

**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: Christopher Mirabella, Esq.

[REDACTED]  
[REDACTED]  
[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 ██████████ that the substantiated report dated ██████████  
████████████████████████████████████████████████████████████████████████████████ 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:** July 21, 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:

Elizabeth M. Devane  
Administrative Law Judge

Held at:

Administrative Hearings Unit  
New York State Justice Center for the Protection  
of People with Special Needs  
9 Bond Street  
Brooklyn, New York 11434  
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  
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161 Delaware Avenue  
Delmar, New York 12054-1310  
By: Christopher Mirabella, 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] 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], while at the [REDACTED] and away from [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you charged at a service recipient and attempted to physically harm her.

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. [REDACTED] serves delinquent youth, as well as children in foster care, and offers services including a residential treatment program and a school called the [REDACTED]. The administrative offices of [REDACTED] are located at [REDACTED].

██████████. ██████████ is licensed by the New York State Office of Children and Family Services (OCFS), which is a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of OCFS Investigator ██████████)

5. At the time of the alleged neglect, the Subject had been employed by ██████████ for approximately fourteen years. The Subject worked as a Sociotherapist. The Subject's duties included supervising, counseling and assisting the service recipients with their daily needs. The Subject was a custodian as that term is so defined in Social Services Law § 488(2). (Hearing testimony of OCFS Investigator ██████████ and Hearing testimony of Subject)

6. At the time of the alleged neglect, the Service Recipient was a fourteen year old female and had been a resident of ██████████ since ██████████ 2013. The Service Recipient was adjudicated by Family Court as a Juvenile Delinquent and was remanded to ██████████ where she attended ██████████. The Service Recipient had diagnoses of mood disorder and conduct disorder. (Hearing testimony of OCFS Investigator ██████████ and Justice Center Exhibits 10 and 11)

7. On ██████████, at the end of the school day, the Subject, along with another Sociotherapist from ██████████, attempted to direct the Service Recipient into the van to be transported from ██████████ to her residential cottage. While other service recipients waited in the van, the Service Recipient refused to get into the van, as she did not want to sit in her assigned van seat. (Hearing testimony of OCFS Investigator ██████████, Hearing testimony of Subject and Justice Center Exhibits 6, 7 and 8)

8. The Subject and the other Sociotherapist tried unsuccessfully for twenty minutes to convince the Service Recipient to enter the van. The other service recipients became agitated as they wanted to leave. (Hearing testimony of OCFS Investigator ██████████, Hearing

testimony of Subject and Justice Center Exhibits 6, 7 and 8)

9. The Sociotherapist asked Assistant Supervisor [REDACTED] for guidance and Assistant Supervisor [REDACTED] directed that the Service Recipient be placed in a restraint and placed in the van. The Subject and the other Sociotherapist attempted to do so. The Subject held the Service Recipient's legs and the other Sociotherapist held the Service Recipient's upper body and attempted to get the Service Recipient into the van. The Service Recipient continued to refuse to enter the van and began to repeatedly kick the Subject. The Subject told the Service Recipient to calm down and that if she did so she would be released from the hold. (Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of Subject and Justice Center Exhibits 6, 7, 8 and 9)

10. A school employee observed the incident and went to the area to assist. That employee tried to calm the Service Recipient as the Service Recipient continued kicking. The Service Recipient then spit in the Subject's face. When the Service Recipient spit in the Subject's face, the school employee told the Subject to remove herself from the situation. The Subject walked away. (Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of Subject and Justice Center Exhibits 6, 7, 8 and 9)

11. While walking away, the Subject noticed there was on saliva on her face. The Subject then charged back toward the Service Recipient. Assistant Supervisor [REDACTED] intervened and physically restrained the Subject to prevent her from reaching the Service Recipient. (Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of Subject and Justice Center Exhibits 6, 7, 8 and 9)

### **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), to include:

"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:

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 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 an act 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 1-11) OCFS Investigator [REDACTED] [REDACTED] was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and did not present any documents.

The Justice Center proved by a preponderance of the evidence that the Subject committed



neglect by charging at the Service Recipient while the Service Recipient was being held in a restraint.

To prove neglect, the Justice Center must establish conduct by the Subject that breached the Subject's custodial duty to the Service Recipient 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 the Service Recipient.

There is no dispute that the Subject was acting as a custodian of the Service Recipient as defined in Social Services Law § 488(2). There is also no dispute that the Service Recipient refused to enter the van, was restrained by the Subject and the other Sociotherapist, was agitated and kicked at the Subject and spat in the Subject's face. (Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of Subject and Justice Center Exhibits 6, 7, 8 and 9)

The statements of three employees and a service recipient who were witnesses to the incident, as well as the Service Recipient's statement, are consistent and establish that after the Service Recipient spat into the Subject's face, the Subject initially walked away, but then became upset, and charged toward the Service Recipient. Ultimately, the Subject had to be physically restrained to protect the Service Recipient. The Subject herself testified that after the Service Recipient spat on her, she "acted in duress" and that she did not know how to deal with the situation. (Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of Subject and Justice Center Exhibits 6, 7, 8 and 9)

The credible testimony established that the Subject charged toward the Service Recipient who was upset and in a restraint. The Subject had a duty to the Service Recipient to deescalate the situation. By charging toward the Service Recipient and having to be physically restrained herself, the Subject breached her duty to the Service Recipient. The Subject's actions were likely to result

in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. The Subject's actions heightened the risk of danger to the Service Recipient who was highly agitated and being restrained. With the other service recipients nearby and agitated, the situation could have easily escalated into a violent interaction involving multiple people and a lack of staff control.

In her defense, the Subject testified that while she was upset and initially started moving toward the Service Recipient, she stopped herself from proceeding any closer to the Service Recipient and did not have to be held back. The Subject later admitted that Assistant Supervisor [REDACTED] did hold her back, but that the action was unnecessary as she had already calmed down by that time.

The Subject testified that the witnesses' statements could not be credited as they were distracted by the intensity of the situation and did not have a clear view of what was occurring between herself and Assistant Supervisor [REDACTED]. (Hearing testimony of the Subject) However, the various witness statements are consistent, do not mention an obscured view and tend to corroborate one another. (Justice Center Exhibits 6 and 7)

After observing and considering the Subject's testimony on this point, and the statements of the witnesses, the Subject's testimony is not credited evidence and the witnesses' statements are credited evidence. Consequently, the credible evidence in the record supports the conclusion that the Subject charged toward the Service Recipient in anger and had to be held back from the Service Recipient by the Assistant Supervisor.

The Subject also testified that Assistant Supervisor [REDACTED] was on her phone and was not paying attention to the situation while the Service Recipient was refusing to enter the van. The Subject testified further that Assistant Supervisor [REDACTED] directed the Subject and the other

Sociotherapist to put the Service Recipient into a restraint in order to get her into the van, when a restraint was not necessary. However, the validity of the restraint is not an issue in this case. The material allegation centers on the Subject's behavior after she was spat on by the Service Recipient, and the Subject bears sole responsibility for her behavior.

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 alleged neglect. 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:**

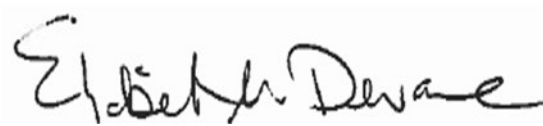
The request of [REDACTED] that the substantiated report dated [REDACTED]  
[REDACTED] be amended and sealed is denied.

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 Elizabeth M. Devane, Administrative Hearings Unit.

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



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Administrative Law Judge