Category 3 offense pursuant to Social Services Law § 493.

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

4. The facility, the [REDACTED],

¹ There was initially an allegation against the Subject of psychological abuse under SSL § 488(1)(c) that was unsubstantiated.

██████████ located at ██████████, is a residence for adults with developmental disabilities that includes ██████████, which is an intensive treatment unit for service recipients with particularly challenging behaviors. The facility 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.

5. At the time of the alleged neglect, the Subject had been employed at the facility's ██████████ in Building █, Unit █, as a Developmental Disabilities Secure Care Treatment Aide (DDSCTA) for a period of seven years. ██████████

██████████ The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. On ██████████, the Subject was working a mandated overtime shift from 7:00 a.m. to 3:30 p.m. The first of the Subject's assignments that day was to supervise two service recipients, including Service Recipient B from 7:00 a.m. until 9:00 a.m., while they set up the dining room for breakfast. The second of the Subject's assignments that day was to supervise the four service recipients in Group █, including Service Recipient A, for the remainder of the shift. The Subject's second assignment included escorting the Group █ service recipients to their day program and supervising them in the classroom. (Hearing testimony of the Subject and Justice Center Exhibit 32)

7. At the time of the alleged neglect, Service Recipient A was forty years of age and had been a resident of the facility since 2001. Service Recipient A is a person with diagnoses of mild mental retardation, fetal alcohol syndrome, multiple psychiatric issues, including antisocial personality disorder, and several serious health related issues. Service Recipient A has a known and documented history of fabricating allegations against staff members and other service

recipients. (Justice Center Exhibits 14 and 16)

8. At the time of the alleged neglect, Service Recipient B was fifty-five years of age and had been a resident of the facility since 2007. Service Recipient B is a person with diagnoses of mild intellectual disability stemming from a childhood traumatic brain injury, psychotic disorder and paranoid/antisocial personality disorder, as well as several serious health related issues. (Justice Center Exhibits 5 and 7)

9. On the morning of [REDACTED], between 7:00 a.m. and 9:00 a.m., the Subject supervised Service Recipient B and another service recipient as they set up the dining room for breakfast. At some point before 9:00 a.m., after he finished the assignment, Service Recipient B said goodbye to the Subject and left for his day program. The Subject did not see him again that day. (Hearing testimony of the Subject and Justice Center Exhibit 32)

10. On [REDACTED], a day trip that had been scheduled for that afternoon was cancelled before lunch due to the facility's staffing shortage. Service Recipient A had been planning to go on the trip and he was upset about its cancellation. (Hearing testimony of the Subject and Justice Center Exhibit 32)

11. On the afternoon of [REDACTED], the Subject was supervising the Group [REDACTED] service recipients, including Service Recipient A, in facility Classroom [REDACTED]. The other staff members who were present were Classroom [REDACTED] Teacher [REDACTED], DDSCTA [REDACTED], DDSCTA [REDACTED], and DDSCTA [REDACTED]. The three DDSCTAs had been assigned to provide 1:1 supervision of other service recipients. (Hearing testimony of the Subject and Justice Center Exhibits 14 and 24)

12. At approximately 2:00 p.m. on [REDACTED], staff member [REDACTED] entered the classroom and informed the DDSCTAs who were present that they were all being

██████████ mandated to work the next shift, which meant that some of the DDSCTAs including the Subject and DDSCTA ██████████ were being “double mandated” to work overtime. (Hearing testimony of the Subject and Justice Center Exhibit 32)

13. Upon receiving the news that he was being required to work overtime again, DDSCTA ██████████ complained to the Subject that the facility “puts staff out,” and then makes the remaining staff work overtime and the Subject responded by saying, “that’s really retarded.” Service Recipient A, who had his head down on his desk because he was still disgruntled at the cancellation of the day trip, lifted his head, jumped up and accused the Subject of calling him “retarded.” The Subject responded that she had not been speaking to him. Service Recipient A then said that he would have the Subject “put out” and rushed out of the classroom to the office of facility Deputy Director ██████████ to report his complaint against the Subject. (Hearing testimony of the Subject and Justice Center Exhibit 32)

14. Deputy Director ██████████ received Service Recipient A’s complaint that the Subject had called him “a retard” and generated an OPWDD 147 Reporting Form for Reportable Incidences and Notable Occurrences (Form 147). Deputy Director ██████████ reacted to Service Recipient A’s allegation by taking measures, including reassigning the Subject to Unit ██████████ for the rest of her shift and otherwise restricting the Subject’s interaction with Service Recipient A. (Justice Center Exhibit 13)

15. A short while later that day, Deputy Director ██████████ received a telephone call from Service Recipient B, who spoke about matters relating to his plans for his future. Service Recipient B then stated to Deputy Director ██████████ that the Subject had called him a “bitch, a nigger and a retard” and that “she always does that to us...” Thereafter, Deputy Director ██████████ arranged for the Subject to be placed on administrative leave. (Justice

Center Exhibits 4 and 5)

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 abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1). Under SSL § 488(1)(h) neglect is defined 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. 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. Under SSL § 493 (4)(c), a Category 3 act is defined as:

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 not established by a preponderance of the evidence that the Subject committed an act of neglect under SSL § 488(1)(h), by failing to use appropriate and professional language in the presence of multiple service recipients as alleged in Offense 2 of the substantiated report.

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In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-32) The investigation underlying the substantiated report was conducted by OPWDD Internal Investigator ██████████, who testified at the hearing on behalf of the Justice Center.

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

The issue in this case is whether on ██████████, the Subject failed to use appropriate or professional language in the presence of multiple service recipients and, if so, whether her conduct constituted neglect as defined in SSL § 488(1)(h).

The evidence upon which the Justice Center relied was that on ██████████, a complaint was made by Service Recipient A against the Subject, alleging that she used inappropriate or unprofessional language in his presence and that later, that same day, a complaint was made by Service Recipient B against the Subject, alleging that she used similar inappropriate or unprofessional language in his presence. Although both of the Service Recipients' allegations are that the Subject directed derogatory comments to them in the presence of other service recipients, there were no other witnesses, among the other service recipients or staff, who corroborated either of the two incidents as alleged by Service Recipient A or Service Recipient B.

Allegation of Service Recipient A

The evidence that was presented by the Justice Center to establish that the Subject used inappropriate or unprofessional language in the presence of Service Recipient A was based on allegations made by Service Recipient A, as well as the statement of DDSCTA ██████████ and the Subject's own admission that she used the word "retarded" in the presence of service

██████████ recipients.

Service Recipient A alleged repeatedly that the Subject directed the word “retarded” at him, in the presence of other service recipients and staff members, in a derogatory manner for the purpose of insulting him. The Subject admitted to having used the word “retarded” in the presence of Service Recipient A, but averred that she had spoken the word innocently in a conversation with DDSCTA ██████████ during which they were expressing their mutual unhappiness with the facility’s practice of having insufficient staffing and then mandating repeated overtime shifts.

The Subject provided her version of the incident to OPWDD Internal Investigator ██████████ in the ██████████, interrogation and in her hearing testimony. The Subject consistently explained that while she admitted having used the word “retarded,” she was speaking only to DDSCTA ██████████, expressing frustration upon having just learned that they were being mandated to work a repeated overtime shift and that when Service Recipient A jumped up and accused her of calling him retarded, she had immediately responded by telling Service Recipient A that she had not been speaking to him. (Hearing testimony of the Subject and Justice Center Exhibit 32)

The Subject advised OPWDD Internal Investigator ██████████ during the interrogation and stated in her hearing testimony that Service Recipient A frequently targets staff members with false complaints and that she had been reassigned in the past due to his negative behaviors towards her. The Subject asserted that at the time of the incident, Service Recipient A was angry about the cancellation of his outing and in this mood, he had twisted her words, seizing the opportunity to fabricate an allegation against her in order to have her “put out.” (Hearing testimony of the Subject and Justice Center Exhibit 32)

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DDSCTA ██████████, who was present at the time that the Service Recipient left facility Classroom ██████████ provided an undated Employee Statement that indicates that on ██████████ ██████████, Service Recipient A was agitated and that, as he ran out of the class, he stated that he was going to "...put ██████████ out." (Justice Center Exhibit 29)

DDSCTA ██████████ subsequently told OPWDD Internal Investigator ██████████ on ██████████, that the Subject had used the word "retarded" when speaking to him, but that she was not using the word towards Service Recipient A and further, that he did not hear the Subject say anything towards anyone. (Justice Center Exhibit 32)

In support of Service Recipient A's allegation, the Justice Center relied on the evidence of Deputy Director ██████████, RN ██████████, Facility Psychologist ██████████, and Service Recipient A.

On ██████████, Deputy Director ██████████ told OPWDD Internal Investigator ██████████ that on ██████████, Service Recipient A came into her office to disclose that the Subject had just called him "a retard." She further stated that Service Recipient A has a history of making up allegations against staff. (Justice Center Exhibit 14)

On ██████████, Service Recipient A was examined by RN ██████████, whose statement was similar to that of Deputy Director ██████████. In the Nursing Incident Report Addendum, RN ██████████ wrote that "Individual stated that staff ██████████ called him a retard." (Justice Center Exhibit 21)

However, OPWDD Internal Investigator ██████████ interview of Service Recipient A reveals a divergent allegation. Then, Service Recipient A told the investigator that the Subject had said, "These fucking retards always complain, complain, complain..." and that the Subject kept repeating those words under her breath. Service Recipient

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A recounted that he had left the classroom to report the incident to Deputy Director ██████████ and he then said that, “he is still upset that she ██████████ would call him ‘retard’ but also feels bad about it because she is not working. He said ‘*maybe she was just joking.*’ He said that he only wants her out for 1 month...” (Justice Center Exhibit 14)

Facility Psychologist ██████████ initially told OPWDD Internal Investigator ██████████ ██████████ on ██████████, that Service Recipient A has a known history of making up allegations, but that he appeared consistent and upset regarding his allegation that the Subject called him a “retard.” The next day, however, on ██████████, Facility Psychologist ██████████ sent an email to OPWDD Internal Investigator ██████████ in which yet another different version of Service Recipient A’s allegation against the Subject was disclosed. In the email, Facility Psychologist ██████████ wrote that Service Recipient A had told her during a counselling session on ██████████, that the Subject had admonished a group of service recipients, including him, that they should all stop complaining because “you are all acting retarded.” (Justice Center Exhibit 14)

A comparison of the various accounts of the incident provided by Service Recipient A reveals three very distinct alleged versions of the Subject’s conduct and comments. At first, Service Recipient A told Deputy Director ██████████ and RN ██████████ that the Subject called him a “retard.” Then, Service Recipient A told OPWDD Internal Investigator ██████████ ██████████ that the Subject said out loud about the service recipients, “These fucking retards always complain, complain, complain...” and that the Subject kept repeating those words under her breath. Lastly, Service Recipient A told Facility Psychologist ██████████ that the Subject said to a group of service recipients that they were “all acting retarded.” These inconsistencies are a partial basis for the finding that Service Recipient A’s allegations were fabricated.

Another important factor in the credibility determination of Service Recipient A's allegations is that the evidence established that none of Service Recipient A's versions of the incident were corroborated by anyone else. Service Recipient A was the only person who claimed to have heard the comments that he alleged were made by the Subject even though the comments were allegedly made in the presence of facility staff members and other service recipients.

DDSCTA [REDACTED] and DDSCTA [REDACTED] were both present at the time of the alleged incident and they provided written Employee Statements dated [REDACTED]. DDSCTA [REDACTED] and DDSCTA [REDACTED] both wrote that they had not been aware of any incident. (Justice Center Exhibits 28 and 30)

Classroom [REDACTED] Teacher [REDACTED] was the classroom teacher at the time of the alleged incident and she provided a written Employee Statement dated [REDACTED]. Classroom [REDACTED] Teacher [REDACTED] wrote that she was not present at the time that Service Recipient A left the classroom but she did mention that she had observed that Service Recipient A was agitated with the Subject for no apparent reason that day. (Justice Center Exhibit 31)

Lastly, Service Recipient A's well established history of fabricating allegations against staff and peers is a very relevant and critical factor in the credibility determination of his allegations against the Subject.

Deputy Director [REDACTED] and Facility Psychologist [REDACTED] both told OPWDD Internal Investigator [REDACTED] of Service Recipient A's propensity to invent false complaints against staff members. (Justice Center Exhibit 14)

Service Recipient A's Evaluation Summary and Service Plan dated [REDACTED], states that Service Recipient A's behavior is "... marked by occasional outburst and allegations made

██████████ toward staff or his peers.” (Justice Center Exhibit 16)

Day Program Supervisor ██████████ disclosed to OPWDD Internal Investigator ██████████ on ██████████, that Service Recipient A “... would usually make false allegations against staff, but he tends to go directly to the administration office ...” (Justice Center Exhibit 14)

In the Investigative Report (Justice Center Exhibit 14), OPWDD Internal Investigator ██████████ herself noted that Service Recipient A’s “...behavior is marked by occasional outburst and allegations made towards staff or his peers. His maladaptive behaviors include verbal abuse to staff (cursing, screaming, teasing, provoking, and threatening staff that he will get them fired).”

Based on all of the foregoing, Service Recipient A’s allegation against the Subject is not credited evidence. Firstly, Service Recipient A provided three significantly differing accounts of the alleged incident. Secondly, the Justice Center provided no corroborative evidence, despite the fact that the Subject’s alleged conduct occurred in the presence of others. Thirdly, Service Recipient A’s conduct of fabricating allegations against staff is widely recognized and well documented. Lastly, the record reflects that Service Recipient A was angry at the Subject and therefore had a motive to fabricate an allegation against her.

On the other hand, the Subject’s statements and hearing testimony were logical and consistent with the evidence adduced by the Justice Center. The Subject’s account of the incident was corroborated by DDSCTA ██████████, who told OPWDD Internal Investigator ██████████ that Service Recipient A stated at the time that he would have the Subject “put out.”

Accordingly it is found that the Subject did use the word “retarded” in the presence of

██████████ service recipients, as an expression of her frustration regarding the facility's repeated requirement that she work overtime shifts, when she was speaking to DDSCTA ██████████.

The question that emerges is whether, based on these facts and the Subject's admission, the Subject's use of the word "retarded" constituted an act of neglect, which would require the Justice Center to prove that the Subject breached a duty. Certainly, the Subject's admitted use of the word "retarded" was a failure to use appropriate and professional language in the presence of service recipients. However, there was no evidence adduced by the Justice Center to establish that the Subject had a duty to refrain from saying the word "retarded" in the presence of service recipients. Moreover, given that the Subject's use of the word "retarded" was not directed at or about anyone, but was employed in a completely different context, her failure to use appropriate and professional language in the presence of service recipients cannot be realistically construed as a breach of the Subject's custodial duty as required for a finding of neglect pursuant to SSL § 488(1)(h).

Furthermore, the Subject's use of the word "retarded," in the context in which she uttered it, did not result in nor was it likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient. While Service Recipient A displayed signs of distress, allegedly caused by being called "retarded" by the Subject, his allegation has been discredited and it is found that his demonstration of upset was similarly manufactured to bolster the believability of his stories. Under the circumstances that the Subject used the word "retarded" it did not and was not likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient, as required for a finding of neglect pursuant to SSL § 488(1)(h).

While the Subject's use of the word "retarded," is found to have been inappropriate and

██████████
unprofessional, her conduct did not rise to level of neglect. It may well be that the Subject's failure to use appropriate and professional language in the presence of service recipients was a significant incident under SSL § 488(1)(i), but with respect to the allegation of Service Recipient A, the Justice Center did not establish by a preponderance of the evidence, the elements of neglect as set forth in SSL § 488(1)(h).

Allegation of Service Recipient B

The evidence that was presented by the Justice Center to establish that the Subject used inappropriate or unprofessional language in the presence of Service Recipient B was based exclusively on the statements of Service Recipient B and Service Recipient A. There were no other witnesses and the Subject's position with respect to Service Recipient B's allegation was a complete denial that anything occurred.

During the ██████████, interrogation by OPWDD Internal Investigator ██████████ ██████████ and in her hearing testimony, the Subject consistently denied the allegation of an incident with respect to Service Recipient B. The Subject consistently stated that on ██████████, she was assigned to supervise Service Recipient B and another service recipient for dining room set up from 7:00 a.m. until 9:00 a.m. and that the last time she had spoken with Service Recipient B that day was when he said goodbye to her prior to leaving for his program before 9:00 a.m. The Subject denied having made any derogatory comment to Service Recipient B and stated that the allegation was false. (Hearing testimony of the Subject and Justice Center Exhibit 32)

In support of Service Recipient A's allegation, the Justice Center relied on the evidence of Deputy Director ██████████, RN ██████████, Service Recipient B and Service Recipient A. On ██████████, Deputy Director ██████████ told OPWDD Internal Investigator ██████████ that on ██████████ after 3:00 p.m., she received a telephone call from

Service Recipient B, who spoke about matters relating to his plans for his future. Service Recipient B then stated to Deputy Director [REDACTED] that the Subject had called him “a bitch, a nigger and a retard” and he further alleged that “she always does that to us...” (Justice Center Exhibit 14)

On [REDACTED], Service Recipient B was examined by RN [REDACTED], whose statement was similar to that of Deputy Director [REDACTED]. In the Nursing Incident Report Addendum, RN [REDACTED] wrote that, “Individual stated that staff [REDACTED] called him dumb, nigger and retard without provocation.” (Justice Center Exhibit 12)

However, OPWDD Internal Investigator [REDACTED], interview of Service Recipient B reveals a distinctly different allegation. In the interview, Service Recipient B told the investigator that one day the preceding week, although he was unsure of the actual day, he was in the dining room on the second floor of the facility in the afternoon. He stated that the Subject appeared upset and that out of nowhere she said to him, “This nigger, retarded, dumb stupid mother fucker.” He further alleged that it was the first time that he had ever heard the Subject speak like that. Service Recipient B initially told the investigator that he could not remember anyone else having been present at the time, but then he recalled that Service Recipient A had been there and that Service Recipient A had also heard what the Subject had said. (Justice Center Exhibit 5)

Service Recipient B told Deputy Director [REDACTED] that the Subject had called him “a bitch, a nigger and a retard.” He told RN [REDACTED] that the Subject had called him “dumb, nigger and retard,” and he told OPWDD Internal Investigator [REDACTED] that the Subject had called him “a nigger, retarded, dumb stupid mother fucker.” Although there are inconsistencies in the words used by Service Recipient B to each different person to whom he

disclosed his allegation, a comparison of the different accounts reveals a more noteworthy contradiction in Service Recipient B's allegations as to the Subject's conduct. When describing the Subject's insults, Service Recipient B told Deputy Director [REDACTED] that "she always does that to us" and he later told OPWDD Internal Investigator [REDACTED] that that was the first time that he had ever heard the Subject speak like that. This significant conflict is one of the reasons that Service Recipient B's allegation against the Subject is not deemed trustworthy.

Service Recipient A's involvement in Service Recipient B's allegation also adversely affects Service Recipient B's credibility. On [REDACTED], Service Recipient B told OPWDD Internal Investigator [REDACTED] that Service Recipient A had been there and had heard what the Subject had said to him. Service Recipient A, whose own allegation against the Subject has already been discredited in this analysis, did not initially disclose that he had heard the Subject speak to Service Recipient B in a manner similar to that of which he complained when he first spoke with OPWDD Internal Investigator [REDACTED] on [REDACTED]. It was only when OPWDD Internal Investigator [REDACTED] re-interviewed Service Recipient A and questioned him about Service Recipient B's allegation that Service Recipient A spontaneously remembered that he had overheard the Subject scream at Service Recipient B and call him a "retard," thereby providing belated corroboration to Service Recipient B's allegation. (Justice Center Exhibit 5)

Not only is Service Recipient A's alleged corroboration problematic due to his failure to initially volunteer the information, his history of fabricating allegations, and his own discredited allegation in this case, but additionally, the evidence does not establish that Service Recipient A was even present when the Subject was in the same place as Service Recipient B. Although Service Recipient B alleged that the incident had occurred the preceding week, the assumption

██████████ that OPWDD Internal Investigator ██████████ made was that it occurred on ██████████ ██████████, the date that Service Recipient B made the disclosure to Deputy Director ██████████ and the same day that Service Recipient A had already made a similar complaint. Significantly, the record reflects that on ██████████, the Subject only worked with Service Recipient B from 7:00 a.m. until he left prior to 9:00 a.m. There is no evidence in the record that would establish that Service Recipient A was present in the dining room at that time and the facility shift assignment sheet supports the finding that Service Recipient A was not in the dining room during that time. (Justice Center Exhibit 25)

Furthermore, it is noteworthy that Service Recipient B disclosed nothing about his allegation against the Subject to his regular psychologist. Facility Psychologist ██████████ told OPWDD Internal Investigator ██████████ on ██████████, that she had known Service Recipient B for two years and had been providing frequent therapy to him. Facility Psychologist ██████████ stated that, although she had spoken to Service Recipient B on the day of the incident, he had not mentioned his allegation against the Subject to her. She further stated that on ██████████, when she asked Service Recipient B if anything was bothering him or if anyone had said anything to him that was bothering him, Service Recipient B became upset and refused to discuss the matter with her. (Justice Center Exhibit 5)

Based on all of the aforementioned evidence, Service Recipient B's allegation against the Subject is not credited. The Subject's statements and hearing testimony (that no incident occurred) were logical and consistent. Having had the opportunity to observe, hear and consider the Subject's hearing testimony, the Administrative Law Judge determines that the Subject's testimony is credited and reliable evidence.

Accordingly, regarding Service Recipient B's allegation against the Subject, it is

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determined that the Subject did not fail to use appropriate and professional language in the presence of service recipients. In short, the Justice Center did not establish by a preponderance of the evidence that the Subject committed an act of neglect as alleged.

Conclusion

The Justice Center alleged that the Subject committed acts of neglect when she breached her duty towards multiple service recipients by failing to use appropriate and professional language in their presence. The evidence relied upon to establish that there were multiple service recipients present when the Subject breached her duty were the two separate allegations of Service Recipient A and Service Recipient B. Regarding the allegation of Service Recipient A, while the evidence established that the Subject failed to use appropriate and professional language in the presence of Service Recipient A, by employing the word “retarded,” the Subject’s conduct did not rise to the level of neglect as defined in SSL § 488(1)(h).

Regarding the separate allegation of Service Recipient B, the evidence did not establish that the Subject failed to use appropriate and professional language in his presence, and, therefore, it is found that the Subject had not committed an act of neglect.

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 the neglect alleged in the substantiated report.

DECISION:

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 neglect.

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

DATED: January 14, 2016
Plainview, New York



Sharon Golish Blum, Esq.
Administrative Law Judge