

**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: Theresa Wells, 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] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed 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:** April 17, 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

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**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

[REDACTED]

Before:

Jean T. Carney  
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

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161 Delaware Avenue  
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By: Theresa Wells, Esq.

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By: Nicole A. Murphy, Esq.  
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39 Broadway, Suite 1910  
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## **INTRODUCTION**

The Justice Center has established by a preponderance of the evidence that the Subject committed an 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 1-22B) The investigation underlying the substantiated report was conducted by the Office for People With Developmental Disabilities (OPWDD) Investigator [REDACTED]. OPWDD Lead Internal Investigator [REDACTED] 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.

## **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] of 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 [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you failed to provide adequate supervision to service recipients when you failed to respond, intervene, and mitigate any potential harm while those service recipients were engaged in a verbal and physical altercation.

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

3. The facility, is an Individualized Residential Alternative (IRA) and is operated by OPWDD, which is a provider agency that is subject to the jurisdiction of the Justice Center.

4. At the time of the alleged neglect, the Subject was employed by OPWDD as a Direct Support Assistant (DSA) since 2006. (Hearing testimony of Subject)

5. At the time of the alleged neglect, Service Recipient A was a 42 year old female resident of the facility. Service Recipient A has diagnoses of mild intellectual disability and impulse control disorder. (Justice Center Exhibits 5 and 22A)

6. At the time of the alleged neglect, Service Recipient B was a 22 year old female resident of the facility. Service Recipient B has diagnoses of severe intellectual disability, major depressive disorder, and Prader-Willi Syndrome. (Justice Center Exhibit 5)

7. On [REDACTED], the Subject and Staff D were working the evening shift. Staff D was assigned one-to-one supervision of service recipient C and kitchen duties. The Subject was assigned medication duties and supervision of the other four residents in the IRA that evening. (Justice Center Exhibit 9; Hearing testimony of Lead Investigator [REDACTED])

8. Service Recipient A and Service Recipient B engaged in a verbal altercation that escalated into a physical altercation, resulting in Service Recipient B biting Service Recipient A's forearm. The Subject failed to intervene despite being asked to by Staff 1. (Justice Center Exhibits 5 and 15)

### **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 neglect.
- Pursuant to Social Services Law § 493(4), the category of neglect that such act or acts constitute.

## **DISCUSSION**

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 her 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))

At the time of the alleged neglect, the Subject had been employed by OPWDD as a DSA since 2006, and had worked in this IRA for approximately one month prior to the incident. (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

At the time of the alleged neglect, the Subject was assigned to supervise Service Recipient A and Service Recipient B. (Justice Center Exhibit 15) The Subject had a duty to the Service Recipients, and breached this duty by failing to intervene when they engaged in a verbal altercation. The Subject testified that she attempted to de-escalate the situation by using verbal prompts as required by the Service Recipients' Behavioral Intervention Plans. (Justice Center Exhibits 22A and 22B; Hearing testimony of Subject) However, that intervention was not adequate because the altercation escalated, moved upstairs, and culminated in Service Recipient B biting Service Recipient A. (Justice Center Exhibit 5)

In her defense, the Subject asserted that she was also assigned to dispense medication that night, and therefore was unable to adequately supervise all four service recipients under her care. However, that contention holds little weight. The Subject also testified that in retrospect, she should have taken Service Recipient A down to the medication room with her in order to remove her from the source of her anxiety. Such redirection is also prescribed under Service Recipient

A's Behavioral Intervention Plan, and would have ensured Service Recipient A's safety under the circumstances while attending to the Subject's other duties. (Hearing testimony of Subject; Justice Center Exhibit 22A)

In addition, the Subject admitted that prior to going down to the medication room, she told Staff 1 that she could not deal with Service Recipient B. This remark was in response to Staff 1 asking the Subject to go upstairs and respond to the altercation that was escalating between Service Recipients A and B. (Hearing testimony of Subject) Consequently, the preponderance of the evidence in the record reflects that the Subject breached her duty to the Service Recipients by failing to intervene in the altercation.

Although an injury is not required to support a finding of neglect, the preponderance of the evidence shows that Service Recipient A was injured as a result of the Subject's breach. Service Recipient B bit Service Recipient A, causing an injury which required medical care. (Justice Center Exhibits 6, 7, 10, 14, 15, and 18)

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 of abuse or neglect set forth in the substantiated report. Category 3 is neglect by custodians that is not otherwise described in Categories 1 and 2. (SSL § 493(4)(c)) 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.

Substantiated Category 3 findings of 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 5 years.

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

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

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

**DATED:** March 6, 2017  
Schenectady, New York

  
Jean T. Carney  
Administrative Law Judge