

**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
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: Todd Sardella, Esq.

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By: Sarah M. Coligan, Esq.
Lippes Mathias Wexler Friedman LLP
54 State Street, Suite 1001
Albany, New York 12207

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 physical abuse.

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: March 20, 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

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before:

Keely D. Parr
Administrative Law Judge

Held at:

Administrative Hearings Unit
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
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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for physical 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], [REDACTED] [REDACTED] of physical 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], while acting as a custodian, you committed physical abuse when you grabbed a service recipient, pushed him against a wall, and punched and/or kicked him in the face.

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 maximum security hospital that provides secure treatment and evaluation of forensic patients [REDACTED]. The facility is operated by the Office of Mental

Health (OMH), which is a provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged physical abuse, the Subject was employed as a Senior Security Hospital Treatment Assistant (SHTA) and had worked at the facility for fourteen years. The Subject was assigned to the admission ward where patients were evaluated for their ability to stand trial. (Hearing Testimony of Subject)

6. At the time of the alleged physical abuse, the Service Recipient was a 26 year old male, who had been admitted to the facility on pursuant to an order of commitment from the Court. The Service Recipient had a history of mental illness and was diagnosed with schizoaffective disorder. This was the Service Recipient's third admission to the facility. (Justice Center Exhibit 7)

7. On the afternoon of the alleged physical abuse, Staff was assigned to monitor patient showers. Staff went to the dormitory and asked the Service Recipient to take a shower. The Service Recipient became agitated by the request and Staff went into the hallway and told the Subject that the Service Recipient did not want to bathe. Staff and the Subject returned to the dormitory where the Service Recipient asked to be left alone. Staff and the Subject offered the Service Recipient the time-out room and the Service Recipient accepted. The facility used time-out as a therapeutic intervention to reduce stimuli to allay agitation. The Service Recipient walked towards the time out room followed by the Subject. Staff went to summon the Nurse, which was standard operating procedure when a patient utilized the time-out room. (Justice Center Exhibits 5 and 11)

8. When the Nurse arrived in the time-out room, the Service Recipient told the Nurse that the Subject had grabbed the Service Recipient off his bed in the dormitory, threw him like a ragdoll and punched him on the left side of the face. The Service Recipient stated that he was

going to get the Subject fired. The Nurse noted that the Subject was in the time-out room when this comment was made and that the Subject appeared calm. The nurse also noted that the Service Recipient did not appear injured, but had visible redness on his neck, his left ear and his elbow. The nurse summoned the doctor. (Hearing Testimony of Subject; Justice Center Exhibit 5)

9. The Service Recipient reported to the doctor that the Subject pushed the Service Recipient against the wall in the time-out room with Staff ■ present, kicked the Service Recipient three times on his left ear, picked the Service Recipient up and threw him around a few times before slapping him in the right face twice. The doctor noted ecchymosis behind the Service Recipient's left ear and abrasions on the right side of the Service Recipient's neck and right elbow. In the mental status exam, the doctor noted that the Service Recipient's thought content was delusional. (Justice Center Exhibit 8)

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 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 and/or neglect 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 as found in SSL § 493(4)(c), which is defined 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 physical abuse alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of physical abuse as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

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

If the Justice Center did not prove the physical abuse by a preponderance of the evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has not established by a preponderance of the evidence that the Subject committed an act, described as “Allegation 1” in the substantiated report. Specifically, the evidence does not establish that the Subject committed physical abuse by grabbing the Service Recipient, pushing him against a wall and punching and/or kicking him in the face.

In order to sustain an allegation of physical abuse, the Justice Center must prove that the Subject was a custodian and intentionally or recklessly caused, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient or caused the likelihood of such injury or impairment. (SSL § 488(1)(a))

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], Justice Center Investigator, who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and provided no other evidence.

The Subject credibly testified that he had no physical contact with the Service Recipient either in the dormitory or time-out room, as alleged. The Subject testified that the facility had a hands-off policy for the service recipients, unless they were in imminent danger and it was necessary to save a life. The Subject testified that he went into the time-out room with the Service Recipient and that the Service Recipient told him that he was tired of him, that he would make sure that he got fired and that he did not want to be around him. The Subject testified that the Service Recipient was sitting on the mattress in the time-out room and that when he stood up, the Subject backed away.

The Service Recipient gave inconsistent accounts of what allegedly transpired. He reported

to the nurse at 5:20 p.m. on the day of the alleged incident that the Subject grabbed him like a ragdoll and punched him on the left side of his face three times while in the dormitory. He reported to the doctor at 6:15 p.m. on the day of the alleged incident, that the Subject pushed him against the wall, kicked him three times in his left ear, picked him up and threw him around a few times before slapping him in the right face twice, all while in the time-out room. Additionally, the Service Recipient informed the doctor that Staff ■ looked on while this was happening but did not mention this in his statement to the nurse. It is clear from the evidence in the record that Staff ■ went to summon the nurse to the time-out room, so Staff ■ clearly could not have been watching while the Subject allegedly pushed and kicked the Service Recipient.

The Service Recipient reported that the Subject threw him around a few times, however the pictures taken right after the alleged incident show the Service Recipient standing intact. The nurse, who was the first person to examine the Service Recipient, noted redness on the Service Recipient but did not characterize it as an injury. The Subject credibly testified that he is 6'2" tall and weighs 290 pounds, while the Service Recipient is 5'4" tall and thin. Clearly, if the Subject had thrown the Service Recipient around a few times, the Service Recipient would have been unable to stand and pose for a photograph, and the nurse would not have reported to the investigator that the Service Recipient did not appear injured. In addition, the Service Recipient alternately reported that he was punched on the left side of his face and slapped on the right side of his face, however the photographs evidence no marks on the Service Recipient's face.

The photographs of the Service Recipient were taken after the alleged incident; however, no one had examined the Service Recipient prior to the alleged incident, making the marks on the Service Recipient inconclusive at best. In addition, the doctor diagnosed the marks behind the Service Recipient's left ear as ecchymosis, which could have easily been caused by a skin

irritation. The Subject testified that the Service Recipient liked to horse-play with the other service recipients, which could have caused the Service Recipient's abrasions. When the doctor diagnosed the Service Recipient's mental status at the same time as the physical exam, he noted that the Service Recipient's thought content was delusional. In addition to the inconsistent reporting, the Service Recipient did not have injuries consistent with either version of his reported events. Accordingly, for all of the reasons outlined above, the Service Recipient's statements are not credited.

The evidence did not establish that the Subject committed physical abuse when the Subject allegedly grabbed the Service Recipient, pushed him against a wall, and punched and/or kicked him in the face.

Accordingly, 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 physical abuse alleged. The substantiated report will be amended and sealed.

DECISION: 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 physical abuse.

This decision is recommended by Keely D. Parr, Administrative Hearings
Unit.

DATED: March 6, 2017
Brooklyn, New York



Keely D. Parr, ALJ