

**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]

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 abuse and/or neglect.

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: January 6, 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:

Christopher R. Riano
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
Delmar, New York 12054-1310
Appearance Waived

New York State Justice Center for the Protection
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161 Delaware Avenue
Delmar, New York 12054-1310
By: Laurie Cummings, Esq.

[REDACTED]
[REDACTED]
[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], [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], at [REDACTED], located at [REDACTED], while acting as a custodian, you committed physical abuse and/or neglect when you failed to appropriately intervene in a physical altercation by tripping a service recipient.

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. [REDACTED] (the "Facility"), located at [REDACTED], is a residential school providing specialized education to students, and is operated by [REDACTED]. The Facility is licensed by the State

Education Department, which is a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing Testimony of Justice Center Investigator [REDACTED] and Justice Center Exhibit 8)

5. At the time of the alleged abuse and/or neglect, the Subject was employed by [REDACTED], and had worked there for over 10 years. The Subject worked as a Teacher. (Hearing Testimony of the Subject)

6. At the time of the alleged abuse and/or neglect, the Service Recipient was 17 years old and a residential student in the facility. The Service Recipient's diagnosis was unknown. (Hearing Testimony of Justice Center Investigator [REDACTED] and Hearing Testimony of the Subject)

7. On [REDACTED], at around noon, the Service Recipient was involved in two separate altercations with a number of other service recipients in the hallway of the third floor of the Facility. (Hearing Testimony of Justice Center Investigator [REDACTED]; Hearing Testimony of the Subject; and Subject Exhibit B)

8. The Service Recipient was quickly and properly separated from the first altercation by members of the Support Staff. (Hearing Testimony of Justice Center Investigator [REDACTED] and Hearing Testimony of the Subject)

9. The Service Recipient remained agitated and angry, and attempted to charge at another group of service recipients further down the third floor hallway of the Facility. In the process, the Service Recipient's knee came into accidental contact with the Subject's knee, causing the Service Recipient to stumble onto the floor. The Service Recipient immediately continued down the hallway, and entered into a serious altercation with a number of other service recipients. (Hearing Testimony of Justice Center Investigator [REDACTED]; Hearing Testimony of the Subject; and Justice Center Exhibit 6)

10. During the course of the second altercation, the Service Recipient sustained a

serious injury, which required immediate medical treatment. The Subject was not involved in the second altercation and, following the established protocols, the Subject allowed Support Staff to break up the altercation. (Hearing Testimony of Justice Center Investigator [REDACTED], Hearing Testimony of the Subject; and 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/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 of a person in a facility or provider agency is defined by SSL § 488, and physical abuse 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.

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

"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 by SSL § 493(4)(c) 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/or 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/or neglect as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged abuse and/or 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/or neglect 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 and/or neglect by a preponderance of the evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has failed to establish 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 1-11) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.¹

The Subject testified in his own behalf and provided two documents as evidence. (Subject Exhibits A & B) In addition, the Subject called [REDACTED], who was employed at the Facility as a member of the Support Staff.

As a threshold matter, there is no contention between the parties that the Subject was a custodian as is defined in SSL § 488(2) as, at the time of the alleged abuse and/or neglect, the Subject was working in his official capacity as a Teacher at the Facility. (Hearing Testimony of the Subject)

First, as to the allegation of physical abuse contained within Allegation 1, the Justice Center has failed to prove by a preponderance of the evidence that the Subject committed physical abuse as defined in the statute. In order to sustain an allegation of physical abuse, the Justice Center must show that the Subject had physical contact with the Service Recipient, that such contact was

¹ Investigator [REDACTED] was married during the course of the investigation, and appears as Investigator [REDACTED] within parts of the record and submitted documents.

intentional or reckless, and that such contact caused either physical injury or the likelihood of such injury. (SSL § 488(1)(a))

Specifically, the evidence and testimony fails to establish that the Subject committed physical abuse by “intentionally or recklessly causing ... physical contact” between the Subject and the Service Recipient. (SSL § 488(1)(a))

As for intentionally causing physical contact between himself and the Service Recipient, the Subject provided credible testimony that establishes, at most, that it was an accident that the Service Recipient’s knee touched the Subject’s knee in the hallway. (Hearing Testimony of the Subject) Additionally, the testimony of Investigator [REDACTED], as well as a letter written by the Service Recipient himself, supports the conclusion that any contact between the Subject and Service Recipient was accidental. (Hearing Testimony of Justice Center Investigator [REDACTED], and Hearing Testimony of the Subject)

As for recklessly causing physical contact between himself and the Service Recipient, it is important to establish a definition of the term “reckless.” SSL § 488(16) states that the word “recklessly” is to be given the same meaning as is provided in New York Penal Law § 15.05(3), specifically that 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.” As established above, the evidence and testimony herein establish only that an accident occurred, and do not rise to the level of a “conscious disregard” of a “substantial and unjustifiable risk” as is required by statute. (Hearing Testimony of Justice Center Investigator [REDACTED]; Hearing Testimony of the Subject; Subject Exhibit A; and SSL § 488(16))

As the Justice Center has failed to establish by a preponderance of the evidence that the Subject abused the Service Recipient, the Justice Center has failed to prove the physical abuse

alleged in Allegation 1.

Second, as to the allegation of neglect contained within Allegation 1, the Justice Center has failed to prove by a preponderance of the evidence that the Subject committed neglect as defined in the statute.

To show that the Subject committed neglect, the Justice Center must show that the Subject committed an act, omission, or failed to pay proper attention to a Service Recipient, that such act, omission, or failure breached a duty to the Service Recipient and, as a result of that breach, the Service Recipient sustained or was likely to sustain “physical injury or serious or protracted impairment of the physical, mental or emotional condition.” (SSL § 488(1)(h))

There is no contention between the parties that the Subject committed an act, i.e., an accidental touching of the knees, between himself and the Service Recipient. However, at no point did the Justice Center show that the Subject had a duty or obligation to physically prevent altercations between service recipients in the educational environment of the Facility. The Justice Center did not present any testimony establishing a duty, nor did the Justice Center enter into evidence any training manuals, guidance documents, or other materials that would establish a duty between the Subject and the Service Recipient. On the contrary, the evidence and testimony presented show that there is no duty upon Teachers in the Facility to intervene during the course of physical altercations between service recipients. (Hearing Testimony of Justice Center Investigator [REDACTED]; Hearing Testimony of Subject; and Hearing Testimony of [REDACTED]) At most, the evidence and testimony establish that Teachers, while trained in various restraint techniques, are not required to interfere during altercations between service recipients. (Hearing Testimony of Subject, and Hearing Testimony of [REDACTED]) In fact, the testimony during the course of the hearing specifically established that it is the duty of Support Staff, not Teachers, to

intervene during the course of physical altercations between service recipients. (Hearing Testimony of Subject and Hearing Testimony of [REDACTED]) By failing to show that the act of accidentally touching knees breached a duty between the Subject and the Service Recipient, the Justice Center has failed to show by a preponderance of the evidence that the Subject committed neglect as is defined in the statute.

Accordingly, after considering all of the evidence, testimony, and arguments presented, 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 abuse and/or neglect alleged. The substantiated report will be amended and sealed.

DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED], [REDACTED] be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed abuse and/or neglect.

This decision is recommended by Christopher R. Riano, Administrative Hearings Unit.

DATED: December 29, 2016
Harlem, New York


Christopher R. Riano, ALJ