

**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

---

**FINAL  
DETERMINATION  
AFTER HEARING**

**Adjud. Case #:**

██████████

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: Jennifer Oppong, Esq.

████████████████████  
████████████████  
██

By: Nicole A. Murphy, Esq.  
Fine, Olin & Anderman, LLP  
39 Broadway, Suite 1910  
New York, New York 10006

██████████

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 ██████████, ██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse and/or neglect.

The substantiated report is properly categorized, as a Category 3 act.

NOW THEREFORE IT IS DETERMINED that the record of this report shall be retained by the Vulnerable Persons Central Register, and will be sealed after five years pursuant to SSL § 493(4)(c).

This decision is ordered by David Molik, Director of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

**DATED:** January 29, 2016  
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:

Jean T. Carney  
Administrative Law Judge

Held at:

Adam Clayton Powell State Office Building  
163 West 125th Street  
New York, New York 10027  
On: ██████████

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: Jennifer Oppong, Esq.

████████████████████

████████████████

██

By: Nicole A. Murphy, Esq.  
Fine, Olin & Anderman, LLP  
39 Broadway, Suite 1910  
New York, New York 10006

### **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 substantiated report dated [REDACTED], [REDACTED] of neglect by the Subject of a Service Recipient.

2. The Justice Center substantiated the report against the Subject. 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 left a service recipient alone with a staff member who was not trained to provide direct care.

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 secure, residential facility, and is operated by the Office for People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice

Center. Wing [REDACTED] of the facility is a Multiple Diagnosis Unit (MDU) where the patients have both developmental and mental health diagnoses.

5. At the time of the alleged neglect, the Subject had been employed by the [REDACTED] for fourteen years. The Subject worked as a Developmental Aide 2 (DA2).

6. At the time of the alleged neglect, the Service Recipients were residents of the facility for an unknown period of time. Service Recipient A was a twenty-five year old woman who functioned within the mild range of intellectual disabilities, with diagnoses of bi-polar disorder, oppositional defiant disorder and post-traumatic stress disorder. Service Recipient B was a twenty-eight year old woman who functioned within the mild range of intellectual disabilities, with a diagnosis of bi-polar disorder. (Justice Center Exhibit 5 and ALJ Exhibits A and B)

7. On [REDACTED], the Subject was assigned as the supervisor to the evening shift on Wing [REDACTED]. The Subject normally worked in a different building, and had not worked on this wing in 5 years. (Justice Center Exhibit 13, Hearing testimony of Subject)

8. At approximately 4:45 p.m., the Subject responded to a crisis call on the wing. Service Recipient B had physically assaulted Service Recipient A. The Subject removed Service Recipient A from the wing and brought her to the core office. The Subject left Service Recipient A with Keyboard Specialist [REDACTED] and told [REDACTED] to have Service Recipient A evaluated by the nurse. (Justice Center Exhibit 5, Hearing testimony of Subject)

9. The Subject assumed that [REDACTED] was a social worker and was an appropriate person to supervise Service Recipient A. The Subject had seen [REDACTED] in the office; but did not ask what her title or job duties were. The Subject knew that Keyboard

Specialists have not been trained to supervise service recipients and therefore would not be appropriate supervisors for service recipients. (Hearing testimony of Subject, and Justice Center Exhibit 14, audio interrogation of Subject)

10. The Subject then went back toward the wing and met DSA [REDACTED] and DSA [REDACTED] in the hallway. DSA [REDACTED] and DSA [REDACTED] had left DSA [REDACTED] alone on the wing with as many as seventeen service recipients to supervise in the midst of this crisis. The Subject told the DSAs to go back on the wing to assist in controlling the crisis. DSA [REDACTED] returned to the wing but DSA [REDACTED] did not. (Hearing testimony of Senior Investigator [REDACTED], Justice Center Exhibits 5 and 14, audio interrogation of Subject)

11. Service Recipient A was left in the care of Keyboard Specialist [REDACTED] for at least fifteen minutes. [REDACTED] ensured that Service Recipient A was seen by the nurse. (Justice Center Exhibit 5, Hearing testimony of Investigator [REDACTED], and Hearing testimony of Subject)

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

The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1)(h), to include:

(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), which is defined as follows:

(a) 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 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).

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 the evidence, the substantiated report must be amended and sealed.

### **DISCUSSION**

The Justice Center has established by a preponderance of the evidence that the Subject committed a prohibited act, described as “Allegation 1” in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-16) The investigation underlying the substantiated report was conducted by Senior Investigator [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified on her own behalf and provided no other evidence. The Administrative Law Judge presiding over this hearing admitted one document on her own motion. (ALJ Exhibit A)

The Justice Center proved by a preponderance of the evidence that the Subject committed neglect by failing to provide proper supervision to Service Recipient A by leaving her in the custody of a person who was not a caregiver. Specifically, the evidence establishes that the Subject left Service Recipient A in the custody of a Keyboard Specialist for at least fifteen minutes. The Subject instructed the Keyboard Specialist to take Service Recipient A to the nurse, and then failed to follow up with the nurse regarding Service Recipient A's welfare.

The facts were not disputed at the hearing. The Subject admitted that she left Service



Recipient A in the custody of Keyboard Specialist [REDACTED] for an unspecified length of time. The Subject had seen [REDACTED] in the core office numerous times; but claimed that she thought [REDACTED] was a social worker. By leaving Service Recipient A with an untrained individual, she breached her duty to the Service Recipient. In addition, the Subject did not follow up to make sure that Service Recipient A was seen by the nurse. This inattention was likely to result in harm to the Service Recipient.

The evidence shows that Service Recipient A was physically assaulted by Service Recipient B and complained of injuries to her head and neck. The Subject admitted to leaving Service Recipient A with [REDACTED] for a period of time<sup>1</sup> while the Subject returned to the unit to control the situation. The Subject assumed that [REDACTED] was an appropriate caregiver; but she did not confirm this assumption with [REDACTED]. (Justice Center Exhibit 14, audio interrogation of Subject, and Hearing testimony of Subject)

After the crisis was resolved, the Subject returned to her office and at some point thereafter, Service Recipient A came into her office. The Subject assumed that Service Recipient A had seen the nurse, but she did not follow up to confirm that assumption. (Hearing Testimony of Subject)

The Subject evinced a lack of attention by assuming [REDACTED] was an appropriate custodian and assuming that Service Recipient A was seen by a nurse. The evidence shows that Service Recipient A was seen by Nurse [REDACTED] at approximately 5:00 p.m. and was given first aid. (Justice Center Exhibit 10) However, this is not a situation where all is well that ends well. Service Recipient A could have been seriously injured, and the Subject did not ensure that Service Recipient A's needs were attended to. In addition, Service Recipient A's target behaviors

---

<sup>1</sup> There is some dispute as to how long Service Recipient A was in [REDACTED] custody. According to the call to the VPCR, [REDACTED] estimated it to be about an hour and fifteen minutes; whereas the Subject estimated it to be about fifteen to twenty minutes.

include emotional and physical outbursts that require complex interventions that only a trained employee should attempt. (ALJ Exhibit A) Therefore, the Subject's breach was likely to result in harm to Service Recipient A.

In her defense, the Subject asserted that she thought [REDACTED] was a social worker and therefore was an appropriate caregiver. However, on cross-examination the Subject admitted that she never asked [REDACTED] whether she was qualified to supervise Service Recipient A. This fact, along with the Subject's testimony that she had not worked on this unit in about five years, compounds her neglect. Being unfamiliar with this wing, the Subject should have assumed nothing. (Hearing testimony of Subject)

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 neglect alleged. The substantiated report will not be amended or sealed.

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category level of abuse or neglect set forth in the substantiated report. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report is properly categorized as a Category 3 act.

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

The substantiated report is properly categorized, as a Category 3 act.

This decision is recommended by Jean T. Carney, Administrative Hearings Unit.

**DATED:** December 21, 2015  
Schenectady, New York



Jean T. Carney  
Administrative Law Judge