

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

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In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**FINAL  
DETERMINATION  
AFTER  
HEARING**

**Adjud. Case #:**

[REDACTED]

Vulnerable Persons' Central Register  
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: Juliane O'Brien, Esq.

[REDACTED]

By: Kevin Mahoney, Esq.  
Hogan Willig Attorneys at Law  
2410 North Forest Road, Suite 301  
Amherst, New York 14068

[REDACTED]

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 the Justice Center and the Subject that the substantiated report under [REDACTED] received and dated [REDACTED], be modified is granted as to the Category level act. The determination that the Subject committed psychological abuse is substantiated.

It is agreed that the substantiated report should be categorized as a Category 3 act.

NOW, THEREFORE, IT IS DETERMINED that the record of this report is substantiated and 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:** February 8, 2016  
Schenectady, New York

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

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  
UPON STIPULATED  
FACTS**

**Adjud. Case #:**

[REDACTED]

Before:

Gerard D. Serlin  
Administrative Law Judge

Held at:

Upon written stipulation,  
Administrative Hearings Unit  
New York State Justice Center for the Protection  
of People with Special Needs  
333 East Washington Street  
Syracuse, New York 13202

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

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By: Kevin Mahoney, Esq  
Hogan Willig Attorneys at Law  
2410 North Forest Road, Suite 301  
Amherst, New York 14068

### **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 upon consideration of a stipulation of facts, it is hereby found:

1. On [REDACTED] an allegation was reported to the VPCR that the Subject, an employee of the [REDACTED] located at [REDACTED] [REDACTED] had abused a service recipient who was a resident of this facility. The Justice Center classified this report as an abuse case and assigned [REDACTED] [REDACTED], to the report.

2. This report was investigated by the New York State Justice Center for the Protection of People with Special Needs (the Justice Center).

3. On [REDACTED], the Justice Center substantiated the report against the Subject for abuse. The Justice Center concluded that:

#### **Offense 1**

It was alleged that on morning of [REDACTED] at the [REDACTED] [REDACTED], located at [REDACTED], you committed acts of psychological abuse against a patient when you touched her twice on the buttocks during a kickball game.

This offense has been SUBSTANTIATED as a Category 2 offense pursuant to Social Services Law § 493.

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

5. Notwithstanding that the Subject was entitled to a full evidentiary hearing, the Subject elected to waive his rights to an evidentiary hearing on the relevant issues and instead the Subject elected to proceed to a hearing decision based upon stipulated facts. The Parties have entered into a stipulation of facts, which is attached hereto and incorporated into this decision. As part of the stipulation, it was agreed and it is understood that, subject to the approval of the Executive Director of the Justice Center, the report will be maintained within the VPCR as a Category 3 finding of psychological abuse.

### **ISSUE**

Whether the resolution of this substantiated report proposed in the Stipulation of Facts is both legally correct and consistent with the public policy expressed in the Protection of People with Special Needs Act (PPSNA) (Ch. 501, L. 2012) that the primary focus of the Justice Center will be on “the protection of vulnerable persons” and that workers found responsible for abuse or neglect are held accountable.

### **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 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 follows:

“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 neglect are categorized into categories pursuant to SSL § 493(4), including Category 2 abuse or neglect, which is defined, as relevant here, as follows:

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.

Abuse and neglect may also be categorized as Category 3 conduct, which is defined as any “abuse or neglect by custodians that is not otherwise described in categories one and two.”

### **DISCUSSION**

The stipulated facts agreed to by the parties establish by a preponderance of evidence that the Subject committed the psychological abuse that was alleged in the substantiated report as contained in Offense 1.

The parties also have requested, as part of the proposed stipulated resolution of this case, that the substantiated finding of psychological abuse be modified from a Category 2 finding to a Category 3 finding. While a Category 2 finding requires a determination that a custodian's conduct “seriously endangers the health, safety, or welfare of a service recipient,” a Category 3

finding does not require such a determination. The consequences of a Category 2 finding and a Category 3 finding also are different. A Category 2 finding could cause a Subject to be placed on the Justice Center's Staff Exclusion List (SEL), but only if he were to commit a second Category 2 act within three years of a previous finding that the subject engaged in Category 2 conduct. There is no similar consequence for a Category 3 finding. Moreover, unless a Category 2 finding is elevated to a Category 1 finding, both a Category 2 finding and a Category 3 finding will be sealed after five years. (SSL § 493(4) (b) and (c))

The requested modification is not inconsistent with the public policy set forth in the PPSNA, I am recommending that the Executive Director accept so much of the stipulated outcome as would uphold the finding of psychological abuse and modify from a Category 2 finding to a Category 3 finding.

The actions of the Subject constitute psychological abuse. However, the Subject's actions did not seriously endanger the health, safety, or welfare of the Service Recipient.

At the time of the incident, the [REDACTED] had no written policy regarding contact in recreational sports. The Justice Center found no evidence that the actions of the Subject were sexually motivated. I find that modifying the Category 2 finding of psychological abuse to a Category 3 finding, as requested by the parties, is not inconsistent with public policy.

Accordingly, it is determined that the substantiated report of psychological abuse should be categorized as a Category 3 act.

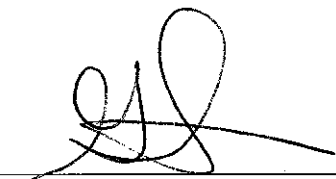
**DECISION:** The request of the Justice Center and the Subject under [REDACTED]  
[REDACTED], received, and dated [REDACTED] be modified is granted

as to the Category level act. The determination that the Subject committed psychological abuse is substantiated.

It is agreed that the substantiated report should be categorized as a Category 3 act.

This decision is recommended by Gerard D. Serlin, Administrative Hearings Unit.

**DATED:** December 30, 2015  
Syracuse, New York

  
Gerard D. Serlin, ALJ

STATE OF NEW YORK -NYS JUSTICE CENTER  
ADMINISTRATIVE HEARINGS BUREAU

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**STIPULATION OF FACTS**

In the Matter of:

[REDACTED]

[REDACTED]

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**JURISDICTION**

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject), for a Category 2 offense. 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 14NYCRR.

A hearing in this matter is scheduled for [REDACTED]. The purpose of a full evidentiary hearing in this matter is to determine:

1. 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?
2. Whether the substantiated allegations constitute abuse or neglect?
3. Pursuant to Social Services Law § 493(4), the category level of abuse or neglect that such act or acts constitute.

Notwithstanding that the Subject is entitled to a full evidentiary hearing, the Subject has elected to waive his right to an evidentiary hearing on the aforesaid issues and instead the Subject has elected to proceed to a hearing decision based upon the following **STIPULATION OF FACTS** and it is further understood by the parties in accordance with this Stipulation that the report will be maintained in the VPCR as a Category 3 finding of psychological abuse.

The presiding Justice Center Administrative Law Judge (ALJ) will draft and recommend a hearing decision based upon the **STIPULATION OF FACTS**. However, the ultimate authority to

approve the hearing decision is vested with the Executive Director of the Justice Center. Therefore, any hearing decision which may be issued based upon this stipulation is subject to the approval of the Executive Director of the Justice Center. The Subject also agrees, after having had an opportunity to consult with counsel, and upon the receipt of the approval of the recommended decision by the Executive Director that the report will continue to be maintained within the VPCR as a Category 3 finding of psychological abuse, that the Subject is waiving any rights that he may have for an appeal of this proceeding.

In the event that the Executive Director shall not approve a recommended decision based upon the **STIPULATION OF FACTS**, a full evidentiary hearing will be scheduled and the existence of this stipulation and any facts admitted herein will not be admitted into the hearing record and this document shall not be used for any purpose whatsoever, at the evidentiary hearing.

#### **STIPULATION OF FACTS**

Jason Jaros, Esq. is the Attorney for [REDACTED].

Juliane O'Brien, Esq., is an Assistant Counsel of the Administrative Appeals Unit, New York State Justice Center and has the authority to enter into this Stipulation of Facts on behalf of the Justice Center.

The parties hereby agree to the following facts:

On [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, [REDACTED] tagged a service recipient in a kickball game on or near her buttocks. At the time of the incident, the [REDACTED] had no written policy regarding contact in recreational sports. Furthermore, there is no evidence in the record that the actions of the Subject were sexually motivated. However, based upon the service recipient's traumatic history which was known by the Subject, his actions did create the likelihood of a substantial diminution of the service recipient's emotional condition and no clinical assessment shall be required to make such a finding and conclusion. This

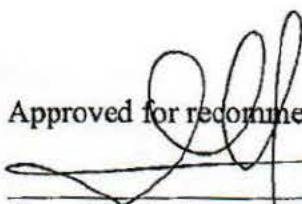
report was originally categorized as Category 2 Offense; however the facts above do not support the allegation that the acts of the subject "seriously endanger[ed] the health, safety or welfare of the service recipient." In fact, later that same day it was reported by staff that the service recipient was "bright, talkative and laughing." Thus, a reduction is appropriate in this matter as there was no evidence that the actions of the Subject had an impact on the service recipient beyond the initial contact. Accordingly, the substantiated finding of psychological abuse would be properly categorized as Category 3 substantiated report of abuse or neglect.

Dated: 9/21/2015


Dated: 9/15/2015

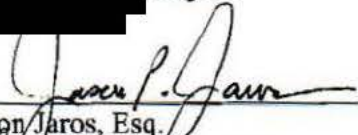

Dated: 9/15/2015

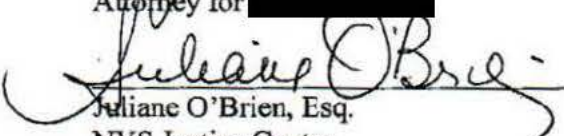
Approved for recommendation:

  
Gerard D. Serlin  
Administrative Law Judge  
New York State Justice Center for the Protection of People with Special Needs

Dated: 9/15, 2015

  
Subject

  
Jason Jaros, Esq.  
Attorney for 

  
Julianne O'Brien, Esq.  
NYS Justice Center