

**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: Christopher Mirabella, 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 ██████████ that the substantiated report dated ██████████
██████████, ██████████ be amended and sealed is denied.

The determination that the Subject committed neglect and physical abuse shall remain substantiated.

The substantiated report of neglect and physical abuse 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: July 19, 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**

Adjudication Case #:

██████████

Before:

Elizabeth M. Devane
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
Adam Clayton Powell Jr. State Office Building
163 West 125th Street
New York , NY 10027
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: Christopher Mirabella, Esq.

████████████████████
████████████████████
████████████████████

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], [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] [REDACTED], while acting as a custodian, you committed neglect and/or physical abuse when you engaged in a verbal and physical confrontation with a service recipient, biting her on the shoulder

This allegation has been SUBSTANTIATED as Category 3 neglect and 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, the [REDACTED] located at [REDACTED], is operated by [REDACTED]. [REDACTED] is certified by the New York State Office for People With Developmental Disabilities (OPWDD), which is a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing

██████████
testimony of ██████████ Consulting Investigator ██████████)

5. The ██████████ provides residential, counseling and support services for developmentally disabled individuals. (Hearing testimony of ██████████ Consulting Investigator ██████████)

6. At the time of the alleged physical abuse and/or neglect, the Service Recipient was a 21-year-old female resident of the ██████████. The Service Recipient had multiple diagnoses including Moderate Intellectual Disability, Mood Disorder, Impulse Control Disorder, ADHD, Oppositional Defiant Disorder, Intermittent Explosive Disorder, Conduct Disorder and Disruptive Behavior Disorder. (Hearing testimony of ██████████ Consulting Investigator ██████████, Justice Center Exhibits 6 and 19)

7. At the time of the alleged physical abuse and/or neglect, the Subject was employed by ██████████ at the ██████████ as a Direct Support Professional (DSP). As a DSP, the Subject was responsible for assisting service recipients as well as providing supervision and counseling to them. The Subject was a custodian as that term is so defined in Social Services Law § 488(2). (Hearing testimony of ██████████ Consulting Investigator ██████████, Hearing testimony of the Subject)

8. The Subject was trained in Strategies for Crisis Intervention and Prevention – Revised (SCIP-R). SCIP-R requires that when staff members face challenging behaviors, a gradient system of implementation is followed and staff use the least restrictive intervention possible, with the minimum amount of force. Restrictive personal interventions are the most intrusive interventions and are sanctioned for use only when necessary for safety, and only after preventative steps have been unsuccessful or are not feasible. (Justice Center Exhibits 20 and 21)

9. The Service Recipient's Behavior Support Plan (BSP) listed the approved SCIP-R

██████████

techniques to be used with the Service Recipient if she engaged in challenging behaviors. Staff was to avoid conversation and eye contact with the Service Recipient, to evade and deflect contact if necessary, and to prepare for the possibility that the Service Recipient's behavior may escalate and that staff may have to move to a safe area. If the Service Recipient became aggressive, staff was to request assistance from available staff and use the least restrictive restraint available to ensure safety. Approved SCIP-R techniques included touch, arm support, deflection, blocking, standing/seated wrap and one-to-two person take down to supine support. (Justice Center Exhibits 2 and 6)

10. On ██████████, the Subject began her work shift at 11:00 p.m., and was scheduled to complete that shift at 9:00 a.m. on ██████████. The Service Recipient was scheduled to go to her day program at around 9:00 a.m. on the morning of ██████████; however, she had been refusing to go to her program because her leg was swollen. (Hearing testimony of ██████████ Consulting Investigator ██████████; Hearing testimony of Subject; Justice Center Exhibits 6, 12 and 14)

11. At approximately 8:10 a.m. on ██████████, the Subject called her supervisor. The Subject explained to her supervisor that she wanted to tell the Service Recipient that the Service Recipient had to go to her program that day and that, if the Service Recipient refused to go to her day program, the Subject could not stay on for the next shift because the Subject had to go to court. The supervisor advised that the Service Recipient could not be forced to attend the program and that the Subject would have to stay at the facility for the next shift with the Service Recipient if the Service Recipient did not go to her program. (Hearing testimony of ██████████ Consulting Investigator ██████████; Hearing testimony of Subject; Justice Center Exhibits 2, 6, 7, 8, 9, 12, 13 and 14)

12. Following the Subject's conversation with her supervisor, at approximately 8:15 a.m., the Subject went upstairs to the Service Recipient's room to convince the Service Recipient to attend her day program. The Service Recipient refused to go to her day program and a verbal confrontation ensued. The conversation escalated and the two began shouting at each other. The verbal confrontation then escalated to a physical altercation and the Service Recipient punched the Subject on the side of her face. (Hearing testimony of [REDACTED] Consulting Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibits 2, 6, 8, 9, 10, 11, 12, 13, 14 and 15)

13. The physical altercation continued to escalate and, while the exact order of events is not clear from the record, ultimately the Service Recipient bit the Subject's hand and the Subject bit the Service Recipient on her back. Three staff members who were downstairs responded to the Service Recipient's room upstairs after they heard a "loud thud." Staff saw the Service Recipient face down on her bed with the Subject on top of the Service Recipient and a mark on the Service Recipient's back. (Hearing testimony of [REDACTED] Consulting Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibits 6, 8, 9, 10, 11, 12, 13, 14 and 15)

14. Emergency Services were called to the facility. The Subject and Service Recipient were both taken to a local hospital emergency room. The Service Recipient was diagnosed with a "human bite – assault". The Service Recipient was prescribed to take Augmentin, an antibiotic, for five days to avoid infection of the bite. (Hearing testimony of the Subject; Justice Center Exhibits 7, 13, 17 and 18)

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 allegation constitutes 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 physical abuse and/or 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 of a person in a facility or provider agency is defined by SSL § 488(1) (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.

Under SSL § 488(1)(h) the definition of neglect is:

"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 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 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 established by a preponderance of the evidence that the Subject committed an act of neglect under SSL § 488(1)(h), as described in Allegation 1, and that the Subject committed an act of physical abuse under SSL § 488(1)(a), also described in Allegation 1 of the substantiated report.

In support of its substantiated findings, the Justice Center presented evidence obtained

██████████

during the investigation. (Justice Center Exhibits 1-22) The investigation underlying the substantiated report was conducted by ██████████ Consulting Investigator ██████████, who testified on behalf of the Justice Center.

The Subject testified at the hearing in her own behalf and provided three documents as evidence. (Subject Exhibits A, B and C)

Allegation 1 of the substantiated report includes two theories, neglect and physical abuse.

Neglect

To prove neglect, the Justice Center must establish conduct by the Subject that breaches the Subject's duty to the Service Recipient and results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

The Subject had a duty to care for the Service Recipient and to follow SCIP-R as well as the Service Recipient's BSP. The Subject went to the Service Recipient's room by herself and initiated the discussion to convince the Service Recipient to attend her day program. The situation quickly escalated to a verbal and then a physical altercation, in large part due to the Subject's behavior and the manner in which the Subject confronted the Service Recipient. Although required by SCIP-R, the Subject did not employ graduated or gradient measures to diffuse the Service Recipient. For instance, instead of leaving the area, calling for staff assistance or employing a less intrusive intervention, the Subject put the Service Recipient in an unapproved hold with force not necessitated by the situation. (Hearing testimony of ██████████ Consulting Investigator ██████████; Hearing testimony of Subject; Justice Center Exhibits 2, 6, 7, 8, 12, 13, 14, 17, 19, 20, 21 and 22)

Although the Subject had a duty to do so, she failed to employ graduated SCIP-R mandated

██████████

techniques to de-escalate the Service Recipient. Ultimately, this failure contributed to a physical altercation between the Subject and the Service Recipient that was likely to result in, and in fact did result in, physical injury to the Service Recipient.

Physical Abuse

To prove physical abuse, the Justice Center must establish intentional or reckless conduct by the Subject that resulted in physical contact, which caused physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient or caused the likelihood of such injury or impairment. SSL § 488(16) indicates that the word “intentionally” has the same meaning as provided in New York Penal Law § 15.05. Under New York Penal Law § 15.05(1), a person acts “intentionally” when a person has a “... conscious objective ...” to cause a result. In this case, the result was the bite injury to the Service Recipient’s back.

The Subject engaging in the confrontation with the Service Recipient and allowing the escalation of the situation to the level of physical contact resulted in the Subject biting the Service Recipient’s back. Pursuant to SSL § 488(1)(a), physical abuse “may include . . .biting,” and biting is therefore specifically prohibited in the statute. Biting is obviously not an approved SCIP-R technique nor was biting approved in the Service Recipient’s BSP. In this case, the Subject intentionally bit the Service Recipient and by physical contact caused physical injury to the Service Recipient. The Service Recipient was diagnosed with a human bite mark for which she had to be treated with antibiotics. (Hearing testimony of ██████████ Consulting Investigator ██████████; Hearing testimony of Subject; Justice Center Exhibits 2, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 20 and 21)

There is no evidence in the record that the physical interventions employed by the Subject

██████████

were reasonable emergency interventions necessary to protect the safety of any person. The Subject's use of non-sanctioned physical intervention resulted in injury to both the Subject and the Service Recipient.

In her defense, the Subject testified that the Service Recipient was never actually diagnosed with having a bite, only that the Service Recipient complained of a bite during triage at the hospital and the hospital treated the Service Recipient for a bite based only on the Service Recipient's word. The Subject also testified that if the Service Recipient was bitten, the Subject did not bite her. The Subject further stated that if there was a mark on the Service Recipient's back, it was likely from the medallion the Subject had on around her neck when she held the Service Recipient. The Subject testified that staff at the facility did not work well together and that they had motive to fabricate statements against her.

These arguments are contradicted by the credible evidence in the record. The "Diagnoses" section of the treating hospital's "Abstract Summary" specifically lists the Service Recipient as being diagnosed with a "human bite – assault." Based on that diagnosis, the Service Recipient was prescribed antibiotics for five days to avoid infection from the bite. The evidence in the record establishes that the Service Recipient did receive a human bite and was required to take medication as a result. (Hearing testimony of ██████████ Consulting Investigator ██████████; Justice Center Exhibits 6, 17 and 18).

Corroborative evidence in the record supports the conclusion that the Subject bit the Service Recipient. Three witnesses reported hearing the Service Recipient say at the time the situation was occurring that the Subject bit her. (Hearing testimony of ██████████ Consulting Investigator ██████████; Justice Center Exhibits 6, 10, 12, and 13) Three witnesses also reported that they saw a mark on the Service Recipient's back right after the confrontation

██████████

between the Subject and the Service Recipient. (Hearing testimony of ██████████ Consulting Investigator ██████████; Justice Center Exhibits 6, 9, 12 and 13) The body check form completed for the ██████████ 4:00 p.m. to 12:00 a.m. time period, with regard to the Service Recipient, indicated that there were no new marks found on the Service Recipient's body. The body check form completed for the ██████████, 8:00 a.m. to 4:00 p.m. time period, during which the incident occurred, noted the Service Recipient's new marks of a scratch on her arm and a bite mark on her back. (Hearing testimony of ██████████ Consulting Investigator ██████████; Justice Center Exhibit 15)

While the Subject stated her medallion must have left an imprint in the Service Recipient's back, again the Service Recipient was diagnosed with a human bite mark which occurred during the timeframe of the incident. ██████████ Consulting Investigator ██████████ inspected the Subject's medallion and pressed the medallion firmly into his hand which left a serrated mark that disappeared in seventeen minutes. Investigator ██████████ determined the mark on the Service Recipient's back was inconsistent with the Subject's medallion. There is no credible evidence to corroborate the assertion that the witnesses fabricated their statements. (Hearing testimony of ██████████ Consulting Investigator ██████████; Hearing testimony of Subject; Justice Center Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 20 and 21)

After considering and evaluating the Subject's hearing testimony, specifically her denial that she bit the Service Recipient, the Subject's hearing testimony is not credited evidence in this regard.

Accordingly, based on all of the evidence, it is concluded that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed neglect under SSL § 488(1)(h), as well as abuse under SSL § 488 (1)(a), as specified in Allegation 1 of the

██████████
substantiated report.

The report will remain substantiated. The next issue to be determined is whether the substantiated report constitutes the category of 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 a Category 3 act. A substantiated Category 3 finding 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 NY SSL § 496 (2). This report will be sealed after five years.

DECISION:


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

The determination that the Subject committed neglect and physical abuse shall remain substantiated.

The substantiated report of neglect and physical abuse is properly categorized as a Category 3 act.

This decision is recommended by Elizabeth M. Devane, Administrative Hearings Unit.

DATED: July 12, 2016
Schenectady, New York


Administrative Law Judge