

**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

**FINAL
DETERMINATION
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: Laurie Cummings, Esq.

████████████████████

██████████

████████████████████

By: William T. Burke, Esq.
O'Neil & Burke, LLP
135 North Water Street
Poughkeepsie, New York 12601

██████████

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 ██████████ that the substantiated report dated ██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse.

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).

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 8, 2016
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

████████████████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before:

Jean T. Carney
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
401 State Street
Schenectady, New York 12305
On: ████████████████████

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: Laurie Cummings, Esq.

████████████████████

██████████

████████████████████

By: William T. Burke, Esq.
O'Neil & Burke, LLP
135 North Water Street
Poughkeepsie, New York 12601

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for 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] of abuse 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], you committed physical abuse when you grabbed a service recipient's left upper arm, causing bruising.

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 day program for adults with developmental disabilities, 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.

5. At the time of the alleged abuse, the Subject was employed by the ██████████ ██████████ as a Direct Support Aide (DSA). The Subject had been working there for 30 years.

6. At the time of the alleged abuse, the Service Recipient was 62 years old, and had been attending the Day Habilitation Center for at least 13 years. The Service Recipient is a verbal, ambulatory adult male with a diagnosis of autism, seizures, severe intellectual delay, PICA, hypernatremia and other medical conditions. (Justice Center Exhibit 10)

7. The Service Recipient is assigned to an enclosed classroom at the day program. The only person named ██████████ in that room is the Subject. Both the Service Recipient and the Subject were present in that classroom on ██████████. (Justice Center Exhibits 4, 7 and Hearing testimony of Subject)

8. The Service Recipient loves coffee but often aspirates liquids so he is given thickened fruit juice instead of coffee. At about 8:45 on the morning of ██████████, the other staff member assigned to this classroom brought a tray of drinks, including coffee, into the room and stored them in the cabinet. Then that staff member left the Subject to supervise the service recipients in the room for a few minutes. (Justice Center Exhibits 4 and 6) While she was gone, the Subject became distracted by noises coming from another room. When he turned around, the Service Recipient was at the cabinet and had drunk some coffee. (Hearing testimony of Subject)

9. In the evening of ██████████, a staff member was showering the Service Recipient and observed a bruise on his inside left bicep that was not there the previous time the Service Recipient was showered. (Justice Center Exhibit 4 and Hearing testimony of

Investigator [REDACTED])

10. A photograph of the Service Recipient's inside left bicep taken on [REDACTED], shows a dark red bruise that appears to be in the shape of a hand, as if the Service Recipient was grabbed under his arm from the back. (Justice Center Exhibit 14)

11. When the Service Recipient was asked how he got the bruise, he told the staff member that [REDACTED] did it, and that he had stolen coffee. Investigator [REDACTED] interviewed the Service Recipient on [REDACTED], and the Service Recipient's accounting to Investigator [REDACTED] was consistent with this initial statement to the staff member. In addition, the Service Recipient told Investigator [REDACTED] that the coffee was in the cabinet at work, which is how the Service Recipient refers to his day program. (Justice Center Exhibit 4 and Hearing testimony of Investigator [REDACTED])

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(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 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, which is defined as follows:

- (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 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 1-17) The investigation underlying the substantiated report was conducted by Investigator ██████████, who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified on his own behalf and provided one document. (Subject Exhibit A)

The Justice Center proved by a preponderance of the evidence not only that the Subject recklessly caused the likelihood of physical injury to the Service Recipient, but also that the Subject caused actual physical injury to the Service Recipient by grabbing the Service Recipient's arm with such force as to leave a noticeable bruise.

There is no doubt that someone grabbed the Service Recipient with sufficient force to cause bruising. The dispute lies in how the injury occurred. The Justice Center contends that the Subject grabbed the Service Recipient's arm while trying to prevent the Service Recipient from drinking coffee. The Subject denies having any physical contact with the Service Recipient.

The record indicates that the Service Recipient is given thickened drinks due to a tendency to aspirate if he drinks too fast. (Justice Center Exhibit 17) However, the Service Recipient loves coffee and will actively seek it out. (Hearing testimony of Investigator ██████████) On the morning of ██████████, while the Subject was the only staff person present in the Service Recipient's classroom at his day program, the Subject became distracted by noises

██████████

coming from another room. (Hearing testimony of Subject) When he turned around, he saw the Service Recipient putting a coffee cup into the cabinet. (Hearing testimony of Subject) The Subject said that he reacted to this by reaching into the cabinet to take a container of plastic puzzle pieces out for the Service Recipient to put together. (Justice Center Exhibit 17) That evening, the bruise was discovered on the Service Recipient's arm.

The Subject suggested that another service recipient may have caused the bruise, however there is nothing noted in the daily log to suggest an altercation occurred between this Service Recipient and another. The Subject suggested that, on occasion, another service recipient has been known to pull someone he finds sitting in his chair. (Justice Center Exhibit 17 and hearing testimony of Investigator ██████████) However, the bruise is inconsistent with this scenario. The bruise on the Service Recipient's left arm was caused by being grabbed by someone's right hand from behind. If he had been pulled out of a chair, the bruise would have a different shape, and would not have been on his upper arm. (Hearing testimony of Investigator ██████████) The only incident that day concerning the Service Recipient was the incident that morning where the Subject caught the Service Recipient drinking the coffee. Therefore, the most reasonable explanation for the bruise is that he was grabbed while trying to drink coffee.

When the bruise was discovered, the Service Recipient was asked how he was injured. He said that ██████████ did it, at work. Three days later, when the Service Recipient was interviewed by Investigator ██████████, his statement was consistent with what he had previously reported. The Subject testified at the hearing that the Service Recipient is not an accurate reporter of abuse; that he will repeat what he believes others want to hear, and that he will make false accusations. (Hearing testimony of Subject) However, the evidence does not corroborate this contention. Rather, the evidence shows that while the Service Recipient may not

consistently report abuse, there is no indication he is not accurate when he does report abuse. (Justice Center Exhibit 11) In addition, there is no fabrication plan for the Service Recipient. A fabrication plan is put into a service recipient's behavior plan and service plan if the service recipient has a history of making false accusations. (Hearing testimony of Investigator [REDACTED]) Therefore the fact that the Service Recipient was consistent in his reporting of this incident makes it more likely than not that the Subject grabbed the Service Recipient's arm and caused the bruise.

In addition to proving that a Service Recipient was injured through physical contact, in order to sustain an allegation of physical abuse, the Justice Center must show that the Subject acted either recklessly or intentionally in causing that physical injury. Here, the Subject was reckless in grabbing the Service Recipient's arm. The Service Recipient appears to be a somewhat frail, gentleman whose highest level of intervention according to his Individualized Service Plan is verbal redirection. (Justice Center Exhibit 10) The plan specifically prohibits both supine and standing wrap because of gastro-esophageal reflux and "because he is elderly frail." (Justice Center Exhibit 10) Therefore, grabbing the Service Recipient's arm is reckless behavior, likely to cause physical injury, and indeed has caused actual physical injury in this case.

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 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 ██████████ that the substantiated report dated ██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse.

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

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

DATED: January 14, 2016
Schenectady, New York


Jean T. Carney
Administrative Law Judge