

**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

████████████████████

Pursuant to § 494 of the Social Services Law

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**FINAL  
DETERMINATION  
AND ORDER  
AFTER HEARING**

**Adjud. Case #:**

████████████████

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: Robert DeCataldo, Esq.

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████████████████████████████████████  
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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 denied.

The Subject has been shown by a preponderance of the evidence to have committed physical abuse and neglect.

The substantiated report is properly categorized, as Category 3 acts.

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:** April 17, 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:

Mary Jo Lattimore-Young  
Administrative Law Judge

Held at:

New York State Justice Center for the Protection  
of People With Special Needs  
Administrative Hearings Unit  
1200 East and West Road  
West Seneca, New York 14224  
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  
of People With Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
By: Robert DeCataldo, Esq.

[REDACTED]  
[REDACTED]  
[REDACTED]

## **JURISDICTION**

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for physical 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] of physical 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 when you pushed a service recipient in the back, causing him to fall onto his hands.

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], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you failed to adhere to a service recipient's behavior support plan, escalated a situation, and/or pushed him.

This allegation has been SUBSTANTIATED as 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, known as the [REDACTED], is located at [REDACTED], and provides services to disabled adults. Operated by [REDACTED], the facility is certified by the New York State Office for People With Developmental Disabilities (OPWDD) and is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged physical abuse and neglect, the Subject had been employed by the [REDACTED] since [REDACTED] 2012. The Subject worked as a Direct Support Professional (DSP), which involved the day-to-day care and supervision of the service recipients. On [REDACTED], the Subject started his shift at 11:44 a.m. and worked until 2:06 p.m. Although he was not assigned to supervise a particular service recipient that day, the Subject was assigned to work as a floater DSP in classroom 2. As a floater DSP, the Subject provided assistance to other DSPs assigned to particular service recipients by providing relief coverage during their breaks or at lunchtime. The Subject was a custodian as that term is so defined under SSL §488(2).

6. On that day, there were approximately four DSPs working in classroom 2 who were supervising nine service recipients attending the day habilitation program.

7. At the time of the alleged physical abuse and neglect, the Service Recipient was a thirty year old male who resided at the [REDACTED], located at [REDACTED]. Although the Service Recipient was non-verbal, he was able to communicate through the use of a few sign language movements and picture book photographs to make his wants and needs known. During the weekdays, the Service Recipient attended the facility's day habilitation program from 8:30 a.m. to 2:45 p.m. The Service Recipient had diagnoses of autism, self-injurious behaviors (SIB), anxiety, impulse control

disorder and other medical conditions. He was approximately six feet, six inches tall and weighed approximately 190 pounds. (Hearing testimonies of the Subject and [REDACTED]. QAA; Justice Center Exhibits 6 and 8)

8. The Service Recipient has a history of engaging in aggressive behaviors, such as hitting and kicking. He is known to bite his arms, shoulder and/or hand. He will also hit himself, bang his head and scratch himself or others. (Hearing testimony of QAA and Justice Center Exhibit 8)

9. The Service Recipient's Behavioral Support Plan (BSP) lists day program strategies, preventive and reactive strategies that staff must employ when trying to address and de-escalate the Service Recipient's acts of aggression. The Service Recipient's plan states that when all proactive strategies and verbal/non-verbal calming techniques have failed, and the Service Recipient continued to engage in severe aggression (hitting, kicking or biting), then staff was allowed to implement the appropriate SCIP-R maneuvers in order to address the situation. (Hearing testimony of the QAA, Justice Center Exhibits 6 and 8)

10. At approximately 1:20 p.m. on [REDACTED], the Service Recipient had a behavioral episode that started while he was in the classroom and continued into the hallway. A DSP injured his knee as a result of the episode. DSP 1 was directed by a supervisor to relieve the injured DSP.

11. A short while later, the Subject approached DSP 1 and the Service Recipient at the front door area of the facility where they were sitting. By that time, the Service Recipient had de-escalated and calmed down. When the Subject asked the Service Recipient to return to the classroom, the Service Recipient swung his arms at the Subject and grabbed DSP 1's shirt. The Team Leader, who was standing behind DSP 1, assisted in freeing DSP 1, and then directed her to

summon additional staff for assistance. At that time, the Service Recipient was standing and biting on one of his hands. The Service Recipient then used the other arm to attempt to hit the Team Leader. The Team Leader deflected the Service Recipient's advances. The Subject then used a "Standing Wrap" physical restraint upon the Service Recipient to subdue him. During the course of the Subject's restraint, the Service Recipient dropped to his knees and the Subject released his hold on the Service Recipient.<sup>1</sup> While still kneeling on the floor, the Service Recipient reached around and scratched the Subject, who was standing behind him. The Subject immediately reacted by using both hands to push the Service Recipient with "moderate to heavy force" away from him. The Subject pushed the Service Recipient on his back and shoulder area, causing the Service Recipient to fall towards the floor. The Service Recipient used his hands to break his fall. (Hearing testimony of the Subject; Justice Center Exhibits 6, 8, 12, 14-15 and 17)

12. At 2:00 p.m. following the incident on [REDACTED], a physical assessment was performed by the facility Licensed Practical Nurse (LPN), who found "no obvious injuries" from the incident. The LPN noted specific areas on the Service Recipient's body where callouses had developed due to his chronic biting. (Hearing testimony of the QAA and Justice Center Exhibit 7)

### **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.

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<sup>1</sup> A "Standing Wrap" is one of the SCIP-R approved personal physical intervention techniques under the Service Recipient's plans that may be used under certain circumstances.

### **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 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 physical abuse and neglect of a person in a facility or provider agency is defined by SSL § 488(1)(a) and SSL § 488(1)(h) as:

"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 under 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(s) committed the act or acts of physical 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 physical abuse and/or neglect as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

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

If the Justice Center did not prove the physical abuse and/or 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 acts, described as “Allegation 1” and “Allegation 2” 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 1-20 and 26-28)<sup>2</sup> The investigation underlying the substantiated report was conducted by a QA Investigator who no longer works for the agency. The QAA (who was the former QA Investigator’s supervisor) was the only witness

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<sup>2</sup> At the hearing, the Justice Center withdrew those exhibits marked as 21 through 25.

who testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and offered Subject Exhibits D and E, which were admitted into evidence.<sup>3</sup>

The Justice Center proved by a preponderance of the evidence that the Subject committed physical abuse and neglect as alleged in the substantiated report.

At the hearing, the Subject testified that after he released his standing wrap restraint hold of the Service Recipient, the Service Recipient remained on his knees and on the floor. At that time, the Subject was about one foot behind the Service Recipient. The Subject testified that, because his back was close to the wall, he was unable to move out of the Service Recipient's way. The Subject also testified that, even though the incident happened quickly, he could have stepped to his left to back away from the situation. The Subject disputes that his reaction to the Service Recipient swinging at him was a "shove or push" and argues that he was blocking or deflecting the Service Recipient's advances in order to protect himself. (Hearing testimony of the Subject)

The part of the Subject's testimony denying that he did not push but was blocking the Service Recipient's advances is incredible. This part of the Subject's testimony is inconsistent with his prior admissions and written statements, both dated [REDACTED], in which the Subject clearly stated that he "pushed" the Service Recipient. Additionally, the overwhelming credible evidence, from the written statements of the Subject's co-workers many of whom were direct eyewitnesses to the incident, corroborates the Subject's prior statements that he pushed or shoved the Service Recipient. Additionally, following the incident, the Team Leader, who witnessed the incident, immediately reprimanded the Subject for pushing the Service Recipient. (Justice Center

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<sup>3</sup> The proposed exhibits marked as Subject's A (Unemployment Decision), B (Unemployment Hearing Transcript) and C (Employer's Response to State Human Rights Request) were excluded based upon the Justice Center's objections that they were cumulative or irrelevant.

Exhibit 15) Moreover, the Team Leader and several of the Subject's co-workers overheard the Subject himself admit that he "pushed" the Service Recipient. (Justice Center Exhibits 13-16)

### **Physical Abuse**

To prove physical abuse, the Justice Center must establish that the Subject used physical contact with the Service Recipient and that the Subject's conduct was intentional or reckless. Such conduct is defined as including shoving. (SSL §488(1)(a)) The terms "intentional" and "reckless" are defined by Penal Law. (SSL §488(16) and PL 15.05(1) and (3)) The term "intentionally" is defined by Penal Law as follows: "A person acts intentionally with respect to a result or to conduct ... when his conscious objective is to cause such result or to engage in such conduct." (PL 15.05(1)) New York State Penal Law states that:

"A person acts recklessly with respect to a result or to a circumstance ... when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation ..." (PL §15.05(3))

The credible evidence establishes that the Subject was a custodian who engaged in physical contact by pushing or shoving the Service Recipient from behind while he was in a kneeling position on the floor.

The Subject's conduct was intentional in that he chose not to back away from the Service Recipient and instead, pushed the Service Recipient in the back intending to prevent the Service Recipient's advances toward him. In so doing, the Subject's actions were also reckless in that he saw that the Service Recipient was in a vulnerable upright kneeling position on the floor. The Subject knew or should have known that the force of a push could cause the Service Recipient to lose his balance, fall and injure himself. Therefore, the Subject was aware of and consciously disregarded a substantial and justifiable risk that the Service Recipient could have been harmed by

his actions.

The Subject's physical contact with the Service Recipient was unwarranted and could have resulted in serious or protracted impairment of the physical, mental, or emotional condition of the Service Recipient as defined by SSL § 488(1)(a).

Any claim by the Subject that the push or unauthorized physical contact was a reasonable emergency measure necessary to protect his safety or the safety of another is unsubstantiated by the facts in this case. At the time of the incident, the Subject was standing behind the kneeling Service Recipient and admittedly could have moved back or sideways to clear himself from the Service Recipient's reach and protect himself from any likely aggression.

### **Neglect**

In order to prove neglect, the Justice Center must establish that the Subject breached a custodian's duty and that 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 record establishes that the Subject was a custodian who was familiar with and had a duty to abide by the Service Recipient's BSP, which provided in pertinent part that, after releasing the Service Recipient from his standing wrap hold, the Subject should have backed away from the Service Recipient. However, the Subject did not back away from the Service Recipient. Consequently, the Subject breached his custodian's duty to the Service Recipient.

The credible evidence in the record establishes that Subject's conduct which resulted in the Service Recipient falling to the floor, was likely to have resulted in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. Consequently, the Justice Center has established that the Subject has committed neglect.

The defenses raised by the Subject are not persuasive for the reasons previously mentioned.

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 physical 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 physical 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 Category 3 acts.

Substantiated Category 3 findings of abuse and/or neglect will not result in the Subject's name being placed on the VPCR Staff Exclusion List and the fact that the Subject has a Substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject to disclosure pursuant to SSL § 496 (2). The report will be sealed after five years.

**DECISION:**

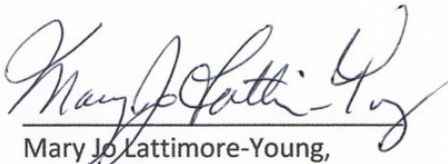
The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED], [REDACTED] be amended and sealed is denied.

The Subject has been shown by a preponderance of the evidence to have committed physical abuse and neglect.

The substantiated report is properly categorized, as Category 3 acts.

This decision is recommended by Mary Jo Lattimore-Young,  
Administrative Hearings Unit.

**DATED:** April 10, 2016  
West Seneca, New York



Mary Jo Lattimore-Young,  
Administrative Law Judge