

**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
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: Karen J. Halpern, R.N., Esq.
225 Broad Hollow Road, Suite 105E
Melville, New York 11747

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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 granted. The Subject has not been shown by a preponderance of the evidence to have committed physical abuse.

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: May 20, 2016
Schenectady, New York



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**

Adjudication Case #

██████████

Before:

Sharon Golish Blum
Administrative Law Judge

Held at:

Justice Center for the Protection of People with
Special Needs
125 East Bethpage Road, Suite 104
Plainview, New York 11803
On: ██████████

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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By: Theresa Wells, Esq.

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By: Karen J. Halpern, R.N., Esq.
225 Broad Hollow Road, Suite 105E
Melville, New York 11747.

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for physical 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] of physical abuse by the Subject of a Service Recipient.

2. The Justice Center substantiated the report against the Subject. The Justice Center concluded that:

Allegation 2¹

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed physical abuse when you punched a service recipient on his forehead.

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, the [REDACTED], which is part of the [REDACTED], located at [REDACTED], is licensed by the New York State

¹ Allegation 1 in the substantiated report was unsubstantiated.

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Office of Mental Health (OMH), which is a provider agency that is subject to the jurisdiction of the Justice Center.

5. The facility provides twenty-four hour evaluation of and treatment for individuals who require emergency psychiatric services. (Hearing testimony of Administration Manager ██████████)

6. At the time of the alleged physical abuse, the Subject had been employed by the facility as a Registered Nurse (RN) for six years and was certified in psychiatric nursing in ██████████ 2014. He was regularly assigned as a geriatric psychiatric nurse but, at the time of the alleged physical abuse, the Subject was on overnight duty as the ██████████ nurse. (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

7. The ██████████ is a secure locked unit that contains a nurse's room, four examination rooms, a bathroom and a waiting area. On the date of the alleged physical abuse, the overnight staffing in the ██████████ consisted of the Subject as the ██████████ nurse, ██████████ as the psychiatrist, and ██████████, as the resident. (Hearing testimony of ██████████)

8. At the time of the alleged physical abuse, the Service Recipient was eighteen years of age and had been evaluated and treated at the facility on previous occasions for his drug related disorders, violent and aggressive behavior, and suspected psychiatric diagnoses. At approximately 1:00 a.m. on ██████████, the Service Recipient, who was accompanied by his mother, was brought to the ██████████ by the police for evaluation. The Service Recipient's mother was required to wait for the Service Recipient outside of the ██████████. (Hearing testimony of ██████████)

9. At the time that the Service Recipient arrived at the ██████████, he appeared to be under the influence of a substance. The Service Recipient had a history a substance abuse,

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including a suspected use of cocaine. (Hearing testimony of ██████████)

10. At the time that the Service Recipient arrived at the ██████████, another Service Recipient, who was in the process of being discharged by ██████████, was standing in the waiting area of the ██████████. ██████████ triaged the Service Recipient and determined that it was safe to finish discharging the other Service Recipient before commencing her evaluation of the Service Recipient. To give the other Service Recipient privacy, ██████████ directed the Service Recipient to one of the examination rooms and asked him to sit down and wait for her there. (Hearing testimony of ██████████)

11. Shortly thereafter, the Service Recipient repeatedly exited the examination room and demanded to be seen. ██████████ and the Subject repeatedly directed the Service Recipient back to the examination room to wait for ██████████ there. The Service Recipient would not remain in the examination room and, while in the waiting area, the Service Recipient became increasingly agitated and he began to swear and he hit a wall. At that point, while still in the hallway outside of the examination room, as the Subject attempted to escort the Service Recipient back into the examination room, the Service Recipient lunged at the Subject, pinned him into a corner and pummeled him with his fists. (Hearing testimonies of the Subject and ██████████ ██████████)

12. The Subject responded to the attack by restraining one of the Service Recipient's arms with one hand, using his other hand to block the Service Recipient's punches, and turning his head away defensively from the Service Recipient, who had crumpled him into a corner of the hallway and was right on top of him. (Hearing testimony of the Subject)

13. ██████████ was immediately alerted to the altercation by the noise it produced and she approached the Service Recipient from behind and attempted to restrain him,

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but was unsuccessful. At the same time, she yelled to ██████████, and instructed her to push the panic button and call security. Instead, the flustered resident pulled the fire alarm and yelled out of the ██████ door into the adjoining hallway for help. Recognizing that the resident had not done as she was instructed, ██████████ stepped away from assisting the Subject and quickly went to the nurse's room to push the panic button and telephone security. In the meantime, the Service Recipient's mother entered the ██████ through the door that was opened by the resident and began causing a commotion. By the time that ██████████ stepped out of the nurse's room a moment later, Security Officer ██████████ had entered the ██████ and restrained the Service Recipient. (Hearing testimony of ██████████)

14. Once separated from the Subject, the Service Recipient immediately began pacing back and forth in the ██████ waiting area. Thereafter, as the Service Recipient's mother was being escorted out of the ██████, she backtracked and took pictures of the Service Recipient's face with her cellphone. Another security officer then entered the ██████ and escorted the Service Recipient's mother out. Thereafter, the Subject, ██████████, ██████████, and Security Officer ██████████ spoke to the Service Recipient in the ██████ waiting area. The Service Recipient was then left alone in the waiting area, where he continued to walk around and shortly thereafter, outside emergency services arrived. (Justice Center Exhibit 13)

15. Subsequent to his assault of the Subject, the Service Recipient, who had a small amount of dried blood in his nostril, was evaluated by ██████████, an emergency room physician, who determined that no treatment was required. (Hearing testimony of ██████████ ██████████ and Justice Center Exhibit 11)

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 allegation constitutes 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 physical 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 physical abuse of a person in a facility or provider agency is defined by SSL § 488(1)(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 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 not established by a preponderance of the evidence that the Subject committed physical abuse, described as Allegation 2 in the substantiated report.

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-14) The investigation underlying the substantiated report was conducted by the facility investigator RN [REDACTED]. Facility Administration Manager [REDACTED] and facility psychiatrist [REDACTED] testified on behalf of the Justice Center.

The Subject testified at the hearing and presented evidence on his own behalf. (Subject Exhibits A-G).

The Subject testified in a clear and forthright manner that he did not punch the Service Recipient as alleged. The Subject testified that the Service Recipient, who was accompanied by his mother, was brought to the [REDACTED] at approximately 1:00 a.m. on [REDACTED], and that the Service Recipient appeared to be under the influence of a substance at that time. The Subject testified that, although the staff initially thought that the Service Recipient had been brought in

██████████ voluntarily, they later learned that he had been brought to the ██████████ by the police. The Subject testified that it was necessary for the Service Recipient to wait to be seen by ██████████ because there was another service recipient who was in the process of being discharged and that, to protect the privacy of the other service recipient, the Service Recipient was shown to an examination room where he was asked to sit down and wait. The Subject testified that the Service Recipient would not remain in the examination room despite repeated requests that he do so by both himself and ██████████, and that the Subject offered him food and/or drink in an attempt to calm him down. (Hearing testimony of the Subject)

The Subject testified that the Service Recipient lunged at him as he was turning away from the Service Recipient, after the Subject attempted to escort the Service Recipient back to the examination room, and that, because the Subject was caught off guard, the Service Recipient knocked him off balance and slammed him up against the wall, all the while hitting him in the head and groin. The Subject testified that he did not punch the Service Recipient, but instead that he restrained one of the Service Recipient's arms with one hand, used his other hand to block the Service Recipient's punches and turned his head away defensively from the Service Recipient, who had crumpled him into a corner of the hallway and was right on top of him. The Subject testified that the injury to his wrist was not a result of hitting the Service Recipient, but instead that it had occurred when he defended himself against the Service Recipient's punches. The Subject testified that after the Service Recipient had been pulled off of him, he saw a small amount of blood in the Service Recipient's nostril and that the police officer, who later arrested the Service Recipient, told the Subject that the Service Recipient also had bruised knuckles. (Hearing testimony of the Subject)

The Subject testified that although his letter of appeal (Justice Center Exhibit 2) seemed

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to admit that he had injured the Service Recipient, the letter was meant to address the potential argument that he had committed physical abuse by inadvertently using physical force on the Service Recipient while defending himself and the Subject reiterated his unequivocal denial that he had punched the Service Recipient. (Hearing testimony of the Subject)

The Justice Center submitted a visual only video of the incident (Justice Center Exhibit 13), which was played at the hearing during the direct examination of ██████████. ██████████ identified the people in the video and provided a narrative as to the sequence of events, which was accepted as credited evidence. The critical portion of the video shows that at 1:07:38 a.m., the Service Recipient lunged at the Subject in the narrow hallway between the examination rooms and began punching him repeatedly, while pushing him back against the wall. The Subject reacted to the Service Recipient's attack by lifting his arms protectively over his head to block his face and head from the Service Recipient's blows as he stumbled backwards into a corner between the rooms, while the Service Recipient continued to assault him. ██████████, who was standing around the corner speaking to another service recipient, immediately perceived the struggle and ran to the Subject's aid, attempting to pull the Service Recipient off of the Subject. On the other side of the screen, ██████████ is seen opening the door to the ██████████ allowing the Service Recipient's mother to enter and approach the Service Recipient, while he continued his assault on the Subject. In the meantime, ██████████ is seen going into the nurse's room for a moment and when she reemerged, Security Officer ██████████ is seen entering the ██████████ and detaching the Service Recipient from the Subject at 1:08:36 a.m.

Because the video image is grainy and the struggle between the Service Recipient and the Subject is seen in a relatively dark area at the top corner of the screen, the finer details of the struggle are unclear. What is evident, though, is that the video does not show that the Subject

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punched the Service Recipient, as alleged.

The documents that the Justice Center primarily relied on as evidence that the Subject punched the Service Recipient were the Incident Report Form of ██████████ (Justice Center Exhibit 7), the Progress Notes of ██████████ (Justice Center Exhibit 11), and the email from Nurse Supervisor ██████████ (Justice Center Exhibit 10). Of the three, ██████████ was the only one who was present during the incident and the only one who testified at the hearing.

In her Incident Report Form (Justice Center Exhibit 7) ██████████ stated that during the incident, the Subject was able to secure the Service Recipient in a “head steady position,” that the Service Recipient continued to throw unrestrained punches at the Subject, and that the Subject reacted by punching the Service Recipient in the forehead. The Incident Report Form also stated that the subsequent physical examination of the Service Recipient revealed bruising to the forehead and a small amount of blood in the nasal cavities of the Service Recipient, with no pain and no need for further medical interventions, and that the Subject’s hand was injured and required an x-ray.

██████████ provided clear and detailed testimony regarding the events as they unfolded. As is evident from the video, ██████████ confirmed that everything happened very quickly. ██████████ testified that she did not see the Subject punch or in any way conduct himself inappropriately towards the Service Recipient, that she did not see the Subject put his arms near the Service Recipient’s neck or head, that she did not see the Subject hold the Service Recipient in a “head steady position,” and that she did not even know what a “head steady position” was. ██████████ testified that she had briefly stepped away from the Service Recipient and the Subject during the incident to push the panic button and to call security, and that what she observed, while she was trying to restrain the Service Recipient, was

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that the Service Recipient kept punching the Subject despite the Subject's and her attempts to restrain him. ██████████ testified that after the Service Recipient released the Subject, the Subject was shaken but calm and composed, while the Service Recipient displayed an arrogant, mocking, and amused demeanor. ██████████ testified that the Subject's wrist or hand had been injured and the Service Recipient had a bloody nose. (Hearing testimony of ██████████ ██████████)

When ██████████ was questioned at the hearing about the discrepancies between her Incident Report Form (Justice Center Exhibit 7) and her testimony, she explained that it had been the first time that she completed an Incident Report Form and that she misunderstood what was required of her. ██████████ testified that she initially thought that, like medical records, she was required to amalgamate as much information as possible from all available collateral sources into the body of the report. ██████████ testified that those parts of her Incident Report Form that indicate that the Subject punched the Service Recipient and held him in a "head steady position" were taken from other sources that were prepared by people who were not present at the incident and that those parts of her statement were unequivocally untrue. ██████████ testified that after she understood that the Justice Center was relying on her Incident Report Form as evidence that the Subject had punched the Service Recipient, she tried to correct the document, but was not able to correct it because her supervisor told her that she could not change the report because it had become a nursing level issue. (Hearing testimony of ██████████)

██████████ testified that because cocaine users' nostrils bleed easily, the blood in the Service Recipient nose after the incident may well have been from the Service Recipient's exertion during the struggle and that the Service Recipient's forehead injury may have been the result of the Service Recipient banging it into the Subject when he attacked him. (Hearing

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testimony of ██████████)

One of the two other documents that support the allegation that the Subject punched the Service Recipient is the email of Nurse Supervisor ██████████. (Justice Center Exhibit 10). Nurse Supervisor ██████████ sent an email to several people, including facility investigator RN ██████████, in which she stated that the Subject told her about the incident and that the Subject told her that he reacted to the Service Recipient's attack on him by punching the Service Recipient in the forehead.

The Subject testified that he called Nurse Supervisor ██████████ immediately after the incident, that he did not tell her that he punched the Service Recipient and that he did not know why she said that he did. The Subject testified that Nurse Supervisor ██████████ was a new supervisor and that he had little confidence in her trustworthiness. The Subject testified that he noticed that Nurse Supervisor ██████████ was delayed in entering the ██████████ after the Subject called her because she spent time speaking with the Service Recipient's mother outside the ██████████ before she came in and when she did enter the ██████████, she did not ask the Subject about the incident. The Subject testified that he completed a Statement (Justice Center Exhibit 9) at Nurse Supervisor ██████████ direction. The Subject's Statement provides a brief description of the incident that is consistent with his testimony and the testimony of ██████████. The statement does not include any acknowledgement that the Subject punched the Service Recipient. (Hearing testimony of the Subject)

Interestingly, the email of Nurse Supervisor ██████████ (Justice Center Exhibit 10), states that the Service Recipient's mother was present through the incident, an assertion that the video definitively establishes as false. The email of Nurse Supervisor ██████████ states that the Service Recipient's mother threatened to call an attorney and the media, and that she had

██████████ taken pictures after the incident and had shown them to a few people. It also states that, although the Service Recipient was noted to have a bloody nose and a small swelling to his forehead, he was medically evaluated and cleared, and thereafter the Service Recipient was arrested, handcuffed and escorted away by the police.

██████████ examined the Service Recipient after the incident. ██████████ Progress Notes (Justice Center Exhibit 11) state that the Service Recipient received a punch to the nose by the Subject when the Subject tried to control him, that there was a small amount of bleeding, that there was dried blood with no active bleeding and that he was cleared to continue back to the ██████████. The record is unclear as to the source of ██████████ belief that the Subject had punched the Service Recipient on the nose.

The two sources that state that the Subject punched the Service Recipient, were not present during the incident and while ██████████ stated that the punch was to the Service Recipient's nose, Nurse Supervisor ██████████ stated that the punch was to the Service Recipient's forehead. No explanation for this discrepancy was provided by the Justice Center. It is conceivable that Nurse Supervisor ██████████ received her account of the incident from the Service Recipient's mother, when she spoke to her outside of the unit, while ██████████ received his account from the Service Recipient when he examined him after the incident.

Security Officer ██████████ had entered the ██████████ while the Service Recipient was assaulting the Subject and he was the one who successfully detached the Service Recipient from the Subject. Security Officer ██████████ Security Incident Report (Justice Center Exhibit 8) describes his involvement and states only that he was told by the Subject that the Service Recipient attacked him. The statement does not include an allegation that the Subject punched the Service Recipient.

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The testimonies of the Subject and ██████████ (including her explanation for and disavowal of her statement to the contrary in the Incident Report Form), that the Subject did not punch the Service Recipient, were unambiguous, stronger and more credible than the evidence alleging that the Subject punched the Service Recipient, namely the statements of ██████████ and Nurse Supervisor ██████████. The three individuals who were present in the ██████████ while the incident occurred and were actually in a position to observe the struggle, were in the best position to report on whether or not the Subject punched the Service Recipient. The statements and testimonies of the Subject, ██████████, and Security Officer ██████████, that the Subject did not punch the Service Recipient, are consistent with each other. Based on this finding, it is determined that the Subject did not punch the Service Recipient as alleged.

Accordingly, in the final analysis, based on all of the evidence, it is concluded that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the physical abuse under SSL § 488(1)(a), as specified in Allegation 2 of the substantiated report.

DECISION:

The request of ██████████ that the substantiated report dated ██████████, ██████████, ██████████ be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed physical abuse.

This decision is recommended by Sharon Golish Blum, Administrative Hearings Unit.

DATED: May 12, 2016
Plainview, New York



Sharon Golish Blum, Esq.
Administrative Law Judge