

**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: August 16, 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**

Adjudge. Case #:

[REDACTED]

Before:

Elizabeth M. Devane
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
Eleanor Roosevelt State Office Building
4 Burnett Blvd
Poughkeepsie, New York 10901
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: Jay Jaffe, Esq.
310 West 43rd Street
New York, New York 10036

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for neglect and 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 neglect and 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 and/or neglect when you placed a towel over a service recipient's face/head, slapped her buttocks, and/or pulled her backwards by the collar of her shirt.

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, [REDACTED], located at [REDACTED], is a [REDACTED]-bed mental health unit in the [REDACTED] which is part of the [REDACTED] and is licensed by the Office of

Mental Health (OMH) which is an agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Justice Center Investigator [REDACTED]; Hearing testimony of the Subject; Hearing testimony of [REDACTED]; Justice Center Exhibits 6 and 8)

5. At the time of the alleged neglect and physical abuse, the Subject had been employed by the [REDACTED] for approximately 38 years, since [REDACTED], and was a Patient Care Technician (PCT). The Subject's duties included supervision, assisting with activities of daily living and direct care of service recipients. The Subject was a custodian as that term is defined in Social Services Law § 488(2). (Hearing testimony of Justice Center Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 8, 10, 11, 12, 13 and 14)

6. At the time of the alleged neglect and physical abuse, the Service Recipient was 68 years old. The Service Recipient had diagnoses including schizoaffective disorder - bipolar type and a long history of psychiatric illness and hospitalizations. She was admitted to the facility on [REDACTED]. (Hearing testimony of Justice Center Investigator [REDACTED]; Justice Center Exhibits 6, 8 and 14)

7. The Service Recipient's supervision level was Constant Observation I (CO) as she was determined to be a danger to herself. Constant Observation I required staff to have eyes on the service recipient at all times and be within arm's length from the assigned service recipient, including when the service recipient is in bed, awake or asleep, toileting and showering. Staff assigned to CO status should be relieved every two hours when possible and are required to complete and initial the service recipient's Observation Checklist every 15 minutes. (Hearing testimony of Justice Center Investigator [REDACTED]; Hearing testimony of the Subject; Hearing testimony of PCT [REDACTED]; Justice Center Exhibits 6, 8, 10, 11, 12, 13 and 14)

8. On [REDACTED], the Subject worked at the facility during both the day and evening shifts. The Subject clocked into work at 7:21 a.m. and out of work at 11:25 p.m. The Subject was assigned to be the CO for the Service Recipient from 11:00 a.m. to 1:00 p.m. during the day shift and from 3:45 p.m. to 5:00 p.m. and 9:00 p.m. to 11:45 p.m. during the evening shift. However, the assignment sheets were not consistently adhered to and the Subject was the CO for the Service Recipient from approximately 12:30 p.m. to 11:00 p.m. on that date with relief during breaks. (Hearing testimony of Justice Center Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 8, 10, 11, 12 and 14)

9. The Service Recipient's behavior throughout the weekend, and on the date of the alleged incident, was restless, labile, and delusional. The Service Recipient had frequent outbursts, often saying "mommy", had bouts of crying and often said she was being hurt. Such behavior was not unusual for the Service Recipient; however, she was more restless than usual as she had trouble sleeping due to incontinence. (Hearing testimony of Justice Center Investigator [REDACTED]; Hearing testimony of the Subject; Hearing testimony of PCT [REDACTED]; Justice Center Exhibits 6, 8, 12 and 14)

10. On [REDACTED] at around 2:30 p.m. to 2:45 p.m., Service Recipient 2 (SR 2) reported to a Charge Nurse, who reported to Nursing Coordinator [REDACTED],¹ that over the previous weekend SR 2 witnessed the Subject put a towel over the Service Recipient's mouth, slap the Service Recipient on the buttocks and grab the Service Recipient by the back of her clothing and pull her back into her bedroom. (Hearing testimony of Justice Center Investigator [REDACTED]; Justice Center Exhibits 6, 7 and 14)

¹ The Justice Center Investigator's Report identified [REDACTED] as the Risk Manager. PCT [REDACTED] testified that [REDACTED] was the Nursing Coordinator. According to [REDACTED], [REDACTED] title is Nursing Coordinator, therefore that is the title used for [REDACTED] in this recommendation.

11. At approximately 3:00 p.m. that same afternoon, the Nursing Coordinator met with both the Service Recipient and SR 2 at the same time, then asked that the Service Recipient be interviewed by a social worker to obtain information from the Service Recipient. (Hearing testimony of Justice Center Investigator [REDACTED]; Hearing testimony of [REDACTED]; Justice Center Exhibits 6 and 14)

12. Soon after, at approximately 3:50 p.m., Social Worker [REDACTED] interviewed the Service Recipient at the direction of her supervisor. The Service Recipient's demeanor was restless and labile, which was typical behavior for the Service Recipient. During a question and answer exchange, the Service Recipient indicated that the CO who was with her earlier that same day, whose name she did not identify, dragged her, grabbed her clothing, and the Service Recipient was quoted as stating "she covered my mouth?" (Hearing testimony of Social Worker [REDACTED]; Hearing testimony of Justice Center Investigator [REDACTED]; Justice Center Exhibit 8)

13. The Service Recipient was examined by a Physician's Assistant and had no complaints of pain and no tenderness or abrasions on her head, neck, arms, feet, chest or trunk, and had what appeared to be an old bruise on her buttock and a superficial abrasion on her knee. The Service Recipient was interviewed by the Mental Health Nurse Practitioner who indicated that it would be difficult to assess any harm to the Service Recipient based on the alleged incident and that the Service Recipient refused to talk to him. (Hearing testimony of Justice Center Investigator [REDACTED]; Justice Center Exhibits 6, 7, 8 and 14.)

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 abuse and neglect presently under review was substantiated. A “substantiated report” means a report “... wherein a determination has been made because 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) and (h) 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.

"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 abuse and neglect alleged in the substantiated report that are the subject of the proceeding and that such act or 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 abuse and neglect cited in the substantiated report constitute 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 not established by a preponderance of the evidence that the Subject committed acts described as “Allegation 1” and “Allegation 2” in the substantiated report.

In support of its substantiated findings, the Justice Center presented documents obtained during the investigation (Justice Center Exhibits 1-13) and an audio recording of statements. (Justice Center Exhibit 14) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who testified at the hearing on behalf of the

Justice Center. Social Worker [REDACTED] also testified.

Facility Patient Care Technician [REDACTED] and Patient Care Technician [REDACTED] testified on behalf of the Subject and the Subject testified in her own behalf.

To sustain the allegation of neglect as alleged, the Justice Center must establish by a preponderance of the evidence that the Subject breached a custodial duty as alleged and that the Subject's 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.

To sustain the allegation of physical abuse as alleged, the Justice Center must establish by a preponderance of the evidence that the Subject intentionally or recklessly caused, by physical contact, 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.

The Justice Center relies mainly on the statement of SR 2, as well as the Service Recipient's statement to the Social Worker and the Service Recipient's statement to the Investigator to establish its case.

Investigator [REDACTED] interviewed SR 2 on [REDACTED]. SR 2 said that, on an occasion over the weekend in question, she heard the Service Recipient screaming and crying in a manner "differently than she usually cries" and the Subject being verbally abusive. (Justice Center Exhibits 6 and 14) SR 2 said she "snuck" down the hall to the Service Recipient's room to see what was going on. (Justice Center Exhibits 6 and 14) SR 2 stated that she looked into the Service Recipient's room and she saw the Subject place a towel over the Service Recipient's mouth to quiet her, heard and saw the Subject slap the Service Recipient's buttocks and saw the Subject grab the Service Recipient's shirt from behind and pull the Service Recipient back into her room as she tried to get out. (Justice Center Exhibits 6 and 14) SR 2 also said that over the weekend

the Subject closed the Service Recipient's door while just the two of them were in her room and that the Subject placed the towel over the Service Recipient's mouth a couple of times. (Justice Center Exhibits 6 and 14)

When the Social Worker interviewed the Service Recipient on [REDACTED], she told the Service Recipient that she heard something may have happened and asked the Service Recipient if she had any details. (Hearing testimony of Social Worker [REDACTED]; Justice Center Exhibit 8) During a question and answer format, the Service Recipient indicated that the staff who was her CO earlier on that day had dragged her and grabbed her clothing and, the Social Workers note quoted the Service Recipient as stating, "she covered my mouth?" According to the evidence, the Subject was the Service Recipient's CO earlier that day. (Justice Center Exhibit 8)

When Investigator [REDACTED] interviewed the Service Recipient², she had difficulty responding directly to the Investigator's questions and staying on point. When asked if someone hurt her, the Service Recipient said she did not know and she could not remember. When the Investigator asked the Service Recipient if she knew the Subject, the Service Recipient's tone of voice became different and she sounded fearful. The Service Recipient said she better not tell on the Subject and then said she got beaten up by the Subject with another girl. (Hearing testimony of Justice Center Investigator [REDACTED]; Justice Center Exhibit 14)

The Subject stated that she was the Service Recipient's CO for most of the weekend in question, however the Subject denied that she ever placed a towel over the Service Recipient's mouth, slapped her buttocks or pulled her back by her clothing. (Hearing testimony of the Subject; Justice Center Exhibit 14)

By all accounts, the Service Recipient's behavior over that weekend was labile, she was

² The Investigative Report indicates that the Service Recipient was interviewed on [REDACTED]. However, the audio states that the interview took place on [REDACTED].

██████████ crying, calling out “mommy” and saying people were hurting her, and that was typical behavior for her. However, the Service Recipient was more restless than usual due to lack of sleep as a result of urinary incontinence and discomfort. Facility policy indicates that staff assigned to CO status should be relieved every two hours wherever possible. (Justice Center Exhibit 12) The Subject was the Service Recipient’s CO from approximately 12:30 p.m. to 11:00 p.m. on the date of the alleged physical abuse and neglect and over much of the weekend in question. The Service Recipient exhibited difficult behaviors throughout that time. (Hearing testimony of Justice Center Investigator ██████████; Hearing testimony of the Subject; Hearing testimony of ██████████; Hearing testimony of ██████████; Justice Center Exhibits 6, 8 and 14)

PCT ██████████, testified that when he was working on the date of the alleged incident, at the same time he heard the Service Recipient say you are hurting me, he saw the Subject sitting in the Service Recipient’s doorway. He testified that SR 2 spent a lot of time in her room, often in bed, and that when he heard the Service Recipient say this, SR 2 was “nowhere in sight.” (Hearing testimony of PCT ██████████; Justice Center Exhibits 6 and 14) He testified that he never saw the Service Recipient’s bedroom door closed and, if he had, he would remember as that would be unusual and it is “just against the rules”. (Hearing testimony of PCT ██████████)

PCT ██████████ testified that around 2:00 p.m. on ██████████ she became aware that an allegation was made against the Subject, but she did not initially know the details. (Hearing testimony of PCT ██████████) Soon after, at about 3:00 p.m., ██████████ saw ██████████ go into a treatment room with a legal pad in her hand and speak with the Service Recipient and SR 2 at the same time. They were talking in the room from fifteen minutes to one half hour, and the Service Recipient was sitting in SR 2’s lap. (Hearing testimony of PCT ██████████; Justice Center Exhibit 8) SR 2 had said the only time she talked to the Service Recipient about

the incident was one time when someone, whose name is unintelligible on the recording, sat her and the Service Recipient down in a room, then took the Service Recipient elsewhere as the Service Recipient was not talking in front of SR 2 and “they got some things out of her.” (Justice Center Exhibit 14)

While SR 2 presents as credible in her belief, no solid context was given as to the unfolding of the alleged events and when they occurred. There is no exact date, time or sequence of events suggested. Whether the alleged contacts happened all at once, in succession, or at various times over the course of a day or over the weekend is not clear and is not discernable from the evidence in the record. SR 2’s vantage point(s) and view into the Service Recipient’s room is unclear. While the Service Recipient sounded fearful when the Subject’s name was mentioned by the Investigator, the Social Worker testified that she met with the Service Recipient nearly every day that she worked, usually for crisis intervention, as the Service Recipient was chronically in crisis and labile. (Hearing testimony of Social Worker [REDACTED]) This tone may have been typical for the Service Recipient and there was no evidence indicating it was not.

The Social Worker said she documented what the Service Recipient said and the Service Recipient did not allege that her buttocks were slapped and would not reveal what was used to cover her mouth. The Social Worker’s note quoted the Service Recipient as stating, “she covered my mouth?” The quote ended with a question mark and it was not clear if the Service Recipient made that statement as a question. When asked at the hearing, the Social Worker stated she had no assessment as to the truthfulness or accuracy of the Service Recipient’s statements. (Hearing testimony of Social Worker [REDACTED]) Notably, it appears that SR 2 and the Service Recipient were interviewed together on [REDACTED] by the Nursing Coordinator, which could compromise statements in any investigation. The Nursing Coordinator was not interviewed, which

may have shed light on that issue.

After considering all of the evidence, including multiple ambiguities in the proof cited, it is not possible to find upon a preponderance of the evidence that the Subject committed the acts as alleged.

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 neglect and the physical abuse alleged. The substantiated report will be amended and sealed.

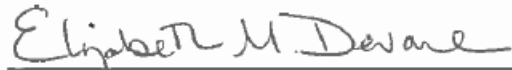
DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED], [REDACTED] be amended and sealed is granted.

The Subject has not been shown by a preponderance of the evidence to have committed neglect or physical abuse.

This decision is recommended by Elizabeth M. Devane, Administrative Hearings Unit.

DATED: July 27, 2018
Schenectady, New York


Elizabeth M. Devane
Administrative Law Judge