

**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]

The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

ORDERED: The attached and incorporated Recommended Decision in its entirety is hereby adopted by the Executive Director.

ORDERED: The Vulnerable Persons' Central Register shall take action in conformity with the attached Recommended Decision, specifically the Decision section.

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 22, 2017
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject

**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

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

Louis P. Renzi
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
11 Perlman Drive
Spring Valley, New York 10977
On: [REDACTED]

Parties:

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Robert T. DeCataldo, Esq.

[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for 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 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 and/or neglect when you lifted a couch while a service recipient was sitting on it, causing her to fall to the ground and hit her head.

These allegations have been SUBSTANTIATED as Category 3 physical abuse and Category 3 neglect pursuant to Social Services Law § 493(4)(c).

3. An Administrative Review was conducted and the substantiated report was retained.

4. The facility, located at [REDACTED] is a residential and day school for male and female youth ages 14 to 16, and is operated by [REDACTED] licensed by the NYS Office of Children and Family Services (OCFS) which is a provider agency that is subject to the jurisdiction of the Justice Center.

5. On the date of the alleged abuse and neglect (the incident), the Subject had been employed by [REDACTED] since 2014 as a Child Care Supervisor (CCS). He had previously been employed by [REDACTED] between 2005 and 2013 in other direct care titles, then returned in 2014 after a year of employment elsewhere.

6. On the date of the incident, the Service Recipient was a teenaged female. There is no evidence in the record regarding her length of stay or specific diagnosis. The facility provides therapeutic and educational services to youth with behavioral problems. (Hearing testimony of OCFS IAB Investigator [REDACTED] (Investigator [REDACTED]))

7. The facility protocols for addressing negative behaviors by service recipients were the Sanctuary Model and Therapeutic Crisis Intervention (TCI). (Hearing testimony of Investigator [REDACTED]; hearing testimony of the Subject) The Subject was trained in TCI, and certified as a TCI trainer beginning in 2009. (Hearing testimony of the Subject; Justice Center Exhibit 19)

8. The incident occurred at approximately 11:30 p.m. on [REDACTED] inside the [REDACTED] residence cottage (the cottage) of the facility's [REDACTED] campus. The Subject was summoned to the cottage to assist in managing the "out of program" situation with the service recipients, which was one of his duties as a supervisor. This situation began at approximately 9:00 p.m. on the day in question, and continued through approximately 11:30 p.m. At the time of the incident, approximately 11:30 p.m., the Service Recipient remained out of program and sitting on the couch located in the common room of the cottage. Several of the residents of the cottage had been non-compliant for at least that 2 ½ hour period, but by the time of the incident, all other service recipients had complied. The campus and cottage logs are in essential agreement with these facts. The campus log (CCS Log) is kept by the Subject and his peers, and the cottage log is kept by direct care staff. (Hearing testimony of Investigator [REDACTED]; hearing testimony of the

Subject; Justice Center Exhibits 17, 18)

9. The Subject directed the Service Recipient to go to her room to bed. The Service Recipient remained non-compliant and argumentative. The Subject failed to utilize any de-escalation techniques sanctioned by TCI. (Hearing testimony of the Subject; Justice Center Exhibits 6, 17, 18)

10. The Subject then lifted up the couch and the Service Recipient fell backwards to the tile floor, striking her head. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 1, 6, 8, 9, 11, 12, 20) The Service Recipient received a “knot” on her head as a result. (Justice Center Exhibit 20) There was no further injury or medical treatment. (Justice Center Exhibits 6, 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 physical abuse and/or neglect.
- Pursuant to Social Services Law § 493(4), the category of physical abuse and/or neglect that such act or acts constitute.

APPLICABLE LAW

The Justice Center is responsible for investigating allegations of abuse and 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 are 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.

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

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

If the Justice Center does not prove the physical abuse and 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 physical abuse and neglect as described in Allegation 1 in the substantiated report.

In support of its substantiated findings, the Justice Center presented several documents obtained during the investigation. (Justice Center Exhibits 1- 20) The investigation underlying the substantiated report was conducted by Investigator [REDACTED], 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 one document (cottage floorplan) created during the hearing and received into evidence as Subject Exhibit A.

Allegation 1 – physical abuse

In order to prove physical abuse, the Justice Center must prove by a preponderance of the evidence that the Subject was a custodian at the time of the incident, that the Subject 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.

At the time of the alleged abuse, the Subject was working in the facility as a child care supervisor, and had regular contact with service recipients. (Hearing testimony of the Subject) As a result, the Subject was a custodian as that term is defined in Social Services Law § 488(2).

The Subject acknowledged being in [REDACTED] cottage at the time of the alleged incident, and he admitted arguing with the Service Recipient while there, although he claimed he could not see her sitting on the couch due to the layout of the room. He further claimed that the incident never happened as alleged. (Hearing testimony of the Subject; Subject Exhibit A)

In contrast, the Service Recipient gave three statements accusing the Subject of abusing her. The statements were given on [REDACTED]. (Justice Center Exhibits 8, 9, 20) Her statements were consistent as to the relevant facts, and corroborated by statements given by two service recipients. Service recipient “[REDACTED]” claimed to have witnessed the incident (Justice Center Exhibit 11), and service recipient “[REDACTED]” stated that she did not see the incident but that she heard the Service Recipient “yelling”, and that the Service Recipient came to her room crying immediately afterwards and made the same accusation against the Subject. (Justice Center Exhibit 12)

There is no evidence in this record tending to discredit these statements, and in fact, another statement taken from Staff “[REDACTED]”, a social worker who was not present at the time of the incident but was later asked about service recipient “[REDACTED]”, lends credibility to the statement made by service recipient “[REDACTED]”. (Justice Center Exhibit 13)

The Subject argued that the Service Recipient and the service recipients who made statements likely colluded with each other to make up a consistent, but false, allegation against him. This argument is mere supposition, not supported by the facts developed in the hearing record. Specifically, the evidence showed that the Service Recipient was absent from the facility

██████████ during the period starting approximately ██████████ (six days after the incident), and had not returned to the facility when her second and third statements were made. (Hearing testimony of Investigator ██████████)

None of the assertions raised by the Subject during the hearing were meritorious or supported by any proof other than his own testimony. The Subject did not provide any independent witnesses or written statements by others in order to support his positions or discredit the evidence offered by the Justice Center. The Subject simply denied that the incident had ever occurred.

Moreover, this matter came under investigation in ██████████, only after the allegation by the Service Recipient was discovered during the course of a different investigation. Therefore, two conclusions arise: first, that the service recipients who gave statements had no reason to believe that the allegation here was being investigated, since at the time it was not, and thus no reason existed to collude, and second, any opportunity for collusion among the service recipients was very short and could only have taken place in the few days following the incident, long before the investigation commenced. (Hearing testimony of Investigator ██████████) Therefore, there is no reason to believe that collusion ever took place at all. The statements by the Service Recipient, service recipients “██████████” and “██████████”, and Staff “██████████” as to the conduct of the Subject are credited evidence and, considering the circumstances under which the statements were made, are given substantial weight.

It is therefore concluded that the Subject intentionally lifted the couch, causing the Service Recipient to fall to the floor as alleged.

The final element of the necessary proof required to sustain the allegation of physical abuse must be examined. There is some evidence in the record, a statement by the Service Recipient

herself, that she suffered a “knot” on her head caused by her head hitting the floor. (Justice Center Exhibit 20) This is a physical injury. But the injury was not noted, treated or documented by any medical staff, according to the hearing record, and indeed the IAB 24-Hour Safety Assessment (Justice Center Exhibit 7) is incomplete and unclear as to any physical injury arising from the incident, since it was prepared more than two months later. Thus, there may be doubt as to the existence of such injury. Nevertheless, it is not necessary for the Justice Center to prove an actual physical injury here; it is sufficient that there is a preponderance of evidence that the conduct of the Subject caused the likelihood of a physical injury to the Service Recipient, or a serious or protracted impairment of her physical, mental or emotional condition. Here, where there is a finding that the Subject ‘dumped’ the Service Recipient off the couch onto a tile floor, there is a clear likelihood that she could have been injured physically, or could have sustained a serious physical, mental or emotional impairment.

Accordingly, it is concluded that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed physical abuse against the Service Recipient.

Allegation 2 – neglect

In order to prove neglect, the Justice Center must prove by a preponderance of the evidence that the Subject was a custodian who owed a duty to the Service Recipient, and breached that duty by any action, inaction or lack of attention, and that the breach 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.

It has already been established that the Subject was a custodian at the time of this incident. The evidence further proved that as a child care supervisor in the facility, the Subject owed a duty

of care to the Service Recipient to properly utilize the facility protocols and techniques in dealing with negative behaviors by the Service Recipient. The Subject failed to utilize or attempt to de-escalate the Service Recipient, and indeed, in engaging in a loud verbal argument with her, likely did the opposite and escalated her negative emotional state. Further, the Subject then by his conduct toward the Service Recipient physically abused her. It is concluded that the Subject breached the duty he owed to the Service Recipient by his conduct as described in Allegation 1. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 1, 6, 19)

The second element of the offense of neglect must be examined. The question is whether the Subject's conduct in breaching his duty resulted in, or was likely to result in, physical injury or serious or protracted impairment of the Service Recipient's physical, mental or emotional condition. Again, it is not necessary for the Justice Center to prove that the Subject's breach of duty caused actual physical injury, and for all of the reasons discussed above, it is concluded on this record that the Subject's breach either did result in, or was likely to result in, such physical injury or serious or protracted impairment. It is thus concluded that the preponderance of the evidence proves that the Subject committed neglect as alleged.

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 a Category 3 act.

DECISION:

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 a Category 3 act.

This decision is recommended by Louis P. Renzi, Administrative Hearings Unit.

DATED: August 16, 2017
Schenectady, New York



Louis P. Renzi, ALJ