

**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 Subject has been shown by a preponderance of the evidence to
have committed physical 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: August 2, 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
9 Bond Street – 3rd Floor
Brooklyn, New York 11201
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
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New York State Justice Center for the Protection
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By: Christopher Mirabella, Esq.

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████████████████
████████████████████

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], while on the agency van and traveling from the [REDACTED], located at [REDACTED], while acting as a custodian, you committed physical abuse when you flicked, pulled, and/or hit a service recipient's ear and/or the area around her ear.

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 habilitation program, operated by [REDACTED], and certified 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 [REDACTED] [REDACTED] for approximately five (5) months. The Subject worked as a Direct Support Professional (DSP) and at the time of the incident, she was assigned as a bus matron.

6. At the time of the alleged abuse, the Service Recipient was 24 years of age, and had been attending the program since [REDACTED]. The Service Recipient is a young ambulatory female with diagnoses of autism and moderate mental retardation, and engages in aggressive/assaultive, disruptive and injurious behaviors. (Justice Center Exhibit 7)

7. At the time of the alleged abuse, the Service Recipient was on the van to be transported from the [REDACTED] to the [REDACTED] when she began jumping up and down in her seat. (Justice Center Exhibits 6, 7 and 8)

8. The Subject and the driver of the van, another DSP, requested that the Service Recipient calm down and attempted to redirect her, however the Service Recipient continued her disruptive behavior. Then the subject flicked the Service Recipient's ear, causing the Service Recipient to flinch and cover her ears. (Justice Center Exhibits 6 and 8)

9. The Service Recipient calmed down for a brief period, but after another service recipient was dropped off, she began to jump up and down again. (Justice Center Exhibit 8)

10. At that point, the Subject moved behind the Service Recipient who then put her hands over her ears. When the Service Recipient took her hands off of her ears, the Subject flicked the Service Recipient's ear again. (Justice Center Exhibits 8, 9 and 11)

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(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.

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 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 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 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. Specifically, the evidence establishes that the Subject committed physical abuse on [REDACTED] when, while acting as a custodian, the Subject flicked the Service Recipient’s ear twice.

In order to sustain an allegation of physical abuse in this matter, the Justice Center must show that the Subject was a custodian who had physical contact with the Service Recipient; that such contact was either intentional or reckless; and that such contact caused either physical injury or serious or protracted impairment of a Service Recipient’s physical, mental or emotional condition; or caused the likelihood of such injury or impairment.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-12) The investigation underlying the substantiated report was conducted by [REDACTED], who, at the time, was an Assistant Director at [REDACTED], and was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf ¹ and provided five (5) letters of reference. (Subject Exhibit A).

The Subject was working at the facility on [REDACTED] as a DSP and was a custodian as that term is defined in Social Services Law § 488. The Subject, acting as a bus matron, and another staff as a driver, were supervising and transporting service recipients, including the Service Recipient, from the [REDACTED] to their respective residences. (Hearing testimony of Assistant Director [REDACTED]) While on the van in the parking lot, the Service Recipient began to jump up and down in her seat, and in an effort to calm the Service Recipient down, the Subject got up and flicked the Service Recipient's ear. (Hearing testimony of Assistant Director [REDACTED], Justice Center Exhibits 6 and 8) When the van stopped to drop off another service recipient, the Service Recipient again began to jump up and down and the Subject went to sit behind the Service Recipient and again flicked the Service Recipient on her ear. (Hearing testimony of Assistant Director [REDACTED], Justice Center Exhibits 6 and 8)

The Subject denied the allegation, testifying that she only put a hand on the Service Recipient's shoulder in an effort to calm her down and that she did not hurt the Service Recipient; however her testimony contains a number of inconsistencies. Assistant Director [REDACTED] testified that when he interviewed the Subject, the Subject stated that she had no physical contact with the Service Recipient. However, in both the Subject's request for amendment and her testimony she stated that she put her hand on the Service Recipient's shoulder. The Subject initially testified that she had a good relationship with everyone at the facility, yet sometime later testified that the staff bus driver was out to get her and had fabricated the incident. Additionally, the Subject testified that other staff had informed her that the staff bus driver had told the service recipient who

¹ An [REDACTED] interpreter was employed for the benefit of the Subject and was duly sworn to faithfully interpret from English to [REDACTED] and from [REDACTED] to English.

witnessed the incident to go along with the “story” of the incident. As neither the staff bus driver nor the service recipient who witnessed the incident had any motive to fabricate the incident, and based upon the Subject’s inconsistent testimony and the evidence in the record, the testimony of the Subject is not credited.

The record reflects that the staff bus driver personally observed the Subject flick the Service Recipient’s ear twice, saw the Service Recipient flinch and cover her ears when the Subject went to sit behind the Service Recipient and dropped the Service Recipient off early as a result of this incident. The driver reported the incident to her supervisor upon returning from the bus run. (Justice Center Exhibits 8, 9 and 11, Hearing Testimony of Assistant Director [REDACTED]) In addition, another Service Recipient who was present on the bus at the time observed the incident and reported to the bus matron the following day that the Subject was trying to stop the Service Recipient from jumping up and down by touching her face. (Justice Center Exhibits 9 and 10, Hearing Testimony of Assistant Director [REDACTED]).

Furthermore, the Service Recipient’s own behavior of covering her ears when the Subject went to sit by her the second time, provides further evidence that physical abuse did in fact occur. It has been established that the Subject acted intentionally by flicking the Service Recipient’s ear and Assistant Director [REDACTED] testified that less intrusive means were available to the Subject. (Hearing Testimony of Assistant Director [REDACTED]) Although the Subject was checked and no injury was found to her body or ear, the physical contact with the Service Recipient was likely to result in harm to the Service Recipient. Additionally, the Service Recipient’s own behavior of holding her ear and flinching when the Subject approached, establish protracted impairment of the Service Recipient’s emotional condition. (Justice Center Exhibit 8, Hearing Testimony of Assistant Director [REDACTED]) A least restrictive to most restrictive approach should have been employed by the

Subject to calm the Service Recipient down, without resorting to physical contact which could have escalated the situation and which increased the likelihood of physical harm to the Service Recipient. (Hearing Testimony of Assistant Director [REDACTED])

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 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 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 a Category 3 act.

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.

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

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

DATED: July 18, 2016
Schenectady, New York



Jean T. Carney
Administrative Law Judge