

**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: Robert DeCataldo, Esq.

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

By: Jason Jaros, Esq. (Subjects' Attorney)  
Jaros & Jaros  
8207 Main Street, Suite 13  
Williamsville, New York 14221

[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 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 request of [REDACTED] that the substantiated report dated [REDACTED] be amended and sealed is denied. The Subject have been shown by a preponderance of the evidence to have committed neglect.

All three substantiated reports have been properly categorized, as Category 3 acts.

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:** August 10, 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 #s:**

[REDACTED]  
[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  
1200 East and West Road  
West Seneca, New York 14224  
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  
of People with Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
By: Robert DeCataldo, Esq.  
Administrative Appeals Unit

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

By: Jason Jaros, Esq. (Subjects' Attorney)  
Jaros & Jaros  
8207 Main Street, Suite 13  
Williamsville, New York 14221

## **JURISDICTION**

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subjects) for neglect. All three Subjects have requested that the VPCR amend the report to reflect that they 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 "substantiated" reports dated [REDACTED] of neglect pertaining to the Subjects.

2. Following an investigation, 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 provided inadequate supervision to a service recipient by falling asleep during your overnight shift.

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, located at [REDACTED], is a short term transitional state operated community residence (SOCR) for male and female adults with various mental health conditions. The facility provides twenty-four hour supervision for the residents and is operated by the [REDACTED] which is a facility or provider agency that is



████████████████████

located in a separate building on the same property as the ██████. Staff Member A was directed by a superior to conduct an unannounced visit of the ██████████ facility and was provided with the key pad code to enable him to enter the facility without staff assistance. Staff Member A was also provided with a key to be used to bypass the door alarm. (Justice Center Exhibits 7 and 9)

9. In the early morning hours of ██████████, Staff Member A entered the facility at approximately 4:05 a.m., to conduct an unannounced inspection. The door alarm sounded very loudly and none of the overnight shift staff came to the door. Within fifteen seconds of activation, Staff Member A used his key to silence the alarm seconds after triggering it. (Justice Center Exhibits 7 and 9)

10. Upon entering the facility, Staff Member A walked through the residence and found all three of the Subjects asleep. Staff Member A found Subject ██████ and Subject ██████ asleep in the dimly lit living room with the television on a low volume. Subject ██████ was laying down on the couch with her eyes closed and legs curled up. Subject ██████ was found in a chair with her head tilted back, mouth open and eyes closed. (Justice Center Exhibits 7 and 9)

11. Staff Member A then proceeded to walk to another dimly lit room at the end of the hallway, where he found Subject ██████ laying fully reclined in a recliner chair in front of the television that was on a low volume. When Staff Member A moved closer to Subject ██████ chair, he could hear Subject ██████ snoring and saw that Subject ██████ had his eyes shut and shoes off. While in the residence, Staff Member A, pretending to be a facility staff member, took a telephone call from another staff person who had called to warn the facility's overnight staff of the unannounced visit. (Justice Center Exhibits 7 and 9)

12. Staff Member A called the ██████ Safety Officer to report that he found staff asleep



13. After entering the facility, Staff Member A walked through the residence for approximately forty-five minutes without being detected or approached by overnight staff. Later, at about 4:56 a.m., Staff Member A walked again into the living room and noticed that Subject [REDACTED] and Subject [REDACTED] were awake. At that time, there was a discussion with Staff Member A. Subject [REDACTED] and Subject [REDACTED] had raised their voices to state their denials that they had fallen asleep. Subject [REDACTED] woke up after hearing the commotion. (Justice Center Exhibits 7 and 9)

- 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 neglect.
- Pursuant to Social Services Law § 493(4), the category of neglect that such act or acts constitute.

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

<sup>2</sup> The acronym [REDACTED] AOC” stands for [REDACTED] Administrator On Call. (Refer to hearing testimony of Investigator [REDACTED], [REDACTED] Clinical Risk Manager)

as a result of an investigation that there is a preponderance of the evidence that the alleged act or acts of neglect occurred....” [Title 14 NYCRR 700.3(f)]

The neglect of a person in a facility or provider agency is defined by SSL § 488. Under SSL §488(1)(h), neglect is defined as:

"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....”

Substantiated reports of neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 3, which is defined under SSL § 493(4)(c) 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 Subject [REDACTED] Subject [REDACTED] and Subject [REDACTED] committed the act or acts of neglect alleged in their substantiated reports that are the subject of the proceeding and that such act or acts constitute the category of neglect as set forth in the substantiated reports. Title 14 NYCRR § 700.10(d).

If the Justice Center proves the alleged neglect, the report(s) 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(s) of neglect cited in the substantiated reports constitute the category of neglect as set forth in the substantiated reports.

If the Justice Center did not prove the neglect by a preponderance of the evidence, the substantiated reports must be amended and sealed.

## DISCUSSION

[REDACTED]

In this case, the main issue in dispute is whether the Subjects committed neglect in failing to provide proper supervision to a service recipient<sup>3</sup> by falling asleep during their overnight shift. The Justice Center's primary evidence in support of the conclusion that the Subjects were asleep during the overnight shift was the written statement of Staff Member A, a [REDACTED] Program Manager at a different residential site, who was assigned to conduct an unannounced inspection or visit to the facility in the early morning hours of [REDACTED]. All three of the Subjects were working at the facility at that time. (Justice Center Exhibits 7 and 9 in Adjudication Cases [REDACTED])

[REDACTED] All three Subjects have denied that they were sleeping during the overnight shift and have raised various defenses.

The Justice Center has established by a preponderance of the evidence that the three Subjects have committed the acts of neglect as described as "Allegation 1" in their substantiated reports dated [REDACTED].

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-13 )

The investigatory interrogations of the three Subjects were conducted by [REDACTED] Human Resource Department, then transcribed and made a part of the record in the Subjects' case. The investigation reports were generated and compiled by Investigator [REDACTED], [REDACTED] Clinical Risk Manager, who was the only witness to testify at the hearing on behalf of the Justice Center.

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<sup>3</sup> At the time the initial report was uploaded to the VPCR, it was not known how many individuals resided at the facility on the date of the alleged incident. Since Resident 1's name was listed as an individual living at the facility, her name was the only name noted as a resident in the initial report. This appears to be the reason why the substantiated report dated [REDACTED] only refers to "a service recipient" even though Subject [REDACTED] clarified during her hearing testimony that there were actually a total of thirteen residents living at the facility at the time of the alleged incident. (Hearing testimony of Subject [REDACTED] and cross-examination testimony of Investigator [REDACTED], [REDACTED] Clinical Risk Manager)

████████████████████  
(Justice Center Exhibit 7)

All three Subjects testified at the hearing and provided no other evidence.

The preponderance of the evidence establishes that while conducting an unannounced visit to the facility on ██████████, Staff Member A entered the facility at approximately 4:05 a.m. The door alarm was then triggered and a loud alarm rang for about fifteen seconds until Staff Member A was able to de-activate the alarm by using a key. No overnight staff came to the door after the alarm initiated and the house residents remained asleep.

Staff Member A then walked through the facility to look for staff. He found all three staff members asleep. Subject ████████ was curled up on a couch with her “eyes closed” in a “darkened” living room with the volume on the television turned down low. Subject ██████ was also in the living room sitting in a chair with her head “tilted back,” “mouth open” and “eyes closed.” Staff Member A proceeded down the hallway to the rear recreational room. Upon entering the rear room, Staff Member A found Subject ██████ fully reclined in a chair with his “eyes closed,” “feet up,” “shoes off,” and television on. As Staff Member A walked closer to the chair where the Subject ██████ was reclining, Staff Member A could hear Subject ██████ “snoring.” (Justice Center Exhibits 7 and 9)

Thereafter, at approximately 4:10 a.m., Staff Member A called his supervisor to report his findings. Then at 4:13 a.m., Staff Member A contacted the ██████ Safety Officer to report his observations and requested to have an officer dispatched to the facility to witness the staff sleeping. At 4:35 a.m., the house telephone rang and Staff Member A answered it, pretending to be a facility staff person. The telephone call was from a staff person at a different facility calling to warn facility staff that based upon a tip received, administration was conducting spot checks. After the telephone call, Staff Member A did not observe any of the facility staff wake up. A second

In his written statement, Staff Member A attested to the accuracy of his eyewitness observations and interactions. Staff Member A's statement and the hearing testimony of all three Subjects have been carefully scrutinized and weight attributed to such evidence based upon its degree of detail, creditability and reliability. (Hearing testimonies of Subject [REDACTED], Subject [REDACTED] and Subject [REDACTED] Justice Center Exhibits 7 and 9 ) The Administrative Law Judge presiding over the hearing has considered the circumstances under which the written statements were initially made, information bearing upon the credibility of the individuals who made the statements and his or her motive to fabricate, and the consistency and degree of inherent believability of the statements.

Staff Member A had no motive to fabricate. However, the Subjects did have concerns about how these allegations could affect their job status. Staff Member A's written statement is extremely persuasive and corroborated by other documentary evidence contained in the record such as the Administrator On Call (AOC) Logs and NYS Office of Mental Health (OMH) Safety

The Subjects have denied the allegations against them and raised many claims in their defense to the charges. During her hearing testimony, Subject [REDACTED] stated that she at no time fell asleep and that about 4:00 a.m. she left the living room to perform a second patrol walk around the facility and then came back to sit in the living room. However, Subject [REDACTED] stated that she never heard the door alarm sound. She also stated that she was awake and texting on her cellular telephone between the hours of 4:20 a.m. and 4:50 a.m., yet offered no proof at the hearing or at the time of her investigative interrogation to substantiate this claim. (Hearing testimony of Subject [REDACTED] and Justice Center Exhibit 7, pp.8-12 of interrogation transcript)

However, during her interrogation, Subject [REDACTED] told the investigator that she first saw the shadow at 4:45 a.m. Subject [REDACTED] further said she could hear Staff Member A talking on the

During Subject [REDACTED] hearing testimony, he denied that he fell asleep with his eyes closed while sitting in the recliner and stated at his investigative interrogation that he was “just resting.” Subject [REDACTED] further stated that at 4:00 a.m., he was watching television and playing games on his cellular telephone until about 4:50 a.m. at which time he started to put his shoes on. Subject [REDACTED] further indicated that, prior to putting his shoes on, he did hear people talking but he thought it was the residents. (Hearing testimony of Subject [REDACTED] and Justice Center Exhibit 7, p.6) The Administrative Law Judge presiding over the hearing, having had the opportunity to evaluate and consider this Subject’s hearing testimony, does not find same to be credible.

The Justice Center has proven by a preponderance of the evidence that all three Subjects committed neglect. While acting as custodians, each Subject breached their custodial duty by

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that Subject [REDACTED], Subject [REDACTED] and Subject [REDACTED]

Although these reports will remain substantiated, the next question to be decided is whether the substantiated reports constitute the category of neglect as set forth in the substantiated reports. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated reports are properly categorized as Category 3 acts. A substantiated Category 3 finding of abuse and/or neglect will not result in the Subjects' names being placed on the VPCR Staff Exclusion List and the fact that the Subjects have Substantiated Category 3 reports will not be disclosed to entities authorized to make inquiry to the VPCR. However, these reports remain subject to disclosure pursuant to NY SSL § 496 (2). The reports as to all three Subjects will be sealed after five years.

**DECISION:** 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.



[REDACTED]

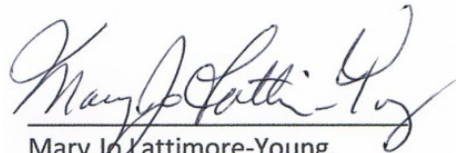
The request of [REDACTED] that the substantiated report dated [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

The request of [REDACTED] that the substantiated report dated [REDACTED] be amended and sealed is denied. The Subject have been shown by a preponderance of the evidence to have committed neglect.

All three substantiated reports have been properly categorized, as Category 3 acts.

This decision is recommended by Mary Jo Lattimore-Young, Administrative Hearings Unit.

**DATED:** August 3, 2016  
West Seneca, New York

  
Mary Jo Lattimore-Young,  
Administrative Law Judge