

**STATE OF NEW YORK  
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE  
WITH SPECIAL NEEDS**

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In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**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 is hereby adopted in its entirety.

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:** November 28, 2017  
Schenectady, New York



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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**

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In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

[REDACTED]

Before:

Mary B. Rocco  
Administrative Law Judge

Held at:

New York State Justice Center for the Protection  
of People with Special Needs  
125 E. Bethpage Road, Suite 104  
Plainview, New York 11803  
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: Jennifer McGrath, Esq.

[REDACTED]

### **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] 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], while a custodian, you committed physical abuse when you yelled at a service recipient excessively and/or hit him with a paper towel roll as a behavior intervention.

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 as a result the substantiated report was retained.

4. The Facility, [REDACTED], located at [REDACTED], is a day habilitation program for individuals over twenty-one years of age with intellectual disabilities, and is certified by the Office

for People With Developmental Disabilities (hereinafter “OPWDD”), which is a provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse and neglect, the Subject had been employed by the facility as a Direct Support Professional (hereinafter “DSP”) for approximately four years. As a DSP, the Subject was responsible for maintaining the safety and care of the service recipients assigned to her classroom adhering to their individual behavioral plans. The Facility is comprised of nine themed classrooms with three staff members assigned to each classroom. The Subject was regularly assigned to classroom [REDACTED] and worked an [REDACTED] shift. (Justice Center Exhibit 6; Hearing testimonies of Facility Director [REDACTED] and the Subject)

6. At the time of the alleged abuse and neglect, the Service Recipient was a non-verbal 41-year-old male with relevant diagnoses of mental retardation with intermittent explosive disorder. The Service Recipient had been attending [REDACTED] for approximately 20 years. (Justice Center Exhibits 6, 9, 10 and 11; Hearing testimony of Facility Director [REDACTED])

7. At approximately 9:30 a.m. on the morning of the alleged abuse and neglect, the Subject, DSP 1 and DSP 2 were attending to their morning duties within classroom [REDACTED] and the Service Recipient was present with a few other service recipients. The Service Recipient, known for inappropriate touching and social behaviors, began to touch a non-verbal female service recipient. Upon seeing this, the Subject immediately came to the female service recipient’s aid and verbally instructed the Service Recipient to leave the female service recipient alone. As the Service Recipient persisted with his behavior, the Subject directed him away and towards the kitchenette area of the classroom. The Subject then picked up a paper towel roll from a nearby shelf and hit the Service Recipient on the hand twice and on the head, twice and scolded him for his behavior. Witnessing this, DSP 2 intervened and escorted the Service Recipient away from

the Subject to the other side of the classroom. The incident was then reported to the Facility program coordinator by DSP 1 and the Service Recipient was evaluated by the facility nurse with no physical injuries noted. (Justice Center Exhibits 2, 6, 7, 17, 18, 21, 22, and 23; Hearing testimonies of Facility Director [REDACTED] and the Subject)

### **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 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 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 abuse and neglect of a person in a facility or provider agency is defined by SSL § 488(1)(a) and (h) 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.

(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 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 acts of physical abuse and neglect alleged in the substantiated report that is the subject of the proceeding and that such acts constitute the category of abuse and neglect as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

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

If the Justice Center did not prove the 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 the acts, 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 1-23). The investigation underlying the substantiated report was conducted by [REDACTED] Director [REDACTED] who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and provided two documents as evidence. (Subject Exhibits A and B)

On the day of the alleged physical abuse and neglect, the Subject was employed by the Facility as a DSP and, accordingly, was a custodian as that term is defined in Social Services Law § 488(2).

### **Physical Abuse**

The Justice Center proved by a preponderance of the evidence that the Subject committed physical abuse as alleged in Allegation 1. 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 and, that such contact intentionally or recklessly 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. (SSL §488(1)(a))

The facts in this matter are not in dispute. The Subject admitted in her statement and her testimony that she used a paper towel roll to chastise the Service Recipient. The Subject, however, denied hitting the Service Recipient with the paper towel roll, rather, she argued, that she tapped him with it in a therapeutic manner. The Subject testified that she witnessed the Service Recipient inappropriately touch a female service recipient and out of concern for the female service

recipient's safety, she used an "unorthodox" method to re-direct the Service Recipient. The Subject argued that this "unorthodox" method of repeatedly tapping the Service Recipient on the hand and on the head with the paper towel roll while scolding him was a therapeutic approach at a point when the Service Recipient was no longer responding to verbal prompts. The Subject further testified that she had used "unorthodox" methods in the past and was never corrected or instructed otherwise. (Justice Center Exhibits 2, 6 and 23; Hearing testimony of the Subject)

The record established that both DSP 1 and DSP 2 witnessed the encounter between the Subject and the Service Recipient and that they were concerned with the amount of force the Subject had used on the Service Recipient and the manner in which the Subject was speaking to the Service Recipient. In her statement dated [REDACTED], DSP 1 stated that the Subject was in an aggravated mood when she arrived for work that morning and that the Subject became more upset when she noticed the Service Recipient touching others. DSP 1 stated that she witnessed the Subject forcefully hit the Service Recipient repeatedly on the head with the paper towel roll and yell at him for his actions. (Justice Center Exhibit 17) In her statement, DSP 2 corroborated DSP 1's detailed summary of the encounter and stated that she physically intervened and re-directed the Service Recipient to the other side of the room out of concern for his safety. (Justice Center Exhibit 18) The Subject asserted that both the DSP's statements were inconsistent and unreliable; however, she offered no evidence to support this contention other than to state that a more desirable employment position was available and that they were motivated by the prospect.

The Subject's testimony that she did not hit or yell at the Service Recipient, but rather therapeutically tapped him with a paper towel roll while projecting her voice was unpersuasive. The record established, and the Subject admitted, that she intentionally struck the Service Recipient with the paper towel roll and scolded him for his actions. The Service Recipient's



Behavioral Support Plan, which the Subject was specifically trained on (Justice Center Exhibit 15), delineated clear examples of strategies to be utilized by staff when the Service Recipient was exhibiting inappropriate behavior, including providing tangible objects to occupy his hands or removing him from the area by taking him for a walk. The Behavioral Support Plan does not suggest yelling, striking or tapping the Service Recipient with an object as a means of re-direction. During her testimony, the Subject was able to articulate, clearly and coherently, her knowledge of the prescribed examples to re-direct the Service Recipient, but she admitted that she chose a different “unorthodox” approach at the time. (Hearing testimony of the Subject) The Subject could have easily handed the Service Recipient the roll of paper towels rather than hit him with it or taken him for a walk. Although the Subject’s objective of protecting the female service recipient from the unwanted touching by the Service Recipient may have been legitimate and commendable, she was not authorized to disregard the Service Recipient’s Behavior Support Plan specifically designed for such behaviors by yelling at and hitting him under any circumstances.

Additionally, in her defense, the Subject proffered a copy of a New York State Unemployment Insurance Appeal Board decision (Justice Center Exhibit 2) in which the Administrative Law Judge determined that this particular incident did not warrant her termination. The Subject argued that, as that decision found in her favor, it should therefore be dispositive in the current matter. However, because the law upon which the Justice Center bases its substantiated reports and subsequent reviews thereof is not the same as the law upon which the New York State Unemployment Insurance Appeal Board’s decisions are predicated, this argument fails.

Accordingly, the record sufficiently establishes that the Subject made physical contact with the Service Recipient by intentionally hitting him with a paper towel roll while scolding him. Consequently, the Subject’s conduct caused a likelihood of serious or protracted impairment of

the Service Recipient's mental and/or emotional condition as evidenced by his documented diagnoses of mental retardation and explosive disorder together with his particularized plan to address his inappropriate behaviors. As such, the Justice Center has met its burden that the Subject committed physical abuse as alleged in Allegation 1.

### **Neglect**

The Justice Center proved by a preponderance of the evidence that the Subject committed neglect against the Service Recipient as alleged. In order to sustain an allegation of neglect, the Justice Center must establish that the Subject was a custodian who owed a duty to the Service Recipient, that she breached that duty, and that the breach either 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. (SSL § 488(1)(h))

The record establishes that the Subject was a custodian who was admittedly familiar with the Service Recipient's Behavior Support Plan and therefore owed a duty to the Service Recipient to provide a caring, therapeutic and safe environment in accordance. The Service Recipient's Behavioral Support Plan specifies the actions to be taken to re-direct the Service Recipient when exhibiting maladaptive behaviors. Hitting the Service Recipient with a paper towel roll was clearly not a redirection technique referenced in his Behavior Support Plan and the Subject's conduct therein did not support a safe and therapeutic environment for the Service Recipient. Consequently, the Subject breached her duty to the Service Recipient. Despite the fact that there was no evidence in the record that the Subject's breach of duty actually resulted in physical injury, or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient, such evidence is not necessary for a finding of neglect. The likelihood of such resulting injury or impairment was clear and corroborated by the detailed Behavioral Support Plan designed

to ensure the safety of the Service Recipient and other service recipients.

The defenses raised by the Subject are not persuasive for the reasons previously discussed.

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 and 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 Category 3 acts. Substantiated Category 3 findings of abuse and 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 SSL § 496(2). The report will be sealed after five years.

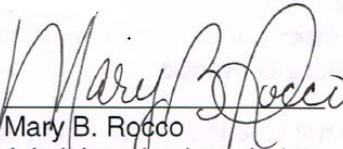
**DECISION:**

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 Mary B. Rocco, Administrative Hearings  
Unit.

**DATED:** November 13, 2017  
Plainview, New York



Mary B. Rocco  
Administrative Law Judge