

**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: Jacqueline Seitz, Esq.

**[REDACTED]**

By: Russell Wheeler, Esq.  
Charny & Associates  
9 West Market Street  
Rhinebeck, New York 12572

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], [REDACTED] be amended and sealed is denied.

The Subject has been shown by a preponderance of the evidence to have committed 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:** March 6, 2017  
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:

Elizabeth M. Devane  
Administrative Law Judge

Held at:

New York State Justice Center for the Protection  
of People with Special Needs  
Eleanor Roosevelt State Office Building  
4 Burnett Boulevard  
Poughkeepsie, New York 12601  
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

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### **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 kicked a service recipient and escalated his agitation.

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], is a residential facility for adjudicated males, 12 to 18 year of age, and is operated by the Office of Children and Family Services (OCFS), which is a provider agency

that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibit 6)

5. At the time of the alleged abuse and neglect, the Subject had been employed by OCFS since 1997 and was a Youth Division Aide III. The Subject's duties included ensuring the safety, security and supervision of the service recipients in the facility. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibit 32)

6. At the time of the alleged abuse and neglect, the Service Recipient was 14 years old, and had been a resident of the facility since [REDACTED] 2015. The Service Recipient had diagnoses of ADHD, Cannabis Abuse and Disruptive Behavior Disorder. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Justice Center Exhibits 6 and 13)

7. The Service Recipient had a history of aggressive and oppositional behavior and anger problems. When triggered, the Service Recipient had a history of assaultive and threatening behavior toward peers and staff. (Justice Center Exhibits 6 and 13)

8. Pursuant to the Service Recipient's Individual Intervention Plan (IIP), in response to potential crisis, staff must allow the Service Recipient time away from the area to calm down. If an argument occurs, staff is to separate the Service Recipient in order to avoid escalation. Rather than challenge the Service Recipient when he is upset, staff should first offer validation then use direct appeal and redirect his behavior (Justice Center Exhibits 6 and 13)

9. [REDACTED] staff utilize the OCFS Policy and Procedure for Crisis Prevention and Management (CPM) which includes the use of calming and de-escalation techniques in the event of crisis. CPM also includes instruction as to how to manage a crisis should one occur. (Hearing

testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibit 33)

10. Pursuant to CPM, the use of physical restraints can lead to negative outcomes, including risk of serious injury and emotional harm. Physical restraints are only employed after less intrusive methods have been unsuccessfully attempted and only when necessary for safety. The Subject was trained in CPM and up to date with certifications. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibits 32, 33 and 34)

11. At the time of the alleged abuse and neglect, at approximately 4:36 p.m. on [REDACTED], the Subject was monitoring the resident service recipients, including the Service Recipient, in [REDACTED] Unit. The Subject was a custodian of the Service Recipient as that term is defined in Social Services Law §488(2). (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibit 6)

12. At the time of the alleged abuse and neglect, the Service Recipient was in the [REDACTED] Unit Lounge with three other service recipients and four staff. The Subject was seated in a chair. The Service Recipient approached the Subject and kicked the Subject's foot. The Subject kicked the Service Recipient in return and the Service Recipient tripped slightly. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 2, 6, 14, 16, 17, 18, 19, 20, 25, 26)

13. The Subject stood up and words were exchanged between the Subject and the Service Recipient. The situation escalated and the Service Recipient went to push the Subject. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6, 14, 15, 16, 17, 18, 20, 25, 26)

14. Two staff members intervened and attempted to place the Service Recipient in a restraint. The Service Recipient became further agitated and struggled with staff who attempted to restrain him. When the team standing physical restraint failed due to the struggle, the Service Recipient was placed in a single seated restraint until he calmed down. Approximately four minutes passed between the initial attempt at the restraint and the time the Service Recipient was released from the restraint. (Hearing testimony of Justice Center Supervising Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6, 8, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, 25, 26)

15. The Service Recipient was seen by the Nurse but refused an exam. The Service Recipient did not complain of pain and he had no visible injuries. (Justice Center Exhibits 6 and 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 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) and (h), 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.

"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 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 an act or 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 1-22, 26 and 32-36). The Justice Center submitted a visual only video of the incident (Justice Center Exhibit 25) and an audio recording of witnesses’ statements (Justice Center Exhibit 26). The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED]. As Investigator [REDACTED] was unavailable, Justice Center Supervising Investigator [REDACTED] testified in his stead. She was the only witness who testified at the hearing on behalf of the Justice Center.

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

#### **Allegation 1 - Physical Abuse**

The Justice Center proved by a preponderance of the evidence that the Subject committed physical abuse as alleged in Allegation 1. 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(1)(a)) Social Services Law defines "intentionally" and "recklessly" as having the same meaning as provided in New York Penal Law § 15.05. (SSL §488(16)) Under New York State Penal Law, a person acts "intentionally" with respect to a result or conduct when a person has a "... conscious objective ..." to cause a result or engage in such conduct. (PL §15.05(1)) Under New York Penal Law, 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." (PL §15.05(3))

There is no dispute that the Subject was a custodian of the Service Recipient as that term is defined in Social Services Law §488(2). It is also established that the Subject's foot had physical contact with the Service Recipient.

The Subject argued that the contact was either a reflex or an illustrative action. The day of the incident, the Subject wrote in an Activity Report that he "tapped" the Service Recipient's foot as a "reflex reaction" to the Service Recipient kicking him. (Justice Center Exhibit 16) In his [REDACTED] [REDACTED] interrogation, the Subject told Investigator [REDACTED] that after the Service Recipient kicked him, the Subject stood up and lightly tapped the Service Recipient's foot to show the Service Recipient behavior the Subject did not want the Service Recipient to repeat. (Justice Center Exhibit 6 and 26) The Subject wrote in his [REDACTED] request for amendment that, in an attempt to illustrate the youth's unwarranted behavior, he "slightly tapped his foot (not even sure if I made contact) with mine." (Justice Center Exhibit 2) At the hearing, the Subject testified that he kicked the Service Recipient in a reflex reaction then stood up, told the Service Recipient not to kick his

foot and sat back down. (Hearing testimony of the Subject)

The Subject's inconsistent statements are not credited evidence. The video depicts the events as they occurred and provides evidence of the Subject sitting in a chair, the Service Recipient kicking the Subject and the Subject immediately kicking the Service Recipient in return, causing the Service Recipient to trip slightly. The Subject then escalated the situation when he stood up and had words with the Service Recipient. The Service Recipient's agitation escalated. The Service Recipient went to push the Subject and the Service Recipient was then physically restrained. (Justice Center Exhibits 14, 17 and 25) The Subject's actions do not appear reflexive or incidental, but instead a result of the Subject's conscious objective to kick the Service Recipient. Consequently, the Subject's actions are found to be intentional.

The Subject made physical contact with the Service Recipient by intentionally kicking him. Social Services Law specifically lists "kicking" in a non-exclusive list of examples of conduct prohibited by the statute. Further, the Subject kicking the Service Recipient escalated the Service Recipient's agitation and caused the Service Recipient to be restrained. The Subject's conduct caused a likelihood of serious or protracted impairment of the Service Recipient's physical, mental and/or emotional condition.

As such, the Justice Center has met its burden that the Subject committed physical abuse as alleged in Allegation 1.

### **Allegation 1 - Neglect**

The Justice Center proved by a preponderance of the evidence that the Subject committed neglect against the Service Recipient as alleged. In order to sustain an allegation of neglect, the Justice Center must prove that the Subject was a custodian who owed a duty to the Service Recipient, that he breached that duty, and that his breach either resulted in or was likely to result

in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. (SSL § 488(1)(h))

The Subject was a custodian of the Service Recipient as that term is defined in Social Services Law §488(2). It is alleged that the Subject breached his duty as a custodian by kicking the Service Recipient and escalating the Service Recipient's agitation.

The Service Recipient had a history of assaultive and threatening behavior toward peers and staff when triggered. (Justice Center Exhibits 6 and 13) The Service Recipient's IPP directs staff to separate the Service Recipient from the area to calm down and avoid escalation in a potential crisis. When the Service Recipient is upset, staff is directed to offer validation or direct appeal to redirect the Service Recipient's behavior, as opposed to challenging him. (Justice Center Exhibits 6 and 13).

The Subject acted in violation of the Service Recipient's IIP and in violation of CPM when he intentionally kicked the Service Recipient. While the Subject wrote in his [REDACTED] request for amendment that he "clearly made an effort to deescalate the situation by backing away from the youth and sitting back down," the evidence shows otherwise. The Subject not only failed to deescalate the situation, but the Subject's actions themselves triggered the Service Recipient further and escalated the situation. The Service Recipient became upset to the point where physical restraints were employed. Further, the first attempted restraint was unsuccessful. A subsequent restraint had to be employed and the Service Recipient had to be seated on the ground. As specifically stated in CPM, physical restraints can lead to a number of negative outcomes including the risk of serious injury and emotional harm.

The Subject breached his duty as a custodian by kicking the Service Recipient and escalating the Service Recipient's agitation to the point that physical restraints were employed,

resulting in likely physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

As such, the Justice Center has met its burden that the Subject committed neglect as alleged in Allegation 1.

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 or neglect set forth in the substantiated report. 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.


**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 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:** February 21, 2017  
Schenectady, New York



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Elizabeth M. Devane  
Administrative Law Judge