

**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

**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:

Mary Jo Lattimore-Young
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People With Special Needs
2165 Brighton Henrietta Town Line Road
Rochester, New York 14623
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: Peter Zisser, Esq.

[REDACTED]

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 a custodian, you committed physical abuse when you grabbed a service recipient by the arm and dragged her toward her bedroom, resulting in contusions.

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, the [REDACTED], located at [REDACTED], provides services to developmentally disabled individuals, and is operated by the New York State Office for People With Developmental

Disabilities (OPWDD), which is a provider agency that is subject to the jurisdiction of the Justice Center. There are ten service recipients who reside at the IRA. The service recipients' intellectual disabilities range from moderate to profound. (Hearing testimony of the Quality Improvement (QI) Liaison¹ and Justice Center Exhibit 5)

5. At the time of the alleged physical abuse, the Subject had been employed at the IRA as a Direct Support Professional (DSP) for approximately one year and worked the [REDACTED] shift. The Subject had been familiar with the Service Recipient and her treatment plans. The Subject was a custodian as that term is so defined in Social Services Law § 488(2). On [REDACTED], the day of the alleged physical abuse, the Subject was working with other IRA staff. (Hearing testimony of the Subject; Justice Center Exhibits 5, 8-9 and 35)

6. At the time of the alleged physical abuse, the Service Recipient, an ambulatory fifty-two-year-old female, had been a resident of the facility since [REDACTED] 1989. Although the Service Recipient had a limited verbal capacity, she communicated her needs to staff by using some sign language, gestures and her own unique vocabulary, which included such words as [REDACTED] for her music and [REDACTED] for her Doritos snack. The Service Recipient had diagnoses of severe intellectual disorder, bipolar disorder, Down syndrome (unspecified) and other medical conditions. Except for Wednesdays, the Service Recipient attended day program outside of the IRA on the other weekdays. The Service Recipient had difficulty with transitions in her routine that may have increased her anxiety and caused behavioral outbursts. The Service Recipient usually engaged in challenging behaviors consisting of physical and verbal aggression or target behaviors that have been specifically addressed in her treatment plans². The Service Recipient

¹ [REDACTED] is hereinafter referred to as QI Liaison. He conducted the investigation and testified at the hearing.

² The Service Recipient's treatment plans are her Individualized Protective Oversight Plan (IPOP) effective [REDACTED] (Justice Center Exhibit 8) and her revised Behavior Support Plan (BSP) dated [REDACTED] (Justice Center Exhibit 9).

displayed physical aggression by hitting, biting, pinching others, slapping and kicking. The Service Recipient also displayed verbal aggression by using a loud voice and yelling in a high-pitched sound. According to the Service Recipient's BSP³, when the Service Recipient is exhibiting physical aggression, staff are permitted to intervene by using authorized physical contact in the form of "touch control" under Strategies for Crisis Intervention and Prevention-Revised (SCIP-R)⁴ to redirect the Service Recipient to another activity. (Hearing testimonies of the QI Liaison and the Subject; Justice Center Exhibits 5, 8-9)

7. At approximately 2:30 p.m. on [REDACTED], the Subject drove the agency van back to the IRA after retrieving the Service Recipient and other service recipients from their day program. Staff 1 was the other staff person riding in the van. The Service Recipient was seated in the third row of the van behind and to the left side of the Subject. During the thirty-minute ride, the Subject could see the Service Recipient in the van's rear-view mirror and observed that, for the entire ride, the Service Recipient was engaging in her usual targeted behaviors. The Subject saw that the Service Recipient had balled her right hand (her dominant hand) into a fist and was hitting her right-hand/wrist or arm against the van's glass window and that the force was such that the Subject could hear the Service Recipient's hand/wrist or arm striking against the window. The Service Recipient was also yelling and biting the knuckles on her left hand. At about 3:00 p.m., the van arrived at the IRA. The Subject assisted the Service Recipient off the bus with the help of Staff 1⁵ and then got back in the van to drive it to a different area of the IRA. While the Subject moved the van, Staff 1 walked the Service Recipient inside the IRA and into a hallway located

³ Refer to footnote 2 supra.

⁴ SCIP-R (or SCIP) techniques involve the use of approved personal physical interventions to address a service recipient's behavioral episodes if such techniques are permitted to be used under a service recipient's treatment plan. (Justice Center Exhibit 5)

⁵ [REDACTED] is hereinafter referred to as Staff 1 and works at the IRA as a DSP. (Justice Center Exhibits 5, 33 and 36)

between the dining area and the kitchen. Staff 2, a new employee, was already present in the dining room area and observed the Service Recipient.⁶ While waiting and standing in the hallway, the Service Recipient began biting herself and proceeded to hit the wall for about five minutes.⁷ Thereafter, the Service Recipient entered the kitchen/dining area where snacks were already on the table. The Service Recipient continued to yell very loudly, stomp her feet, bite her hand and try to pinch other people. At some point, the Subject came inside and positioned herself in the kitchen/dining area. The Subject asked the Service Recipient whether she wanted a snack. However, during the transition to the dining area, the Service Recipient continued to be agitated and began hitting her right hand on the water cooler jug, yelling loudly and biting her hand. The Subject heard the Service Recipient say [REDACTED] and asked her if she wanted to go to her bedroom to listen to her [REDACTED] (the Service Recipient's word for music). The Subject then used her right hand to grab onto fingers of the Service Recipient's left hand and they proceeded to walk down the hallway to the Service Recipient's bedroom. During this time, the Service Recipient's agitation subsided as the Service Recipient walked closer to her bedroom and she could see her favorite music recliner. The Subject then escorted the Service Recipient into her bedroom, sat her in her chair and turned on the radio/CD player located next to the chair so that the Service Recipient could listen to her music. (Hearing testimonies of the QI Liaison and the Subject; Justice Center Exhibits 5, 29-31, 35-37)

8. On [REDACTED], five days after the alleged physical abuse, the LPN performed the body check of the Service Recipient. The LPN noted on the Body Check Sheet and Event Report Form (Justice Center Exhibits 20 and 21) that she observed three circular purple/grey

⁶ [REDACTED], a DSP is hereinafter referred to as Staff 2. (Justice Center Exhibit 31)

⁷ The record is unclear as to which hand the Service Recipient used to hit the wall, however, the record establishes that the Service Recipient's usual practice was for her to take her dominant right hand, ball it into a fist and then bang it against the wall. (Hearing testimony of the Subject)

bruises approximately one-half inch in diameter located below the elbow on the back side of the Service Recipient's right wrist/forearm area and that the Service Recipient's bruises were non-serious "requiring no more than first aid" treatment. The LPN did not comment either on the Body Check Sheet or the Event Report Form as to what caused the bruises and whether they could have resulted from the alleged incident or from the Service Recipient engaging in her usual hitting or target behaviors. The Service Recipient was not treated at a hospital or a clinic for her injuries. (Justice Center Exhibits 5, 20-21 and 31)

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 physical 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 or neglect 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) as:

"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, which is defined under SSL § 493(4)(c) as:

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(s) 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.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-5, 7-11, 13, 16-22, 28-37) The investigation underlying the substantiated report was conducted by the OPWDD QI Liaison, 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 no other evidence.

The Justice Center contends that, in responding to the Service Recipient's behavioral episode, the Subject committed physical abuse when she stated to the Service Recipient that "nobody wants to deal with your bullshit today" then intentionally or recklessly used unauthorized physical contact ("arm control") to drag the Service Recipient to her bedroom in a manner that was contrary to the Service Recipient's treatment plans. The Justice Center further contends that the Subject's conduct caused the bruises on the Service Recipient's right wrist.

To prove physical abuse under SSL § 488(1)(a), the custodian must be shown to have "intentionally or recklessly [caused], by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient or [caused] the likelihood of such injury or impairment." The terms "intentional" and "reckless" are defined by Penal Law. (SSL §488(16) and PL 15.05(1) and (3)) The term "intentionally" is defined by Penal Law as follows: "A person acts intentionally with respect to a result or to conduct ... when his conscious objective is to cause such result or to engage in such conduct." (PL 15.05(1))

At the hearing, the Subject adamantly denied the allegations. The Subject also raised the defense that the Service Recipient's bruises were caused by her usual self-harm type hitting behaviors, which are targeted behaviors in her treatment plans. During her testimony, the Subject admitted that she had physical contact with the Service Recipient during the escort, but vehemently denied ever dragging the Service Recipient by her upper right arm, wrist or biceps as alleged.⁸ The Subject testified that when she heard the Service Recipient say [REDACTED] she asked the Service Recipient if she wanted to go into her bedroom to listen to her music [REDACTED] and escorted her

⁸ Refer to Justice Center Exhibit 5; Justice Center Exhibits 33 and 36 (Staff 1's first and second written statements); Justice Center Exhibit 31 (Staff 2's written statement).

down the hallway towards her bedroom. As to the nature of her physical contact with the Service Recipient during the escort, the Subject adamantly testified that she only used her right hand to grab onto the Service Recipient's left-hand fingers then guided her down the hallway towards her bedroom. The Subject explained that she used no force during the escort and that the Service Recipient voluntarily walked with her towards her bedroom which was where the Service Recipient wanted to be to listen to her music. The Subject further stated that she did not grab the Service Recipient's arm during the escort and that she held onto the Service Recipient's fingers while her left arm was hanging down at her side as she walked. The Subject stated that she never put her arm around the Service Recipient's waist as another staff person (Staff 1) had reported (during her second investigatory interview). (Justice Center Exhibits 5, 33 and 36)⁹

Although the Justice Center pointed to what appeared to be discrepancies between the Subject's testimony and her written statement, the Subject, however, clarified and dispelled those discrepancies during her direct testimony and on cross-examination.

At the hearing, the QI Liaison testified that staff had reported to him that, on the incident date, they saw the Service Recipient engaging in her usual hitting behaviors after she returned to the IRA from program and prior to the Subject's physical contact with the Service Recipient. The Subject told the QI Liaison that the Service Recipient was being her "normal" self that day, "yelling and hitting the window," apparently referring to the thirty-minute van ride to the IRA from program. (Justice Center Exhibit 35) Staff 1 also told the QI Liaison that the Service Recipient engaged in her usual "behaviors that day" and when the Service Recipient was about to

⁹ It should be noted that during Staff 1's initial telephone interview on [REDACTED] (Justice Center Exhibit 33), she told the investigator that she did not remember any intervention occurring between the Service Recipient and staff. During her second interview on [REDACTED] (Justice Center Exhibit 36), Staff 1 relayed to the investigator what she now recalled about the incident. The record is unclear as to how or why Staff 1's recollection abruptly changed.

have a snack in the dining area, Staff 1 saw the Subject escort the Service Recipient to her bedroom and that they all talked to the Service Recipient in an attempt “to help guide her to her room.” (Justice Centers Exhibits 33 and 36) However, during his hearing testimony, the QI Liaison intimated that, although staff had reported that they witnessed the Service Recipient hitting the window (during the van ride on the incident date), hitting the wall for five minutes and engaging in her usual behaviors (including known hitting behaviors), he did not inquire further to rule out whether the Service Recipient’s usual hitting behaviors prior to the Subject’s intervention may have been the cause of her bruises. In his signed investigatory statement (Justice Center Exhibit 37), the QI Liaison wrote that “the information reported by (Staff 1) about (the Service Recipient) returning from day program with bruises was not included in the investigatory report because this appears to be a separate issue.” The QI Liaison further noted that Staff 1 “did not provide any details as to the dates of the bruises, the nature of [the] bruises or a description of the bruises” and that Staff 1 “did not report that they were abnormal for [the Service Recipient] or suspicious in nature.” Nevertheless, given all that staff reported to the QI Liaison, it is more likely than not that the Service Recipient’s bruises were caused by her normal hitting behaviors in which she engaged on the incident date and prior or possibly after the Subject’s involvement.

Regardless of whether the Subject’s physical contact with the Service Recipient was proper, the dispositive issue here is what caused the bruises to the back of the Service Recipient’s right hand/wrist or forearm. The inquiry then becomes whether the Subject’s physical contact with the Service Recipient caused the Service Recipient’s bruises or was likely to cause physical injury to the Service Recipient. Alternatively, inquiry has to be made as to whether there was a likelihood that the Service Recipient’s injuries were caused by her own usual repetitive behaviors of hitting her right hand/wrist or forearm against hard surfaces (walls or windows) or hard objects.

The record contains conflicting eyewitness accounts from staff regarding how the Subject's physical contact manifested itself during her escort of the Service Recipient to the Service Recipient's bedroom. However, the Subject was the only eyewitness who testified at the hearing. The Subject clarified during her hearing testimony that she only used her right hand to grab onto the Service Recipient's left fingers to escort her to her bedroom. Staff 1 reported in her written statements, dated [REDACTED] and follow-up statement dated [REDACTED], that she observed the Service Recipient engaging in her usual behaviors during the afternoon snack time in the dining room area. (Justice Center Exhibits 33 and 36) Staff 1 also reported that at the relevant time she heard the Service Recipient yelling loudly and saw her stomping her feet, after which she saw the Subject use "arm control" to take the Service Recipient to her bedroom. The Service Recipient's treatment plan authorizes the use of "touch control" to re-direct her, but not the use of "arm control." (Justice Center Exhibit 9) In her description as to how the Subject allegedly escorted the Service Recipient, Staff 1 reported that she observed the Subject improperly placing her left hand on the Service Recipient's right wrist/forearm and placing her right hand around the Service Recipient's waist from the left side of the Service Recipient as they began to walk towards her room. Staff 1 further reported that the Service Recipient was trying to "break out" of the Subject's hold as they walked down the hallway, but staff "all talked to [the Service Recipient] and tried to help guide her to her room." (Justice Center Exhibits 33 and 36)

In Staff 2's written statement dated [REDACTED], she reported that, after the Service Recipient arrived at the IRA at about 3:00 p.m. on the date of the alleged physical abuse, Staff 2 saw the Service Recipient "biting herself and hitting the wall" "for about 5 minutes" as the Service Recipient stood in the hallway between the dining and kitchen area. Staff 2 further reported that she heard the Subject say to the Service Recipient that "nobody wants to deal with your bullshit

today” and that she saw the Subject grab the Service Recipient “by the upper right arm” or “by her biceps, and dragged (the Service Recipient) to her bedroom.” Staff 2 further reported in her written statement that, while she stood in the dining area doorway, she overheard the Subject tell the Service Recipient that “she was going to listen to her radio and she wasn’t having a snack.” (Justice Center Exhibit 31)

The Administrative Law Judge, having observed the Subject at the hearing and having evaluated her testimony on the material issue of her physical contact with the Service Recipient, finds the Subject’s testimony to be credible. After weighing all of the credible evidence, it is determined that the Service Recipient’s bruises were likely caused by the Service Recipient’s own usual behaviors. This finding is based upon the Subject’s credible testimony; on the fact that the Service Recipient normally engages in repetitive behaviors involving hitting her right hand/wrist or forearm on hard surfaces or objects; on the fact that on the date of the incident and prior to the Subject’s physical contact, the Service Recipient did engage in her usual hitting behaviors when she was hitting on the window during the thirty-minute van ride and hitting for about five minutes on the hallway wall as she waited to enter the dining room area; and on the fact that after entering the dining room, the Service Recipient was hitting on the water jug. In addition, the fact that there was a five-day delay between the date of the Subject’s alleged physical abuse and the date the body check was performed significantly increases the likelihood that the Service Recipient’s own repetitive hitting behaviors caused her bruises.

Although, the Justice Center argues that the nature of the bruising was consistent with the Subject grabbing the Service Recipient’s right arm, the evidence in the record provides insufficient and unpersuasive support for this claim.

Consequently, it is found that the record lacks sufficient proof, medical or otherwise, that

the physical contact the Subject had with the Service Recipient caused her right wrist/forearm bruises. There is also insufficient proof in the record that the Subject's conduct caused the likelihood of 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.

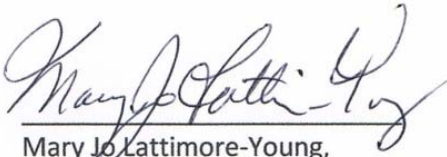
Accordingly, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the physical abuse alleged. The substantiated report will be amended and sealed.

Since it has been determined that the substantiated report will be amended and sealed, it is not necessary to discuss if the category level set forth in the report was appropriate.

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 Mary Jo Lattimore-Young,
Administrative Hearings Unit.

DATED: March 29, 2018
Rochester, New York


Mary Jo Lattimore-Young,
Administrative Law Judge