

**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: Todd Sardella, Esq.

[REDACTED]  
[REDACTED]  
[REDACTED]

By: Desiree Gargano, Esq.  
Certilman Balin Adler & Hyman, LLP  
90 Merrick Avenue, 9<sup>th</sup> Floor  
East Meadow, New York 11554

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] of neglect by the Subject of a Service Recipient be amended and sealed is denied with respect to the substantiation, but granted with respect to the Category level. The Subject has been shown by a preponderance of the evidence to have committed neglect.

The substantiated report is amended to be 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:** December 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**

**Adjudication Case #:**

[REDACTED]

Before:

Sharon Golish Blum  
Administrative Law Judge

Held at:

Administrative Hearings Unit  
New York State Justice Center for the Protection  
of People with Special Needs  
125 East Bethpage Road, Suite 104  
Plainview, New York 11803

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  
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By: Todd Sardella, Esq.

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[REDACTED]

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By: Desiree Gargano, Esq.  
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90 Merrick Avenue, 9<sup>th</sup> Floor  
East Meadows, New York 11554

### **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], at 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 the service recipient had sexual contact with a visitor.

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

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

4. The facility, [REDACTED] located at [REDACTED] is a crisis respite residence for people with developmental disabilities and is operated by the [REDACTED] which is certified by the New York

State Office for People With Developmental Disabilities (OPWDD), a provider agency that is subject to the jurisdiction of the Justice Center.

5. The facility was a small bungalow, in which three service recipients resided. The facility had a basketball hoop in the backyard, which could be observed through a rear bathroom window. (Hearing testimony of the Subject)

6. At the time of the alleged neglect, the Subject had been employed as the facility Residence Manager and Psychologist from the time that it initially began operations [REDACTED] until the incident occurred, which was a period of approximately five years. (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

7. At the time of the alleged neglect, the Service Recipient was nineteen years of age and had been a resident of the facility since [REDACTED]. The Service Recipient was a person with a mild intellectual disabilities, multiple psychiatric diagnoses including traumatic brain injury, mood disorder, suicidal ideation, and other unidentified behavioral, cognitive and emotional challenges. (Justice Center Exhibit 8)

8. The Service Recipient's Behavior Support Plan (BSP) dated [REDACTED] indicates that because there was "considerable concern" that the Service Recipient was engaging in promiscuous behavior with older men during frequent middle of the night elopements, it was necessary that she be moved to the more structured, supervised placement. (Justice Center Exhibit 8, page 11)

9. The Service Recipient's Plan of Protective Oversight (PPO) dated [REDACTED], indicates that because the Service Recipient repeatedly engaged in unsafe sexual behavior through the use of the internet and social media, she was restricted from unsupervised internet access and, furthermore, her telephone use was monitored. The PPO further indicates that the

Service Recipient required close and direct supervision at both the facility and while in the community. (Justice Center Exhibit 8, page 20 and 21)

10. On the afternoon of [REDACTED] the Service Recipient and service recipient A were present at the facility, as well as the Subject and Staff A. On that day, service recipient A's brother, with whom the Service Recipient was friendly, and young daughter visited the facility from approximately 2:30 p.m. until 6:30 p.m. Throughout the afternoon, the Service Recipient spent time socializing with service recipient A's brother. (Hearing testimony of the Subject)

11. During that time, the Service Recipient announced that she and service recipient A's brother were going outside to play basketball. Staff A supervised the Service Recipient and service recipient A's brother while they played basketball by watching them through the rear bathroom window until they returned indoors a short while later. (Justice Center Exhibit 10)

12. At some point later, the Service Recipient announced again that she and service recipient A's brother were going outside to play basketball. This time, the Subject assumed responsibility for supervising the Service Recipient. As the Subject watched the two from the same bathroom window, she observed that, as they walked around the outside of the facility, they were holding hands, that service recipient A's brother gave the Service Recipient a quick kiss and hug, and that they then moved away from each other as they talked. (Justice Center Exhibit 9)

13. While the Service Recipient and service recipient A's brother were still outside alone, the Subject became distracted and discontinued supervising the Service Recipient. A short while later, the two returned indoors. (Justice Center Exhibit 9)

14. Subsequently, the staff, the service recipients and the visitors ate dinner. When service recipient A's brother finished eating, he left the table and the Service Recipient remained to finish eating. The visitors left the facility at approximately 6:30 p.m. and the remainder of the

Service Recipient's evening continued uneventfully. (Justice Center Exhibit 10)

15. On [REDACTED] the Service Recipient disclosed to a staff that, on the preceding day, she had sexual intercourse with service recipient A's brother outside and that she was afraid that she was pregnant and/or had contracted a sexually transmitted disease. (Justice Center Exhibit 6)

16. The Service Recipient was taken to the [REDACTED] for evaluation and testing and it was determined that she was not pregnant and had not contracted a sexually transmitted disease. There was no determination made as to whether the Service Recipient had engaged in sexual intercourse as she had disclosed. (Hearing testimony of Senior Director of Quality Assurance [REDACTED])

### **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 allegation constitutes 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):



"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...

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4). Category 2 is defined as follows:

(b) 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 3 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 and/or neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of abuse and/or neglect as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged abuse and/or 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 abuse and/or neglect cited in the substantiated report constitutes the category of abuse and/or neglect 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 act described as Allegation 1 in the substantiated report.

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-12) The investigation underlying the substantiated report was conducted by then [REDACTED] Coordinator of Investigation Activities [REDACTED] and because he was no longer employed by [REDACTED] at the time of the hearing, Senior Director of Quality Assurance [REDACTED] testified on behalf of the Justice Center.

The Subject testified at the hearing on her own behalf.

A finding of neglect requires, in part, that a preponderance of the evidence establishes that the Subject engaged in conduct that breached her duty to the Service Recipient. In this case, the Subject's duty to the Service Recipient included ensuring close and direct supervision of the Service Recipient, as specified in the Service Recipient's PPO (Justice Center Exhibit 8, page 19), and being alert to the serious concerns raised in the PPO and the BSP (Justice Center Exhibit 8, page 11) that the Service Recipient repeatedly engaged in unsafe sexual behavior.

On February 24, 2014, the Subject wrote and signed a statement indicating that when the Service Recipient and service recipient A's brother went outside to play basketball, the Subject went to the back window to keep the Service Recipient in her "line of vision" and that she saw them holding hands briefly and saw service recipient A's brother give the Service Recipient a quick peck or kiss and a hug before they separated. The Subject's statement indicates that the Subject then became distracted by people inside the facility and that the Service Recipient and service recipient A's brother returned indoors "about 5 minutes later."

The Subject testified that she was familiar with the Service Recipient's BSP and PPO, that

she was aware that the Service Recipient sought out sexual encounters by eloping or attempting to elope to meet with strangers that she had communicated with on the internet, and that even though the Service Recipient's PPO did not require it, the Subject generally assigned 1:1 staff to supervise the Service Recipient.

The Subject testified that on [REDACTED] she had assigned Staff A as the Service Recipient's 1:1 supervisor, that she was aware of the fact that the Service Recipient knew and was friendly with service recipient A's brother, that there was no restriction on visitors and that she felt that she had no reason to watch the Service Recipient especially closely.

With respect to the question of whether she failed to provide proper supervision, the Subject testified that when the Service Recipient and service recipient A's brother were inside, they were listening to music on the computer and watching TV together while sitting far apart from each other on a couch. The Subject testified that she could not remember how many times the Service Recipient and service recipient A's brother went outside but that, on the one occasion when the Service Recipient announced that she was going outside to play basketball and the Subject was supervising her, the Subject observed that the Service Recipient and service recipient A's brother held hands for "two seconds," that service recipient A's brother put his arm around her and they "bumped cheeks" before separating. The Subject testified that the physical contact was not sexual, but "just like friends," that she told them to keep their distance, and that before she got distracted, she had been watching them through an open window to keep them in line of sight and earshot. The Subject testified that, before she turned her attention away from the Service Recipient, she observed the Service Recipient to be walking back towards the house, that she called out to Staff A that the Service Recipient was returning, that Staff A responded that she was watching her, and that she did not take her eyes off the Service Recipient until Staff A began

supervising her.

The Subject's position, as stated in her testimony and through the submissions of her counsel, was that she did not breach her duty to the Service Recipient because she provided proper supervision during the relevant time and that the sexual encounter as disclosed by the Service Recipient could not have occurred during this timeframe.

The account of the incident contained in the Subject's [REDACTED] statement, insofar as it deviates from the Subject's testimony, is accepted as credible evidence over the Subject's testimony. In the statement, the Subject admitted that she was distracted and that the Service Recipient was unsupervised for some period of time, which she estimated at five minutes. Given the Subject's own contemporaneous admissions, that she was familiar with the Service Recipient's BSP and PPO, the latter of which included the requirement that the Service Recipient have close and direct supervision, that she generally assigned the Service Recipient with 1:1 supervision, that she was aware of the Service Recipient's repeated pursuits of sexual encounters, and that she witnessed affectionate physical contact between the Service Recipient and service recipient A's brother immediately before she became distracted and discontinued her supervision of the Service Recipient, it is concluded that the Subject breached her duty to provide the Service Recipient with proper supervision under SSL § 488(1)(h).

A finding of neglect also requires that the Subject's breach of duty 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. It was argued by Justice Center's counsel that the fear and anxiety that the Service Recipient experienced regarding an unwanted pregnancy and possible sexually transmitted disease, despite the fact that ultimately, she was fine, seriously endangered her health, safety and welfare, which would certainly also amount to a serious impairment of her

mental or emotional condition. The Subject's counsel argued that the Service Recipient must have fabricated the disclosure that she had engaged in sexual intercourse and as such, the Subject's conduct did not result, nor was it likely to have resulted, in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

In this case, despite the fact that there is no evidence in the record that the Subject's breach of duty actually resulted in physical injury, or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient, such evidence is not necessary for a finding of neglect. All of the factors in this case, including the Service Recipient's proclivity towards unsafe sexual behavior and her need to have close and direct supervision, reflect that the Subject's breach of duty to provide proper supervision to the Service Recipient for any amount of time was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

Accordingly, it is concluded that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed the neglect under SSL § 488(1)(h), as alleged in Allegation 1 of the substantiated report. The report will remain substantiated.

The next issue to be determined is whether the substantiated report constitutes the category of neglect set forth in the substantiated report. Under 14 NYCRR § 700.6(a), the Administrative Law Judge has discretion to amend the findings of the substantiated report since it is the subject matter of the hearing, namely "whether the findings of the report should be amended." Section 700.6(b) specifically sets forth the category of abuse or neglect as one of the three issues to be determined at the hearing. In this case, the Subject's conduct was substantiated as a Category 2 act, however, the Justice Center did not establish by a preponderance of the evidence that the Subject's neglect seriously endangered the health, safety or welfare of the Service Recipient.

Accordingly, the category of neglect is hereby amended to a Category 3 act. A substantiated Category 3 finding of 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] of neglect by the Subject of a Service Recipient be amended and sealed is denied with respect to the substantiation, but granted with respect to the Category level. The Subject has been shown by a preponderance of the evidence to have committed neglect.

The substantiated report is amended to be a Category 3 act.

This decision is recommended by Sharon Golish Blum, Administrative Hearings Unit.

**DATED:** November 25, 2016  
Plainview, New York



Sharon Golish Blum, Esq.  
Administrative Law Judge