

**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: 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 [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 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: November 16, 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

[REDACTED]

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

Elizabeth M. Devane
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
Adam Clayton Powell State Office Building
163 West 125th Street
New York, NY 10027
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
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Thomas C. Parisi, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for physical 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] [REDACTED] of physical 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 had physical contact with a service recipient.

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, [REDACTED] located at [REDACTED] [REDACTED], provides short term residential care for youth, and is licensed by the New York State Office of Children and Family Services (OCFS), which is a facility or provider agency that is subject to

the jurisdiction of the Justice Center. (Hearing testimony of OCFS Supervisor [REDACTED]
[REDACTED])

5. At the time of the alleged abuse and/or neglect, the Subject had been employed by [REDACTED] since [REDACTED] 2012 and worked as an AWOL (Absent With Out Leave) Advanced Specialist working with service recipients who were an elopement risk. The Subject also assisted with classroom supervision as needed when she was available to do so. (Hearing testimony of OCFS Supervisor [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 2 and 9)

6. At the time of the alleged physical abuse and/or neglect, the 16 year old female Service Recipient was in the Family Court Assistance Program (FCAP) at [REDACTED] which provided an intermediary residence while the Service Recipient had a court case pending, and she had resided at [REDACTED] for about one week. (Hearing testimony of OCFS Supervisor [REDACTED] Hearing testimony of the Subject; Justice Center Exhibit 9)

7. The Service Recipient had a history of post-traumatic stress disorder and yelling was a behavioral trigger for her, although the Subject was unaware of this. (Hearing testimony of OCFS Supervisor [REDACTED] Hearing testimony of the Subject; Justice Center Exhibits 6, 8, 9, 10, 11, 12 and 17)

8. On [REDACTED], the Subject was monitoring the Service Recipient and three other female service recipients while their assigned teacher was busy elsewhere making copies. Three of the four service recipients were AWOL risks. The Subject was a custodian as that term is defined in Social Services Law §488(2). (Hearing testimony of OCFS Supervisor [REDACTED] [REDACTED] Hearing testimony of the Subject; Justice Center Exhibits 2, 6, 9 and 17)

9. The four service recipients entered their classroom and began taking paperwork off

the teacher's desk and acting inappropriately. The Subject entered the room behind them. The Subject redirected the service recipients and yelled at them to put the items back where they belong and sit down. (Hearing testimony of OCFS Supervisor [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 2, 6, 9, 12, 14, 16, 17 and 19)

10. The Service Recipient got upset and asked the Subject to stop yelling at her. The Service Recipient then flipped over the desk where she had been seated and began to walk toward the door, and out of the classroom. (Hearing testimony of OCFS Supervisor [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 2, 6, 9, 10, 11, 12, 14, 15, 16, 17 and 19)

11. The Subject got in front of the Service Recipient and raised her right arm, in an effort to prevent the Service Recipient from leaving the room. As the Subject raised her arm, it came into contact with the Service Recipient's neck area. (Hearing testimony of OCFS Supervisor [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6, 9, 10 and 19)

12. The Service Recipient got ahead of the Subject and into the hallway when the Subject grabbed the Service Recipient's arm and pulled her back toward the classroom. The Subject and Service Recipient then went back into the classroom. (Hearing testimony of OCFS Supervisor [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 9, 10, 12, 13, 15, 17 and 19)

13. Within the next minute, additional employees went to the room to check on matters and assist the Subject in managing the situation. (Hearing testimony of OCFS Supervisor [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 9, 11, 12, 13, 14 and 19)

14. The Service Recipient returned to her seat, sat down and put her head in her hands. Over the following ten minutes, the Service Recipient became increasingly upset. Employees, including the Subject, unsuccessfully attempted to calm the Service Recipient. The Service

Recipient began to have difficulty breathing and she was taken out of the classroom to be medically assessed. (Hearing testimony of OCFS Supervisor [REDACTED] Hearing testimony of the Subject; Justice Center Exhibits 9, 11, 12, 13, 14, 15, 16, 17 and 19)

15. The Service Recipient was examined by a medical professional at [REDACTED] who assessed the Service Recipient with post-traumatic stress disorder and panic attack. The treatment notes made as a result of the incident instructed staff to maintain a calm environment and avoid loud or angry encounters and altercations. (Justice Center Exhibits 8 and 9)

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 physical abuse of a person in a facility or provider agency is defined by SSL § 488(1)(a) as:

"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.

The neglect of a person in a facility or provider agency is defined by SSL § 488(1)(h)

as:

"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:

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 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 an act of physical abuse and neglect, 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 1-18) as well as DVD video footage. (Justice Center Exhibit 19) The investigation underlying the substantiated report was conducted by OCFS Investigator [REDACTED]. Investigator [REDACTED] was not available to testify at the hearing. OCFS Supervisor [REDACTED] testified in Investigator [REDACTED] stead and was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and provided no other evidence.

Physical Abuse

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. SSL § 488(16) indicates that the

word “recklessly” has the same meaning as provided in New York Penal Law § 15.05. Under New York Penal Law § 15.05(3), a person acts “recklessly with respect to a result or to a circumstance” when the person is “aware of and consciously disregards a substantial and unjustifiable risk that such result will occur.”

The Subject, an AWOL Advanced Specialist at [REDACTED], who at the time of the incident was in charge of the Service Recipient, was a custodian of the Service Recipient as that term is defined in Social Services Law §488(2). There is no dispute that there was some type of physical contact. The video recording of the incident was most illuminating in depicting the physical contact at issue. The video shows the interaction between the Subject and the service recipients in the classroom, the Service Recipient flipping her desk and going toward the room exit and the Subject attempting to get in front of the Service Recipient. The Subject is seen with an object in her left hand, raising her right arm toward the Service Recipient and contacting the Service Recipient at about her neck area. The Subject is further shown grabbing the Service Recipient’s arm at about her wrist area and pulling her back into the classroom from the hallway. (Justice Center Exhibit 19)

The Subject argued that she was using the “arms out hands up” de-escalation technique to stop the Service Recipient from exiting the room. The Subject further argued that an emergency situation was unfolding. She was alone without assistance and in charge of the four service recipients, three of whom were AWOL risks, while the classroom had two exits, including one that went out to street level. The Subject wanted to make sure the service recipients each remained in the classroom.

The Subject’s argument is not credited. As testified to by OCFS Supervisor [REDACTED] [REDACTED] the Subject’s actions did not constitute any approved de-escalation or therapeutic crisis

intervention technique. Additionally, the Subject had an object in her left hand, therefore the technique the Subject described would not have been possible. During the incident, none of the other service recipients made any attempt to leave the classroom toward either exit. Additionally, within a minute of the incident occurring, three other employees came to the room. There was no imminent emergency. The Subject acted recklessly when she subjected the Service Recipient to an “inappropriate level of contact” about the neck and wrist, given the situation. (Hearing testimony of OCFS Supervisor [REDACTED] Justice Center Exhibit 19)

The Subject raised her voice. Yelling was a behavioral trigger for the Service Recipient which caused the Service Recipient to become agitated and try to leave the room. The Subject’s physical contact with the Service Recipient escalated the incident to the extent that the Service Recipient eventually had trouble breathing and had to be medically assessed. The Service Recipient was assessed as suffering from post-traumatic stress disorder and having a panic attack as a result of this incident. Consequently, the contact caused serious or protracted impairment of the Service Recipient’s physical, mental or emotional condition.

As such, the Justice Center has met its burden that the Subject committed physical abuse, in violation of SSL § 488(1)(a).

Neglect

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 shown that the Subject committed physical abuse

when she inappropriately physically contacted the Service Recipient's neck area and pulled the Service Recipient's arm. The Subject had a duty to use techniques authorized by the facility. However, the Subject's actions followed no authorized techniques. (Hearing testimony of OCFS Supervisor [REDACTED]) Therefore, the Subject breached her custodial duty of care to the Service Recipient. The Subject's yelling and physical contact with the Service Recipient resulted in an exacerbation of the Service Recipient's post-traumatic stress disorder and caused the Service Recipient to suffer a panic attack, constituting 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).

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 physical 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 or neglect set forth in the substantiated report. The Subject apologized for any harm caused as a result of the difficult situation. 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. Substantiated Category 3 findings of physical abuse and neglect will not result in the Subject's name being placed on the VPCR Staff Exclusion List and the fact that the Subject has a Substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject to disclosure pursuant to SSL § 496 (2). The report will be sealed after five years.

DECISION:

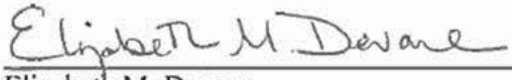
The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED], [REDACTED] be amended and sealed is denied.

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 Elizabeth M. Devane, Administrative Hearings Unit.

DATED: November 3, 2016
Schenectady, New York


Elizabeth M. Devane
Administrative Law Judge