

**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  
AND ORDER  
AFTER HEARING**

**Adjud. Case #:**

████████████████

Vulnerable Persons' Central Register  
New York State Justice Center for the Protection  
of People with Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
Appearance Waived

New York State Justice Center for the Protection  
of People with Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
By: Jennifer Oppong, Esq.

██  
████████████████████  
██

██████████

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 ██████████ of neglect by the Subject of a Service Recipient be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

The substantiated report is properly categorized as a Category 3 act.

NOW, THEREFORE, IT IS DETERMINED that the record of this report shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(c).

This decision is ordered by David Molik, Director of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

**DATED:** September 12, 2016  
Schenectady, New York

  
\_\_\_\_\_  
David Molik  
Administrative Hearings Unit

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

In the Matter of the Appeal of

Pursuant to § 494 of the Social Services Law

## RECOMMENDED DECISION AFTER HEARING

**Adjudication Case #:**

Before:

Jean T. Carney  
Administrative Law Judge

Held at:

New York State Justice Center for the Protection  
of People with Special Needs  
401 State Street  
Schenectady, New York 12305  
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: Jennifer Oppong, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

## **JURISDICTION**

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for 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 a Service Recipient.
2. The Justice Center's Report of Substantiated Finding concluded that:

### **Allegation 1**

It was alleged that on [REDACTED] while on an outing and away from the [REDACTED] located at [REDACTED], while acting as a custodian, you committed neglect when you failed to properly supervise a service recipient, during which time he wandered off and was unsupervised for at least forty-five minutes.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493(4)(c).

3. An Administrative Review was conducted and, as a result, the substantiated report was retained.
4. The facility, [REDACTED] located at [REDACTED]  
[REDACTED] is a residential facility for developmentally disabled individuals and provides twenty-four hour supervision. The facility is operated by [REDACTED], a not-for-profit corporation that is certified by the New York State Office for People With

██████████  
Developmental Disabilities (OPWDD), which is a 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 by ██████████ and assigned to the ██████████ as a Direct Support Professional (DSP) for approximately one month.

6. As an ██████████, the ██████████ DSP staff are required to have eyes-on supervision of the service recipients at all times. (Hearing testimony of ██████████ Quality Assurance Assistant Director ██████████)

7. At the time of the alleged neglect, the Service Recipient, a non-verbal, 48 year old male, had diagnoses that included profound mental retardation, autism and obsessive compulsive disorder. The Service Recipient was admitted to the ██████████ facility on ██████████. (Justice Center Exhibit 19)

8. The Service Recipient's Comprehensive Functional Assessment (CFA) dated ██████████ and in effect at the time of the incident, states that the Service Recipient must be closely supervised while out in the community due to his proclivity to elope and his inability to verbally communicate. The CFA further indicates that the Service Recipient "lacks a general awareness of safety" and can become nervous or agitated in a community setting. (Justice Center Exhibit 19)

9. On ██████████<sup>1</sup>, the Subject worked the evening shift from 3:00 p.m. to 11:00 p.m., and took the Service Recipient and another service recipient on an outing to ██████████. They visited three stores before the Subject realized that the keys to the facility vehicle

---

<sup>1</sup> The date of the incident was initially reported to the NYS Justice Center as taking place on ██████████. During the course of the investigation, it was discovered that the correct date of the incident was actually ██████████. Subject, through her own statement and testimony, conceded to the date correction and the record was amended. (Hearing testimony of the Subject and Justice Center Exhibit 11)

██████████

were missing, and that her cellphone was locked in the vehicle. (Hearing Testimony of Subject; and Justice Center Exhibit 11)

10. Upon realizing the keys were lost, the Subject enlisted the help of a security guard to assist in locating the keys. During this brief conversation with the guard, the Service Recipient wandered away from the Subject. (Hearing testimony of the Subject)

11. Moments after the Service Recipient had wandered away, the Subject became aware of his absence and immediately requested the guard's assistance in locating him. The Subject took the other service recipient by the hand and they began to search for the Service Recipient. After about 45 minutes, security informed the Subject that the Service Recipient was sitting alone in the food court. (Hearing testimony of the Subject and Justice Center Exhibit 11)

12. After retracing her steps with both service recipients by the hand, the Subject located the keys to the facility van at one of the stores she had previously visited. In the meantime, both the Team Leader and the Resident Manager of the ██████ had been trying to reach the Subject, but were unsuccessful because her phone was locked in the vehicle. Once in the vehicle, the Subject received a call from the Residence Manager, directing her to return immediately because both service recipients were past due their medications. (Hearing testimony of Subject; and Justice Center Exhibits 10, 11 and 12)

13. At approximately 9:30 p.m., the Subject returned to the ████████████████████ with the service recipients. Both service recipients were administered their medications over one hour late. A body check was performed on the Service Recipient by the Team Leader; no marks or injuries were found. (Hearing testimony of Subject; and Justice Center Exhibits 11 and 13)

### **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 neglect of a person in a facility or provider agency is defined by SSL § 488(1)(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.

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

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

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

### **DISCUSSION**

The Justice Center has established by a preponderance of the evidence that the Subject committed the act described as Allegation 1 in the substantiated report.

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-20) The investigation underlying the substantiated report was conducted by ██████████ Assistant Director of Quality Assurance, ██████████ who testified on behalf of the Justice Center. Also called to testify by the Justice Center was ██████████ ██████████ Quality Assurance Specialist who conducted the interrogation of the Subject.

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

The Justice Center proved by a preponderance of the evidence that the subject committed neglect by failing to keep the Service Recipient in sight at all times in the community. This breach placed the Service Recipient at risk of harm. It is clear under SSL § 488 (1)(h) that the Subject's



██████████

lack of attention breached her custodial duty to the Service Recipient. Her failure to maintain visual contact with the Service Recipient allowed him the opportunity to wander away, and given his intellectual and emotional limitations, may have resulted in a protracted impairment of his physical, mental or emotional condition. On this basis alone, the conduct of the Subject was properly substantiated as neglect.

The facts in this matter are not in dispute. The Subject admitted in her interview and in her hearing testimony that she was aware of the Service Recipient's inability to verbally communicate, she was aware of his need for eyes-on supervision at all times, and she was aware of his propensity to wander. It is also uncontroverted that while discussing her lost keys with mall security, she became distracted, which caused her to lose sight of the Service Recipient. (Hearing testimony of Subject and Justice Center Exhibit 11) Consequently, the Subject failed to provide proper supervision to the Service Recipient, and failed to adhere to the Service Recipient's CFA.

In her defense, the Subject argued that her failure to keep the Service Recipient within sight was a result of her youth and inexperience, of being overworked and overwhelmed, and that her supervisors were to blame for her lack of training and support. The Subject further argued that she was unsettled by an earlier shopping encounter with another service recipient that left her "shaken" and that may have led to misplacing the keys. She testified that she "panicked" when she realized she had lost the keys and that was what distracted her from her duty to properly supervise. The Subject stated that she "made an innocent, honest mistake" and there was no malicious intent involved. (Hearing testimony of Subject)

Prior to being assigned to ██████████ the Subject was required to complete a two week orientation training program in addition to on-the-job training, which included observing and assisting other DSP employees in the home and on outings. (Hearing testimony of ██████████  
██████████ Assistant Director of Quality Assurance ██████████; and Justice Center Exhibits 15,

16, 17 and 18) The Subject also stated that she had accompanied the Service Recipient on at least five or six outings prior to this incident. Moreover, the Subject's testimony establishes her knowledge that the level of supervision delineated in the Service Recipient's CFA was an important surety to protect him from perceived dangers and known factors given his severe disabilities. (Hearing testimony of Subject; and Justice Center Exhibits 11, 15, 16, 19) All of which discredits the Subject's argument that she lacked sufficient training.

The Subject's testimony regarding the difficulties she experienced in providing adequate supervision to the Service Recipient was credible evidence. However, none of these assertions relieve the Subject from her duty to comply with the provisions of the Service Recipient's CFA. Furthermore, the Subject's contention that she lacked intent is irrelevant as the Statute does not require an element of intent. The Subject's lack of attention suffices to constitute neglect. The Subject breached her duty to the Service Recipient and as a result of that breach, the Service Recipient was administered his prescribed medication over an hour late.

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed the neglect alleged. The substantiated report will not be amended or sealed.

The next issue to be decided is whether the substantiated report constitutes the category of neglect set forth in the substantiated report. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report is properly categorized as a Category 3 act. A substantiated Category 3 finding of neglect will not result in the Subject's name being placed on the VPCR Staff Exclusion List and the fact that the Subject has a Substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject to disclosure pursuant to SSL § 496 (2). This report will be sealed after five years.

**DECISION:**

The request of [REDACTED] that the substantiated report dated [REDACTED] of neglect by the Subject of a Service Recipient be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

The substantiated report is properly categorized as a Category 3 act.

This decision is recommended by Jean T. Carney, Administrative Hearings Unit.

**DATED:** August 29, 2016  
Schenectady, New York



Jean T. Carney  
Administrative Law Judge