

**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: Laurie Cummings, Esq.

[REDACTED]  
[REDACTED]  
[REDACTED]

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 [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 (obstruction of reports of reportable incidents) and neglect.

The substantiated report is 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:** January 13, 2017  
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:

Keely D. Parr  
Administrative Law Judge

Held at:

New York State Justice Center for the Protection  
of People with Special Needs  
9 Bond Street  
Brooklyn, New York 11201  
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: Laurie Cummings, Esq.

[REDACTED]

[REDACTED]

Brooklyn, New York 11226  
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 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 abuse and neglect by the Subject of Service Recipients.

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] House [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you she failed to timely report allegations of abuse and/or neglect against service recipients by staff members.

This allegation has been SUBSTANTIATED as Category 3 abuse (obstruction of reports of reportable incidents) pursuant to Social Services Law § 493(4)(b).

### **Allegation 2**

It was alleged that on [REDACTED], at the [REDACTED] House [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when, after learning of allegations of abuse and/or neglect by staff members against service recipients, you failed to implement plans of protection for the service recipients.

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 group home for persons with intellectual disabilities, operated by the [REDACTED], a division of 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 abuse and neglect, the Subject had been employed by ██████ for approximately 29 years. The Subject worked as a Developmental Assistant 1 (DA1) and had been in that position for approximately ten years. The Subject was the evening mid-level supervisor for House █ and was also assigned to cover House █. (Hearing Testimony of Subject; Justice Center Exhibit 19)

6. At the time of the alleged abuse and neglect, Service Recipient ■ was a 45 year old female with diagnoses of profound retardation and autism. Service Recipient ■ was a 49 year old female functioning in the profound range of intellectual disabilities with a secondary diagnosis of schizophrenia. (Justice Center Exhibits 6 and 12)

7. At the time of the alleged abuse and neglect, Direct Support Assistant (DSA) [REDACTED] was giving medication to Service Recipient [REDACTED] who was sitting on a shower chair over the toilet in the bathroom. DSA [REDACTED] entered the bathroom with Service Recipient [REDACTED], who needed to use the toilet and told DSA [REDACTED] that she was taking too long. When DSA [REDACTED] told DSA [REDACTED] that she was ensuring that Service Recipient [REDACTED] swallowed her medication, DSA [REDACTED] became enraged, yanked the shower chair with Service Recipient [REDACTED] still in it and pushed the shower

chair into the leg of DSA [REDACTED], telling DSA [REDACTED] to “get the f\_ \_k out of the way.” DSA [REDACTED] and DSA [REDACTED] continued to use profanities toward each other in the presence of both Service Recipients. (Justice Center Exhibit 6)

8. Although DSA [REDACTED] denied the altercation, DSA [REDACTED] overheard the shouting between the DSAs and heard DSA [REDACTED] cursing at DSA [REDACTED]. (Justice Center Exhibit 21)

9. At the time of the alleged abuse and neglect, the Subject was at House [REDACTED]. The Subject received a telephone call from DSA [REDACTED] requesting that she return to House [REDACTED] due to a confrontation between DSA [REDACTED] and DSA [REDACTED] that was becoming heated. DSA [REDACTED] reported the incident to the Subject, who was her supervisor. The Subject did not report the incident to the Justice Center. (Hearing Testimony of Subject; Justice Center Exhibits 6 and 21)

10. When the Subject returned to House [REDACTED], she spoke with both DSAs and instructed them not to argue with each other, especially in front of the Service Recipients. The Subject did not separate the DSAs from one another nor did she separate the DSAs from the Service Recipients. (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), to include:

(f) "Obstruction of reports 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.

(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.

Social Services Law §§ 491(1)(a) and (b) require in relevant part that:

- (a) Mandated reporters shall report allegations of reportable incidents to the vulnerable persons' central register...and in accordance with the requirements set forth herein.
- (b) Allegations of reportable incidents shall be reported immediately to the vulnerable persons' central register upon discovery. For purposes of this article, "discovery" occurs when the mandated reporter witnesses a suspected reportable incident or when another person, including the vulnerable person, comes before the mandated reporter in the mandated reporter's professional or official capacity and provides the mandated reporter with reasonable cause to suspect that the vulnerable person has been subjected to a reportable incident.

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:

- (c) 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 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 acts of abuse and/or neglect cited in the substantiated report constitute the category of abuse and 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**

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1- 22) The Justice Center also presented an audio recording of the interrogation of the Subject. (Justice Center Exhibit 22) The Justice Center presented a number of documents obtained from OPWDD related to the Subject's job responsibilities. (Justice Center Exhibits 23-28) The investigation underlying the substantiated report was conducted by Office of Investigations and Internal Affairs (OIIA) Investigator [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and provided no other evidence.

### **Allegation of Abuse (Obstruction of Reports of Reportable Incidents)**

The Subject, through counsel, admitted the facts in Allegation 1 as true. The Subject, as a custodian, is a mandated reporter. A mandated reporter is required to report allegations of reportable incidents to the Justice Center immediately upon discovery. (SSL §§ 488(1)(f)) Where, as here, the mandated reporter does not actually witness a suspected reportable incident, discovery occurs when another person provides the mandated reporter with reasonable cause to suspect that the service recipient was subjected to a reportable incident. (SSL §491(1)(b)) The Subject learned of the incident from DSA [REDACTED] on the evening of [REDACTED]. At that time, the Subject informed the DSAs involved in the incident that the language they used constituted psychological abuse of the Service Recipients. (Justice Center Exhibit 19) Upon discovery, the Subject had a legal obligation to immediately report the incident, which she did not do.

These facts establish by a preponderance of the evidence that the Subject committed the abuse (obstruction of reports of reportable incidents) that was alleged in the substantiated report as contained in Allegation 1.

**Allegation of Neglect**

In order to sustain an allegation of neglect, the Justice Center must prove that the Subject was a custodian who owed a duty to the Service Recipients, that she breached that duty, and that this 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, the Subject was employed by [REDACTED] as a DA1 and was clearly a custodian as that term is defined in Social Services Law § 488(2). The Subject was the mid-level supervisor for House [REDACTED] and had a duty to ensure the health and safety of the Service Recipients. (Justice Center Exhibits 19 and 27) The Subject breached that duty by failing to separate the DSAs who were involved in the incident from the Service Recipients. (Justice Center Exhibit 27)

The Subject arrived at House [REDACTED] after receiving a telephone call from another DSA requesting that she return to the House immediately. Upon arrival, the Subject became aware of the confrontation between DSA [REDACTED] and DSA [REDACTED]. DSA [REDACTED] informed the Subject that DSA [REDACTED] had yanked the shower chair with Service Recipient [REDACTED] on it and pushed the chair into DSA [REDACTED] leg. The Subject was also informed that both DSAs were using profanity towards each other in front of Service Recipient [REDACTED] and Service Recipient [REDACTED]. In fact, the Subject went so far as to tell both DSAs that their profanity constituted psychological abuse to the Service Recipients. (Justice Center Exhibit 19) According to the [REDACTED] Policy and Procedure Manual, the Subject should have immediately separated the DSAs from the Service Recipients, which she did not do. (Justice Center Exhibit 27)

In her defense, the Subject testified that when she returned to House [REDACTED] it was quiet and all

was well; that the Service Recipients were sleeping and both DSAs had calmed down. Additionally, the Subject testified that she spoke with both DSAs and instructed them not to argue with each other, especially in front of the Service Recipients. However, the Subject had a duty to implement a plan of protective oversight which she did not do, including separating the DSAs from the Service Recipients. It was not until [REDACTED] (three days after the incident), when the Treatment Team Leader (TTL) transferred DSA [REDACTED] to another work location. (Justice Center Exhibit 7)

After DSA [REDACTED] yanked the shower chair, a body check was performed on Service Recipient [REDACTED] and no marks or bruises were found. (Justice Center Exhibit 6) Although the Service Recipients were not physically injured, there was a likelihood that the Subject's breach would result in the serious or protracted impairment of the physical, mental or emotional condition of the Service Recipients. By not separating the staff from one another, nor from the Service Recipients, the Subject exposed the Service Recipients to the likelihood of further harm.

The evidence establishes that the Subject committed neglect when, after learning of allegations of abuse and neglect by staff members against service recipients, the Subject failed to implement plans of protection for the Service Recipients.

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.

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse and 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 of abuse and neglect is properly

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categorized as Category 3 acts. Substantiated Category 3 findings of abuse and/or neglect will not result in the Subject's name being placed on the VPCR Staff Exclusion List and the fact that the Subject has a Substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject to disclosure pursuant to SSL § 496(2). The report will be sealed after five years.

**DECISION:**

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 (obstruction of reports of reportable incidents) and neglect.

The substantiated report is properly categorized as Category 3 acts.

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

**DATED:** January 9, 2017  
Brooklyn, New York

  
Keely D. Parr, ALJ