

**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 17, 2017  
Schenectady, New York



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David Molik  
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register  
Administrative Appeals Unit  
[REDACTED], Subject  
Ronald Benjamin, 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:

Gerard D. Serlin  
Administrative Law Judge

Held at:

Administrative Hearings Unit  
New York State Justice Center for the Protection  
of People with Special Needs  
New York State Office Building  
44 Hawley Street, Room 1701  
Binghamton, New York 13901  
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: Peter Zisser, Esq.

[REDACTED]

By: Ronald Benjamin, Esq.  
Law Office of Ronald Benjamin  
Attorneys at Law  
126 Riverside Drive  
PO Box 607  
Binghamton New York 13902

### **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 unspecified dates between [REDACTED] and [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian you committed neglect when you directed inappropriate language toward a service recipient, and failed to adhere to his smoking schedule.

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, the [REDACTED], is an Individual Residential Alternative (IRA), and is operated by [REDACTED]. The facility is certified by the 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 neglect, the Subject was employed by [REDACTED]. The Subject worked as a habilitator. 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 fifty-eight year old male, with diagnoses of mild intellectual functioning, asthma and chronic obstructive pulmonary disorder, anxiety and antisocial behavior. The Service Recipient used a wheelchair to ambulate. The Service Recipient had a history of violent aggression and was prescribed Seroquel to address the aggression. (Hearing testimony of the provider agency Investigator)

7. The Service Recipient's Individual Plan Of Protective Oversight (IPOP) designated that the Service Recipient was to be provided a cigarette break every two hours, and to be provided more opportunities to smoke when necessary to avoid or minimize his behaviors. The IPOP also stated that staff was not to engage in power struggles with the Service Recipient over cigarette smoking. (Justice Center Exhibit 12)

### **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 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 is defined in 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 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 abuse and/or 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 not 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 1-27) The Justice Center called [REDACTED], Director of Quality improvement at [REDACTED]. (the Investigator) to testify on behalf of the Justice Center. The Investigator was not involved in the investigation and supervised as many as three other investigators who conducted the investigation.

The Subject testified in his own behalf. Also, on behalf of the Subject, [REDACTED], (Witness 1) a lead habilitator at the facility, testified.

A finding of neglect requires that a preponderance of the evidence establish that the Subject engaged in conduct that breached his duty to the Service Recipient and that the 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.

The Justice Center alleged that at some point during the period of [REDACTED] through [REDACTED], the Subject told the Service Recipient, “fuck you” and “cursed” at the Service Recipient. The Justice Center alleged that on one occasion during the period of [REDACTED]

██████████ through ██████████, the Subject woke the Service Recipient in the middle of the night or early morning, intentionally agitated the Service Recipient and then denied him the opportunity to smoke a cigarette.

These allegations were based on a statement provided by Staff-1 who indicated that the Subject woke the Service Recipient, agitated him and denied him the ability to smoke and that the Subject and several other staff had cursed at the Service Recipient. (Justice Center Exhibit 20) Staff-2 alleged that several staff including the Subject disliked taking the Service Recipient outside to smoke cigarettes, and that the Subject had refused on one occasion to do so. Further Staff -2 also alleged that he had heard the Subject “swear to [the Service Recipient].” (Hearing testimony of the Investigator and Justice Center Exhibit 21) Staff -2 had been employed at the facility since ██████████ of 2015. (Hearing testimony of the Investigator)

While the Investigator did not participate in the investigation, she did testify as to her knowledge of the process for taking witness statements. The Investigator testified that when witness statements are obtained, the Investigator who is taking the statement types the statement on a computer and then prints the statement in the presence of the witness. The witness then reviews and signs the statement. However, the statement signed by Staff-1 appears to have been obtained on ██████████, but it was signed on ██████████. (Justice Center Exhibit 20) Obviously, there was some error. The Investigator was unable to provide an explanation for this discrepancy.

Additionally, while Staff 2 also alleged that he heard the Subject “swear to” the Service Recipient, later in the statement Staff 2 stated that the Subject was “swearing and on his phone.” While this may be a reference to a separate allegation or staff complaint that the Subject was on his phone when working, it is not clear from the record that it is a separate and distinct issue and could be read to mean that the Subject swore while on his phone. (Justice Center Exhibit 21) The

Investigator who testified at the hearing had no first-hand knowledge of the statement so she could not provide any insight.

The Service Recipient was verbal and capable of reading and comprehending. (Hearing testimony of the provider agency Investigator) When interviewed the Service Recipient did not indicate that the Subject had engaged in any of the acts alleged, but the Service Recipient did make several allegations toward other staff during the interview of a similar nature. (Justice Center Exhibit 19) The Service Recipient had a long and well-documented history of falsely reporting incidents and swearing at staff. (Hearing testimony of the provider agency Investigator)

The Subject testified that he did not swear at the Service Recipient and did not deny him the opportunity to smoke cigarettes as long as appropriate staff ratios could be maintained, as the Service Recipient had to be supervised while smoking. The Subject also denied ever having woken the Service Recipient and intentionally agitating him. The Subject worked the [REDACTED] shift. Rarely would the Service Recipient be awake during the Subject's shift.

Witness-1 testified that she acted as a shift supervisor at the facility during the time of the alleged neglect. The Service Recipient's smoking plan had undergone multiple revisions in the time prior to the incident. Witness-1 worked with and supervised the Subject during the period of the alleged neglect and characterized the Subject as fair and professional with all service recipients. Witness-1 testified that the Subject was knowledgeable of the individual service recipients' needs and plans. Witness-1 testified that she never witnessed and was never advised during the relevant time by anyone that the Subject engaged in the conduct alleged.

It should be noted that Witness-1 was not assigned to a consistent shift and did not always supervise the Subject. Witness -1 was herself the subject of allegations that she would not take the Service Recipient outside to smoke cigarettes. (Hearing testimony of Witness-1)




The Administrative Law Judge presiding over the hearing, having observed and evaluated the hearing testimony of the Subject and Witness-1, does find their respective testimonies to be credible. Further, the statements made by Staff-1 and Staff-2 are not credited evidence. Staff- 1's statement does not stand against the credible hearing testimony of the Subject, and the Service Recipient does not corroborate statements of either Staff-1 or Staff-2. With regard to the statement of Staff-2, there is inherent ambiguity in that statement, and no witness was presented to clarify the statement.

Accordingly, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the neglect alleged. The substantiated report will be amended and sealed.

**DECISION:** The request of [REDACTED] that the substantiated report dated, [REDACTED], [REDACTED] be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed neglect.

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

**DATED:** August 10, 2017  
Schenectady, New York

  
Gerard D. Serlin, ALJ