

**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

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: Juliane O'Brien, Esq.

[REDACTED]

By: Terry M. Sugrue, Esq.  
135 Delaware Avenue, Suite 410  
Buffalo, New York 14202-2410

[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 [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] be amended and sealed is denied as to Allegation 1. The Subject has been shown by a preponderance of the evidence to have committed neglect.

The substantiated report concerning Allegation 1 is properly categorized as a Category 2 act.

NOW, THEREFORE, IT IS DETERMINED that the report that results in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years. The record of this report shall be retained in part by the Vulnerable Persons Central Register, and will be sealed after five years pursuant to SSL § 493(4)(b).

The request of [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] be amended and sealed is granted as to Allegation 2. The Subject has not been shown by a preponderance of the evidence to have committed the neglect alleged in Allegation 2.

NOW, THEREFORE, IT IS DETERMINED that the record of this report shall be amended and sealed by the Vulnerable Persons Central Register, pursuant to SSL § 493(3)(d).

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:** April 7, 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

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

[REDACTED]

Before: Gerard D. Serlin  
Administrative Law Judge

Held at: Administrative Hearings Unit  
New York State Justice Center for the Protection of  
People with Special Needs  
2165 Brighton Henrietta Town Line Rd  
Rochester, New York, 14623-2755  
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: Juliane O'Brien, Esq.

[REDACTED]

By: Terry M. Sugrue, Esq.  
135 Delaware Avenue, Suite 410  
Buffalo, New York 14202-2410

### **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 three Service Recipients.
2. The Justice Center substantiated the report against the Subject. The Justice Center concluded that:

#### **Allegation 1**

It was alleged that on [REDACTED], and [REDACTED], during outings in the vicinity of the [REDACTED], and/or at the [REDACTED] located at [REDACTED] while acting as a custodian, you committed neglect when you permitted a service recipient to eat uncut food while riding in an agency vehicle and/or at the [REDACTED] in violation of his Individual Plan of Protective Oversight, which requires that his food be cut up and that he eat all meals in a special chair due to his choking risk.

This allegation has been SUBSTANTIATED as Category 2 neglect pursuant to Social Services Law § 493.

#### **Allegation 2**

It was alleged that on [REDACTED], and [REDACTED], during outings in the vicinity of the [REDACTED], and/or at the [REDACTED] located at [REDACTED] while acting as a custodian, you committed neglect when you permitted two service recipients to purchase and consume fast food meals, in violation of their dietary restrictions, which limit their daily caloric intake to 1300 calories.

These allegations have been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law§ 493.

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

4. The facility is an [REDACTED] for adult individuals with developmental disabilities, located at [REDACTED], [REDACTED], and is operated by the New York State Office of 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 was employed by the OPWDD at the [REDACTED] as a Direct Support Assistant (DSA) and had been so employed by the provider agency for over twenty years. (Hearing testimony of Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. Service Recipient A was a person with diagnoses of cerebral palsy, scoliosis, impulse control disorder and schizoaffective disorder. (Justice Center Exhibit 24) Service Recipient A had no gag reflex and was at substantial risk for choking. Service Recipient A's Individual Protective Oversight Plan dictated that he was never to eat or drink in a vehicle due to his heightened risk of choking. (Justice Center Exhibit 23) Service Recipient A's "Feeding Guidelines and Adaptive Equipment" list dictated that Service Recipient A should only eat while seated in a specific wooden chair. (Justice Center Exhibit 22) The chair, which was located in the facility, was to be used by the Service Recipient while seated at a table. (Hearing testimony of Justice Center Investigator [REDACTED]) Service Recipient A had no false allegation plan. (Hearing testimony of Justice Center Investigator [REDACTED])

7. Service Recipient B was a person with diagnoses of moderate disability in the area of intellectual functioning, pre-diabetes, obesity and dysthymic disorder. (Justice Center Exhibit 28) Service Recipient B had a nutrition prescription plan, which dictated a 1300-calorie daily intake limit and a high fiber diet. Service Recipient B's Individual Protective Oversight Plan dictated that while eating, she was subject to range of hearing supervision by staff. (Justice Center Exhibits 25, 26 and 27, p. 2) Service Recipient B had no false allegation plan. (Hearing testimony of Justice Center Investigator [REDACTED])

8. Service Recipient C was a person with diagnoses of moderate disability in the area of intellectual functioning, post-traumatic stress disorder, borderline personality disorder, hypertension, high cholesterol and obesity. Additionally, Service Recipient C received a liver transplant [REDACTED] (Justice Center Exhibits 30 and 31) Service Recipient C had a nutrition prescription plan, which dictated a 1300-calorie daily intake limit, and called for elimination of the following foods: raw fish, onions, avocados, ginger, garlic and potassium or salt substitutes. (Justice Center Exhibit 29) Service Recipient C had no false allegation plan. (Hearing testimony of Justice Center Investigator [REDACTED])

9. At the time of the alleged neglect, the Subject had numerous employment restrictions. The Subject was precluded from working alone, could not assume lead staff duties, could not perform kitchen duties except clean up, could not supervise service recipients who were eating, and could not work overnights. (Justice Center Exhibits 32, 33 and 34)

10. Although the Subject was precluded from working alone with service recipients, the Subject's supervising DA-3 interpreted the restriction incorrectly and allowed the Subject to regularly take facility service recipients on outings, with no other staff members present. (Justice Center Exhibit 42 and Hearing testimony of Justice Center Investigator [REDACTED])

11. On [REDACTED] Service Recipients B and C may have consumed breakfast and lunch, but Justice Center Investigator [REDACTED] was unable to confirm if this was the case. (Justice Center Investigator [REDACTED])

12. On [REDACTED] the Subject worked the 3:00 p.m. to 11:00 p.m. shift. (Justice Center Exhibit 9) On that day, the Subject chaperoned the three Service Recipients on an outing to Target and Kentucky Fried Chicken (KFC). Service Recipient A ordered one chicken leg, one chicken thigh, mashed potatoes and gravy with a biscuit. (Justice Center Exhibit 15) Service Recipient B ordered one chicken leg, one chicken thigh, small mashed potatoes and gravy with a biscuit and a medium sized soda drink. (Justice Exhibit 17) Service Recipient C ordered a chicken little, snack potato wedge and a medium sized soda drink. (Justice Center Exhibit 5, twelfth and thirteenth page; and Justice Center Exhibit 16)

13. On the return trip from KFC, and while in the facility van under the Subject's supervision, Service Recipient A consumed the food, which had not been cut up as required. (Justice Center Exhibit 5, pp. 12-13; Hearing testimony of Justice Center Investigator [REDACTED]; Hearing testimony of the Subject) After returning to the facility, Service Recipients B and C consumed the food they purchased from the KFC while under the supervision of the Subject. (Justice Center Exhibit 5, pp. 12-13; Hearing testimony of Justice Center Investigator [REDACTED])

14. On [REDACTED] at approximately 7:35 p.m., after facility dinner was served and consumed by the Service Recipients, the Subject reported to direct care staff member [REDACTED] that she was taking the same three Service Recipients to a nearby retail store. The Subject did not disclose that she intended to visit any other location. (Justice Center Exhibit 39) Thereafter, the Subject chaperoned the three Service Recipients to a McDonald's restaurant and the nearby



retail store. (Justice Center Exhibit 5)

15. While at the McDonald's restaurant, Service Recipient A purchased a cheeseburger and fries, which he consumed in the facility van during the return trip to the facility. Service Recipient B purchased ice cream at McDonalds, which she also consumed in the facility van, and Milk Dud candies at the store. Service Recipient C purchased an unspecified "snack" at the store. (Hearing testimony of Justice Center Investigator [REDACTED]; Justice Center Exhibits 5, 39 and 40)

### **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 abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1). Neglect under SSL § 488(1) (h) is defined as:

"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 Categories 2 and 3, which is defined 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. 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.

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 acts described in Allegation 1 of the substantiated report. The Justice Center has not established by a preponderance of the evidence that the Subject committed the acts described in Allegation 2 of the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-45) The investigation underlying the substantiated report was conducted by Justice Center<sup>1</sup> Investigator [REDACTED] who was the only witness who testified at the hearing on behalf of the Justice Center

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

[REDACTED]

The Subject testified that, on [REDACTED], she chaperoned the Service Recipients on an outing to KFC and a Target store. At the KFC, the Service Recipients ordered their own food. Although the receipt provided (see Justice Center Exhibits 15-17) itemized the beverage purchased by each of the Service Recipients as a medium Pepsi drink, the Subject testified that each of the Service Recipients obtained water from the self-service fountain drink dispenser. The Subject's hearing testimony on this issue is not credited evidence. Irrespective, this disputed fact does not materially change the analysis with regard to the total calories consumed by Service Recipients B and C on [REDACTED]

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<sup>1</sup> At the time of the investigation, Investigator [REDACTED] was employed by OPWDD.

The Subject testified that she did not observe Service Recipient A consume his food in the van, but the Subject acknowledged that she was focused on driving. The Subject testified that she was not warned that Service Recipient A might secretly eat his food in the van. However, the Subject conceded in her testimony that Service Recipient A did eat his food in the van.

When interviewed at the time of the investigation, the Subject stated that all of the Service Recipients had consumed their KFC meals at the facility. During the interview, the Subject acknowledged that Service Recipient A should not have eaten in the van, and acknowledged that she had known that he did not have a gag reflex. (Justice Center Exhibit 43) The Subject confirmed that she was aware of the Plan of Protective Oversight for all three Service Recipients. (Justice Center Exhibit 43, p. 11)

The Subject testified that upon returning to the facility on [REDACTED] she logged her mileage as she sat in the van. The Subject testified that the Service Recipients went into the facility unescorted, with their food, while she completed the vehicle mileage log. The Subject testified that sometime later, she entered the facility dining room and found the three Service Recipients under the supervision of two staff members, including staff member [REDACTED]

The Subject testified that she had no responsibility for supervising or cutting up food because of her restrictions, and therefore supervision and food cutting was left to the other two staff members in the dining room. The Subject's testimony on this point is not credited evidence. The Subject's testimony is contradicted by staff member [REDACTED] who wrote in her statement that on [REDACTED] she returned to the facility from her own outing at 6:00 p.m. and that she did not observe the Service Recipients with food or snacks, nor did she see any evidence of fast food in the facility. (Justice Center Exhibit 36) The relevant receipts indicate

that the KFC meals were purchased at 5:35 p.m., approximately twenty-five minutes before staff member [REDACTED] returned to the facility. (Justice Center Exhibits 15-17)

Service Recipient A advised Justice Center Investigator [REDACTED] that on [REDACTED] [REDACTED] the Service Recipients had consumed the food purchased from the KFC in the facility van during the return trip from the outing. (Justice Center Exhibit 5, pp. 12-13; Hearing testimony of Justice Center Investigator [REDACTED]) The statement provided by Service Recipient A to Justice Center Investigator [REDACTED] is credited evidence. It is concluded that Service Recipient A consumed his food in the facility van, during the return trip to the facility.

Service Recipients B and C advised Justice Center Investigator [REDACTED] that on [REDACTED] they consumed the food purchased from the KFC at the facility and at that time, there were no other people in the facility, except themselves and the Subject. (Justice Center Exhibit 5, pp. 12-13; Hearing testimony of Justice Center Investigator [REDACTED]) The statements provided to Justice Center Investigator [REDACTED] by Service Recipients B and C, are likewise credited evidence.

It is concluded that Service Recipients B and C consumed their food at the facility and without the supervision of any other facility staff, except for the Subject.

It is concluded that Service Recipient A consumed his food in the facility van.

With regard to Allegation 2, the investigator testified that consumption by Service Recipient B of one chicken leg, one chicken thigh, small mashed potatoes and gravy with a biscuit and a medium sized soda drink exceeded her 1300 daily caloric limit. (Justice Center Exhibit 17) The investigator rendered the same conclusion with regard to Service Recipient C's consumption of a chicken little, snack potato wedge and a medium sized soda drink. (Justice Center Exhibit 5, twelfth and thirteenth page; Justice Center Exhibit 16) The investigator was

asked if she confirmed that Service Recipients B and C had also eaten breakfast and lunch on [REDACTED]. The investigator testified that she had no reason to believe that the Service Recipients had not eaten breakfast or lunch on that day. Facility staff member [REDACTED] told the investigator that he had prepared the dinner meals for Service Recipients A, B and C, but those meals were ultimately not consumed on the evening of [REDACTED]. (Hearing testimony of Justice Center Investigator [REDACTED])

There is no evidence in the record of calories consumed by Service Recipients B and C from their breakfast, lunch or other caloric intake, except for the food purchased at KFC on the evening of [REDACTED]. The Justice Center presented a nutritional guide for the Kentucky Fried Chicken food. (Justice Center Exhibit 45)

The caloric count for Service Recipient B's KFC meal on [REDACTED], was as follows: one chicken leg (160 calories), one chicken thigh (270 calories), one order of small mashed potatoes and gravy (120 calories), one biscuit (180 calories), and one medium sized Pepsi drink (200 calories) which establishes a total meal calorie count of 930 calories. (Justice Center Exhibit 45)

The caloric count for Service Recipient C's KFC meal on [REDACTED], was as follows: one Chicken Little (320 calories), one snack potato wedge (270 calories), and one medium sized Pepsi drink (200 calories), which establishes a total meal calorie count of 790 calories.

[REDACTED]

On [REDACTED], the Subject chaperoned the Service Recipients to McDonalds and a local retail store. At the McDonalds Restaurant, Service Recipient A purchased a cheeseburger with fries. (Justice Center Exhibits 39 and 40) Service Recipient B purchased ice cream at

McDonalds and Milk Dud candies at the store. (Justice Center Exhibits 39 and 40) Service Recipient C purchased an unspecified snack. (Justice Center Exhibit 39) Service Recipient A reported to Justice Center Investigator [REDACTED] that he consumed his food in the facility van on the return trip. (Justice Center Exhibit 5) Service Recipient B reported to Justice Center Investigator [REDACTED] that she consumed the ice cream in the facility van on the return trip. (Justice Center Exhibit 5) The statements provided by the Service Recipients with respect to the food purchased and consumed on [REDACTED] are credited evidence.

The investigator was asked if she confirmed that Service Recipients B and C had also eaten breakfast and lunch on [REDACTED]. The investigator testified that she believed that they had. However, there is no evidence in record of the calories consumed by Service Recipient B from her breakfast, lunch and dinner, or even from the ice cream and Milk Dud candies (Justice Center Exhibit 39), which she purchased on [REDACTED]. With regard to Service Recipient C, there is likewise no evidence in the record of the calories consumed by Service Recipient C from her breakfast, lunch and dinner, or from the unspecified snack that she purchased on [REDACTED].

### **Allegation 1**

The Justice Center has established by a preponderance of the evidence that that on [REDACTED] and [REDACTED], during outings near the [REDACTED], the Subject permitted Service Recipient A to eat uncut food while riding in an agency vehicle in violation of his Individual Plan of Protective Oversight. Service Recipient A had no gag reflex and was at risk for choking. Service Recipient A was never to eat or drink in a vehicle due to his heightened risk of choking. His nutrition prescription plan dictated that he was only to eat food while seated in a specific wooden chair located in the facility, and while seated at a table.

The Justice Center proved by a preponderance of the evidence, not only that the Subject's inaction and/or lack of attention breached her duty to the Service Recipient, but also that the likely result of such breach was physical injury, or serious or protracted impairment of the physical, mental or emotional condition of Service Recipient A. 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 report will remain substantiated and the next issue to be determined 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, the witnesses' statements, and considering the omissions and the commissions of this Subject's neglect, in particular considering the serious choking hazard associated with Service Recipient A's consumption of food, the Subject's neglect seriously endangered the health, safety or welfare of the Service Recipient. Therefore, it is determined that the substantiated report is properly categorized as a Category 2 act.

A substantiated Category 2 finding of abuse or neglect will not result in the Subject being placed on the VPCR Staff Exclusion List. A Category 2 act under this paragraph shall be elevated to a Category 1 act when such an act occurs within three years of a previous finding that such custodian engaged in a Category 2 act. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years.

### **Allegation 2**

The Justice Center has not established by a preponderance of the evidence that during outings on [REDACTED], and [REDACTED], the Subject permitted Service Recipients B and C to purchase and consume fast food meals in violation of their dietary restrictions. There



was no proof that the food consumed during the outings violated any dietary restrictions of Service Recipients B and C. The evidence presented established that Service Recipients B and C had daily caloric intake limits of 1300 calories. There was no evidence presented that the number of calories that Service Recipients B and C consumed on [REDACTED] or [REDACTED], respectively, exceeded their 1300 calorie limitation.

The Justice Center did not prove by a preponderance of the evidence that the Subject's inaction and/or lack of attention breached her duty to Service Recipients B and C as alleged in Allegation 2. Accordingly, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the neglect alleged in Allegation 2. The substantiated report will be amended and sealed as to Allegation 2.

**DECISION:**

The request of [REDACTED] that the substantiated report dated [REDACTED] be amended and sealed is denied as to Allegation 1. The Subject has been shown by a preponderance of the evidence to have committed neglect.


The substantiated report concerning Allegation 1 is properly categorized as a Category 2 act.

The request of [REDACTED] that the substantiated report dated [REDACTED] be amended and sealed is granted as to Allegation 2. The Subject has not been shown by a

preponderance of the evidence to have committed the neglect alleged in Allegation 2.

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

**DATED:** March 22, 2016  
Schenectady, New York

  
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Gerard D. Serlin, ALJ