

**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: Laurie Cummings, Esq.

[REDACTED]  
[REDACTED]  
[REDACTED]

By: Jessica Peraza, Esq  
Reden & Sugrue  
135 Delaware Avenue # 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 ██████████ 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 abuse.

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 30, 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

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Pursuant to § 494 of the Social Services Law

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**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

██████████

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: ██████████

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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By: Jessica Peraza, Esq  
Reden & Sugrue  
135 Delaware Avenue # 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 abuse. 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] [REDACTED] of abuse (obstruction of reports of reportable incidents) 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] [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you falsified medical administration records related to the treatment of a service recipient.

This allegation has been SUBSTANTIATED as Category 3 abuse (obstruction of reports of reportable incidents) 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] [REDACTED], is an [REDACTED] for adult individuals with

developmental disabilities, and is operated by the New York State Office for 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 abuse, the Subject was employed by the OPWDD and worked as a Developmental Specialist Aide (DSA). (Hearing testimony of OPWDD Investigator [REDACTED]) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged abuse, the Service Recipient was a forty-six year old male with mild cognitive impairment and a number of mental health diagnoses, and diabetes. (Justice Center Exhibit 9; Hearing testimony of OPWDD Investigator [REDACTED])

7. Medical orders dictated that the Service Recipient was to have his blood glucose level monitored one time daily. (Justice Center Exhibit 14; Hearing testimony of OPWDD Investigator [REDACTED]) The monitoring could be done by the Service Recipient with assistance from staff or by staff alone, and was typically completed in the morning. (Hearing testimonies of OPWDD Investigator [REDACTED] and the Subject) It was required that after the blood glucose level was measured, the level be recorded in the Medication Administration Record (MAR). (Hearing testimony of OPWDD Investigator [REDACTED]) The Service Recipient had a single glucose meter assigned to him and no other meter was sanctioned for use to measure the Service Recipient's blood glucose level during the relevant time. (Hearing testimony of OPWDD Investigator [REDACTED])

8. Staff -1 assisted the Service Recipient with his morning routine on [REDACTED]. (Hearing testimony of OPWDD Investigator [REDACTED]) The Subject assisted the Service Recipient with his morning routine on [REDACTED]. (Justice Center Exhibit 13; Hearing testimony

of the Subject) However, during the [REDACTED] morning routine, the Subject failed to measure, or assist the Service Recipient with measuring his blood glucose level.

9. After completion of her shift, the Subject departed from the facility at 8:15 a.m. (Justice Center Exhibit 12) Shortly thereafter, the facility Registered Nurse (RN) reviewed the MAR and noted that the Service Recipient's blood glucose level was not recorded in the MAR for the dates [REDACTED] and [REDACTED]. (Justice Center Exhibits 6, 14 and 21; Hearing testimony of OPWDD Investigator [REDACTED])

10. The RN advised the facility director of her discovery. (Justice Center Exhibit 22) The facility director reviewed the Service Recipient's MAR and confirmed the missing entries. (Justice Center Exhibit 22) The facility director then left the facility for a brief period. (Justice Center Exhibits 6 and 22) During the facility director's absence, the Subject returned to the facility. (Justice Center Exhibit 23) At that time, the Subject notated in the Service Recipient's MAR a fictitious number to represent the blood glucose level of the Service Recipient for [REDACTED], (Justice Center Exhibit 14) in order to avoid detection of the fact that she had failed to measure, or assist the Service Recipient in measuring, a blood glucose level on the morning of [REDACTED].

11. When the director returned to the facility, Staff-2 advised him that the Subject, though not on duty, had returned to the facility during his absence. The facility director then re-examined the MAR and observed that the blood glucose level of the Service Recipient was noted in the MAR for date of [REDACTED] (Justice Center Exhibits 14 and 22)

12. When questioned about this entry, the Subject advised the director that she had taken blood glucose levels on [REDACTED] and had forgotten to make a notation of this in the

MAR. The Subject advised that when she returned to the facility on [REDACTED] she had entered the blood glucose numbers into the MAR for that morning's readings. (Justice Center Exhibit 22)

13. Staff-1 advised the director that she had taken the blood glucose level on [REDACTED], but had not recorded the level in the MAR. Staff-1 then produced, or referred the director to the blood glucose monitor utilized for the Service Recipient and explained that a blood glucose level had been recorded in the meter for [REDACTED]. Upon examination, the director observed that a recorded glucose level for [REDACTED] was stored in the memory of the monitor. However, the director found no recorded blood glucose level for the date of [REDACTED] in the memory of the monitor. (Justice Center Exhibit 22)

### **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 abuse 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)(f) to include:

(f) "Obstruction of reports of reportable incidents," which shall mean conduct by a custodian that impedes the discovery, reporting or investigation of the treatment of a service recipient by falsifying records related to the safety, treatment or supervision of a service recipient, actively persuading a mandated reporter from making a report of a reportable incident to the statewide vulnerable persons' central register with the intent to suppress the reporting of the investigation of such incident, intentionally making a false statement or intentionally withholding material information during an investigation into such a report; intentional failure of a supervisor or manager to act upon such a report in accordance with governing state agency regulations, policies or procedures; or, for a mandated reporter who is a custodian as defined in subdivision two of this section, failing to report a reportable incident upon discovery.

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 abuse alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of abuse as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged abuse, 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 abuse and/or neglect cited in the substantiated report constitutes the category of abuse as set forth in the substantiated report.

If the Justice Center did not prove the abuse and/or 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.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-24<sup>1</sup>) The Administrative Law Judge (ALJ) presiding over the hearing also moved ALJ Exhibit #1 into evidence, a manufacturer produced manual for the operation of the Redi-Code glucose meter.

The investigation underlying the substantiated report was conducted by OPWDD Investigator [REDACTED], who was not available to testify at the hearing. [REDACTED] supervisor, OPWDD Investigator [REDACTED], was the only witness to testify on behalf of the Justice Center.

The proof offered by the Justice Center focused heavily upon the conclusion that had the Subject measured the Service Recipient's glucose level on [REDACTED] the blood glucose meter would have been stored the test results in the monitor. As the proof developed, it became clear that the monitor had a number of date specific glucose levels stored in its memory, that were inconsistent with those recorded in MAR on other dates, and that there was a several month gap when the monitor had no recorded levels stored at all. Somewhat inexplicably, the meter had several months of recorded levels stored for the period both before and after this gap. (Justice Center Exhibit 24; Hearing testimony of OPWDD Investigator [REDACTED] Additionally, the manual published by the manufacturer for operating the glucose meter illustrates that it is

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<sup>1</sup> Justice Center Exhibit 24, the glucose monitor assigned to the Service Recipient during the relevant time, was accepted into evidence and was utilized throughout the hearing. The monitor had been maintained and was appropriately stored as required by chain of custody protocols. At the conclusion of the hearing, the monitor was returned to Investigator [REDACTED] for appropriate safekeeping.

theoretically possible, though not necessarily probable, to obtain a blood glucose level which is not stored in the meter. (ALJ Exhibit #1)

After considering all of the evidence, the absence of a recorded blood glucose level in the monitor is not, in and of itself, sufficient to conclude that the Subject made a false entry into the MAR to hide the fact that she failed to assist with, or failed to measure the blood glucose level of the Service Recipient on [REDACTED]. At the hearing, the Subject testified that she assisted the Service Recipient on [REDACTED] with using the blood glucose monitor to measure his blood glucose level. The Subject testified that after the level was obtained, she wrote the monitor reading on her hand, but then that she forgot to record the level in the MAR. The Subject testified that she did not remember that she had failed to record the level in the MAR, until after she had left the facility when she noticed the blood glucose level written on her hand. Whereupon, she returned to the facility and recorded the number in the MAR. (Hearing testimony of the Subject)

Having had the opportunity to consider and evaluate the hearing testimony of the Subject, the ALJ presiding over the hearing concludes that the entirety of the Subject's hearing testimony on this material issue is not credited evidence.

The Justice Center proved by a preponderance of the evidence that the Subject fabricated a blood glucose level for the Service Recipient on [REDACTED] and that she transcribed the fabricated value in the Service Recipient's MAR. The Subject engaged in this conduct to avoid discovery of the fact that she had failed in her custodial duty on [REDACTED] to measure the blood glucose level of the Service Recipient, or to assist him with this. Consequently, the Justice Center proved by a preponderance of the evidence that the Subject, a custodian, falsified records related to the safety, treatment or supervision of the Service Recipient and in doing so impeded the discovery, reporting or investigation of the treatment of the Service Recipient.

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 abuse (obstruction of reports of reportable incidents). The substantiated report will not be amended or sealed.

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. A substantiated Category 3 finding of abuse and/or neglect will not result in the Subject's name being placed on the VPCR Staff Exclusion List and the fact that the Subject has a substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject to disclosure pursuant to NY SSL § 496(2). This report will be sealed after five years.

**DECISION:**

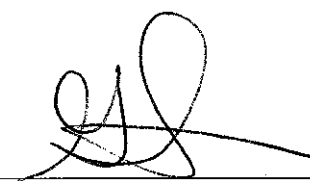
The request of [REDACTED] that the substantiated report dated [REDACTED]  
[REDACTED], [REDACTED] be amended and sealed is denied.

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

The substantiated report is properly categorized, as a Category 3 act.

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

**DATED:** November 23, 2016  
Schenectady, New York



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Gerard D. Serlin, ALJ