

**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: Thomas Parisi, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

██████████

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 hereby granted. The Subject has not been shown by a preponderance of the evidence to have committed abuse and/or neglect.

NOW THEREFORE IT IS DETERMINED that the record of this report shall be amended and sealed by the Vulnerable Persons Central Register, pursuant to SSL § 493(3)(d).

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
February 1, 2016



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

[REDACTED]

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

Mary Jo Lattimore-Young
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center
1200 East & West Road
West Seneca, New York 14224
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
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161 Delaware Avenue
Delmar, New York 12054-1310
By: Thomas Parisi, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

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/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 improperly supervised a service recipient by hitting her in her forehead after she slapped another service recipient, causing her to fall backwards onto a couch.

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

Allegation 2

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed physical abuse when you hit a service recipient on her forehead with enough force to cause her to fall backwards onto a couch.

This allegation has been SUBSTANTIATED as Category 3 physical abuse, 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 an [REDACTED] residence operated by [REDACTED], a not-for-profit organization. [REDACTED] is certified by the New York State Office for People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. There are six individuals who reside at the facility. (Hearing testimony of Investigator [REDACTED] [REDACTED])

5. At the time of the alleged abuse and/or neglect, the Subject had been employed by the facility since [REDACTED] 1985, and had worked as a [REDACTED] Instructor for fourteen years. (Hearing testimony of the Subject and Justice Center Exhibit 2a, page 4)

6. On [REDACTED], the date of the alleged incident, the Subject worked the 6:00 a.m. to 5:00 p.m. shift, though his work hours varied. (Hearing testimony of the Subject)

7. At the time of the alleged abuse and/or neglect, the Service Recipient was thirty-two years old and had been a resident of the facility for approximately thirteen years. The Service Recipient is an individual with a diagnosis of Moderate Intellectual Disability, Psychiatric Disability and chronic physical and mental conditions. At the time of the incident, the Service Recipient was taking medication for an Anxiety Disorder. (Justice Center Exhibit 8 and Hearing testimony of the Subject)

8. On [REDACTED], at approximately 4:45 p.m., while in his office, the Subject heard Staff Member A yelling “stop it” at the Service Recipient. The Subject went to investigate and upon entering the computer room, the Subject saw Service Recipient 1 standing

beside a cabinet and she pointed at her arm and then at the Service Recipient. When the Subject asked the Service Recipient if she had done anything to Service Recipient 1, the Service Recipient raised her right arm and attempted to slap the Subject with her right hand.

9. The Subject then raised his right arm with an open palm hand towards the Service Recipient to block the slap. The Service Recipient then sat down on the couch and began to cry and said, "...it's starting again, what can I do?..." The Subject put his hand on the Service Recipient's shoulder and told her to relax. He then asked her to follow him back to his office. The Service Recipient complied and sat down in the Subject's office where she was able calm herself. (Hearing testimony of the Subject and Justice Center Exhibit 10)

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 neglect of a person in a facility or provider agency is defined by SSL § 488(1). SSL § 488(1)(a) defines physical abuse and SSL §488(1)(h) defines neglect as follows:

- (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.
- (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 under SSL §493(4)(c) as follows:

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

DISCUSSION

The Justice Center has not established by a preponderance of the evidence that the Subject committed the prohibited acts described as “Allegation 1” and “Allegation 2” 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- 12) The investigation underlying the substantiated report was conducted by Investigator [REDACTED], [REDACTED], who testified at the hearing on behalf of the Justice Center. The Subject testified at the hearing on his own behalf and provided no other evidence.

During the course of the investigation, Investigator [REDACTED], [REDACTED], had interviewed the Service Recipient regarding her account of the incident. The Service Recipient told Investigator [REDACTED] that she did not know the Subject, nothing had happened and that she was fine. (Justice Center Exhibit 8, page 3 at the top)

The resolution of this case turns on a question of fact as to whether the Subject had, in

any way, struck, slapped or hit the Service Recipient. The evidence upon which the Justice Center relied consists of written statements provided by two facility staff members. In his hearing testimony, the Subject denied that he engaged in any improper conduct as alleged.

The written statements of Staff Member A and Staff Member B, as well as the Subject's hearing testimony, have been carefully scrutinized and weight attributed to such evidence based upon its degree of creditability and reliability. The Administrative Law Judge presiding over the hearing has considered the circumstances under which the written statements were initially made, information bearing upon the credibility of the individuals who made the statements and his or her motive to fabricate, and the consistency and degree of inherent believability of the statements.

The written statements of Staff Member A and Staff Member B are not credited evidence. A careful review and comparison of the written statements reveal that they are inconsistent as to their descriptions of the most crucial detail of the incident, that is, the manner in which the alleged physical contact occurred between the Subject and the Service Recipient.

Staff Member A's Incident Report dated [REDACTED] states that Staff Member A saw the Subject "...leap and open hand (palm) [the Service Recipient] in the forehead which knocked her back onto the couch..." (Justice Center Exhibit 7) Staff Member B's Incident Report dated [REDACTED] states that after the Subject got the Service Recipient off of Service Recipient 1, the Subject "...took his fingertips (like you [were] making a shadow hand puppet on the wall) and in a punching motion, his fingertips hit [the Service Recipient] in the forehead and ... [she] fell on the couch yelling...." (Justice Center Exhibits 8 and 9)

The written statements of Staff Member A and Staff Member B were inconsistent with each other as to how they each alleged that the Subject made contact with the Service Recipient.

As well, they each lacked crucial details such as where they were located, how close they were standing, and what time it was when the alleged incident occurred.

There was convincing evidence in the record that Staff Member A had a strifeful work relationship with the Subject. Also, both Staff Members knew that the Subject had reported each of them for their alleged job performance failures earlier in the day on [REDACTED]. The Subject had made such report against the Staff Member A and Staff Member B before this alleged incident against the Subject was reported by Staff Member A on [REDACTED]. The Subject argued that Staff Members A and B had a motive to fabricate these allegations against him. In fact, there was uncontroverted evidence in the record that Staff Member A collaborated with Staff Member B with their versions of the allegation before they were interviewed by the investigator. Staff Member B admitted during her investigative interview, that Staff Member A had called her prior to their interview dates to discuss what they were going to say to the investigator when interviewed. (Hearing testimony of Investigator [REDACTED], [REDACTED]; and Justice Center Exhibits 7, 8 and 9)

The Subject's hearing testimony was consistent with his written statement, (Justice Center Exhibit 10) and is credited evidence. During the Subject's testimony, he explained that after he used an open hand to block the Service Recipient's slap, he then asked the Service Recipient to sit down on the couch and she complied. The Subject testified that the Service Recipient began to cry and said "...it's starting again, what can I do?..." then further explained that though he does not understand what this statement means, it is a statement that the Service Recipient has made frequently over the years. The Subject stated that it was not uncommon for the Service Recipient to make seemingly random statements. The Subject was steadfast in his testimony that at the time of the incident, the only staff person in the area was Staff Member A

and that Staff Member B was not present during the incident. (Hearing testimony of the Subject)

The Subject testified that in order to protect himself from being slapped by the Service Recipient's right hand, he made physical contact with the Service Recipient when he raised his right hand in an open palm manner to block the Service Recipient's slap. (Hearing testimony of the Subject) The blocking maneuver utilized by the Subject during the incident is one of the permissible physical intervention practices and techniques under the Guidelines for Crisis Intervention and Prevention - Revised (SCIP-R). This maneuver is mandated and authorized to be used by staff under OPWDD Policy in order to protect the Service Recipient and staff from harm during behavioral episodes. (Hearing testimony of Investigator [REDACTED], [REDACTED] [REDACTED]) As such, the Subject's physical contact with the Service Recipient by using a SCIP-R blocking technique was permissible under the circumstances.


After considering all of the evidence, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed act or acts of abuse and/or neglect as set forth as in Allegation 1 and Allegation 2 of the substantiated report.

As such, the substantiated report will be amended and sealed.

DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED] be amended and sealed is hereby granted. The Subject has not been shown by a preponderance of the evidence to have committed abuse and/or neglect.

This decision is recommended by Mary Jo Lattimore-Young,
Administrative Hearings Unit.

DATED: January 14, 2016
West Seneca, New York



Mary Jo Lattimore-Young,
Administrative Law Judge