

**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: Laurie Cummings, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By: Nicole A. Murphy, Esq.
Fine, Olin & Anderman, LLP
39 Broadway, Suite 1910
New York, New York 10006

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 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: March 20, 2017
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:

Keely D. Parr
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street – 3rd Floor
Brooklyn, New York 11201
On: [REDACTED]

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
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By: Laurie Cummings, Esq.

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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], while at a doctor's appointment and away from the [REDACTED], located at [REDACTED], while acting as a custodian, you committed physical abuse when you hit a service recipient in the head.

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, located at [REDACTED], is a group home for persons with intellectual disabilities, operated by the [REDACTED]

¹ Allegation 1 was unsubstantiated.

██████████, a division of the Office for People With Developmental Disabilities (OPWDD), which is a provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged physical abuse, the Subject worked as a Developmental Assistant 1 (DA1) and had been in that position for approximately fifteen years. The Subject was assigned to take the Service Recipient to a doctor's appointment at ██████████. (Hearing Testimony of Subject)

6. At the time of the alleged physical abuse, the Service Recipient was a 48 year old female, who had been at the facility since ██████████ 1991 and functioned in the profound range of intellectual disabilities. The Service Recipient was ambulatory, non-verbal and could communicate with some simple sign, facial gestures and body language. (Justice Center Exhibits 6 and 12)

7. On the afternoon of the alleged physical abuse, the Subject and the Service Recipient were dropped off in front of ██████████. Upon entering the lobby, the Subject inquired as to where to go for the Service Recipient's appointment. The concierge informed the Subject that the appointment was on the other side of the hospital. The concierge offered the services of a hospital volunteer to escort the Subject and the Service Recipient to the correct destination for the appointment. The Subject, Service Recipient and hospital volunteer walked through the lobby and down a corridor to a bank of elevators, which they entered. (Hearing Testimony of Subject; Justice Center Exhibit 15 - Interview of ██████████)

8. The hospital volunteer reported that the Service Recipient's feet were dangling from the wheelchair and that the Subject roughly pushed the Service Recipient's feet onto the footrest. In addition, he reported that the Subject repeatedly told the Service Recipient that she was

bad and that while in the elevator, the Subject smacked the Service Recipient on the side of the head. (Justice Center Exhibit 15 - Interview of [REDACTED])

9. The Service Recipient was examined in the emergency room and no bruises or marks of any kind were found. (Justice Center Exhibit 8)

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 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 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 3 as found in 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 committed the act or acts of physical abuse alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of physical abuse as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

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

If the Justice Center did not prove the physical abuse 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 an act, described as “Allegation 2” in the substantiated report. Specifically, the evidence does not establish that the Subject committed physical abuse when she hit the Service Recipient in the head.

In order to sustain an allegation of physical abuse, the Justice Center must prove that the Subject was a custodian and intentionally or recklessly caused, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient or caused the likelihood of such injury or impairment. (SSL § 488(1)(a))

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-15) The investigation underlying the substantiated report was conducted by [REDACTED], Justice Center Investigator, who 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.

The Justice Center submitted a visual only video of the lobby of [REDACTED], which was extremely helpful and illuminating evidence with respect to the substantiated allegation. (Justice Center Exhibit 15 – Surveillance Video)

The Justice Center's entire case is based upon the statement of the hospital volunteer, which is riddled with inconsistencies and negated by other evidence in the record. During the hospital volunteer's interview he stated that the Subject was unnecessarily forceful in putting the Subject's feet on the foot holders of the wheelchair. He further stated that this occurred in the main entrance of [REDACTED], by the concierge desk. (Justice Center Exhibit 15 – Interview of [REDACTED]) However, the video footage which encompasses this entire area, shows no such thing. The video depicts the Subject wheeling the Service Recipient into the lobby of [REDACTED], going to the concierge desk and a few minutes later speaking with the hospital volunteer. The video further shows the Subject, Service Recipient and hospital volunteer walking away from the lobby together. According to the video, the Subject had no physical contact with the Service Recipient whatsoever, save for wheeling her in the wheelchair.

The hospital volunteer next stated that he was concerned about the way the Subject was treating the Service Recipient and therefore felt that he had to escort her to the doctor's appointment. However, the interview of the concierge reveals that the concierge instructed the hospital volunteer to accompany the Subject and Service Recipient to their appointment because

it was located on the other side of [REDACTED]. (Justice Center Exhibit 15 – Interview of [REDACTED])

The hospital volunteer stated that while they were walking, the Subject made disparaging remarks to the Service Recipient, telling her that she was bad over and over again. However, the Subject credibly testified that the Service Recipient had no behaviors that day and denied making these remarks both in her interrogation and at this hearing. The interview of the driver of the van who transported the Subject and the Service Recipient to [REDACTED], confirmed that the Service Recipient had no behavioral issues on the way to [REDACTED]. (Justice Center Exhibit 15 – Interview of [REDACTED])

The hospital volunteer also stated during his interview that the Service Recipient had burn marks on her body; however, the video depicts that the Service Recipient was bundled up and there was no way for the hospital volunteer to see her body. In addition, when the Service Recipient was examined in the emergency room after the hospital volunteer's allegation, no burn marks were noted on the report. (Justice Center Exhibit 8)

The hospital volunteer further alleged that while in the elevator the Subject smacked the Service Recipient in the back of the head. No footage of the video of the hospital elevator was presented by the Justice Center, despite the investigator telling the Subject during her interrogation that he had the video and that "cameras don't lie". At the hearing, the investigator testified that the elevator camera was out on the day of the alleged incident and that there was no video recording. The Subject credibly denied smacking the Service Recipient on her head, testifying that the Service Recipient had no behaviors that day, recalling that she pulled the Service Recipient's hat down on her head, because the hat was too small. During the interrogation, when the investigator stated repeatedly to the Subject that he saw her slap the Service Recipient on the

head based upon the video footage of the elevator which we now know is nonexistent, the Subject kept saying that she did not remember that and that the only thing she would have done would have been to give her a love tap and say good job. The Subject rightfully argued that this was not an admission by the Subject as to the allegation but merely an explanation as to what the investigator thinks that he saw on the non-existent video.

The hospital volunteer's method of answering the investigator's questions was very evasive and at times he did not answer the question at all, instead choosing to add disparaging remarks of his own about the Subject, including that she had a chip on her shoulder and was taking it out on the Service Recipient and that the Subject wanted special treatment.

Following the interview, the hospital volunteer was adamant about not testifying at a court proceeding. (Justice Center Exhibit 6)

Accordingly, for all of the reasons outlined above, the hospital volunteer's statements are not credited. The evidence did not establish that the Subject committed physical abuse by allegedly hitting the Service Recipient in the head.

Accordingly, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the physical abuse alleged. The substantiated report will be amended and sealed.

DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED] 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 Keely D. Parr, Administrative Hearings
Unit.

DATED: March 13, 2017
Brooklyn, New York


Keely D. Parr, ALJ