

**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**

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 C. Parisi, Esq.

[REDACTED]

By: Jonathan G. Johnsen, Esq.
Creighton, Johnsen & Giroux
560 Ellicott Square Building
295 Main Street
Buffalo, New York 14203

[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 the Justice Center by [REDACTED], the Subject, that the substantiated report dated [REDACTED], under [REDACTED], received and dated [REDACTED], be modified is granted.

The determination that the Subject committed physical abuse is modified to indicate that it is unsubstantiated. The determination that the Subject committed neglect is substantiated.

It is agreed that the substantiated report should be categorized as a Category 3 act.

NOW, THEREFORE, IT IS DETERMINED that the record of this report is substantiated in part and 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: February 24, 2016
Schenectady, New York

A handwritten signature in dark ink, appearing to read "David Molik", 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
UPON STIPULATED
FACTS**

Adjud. Case #:



Before:

Gerard D. Serlin

Held at:

Upon written stipulation,
New York State Justice Center
333 East Washington Street
Syracuse, New York 13202

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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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 upon consideration of a stipulation of facts, it is hereby found:

1. On [REDACTED] an allegation was reported to the VPCR that the subject, an employee of the [REDACTED] located at [REDACTED], had committed an act of abuse and/or neglect against a service recipient who was a resident of this facility. The Justice Center classified this report as a physical abuse and/or neglect case and assigned [REDACTED] to the report.

2. This report was investigated by an investigator affiliated with the [REDACTED]

3. On [REDACTED] the Justice Center substantiated the report against the Subject for physical abuse and/or neglect. The Justice Center concluded that:

Offense 1

It was alleged that on [REDACTED] at the [REDACTED], Located at [REDACTED], while acting as a custodian, you committed an act of physical abuse and/or neglect, when you pushed a service recipient and/or pushed a chair the service recipient was sitting in and trapped her hand/fingers between the chair and a table, causing her to sustain injuries.

The allegation has been SUBSTANTIATED as Category 2 physical abuse and /or neglect pursuant to Social Services Law § 493.

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

5. Notwithstanding that the Subject was entitled to a full evidentiary hearing, the Subject elected to waive his rights to an evidentiary hearing on the relevant issues and instead the Subject elected to proceed to a hearing decision based upon stipulated facts. The Parties have entered into a stipulation of facts, which is attached hereto and is incorporated into this decision. As part of the stipulation, it was agreed and it is understood that, subject to the approval of the Executive Director of the Justice Center, the report will be maintained within the VPCR as a Category 3 finding of neglect, and that the Category 2 finding of abuse that was alleged in Offense 1, will be unsubstantiated.

ISSUE

Whether the resolution of this substantiated report proposed in the Stipulation of Facts is both legally correct and consistent with the public policy expressed in the Protection of People with Special Needs Act (PPSNA) (Ch. 501, L. 2012), namely that the primary focus of the Justice Center be on “the protection of vulnerable persons” and that workers found responsible for abuse or neglect be held accountable.

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 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 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 neglect are categorized into categories pursuant to SSL § 493(4), including Category 2 abuse and neglect, which is defined as follows:

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.

Abuse and neglect may also be categorized as Category 3 conduct, which is defined as any “abuse or neglect by custodians that is not otherwise described in categories one and two.”

DISCUSSION

The stipulated facts agreed to by the parties establish by a preponderance of evidence that the Subject committed the neglect, that was alleged in the substantiated report as contained in Offense 1. Although the stipulated facts may also support a determination that the Subject committed physical abuse, the parties have asked that the finding of physical abuse be dismissed. Because dismissal of the physical abuse determination, under these circumstances, is not inconsistent with the public policy set forth in the PPSNA, I am recommending that the Executive Director accept so much of the stipulated outcome as would uphold the finding of neglect and dismiss the finding of physical abuse.

On [REDACTED] the Service Recipient was seated at a dining room table within the facility with her hand resting on the armrest of the chair at which time the Subject pushed the chair under the table, causing the Service Recipient's fingers to become pinched between the table and the chair. Based upon the stipulation, it does not appear that the Subject acted recklessly, or with the intention to cause by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient or causing the likelihood of such injury or impairment, to the Service Recipient.

The parties also have requested, as part of the proposed stipulated resolution of this case, that the substantiated finding of neglect be modified from a Category 2 finding to a Category 3 finding. While a Category 2 finding requires a determination that a custodian's conduct “seriously endangers the health, safety, or welfare of a service recipient,” a Category 3 finding does not require such a determination. The consequences of a Category 2 finding and a Category

3 finding also are different. A Category 2 finding could cause a Subject to be placed on the Justice Center's Staff Exclusion List (SEL), but only if he were to commit a second Category 2 act within three years of a previous finding that the subject engaged in Category 2 conduct. There is no similar consequence for a Category 3 finding. Moreover, unless a Category 2 finding is elevated to a Category 1 finding, both a Category 2 finding and a Category 3 finding will be sealed after five years. (SSL § 493(4)(b) and (c))

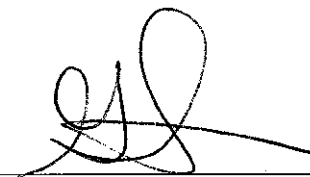
While the Subject's conduct was negligent and endangered the Service Recipient's welfare, it did not seriously endanger her health, safety, or welfare. The medical evidence demonstrated a minor contusion to the Service Recipient's hand, which did not cause gross swelling and did not affect function. I find that modifying the Category 2 finding of neglect to a Category 3 finding, as requested by the parties, also is not inconsistent with public policy.

Accordingly, it is determined that the substantiated report of neglect should be categorized as a Category 3 act.

DECISION: The request of the Justice Center and the Subject, that the substantiated report dated [REDACTED] under [REDACTED] received and dated [REDACTED] be modified is granted. The determination that the Subject committed physical abuse is modified to indicate that it is unsubstantiated. The determination that the Subject committed neglect is substantiated.

It is agreed that the substantiated report should be categorized as a Category 3 act.

This decision is recommended by Gerard D. Serlin, Administrative Hearings Unit.


Gerard D. Serlin, ALJ

DATED: December 19, 2015,
Schenectady, New York

STATE OF NEW YORK – NYS JUSTICE CENTER
ADMINISTRATIVE HEARINGS UNIT

In the Matter of:

STIPULATION OF FACTS

██████████

██

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating ██████████ (the Subject), for a Category 2 offense under ██████████. The Subject requested that the Justice Center amend the report to reflect that the category findings are not supported by a preponderance of the evidence. The Justice Center, after review, declined to do so, and a hearing was scheduled in accordance with the requirements of Social Services Law (SSL) § 494 and Part 700 of 14 NYCRR.

A hearing in this matter is currently scheduled for ██████████. The purpose of a full evidentiary hearing in this matter would be to determine:

1. 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?
2. Whether the substantiated allegations constitute abuse or neglect?
3. Pursuant to SSL § 493(4), the category level of abuse or neglect that such act or acts constitute.

Notwithstanding that the Subject is entitled to a full evidentiary hearing, the Subject has elected to waive his right to an evidentiary hearing on the aforesaid issues and instead the Subject has elected to proceed to a hearing decision based upon the following stipulation of facts and it is further understood by the parties that the report will continue to be maintained within the VPCR as a Category 3 finding of abuse (deliberate inappropriate use of restraints).

The presiding Justice Center Administrative Law Judge (ALJ) will draft and recommend a hearing decision based upon the stipulation of facts. However, the ultimate authority to approve the

hearing decision is vested with the Executive Director of the Justice Center. Therefore, any hearing decision which may be issued based upon this stipulation is subject to the approval of the Executive Director of the Justice Center. The Subject also agrees, after having had an opportunity to consult with counsel, and upon the receipt of the approval of the recommended decision by the Executive Director, that the report will continue to be maintained within the VPCR as a Category 3 finding of physical abuse and/or neglect, and that the Subject is waiving any rights that he may have for an appeal of this proceeding.

In the event that the Executive Director shall not approve a recommended decision based upon the stipulation of facts, a full evidentiary hearing will be scheduled and the existence of this stipulation and any facts admitted herein will not be admitted into the hearing record and this document shall not be used for any purpose whatsoever, at the evidentiary hearing.

STIPULATION OF FACTS

Jonathan Johnsen, Esq. is counsel for the subject and has the authority to enter into this Stipulation of Facts on behalf of the Subject, [REDACTED].

Thomas C. Parisi, Esq. is an Assistant Counsel of the Administrative Appeals Unit, New York State Justice Center and has the authority to enter into this Stipulation of Facts on behalf of the Justice Center.

The parties hereby agree to the following facts:

1. The facility, [REDACTED] is located at [REDACTED]
[REDACTED] and is operated by the New York State Office of Mental Health (OMH), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center.
2. On [REDACTED], the Subject, [REDACTED], was employed as a Mental Health Therapy Aide (MHTA) at the [REDACTED] and at all

times relevant hereto was a direct care custodian pursuant to Social Services Law § 488(2).

3. On said date, the Service Recipient was seated at a dining room table within the facility with her hand resting on the arm rest of the chair at which time the Subject pushed the chair under the table, causing the Service Recipient's fingers to become pinched between the table and the chair.
4. The Subject's actions were characterized as "rough" by witnesses to the incident but were not consistent with the Subject having the intent to cause harm to the Service Recipient. The Subject stated his desire was to have the Service Recipient finish her meal at the table.
5. The Service Recipient was examined by a physician who stated the Service Recipient sustained a mild contusion to her right index finger, an injury that did not cause gross swelling or affect the functioning of the finger.
6. Based on the above, the parties have agreed that the substantiated finding should reflect that the actions of the Subject did not seriously endanger the health, safety, or welfare of the service recipient, and that the physical abuse shall be reduced in Category level from a Category 2 to a Category 3.

Dated:

1/7/16



Dated:

1/11/16

Dated:

2/4/16

Approved for recommendation:


CREIGHTON, JOHNSON & GIROUX
By: Jonathan Johnson, Esq.
Attorney for the Subject

Thomas C. Parisi, Esq.
NYS Justice Center

Gerard D. Serlin

Administrative Law Judge

New York State Justice Center for the Protection of People with Special Needs

Dated: _____, 2015