

**STATE OF NEW YORK  
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE  
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

Pursuant to § 494 of the Social Services Law

## 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: Laurie Cummings, 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 [REDACTED] that the substantiated report dated [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 2 act.

NOW, THEREFORE, IT IS DETERMINED that reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years. The record of these reports shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(b).

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**

In the Matter of the Appeal of

Pursuant to § 494 of the Social Services Law

## RECOMMENDED DECISION AFTER HEARING

**Adjud. Case #:**

Before:

John T. Nasci  
Administrative Law Judge

Held at:

New York State Office Building  
207 Genesee Street, Room 103D  
Utica, New York 13501  
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: Laurie Cummings, 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], 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 by not securing the safety belt or locking the wheels on the shower chair, as a result of which the service recipient fell out of the chair and onto the floor and sustained multiple injuries.

This allegation 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, the [REDACTED], located at [REDACTED], is a residential facility for adults with developmental disabilities, and is operated by the New York State Office for People With

Developmental Disabilities (OPWDD), which is an agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of [REDACTED], Justice Center Investigator)

5. At the time of the alleged neglect, the Subject was employed by the [REDACTED] [REDACTED] as a Direct Support Assistant (DSA) and had been employed by the facility for eleven years. (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged neglect, the Service Recipient was a sixty-nine year old male resident of the facility. The Service Recipient was diagnosed with osteoporosis, was in declining physical health in the years preceding the date of the alleged neglect and had a history of falling. The Service Recipient ambulated by use of a wheelchair which he propelled with his feet a majority of the time. When the Service Recipient was transferred to or from the wheel chair or when he stood from his wheelchair, he required the assistance of staff to steady him with a gait belt. (Hearing testimony of [REDACTED], Justice Center Investigator and Justice Center Exhibit 16).

7. The Service Recipient was showered while he was seated in a shower wheelchair which was equipped with a lap seat belt and brakes on all four wheels. The facility procedure for showering the Service Recipient was the following: 1) with the use of a gait belt, staff helped the Service Recipient stand up from his regular wheelchair while the Service Recipient held onto the toilet railing; 2) staff removed the Service Recipient's pants and helped the Service Recipient onto the toilet; 3) after toileting, staff helped the Service Recipient stand with the use of the gait belt and removed the remainder of the Service Recipient's clothing; 4) staff helped the Service Recipient move to and sit in the shower wheelchair with the use of a gait belt; 5) once the Service Recipient was seated in the shower wheelchair, staff secured the Service Recipient by latching the seatbelt; and 6) staff then wheeled the Service Recipient into the shower stall and engaged the

shower wheelchair brakes. (Justice Center Exhibit 19: Audio recording of Justice Center interview of Staff A)

8. On [REDACTED], the Subject worked the 3:00 p.m. to 11:00 p.m. shift and was assigned to kitchen duties as well as the care of three service recipients including the Service Recipient. (Justice Center Exhibits 17 and 18; and Hearing testimony of the Subject)

9. On [REDACTED], at approximately 7:45 p.m., the Subject brought the Service Recipient to the bathroom for the purpose of giving the Service Recipient his evening shower. The Subject transferred the Service Recipient from his regular wheelchair, onto the toilet, and then into the shower wheelchair. (Hearing testimony of the Subject) The Subject did not latch the shower wheelchair seatbelt. The Subject then wheeled the Service Recipient into the shower stall. The Subject then proceeded to shower the Service Recipient. (Justice Center Exhibits 7, 8 and 16: audio recording of Justice Center interview of the Service Recipient)

10. While the Subject was cleaning the Service Recipient's feet, the Service Recipient stood and then fell to the floor, hitting his head on the wall and/or the floor of the shower. (Justice Center Exhibits 7, 8 and 19: audio recording of Justice Center interview of the Service Recipient; and Hearing testimony of the Subject)

11. After the Service Recipient fell, the Subject called for help. Staff A responded by coming to the shower within minutes and found the Subject standing in the shower area and the Service Recipient on the floor of the shower stall. (Justice Center Exhibits 8 and 19: audio recording of Justice Center interview of Staff A; and Hearing testimony of the Subject)

12. The Service Recipient suffered physical injuries from the fall which included a contusion on the bridge of his nose, an abrasion on his right knee, a bleeding cut to his right big toe and a bruise on his left second toe. (Justice Center Exhibits 9 and 11)

### **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):

"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)(b), including Category (2), 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. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one 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.

In support of its substantiated findings, the Justice Center presented a number of documents and photographs obtained during the investigation. (Justice Center Exhibits 1 through 18) The Justice Center also presented audio recordings of the Justice Center Investigator’s interview of witnesses and interrogation of the Subject. (Justice Center Exhibit 19) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED],



who was the only witness who testified at the hearing on behalf of the Justice Center.

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

The Justice Center proved by a preponderance of the evidence that the Subject committed neglect when she failed to follow facility procedure by not latching the shower wheelchair seatbelt, which resulted in the Service Recipient falling and sustaining physical injuries.

The main point of contention between the Justice Center and the Subject is whether or not the Subject secured the Service Recipient in the shower wheelchair by latching the seatbelt and engaging the shower wheelchair brakes. The Justice Center contends that the Subject did neither and the Subject contends that she did both.

In support of its position, the Justice Center relies on various statements of the Service Recipient that were made contemporaneously to the time of the Service Recipient's fall in the shower, as well as the Service Recipient's interview statement to the Justice Center investigator. Within twenty-four hours after the incident, the Service Recipient told at least three facility staff, including Staff A, that the Subject did not put the seatbelt on him while he was in the shower wheelchair. (Justice Center Exhibits 7 and 8). The Service Recipient also told the Justice Center investigator twelve days after the incident that the Subject told him that he did not need the seat belt on and that she did not put it on him. (Justice Center Exhibit 19: audio recording of Justice Center interview of the Service Recipient) The Service Recipient did not make any statements concerning the shower wheelchair brakes.

The Subject's various statements concerning the shower wheelchair seatbelt and brakes are inconsistent. In the Subject's written statement, which she made immediately following the fall, she did not mention the seatbelt or the brakes. (Justice Center Exhibit 8) In the Subject's Justice Center interrogation, the Subject stated that the Service Recipient was "fastened in" and that she locked the shower wheelchair brakes. (Justice Center Exhibit 19: audio recording of Justice Center

interrogation of the Subject) In the Subject's request for amendment of the report, the Subject stated: "I am positive the brakes and safety belt were locked." (Justice Center Exhibit 2) In the Subject's hearing testimony, she stated that she was sure that she buckled the Service Recipient into the shower wheelchair but that she was not sure about putting the brakes on. When asked how the Service Recipient could have gotten up from the shower wheelchair before he fell, the Subject posited that the Service Recipient may have taken the belt off himself. Then the Subject contradicted her testimony by stating that the reason that she was sure that she had secured the seatbelt was because she had to take it off the Service Recipient after he fell.

Having had the opportunity to consider and evaluate the statements and hearing testimony of the Subject and having considered and weighed the statements of the Service Recipient, the ALJ presiding over the hearing concludes that the Subject did not latch the shower wheelchair seatbelt. There is not a preponderance of the evidence from which to conclude that the Subject did not engage the shower wheelchair brakes. However, coming to such a conclusion is not necessary to make a decision concerning neglect in this matter.

In order to prove neglect, the Justice Center must establish that the Subject's conduct breached her custodian's duty and 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))

The Justice Center established by a preponderance of the evidence that the Subject had a duty to latch the seatbelt of the shower wheelchair after the Service Recipient was seated in the chair, and to engage the shower wheelchair brakes after moving the chair into the shower stall. The Justice Center has established that the Subject failed to latch the seatbelt, and that the Subject's failure to latch the seatbelt was a breach of her duty. Furthermore, the record reflects that the Service Recipient's fall was the result of his attempt to stand, which he could not have done if the

seatbelt was latched. Therefore, the Justice Center has established that the Service Recipient's fall was a result of not being secured by the Subject in the shower wheelchair. Consequently, the Justice Center has established that the Service Recipient's physical injuries were a result of his fall, and by extension, a result of the Subject's breach of duty.

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.

In order to prove Category 2 conduct, the Justice Center must establish that the Subject seriously endangered the health, safety or welfare of the Service Recipient. The record reflects that the Service Recipient was in frail and declining physical health, that he was diagnosed with osteoporosis and that he had a history of falling. The record also reflects that the Service Recipient had previously fractured his right humerus. (Hearing testimony of [REDACTED], Justice Center Investigator and Justice Center Exhibits 12 and 16). Furthermore, the record reflects that Subject was familiar with the Service Recipient's physical condition. (Hearing testimony of the Subject and Justice Center Exhibit 19: audio recording of the Justice Center interrogation of the Subject) Given the frail physical condition of the Service Recipient at the time of the incident, it is concluded that the Subject's failure to latch the Service Recipient's shower wheelchair seatbelt seriously endangered the Service Recipient's safety, health and welfare. Therefore, 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 2 act.

A Category 2 act under this paragraph shall be elevated to a Category 1 act when such an act occurs within three years of a previous finding that such custodian engaged in a Category 2 act. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years.

**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 2 act.

This decision is recommended by John T. Nasci, Administrative Hearings Unit.

**DATED:** January 3, 2017  
Schenectady, New York



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John T. Nasci, ALJ