**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 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: Theresa Wells, Esq.

[redacted]

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

[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] be amended and sealed is denied in part. The Subject has been shown by a preponderance of the evidence to have committed abuse.

The request of [redacted] that the substantiated report dated [redacted] be amended and sealed is granted in part. The Subject has not been shown by a preponderance of the evidence to have committed 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).

[redacted]

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**: February 11, 2016
Schenectady, New York

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: Adam Clayton Powell State Office Building
163 West 125th Street
New York, New York 10027
On: [redacted]

Parties: Vulnerable Persons' Central Register
New York State Justice Center for the Protection of People with Special Needs
161 Delaware Avenue
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[redacted]

## JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [redacted] (the Subject) for abuse and/or 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] of abuse and/or 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], in Wing [redacted] of [redacted], located at [redacted], while acting as a custodian, you committed physical abuse when you punched and kicked a service recipient.

This allegation has been SUBSTANTIATED as Category 3 physical abuse, pursuant to Social Services Law § 493(4)(c).

### Allegation 2

It was alleged that on [redacted], in Wing [redacted] of [redacted], located at [redacted], while acting as a custodian, you committed neglect when you failed to properly intervene when other service recipients, including your assigned 1:1, began to punch and kick a service recipient while he was on the floor and he sustained various injuries and symptoms including lacerations, bruises, visible swelling of his face and jaw, and coughing up blood, all of which prompted staff to send the attacked service recipient to the hospital for a possible head fracture.

[redacted]

This allegation has been SUBSTANTIATED as Category 2 neglect, pursuant to Social Services Law § 493(4)(b).

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

4. The facility, located at [redacted], is a secure, residential facility, and is operated by the Office for People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. Wing [redacted] of the facility is a Multiple Diagnosis Unit (MDU) where the patients have both developmental and mental health diagnoses.

5. At the time of the alleged abuse, the Subject was employed by [redacted] as a Direct Support Aide (DSA). The Subject had been working there for 8 years.

6. At the time of the alleged abuse, Service Recipient A was 44 years old, and had been a resident of the facility for many years. Service Recipient A is a verbal adult male with a diagnosis of autism, seizures, severe intellectual delay, PICA, burst lumbar L3, cataracts, celiac disease, GERD, decubitus, diverticulitis, orthostatic hypertension, pan colitis, and hypernatremia. (Justice Center Exhibit 10)

7. At the time of the alleged neglect, Service Recipient B was 23 years old and had been residing in the facility for about one and a half years. Service Recipient B is a verbal adult male with a diagnosis of mood disorder and cognitive deficit. He has a history of verbal and physical aggression, self-injurious behavior, and suicidal attempts. (Justice Center Exhibit 24)

8. At the time of the alleged abuse and neglect, eighteen service recipients resided in the MDU. The service recipient to staff ratio was 4 to 1. Additionally, 3 service recipients

[redacted]

required enhanced supervision: Service Recipient B required 2 staff supervising him, and 2 other service recipients required 1 to 1 supervision. In order for the unit to be fully staffed, 8 DSAs needed to be on the unit. During the day shift on [redacted], only 3 DSAs were on the unit. (Justice Center Exhibit 8, and Hearing testimony of Subject)

9. Each DSA was assigned 1 to 1 supervision of the service recipients whose plans required enhanced supervision. The Subject was the only DSA assigned to supervise Service Recipient B, whose plan required 2 staff to supervise him. At the top of the staff assignment sheet for [redacted], a handwritten note directs staff to monitor individuals, and Supervisor [redacted] will monitor or check individuals at half hour periods due to lack of staffing. (Justice Center Exhibit 8)

10. The Subject observed that no one was making rounds, so he proceeded to do so, bringing Service Recipient B with him. The Subject approached Service Recipient A in order to secure the remote control for the television. Service Recipient A refused to hand over the remote control. The Subject attempted to take the remote control from Service Recipient A, and Service Recipient A grabbed the Subject's sweater, spit at the Subject, and struck him. (Hearing testimony of Subject, and Justice Center Exhibit 27: audio interview of Subject)

11. While trying to extricate himself from Service Recipient A, the Subject struck Service Recipient A. (Justice Center Exhibit 27: audio interviews of Service Recipient A, and Service Recipient B) Service Recipient B assaulted Service Recipient A, and another service recipient joined the melee. (Hearing testimony of Subject, and Justice Center Exhibit 27: audio interviews of Subject, Service Recipient A, and Service Recipient B) The Subject tried to remove himself and Service Recipient B from the situation. DSA [redacted] was assigned 1 to 1 to the third service recipient involved in the altercation, and she attempted to defuse the situation.

[redacted]

When that did not work, DSA [redacted] left the wing and returned with the Supervisor, [redacted], and another employee; and they were able to get everyone calmed down. (Hearing testimony of Subject, and Justice Center Exhibit 27: audio interview of Subject)

12. As a result of the altercation, Service Recipient A suffered from a black eye and several scrapes to his knees. Service Recipient A was taken to the hospital for treatment and then moved to a different unit at [redacted]. (Justice Center Exhibits 5 and 15) Service Recipient B was not injured. (Justice Center Exhibits 5 and 22)

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

> (a) "Physical abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by physical contact, physical injury or serious or

[redacted]

> 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), to include:

> (h) "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 2 and Category 3, which are defined as follows:

> (b) Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a Service Recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one finding shall be sealed after five years.

[redacted]

(c) 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 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, 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 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 physical abuse, described as "Allegation 1" in the substantiated report. The Justice Center has not established by a preponderance of the evidence that the Subject committed neglect, as described in "Allegation 2" of 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 and 20-27) The investigation underlying the substantiated report was conducted by Justice Center Investigator [redacted], who did not testify. Justice Center Supervising Investigator [redacted] was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified on his own behalf and provided two documents. (Subject Exhibits

[redacted]

A and B)

The Justice Center proved by a preponderance of the evidence that the Subject recklessly caused the likelihood of injury to the Service Recipient, by striking Service Recipient A while attempting to take the television remote control from Service Recipient A.

**Physical Abuse**

In order to sustain the allegation of physical abuse in this matter, the Justice Center must show that the Subject has 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 the Service Recipient's emotional condition; or the likelihood of either an injury or impairment.

Here, the Subject acted recklessly when he engaged Service Recipient A in a struggle over the television remote. Service Recipient A reported that he became agitated and threw the remote so that the Subject could not take it from him. Service Recipient A admitted to losing his temper and grabbing the Subject. That is when, according to Service Recipient A and corroborated by Service Recipient B, the Subject hit back at Service Recipient A. (Justice Center Exhibit 27)

The Subject did not need to engage with Service Recipient A over the remote that day. It is undisputed that the unit was extremely short staffed that shift, and each person was assigned 1 to 1 supervision of specific service recipients. In addition, the shift supervisor, [redacted], was supposed to make rounds at half hour intervals due to this shortage. (Justice Center Exhibit 8) Therefore, when the Subject made his round on the unit, with Service Recipient B by his side, and then engaged in a physical altercation with Service Recipient A, the Subject acted recklessly.

In this case, the Justice Center must also show that the Subject's recklessness caused

[redacted]

either physical injury or serious or protracted emotional impairment of Service Recipient A's emotional condition; or the likelihood of either an injury or impairment.

Here, the competent evidence shows that Service Recipient A suffered from protracted emotional impairment due to this incident. Three days after the incident, Service Recipient A was interviewed by Investigator [redacted]. Having had an opportunity to listen to Service Recipient A's audio recorded description of the incident, it is clear from his tone of voice that he is still affected by the event. Service Recipient A told the investigator that he liked the Subject, but now "the friendship is gone." (Justice Center Exhibit 26, page 7; and Justice Center Exhibit 27, audio recording) In addition, after the incident Service Recipient A had to be moved off the unit where he had resided for many years, onto a different unit for his own safety. (Justice Center Exhibit 5) Therefore it may be determined that Service Recipient A suffered from protracted emotional impairment because of the Subject's recklessness.

The evidence also shows that Service Recipient A suffered from some physical injuries because of the incident; but it is not clear who inflicted those injuries. By all accounts, the incident quickly escalated into a chaotic melee involving two other service recipients attacking Service Recipient A while Service Recipient A attacked the Subject. However, it is clear that those physical injuries resulted from the Subject's initial reckless act of engaging Service Recipient A in a struggle over the remote control. When Service Recipient A lost his temper and grabbed the Subject, Service Recipient B went after Service Recipient A. Then a third service recipient entered the fray and the likelihood of physical injury to all three service recipients was apparent. Therefore, regardless of who actually inflicted the physical injuries to Service Recipient A, it was the reckless act of the Subject that ultimately caused those physical injuries.

[redacted]

**Neglect**

In order to sustain the allegation of neglect in this case, the Justice Center must prove that the Subject breached his duty to Service Recipient B, and that breach either resulted in or was likely to result in an injury to Service Recipient B. Such injury could be a physical injury, or a serious or protracted impairment of Service Recipient B's physical, mental, or emotional condition.

The Justice Center's position is that the Subject breached his duty to Service Recipient B by failing to properly intervene when Service Recipient B started punching and kicking Service Recipient A. The evidence shows that at the time when Service Recipient B assaulted Service Recipient A, the Subject was being assaulted by Service Recipient A. The Subject tried to get away from Service Recipient A, and tried to get Service Recipient B to stop attacking Service Recipient A. However at that point it was too late. Both Service Recipients were out of control and fully involved in the fight.

The situation was further complicated when a third service recipient, also on enhanced supervision, also started assaulting Service Recipient A. The staff assigned to that third service recipient left the unit in order to get assistance. Therefore the Subject was the only DSA in the middle of a physical altercation where he was being attacked by Service Recipient A, and Service Recipient B and the third service recipient were attacking Service Recipient A.

Additionally, because of his volatile behavior, Service Recipient B should have had two staff assigned to supervise him. However, due to the severe shortage of staff that day, only one staff was assigned to supervise him. (Justice Center Exhibit 8) In fact, the unit was so short-staffed for that shift, that there were no DSAs available to supervise the service recipients that required no enhanced supervision. Every DSA was assigned to supervise a service recipient 1 to

[redacted]

1. As a result, the Subject had insufficient resources to adequately control the situation. Therefore, the Subject did not breach his duty to Service Recipient B by failing to intervene.[1]

Accordingly, it is determined that the Justice Center did not meet its burden of proving by a preponderance of the evidence that the Subject committed the neglect alleged.

However 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 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 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] be amended and sealed is denied in part. The Subject has been shown by a preponderance of the evidence to have committed abuse.

The request of [redacted] that the substantiated report dated [redacted] be amended and sealed is granted in part. The Subject has not been shown by a preponderance of the evidence to have committed neglect.

[1] The Subject may have breached his duty to Service Recipient B by taking him on rounds, however the Administrative Law Judge presiding over this hearing cannot address that issue as the Subject was not substantiated for that act.

[redacted]

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

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

**DATED**: January 22, 2016
Schenectady, New York

