

**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**

**Adjudication 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]  
[REDACTED]  
[REDACTED]

By: Nicole Murphy, Esq.  
Fine, Olin & 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 the substantiated report dated ██████  
████████████████████ dated ██████  
be amended and sealed is denied with respect to the allegation that that she  
committed an act of neglect. 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:** May 1, 2015  
Schenectady, New York

  
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David Molik  
Administrative Hearings Unit

**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

---

**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjudication Case #:**

[REDACTED]

Before:

Sharon Golish Blum  
Administrative Law Judge

Held at:

Adam Clayton Powell Jr. State Office Building  
163 W 125th Street  
New York, New York 10027  
On: [REDACTED]

Parties:

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  
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161 Delaware Avenue  
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By: Juliane O'Brien, Esq.

[REDACTED]

[REDACTED]

[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 (hereinafter "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 the Subject of a 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.

## **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] received and dated [REDACTED] of abuse and/or neglect by the Subject against a Service Recipient.

2. The Justice Center substantiated the report against the Subject for abuse and/or neglect. The Justice Center concluded that:

### **Offense 3<sup>1</sup>**

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you directed derogatory and threatening language towards a service recipient.

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

3. [REDACTED] (the facility), located at [REDACTED], is a group home for people with developmental disabilities, which is operated by the New York State Office for People With Developmental Disabilities,

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<sup>1</sup> Originally there were three Offenses listed against the Subject. The first two of these were unsubstantiated.

██████████ (OPWDD), and is *a facility or provider agency* that is subject to the jurisdiction of the Justice Center.

4. At the time of the incident, the Subject, ██████████, had been employed as a staff member at the facility for over six years. Her regular work shift was from ██████████ ██████████. (Testimony of ██████████; Subject)

5. At the time of the incident, the Service Recipient was a 42-year-old person with diagnoses of bipolar disorder, paranoia and developmental delays. She has a long history of violence and aggression against others and had been in and out of psychiatric facilities and jails from the time that she was 14 years old. (Justice Center Exhibit 11)

6. On ██████████, ██████████ and staff member ██████████ were working together, in building ██████████. Shortly after lunch, ██████████ was discussing an issue related to the Service Recipient's laundry with the Service Recipient. ██████████, who was sitting nearby, commented to ██████████, "Just let her do it the way she used to." The Service Recipient overheard the remark and turned toward ██████████ and asked, "Are you talking to me?" ██████████ did not respond. The Service Recipient repeated the question several times as she approached ██████████, who remained silent. ██████████ intervened and told the Service Recipient that ██████████ had not been speaking to her. (Testimony of ██████████)

7. The Service Recipient, who had gotten very close to ██████████ face, began repeatedly swearing at and threatening ██████████. ██████████ inserted herself between the Service Recipient and ██████████, and repeatedly told the Service Recipient to calm down and step back, attempting to deescalate her anger and redirect her away from ██████████. (Testimony of ██████████)

██████████

8. The Service Recipient would not be redirected and she kept repeating to ██████████ that, "It's not the first time," and that, "I'm gonna f--k that bitch up." After a short time, ██████████ said, "If you f--k me up, I'm gonna f--k you up too." At that point both the Service Recipient and ██████████ were cursing at and threatening each other. (Testimony of ██████████)

9. ██████████ directed ██████████ to go into the office and telephone their supervisor, but she did not do so. ██████████ stopped the Service Recipient from spitting at ██████████ and managed to cajole the Service Recipient into moving away from ██████████. As they were walking away from ██████████, ██████████ told the Service Recipient, "I'm not taking you to smoke. You have no cigarettes," a statement that turned out to be untrue. (Testimony of ██████████)

10. In the meantime, another Service Recipient had overheard or witnessed the conflict and he went to the glass door, between the unit and the lobby area, and banged on the glass as he called for help. (Justice Center Exhibit 5)

11. Safety Officer ██████████ reported to the investigator that when she entered the unit, she observed ██████████ standing near ██████████ and the Service Recipient, who appeared to be upset with ██████████. ██████████ assisted for a few moments by suggesting that ██████████ take the Service Recipient off the unit until she became calm, which ██████████ did. ██████████ then left the area, as other staff had arrived to assist. (Justice Center Exhibit 7)

12. ██████████ then went to the core office and advised her supervisor, ██████████, that there was "...some verbal aggression between the Service Recipient and ██████████..." ██████████ went to the unit and reassigned ██████████ to another unit. ██████████

██████████ spoke with ██████████, who revealed nothing about her own inappropriate conduct, and to the Service Recipient, who also did not provide any details about the confrontation. ██████████ only became aware of ██████████ inappropriate conduct after the Service Recipient disclosed the information to her psychologist, who prepared the Form 147 ██████████. (Justice Center Exhibit 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 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 evidence that the alleged act or acts of abuse or neglect occurred...” (Title 14 NYCRR 700.3(f))

Pursuant to SSL §§ 494(1)(a)(b) and (2), and Title 14 NYCRR § 700.6(b), this hearing decision will determine: 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, and if there is a finding of a preponderance of the evidence; whether the substantiated allegations constitute

abuse and/or neglect; and pursuant to Social Services Law § 493(4), the category of abuse and/or neglect that such act or acts constitute.

The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488:

1. "Reportable incident" shall mean the following conduct that a mandated reporter is required to report to the vulnerable persons' central register:
  - (a) "Physical abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient or causing the likelihood of such injury or impairment. Such conduct may include but shall not be limited to: slapping, hitting, kicking, biting, choking, smothering, shoving, dragging, throwing, punching, shaking, burning, cutting or the use of corporal punishment. Physical abuse shall not include reasonable emergency interventions necessary to protect the safety of any person.
  - (b) "Sexual abuse," which shall mean any conduct by a custodian that subjects a person receiving services to any offense defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law; or any conduct or communication by such custodian that allows, permits, uses or encourages a service recipient to engage in any act described in articles two hundred thirty or two hundred sixty-three of the penal law. For purposes of this paragraph only, a person with a developmental disability who is or was receiving services and is also an employee or volunteer of a service provider shall not be considered a custodian if he or she has sexual contact with another service recipient who is a consenting adult who has consented to such contact.
  - (c) "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.



- (d) "Deliberate inappropriate use of restraints," which shall mean the use of a restraint when the technique that is used, the amount of force that is used or the situation in which the restraint is used is deliberately inconsistent with a service recipient's individual treatment plan or behavioral intervention plan, generally accepted treatment practices and/or applicable federal or state laws, regulations or policies, except when the restraint is used as a reasonable emergency intervention to prevent imminent risk of harm to a person receiving services or to any other person. For purposes of this subdivision, a "restraint" shall include the use of any manual, pharmacological or mechanical measure or device to immobilize or limit the ability of a person receiving services to freely move his or her arms, legs or body.
- (e) "Use of aversive conditioning," which shall mean the application of a physical stimulus that is intended to induce pain or discomfort in order to modify or change the behavior of a person receiving services in the absence of a person-specific authorization by the operating, licensing or certifying state agency pursuant to governing state agency regulations. Aversive conditioning may include but is not limited to, the use of physical stimuli such as noxious odors, noxious tastes, blindfolds, the withholding of meals and the provision of substitute foods in an unpalatable form and movement limitations used as punishment, including but not limited to helmets and mechanical restraint devices.
- (f) "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.
- (g) "Unlawful use or administration of a controlled substance," which shall mean any administration by a custodian to a service recipient of: a controlled substance as defined by article thirty-three of the public health law, without a prescription; or other medication not approved for any use by the federal food and drug administration. It also shall include a custodian unlawfully using or distributing a controlled substance as defined by article thirty-three of the public health law, at the workplace or while on duty.

- (h) "Neglect," which shall mean any action, inaction or lack of attention that breaches a custodian's duty and that results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient. Neglect shall include, but is not limited to: (i) failure to provide proper supervision, including a lack of proper supervision that results in conduct between persons receiving services that would constitute abuse as described in paragraphs (a) through (g) of this subdivision if committed by a custodian; (ii) failure to provide adequate food, clothing, shelter, medical, dental, optometric or surgical care, consistent with the rules or regulations promulgated by the state agency operating, certifying or supervising the facility or provider agency, provided that the facility or provider agency has reasonable access to the provision of such services and that necessary consents to any such medical, dental, optometric or surgical treatment have been sought and obtained from the appropriate individuals; or (iii) failure to provide access to educational instruction, by a custodian with a duty to ensure that an individual receives access to such instruction in accordance with the provisions of part one of article sixty-five of the education law and/or the individual's individualized education program.

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).

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493:

4. Substantiated reports of abuse or neglect shall be categorized into one or more of the following four categories, as applicable:
  - (a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:
    - (i) intentionally or recklessly causing physical injury as defined in subdivision nine of section 10.00 of the penal law, or death, serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, or consciously disregarding a

substantial and unjustifiable risk that such physical injury, death, impairment or loss will occur;

(ii) a knowing, reckless or criminally negligent failure to perform a duty that: results in physical injury that creates a substantial risk of death; causes death or serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, 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 is likely to result in either;

(iii) threats, taunts or ridicule that is likely to result in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;

(iv) engaging in or encouraging others to engage in cruel or degrading treatment, which may include a pattern of cruel and degrading physical contact, of a service recipient, that results in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;

(v) engaging in or encouraging others to engage in any conduct in violation of article one hundred thirty of the penal law with a service recipient;

(vi) any conduct that is inconsistent with a service recipient's individual treatment plan or applicable federal or state laws, regulations or policies, that encourages, facilitates or permits another to engage in any conduct in violation of article one hundred thirty of the penal law, with a service recipient;

(vii) any conduct encouraging or permitting another to promote a sexual performance, as defined in subdivision one of section 263.00 of the penal law, by a service recipient, or permitting or using a service recipient in any prostitution-related offense;

(viii) using or distributing a schedule I controlled substance, as defined by article thirty-three of the public health law, at the work place or while on duty;

- (ix) unlawfully administering a controlled substance, as defined by article thirty-three of the public health law to a service recipient;
- (x) intentionally falsifying records related to the safety, treatment or supervision of a service recipient, including but not limited to medical records, fire safety inspections and drills and supervision checks when the false statement contained therein is made with the intent to mislead a person investigating a reportable incident and it is reasonably foreseeable that such false statement may endanger the health, safety or welfare of a service recipient;
- (xi) knowingly and willfully failing to report, as required by paragraph (a) of subdivision one of section four hundred ninety-one of this article, any of the conduct in subparagraphs (i) through (ix) of this paragraph upon discovery;
- (xii) for supervisors, failing to act upon a report of conduct in subparagraphs (i) through (x) of this paragraph as directed by regulation, procedure or policy;
- (xiii) intentionally making a materially false statement during an investigation into a report of conduct described in subparagraphs (i) through (x) of this paragraph with the intent to obstruct such investigation; and
- (xiv) intimidating a mandated reporter with the intention of preventing him or her from reporting conduct described in subparagraphs (i) through (x) of this paragraph or retaliating against any custodian making such a report in good faith.
- (b) Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one finding shall be sealed after five years.
- (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.
- (d) Category four shall be conditions at a facility or provider agency that expose service recipients to harm or risk of harm where staff culpability is mitigated by systemic problems such as inadequate management, staffing,

██████████ training or supervision. Category four also shall include instances in which it has been substantiated that a service recipient has been abused or neglected, but the perpetrator of such abuse or neglect cannot be identified.

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 evidence, the substantiated report must be amended and sealed.

### DISCUSSION

The Justice Center has established by a preponderance of evidence that ██████████ committed the neglect as alleged in the Report of Substantiated Finding. Specifically, the evidence establishes that ██████████ committed an act of neglect when she directed derogatory and threatening language towards the Service Recipient. The category of the affirmed substantiated neglect that such act constitutes was properly substantiated as a Category 3 act.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-13) The investigation underlying the substantiated report was conducted by OPWDD Internal Investigator, ██████████. ██████████ and ██████████ testified at the hearing on behalf of the Justice Center. ██████████ testified on her own behalf and provided two documents as evidence. (Subject Exhibits 1 and 2)

The Justice Center alleged that the act of directing derogatory and threatening language towards a Service Recipient meets the definition of “neglect” as set out in SSL § 488(1)(h) and that such language constitutes an “...action...that breaches a custodian’s duty...and is likely to

██████████  
*result in...serious or protracted impairment of the physical, mental or emotional condition of a service recipient.”*

In both her interrogation and her hearing testimony, ██████████ stated that when the Service Recipient initially confronted her, she did try to explain that she was just speaking to ██████████, but that the Service Recipient ignored her explanation.

██████████ consistently denied, both in her interrogation and her hearing testimony, that she swore at or threatened the Service Recipient in any way. She testified that she “... never used inappropriate language... [and]... never used verbal aggression...” against the Service Recipient. (Testimony of ██████████; Subject)

██████████ testified that she was present throughout the incident and that, after the Service Recipient became aggressive with ██████████, by swearing at her, threatening her and being physically threatening, ██████████ did respond inappropriately by swearing at and issuing her own threats to the Service Recipient. (Testimony of ██████████)

The hearing testimony of ██████████, which was consistent with her statements made to the investigator, is credited evidence. ██████████ had no reason to fabricate her version of events. She had no interest in the investigation of this matter. In fact, the evidence shows that ██████████ did not clearly disclose the extent of ██████████ involvement in the “... verbal aggression between the Service Recipient and ██████████...” to anyone, until after the investigation started. It was the Service Recipient’s disclosure to the psychologist that initiated the investigation of the incident.

██████████, on the other hand, was motivated to fabricate her version of events, to hide the fact of her misconduct towards a Service Recipient, in order to preserve her employment. ██████████ hearing testimony is, therefore, not credited evidence.

breach of duty was *likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition* of the Service Recipient, as set out in

substantiated report. It is determined that the neglect is properly categorized as a Category 3 act.

report will be sealed after five years.

\_\_\_\_\_ dated \_\_\_\_\_

be amended and sealed is denied with respect to the allegation that that she committed an act of neglect. 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 Sharon Golish Blum, Administrative Hearings Unit.

DATED: March 20, 2015  
Plainview, New York



Sharon Golish Blum, Esq.  
Administrative Law Judge