

**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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**FINAL  
DETERMINATION  
AND ORDER  
AFTER HEARING**

**Adjud. Case #:**

██████████

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: Thomas Parisi, Esq.

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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 ██████████  
██ 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 2, 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:

Louis P. Renzi  
Administrative Law Judge

Held at:

Adam Clayton Powell State Office Building  
163 West 125<sup>th</sup> Street  
New York, New York 10027  
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: Thomas C. Parisi, 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], [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] on an outing with the [REDACTED] located at [REDACTED] while acting as a custodian, you committed neglect when you failed to provide proper supervision to a service recipient, during which time he was left behind unsupervised at a Wendy's fast food restaurant.

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], provides day habilitation services to persons with developmental disabilities and is certified by the New York State Office for People With

Developmental Disabilities (OPWDD), which is a facility or 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 by [REDACTED] for approximately four and one-half years and was a Direct Service Professional (DSP), and for all times relevant to this matter was assigned as a one-to-one (1:1) aide to a particular female service recipient (No. 2). (Hearing testimony of Subject; Justice Center Exhibit 2)

6. At the time of the alleged neglect, the Service Recipient (No.1) was a young adult male with a primary diagnosis of Cerebral Palsy and mild M/R. He resided at a 24-hour supervised IRA and attended [REDACTED] three days per week. His plan of protective oversight indicates that he is not to be left alone in the community, particularly in the restroom. (Hearing testimony of [REDACTED] Director of Services [REDACTED] Justice Center Exhibits 7, 8)

7. At approximately 12:10 p.m. on the day of the alleged neglect, the Subject and two other [REDACTED] staff were accompanying several service recipients, including service recipient No. 2 and the Service Recipient, on a planned outing to a bowling center. The group was in a single vehicle, and they stopped at a Wendy's restaurant en route for refreshments and a restroom break. During the stop, the Service Recipient went to the restroom without informing staff. The group boarded their van, left Wendy's and arrived at the bowling center approximately 20 minutes later, at which time staff were notified by phone that they had left the Service Recipient behind at the restaurant. The restaurant staff called 911 and the local police responded. Immediate measures were taken by staff to retrieve the Service Recipient from Wendy's. (Hearing Testimony of [REDACTED] Director of Services [REDACTED]; Justice Center Exhibits 7, 8)

8. [REDACTED] testified at the hearing that under such circumstances, all staff are responsible for all service recipients. This testimony is credited evidence.

9. The Service Recipient exhibited signs of emotional distress upon being rejoined with his caregivers, blaming himself for the situation. At the request of his family who feared it would further upset him, a psychological assessment was not performed. (Justice Center Exhibits 7, 8)

### **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 neglect.
- Pursuant to Social Services Law § 493(4), the category of 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:

(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 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 an act, described as “Allegation 1” in the substantiated report. Specifically, the evidence establishes that the Subject breached a duty when the Subject was less than attentive to

the Service Recipient while on duty, contributing to him having been left behind at a restaurant while on an outing with other staff and service recipients.

In order to sustain an allegation of neglect, the Justice Center must prove that the Subject was a custodian who owed a duty to the Service Recipient, that she breached that duty, and that her breach either resulted in or was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. (SSL § 488(1)(h))

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-20) The investigation underlying the substantiated report was conducted by [REDACTED] [REDACTED] Coordinator of Quality Assurance. Her supervisor, Director of Services [REDACTED], testified at the hearing on behalf of the Justice Center.

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

On the day of the alleged neglect, the Subject was employed by [REDACTED] and was a custodian as that term is defined in Social Services Law § 488(2). As a Direct Service Professional, the Subject was responsible for patient care. (Hearing Testimony of [REDACTED] Director of Services [REDACTED]; Hearing testimony of Subject). At the time of the alleged neglect, the Subject was assigned as a 1:1 caregiver for service recipient No. 2; she testified that she was present and was accompanying service recipient No. 2 on the outing. The Subject was one of three staff who were escorting seven service recipients, including the Service Recipient. The record clearly supports, and the Subject does not contest, the fact that the group had left Wendy's restaurant and inadvertently left the Service Recipient behind, which was a clear breach of the duty owed to the Service Recipient.

The Subject was a custodian as that term is defined by SSL §488(2). Thus, there are only two issues to be decided here: (1) whether the Subject had a duty to the Service Recipient and (2) if the Subject did owe such duty, whether that breach resulted in or was likely to result in any physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

The credited evidence in this record supports a conclusion that both questions should be answered in the affirmative. Director of Services [REDACTED] testified that regardless of specific assignments, all direct support staff have the same duties and are generally responsible for all service recipients within their purview. Further, the evidence shows that the Service Recipient was upset upon being rejoined with staff, and had to be counseled that the incident was not his fault. (Hearing testimony of [REDACTED] Director of Services [REDACTED]; Justice Center Exhibits 7, 8)

The Subject contends that she should not be held responsible for the incident because she was specifically assigned as a 1:1 caregiver for a different service recipient (No. 2) who required all of her attention and with whom she was seated in the van. As a result, she believed she had no duty towards, and bore no responsibility whatsoever for, any of the remaining six service recipients in the group, not even to the extent of turning her head and assisting in taking a “headcount” of the service recipients in the van before departure. (Justice Center Exhibit 2; Hearing testimony of Subject)

The Subject’s testimony in this regard is entirely unpersuasive. Common sense and the ability to count to six – neither of which she denied having - would have completely avoided this incident. It would have required no effort at all for the Subject to turn her head and determine whether all service recipients were in the van before departure, or at a bare minimum, to verbally

communicate that question to the other staff, who clearly also overlooked that particular task.

It is concluded that the Subject breached her duty to the Service Recipient by being inattentive to him while on duty and thereby contributing to his being left alone and unsupervised in the community.

As to the second issue noted above, the Service Recipient exhibited clear signs of emotional distress as a result of the incident. Further, although the police became quickly aware of the situation and responded, it is not unreasonable to conclude that harm could have befallen the Service Recipient prior to the arrival of the police. Thus, pursuant to SSL § 488(1)(h), there was a likelihood that the Subject's breach would result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. (Justice Center Exhibits 7, 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 abuse or 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 Louis P. Renzi, Administrative Hearings Unit.

**DATED:** October 21, 2016  
Schenectady, New York



Louis P. Renzi, ALJ