

**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

████████████████████

Pursuant to § 494 of the Social Services Law

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**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.

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██

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

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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 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 15, 2016  
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

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Pursuant to § 494 of the Social Services Law

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**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  
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## 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 abuse and/or 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 Wing [REDACTED] with only one custodian to provide oversight for at least nine 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 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 abuse and/or neglect, the Subject was employed by the [REDACTED] for six years. The Subject worked as a Direct Support Aide (DSA).

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 to the evening shift on wing [REDACTED] along with DSA [REDACTED] and DSA [REDACTED]. The service recipients on the wing were broken down into three groups. Each group consisted of 6-8 patients. and each DSA was assigned to one group. (Justice Center Exhibit 13)

8. The Subject was the only DSA on staff that evening who was regularly assigned to work on that wing. The other staff members were floaters filling in because the facility was short staffed. In addition to the three DSAs assigned to general supervision, two other staff members were assigned 1:1 supervision of individual patients on the wing. (Justice Center Exhibit 14, audio interrogation of Subject)

9. Service Recipient B had been acting out earlier in the day. The day shift supervisor took her off the wing in order to calm her down, and brought her back to the wing at

the end of the day shift. At that point in time, Service Recipient B was still agitated, but responded positively to verbal prompts and calmed down. (Justice Center Exhibit 14, interrogation of DSA [REDACTED])

10. At approximately 4:45 p.m., Service Recipient B physically attacked Service Recipient A, hitting Service Recipient A and pulling her hair. Service Recipient A ran away and tried to hide behind the Subject. The Subject intervened, which resulted in Service Recipient B turning on the Subject and threatening to beat her. (Justice Center Exhibits 5, 14, and Hearing testimony of Subject)

11. DSA [REDACTED] called in a crisis and the evening supervisor, Developmental Assistant 2 (DA2) [REDACTED], responded to the wing. DA2 [REDACTED] took Service Recipient A off the wing and left her with Keyboard Specialist [REDACTED]. DA2 [REDACTED] then went back toward the wing and met the Subject and DSA [REDACTED] in the hallway. DSA [REDACTED] and the Subject had left DSA [REDACTED] alone on the wing with as many as seventeen service recipients to supervise in the midst of this crisis. DA2 [REDACTED] told the Subject and DSA [REDACTED] to go back on the wing to assist in controlling the crisis. The Subject said that she had become the target of Service Recipient B's aggression, and she would only go back on the wing if DA2 [REDACTED] did something about Service Recipient B. (Hearing testimony of Senior Investigator [REDACTED], Hearing testimony of Subject and Justice Center Exhibits 5 and 14)

12. The Subject did not go back on the wing, and after the crisis was resolved, DA2 [REDACTED] assigned the Subject to another unit. (Hearing testimony of Subject, Justice Center Exhibit 14)

### 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 two exhibits on her own motion. (ALJ Exhibits A and B)

The Justice Center proved by a preponderance of the evidence that the Subject committed neglect by failing to provide proper supervision to the Service Recipients in her care. Specifically, the evidence establishes that the Subject left the wing during a crisis situation between Service Recipient A and Service Recipient B. In leaving the wing, the Subject left only one DSA on the wing, who was a floater, to supervise seventeen service recipients. This resulted in a supervision level below the minimum supervision ratio of staff to service recipients.

The facts were not disputed at the hearing. The Subject admitted that she left the wing during a crisis. The Subject also testified that this wing requires three staff for general supervision of the service recipients during the evening shift. By leaving the wing during this crisis, the Subject not only breached her duty to Service Recipients A and Service Recipient B, but also to the other service recipients residing on that wing. Further, the Subject's actions were likely to cause physical harm to the service recipients under her care.

From the beginning of the evening shift on [REDACTED], Service Recipient B was agitated. The evidence shows that she had been removed from the wing for a brief period of time during the day shift, and returned shortly before the evening shift began. DSA [REDACTED] stated in her interrogation that Service Recipient B responded to verbal prompts and calmed down, but then would get agitated again. (Justice Center Exhibit 14)

Service Recipient B's Behavior Plan in place at the time of the incident sets forth the procedure for responding to her target behaviors. Appropriate responses to target behaviors

include, firstly verbal redirection. If unsuccessful, then touch control techniques may be employed. If the aggressive behaviors continue, then staff should clear the area, and remove Service Recipient B and the person toward whom she is being aggressive. Approved Strategies for Crisis Intervention and Prevention (SCIP) techniques include a two person escort; and take down, face up for no more than twenty minutes. (ALJ Exhibit B)

The Subject was trained on SCIP techniques, however there was no evidence introduced at the hearing to suggest that the Subject employed any of these techniques. In fact, the Subject testified that her understanding of Service Recipient B's Behavior Plan did not allow physical intervention. (Justice Center Exhibit 15 and Hearing testimony of Subject) If the subject had followed Service Recipient B's Behavior Plan and employed approved de-escalation techniques as she had been trained to do, this crisis may have been averted.

In her defense, the Subject asserted that she left the wing because she feared for her safety. Service Recipient B's aggression was out of control and now the Subject was the target of this aggression. However, on cross-examination the Subject admitted that to her knowledge, the crisis had been called in and presumably, help was on the way. The Subject further admitted that she knew she was not following protocol by leaving the wing. (Hearing testimony of Subject)

In addition, the evidence shows that the Subject's understanding of Service recipient B's Behavior Plan was not accurate. A SCIP sanctioned physical intervention was allowed under the plan. Therefore the Subject could have de-escalated Service Recipient B's aggression before it escalated to the point where a crisis was called. (ALJ Exhibit B)

Finally, there were several inconsistencies in the Subject's testimony. The Subject testified that she called the core office but there was no answer. The Subject also testified that

she tried to call but the phone on the wing was not working. At another point the Subject testified that Service Recipient B prevented her from calling by breaking the phone. (Hearing testimony of Subject) These varying accounts do not support the Subject's contention that she did everything possible to diffuse the situation. In fact, one thing she could have done, that is follow her training and attempt to de-escalate Service Recipient B's aggression, she failed to do.

The Justice Center proved by a preponderance of the evidence not only that the Subject's inaction and/or lack of attention breached her duty to the Service Recipients, but also that the likely result of such breach was physical injury, or serious or protracted impairment of the physical, mental or emotional condition of 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 neglect alleged. The substantiated report will not be amended or sealed.

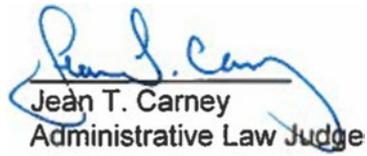
Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category level of abuse or neglect set forth in the substantiated report. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, 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 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