

**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  
AND ORDER  
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: Theresa Wells, Esq.

[REDACTED]  
[REDACTED]  
[REDACTED]

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

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The Findings of Fact and Conclusions of law are incorporated from the Recommendations of the presiding Administrative Law Judge's Recommended Decision.

**ORDERED:**

The request of ██████████ that the substantiated report dated ██████████  
██ of neglect by the Subject of  
Service Recipients 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:** October 28, 2016  
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

██████████

Pursuant to § 494 of the Social Services Law

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**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: ██████████

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: Theresa Wells, Esq.

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

## **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] of neglect by the Subject of Service Recipients.

2. The Justice Center's Report of Substantiated Finding concluded that:

### **Allegation 1**

It was alleged that on [REDACTED], at the [REDACTED] Unit [REDACTED], located at [REDACTED] while acting as a custodian, you committed neglect when you failed to maintain the required supervision level of services recipients assigned to you.

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 an inpatient psychiatric facility for individuals with serious and persistent mental illnesses. The facility is operated by the New York State Office of Mental Health (OMH), 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 at [REDACTED] for 3 years as a Mental Health Therapy Aide (MHTA). (Hearing testimony of Subject, Justice Center Exhibit 9)

6. On [REDACTED] the Subject was working an overtime morning shift from 7:00 a.m. to 3:30 p.m. in the Facility's [REDACTED] Unit. From 9:30 a.m. to 10:30 a.m., the Subject was assigned to provide constant observation to three service recipients with severe psychiatric diagnoses. Staff members are required to maintain full view of service recipients placed on constant observation at all times. The Subject was experienced in and presented a coherent understanding of facility policy regarding this level of supervision. The service recipients required constant observation due to poor safety awareness and potential of injury due to their long psychiatric histories. (Hearing testimony of Subject; Hearing testimony of Facility Risk Management Investigator [REDACTED] [REDACTED] Justice Center Exhibit 6, 9, 10 and 13; Subject Exhibit C)

7. [REDACTED] policy requires verbal communication to hand off supervision of constant observation service recipients if the MHTA must leave the unit, even for a short period of time. This verbal communication requirement operates to ensure the safety of the facility's vulnerable population of service recipients at all times. (Hearing testimony of Facility Risk Management Investigator [REDACTED]; Justice Center Exhibit 10 and 11)

8. At approximately 10:00 a.m., the three service recipients assigned to the Subject for constant observation were found unattended in the lower level of Unit [REDACTED] by another MHTA who immediately assumed supervision over the service recipients. The MHTA also notified the Charge Nurse and a search for the Subject ensued. The Subject was located moments later exiting the staff lounge with an explanation that he needed to use the restroom. The Subject thereafter returned to the lower level and resumed supervision of the three service recipients. The incident was reported to Facility Supervisor [REDACTED] and the Administrator On Call (AOC) [REDACTED]

██████████. All three Service Recipients were medically evaluated and no injuries were noted.  
(Hearing Testimony of Subject; Justice Center Exhibits 6, 7, 8, 9 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

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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 1-13) The investigation underlying the substantiated report was conducted by ██████████ Risk Management Investigator ██████████, who testified on behalf of the Justice Center.

The Subject testified at the hearing in his own behalf and offered several documents

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(Subject Exhibits A – D), which were admitted into evidence.

In order to sustain an allegation of neglect, the Justice Center must show that the Subject acted, or failed to act, or lacked attention in such a manner that it breached his duty to the service recipients. In addition, the Justice Center must show that this breach either resulted in, or was likely to result in either physical injury, or a serious or protracted impairment of the physical, or mental, or emotional condition of the service recipients.

The facts in this matter are not in dispute. The Subject admitted in his interrogation and in his hearing testimony that he was aware of the severity of his assigned service recipients' diagnoses and their required levels of supervision. Furthermore, it is also uncontroverted that the Subject was trained in and aware of the ██████████ policy requiring verbal hand off communication when transferring supervision of service recipients from one staff to another. The Subject, however, conceded that he left his assigned service recipients unattended to use the restroom without any verbal hand off communication. (Hearing testimony of Subject and Facility Risk Management Investigator ██████████ Justice Center Exhibits 6, 9, 10, 11, 12 and 13) Consequently, the Justice Center was successful in demonstrating that the Subject breached his duty by failing to provide the proper level of supervision to the service recipients in leaving them unattended and disregarding the required supervision hand off policy.

In his defense, the Subject argued that he in fact handed off supervision to MHTA ██████████ when he requested a bathroom break. The Subject testified that he shouted up the stairs asking for someone to relieve him. He did not call to anyone specific. Upon seeing MHTA ██████████ descending the stairs, he assumed she was coming to relieve him, and he left to use the restroom. The Subject admitted in his testimony that he never actually spoke to MHTA ██████████. The Subject stated that because nothing had changed in the service recipients' status or conditions, he did not think that he needed to verbally hand off supervision. This assertion lacks merit as it is



The Subject further testified that MHTA [REDACTED] was inconsistent in her statements regarding the time of the incident and that she was biased against him having asserted a series of false allegations. None of these contentions were particularly persuasive or relevant nor did they address the issue of the Subject's duty to maintain constant observation of the three service recipients to whom he was assigned. Given the service recipients' psychiatric histories, the Subject's failure to provide the required level of supervision, even for a short period of time, was likely to have resulted in physical injury or serious or protracted impairment of the service recipients' physical, mental or emotional condition.

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 NY SSL § 496 (2). This report will be sealed after five years.

**DECISION:** The request of [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] of neglect by the Subject of [REDACTED]

Service Recipients 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:** October 4, 2016  
Schenectady, New York



Jean T. Carney  
Administrative Law Judge