

**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**

**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: Robert T. DeCataldo, Esq.

[REDACTED]

By: Karen Halpern, RN, Esq.  
Lawrence, Worden, Rainis & Bard, P.C.  
225 Broad Hollow Road, Suite 105E  
Melville, New York 11747

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. The Subject has been shown by a preponderance of the evidence to have committed neglect.

It is agreed that the substantiated report should be properly 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:** January 9, 2017  
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  
UPON STIPULATED  
FACTS**

**Adjud. Case #:**

[REDACTED]

Before:

Elizabeth M. Devane  
Administrative Law Judge

Held at:

Upon written stipulation,  
Administrative Hearings Unit  
New York State Justice Center for the Protection  
of People with Special Needs  
401 State Street  
Schenectady, New York 12305

Parties:

Vulnerable Persons' Central Register  
New York State Justice Center for the Protection  
of People with Special Needs  
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By: Robert DeCataldo, 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 upon consideration of a Stipulation of Facts, it is hereby found:

1. On [REDACTED], an allegation was reported to the VPCR that [REDACTED], the subject, while acting as an employee of the [REDACTED], (the Facility) located at [REDACTED], engaged in conduct constituting neglect of a person receiving services under her care. The Justice Center classified this report as a neglect case and assigned [REDACTED] to the report.

2. This report was investigated by the Justice Center.

3. On [REDACTED], the Justice Center substantiated the report against the Subject for neglect. 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 document your medical examination of a service recipient and failed to send him to the hospital after discovering bruising on his ribs, causing a delay in his medical care.

This allegation has been SUBSTANTIATED as Category 2 neglect pursuant to Social Service Law § 493(4)(b).

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 her 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 neglect.

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

Substantiated reports of neglect are categorized into categories pursuant to SSL § 493(4), including Category 2 abuse and neglect, 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.

Abuse and neglect may also be categorized as Category 3 conduct, which is defined 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.

### **DISCUSSION**

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

The parties have requested, as part of the proposed stipulated resolution of this case, that the substantiated finding of neglect 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 are also different. A Category 2 finding could cause a Subject to be placed on the Justice Center's Staff Exclusion List (SEL), but only if she 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))

On [REDACTED], a Direct Support Assistant (DSA) at the Facility asked that the Service Recipient be examined as he said his ribs hurt, although there was no bruising on, or unusual behavior by, the Service Recipient. The Subject conducted an examination of the Service Recipient who denied any pain, fall or injury and the Subject did not observe any bruising. The Subject did not document the reason for the exam or the results thereof. On [REDACTED], the Service Recipient was examined again and new bruising was found. The Service Recipient was diagnosed with two fractured ribs. There is no proof of any bruising prior to [REDACTED].

While the Subject's conduct in failing to document the medical exam was negligent and endangered the Service Recipient's welfare, the medical exam, as well as other evidence, did not reveal any findings of bruising or injury. There is no evidence that her actions seriously endangered the Service Recipient's health, safety, or welfare.

As the requested modification is not inconsistent with the public policy set forth in the PPSNA, it is recommended that the Acting Executive Director accept so much of the stipulated outcome as would uphold the finding of neglect and modify from a Category 2 finding to a Category 3 finding.

Accordingly, it is determined that the substantiated report of neglect should be categorized as a Category 3 act. I am recommending that the Executive Director accept the stipulated outcome which upholds the finding of neglect.

**DECISION:**

The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED] be amended and

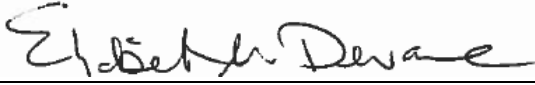


sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

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

This decision is recommended by Elizabeth M. Devane, Administrative Hearings Unit.

**DATED:** September 15, 2016  
Schenectady, New York

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Administrative Law Judge

STATE OF NEW YORK NYS JUSTICE CENTER  
ADMINISTRATIVE HEARINGS UNIT

In the Matter of:

**STIPULATION OF FACTS**

Adjudication Case No. [REDACTED]

**JURISDICTION**

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the "Subject"), for a Category 2 offense for neglect under [REDACTED]. The Subject requested that the Justice Center amend the report to reflect that the category findings are not supported by a preponderance of the evidence. The New York State Justice Center for the Protection of People with Special Needs ("Justice Center"), after review, declined to do so, and a pre-hearing conference was scheduled in accordance with the requirements of Social Services Law ("SSL") § 494 and Part 700 of 14 New York Code of Rules and Regulations.

A hearing in this matter has not yet been held as the parties have agreed to enter into this Stipulation of Facts. 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 SSL § 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 her 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 that the report will be maintained in part and amended in part to reflect that one Category 3 finding of neglect will be substantiated.

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 allegation report will continue to be maintained within the VPCR as a Category 3 finding of neglect, and that the Subject is waiving any rights that she 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**

The Subject's attorney, Karen J. Halpern, R.N., Esq., has the authority to enter into this Stipulation of Facts on her behalf.

Robert T. DeCataldo, Esq. is an Assistant Counsel of the Justice Center's Administrative Appeals Unit, 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:

1. At all times relevant herein, the [REDACTED] (the "Facility"), located at [REDACTED], was a [REDACTED]

██ intermediate care facility, operated, licensed and/or certified by the Office for People with Developmental Disabilities, which is an agency that is subject to the jurisdiction of the Justice Center.

2. At all times relevant herein, the Subject was employed as nurse by the ██████████ and was a custodian pursuant to Social Services Law § 488(2).

3. At all times relevant herein, the Subject's work assignment, among others, included providing services at the Facility to the residents thereof.

4. At all times relevant herein, the service recipient '████' was a resident at the Facility.

5. On or about ██████████, █████ lost his balance and fell against a wall unit, causing a red mark to his lower back.

6. On or about ██████████, ██████████, a nurse assigned to the Facility, completed an Interdisciplinary Treatment Team ("ITT") note regarding █████ indicating the area was non-tender to the touch and had no further bruising.

7. On or about ██████████, Direct Support Assistant ("DSA") ██████████ completed an ITT note documenting that '████ said his ribs hurt' and requested that the subject examine him. The Subject questioned the staff as to whether or not █████ had sustained any type of fall or injury. She was told there was none.

8. The Subject conducted an examination of █████ and did not observe bruising to his rib area. The Subject spoke to █████ who denied any complaint of pain and denied that he fell or sustained any type of injury. The Subject did not document why she conducted the examination or the results thereof.

9. On or about [REDACTED], [REDACTED], a staff assigned to the Facility on a night shift, completed an ITT note regarding [REDACTED] indicating [REDACTED] complained of "pain to his side" and "slight bruising to the right side of his stomach." [REDACTED] was examined by Nurse [REDACTED] and discovered to have bruising "around [his right] back lower rib cage." Nurse Practitioner [REDACTED] separately noted a "new . . . melon fist size" bruise over [REDACTED] "[right] flank kidney area." [REDACTED] was later admitted to [REDACTED] Hospital, where he was diagnosed with two fractured ribs.

10. On or about [REDACTED], DSA [REDACTED] provided a written statement indicating that during morning care on [REDACTED], she observed "no bruise or any discoloration" nor "unusual behavior" on or by [REDACTED].

11. There is no proof in the record to show that there was bruising to [REDACTED] side from [REDACTED] to [REDACTED].

12. The Subject had a duty to document the medical complaints of the residents of the Facility and the results of her examinations stemming therefrom.

13. The Subject does not contest that her conduct outlined above constitutes a breach of her duty of care as to [REDACTED].

14. The Subject does not contest that the foregoing conduct was likely to endanger the health, safety or welfare of [REDACTED].

15. Based on the above, the parties have agreed that the report will be maintained in part and amended in part to reflect that the finding of neglect will be substantiated as a category three substantiation.

Dated:

9/13/16

  
Karen J. Halpern, R.N., Esq.  
Counsel for [REDACTED]

Dated:

9-13-16

  
Robert T. DeCataldo, Esq.  
NYS Justice Center

Approved for recommendation:

  
Elizabeth M. Devane  
Administrative Law Judge  
New York State Justice Center for the Protection of People with Special Needs

Dated:

9/14, 2016