

**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]

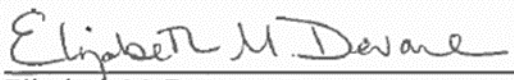
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

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 Elizabeth M. Devane, ALJ, Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: October 16, 2018
Schenectady, New York


Elizabeth M. Devane
Administrative Law Judge

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject
Hugh Reid, 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:

Susanna Requets
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street – 3rd 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: Nicole Murphy, Esq.

[REDACTED]

By: Hugh Reid, Esq.
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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], 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 1¹

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed physical abuse when you grabbed and/or pushed a service recipient.

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, located at [REDACTED], is an Individualized Residential Alternative (IRA). The facility is operated by [REDACTED] and certified by the New York State Office for People With Developmental Disabilities (OPWDD),

¹ Allegation 2 was unsubstantiated at the beginning of the hearing.

which is an agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Justice Center Investigator [REDACTED] [Investigator [REDACTED]])

5. At the time of the alleged physical abuse, the Subject was employed by [REDACTED] as a Direct Support Professional (DSP) for eighteen years. The Subject assisted the service recipients with their activities of daily living, including showering, medication, and getting ready for bed. (Hearing testimony of the Subject; Justice Center Exhibit 15: audio recording of Justice Center interrogation of the Subject) The Subject was a custodian as that term is defined in Social Services Law § 488(2).

6. At the time of the alleged physical abuse, the Service Recipient was a 58-year-old non-verbal adult male who engaged in PICA, a disorder characterized by ingesting non-nutritive substances, "head dunking" in the toilet, taking food from other staff and service recipients, rectum digging and pulling his pants down. The Service Recipient also engaged in aggressive behaviors, including stomping his foot, touching other service recipients and eating food that did not belong to him. The Service Recipient operated within the profound range of intellectual disability. (Justice Center Exhibits 6, 9, 10 and 15: audio recording of Justice Center interrogations of the Subject and DSP 1²; interviews of DSP 2³, DSP 3⁴, DSP 4⁵, DSP 5⁶, DSP 6⁷, and DSP 7⁸)

7. The facility was comprised of two separate apartments, each with bedrooms, a kitchen and a dining room. The entrance to [REDACTED], the first-floor apartment, was in the front. The entrance to [REDACTED], the second-floor apartment, and the basement was on the side. Three service recipients resided in [REDACTED]. Four service recipients, including the Service

² DSP 1 was [REDACTED].

³ DSP 2 was [REDACTED].

⁴ DSP 3 was [REDACTED].

⁵ DSP 4 was [REDACTED].

⁶ DSP 5 was [REDACTED].

⁷ DSP 6 was [REDACTED].

⁸ DSP 7 was [REDACTED].

Recipient, resided in [REDACTED]. The Supervisor⁹, Manager¹⁰ and Registered Nurse¹¹ had offices in the basement. (Justice Center Exhibit 15: audio recording of Justice Center interview of DSP 2 and interrogation of the Subject)

8. After the service recipients returned to the facility from their day program, two staff worked in [REDACTED] and two staff worked in [REDACTED]. On [REDACTED], the Subject and DSP 2 worked the 3:00 p.m. to 11:00 p.m. shift and were assigned to [REDACTED]. DSP 1 and DSP 8¹² were assigned to [REDACTED] during the evening shift as well. DSP 4 began his shift at 8:00 a.m. and worked until 5:00 p.m. (Hearing testimony of the Subject; Justice Center Exhibits 11 and 15: audio recording of Justice Center interviews of DSP 2, DSP 3, DSP 4 and DSP 8; interrogations of the Subject and DSP 1)

9. DSP 8, a temporary worker from [REDACTED], arrived at the facility at 4:30 p.m. Since DSP 8 arrived late and all the service recipients were entering [REDACTED] from their day program, DSP 1 started cooking dinner in [REDACTED] for all the service recipients. (Justice Center Exhibit 15: audio recording of Justice Center interrogation of DSP 1)

10. The Subject opened the [REDACTED] door for DSP 8 and identified the Supervisor outside. DSP 4 escorted DSP 8 to the Supervisor. The Supervisor directed DSP 8 to work on [REDACTED] with DSP 1 and DSP 4 introduced DSP 8 to DSP 1. (Hearing testimony of the Subject; Justice Center Exhibit 15: audio recording of Justice Center interrogation of the Subject and interviews of DSP 4 and DSP 8)

11. Shortly thereafter, DSP 1, who worked at the facility for twenty years, slapped the

⁹ The Supervisor was [REDACTED]. (Hearing testimony of the Subject; Justice Center Exhibit 13)

¹⁰ The Manager was identified as [REDACTED]. (Hearing testimony of the Subject; Justice Center Exhibit 15: audio recording of Justice Center interview of DSP 2)

¹¹ The Registered Nurse was [REDACTED]. (Justice Center Exhibits 13)

¹² DSP 8 was [REDACTED].

Service Recipient on his back and told the Service Recipient to give her the soda he was drinking because the soda belonged to DSP 8. (Justice Center Exhibits 14 and 15: audio recording of Justice Center interrogation of DSP 1 and interview of DSP 8)

12. The Service Recipient touched service recipient 1 (SR 1¹³) and DSP 1 hit him again on his back and cursed at him to sit down. (Justice Center Exhibit 15: audio recording of Justice Center interview of DSP 8)

13. Between 5:30 p.m. and 6:30 p.m., the service recipients ate dinner in [REDACTED]. While DSP 8 set the dinner table, the Service Recipient stood in front of SR 1. The Subject grabbed the Service Recipient by his green collared shirt and pulled the Service Recipient towards him telling the Service Recipient to go and sit down. (Justice Center Exhibit 15: audio recording of Justice Center interview of DSP 8)

14. After dinner, DSP 1, DSP 2 and the Service Recipient were in the basement packing suitcases for four services recipients to go on vacation. DSP 8 watched the remaining [REDACTED] service recipients, while the Subject watched the [REDACTED] service recipients. The supervisor was no longer in the facility when DSP 8 went to get the Service Recipient from the basement and bring him upstairs. (Justice Center Exhibit 15: audio recording of Justice Center interrogation of DSP 1 and interviews of DSP 2 and DSP 8)

15. At approximately 8:30 p.m., the Subject, DSP 2 and DSP 8 assisted the individuals to get ready for bed. DSP 1 left the facility between 8:40 p.m. and 9:00 p.m. leaving DSP 8 responsible to get the [REDACTED] service recipients ready for bed. (Justice Center Exhibit 15: audio recording of Justice Center interview of DSP 8)

16. DSP 8 asked the Subject for assistance with the Service Recipient, who refused to

¹³ SR 1 was Service Recipient [REDACTED].

go to bed. When DSP 8 and the Subject returned to the second floor, the refrigerator door was open and the Service Recipient was sitting on the bathroom toilet eating a yogurt. The Subject grabbed the Service Recipient by his shirt, pulled him off the toilet and dragged him into his bedroom as the Service Recipient's pants fell. (Justice Center Exhibits 6, 14 and 15: audio recording of Justice Center interview of DSP 8)

17. DSP 8 attempted to report her earlier observations to the Supervisor, but could not find him in the facility. DSP 8 reported her observations to the [REDACTED] supervisor, to the facility Quality Assurance/Training Coordinator (QA Coordinator)¹⁴ and to the Justice Center. No injuries were reported. (Justice Center Exhibits 6, 8, 14 and 15: audio recording of Justice Center interview of DSP 8)

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 physical abuse.
- Pursuant to Social Services Law § 493(4), the category of physical abuse 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

¹⁴ The QA Coordinator was [REDACTED].

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), as follows:

- (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 physical abuse 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 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 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 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 through 14) The Justice Center also presented audio recordings of the Justice Center Investigator’s interviews of witnesses and interrogations of the Subject and DSP 1. (Justice Center Exhibit 15) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and presented no additional evidence.

In order to sustain an allegation of physical abuse in this matter, the Justice Center must show that the Subject 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. The statute allows, as an exception, the use of physical contact as a reasonable emergency intervention necessary to protect the safety of any person. (SSL § 488[1][a])

Social Services Law defines “intentionally” and “recklessly” as having the same meaning as provided in New York Penal Law § 15.05. (SSL § 488[16]) Under New York State Penal Law, a person acts “intentionally” with respect to a result or conduct when a person has a “... conscious objective ...” to cause a result or engage in such conduct. (PL § 15.05[1])

DSP 8 was the only eyewitness to the events. DSP 8 had no motive to fabricate the allegations because this was her first day at the facility. DSP 8 reported the incident to her agency

supervisor, to the facility QA Coordinator and to the Justice Center. Her statement to Investigator [REDACTED] was credible and emotional. DSP 8 identified a male that grabbed the Service Recipient by the collar and pushed him to sit down while she was setting the dinner table. In the evening when getting the service recipients ready for bed, DSP 8 also identified a male that grabbed the Service Recipient by his shirt, pulled him off the toilet, dragged, and pushed him into his bedroom. (Hearing testimony of the Investigator [REDACTED]; Justice Center Exhibits 6, 8, 14 and 15: audio recording of Justice Center interview of DSP 8)

The Subject does not dispute that the incident occurred as described by DSP 8. Instead, the Subject argued that he has dark skin and DSP 8's description of the staff as a "big red skin, Jamaican man" proves that another male pulled the Service Recipient off the toilet and pushed him to his bedroom. The Subject argued that both the Supervisor and DSP 4 were fair skinned and that they could have been in the facility because the Justice Center did not provide an assignment sheet for [REDACTED] and the Justice Center did not interview the Supervisor. The Subject also argued that he was not with or near the Service Recipient during dinner because [REDACTED] and [REDACTED] service recipients did not eat on the same floor. Therefore, the Subject could not have been the male staff that grabbed the Service Recipient's collar and pushed him to sit down prior to dinner. (Hearing testimonies of the Subject and Investigator [REDACTED]; Justice Center Exhibits 11 and 14)

The Subject's arguments are not persuasive. The Subject's disagreement with DSP 8's description of him is immaterial because the Subject was the only male in the facility at that time of the physical abuse. On [REDACTED], the only males identified were the Subject who worked the 3:00 p.m. to 11:00 p.m. shift, DSP 4 who worked the 8:00 a.m. to 5:00 p.m. shift, and the Supervisor who worked an unknown schedule. (Hearing testimony of the Subject; Justice Center

Exhibits 11, 13, 14 and 15: audio recording of Justice Center interview of DSP 2; interrogation of DSP 1)

The credible evidence shows that DSP 4 was not in the facility after 5:00 p.m. Even though there is no assignment sheet in evidence, the Subject and DSP 1 confirmed that there were only four staff working with the service recipients during the evening shift on [REDACTED] – the Subject, DSP 1, DSP 2 and DSP 8. Furthermore, the Subject testified that he never worked an entire shift with DSP 4. (Hearing testimony of the Subject; Justice Center Exhibit 15: audio recording of Justice Center interview of DSP 4; interrogations of the Subject and DSP 1)

The credible evidence also shows that the Supervisor was not in the facility at the time of the physical abuse. It is illogical that DSP 8 would identify the Supervisor as either an "unknown male" or a "a big red skin, Jamaican man" when she knew the identity of the Supervisor. The Subject identified the Supervisor when DSP 8 first entered the facility, the Supervisor provided DSP 8 with her daily assignment, and DSP 8 actively sought to find the Supervisor to file a complaint. (Hearing testimony of the Subject; Justice Center Exhibits 14 and 15: audio recording of Justice Center interviews of DSP 4 and DSP 8)

In addition, the credible evidence shows that all seven service recipients were in [REDACTED] while DSP 1 prepared dinner. The Subject admitted that while not customary, there were times that all seven service recipients had dinner together in [REDACTED]. DSP 1 started cooking dinner for all the service recipients in [REDACTED] because they were short staffed when DSP 8 arrived late. Therefore, even though the Subject was not assigned to the [REDACTED] service recipients, he had contact with them, including the Service Recipient, prior to and during dinner. (Hearing testimony of the Subject; Justice Center Exhibits 11 and 15: audio recording of Justice Center interrogation of DSP 1 and interview of DSP 8)

Based on the foregoing evidence, the Subject was the only male in the facility during dinner and during bed time. Therefore, substantial weight is given to the evidence identifying the Subject as the man who committed the physical abuse. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6, 11, 14 and 15: audio recording of Justice Center interview of DSP 8)

The preponderance of the evidence establishes that the Subject made physical contact with the Service Recipient by intentionally grabbing the Service Recipient by his shirt collar and pushing him to sit down and thereafter grabbing the Service Recipient from the toilet and dragging him to his bedroom. The Subject's actions were intentional because he had a conscious objective to forcibly move the Service Recipient. Although the Service Recipient did not sustain any injuries because of the Subject's conduct, there was a strong likelihood that serious injuries could have occurred when the Service Recipient was grabbed, pushed and dragged. Furthermore, there is no evidence that a reasonable emergency intervention was necessary to protect the safety of any person. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6, 11, 14 and 15: audio recording of Justice Center interview of DSP 8)

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 alleged. The substantiated report will not be amended and sealed.

Because the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse or 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 a Category 3 act. Substantiated Category 3 findings of abuse 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], 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 3 act.

This decision is recommended by Susanna Requets, Administrative Hearings Unit.

DATED: October 12, 2018
Brooklyn, New York



Susanna Requets, ALJ