

**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

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Adjud. Case #:

████████████████

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: Jennifer Oppong, Esq.

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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 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 1 act.

NOW, THEREFORE, IT IS DETERMINED that reports resulting in a Category 1 finding shall cause the Subject's name to be permanently placed on the staff exclusion list of the Vulnerable Persons' Central Register (VPCR), and the report to be permanently retained. Thus, the record of this report for abuse (physical abuse) shall be permanently retained by the VPCR, and the Subject's name shall be placed permanently on the staff exclusion list, pursuant to SSL §§ 493(5)(a) and 495.

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 29, 2016
Schenectady, New York

A handwritten signature in black ink, appearing to read "David Molik", is written over a horizontal line.

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:

Jean T. Carney
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street, 3rd Floor
Brooklyn, New York 11201
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
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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] of abuse 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 when you hit a service recipient on the head with a cup, causing a scalp laceration.

This allegation has been SUBSTANTIATED as Category 1 serious physical abuse pursuant to Social Services Law § 493(4)(a).

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

4. The facility, located at [REDACTED], is an [REDACTED] providing services for adults with developmental disabilities and is

operated by [REDACTED]¹, which is a facility certified by the Office for People With Developmental Disabilities, which is a provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse, the Subject was employed by [REDACTED] as a Direct Support Professional (DSP).

6. At the time of the alleged abuse, the Service Recipient was 56 years of age, and had been a resident of the facility for an unknown period of time. The Service Recipient is a verbal, adult female diagnosed with moderate mental retardation, schizophrenia, and personality disorder. (Justice Center Exhibits 5 and 16)

7. The Service Recipient requires minimal assistance in activities of daily living (ADL). She can dress and undress herself independently, as well as feed herself and fix her own snacks. The Service Recipient can do laundry, set the table and load the dishwasher, and clean her room, with minimal assistance. She is able to shower, brush her teeth and brush her hair with minimal assistance, and prefers a certain amount of privacy when showering. (Justice Center Exhibits 16 and 17)

8. The Service Recipient is capable of, and has demonstrated, the ability to verbalize her wants and needs. (Hearing testimonies of [REDACTED], [REDACTED] Supervising Investigator [REDACTED] Justice Center Exhibits 16 and 17)

9. On Monday, [REDACTED] the Service Recipient arrived at her day program and informed the Assistant Manager that her head hurt. The assistant manager examined the Service Recipient's head and found a laceration approximately two inches long, shaped in an arc. Blood had dried in the gash, so that it appeared as if stitches had been applied. The Assistant

¹ At the time of the hearing the facility's name had changed to [REDACTED]

Manager called her supervisor, who called the [REDACTED] to ascertain what had happened, and why no-one from the [REDACTED] had informed the day program of the Service Recipient's injury. At that point, it was discovered that no report of an incident involving the Service Recipient had been noted at the [REDACTED] (Hearing testimony of Assistant Manager [REDACTED]; Justice Center Exhibit 5)

10. The Service Recipient reported to the day program Assistant Manager that the Subject had hit her in the head with a glass cup on Friday evening. The Subject then cleaned the Service Recipient's injury with a washcloth. After that, the Service Recipient went downstairs to get her medications, and then went to bed. (Justice Center Exhibits 5 and 17)

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/or neglect of a person in a facility or provider agency is defined by SSL § 488(1)(a), to include:

"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 1, which is defined in pertinent part as follows:

(a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:

(i) intentionally or recklessly causing physical injury as defined in subdivision nine of section 10.00 of the penal law, or death, serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, or consciously disregarding a substantial and unjustifiable risk that such physical injury, death, impairment or loss will occur;

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 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 and/or neglect as set forth in the substantiated report.

If the Justice Center did not prove the abuse 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, 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 1-16 and 18-20) In addition, the Justice Center presented an audio CD of interviews with the Service Recipient and several staff members who worked at the [REDACTED] the weekend of the incident. (Justice Center Exhibit 17) The investigation underlying the substantiated report was initiated by Justice Center Investigator [REDACTED] and completed by Justice Center Investigator [REDACTED], who testified at the hearing on behalf of the Justice Center. In addition, Justice Center Supervising Investigator [REDACTED] Assistant Manager [REDACTED] and [REDACTED] Residential Program Coordinator [REDACTED] testified on behalf of the Justice Center.

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

The Justice Center proved by a preponderance of the evidence that the Subject committed serious physical abuse when she hit the Service Recipient in the head with a cup, causing a physical injury as defined in Penal Law § 10.00(9).

In order to sustain a substantiation of physical abuse, the Justice Center must show that the Subject acted either recklessly or intentionally; with physical contact; and caused physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. The statute enumerates several forms of such physical contact, including hitting. [SSL § 488(1)(a)]

Here, the Subject hit the Service Recipient in the head with a cup, with sufficient force to cause a laceration. According to the Service Recipient’s statement, the Subject was on the phone, and hit the Service Recipient because she was “acting up”. After causing the injury to the Service Recipient’s head, the Subject cleaned the wound. (Justice Center Exhibit 17: Interview with

Service Recipient) The Service Recipient's statement is corroborated by the fact that she suffered a laceration on her head that was otherwise not explained, and went unreported. Additionally, when the injury was discovered, there appeared to be gauze in the wound. (Justice Center Exhibits 5 and 7; Hearing testimonies of [REDACTED] [REDACTED], and Investigator [REDACTED] Therefore, the evidence supports the contention that the Subject acted either with intent, or recklessly, making physical contact with the Service Recipient, causing an injury.

In her defense, the Subject denies hitting the Service Recipient, and suggests that the injury could have occurred during an altercation between the Service Recipient and another service recipient (S [REDACTED] . There have been occasions where SR[REDACTED] has touched the Service Recipient's belongings, which upsets the Service Recipient. Although, the Subject had no actual knowledge of any such altercation that evening. Additionally, the Subject asserts that the Service Recipient initially reported SR[REDACTED] had hurt her in the head. (Hearing testimony of Subject) However, this assertion is not supported by the evidence. In her interview with the Justice Center Investigator, the Service Recipient said that S [REDACTED] had pulled her hair. The house Manager, [REDACTED], was present during this interview, and asked the Service Recipient who hit her. The Service Recipient replied [REDACTED] which indicates that the hair-pulling was a different situation. (Justice Center Exhibit 17: Interview with Service Recipient) Additionally, the Subject did not explain how SR[REDACTED] [REDACTED] who is blind, could have obtained a cup and hit the Service Recipient in such a manner as to cause this injury, without any staff knowledge. As a result, the Subject's defense is not borne out by the proof.

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. The substantiated report will not be amended or sealed.

Having established that the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse set forth in the substantiated report. The allegation of physical abuse was substantiated as a Category 1 act based on “intentionally or recklessly causing physical injury as defined in subdivision nine of section 10.00 of the penal law, or death, serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, or consciously disregarding a substantial and unjustifiable risk that such physical injury, death, impairment or loss will occur”. SSL § 494[(4)(a)(i)] The penal law (PL) defines physical injury as an impairment of the physical condition or substantial pain. There is no requirement to show that the injuries sustained were serious. [PL § 10.00(9)] Here, the Service Recipient suffered a laceration on her head several inches long, which is sufficient to show physical injury pursuant to penal law § 10.00(9). (Justice Center Exhibit 7) Because the injury was not reported for several days, the Service Recipient suffered a considerable amount of pain, and her treatment was delayed. Therefore the Justice Center has shown that the physical abuse alleged was properly categorized as a Category 1 act.

A substantiated Category 1 finding of abuse will result in the Subject being permanently placed on the VPCR Staff Exclusion list. The fact that the Subject has a substantiated Category 1 report will be disclosed to entities authorized to make inquiry to the VPCR.

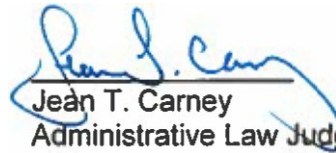
DECISION:

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 abuse.

The substantiated report is properly categorized as a Category 1 act.

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

DATED: November 18, 2016
Schenectady, New York



Jean T. Carney
Administrative Law Judge