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	**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: Jennifer Oppong, Esq.

[redacted]
By: Jessica Peraza, Esq.
135 Delaware Avenue, Suite 410
Buffalo, New York 14202-2410

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 [redacted] that the substantiated report dated [redacted] 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: November 29, 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

[redacted]

Pursuant to § 494 of the Social Services Law

RECOMMENDED DECISION AFTER HEARING

Adjud. Case #: [redacted]

Before: Mary Jo Lattimore-Young
Administrative Law Judge

Held at: NYS Justice Center for the Protection of People With Special Needs
2165 Brighton Henrietta Town Line Road
Rochester, New York 14623
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.

Administrative Appeals Unit
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.

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

Allegation 1

> It was alleged that on [redacted] at 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 eloped from the building undetected.
>
> 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, the [redacted], located at [redacted], provides day habilitation services to disabled persons, and is operated by the New York State Office for People With Developmental Disabilities (the

OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. The service recipients who attended the [redacted] had the capability of communicating their needs to staff and varied in their levels of disabilities ranging from borderline to moderate intellectual impairments. (Justice Center Exhibit 14)

5. At the time of the alleged neglect, the Subject had been employed by the OPWDD since 1992. For approximately six years, the Subject had worked at the facility as a Direct Support Aide (DSA) and was responsible for the direct care and supervision of service recipients who attended the [redacted] The Subject, DSA 2 and DSA 3 were staff assigned to work in classroom #[redacted] on [redacted] [1] Service Recipient 1 was one of the seven service recipients who attended [redacted] in classroom [redacted] that day. DSA 2 and DSA 3 came to [redacted] that morning from their respective group homes with the service recipients attending the [redacted]. DSA 2 worked at the [redacted] and DSA 3 worked at the [redacted]. Staff assigned to a classroom are responsible to supervise all of the service recipients, with the exception of staff assigned to a particular service recipient requiring one-to-one supervision. (Hearing testimonies of the Subject and OPWDD Investigator [redacted] hereinafter referred to as Investigator [redacted] Justice Center Exhibits 5, 8 (Subject's interrogation transcript), 10, 12 and 15-16) The Subject was a custodian as that term is so defined under SSL §488 (2).

6. At the time of the alleged neglect, Service Recipient 1 was a twenty-two year old male who resided at home with his mother. Service Recipient 1 had been attending the [redacted] during the weekdays from approximately 8:30 a.m. to 2:30 p.m. since early [redacted] 2014.

[1] Investigator [redacted] testified that he did not interview DSA 3 because he thought DSA 3 was not assigned to classroom #[redacted] on [redacted]. However, the record shows that according to the [redacted] staff assignment sheet, DSA 3's official assignment was in classroom [redacted] on that day but DSA 3 was not in the classroom at the time of the incident. (Hearing testimony of Investigator [redacted] and Justice Center Exhibit 16)

At the time of the incident, Service Recipient 1's Individual Protective Oversight Plan (IPOP)[2], dated [redacted], mandated that staff maintained a "range of scan" supervisory level of the Service Recipient 1. The "range of scan" supervisory level required staff to monitor Service Recipient 1 at all times with an unobstructed view. Service Recipient 1 also had a history of eloping from programs and group homes, and jumping out of vehicles, as well as engaging in conduct involving verbal and physical aggression. Service Recipient 1 had diagnoses of mild intellectual disability, Klinefelter's syndrome, Asperger's syndrome, intermittent explosive disorder, and a history of bipolar disorder and anxiety disorder with post-traumatic stress disorder and other medical conditions. (Hearing testimonies of the Subject and Investigator [redacted]; Justice Center Exhibits 11-14)

7. On [redacted] Service Recipient 1 was checked into [redacted] at 8:45 a.m. Thereafter, at approximately 9:45 a.m., Service Recipient 1 asked the Subject if he could play a board game. The Subject entered the walk-in closet where the games were kept and heard DSA 2 trying to speak to her. When she came out of the closet to answer DSA 2's question, she saw that Service Recipient 1 was present and that DSA 2 had been talking to him. The Subject answered DSA 2's question then turned and walked back into the closet at which time the Subject's view of Service Recipient 1 became obstructed. Before the Subject returned to the closet, she neither informed staff of her intentions to leave her unobstructed area of supervision, nor requested a transfer of Service Recipient 1's supervision to staff who were able to maintain "range of scan" supervision while the Subject returned to the closet. (Hearing testimony of the Subject; Justice Center Exhibits 5, 8 and 12)

[2] Justice Center Exhibit 13 is Service Recipient 1's typewritten IPOP effective [redacted] which was in effect at the time of the incident. However, reflected on the typewritten IPOP are handwritten notes dated [redacted] which represent updates to Service Recipient 1's IPOP. (Hearing testimony of Investigator [redacted] and Justice Center Exhibit 13)

8. At some point after the Subject returned to the closet for a second time to retrieve the board game for Service Recipient 1, DSA 2 left the classroom to get a cup of coffee without telling the Subject or any other staff of his departure. At that time, DSA 3 was not present in the classroom. A non-staff senior volunteer was present in the classroom, but she was neither allowed to supervise service recipients, nor to perform staff administrative duties. Also, present in the room at that time were Service Recipient 1 and six other service recipients, one of who was accompanied by a staff person from his own group home who was responsible for providing one-to-one supervision of that particular service recipient. (Hearing testimonies of the Subject and Investigator [redacted]; Justice Center Exhibits 5 and 7-8)

9. During the timeframe that the Subject remained in the closet, DSA 2 and DSA 3 were not in the classroom. Also during that timeframe, Service Recipient 1 exited the classroom, walked down the hall, entered the gym, opened the side door using the key code pad, and exited the [redacted] building undetected. Service Recipient 1 then proceeded to abscond from the grounds of the facility. After the Subject emerged from the closet, she immediately noticed that Service Recipient 1 was missing. The Subject summoned DSA 3 back into the classroom and asked him to stay to supervise the other service recipients. The Subject then went to search for Service Recipient 1, but to no avail. The facility supervisor telephoned the police department. (Hearing testimonies of the Subject and Investigator [redacted]; Justice Center Exhibits 5 and 7-8)

10. Less than an hour thereafter, the [redacted] received a telephone call from Service Recipient 1's mother to inform them that Service Recipient 1 telephoned her to tell her that he was at Home Depot. When the police arrived at the facility, they were informed of Service Recipient 1's whereabouts. The police then drove to Home Depot to retrieve Service Recipient 1.

At approximately 10:20 a.m., the police returned Service Recipient 1 to the [redacted] facility. Service Recipient 1 refused a body check for any physical injuries he may have sustained. Service Recipient 1's psychological assessment, dated [redacted], showed that there was no negative psychological impact upon Service Recipient 1 as a result the incident. (Hearing testimonies of the Subject and Investigator [redacted]; and 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 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) which states as follows:

> "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…."

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 3, which is defined under SSL § 493(4)(c) as follows:

> 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 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(s) 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(s), described as "Allegation 1" in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-17) The investigation underlying the substantiated report was conducted by [redacted], who was an internal investigator for the OPWDD at the time of the investigation. Service Recipient 1 was interviewed by Investigator [redacted] The six other service recipients were also interviewed but were unable to provide

additional information. The senior volunteer was not available to be interviewed by the investigator due to health reasons. DSA 3 was not interviewed as a part of the investigation as he was not present at the time of the incident. Investigator [redacted] was the only witness who testified at the hearing on behalf of the Justice Center. (Hearing testimonies of the Subject and Investigator [redacted]; Justice Center Exhibits 5 and 8)

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

The Justice Center proved by a preponderance of the evidence that the Subject's actions constituted neglect in that she failed to properly supervise Service Recipient 1.

Overall, there were no significant factual disputes in this case. The key issue here involves the Subject's entry into a walk-in closet to retrieve a board game during which time she failed to maintain "range of scan" supervision of Service Recipient 1 as required by his [redacted] IPOP.

In order to establish neglect, the Justice Center must prove that the Subject had a duty to Service Recipient 1 and that the Subject's breach of that duty resulted in or was likely to have resulted in physical injury or serious or protracted impairment of the physical, mental or emotional condition of Service Recipient 1.

The Subject was Service Recipient 1's custodian as one of three DSAs assigned to supervise all of the service recipients in classroom #[redacted] on [redacted]. As a custodian, the Subject had a duty to ensure that the required range of scan supervision of Service Recipient 1 was maintained at all times while he was in classroom [redacted]. The Subject admittedly knew when she returned to the closet that her view of Service Recipient 1 would be obstructed and she failed to communicate and coordinate the transfer of supervision of Service Recipient 1 to other staff to ensure that the proper supervision was being maintained. Consequently, the Subject breached her

duty of supervision to Service Recipient 1. Service Recipient 1 then eloped from facility grounds unsupervised and ended up one hour later in a Home Depot store. During the one hour elopement, proper supervision of Service Recipient 1 was not being maintained by staff. As a result of the lack of adequate supervision, Service Recipient 1's whereabouts and activities were unknown which created an increased risk of potential harm to him. Consequently, the Subject's breach of duty was likely to have resulted in physical injury or serious of protracted impairment of the physical, mental or emotional condition of Service Recipient 1. (Hearing testimonies of the Subject and Investigator [redacted]; Justice Center Exhibits 5 and 13)

At the hearing, the Subject claimed that there was no protocol in place that required her to inform other staff that she intended to return to the closet when other staff was present in the classroom. The Subject also claimed that DSA 2 and DSA 3 did not tell her they were going to leave the area, inferring somehow that since she did not have prior notice of their departure that her actions were justified. However, these claims lacked merit and did not absolve the Subject from her own obligation as a custodian to properly supervise Service Recipient 1. Moreover, the Subject's claim that there was no protocol in place requiring her communicate with staff when she returned to the closet is inconsistent with what the Subject told the investigator at her [redacted] interrogation. During the Subject's interrogation, she stated that when staff transferred supervision of a service recipient, they usually verbally communicated that to each other. The Subject should have done that in this case as well, but did not. (Hearing testimonies of Subject and Investigator [redacted] Justice Center Exhibits 7 and 8)

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.

Although the report will remain substantiated, the next question 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.

DECISION: The request of [redacted] that the substantiated report dated [redacted] 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 Mary Jo Lattimore-Young, Administrative Hearings Unit.

DATED: November 21, 2016
West Seneca, New York

Mary Jo Lattimore-Young,
Administrative Law Judge