

**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]  
[REDACTED]

By: Kavitha Janardhan, Esq.  
Bousquet Holstein, PLLC  
110 West Fayette Street  
One Lincoln Center, Suite 900  
Syracuse, New York 13202

[REDACTED]  
[REDACTED]  
[REDACTED]

By: Brittany Irving, Esq.  
465 West 148<sup>th</sup> Street, Suite 4D  
New York, New York 10031

[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 Subjects have been shown by a preponderance of the evidence to have committed neglect.

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:** July 26, 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**

**Adjud. Case #:**

[REDACTED]

Before:

John T. Nasci  
Administrative Law Judge

Held at:

Administrative Hearings Unit  
New York State Office Building  
333 East Washington Street  
Syracuse, New York 13202  
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

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[REDACTED]

2.

Syracuse, New York 13202

[REDACTED]

[REDACTED]

[REDACTED]

By: Brittany Irving, Esq.  
465 West 148<sup>th</sup> Street, Suite 4D  
New York, New York 10031

### **JURISDICTION**

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subjects) for neglect. The Subjects requested that the VPCR amend the report to reflect that the Subjects are not subjects 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 Subjects of a Service Recipient.

2. The Justice Center substantiated the report against the Subjects. The Justice Center concluded that:

#### **Allegation 1**

It was alleged that on [REDACTED], at [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you left a service recipient unsupervised in cabin [REDACTED].

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, [REDACTED], located at [REDACTED], is a summer camp for adults and children with developmental disabilities, and is operated by [REDACTED], which is an agency that is certified by the New York State Office for People With Developmental

Disabilities (OPWDD), and is subject to the jurisdiction of the Justice Center. (Hearing testimony of [REDACTED], [REDACTED] Regulatory Affairs Coordinator)

5. At the time of the alleged neglect, the Subjects were employed by [REDACTED] as Counselors and were employed by the facility for the [REDACTED] summer camp season which commenced in the beginning of [REDACTED]. (Hearing testimony of [REDACTED], [REDACTED] Regulatory Affairs Coordinator) The Subjects were custodians 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 forty-three year old adult male and a camper at [REDACTED]. The Service Recipient had diagnoses of intellectual developmental disabilities and autism, and was only able to express himself through the use of single words. (Justice Center Exhibit 11 and Hearing testimony of [REDACTED], [REDACTED] Regulatory Affairs Coordinator)

7. On [REDACTED], the Subjects were assigned to cabin [REDACTED] and the Service Recipient was bunked in Cabin [REDACTED]. Cabin [REDACTED] was one building that was designated as Cabin [REDACTED] on one side and Cabin [REDACTED] on the other side. Although Counselors were assigned to either Cabin [REDACTED] or [REDACTED], they were responsible for service recipients who bunked on both sides. (Hearing testimony of [REDACTED], [REDACTED] Regulatory Affairs Coordinator)

8. Sometime between 7:00 p.m. and 7:30 p.m., Subject [REDACTED] left the cabin with three or four of the cabin's service recipients and took them to the recreation hall. Before leaving, Subject [REDACTED] did not conduct a headcount and did not wait to determine where any other Counselors were. When Subject [REDACTED] arrived at the recreation hall, he learned that the Service Recipient was left behind in the Cabin. (Justice Center Exhibits 2, 11 and 14)

9. At approximately 7:30 p.m., Staff A was taking a shower and conversing with a

service recipient through the shower curtain. Staff A had taken the day off and consequently was off-duty and had not been assigned the responsibility of care and supervision of any service recipients. When Staff A was done with his shower, he took the service recipient (with whom he was talking) to the cabin door where Subject [REDACTED] was waiting outside the cabin at the bottom of the stairs. Subject [REDACTED] then took that service recipient to the recreation hall. Subject [REDACTED] did not conduct a headcount before leaving Cabin [REDACTED] for the recreation hall. (Hearing testimony of [REDACTED], [REDACTED] Regulatory Affairs Coordinator and Justice Center Exhibits 2, 7, 14, 15, 18 and 19)

10. Staff A walked back into the cabin and started getting himself ready to leave. Staff A then spotted the Service Recipient sitting on his bed alone. Staff A started to put the Service Recipient's shoes on him and noticed that he had wet himself. Staff A then cleaned up the Service Recipient, toileted him and helped him change his clothes. While he was doing this, Staff A called to a passerby to get a staff to come take the Service Recipient to the recreation hall. Within minutes, another staff came to the cabin and took the Service Recipient to the recreation hall. The Service Recipient was alone and unsupervised in Cabin [REDACTED] for approximately ten minutes. (Justice Center Exhibits 2, 7, 11, 14, 15, 17, 18 and 19)

11. [REDACTED] policy requires that Counselors must always account for the whereabouts of service recipients to whom they are assigned, and that headcounts be conducted prior to leaving any area, including the cabin. (Justice Center Exhibit 13)

### **ISSUES**

- Whether the Subjects have 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 abuse and/or 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)(c), including Category (3), which is defined as follows:



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 Subjects 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 Subjects 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 obtained during the investigation. (Justice Center Exhibits 1-24) The investigation underlying the substantiated report was conducted by [REDACTED], [REDACTED] Regulatory Affairs Coordinator, who was the only witness who testified at the hearing on behalf of the Justice Center. At the time of the alleged neglect, [REDACTED] was employed by [REDACTED] as Quality Assurance Administrator and conducted the investigation in this position. (Hearing testimony of [REDACTED], [REDACTED] Regulatory Affairs Coordinator)

The Subjects did not testify or present any other evidence at the hearing.

The Justice Center proved by a preponderance of the evidence that the Subjects committed neglect by breaching their duty, to the Service Recipient, to conduct headcounts before they left Cabin [REDACTED]. This breach resulted in the Service Recipient being left alone and unsupervised in the cabin for approximately ten minutes, during which time the Service Recipient soiled himself.

The evidence presented by the Justice Center in the hearing was neither rebutted nor disputed by the Subjects.

In order to prove neglect, the Justice Center must establish by a preponderance of the evidence that the Subjects' actions, inactions or lack of attention breached a 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))

Both Subjects had a duty to know the whereabouts of the service recipients in their charge, and to conduct headcounts before leaving any area with service recipients. (Justice Center Exhibit 13)

Subject [REDACTED] admitted, in his written statement on the day of the incident, that when he arrived at the recreation hall with four of the Cabin [REDACTED] service recipients, he did not know where the Service Recipient or the other Counselors were. Furthermore, he did not mention in either his request for amendment or his written statement that he had conducted a headcount before leaving the Cabin [REDACTED] with four service recipients. However, he stated in his written statement that he and the other Counselors had miscommunicated. (Justice Center Exhibits 2 and 14) It is concluded from this evidence that Subject [REDACTED] did not conduct a headcount before leaving Cabin [REDACTED] with four service recipients. Subject [REDACTED] admitted that he did not do a headcount before he left Cabin [REDACTED] with a service recipient for evening activity. (Justice Center Exhibit 15)

As Counselors, the Subjects had a duty to conduct headcounts before leaving Cabin [REDACTED]

with service recipients, and both Subjects failed to conduct a headcount on the date and time in question. Consequently, the Justice Center has established by a preponderance of the evidence that the Subjects breached their custodian's duty to the Service Recipient.

The record reflects that the Service Recipient was left alone for approximately ten minutes and in that timeframe the Service Recipient soiled himself. The record also reflects that the Service Recipient was developmentally disabled, had a diagnosis of autism and needed assistance or direction with many routine daily needs. (Justice Center Exhibit 16 and Hearing testimony of [REDACTED], [REDACTED] Regulatory Affairs Coordinator) Being left alone not only resulted in the Service Recipient soiling himself, but due to his developmental limitations, being left alone was also likely to have resulted in something much more serious. Consequently, the Justice Center has sufficiently established that the Subjects' breach of duty 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 determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subjects 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. 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.

**DECISION:** The request of [REDACTED] that the substantiated report dated [REDACTED], be amended and sealed is denied. The Subjects have 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 John T. Nasci, Administrative Hearings Unit.

**DATED:** July 22, 2016  
Schenectady, New York



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John T. Nasci, ALJ