

**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  
AFTER  
HEARING**

**Adjud. Case #:**

[REDACTED]

Vulnerable Persons' Central Register  
Justice Center for the Protection of People with  
Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
Appearance Waived

Justice Center for the Protection of People with  
Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
By: Juliane O' Brien, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By: Constance R. Brown, Esq.,  
CSEA, Inc.  
143 Washington Avenue  
Capitol Station Box 7125  
Albany, New York 12224

██████████

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 ██████████ that the substantiated report ██████████  
██████████ dated and received on ██████████ be amended  
and sealed is denied. The Subject has been shown by a preponderance of  
the evidence to have committed abuse and neglect.

The substantiations are properly categorized as a Category 2 and a  
Category 3, respectively.

NOW THEREFORE IT IS DETERMINED that the record of this report  
shall be retained in part by the Vulnerable Person's 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:** May 26, 2015  
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

---

**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

[REDACTED]

Before:

Gerard D. Serlin  
Administrative Law Judge

Held at:

New York State Office Building  
Room 115  
333 East Washington Street  
Syracuse, New York 13202  
[REDACTED]

Parties:

Vulnerable Persons' Central Register  
Justice Center for the Protection of People with  
Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
Appearance Waived.

Justice Center for the Protection of People with  
Special Needs

161 Delaware Avenue  
Delmar, New York 12054-1310

By: Juliane O'Brien, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By: Constance R. Brown, Esq.,  
CSEA, Inc.

143 Washington Avenue  
Capitol Station Box 7125  
Albany, New York 12224

## **JURISDICTION**

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and/or 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 report "substantiated" on [REDACTED] [REDACTED] [REDACTED], dated and received on [REDACTED], of abuse and neglect by the Subject of a Service Recipient.

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

### Offense 2<sup>1</sup>

... [O]n [REDACTED], at the [REDACTED], located at [REDACTED] [REDACTED], while acting as a custodian (DA-1), you committed neglect when you failed to provide proper supervision to a service recipient and failed to adhere to her Behavior Support Plan by providing the service recipient the opportunity to access a television remote control from which she removed and swallowed a battery, which was action, inaction, or lack of attention that 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 a service recipient.

This offense has been SUBSTANTIATED as a Category 2 offense pursuant to Social Services Law § 493

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<sup>1</sup> Offense 1 was unsubstantiated after administrative review.

Offense 3

...[O]n [REDACTED], at the [REDACTED], located at [REDACTED] [REDACTED], while acting as a custodian (DA-1), you committed acts of abuse (obstruction of report of reportable incidents) when you attempted to persuade another custodian not to tell anyone that you allowed a service recipient to have unsupervised access to a television remote control and when you denied making such a statement during an interrogation, which was conduct by a custodian to impede the discovery, reporting, or investigation of the treatment of a service recipient by actively persuading a mandated reporter from making a report to the (S)tatewide Vulnerable Persons' Central Register with the intent to suppress the reporting or the investigation of such incident and/or intentionally making a false statement or intentionally withholding material information during an investigation into such report.

This offense has been SUBSTANTIATED as a Category 3 offense pursuant to Social Services Law § 493. (Justice Center Exhibit 1)

3. An Administrative Review was conducted and as a result the substantiated report were retained.

4. The facility, [REDACTED], located at [REDACTED] [REDACTED], is a [REDACTED], Office for People With Developmental Disabilities (OPWDD), operated residential [REDACTED], which is a facility or provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse and neglect, the Subject was employed by the [REDACTED]. The Subject worked as a DA-1.

6. At the time of the alleged abuse and neglect, the Service Recipient had been a resident of the facility for about two and one-half years. The Service Recipient is a person with a diagnosis of mild intellectually disability, borderline personality disorder and depressive disorder. (Justice Center Exhibit 14)

7. The Service Recipient has a long history of ingesting inanimate objects including: batteries, nail polish remover and hand sanitizer. The Service Recipient ingested batteries twice

in [REDACTED]. In [REDACTED] the Service Recipient's Behavioral Support Plan was amended<sup>2</sup> to include among other changes, the requirement of locking certain items including "... electronic items with cords or items without secure battery compartments to reduce the risk of ingesting batteries ..." (Justice Center Exhibit 14) After [REDACTED] the Service Recipient was no longer allowed to have hearing aids because she had twice ingested her hearing aid batteries. (Hearing testimony of [REDACTED], [REDACTED])

8. The Service Recipient shared her bedroom with another resident who owned a television. The television remote control was secured, except when use of the remote control was supervised. The remote control was sometimes secured in a key-locked closet and other times the remote control was secured in a drawer used by the roommate. When the remote control was stored in the roommate's drawer, the drawer was secured with a "child-proof" lock, which was neither a keyed nor a combination lock. (Hearing testimony of [REDACTED]) The "child-proof" locks had been in use in the Service Recipient's bedroom since at least [REDACTED]. (Hearing testimony of [REDACTED], Psychologist 1)

9. At some point during the five-day period preceding [REDACTED], and before the Service Recipient ingested the batteries she found in the remote control, [REDACTED], a [REDACTED] employee, observed the Service Recipient defeat the "child-proof" lock device used to secure one of the drawers in the Service Recipient's room. Upon discovering that the Service Recipient could defeat the "child-proof" lock, [REDACTED] advised the Subject of the same. (Hearing testimony of [REDACTED])

10. On [REDACTED], the Subject turned the television on in the Service

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<sup>2</sup> As of [REDACTED] the Service Recipient's Behavior Support Plan contained some requirement that batteries and items containing same be secured and the Subject was aware of this plan and [REDACTED], Psychologist 1 had completed a "read-and- sign" with the Subject as to this rights restriction. (See Justice Center Exhibit 17 and hearing testimony of [REDACTED], Psychologist 1) Additionally, the Subject was well aware of the Service Recipient's history of ingesting batteries. (Hearing record throughout)

Recipient's bedroom so that the Service Recipient could watch it. The Subject then secured the television remote control in the roommate's drawer which was secured with a "child-proof" lock. While unsupervised, the Service Recipient defeated the "child-proof" lock, obtained the remote control and ingested a battery that she found in the remote control. When the Subject returned to the Service Recipient's room, the Service Recipient advised the Subject that she had ingested a battery. The Subject then arranged for the Service Recipient to be transported to the hospital.

11. The Subject then informed, by text, [REDACTED], Facility Psychologist 1, that the Service Recipient had swallowed a battery from the television remote control and that the remote control had been in the "cabinet." After receiving the text, [REDACTED] spoke with the Subject on the phone.

12. During this conversation, the Subject told [REDACTED] that she "thought that [the Service Recipient] was doing well," that the Subject had left the Service Recipient "alone with the remote to watch" [her roommate's T.V.] and that sometime thereafter the Service Recipient told the Subject that she had ingested a battery. During the telephone conversation with [REDACTED], the Subject stated to [REDACTED]: "Don't tell anyone" she swallowed the battery. (Hearing testimony of [REDACTED], Psychologist 1)

### 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 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 evidence that the alleged act or acts of abuse or neglect occurred...” (Title 14 NYCRR 700.3(f))

Pursuant to SSL §§ 494(1)(a)(b) and (2), and Title 14 NYCRR § 700.6(b), this hearing decision will determine: 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, and if there is a finding of a preponderance of the evidence; whether the substantiated allegations constitute abuse and/or neglect; and pursuant to Social Services Law § 493(4), the category of abuse and/or neglect that such act or acts constitute.

The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488:

- 1 "Reportable incident" shall mean the following conduct that a mandated reporter is required to report to the vulnerable persons' central register:
  - (a) "Physical abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient or causing the likelihood of such injury or impairment. Such conduct may include but shall not be limited to: slapping, hitting, kicking, biting, choking, smothering, shoving, dragging, throwing, punching, shaking, burning, cutting or the use of corporal punishment. Physical abuse shall not include reasonable emergency interventions necessary to protect the safety of any person.
  - (b) "Sexual abuse," which shall mean any conduct by a custodian that subjects a person receiving services to any offense defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law; or any conduct

or communication by such custodian that allows, permits, uses or encourages a service recipient to engage in any act described in articles two hundred thirty or two hundred sixty-three of the penal law. For purposes of this paragraph only, a person with a developmental disability who is or was receiving services and is also an employee or volunteer of a service provider shall not be considered a custodian if he or she has sexual contact with another service recipient who is a consenting adult who has consented to such contact.

- (c) "Psychological abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by verbal or non-verbal conduct, a substantial diminution of a service recipient's emotional, social or behavioral development or condition, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor, or causing the likelihood of such diminution. Such conduct may include but shall not be limited to intimidation, threats, the display of a weapon or other object that could reasonably be perceived by a service recipient as a means for infliction of pain or injury, in a manner that constitutes a threat of physical pain or injury, taunts, derogatory comments or ridicule.
- (d) "Deliberate inappropriate use of restraints," which shall mean the use of a restraint when the technique that is used, the amount of force that is used or the situation in which the restraint is used is deliberately inconsistent with a service recipient's individual treatment plan or behavioral intervention plan, generally accepted treatment practices and/or applicable federal or state laws, regulations or policies, except when the restraint is used as a reasonable emergency intervention to prevent imminent risk of harm to a person receiving services or to any other person. For purposes of this subdivision, a "restraint" shall include the use of any manual, pharmacological or mechanical measure or device to immobilize or limit the ability of a person receiving services to freely move his or her arms, legs or body.
- (e) "Use of aversive conditioning," which shall mean the application of a physical stimulus that is intended to induce pain or discomfort in order to modify or change the behavior of a person receiving services in the absence of a person-specific authorization by the operating, licensing or certifying state agency pursuant to governing state agency regulations. Aversive conditioning may include but is not limited to, the use of physical stimuli such as noxious odors, noxious tastes, blindfolds, the withholding of meals and the provision of substitute foods in an unpalatable form and movement limitations used as punishment, including but not limited to helmets and mechanical restraint devices.

- (f) "Obstruction of report of reportable incidents," which shall mean conduct by a custodian that impedes the discovery, reporting or investigation of the treatment of a service recipient by falsifying records related to the safety, treatment or supervision of a service recipient, actively persuading a mandated reporter from making a report of a reportable incident to the statewide vulnerable persons' central register with the intent to suppress the reporting of the investigation of such incident, intentionally making a false statement or intentionally withholding material information during an investigation into such a report; intentional failure of a supervisor or manager to act upon such a report in accordance with governing state agency regulations, policies or procedures; or, for a mandated reporter who is a custodian as defined in subdivision two of this section, failing to report a reportable incident upon discovery.
- (g) "Unlawful use or administration of a controlled substance," which shall mean any administration by a custodian to a service recipient of: a controlled substance as defined by article thirty-three of the public health law, without a prescription; or other medication not approved for any use by the federal food and drug administration. It also shall include a custodian unlawfully using or distributing a controlled substance as defined by article thirty-three of the public health law, at the workplace or while on duty.
- (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.

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject(s) committed the act or acts of abuse and/or neglect alleged in the

substantiated report that is the subject of the proceeding and that such act or acts constitute the category of abuse and/or neglect as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

Substantiated report of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493:

4. Substantiated report of abuse or neglect shall be categorized into one or more of the following four categories, as applicable:
  - (a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:
    - (i) intentionally or recklessly causing physical injury as defined in subdivision nine of section 10.00 of the penal law, or death, serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, or consciously disregarding a substantial and unjustifiable risk that such physical injury, death, impairment or loss will occur;
    - (ii) a knowing, reckless or criminally negligent failure to perform a duty that: results in physical injury that creates a substantial risk of death; causes death or serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor; or is likely to result in either;
    - (iii) threats, taunts or ridicule that is likely to result in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;
    - (iv) engaging in or encouraging others to engage in cruel or degrading treatment, which may include a pattern of cruel and degrading physical contact, of a service recipient, that results in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;

(v) engaging in or encouraging others to engage in any conduct in violation of article one hundred thirty of the penal law with a service recipient;

(vi) any conduct that is inconsistent with a service recipient's individual treatment plan or applicable federal or state laws, regulations or policies, that encourages, facilitates or permits another to engage in any conduct in violation of article one hundred thirty of the penal law, with a service recipient;

(vii) any conduct encouraging or permitting another to promote a sexual performance, as defined in subdivision one of section 263.00 of the penal law, by a service recipient, or permitting or using a service recipient in any prostitution-related offense;

(viii) using or distributing a schedule I controlled substance, as defined by article thirty-three of the public health law, at the work place or while on duty;

(ix) unlawfully administering a controlled substance, as defined by article thirty-three of the public health law to a service recipient;

(x) intentionally falsifying records related to the safety, treatment or supervision of a service recipient, including but not limited to medical records, fire safety inspections and drills and supervision checks when the false statement contained therein is made with the intent to mislead a person investigating a reportable incident and it is reasonably foreseeable that such false statement may endanger the health, safety or welfare of a service recipient;

(xi) knowingly and willfully failing to report, as required by paragraph (a) of subdivision one of section four hundred ninety-one of this article, any of the conduct in subparagraphs (i) through (ix) of this paragraph upon discovery;

(xii) for supervisors, failing to act upon a report of conduct in subparagraphs (i) through (x) of this paragraph as directed by regulation, procedure or policy;

(xiii) intentionally making a materially false statement during an investigation into a report of conduct described in subparagraphs (i) through (x) of this paragraph with the intent to obstruct such investigation; and

(xiv) intimidating a mandated reporter with the intention of preventing him or her from reporting conduct described in subparagraphs (i) through (x) of this paragraph or retaliating against any custodian making such a report in good faith.

- (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. Report that result in a category two finding not elevated to a category one finding shall be sealed after five years.
- (c) Category three is abuse or neglect by custodians that is not otherwise described in categories one and two. Report that result in a category three finding shall be sealed after five years.
- (d) Category four shall be conditions at a facility or provider agency that expose service recipients to harm or risk of harm where staff culpability is mitigated by systemic problems such as inadequate management, staffing, training or supervision. Category four also shall include instances in which it has been substantiated that a service recipient has been abused or neglected, but the perpetrator of such abuse or neglect cannot be identified.

If the Justice Center proves the alleged abuse and/or 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 abuse and/or neglect as set forth in the substantiated report.

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

### **DISCUSSION**

The Justice Center has established by a preponderance of evidence that the Subject committed the prohibited acts, as described in “Offense 2 and Offense 3” in the substantiated report. The acts committed by the Subject constitute abuse and neglect. The category of the affirmed substantiated neglect that Offense 2 constitutes is Category 2. The category of the

affirmed substantiated abuse that Offense 3 constitutes is Category 3.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-8) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who testified at the hearing on behalf of the Justice Center. [REDACTED], Psychologist 1, also testified on behalf of the Justice Center. The Subject testified on her own behalf. The Subject also called three witnesses to testify on her behalf: [REDACTED]

The first issue to be resolved was whether the Subject's leaving the Service Recipient alone with the remote control in a "child-proof" lock constituted neglect.

During the course of her interrogation with the Justice Center investigator, the Subject stated that she had stored the remote control in the roommate's cabinet which was secured with a zip type-non keyed, non-combination, "child-proof" lock that the Service Recipient must have learned how to defeat. (Hearing testimony of Justice Center investigator [REDACTED]; Justice Center Exhibit 4) The explanation which was provided to the investigator was inconsistent with the explanation the Subject provided to Psychologist [REDACTED].<sup>3</sup> The implication of the initial explanation provided to [REDACTED] was that the Subject simply left the Service Recipient alone with the unsecured television remote control.

During her interrogation the Subject told the investigator that the remote control had been secured with a "child-proof" lock. (Justice Center Exhibit 4) At the hearing, the Subject testified that she had secured the remote in the drawer with a "child-proof" lock. In testimony, the Subject denied having any knowledge that the Service Recipient was capable of defeating the

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<sup>3</sup> [REDACTED] testified that the Subject told her that she "thought that [the Service Recipient] was doing well" and that she (the Subject) left the Service Recipient "alone with the remote to watch" [her roommate's T.V.].

“child-proof” lock. The Subject also denied that she attempted to persuade [REDACTED] to not report the incident.

After considering all of the evidence, and in particular those factors cited above, and having observed the witnesses and the Subject, and having listened to their respective sworn hearing testimony, the Administrative Law Judge presiding over the hearing concludes that the hearing testimony of the Subject is not credited evidence. The respective hearing testimony of [REDACTED], was material and pivotal testimony and is credited evidence.

The Justice Center proved by a preponderance of the evidence that the Subject committed neglect. More specifically, the Justice Center has established by a preponderance of the evidence that the Subject had knowledge that the Service Recipient was motivated to ingest batteries and also had the capability to defeat the “child-proof” lock that the Subject used to secure the remote control. Consequently, the Justice Center has proved by a preponderance of the evidence that the Subject’s action or lack of attention was a breach of her duty to the Service Recipient that was likely to result in physical injury or serious or protracted impairment of the physical condition of the Service Recipient. The category of the affirmed substantiated neglect that such act constitutes is Category 2.

The Justice Center proved by a preponderance of the evidence that the Subject committed abuse. More specifically, the Justice Center has established by a preponderance of the evidence that the Subject actively attempted to persuade a mandated reporter from making a report of a reportable incident to the statewide Vulnerable Persons' Central Register with the intent to suppress the reporting of the investigation of such incident, when the Subject stated to [REDACTED]: “Don’t tell anyone” that the Service Recipient swallowed the battery. The category of the affirmed substantiated abuse that such act constitutes is Category 3.



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

Finally, it is determined that the substantiated report is properly categorized as a Category 2 (neglect) for Offense 2 and Category 3 (abuse) for Offense 3.

**DECISION:**

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

The substantiations are properly categorized as a Category 2 and a Category 3, respectively.

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

**DATED:** May 5, 2015  
Schenectady, New York

  
Gerard D. Serlin, ALJ