

**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 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: April 17, 2018
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject
David J. Friedman, Esq.

**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:

David Molik
Supervising Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
401 State Street
Schenectady, New York 12305
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]

By: David J. Friedman, Esq.
CSEA, Inc.
143 Washington Avenue
Capitol Station Box 7125
Albany, New York 12224-0125

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], [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], at the [REDACTED], located at [REDACTED], while a custodian, you committed physical abuse when you punched a service recipient in the face/head and/or body multiple times.

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 [REDACTED] (the facility), located at [REDACTED], is a secure facility for males, ages sixteen to twenty-one years old, and is operated by the New York State Office of Children and Family Services, 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 the Office of Children and Family Services as a Youth Division Aide 4 (YDA-4), had worked for the Office of Children and Family Services for approximately three years and had been at the facility for fifteen months. (Hearing testimony of the Subject; Hearing testimony of Justice Center Senior Investigator [REDACTED] (Investigator [REDACTED]); Justice Center Exhibit 6)

6. At the time of the alleged abuse, the Service Recipient was sixteen years old, and had been a resident of the facility for approximately ten months. The Service Recipient has a diagnoses of adjustment disorder with anxiety (by history), conduct disorder, cannabis abuse and asthma. (Justice Center Exhibits 6 and 10)

7. On [REDACTED] the Subject was escorting the Service Recipient and two other service recipients from a classroom to the water fountain. They were waiting for a security door to be opened. Movement on the other side of the door had to be completed prior to the door being opened. (Hearing testimony of the Subject; Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6, 12 and 13)

8. The Subject instructed the Service Recipient to move away from the classroom window. The Service Recipient was making hand gestures and faces at other service recipients. (Hearing testimony of the Subject; Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6, 12 and 13)

9. The Subject turned away from the Service Recipient and, at that moment, the Service Recipient sucker punched the Subject in the face. The Subject reacted by going into a boxer's stance. The Subject then attempted to "hook"¹ and or otherwise restrain the Service

¹ "Hook" is a form of manual restraint.

Recipient. This was not successful. (Hearing testimony of the Subject; Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6, 12 and 13)

10. Another YDA entered the hallway and placed the Service Recipient in a standing hold. As this was happening, the Subject punched the Service Recipient three times in the face and neck area with a closed fist. (Hearing testimony of the Subject; Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6, 12 and 13)

11. Preventing and Managing Crisis Situations (PMCS) is the protocol for addressing outbursts of physical behavior at the facility which the Subject had received training in. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 8 and 9)

12. The Service Recipient was taken to the facility nurse where it was documented that the Service Recipient had no observable injuries. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6 and 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 abuse.
- Pursuant to Social Services Law § 493(4), the category of abuse that such act or acts constitute.

APPLICABLE LAW

The Justice Center is responsible for investigating allegations of abuse 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 occurred..." (Title 14 NYCRR 700.3(f))

The physical abuse of a person in a facility or provider agency is 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.

Substantiated reports of abuse shall be categorized into categories pursuant to SSL § 493(4), including Category 2, which is defined as follows:

(b) 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 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 of physical abuse, 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 1-13) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who was unavailable to testify at the hearing. Investigator [REDACTED] 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 submitted a visual only video of the incident, which was extremely helpful and illuminating evidence with respect to the substantiated allegations. (Justice Center Exhibit 13)

In order to sustain an allegation of physical abuse, the Justice Center must prove by a preponderance of the evidence 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.

On the day of the alleged physical abuse, the Subject was employed by the NYS Office of Children and Family Services as a YDA-4 at [REDACTED] and was a custodian as that term is defined in Social Services Law § 488(2). It is undisputed that the Subject made physical contact with the Service Recipient. After the Service Recipient was instructed to move

away from the classroom window through which he was making gestures, the Subject turned away from the Service Recipient. At that moment, the Service Recipient sucker punched the Subject in the face. The Subject reacted by going into a boxer's stance. The Subject then attempted to physically restrain the Service Recipient. This was not successful. Another YDA entered the hallway and placed the Service Recipient in a standing hold. As this was happening, the Subject punched the Service Recipient three times in the face and neck area with a closed fist. (Hearing testimony of the Subject; Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6, 12 and 13)

The Subject testified that he did not remember hitting the Service Recipient and that he was in "fight or flight mode." The Subject was concerned that the other two Service Recipients would attack him. The video footage clearly shows that the Subject reacted immediately to the Service Recipient's punch. Whether the Subject remembers hitting the Service Recipient is not relevant. The Subject's actions are clearly reckless. (Hearing testimony of the Subject; Justice Center Exhibit 13) Social Services Law defines "recklessly" as having the same meaning as provided in New York Penal Law § 15.05. (SSL § 488(16)) New York Penal Law § 15.05(3) states that a person acts "recklessly with respect to a result or to a circumstance" when the person is "aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

Although the Subject's reaction was immediate, he had to have been aware of the risk of punching the Service Recipient in his face. The Subject understood this. The Subject was trained in Preventing and Managing Crisis Situations (PMCS) which trains staff in how to handle

aggressive service recipients by deflecting and redirecting the service recipients and removing oneself, if necessary. The training did not include punching a service recipient in the face or throat. The Subject's conduct represented a gross deviation from the standard of conduct that a reasonable person would observe in the situation. *People v. Atkinson*, 799 N.Y.S.2d 125, 129 (2005) The Subject acted recklessly. (Hearing testimony of the Subject; Justice Center Exhibits 8, 9 and 13)

The Subject also argues that this was a reasonable emergency intervention. This argument has no merit. It is clear from the video of the incident that the Service Recipient was already being placed in a restraint when the Subject hit him. Accordingly, the Subject consciously disregarded the risk of injury to the Service Recipient. (Hearing testimony of the Subject; Justice Center Exhibit 13)

Although the Service Recipient did not sustain any injuries as a result of the Subject's punches, there was a strong likelihood that serious injuries could have occurred. Any punch to the face could have serious consequences, especially if contact is made with the throat, the eyes, the eye socket, the cheekbones, the nose, the mouth or the jaw. This Service Recipient could have easily incurred numerous fractures. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6 and 7)

In conclusion, 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 set forth in the substantiated report. In order to prove Category 2 conduct, the Justice Center must establish that the Subject seriously endangered the health, safety or welfare of the Service Recipient. Based upon the nature of the

Subject's conduct and the potential affect it could have had on the Service Recipient, as well as 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 2 act.

A substantiated Category 2 finding of abuse and/or neglect 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 2 conduct. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall 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.

The substantiated report is properly categorized as a Category 2 act.

This decision is recommended by David Molik, Administrative Hearings Unit.

DATED: April 2, 2018
Schenectady, New York



David Molik
Administrative Hearings Unit