

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

---

In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

---

**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 is hereby adopted in its entirety.

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 30, 2018  
Schenectady, New York

  
\_\_\_\_\_  
David Molik  
Administrative Hearings Unit

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

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

---

In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

---

**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 is hereby adopted in its entirety.

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 30, 2018  
Schenectady, New York

  
\_\_\_\_\_  
David Molik  
Administrative Hearings Unit

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

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

---

In the Matter of the Appeals of

[REDACTED]

Pursuant to § 494 of the Social Services Law

---

**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #s:**

[REDACTED]

Before:

Keely D. Parr  
Administrative Law Judge

Held at:

Administrative Hearings Unit  
New York State Justice Center for the Protection  
of People with Special Needs  
9 Bond Street – 3<sup>rd</sup> Floor  
Brooklyn, New York 11201  
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: Kevin McGuckin, Esq.

[REDACTED]

[REDACTED]

### **JURISDICTION**

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

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

#### **Allegation 1 [REDACTED]**

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you fell asleep or were less than alert while on duty, during which time a service recipient was not properly supervised.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493(4)(c).

#### **Allegation 1 [REDACTED]**

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you left the residence, during which time service recipients were not properly supervised.

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 reports were retained.

4. The facility, located at [REDACTED], is an Intermediate Care Facility (ICF) operated by [REDACTED] and 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, Subject [REDACTED] was employed by [REDACTED] for approximately four years and Subject [REDACTED] for approximately nine years. Both Subjects worked as Direct Care Counselors (DCC). (Hearing Testimony of Subjects; Justice Center Exhibit 6)

6. At the time of the alleged neglect, Service Recipient #1<sup>1</sup>, assigned to Subject [REDACTED], was a 52-year old non-verbal and non-ambulatory female, with diagnoses of profound intellectual disability, seizure disorder and insulin dependent diabetes mellitus. Service Recipient #1 required total assistance with all activities of daily living and evacuation and required a two-person transfer at all times. (Justice Center Exhibit 6)

7. At the time of the alleged neglect, Service Recipient #2<sup>2</sup>, assigned to Subject [REDACTED], was a 52-year old non-verbal and non-ambulatory female, with diagnoses of profound intellectual disability, spastic quadriplegia and seizure disorder. Service Recipient #3<sup>3</sup>, also assigned to Subject [REDACTED], was a 37-year old non-verbal and non-ambulatory female, with diagnoses of profound intellectual disability, seizure disorder, spastic quadriplegia and Parkinson's disease. Service Recipients #2 and #3 required total assistance with all activities of daily living and evacuation and required a two-person transfer at all times. (Justice Center Exhibit 6)

---

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

8. Subject [REDACTED] was scheduled for a break at 2:00 a.m. and Subject [REDACTED] was scheduled for a break at 1:00 a.m. At approximately 3:20 a.m. the night shift supervisor and the day shift supervisor (the supervisors) arrived at the facility for a surprise visit. They encountered Subject [REDACTED] asleep on the couch. The day shift supervisor said “hello” two times and Subject [REDACTED] did not respond. The supervisors then went to check on the Service Recipients and found Service Recipients #1, #2 and #3, assigned to Subjects [REDACTED] and [REDACTED], saturated in urine. They could not find Subject [REDACTED] in the facility and subsequently found her asleep in her car, with the chair reclined. (Justice Center Exhibit 6)

### **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 reports.
- 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) as:

- (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), including Category 3 as found in SSL § 493(4)(c), 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 abuse and/or neglect alleged in the substantiated reports that are the subject of the proceedings 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 abuse and/or neglect, the reports 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 acts of abuse and/or neglect cited in the substantiated reports constitute the category of abuse and/or 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

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-28) The investigation underlying the substantiated report was conducted by [REDACTED] Special Investigator [REDACTED], who was not available to testify at this hearing. [REDACTED], administrator of investigations for [REDACTED], was the only witness who testified at the hearing on behalf of the Justice Center.

The Subjects testified in their own behalf. Subject [REDACTED] presented two documents. (Subject Exhibit A and B)

The Justice Center has established by a preponderance of the evidence that the Subjects committed an act, described as “Allegation 1” in the substantiated reports. Specifically, the evidence establishes that the Subjects committed neglect.

In order to sustain an allegation of neglect, the Justice Center must prove that the Subjects were custodians who owed a duty to the Service Recipients, that they breached that duty, and that their breach either 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 Recipients. (SSL § 488(1)(h))

On the day of the alleged neglect, both Subjects were employed as DCCs by [REDACTED] and were acting as custodians as that term is defined in Social Services Law § 488(2). The Subjects were required to check on their assigned Service Recipients every half hour and document their condition in the record of night shift assignments. The Subjects were also required to document their breaks on this same form. Subject [REDACTED] documented her assignments up until 3:00 a.m. while no record of night shift assignments was found for Subject [REDACTED]. (Justice Center Exhibits 6 and 15)

When the supervisors arrived unannounced at the facility at 3:20 a.m., they encountered



Subject [REDACTED] asleep on the couch. The supervisors then went to check on the Service Recipients and found Service Recipients #1, #2 and #3, assigned to Subjects [REDACTED] and [REDACTED], saturated in urine. They could not find Subject [REDACTED] in the facility and subsequently found her asleep in her car, with the chair reclined. Neither Subject was on her scheduled break. The Subjects breached their duty to the Service Recipients by not performing rounds every half hour to check on the condition of the Service Recipients assigned to their care. (Justice Center Exhibits 6, 11 and 12).

Subject [REDACTED] argued that she missed her assigned break time and sat down on the couch because she was not feeling well and that she must have “dozed off”. When the day shift supervisor encountered Subject [REDACTED], she was sleeping on the sofa in a fetal position, not reflective of someone who had just dozed off. The day shift supervisor said “hello” two times and Subject [REDACTED] did not respond. Subject [REDACTED] never informed anyone that she was taking her break nor did she tell the nurse on duty that she was not feeling well. It was not until the supervisors told her that she was suspended and she began hyperventilating, that she was brought to the nurse who checked her vital signs and called 911. (Hearing Testimony of Subject [REDACTED]; Justice Center Exhibits 6, 8 and 12)

Subject [REDACTED] testified that no one told her about her assigned break time and that she told Staff [REDACTED] that she was going to her car. However, Subject [REDACTED] testified that she told Subject [REDACTED] that her break was at 1:00 a.m. which is corroborated by both Subject [REDACTED] statement and staff [REDACTED] statement. Subject [REDACTED] further testified that no one told her about the assignment sheets. (Hearing Testimony of Subjects [REDACTED] and [REDACTED]; Justice Center Exhibits 8 and 9)

It is clear from the record that Subject [REDACTED] break time was at 1:00 a.m. and not at 3:30 a.m. when she was found sleeping in her car. It is also clear from Subject [REDACTED] testimony and her statement that she knew that her assigned break time was at 2:00 a.m. and not at 3:20 a.m. when

she was found sleeping on the couch. (Hearing Testimony of Subject [REDACTED]; Justice Center Exhibits 6, 8 and 9)

Although no physical injuries to the Service Recipients were identified, there was a likelihood that the Subjects' breach would result in the serious or protracted impairment of the mental and/or emotional conditions of the Service Recipients. When the day shift supervisor checked Service Recipient #1, who was assigned to Subject [REDACTED], she was wet through her diaper, gown and chuck (bed pad). The night shift supervisor found Service Recipients #2 and #3, assigned to Subject [REDACTED] also wet and discovered Service Recipient #3 moaning and awake. The Service Recipients were completely dependent upon staff for all of their ADL skills, including evacuation and being washed and changed. The Service Recipients were lying in bed soaked in their own urine, helpless to do anything about it. Clearly the Subjects' breach resulted in the protracted impairment of the Service Recipients' mental and emotional conditions. (Justice Center Exhibits 6 and 12)

The evidence establishes that the Subjects committed neglect. 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 reports will not be amended or sealed.

Although the reports will remain substantiated, the next question to be decided is whether the substantiated reports constitute the category of neglect 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 of neglect are properly categorized as Category 3 acts. Substantiated Category 3 findings of abuse and/or neglect will not result in the Subjects' name being placed on the VPCR Staff Exclusion List and the fact that the Subjects have a

Substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the reports remain subject to disclosure pursuant to SSL § 496(2). The reports will be sealed after five years.

**DECISION:** The requests of [REDACTED] and [REDACTED] that the substantiated reports dated [REDACTED], [REDACTED] [REDACTED] be amended and sealed is denied. The Subjects have been shown by a preponderance of the evidence to have committed neglect.

The substantiated reports are properly categorized, as Category 3 acts.

This decision is recommended by Keely D. Parr, Administrative Hearings Unit.

**DATED:** August 16, 2018  
Brooklyn, New York



Keely D. Parr, ALJ