

**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]
[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: Thomas Parisi, Esq.

[REDACTED]
[REDACTED]
[REDACTED]
By: Elizabeth A. Sopinski, Esq.
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P.O. Box F-1706
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[REDACTED]
[REDACTED]
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By: Emily G. Hannigan, Esq.
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54 State Street, Suite 1001
Albany, New York 12207

[Redacted]

[Redacted]

[Redacted]

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By: Emily G. Hannigan, Esq.
Lippes Mathias Wexler Friedman, LLP
54 State Street, Suite 1001
Albany, New York 12207

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] [REDACTED], be amended and sealed is granted. Subject [REDACTED] has not been shown by a preponderance of the evidence to have committed neglect.

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

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

NOW, THEREFORE, IT IS DETERMINED that the record of these reports shall be amended and sealed by the Vulnerable Persons' Central Register, pursuant to SSL § 493(3)(d).

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: March 20, 2017
Schenectady, New York



David Molik
Administrative Hearings Unit

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

In the Matter of the Appeal of

██

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██
████████████████████

Before: John T. Nasci
Administrative Law Judge

Held at: New York State Office Building
44 Hawley Street, Room 1701
Binghamton, New York 13901
On: ████████████████████

Parties: Vulnerable Persons' Central Register
New York State Justice Center for the Protection
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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], [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 [REDACTED]

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, during which time her wheelchair tipped over and she hit her head, causing a brain injury.

This allegation has been SUBSTANTIATED as Category 2 neglect pursuant to Social Services Law § 493(4)(b).

Allegation 1 [REDACTED]

It was alleged that on [REDACTED], regarding an incident that occurred 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 assign adequate staffing for a service recipient as required in her individualized oversight plan.

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, the [REDACTED], located at [REDACTED], is a facility which provides day habilitation services for developmentally and intellectually delayed people who are twenty-one to ninety-five years old. [REDACTED] is operated by the New York State Office for People With Developmental Disabilities (OPWDD), which is an agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of [REDACTED], Justice Center Investigator II)

5. At the time of the alleged neglect, Subject [REDACTED] had been employed by the OPWDD as a Direct Support Assistant (DSA) in [REDACTED] since 1992. Subject [REDACTED] duties included, in pertinent part, assisting service recipients with skills of daily living, which included supervising service recipients on outings. (Hearing testimony of Subject [REDACTED]) Subject [REDACTED] was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged neglect, Subject [REDACTED] had been employed by the OPWDD as a Recreational Therapist (RT) in [REDACTED] since 2012. Subject [REDACTED] duties included, in pertinent part, planning and organizing service recipient activities and outings. (Hearing testimony of Subject [REDACTED]) Subject [REDACTED] was a custodian as that term is so defined in Social Services Law § 488(2).

7. At the time of the alleged neglect, Subject [REDACTED] had been employed by the OPWDD as a Rehabilitation Counselor II (RCII) in [REDACTED] since 2012. Subject [REDACTED] duties included overall supervision of [REDACTED]. (Hearing testimony of Subject [REDACTED]) Subject [REDACTED] was a custodian as that term is so defined in Social

Services Law § 488(2).

8. At the time of the alleged neglect, the Service Recipient was a forty-nine year old female with diagnoses of severe mental retardation and cerebral palsy with marked spasticity. (Justice Center Exhibit 17¹ and Hearing testimony of Staff A [REDACTED]) The Service Recipient was non-verbal and non-ambulatory, and relied on a wheelchair to move around. The Service Recipient had a history of disengaging her wheelchair brakes and propelling her wheelchair using her feet or hands. (Justice Center Exhibit 19/22: audio recording of Justice Center interrogations of Subject [REDACTED], Staff A [REDACTED] and Staff B [REDACTED]; and Hearing testimonies of Subject [REDACTED] and Staff A [REDACTED])

9. When the Service Recipient was in the community, staff were required to provide her with arm's length supervision (ALS) in order to protect her safety. (Justice Center Exhibit 17)

10. On [REDACTED], Subject [REDACTED], Subject [REDACTED], Staff A and Staff B were assigned by Subject [REDACTED] to [REDACTED] morning bowling outing with nine service recipients. Of the nine service recipients, three (including the Service Recipient) were non-ambulatory and remained in their wheelchairs for the duration of the outing. One of the ambulatory service recipients required ALS while in the community. No specific staff was assigned to any specific service recipient during the outing. Subject [REDACTED] remained at [REDACTED] and did not go on the outing. (Justice Center Exhibit 19/22: audio recording of Justice Center

¹ The Justice Center presented individual evidence packets for each of the three Subjects which were accepted into evidence. Justice Center Exhibits 1 through 5 in each of the three evidence packets are unique to the individual Subjects. Justice Center Exhibits 6, 7 and 9 through 18 are identical in each of the three packets. There was no Justice Center Exhibit 8 admitted into evidence for any of the Subjects. Justice Center Exhibits 19 through 22 are identical in Subjects [REDACTED] and [REDACTED] packets. However, there was no Exhibit 20 admitted into evidence for Subject [REDACTED]. The exhibits in the evidence packet for Subject [REDACTED] are numbered 1 through 19. Justice Center Exhibit 19 in Subject [REDACTED] evidence packet contains audio recordings that are identical to those contained in Justice Center Exhibit 22 of the other two Subjects' evidence packets. In this decision, the Justice Center exhibits are referred to as "Justice Center Exhibit (*exhibit number*)" unless the citation refers to a Justice Center exhibit that is unique to a specific Subject, in which case, the Subject's name is specified. The audio recordings are referred to as "Justice Center Exhibit 19/22," meaning, Justice Center Exhibit 19 for Subject [REDACTED] and Justice Center Exhibit 22 for Subjects [REDACTED] and [REDACTED].

interrogations of Subject [REDACTED], Subject [REDACTED], Staff A and Staff B; and Hearing testimonies of Subject [REDACTED], Subject [REDACTED], Subject [REDACTED] and Staff A)

11. Once inside the entrance of the bowling alley, there was a ramp down to the hardwood approach² and the bowling lanes, which were numbered in pairs starting with lanes one and two, and proceeding in ascending order with lanes three and four, five and six, etc. Between each pair of lanes on the approach were the ball returns which physically separated the approach. The approach extended approximately three to four feet behind the ball returns of each set of lanes. At the rear of the approach was a six inch drop-off, or step-down, to a recessed tile floor area which contained chairs, tables and the scoring computers. (Justice Center Exhibit 13 and Hearing testimonies of Subject [REDACTED], Subject [REDACTED] and Staff A)

12. The bowling outings were routine [REDACTED] and had been ongoing for at least ten years prior to the incident. [REDACTED] staff's past practice had been to have the wheelchair-bound service recipients bowl in lane one in order to place their wheelchairs backed-up against the end wall of the bowling alley when they were not bowling. On the [REDACTED] outing, lanes one and two were not in service. As a result, [REDACTED] staff decided to use lanes three, four and five, with the wheelchair-bound service recipients using lane three. (Justice Center Exhibit 13; Justice Center Exhibit 19/22: audio recording of Justice Center interrogations of Subject [REDACTED], Subject [REDACTED], Staff A and Staff B; and Hearing testimonies of Subject [REDACTED], Subject [REDACTED] and Staff A)

13. After arriving at the bowling alley and getting prepared to bowl, Staff A took the three wheelchair-bound service recipients, including the Service Recipient, to lane three, Subject

² The approach is the area of the bowling alley from the rear of the ball return area to the foul line.

██████████ took three of the ambulatory service recipients to lane four and Staff B took the remaining three ambulatory service recipients to lane five. Each staff supervised and assisted their respective service recipients with bowling. Subject ██████████ sat at the scoring table in the recessed tile floor area behind the lane three/lane four ball return and kept score for the service recipients bowling in lanes three and four. Subject ██████████ manipulated the scoring computer for the lane three service recipients so as to allow each wheelchair-bound service recipient to bowl two consecutive frames, thereby making it easier for the service recipients and Staff A, who was supervising and assisting them. (Justice Center Exhibit 19/22: audio recording of Justice Center interrogations of Subject ██████████, Subject ██████████, Staff A and Staff B; and Hearing testimonies of Subject ██████████, Subject ██████████ and Staff A)

14. When Staff A was assisting one of the wheelchair-bound service recipients with bowling, she positioned the other two wheelchair-bound service recipients on the hardwood approach between lane three and lane two, roughly perpendicular to the lane, and engaged the service recipients' wheelchair brakes. While Staff A was assisting one of the wheelchair-bound service recipients with bowling, her back was turned to the other two wheelchair-bound service recipients and she was more than arm's length away from them. (Justice Center Exhibit 11; Justice Center Exhibit 19/22: audio recording of Justice Center interrogation of Staff A; and Hearing testimony of the Staff A)

15. While Staff A was assisting one of the wheelchair-bound service recipients with bowling, while she was more than arm's length away from the Service Recipient, and while she had her back turned to the Service Recipient, the Service Recipient disengaged her wheelchair brakes and rolled backward at an angle toward the edge of the hardwood approach. One of the rear wheels of the Service Recipient's wheelchair rolled over the edge and down six inches to the

recessed tile floor area. As a result, the wheelchair tipped over, causing the Service Recipient to fall to the floor and hit the back of her head on the tile floor. At the moment that this happened, Subject [REDACTED] was in lane four assisting the ambulatory service recipient who required ALS, Staff B was away from the bowling area with three ambulatory service recipients in the shoe return area, and Subject [REDACTED] was at the scoring table in the recessed tile floor area. (Justice Center Exhibits 9, 10, 11, 12 and 14; Justice Center Exhibit 19/22: audio recording of Justice Center interrogations of Subject [REDACTED], Subject [REDACTED], Staff A and Staff B; and Hearing testimonies of Subject [REDACTED], Subject [REDACTED] and Staff A)

16. After the Service Recipient fell, she was treated by emergency responders and airlifted to [REDACTED] Hospital in [REDACTED] where she was treated for a traumatic brain injury. At the hospital, the Service Recipient was diagnosed with a “small, right-sided subdural hematoma,” a “small right frontal/right temporal contusion” and a “small left-sided middle cranial fossa extraaxial hemorrhage.” (Justice Center Exhibit 18)

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 neglect.
- Pursuant to Social Services Law § 493(4), the category of 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 in a facility or provider agency is defined by SSL § 488(1)(h) 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; (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 (2), 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.

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 not established by a preponderance of the evidence that the Subjects ██████████ committed acts, 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. (Subject ██████████: Justice Center Exhibits 1-7 and 9-22; Subject ██████████: Justice Center Exhibits 1-19 and 21-22; and Subject ██████████: Justice Center Exhibits 1-19) The investigation underlying the substantiated report was conducted by ██████████, Justice Center Investigator II, who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subjects each testified in their own behalf and presented one other witness who testified on their behalf.

The facts surrounding the events of ██████████, are not in dispute.

In order to prove neglect, the Justice Center must prove by a preponderance of the evidence that the Subjects breached a custodian's duty that 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))

The Justice Center contends that, because no specific staff was assigned to supervise any specific service recipient on the outing, all staff who were assigned to the outing had a duty to provide the correct level of supervision for all service recipients on the outing. Consequently, the Justice Center contends that Subject [REDACTED] had the duty to maintain ALS of the Service Recipient and breached her duty to the Service Recipient by failing to maintain ALS. Subject [REDACTED] contends that she could not have provided ALS for the Service Recipient because the ball return acted as a physical barrier between lanes three and four and she was assisting three ambulatory service recipients in lane four, one of whom also required ALS.

The record reflects that when Subject [REDACTED], Staff A, Staff B and the service recipients entered the bowling alley, although there were no specific designations, with little communication, if any, the staff assumed specific duties: Staff A went with, supervised and assisted the three wheelchair-bound service recipients in lane three; Subject [REDACTED] went with, supervised and assisted three ambulatory service recipients in lane four, Staff B went with, supervised and assisted the remaining three ambulatory service recipients in lane five; and Subject [REDACTED] assumed scoring responsibilities. Each staff was or should have been familiar with their respective service recipients' IPOPs as a requirement of their employment. Consequently, each staff knew or should have known the required level of supervision for each of the service recipients in his or her care. By tacitly assuming the responsibility for three specific service recipients, each staff also implicitly relied on the other staff to properly perform their duties relating to the other six service recipients.

Because Subject [REDACTED] was supervising three service recipients in lane four and relied on Staff A to supervise the Service Recipient and the other two wheelchair-bound service

recipients in lane three, she did not have a duty to provide ALS for the Service Recipient at the time of her fall. Consequently, the Justice Center has not met its burden of proving that Subject [REDACTED] committed neglect.

[REDACTED]

As stated above, the Justice Center contends that all staff had a duty to provide the correct level of supervision for all service recipients on the outing and, therefore, Subject [REDACTED] had the duty to maintain ALS of the Service Recipient and breached this duty by failing to maintain ALS for the Service Recipient. Subject [REDACTED] contends that he could not have provided ALS for the Service Recipient because he was sitting at the scoring table in the recessed tile floor area and was operating the scoring computer, as well as keeping an eye on the service recipient in lane four who had a seizure disorder and required ALS. (Justice Center Exhibit 10, Justice Center Exhibit 19/22: audio recording of Justice Center interrogation of Subject [REDACTED], and Hearing testimony of Subject [REDACTED]).

As stated above, Subject [REDACTED], Subject [REDACTED], Staff A and Staff B were not assigned to specific service recipients, but instead assumed responsibilities for specific service recipients when they entered the bowling alley. Each staff was or should have been familiar with their respective service recipients' IPOPs as a requirement of their employment and, as such, each staff knew or should have known the required level of supervision for each of the service recipients in their care. By tacitly assuming the responsibility for three specific service recipients, each staff also implicitly relied on the other staff to properly perform their duties relating to the other six service recipients.

Because Staff A assumed responsibility for assisting the three wheelchair-bound service recipients, including the Service Recipient, in lane three, Subject [REDACTED] relied on her to

properly supervise the three service recipients so that he could attend to other duties. Therefore, Subject [REDACTED] did not have a duty to provide ALS for the Service Recipient at the time of her fall. Consequently, the Justice Center has not met its burden of proving that Subject [REDACTED] committed neglect.

[REDACTED]

The Justice Center contends that Subject [REDACTED] was the supervisor who was in charge of staffing the bowling outing and that she failed to assign adequate staffing for the Service Recipient, as required in the Service Recipient's IPOP. Subject [REDACTED] admits that she was responsible for the overall supervision of [REDACTED], including outings, although she relied on the recreational staff to plan and staff the outings. Subject [REDACTED] testified that the [REDACTED] bowling outing was staffed properly with four staff and nine service recipients, that it was a routine outing that had been done many times before and that the staffing level on the outing allowed for proper staffing to remain at [REDACTED]. (Hearing testimony of Subject [REDACTED])

The Justice Center presented no evidence of any facility policy concerning staffing levels on outings. Likewise, there is no evidence in the record that supports the contention that the staffing level of four staff to nine service recipients was insufficient or improper for the bowling outing. Subject [REDACTED] testified that she was aware of the supervision levels of the service recipients who went on the outing, including the Service Recipient, but she did not assign specific staff to specific service recipients because she relied on the seasoned staff, who she assigned to the outing, to use their professional judgment to maintain proper supervision levels during the outing. (Hearing testimony of Subject [REDACTED])

While it is clear that Subject [REDACTED] had a duty, as overall supervisor of [REDACTED]

██████████, to ensure the proper staffing of outings, it has not been shown by a preponderance of the evidence that the ██████████ bowling outing was improperly staffed. Therefore, the Justice Center has not established that Subject ██████████ breached her duty to ensure proper staffing of the outing. Consequently, the Justice Center has not established that Subject ██████████ committed neglect.

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

DECISION:

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

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

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

This decision is recommended by John T. Nasci, Administrative Hearings
Unit.

DATED: March 10, 2017
Schenectady, New York

A handwritten signature in black ink, appearing to be 'J. Nasci', written over a light gray background.

John T. Nasci, ALJ