

**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]

The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

ORDERED: The attached and incorporated Recommended Decision in its entirety is hereby adopted by the Executive Director.

ORDERED: The Vulnerable Persons' Central Register shall take action in conformity with the attached Recommended Decision, specifically the Decision section.

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:** August 2, 2017  
Schenectady, New York



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David Molik  
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register  
Administrative Appeals Unit  
[REDACTED], Subject  
Jason Jaros, Esq.

**STATE OF NEW YORK  
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE  
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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:

Mary Jo Lattimore-Young  
Administrative Law Judge

Held at:

New York State Justice Center for the Protection  
of People With Special Needs  
Administrative Hearings Unit  
2630 North America Drive  
West Seneca, New York 14224  
On: [REDACTED]

Parties:

New York State Justice Center for the Protection  
of People with Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
By: Theresa Wells, Esq.

[REDACTED]

By: Jason Jaros, Esq.  
Jaros & Jaros  
8207 Main Street, Suite 13  
Williamsville, NY 14221

### **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 2<sup>1</sup>**

It was alleged that on [REDACTED], while on an outing in the community and away from 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 taking him to the family home, in violation of his safety plan, his behavior support plan, and his individual plan of protective oversight.

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, located at [REDACTED] is an Individualized

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<sup>1</sup> Allegation 1 of the said substantiated report was unsubstantiated.

Residential Alternative (IRA) for disabled individuals, 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. (Hearing testimony of OPWDD Investigator [REDACTED], hereinafter referred to as the OPWDD Investigator)

5. At the time of the alleged neglect, the Subject was employed at the facility by the [REDACTED] who provides local staff to the facility. The Subject worked the [REDACTED] shift as a Developmental Aide (DA) 2, was responsible for providing oversight of the facility and supervising direct care staff. The Subject has known the Service Recipient since 2011, serving at that time as a DA 1. The Subject was aware of the Service Recipient's plans and history, and knew his family well. (Hearing testimony of the Subject)

6. At the time of the alleged neglect, the Service Recipient was an ambulatory twenty year old male who attended school. He was limited in his verbal ability and communication skills. Sometime prior to [REDACTED], the Service Recipient was arrested for allegedly shooting his mother, but her gun shot wound was not fatal. Ultimately, the Service Recipient was found incompetent to stand trial and in [REDACTED] he was released to the custody of the [REDACTED] who placed him at a different [REDACTED] residence. In [REDACTED] 2013, the Service Recipient was moved to the instant facility where he has lived with four other individuals. The Service Recipient has diagnoses of moderate intellectual disability, pervasive developmental disorder, impulse control disorder, attention deficit hyperactive disorder (ADHD) and other medical conditions. In the past, when the Service Recipient lived at his family's home, he exhibited challenging behaviors due to the presence of physical and verbal abuse. He had a history of violent behavior, including the use of a weapon, property destruction, inappropriate social behavior and fire setting. (Hearing

testimony of the OPWDD Investigator; Justice Center Exhibits 6, 8-10 and 17)

7. The Service Recipient's revised Behavior Support Plan (BSP) dated [REDACTED] stated that, for the most part, the Service Recipient had made significant progress with his behavioral issues. He had no reported acts of aggression or verbal threats in over a year. In addition, the Service Recipient had not exhibited behavioral issues at the facility. (Hearing testimonies of the OPWDD Investigator and the Subject; Justice Center Exhibits 6 and 8)

8. According to his [REDACTED] Plan of Protective Oversight (POPO), the Service Recipient was allowed to have unsupervised or supervised family visits only at the facility or in the community due to the past trauma he experienced at the family home. Staff was required to maintain range of scan supervision of him when he was in the community at all times. (Hearing testimonies of the OPWDD Investigator and the Subject; Justice Center Exhibits 6 and 9)

9. The Service Recipient's [REDACTED] Safety Plan further mandated that absolutely "[n]o outings" were to "take place at the family's home (supervised or unsupervised) at this time" and that "[a]ll outings" were to "take place in a community setting." The Safety Plan further provided that the Service Recipient was allowed three hours of unsupervised time with his family in the community and facility staff would drive him to the location, drop him off, then retrieve him when the visit ended. (Hearing testimonies of the OPWDD Investigator and the Subject; Justice Center Exhibits 6, 10 and 19)

10. On [REDACTED], while working at the facility, the Subject drove the Service Recipient in the facility van to a community park for his previously scheduled family visit. The Subject and the Service Recipient were the only persons that rode in the van. The Service Recipient and the Subject exited the van after they arrived at the park and joined the Service Recipient's mother, father and sister who were already there. At some point, the Service

Recipient's mother left the park in her car to head back home to retrieve an item of food she had forgotten for the picnic. (Hearing testimony of the Subject)

11. Shortly thereafter, the Service Recipient's father instructed the Service Recipient to get back in the facility van and told the Subject to drive the van over to see the family home. The Service Recipient and the Subject complied. The Subject reluctantly drove the Service Recipient in the van from the park to the family home, which was close to the park. The Subject followed the Service Recipient's sister as she drove in her own car. When they arrived, the Subject parked the van in a driveway or field-like area of the family's home. The Service Recipient's mother was already there. The Subject and the Service Recipient exited the van and the Service Recipient's mother showed them the "junk yard" outside of the family home. Shortly thereafter, the Subject drove the Service Recipient back to the park for his family picnic. (Hearing testimony of the Subject; Justice Center Exhibits 6, 16 and 19)

12. Sometime after returning to the facility, the Subject made an entry in the facility's communication log that the Service Recipient had attended his family visit at the community park. However, the Subject did not document that during his family visit that she accompanied him to visit the family home. (Hearing testimonies of the Subject and the OPWDD Investigator; Justice Center Exhibit 6 and 16)

13. On [REDACTED], after the Subject received a telephone call from the Service Recipient's school teacher who reported that the Service Recipient's behavior at school had worsened, the Subject telephoned the facility psychologist and reported that she had taken him to see his family's home. (Hearing testimony of the Subject; Justice Center Exhibits 6, 11-12 and 19)

14. On [REDACTED], a different psychologist interviewed the Service Recipient

and performed an impact assessment in regards to the incident. The psychologist concluded that there existed a possibility of an emotional impact on the Service Recipient as a result of the incident; however, there was no obvious negative emotional impact upon the Service Recipient. (Hearing testimonies of the Subject and OPWDD Investigator; Justice Center Exhibit 6 and 12-13)

### **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 and 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 Categories 2 and 3, which 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 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.

(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(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 abuse and/or 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 2” 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 1-19) The investigation underlying the substantiated report was conducted by the OPWDD Investigator, who was the only witness who testified at the hearing on behalf of the Justice Center.

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

The Justice Center has proven beyond a preponderance of the evidence that the Subject committed neglect.

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 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 record establishes that the Subject knew of the Service Recipient’s history and knew that his plans prohibited him from visiting the family home either supervised or unsupervised. Additionally, the Subject admitted that she knew she was violating the Service Recipient’s plans by transporting him to his family home for the brief visit, but she took him there anyway. The Subject testified that there was no specific purpose to take the Service Recipient to the family home other than to see it and where it was located. (Hearing testimony of the Subject; Justice Center Exhibits 6, 8-10 and 19)

Consequently, the Subject's conduct breached her custodian's duty to follow the Service Recipient's plans and the breach was likely to result in serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. (SSL § 488(1)(h))

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.

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.

In this case, the Service Recipient had a history of engaging in various behaviors but had made significant improvement in regards to those behaviors. Since the incident on [REDACTED], the Service Recipient's behavioral data sheets indicate that his improvements have remained unchanged for the most part. Moreover, the psychologist concluded, after his [REDACTED] interview and clinical assessment of the Service Recipient, that there was a "possible emotional impact" on the Service Recipient as a result of the incident, but that there was "no obvious or discernible negative emotional impacts" upon the Service Recipient from the incident. (Justice Center Exhibits 6 and 12-13)

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. The record establishes that the Subject's breach of duty created a likelihood of injury of the Service Recipient. However, since the Subject's breach of duty did not seriously endanger the health, safety or welfare of the Service Recipient, the Subject's conduct did not rise to a Category 2 level finding of neglect. Therefore, the substantiated report is properly categorized as a Category 3, act.

Substantiated Category 3 findings 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 SSL § 496 (2). The report will be sealed after five years.

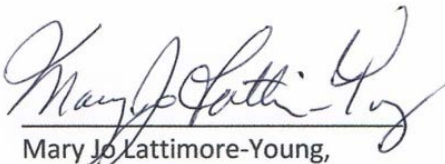
**DECISION:**

The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED] be amended is granted in part and denied in part. 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 Mary Jo Lattimore-Young,  
Administrative Hearings Unit.

**DATED:** July 28, 2017  
West Seneca, New York

  
Mary Jo Lattimore-Young,  
Administrative Law Judge