

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
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: Todd Sardella, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: Steven M. Klein, 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 ██████████, ██████████, ██████████ received and dated ██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse.

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: Schenectady, New York
December 31, 2015



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:

John T. Nasci
Administrative Law Judge

Held at:

New York State Office Building
207 Genesee Street, Hearing Room A
Utica, New York 13501
On: ██████████

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
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████████████████████

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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse. 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] [REDACTED], received and dated [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:

Offense 1

It was alleged that on [REDACTED], at [REDACTED], located at [REDACTED] [REDACTED], while acting as a custodian in your capacity as a DSA from [REDACTED], you committed physical abuse when you swatted and/or hit a service recipient's thigh.

This allegation has been SUBSTANTIATED as Category 3 physical abuse pursuant to Social Services Law § 493.

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

4. The facility, located at [REDACTED], is an [REDACTED] [REDACTED] commonly referred to as "[REDACTED]", 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. (See Hearing testimony of the Subject)

5. At the time of the alleged abuse, the Subject had been employed by OPWDD [REDACTED]. The Subject worked as a Direct Support Assistant (DSA). (See Hearing testimony of the Subject)

6. At the time of the alleged abuse, the Service Recipient was approximately sixty years of age and was a resident of [REDACTED]. The Service Recipient was an adult male with a primary diagnosis of profound mental retardation. The Service Recipient is ambulatory but non-verbal and has an intellectual functioning age of one year and six months. (See Justice Center Exhibit 12)

7. On [REDACTED], the Service Recipient was a patient at [REDACTED] Hospital and had been a patient at the hospital for several days. At the time of the incident, the Service Recipient was lying in bed with a catheter in place. The Service Recipient also had padded wrist restraints applied to each of his arms. The restraints were attached to the sides of the bed by hospital staff to prevent the Service Recipient from pulling out the catheter. The Service Recipient also had Velcro secured cuffs (to help with circulation) wrapped around each of his shins. (See Hearing testimony of Nursing Assistant [REDACTED] and Hearing testimony of the Subject) While in the hospital, the Service Recipient was very agitated and very aggressive. The Service Recipient's behaviors included swinging at, clawing at, yelling at and biting hospital staff. The Service Recipient also made multiple attempts to remove his catheter. (See Justice Center Exhibit 12 and Hearing testimony of the Subject)

8. On [REDACTED], the Subject worked his scheduled 3:00 p.m. to 11:00 p.m. shift. As part of his work duties, the Subject was assigned to the hospital for four hours of his shift, to

██████████ sit with the Service Recipient in his hospital room and to supervise the Service Recipient. The Subject arrived at the hospital at approximately 7:00 p.m. for last four hours of his shift. (See Hearing testimony of the Subject)

9. On ██████████, ██████████, a Nursing Assistant (NA) employed by ██████████ Hospital was assigned to work the Service Recipient's floor and her duties included taking patient vitals and attending to other needs of the patients and nurses. In furtherance of her duties, NA ██████████ was in the Service Recipient's room at least once per hour, or four to five times that day. (See Hearing testimony of NA ██████████)

10. On ██████████ at approximately 8:00 p.m. the Subject was sitting next to the Service Recipient's bed to the right of the Service Recipient, on the window side of the bed. The Subject then requested that someone from the hospital come into the room to sit with the Service Recipient while he went to the bathroom. When NA ██████████ came into the room, the Subject stood and moved to the left of the Service Recipient (on the other side of the bed from where he had been sitting). The Subject asked NA ██████████ if the hospital could possibly put foot restraints on the Service Recipient to help keep the Service Recipient from pulling the cuffs off his legs. NA ██████████ told the Subject that she would ask about it. At that time, NA ██████████ was standing at the end of the bed and the Service Recipient was moving his body down the bed trying to get at the cuffs. As the Service Recipient reached for one of the cuffs, the Subject swatted the Service Recipient on his thigh and told the Service Recipient to "Knock it off." (See Justice Center Exhibit 16: audio recording of Justice Center interrogation of the Subject; Hearing testimony of NA ██████████; and Hearing testimony of the Subject)

11. As a result of the ██████████ incident, the Subject was charged with Endangering Incompetent Person, a violation of New York State Penal Law §260.25, a Class E

Felony. Thereafter, the Felony charge was reduced to Second Degree Harassment, and on [REDACTED], the matter was disposed of with an adjournment in contemplation of dismissal. (See Justice Center Exhibits 14 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 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 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:

- (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.

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

If the Justice Center proves the alleged abuse, 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 cited in the substantiated report constitutes the category of abuse as set forth in the substantiated report.

If the Justice Center did not prove the abuse 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 an act, described as “Offense 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 1-15) The Justice Center also presented an audio recording of the OPWDD investigator’s interrogation of the Subject. (See Justice Center Exhibit 16) The investigation underlying the substantiated report was conducted by OPWDD Investigator [REDACTED]¹. [REDACTED], employed by the [REDACTED]

¹ [REDACTED] is presently employed by the Justice Center as an Investigator. (See Hearing testimony of OPWDD Investigator [REDACTED])

██████████ Hospital as a Nursing Assistant (NA), also testified at the hearing in behalf of the Justice Center.

The Subject testified on his own behalf and provided no other evidence.

The Justice Center proved by a preponderance of the evidence not only that the Subject intentionally caused the likelihood of serious impairment of the Service Recipient's emotional condition, but also that the Subject intentionally caused actual serious emotional impairment, through physical contact with the Service Recipient by using his hand to swat the Service Recipient on the Service Recipient's thigh.

Because the Subject worked at the ██████████ as a DSA and the Service Recipient was a resident at the ██████████ at the time of the alleged abuse, it is determined that the Subject was a custodian within the meaning of the statute. (See SSL §488[2]).

The Justice Center must first establish that the Subject's conduct amounted to intentional or reckless physical contact with the Service Recipient. The Justice Center contends that the Subject swatted the Service Recipient in his thigh, and to prove its contention the Justice Center relies solely on the testimony of an eye witness to the ██████████ incident. The record reflects that the eye witness, NA ██████████, acting in her employment capacity at the hospital on ██████████ ██████████, was regularly inside the Service Recipient's hospital room performing her duties. NA ██████████ testified in the hearing that on ██████████, she saw the Subject swat the Service Recipient in the thigh. (See Hearing Testimony of NA ██████████)

The Subject contends that he did not swat the Service Recipient anywhere on his body but instead that he used "touch control" to move the Service Recipient's arm away from the cuff on his leg. The Subject further contends that NA ██████████ account of the incident is incorrect and must be the result of NA ██████████ misinterpretation of his actions. (See

Hearing Testimony of the Subject)

By the Subject's own account, at the time of the incident NA [REDACTED] was standing at the end of the Service Recipient's bed and the Subject was standing to the left of the Service Recipient on the side of the bed. Therefore, NA [REDACTED] had a clear line of sight to the Service Recipient and the Subject, rendering it highly improbable that NA [REDACTED] could have mistaken a "touch" for a "swat" or an arm for a thigh.

Furthermore, there is no evidence in the record from which a conclusion, or even an inference, could be drawn to support the idea that NA [REDACTED] had any motivation to fabricate her account of the incident.

It is therefore determined that NA [REDACTED] version of the incident is credited evidence and that the Subject's version of the incident is deemed not credible.

Having determined that the Subject swatted the Service Recipient in the thigh for the purpose of preventing the Service Recipient from grabbing at the leg cuff, it is determined that the Justice Center has established that the Subject's actions amounted to intentional physical contact with the Service Recipient.

The Justice Center must further establish that the Subject's actions resulted in "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." (See SSL §488[1][a]) The Justice Center presented no evidence of physical injury suffered by the Service Recipient as a result of the Subject's actions. However, the record reflects that immediately after the Subject swatted the Service Recipient's thigh, the Service Recipient was upset, had a bright red face, was grinding his teeth and was staring or glaring at the Subject. (See Justice Center Exhibit 8 and Hearing testimony of NA [REDACTED]) Taking into consideration the Service Recipient's

intellectual age of one year and six months, his resultant fragile emotional state, and his reaction to the Subject's conduct, it is clear that the Subject's actions caused the Service Recipient serious emotional impairment and caused the likelihood of further or additional emotional impairment.

Finally, the use of physical force is not considered physical abuse in a situation where reasonable emergency interventions are necessary to protect the safety of the Service Recipient or any other person. (See SSL §488[1][a]) The record contains no evidence of any emergency situation where the safety of the Service Recipient or anyone else was in jeopardy. Instead, the record reflects that the Subject was simply attempting to prevent the Service Recipient from grabbing the leg cuff, and there is no evidence in the record that supports a conclusion that the Service Recipient grabbing the leg cuff was cause for an emergency intervention.

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

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

This decision is recommended by John T. Nasci, Administrative Hearings Unit.

DATED: December 15, 2015
Schenectady, New York



John T. Nasci, ALJ