

**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: Robert DeCataldo, Esq.

[REDACTED]  
[REDACTED]  
[REDACTED]

By: Eric W. Chen, Esq.  
52 Broadway, 9<sup>th</sup> Floor  
New York, New York 10004

██████████

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 physical abuse and 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:** October 28, 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

[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, 3<sup>rd</sup> Floor  
Brooklyn, NY 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

New York State Justice Center for the Protection  
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By: Robert DeCataldo, Esq.

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[REDACTED]  
[REDACTED]

By: Eric W. Chen, Esq.  
52 Broadway, 9<sup>th</sup> Floor  
New York, New York 10004

## **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 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 physical abuse and/or neglect when you hit, flicked, and/or poked a service recipient's ear.

These allegations have been SUBSTANTIATED as Category 3 physical abuse and 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 an [REDACTED] [REDACTED] serving approximately 22 male and female service recipients who are primarily wheelchair bound. [REDACTED] is operated by [REDACTED], an agency certified by the Office of People With Developmental Disabilities (OPWDD), which is

██████████ a facility or provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse and neglect, the Subject was employed by ██████████

██████████ The Subject worked as a Residential Program Specialist (RPS).

6. At the time of the alleged abuse and neglect, the Service Recipient was a 66 year old verbal, non-ambulatory female, and had been a resident of ██████████ for approximately two years. The Service Recipient is an adult with diagnoses of moderate intellectual disability, hydrocephalus, and several psychological and neurological disorders. (Justice Center Exhibit 7 and Subject Exhibit A)

7. On ██████████ at approximately 1:15 p.m., the Subject was working during the course of her normal shift at ██████████ where she was charged with the custodial care of the Service Recipient. The Subject was in the living room with the Service Recipient that afternoon. (Hearing Testimony of ██████ Investigator ██████████, Hearing Testimony of Subject, and Justice Center Exhibits 7 and 9)

8. Case Manager ██████████ heard the Service Recipient yelling, so she walked into the living room to investigate. The Subject informed the Case Manager that the Service Recipient wanted to use the bathroom, but it was currently occupied. The Case Manager reassured the Service Recipient that she would be taken to the bathroom shortly, and left the living room. (Justice Center Exhibits 7 and 9)

9. A few moments later, Case Manager ██████████ heard the Service Recipient make a crying sound. The Case Manager went back into the living room and saw the Subject, while sitting behind the Service Recipient, “[f]licking [the Service Recipient’s] ear, which was red in color.” When the Subject saw Case Manager ██████████ standing there, the Subject began rubbing the Subject’s back and ears. (Hearing Testimony of ██████ Investigator ██████████, and Justice

Center Exhibits 7 and 9)

10. Case Manager [REDACTED] heard the Service Recipient remark “she hits my ear and I don’t like it.” The Service Recipient also reported to the nurse who examined her for any injuries resulting from this incident that the Subject had hit her. (Justice Center Exhibits 9 and 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 allegations constitute abuse and neglect.
- Pursuant to Social Services Law § 493(4), the category of abuse and neglect that such act or acts constitute.

### **APPLICABLE LAW**

The Justice Center is responsible for investigating allegations of abuse and 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)(a) (“Physical abuse”) and 488(1)(h) (“Neglect”), which includes:

"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.

"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 neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 3 under SSL § 493(4)(c), which is defined 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 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 neglect as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

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

If the Justice Center did not prove the abuse and 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 the acts 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 1-20) The investigation underlying the substantiated report was conducted by [REDACTED] Investigator [REDACTED] who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf, called an additional witness, [REDACTED], and provided one piece of evidence. (Subject Exhibit A)

The Justice Center has proved by a preponderance of the evidence that that the Subject committed both physical abuse and neglect when, while acting as a custodian, the Subject flicked and/or hit the Service Recipient’s ear.

First, there is no dispute in the record that the Subject was acting as a custodian as defined in the statute, during her time of employment at [REDACTED]. The Subject was employed by a provider agency certified by OPWDD, and therefore meets the statute’s definition of custodian. (Hearing Testimony of [REDACTED] Investigator [REDACTED] Hearing Testimony of Subject)

In order to sustain an allegation of physical abuse in this matter, the Justice Center must show that the Subject was a custodian who had physical contact with the Service Recipient; that such contact was either intentional or reckless; and that such contact caused either physical injury or serious or protracted impairment of a Service Recipient’s physical, mental or emotional condition; or caused the likelihood of such injury or impairment.

As described by [REDACTED] Investigator [REDACTED], Case Manager [REDACTED] responded to the Service Recipient yelling, and personally observed the Subject either flicking or hitting the Service



Recipient's ear. Such physical contact was intentional, and the Subject attempted to disguise the intent by rubbing the Service Recipient's shoulders when she observed Case Manager [REDACTED].

(Hearing Testimony of [REDACTED] Investigator [REDACTED] Justice Center Exhibits 6, 9 and 12)

The record reflects that while the nurse did not find any injury to the Service Recipient, Case Manager [REDACTED] described the Service Recipient's ear being red, indicating that the Subject hit and/or flicked the Service Recipient with enough force to leave a mark on her ear. The Service Recipient was crying, and appeared to Case Manager [REDACTED] to be in distress. Additionally, the Service Recipient's remarks to both Case Manager [REDACTED] and the nurse constitute the likelihood of a serious impairment of the either the physical, mental, or emotional condition of the Service Recipient. (Justice Center Exhibits 11 and 12) As such, the Justice Center has met its burden that the Subject committed physical abuse, in violation of SSL § 488(1)(a).

In order to sustain an allegation of neglect, the Justice Center must show that the Subject acted, or failed to act, or lacked attention in such a manner that it breached her duty to the Service Recipient. In addition, the Justice Center must show that this breach either resulted in, or was likely to result in either physical injury, or a serious or protracted impairment of the physical, or mental, or emotional condition of the Service Recipient.

As noted above, the Justice Center has already shown that the Subject committed the physical act of flicking and/or hitting the Service Recipient. That act of physical abuse breached the Subject's duty to the Service Recipient. That act also was likely to result either in physical injury, or a serious or protracted impairment of the Service Recipient's physical, mental or emotional condition. Therefore, the Justice Center has also met its burden to show that the Subject committed Neglect as defined in SSL § 488(1)(h).

The Subject testified both at the hearing and in her statement that she was standing behind

the Service Recipient, attempting to calm her down, when Case Manager [REDACTED] came into the room the second time. In fact, the Subject's statement corroborates much of Case Manager [REDACTED] statement, except that the Subject denies having hit and/or flicked the Service Recipient's ear. In her testimony at the hearing, the Subject contended that Case Manager [REDACTED] could not have seen the Subject from the hallway outside the living room. (Hearing testimony of Subject; justice Center Exhibit 10) However, the record reflects that Case Manager [REDACTED] saw the Subject hit and/or flick the Service Recipient's ear after entering the room. Therefore, the Subject's argument holds no weight. The preponderance of the evidence presented supports the Justice Center's contention that physical abuse and neglect occurred. (Hearing Testimony of [REDACTED] Investigator [REDACTED]; Justice Center Exhibits 6 and 7)

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 and 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 and neglect set forth in the substantiated report. Based upon the totality of the circumstances, the evidence presented and the witnesses' testimony, it is determined that the substantiated report is properly categorized as a Category 3 act.

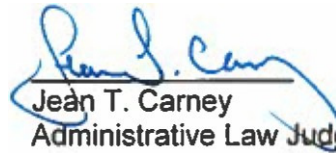
**DECISION:**

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

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

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

**DATED:** October 3, 2016  
Schenectady, New York



Jean T. Carney  
Administrative Law Judge