

**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:** December 1, 2017  
Schenectady, New York



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David Molik  
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register  
Administrative Appeals Unit  
[REDACTED], Subject  
Nicole A. Murphy, Esq.

**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:

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 – 3<sup>rd</sup> Floor  
Brooklyn, New York 11201  
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: Laurie Cummings, Esq.

[REDACTED]

By: Nicole A. Murphy, Esq.  
Fine, Olin & Anderman, LLP  
39 Broadway, Suite 1910  
New York, New York 10006

### **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] 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 by his shirt, dragged him, pushed/shoved him to the floor, pushed him against a wall, and/or kicked/swept his feet, causing him to fall to the floor.

This allegation has been SUBSTANTIATED as Category 2 physical abuse pursuant to Social Services Law § 493(4)(b).

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

4. The facility, located at [REDACTED], is an Individualized Residential Alternative (IRA), operated by the [REDACTED] of the Office for People With Developmental Disabilities

(OPWDD), 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 Direct Support Assistant (DSA) for 9 years. The Subject and DSA [REDACTED] were assigned 2:1 supervision of the Service Recipient. (Hearing Testimony of Subject; Justice Center Exhibit 21 – Audio Interview of DSA [REDACTED])

6. At the time of the alleged physical abuse, the Service Recipient was a very slim, 22-year-old male, with diagnoses of autistic and bipolar disorders and severe mental retardation. The Service Recipient routinely engaged in physical aggression, self-injurious and disruptive behaviors and was placed on 2:1 staffing due to his unmanageable behaviors. (Hearing Testimony of Subject; Justice Center Exhibit 15)

7. On the afternoon of the alleged physical abuse, the Service Recipient was in the back room trying to pinch, kick and hit DSA [REDACTED]. The Subject asked the Service Recipient whether he wanted water and the Service Recipient said yes. The Subject accompanied the Service Recipient into the kitchen where they stood by the kitchen island. DSA [REDACTED], who was cooking in the kitchen, poured a glass of water and handed it to the Subject who gave it to the Service Recipient. After drinking the water, the Service Recipient began to run in place, intermittently stepping on top of the Subject's feet and ankles. As the Subject moved his leg, the Service Recipient lost his balance and fell to the ground. Shortly thereafter, the Service Recipient got up and walked into the back room. (Hearing Testimony of Subject; Justice Center Exhibits 16 and 21 – Audio Interview of DSA [REDACTED])

8. Direct Support Assistant Trainee (DSAT) [REDACTED] who was in the kitchen, told the Subject that there was a way to take the Service Recipient down without hurting him, to which the Subject responded that if she was paying attention she would have seen that it was not a takedown. DSAT

█ promptly reported the incident and a body check was performed on the Service Recipient. No new visible injuries were observed; no swelling was observed and the Service Recipient did not appear to be in pain. (Hearing Testimony of Subject; Justice Center Exhibits 7 and 21 – Audio Interview of DSAT █)

### **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 2 as found in SSL § 493(4)(b), which is defined as follows:

Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one 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 by his shirt, dragging him, pushing/shoving him to the floor, pushing him against a wall, and/or kicking/sweeping his feet, causing him to fall to the floor.

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 along with audio interviews of staff, including the Subject. (Justice Center Exhibits 1 - 21) 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 Justice Center's entire case is based upon the allegations of DSAT [REDACTED]. In her interview, she stated that the Subject dragged the Service Recipient into the kitchen. However, the Subject vehemently denied this and DSA [REDACTED] stated no such thing during her interview. DSA [REDACTED] stated that the Service Recipient walked towards the kitchen with the Subject behind him. Additionally, DSA [REDACTED], who was in the kitchen at the time of the alleged incident, stated that the Subject walked with the Service Recipient into the kitchen and did not drag him. (Hearing Testimony of Subject; Justice Center Exhibit 21 – Audio Interviews)

DSAT [REDACTED] next stated that the Subject was being aggressive with the Service Recipient in the kitchen, however both the Subject and DSA [REDACTED] stated that the Service Recipient was in the kitchen waiting for his water, having his usual behaviors and that the Subject was trying to verbally calm him. DSAT [REDACTED] next stated that the Subject came from around the corner and kicked the Service Recipient with all of his might, swept him off of his feet and that the Service Recipient landed on his hipbone. However, a body check was performed after DSAT [REDACTED] reported the incident and there were no bodily injuries observed on the Service Recipient whatsoever. No visible marks or

swelling were observed and the Service Recipient did not appear to be in any pain. (Hearing Testimony of Subject; Justice Center Exhibits 7 and 21 – Audio Interviews)

The Subject credibly testified that the Service Recipient was running on top of his feet and that when he tried to move his leg, the Service Recipient had one foot on top of the Subject's foot and lost his footing with the other one, coming down almost Indian style to sit on the floor. The Subject testified that the Service Recipient got up a short time later and went into the back room.

Accordingly, DSA [REDACTED] version of events is not credited. Had the Service Recipient been dragged, kicked and swept off his feet where all 100 lbs. of him landed on his hipbone, some injury, marks and/or pain would have been observed. The Subject's Narrative Progress Notes state that the Service Recipient ate all of his dinner and took his medication without incident, approximately 1 ½ hour after the alleged "take-down". The Subject's version of events is corroborated by both staff who were present, DSA [REDACTED] in the back room who did not observe the Subject drag the Service Recipient and by DSA [REDACTED] who was in the kitchen and did not observe the Subject being aggressive with the Service Recipient. (Justice Center Exhibits 13 and 21 – Audio Interviews)

The evidence did not establish that the Subject committed physical abuse when the Subject allegedly grabbed the Service Recipient by his shirt, dragged him, pushed/shoved him to the floor, pushed him against a wall, and/or kicked/swept his feet, causing him to fall to the floor.

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:** November 16, 2017  
Brooklyn, New York

  
Keely D. Parr, ALJ