

**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]

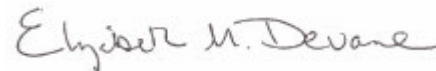
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

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, of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: May 7, 2019
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Kevin McGuckin, Esq.
[REDACTED], Subject
Maulik Sharma, 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:

Sharon Golish Blum
Administrative Law Judge

Held at:

New York State Justice Center for the Protection of
People with Special Needs
125 East Bethpage Road
Plainview, New York 11803
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: Kevin McGuckin, Esq.

[REDACTED]

By: Maulik Sharma, Esq.
Fine, Olin and 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] 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 report of substantiated finding dated [REDACTED] of physical abuse by the Subject of a Service Recipient.
2. The Justice Center's substantiated report against the Subject 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 pushed a service recipient against a wall and placed your hands on or near his neck area.

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 a secure inpatient hospital program for youth with serious mental health issues that is operated by the New York State 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])
5. At the time of the alleged abuse, the Service Recipient, a twelve year old male, had

been a resident of facility unit [REDACTED] for just over one month. The Service Recipient's relevant diagnoses were disruptive mood dysregulation disorder and attention deficit/hyperactivity disorder. The Service Recipient's behaviors included excessive and easily provoked anger, violence, aggression, impulsivity and self-harm. The Service Recipient resided at a Residential Treatment Center at the time of his admission to the facility and he had been hospitalized on approximately nine previous occasions due to mental health issues. (Justice Center Exhibit 7)

6. At the time of the alleged abuse, the Subject had been employed by the facility as a Secure Care Treatment Aide since 1991 and was assigned to work his regular day shift in unit [REDACTED]. (Hearing testimony of the Subject) The Subject was a custodian as the term is so defined in SSL § 488(2).

7. At approximately 9:30 a.m. on [REDACTED], the Service Recipient, who was in an agitated state because three or four female service recipients were harassing him, entered the unit Activity Room where the Subject was conducting an activity with a group of other service recipients. The female service recipients attempted to follow the Service Recipient into the Activity Room, which caused noise and disorder. The Subject attempted to verbally redirect the Service Recipient and the female service recipients, who did not listen, and he then inserted himself between them, facing himself toward the female service recipients with the Service Recipient behind him and a wall behind the Service Recipient. The Service Recipient struck the Subject on the back. The Subject turned around to face the Service Recipient, put his hands on the Service Recipient's shoulders, pushing him against the wall, and yelled at him "What are you doing? I'm protecting you." The Subject then ordered the female service recipients out of the Activity Room and told the Service Recipient to get out too. (Hearing testimony of the Subject and Justice Center Exhibits 24(f) and 25: audio interview of the Subject)

8. The Service Recipient did not comply with the Subject's instruction to leave the Activity Room and the Subject's hands moved from the Service Recipient's shoulders to his neck. With both of his hands on the Service Recipient's neck, the Subject moved the Service Recipient out of the Activity Room and into the unit hallway, whereupon he released him. As a result of the incident, the Service Recipient's neck was red, which faded shortly thereafter. (Justice Center Exhibits 24(b), 24(c) and 25: audio interviews of Service Recipient 2 and the Peer Youth Advocate)

9. Immediately after he was forced out of the Activity Room by the Subject, the Service Recipient's behavior escalated and he did not respond to less restrictive techniques. The facility nurse administered medication to him and he was put in seclusion for a period of one-half hour. (Justice Center Exhibit 16)

ISSUES

- Whether the Subject has been shown by a preponderance of the evidence to have committed the acts giving rise to the substantiated reports.
- 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 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 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 of a person in a facility or provider agency is defined by SSL § 488(1) to include the following:

(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 and/or neglect 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 and/or 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/or neglect as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged abuse and/or neglect in a report, 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 or acts of abuse and/or neglect cited in the substantiated report constitute the category of abuse and/or neglect as set forth in the substantiated report.

If the Justice Center did not prove the abuse and/or neglect 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 the act of pushing the Service Recipient against a wall and placing his hands on the Service Recipient's neck, as described in Allegation 1 of the substantiated report.

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-27) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who testified on behalf of the Justice Center.

The Subject testified in his own behalf at the hearing and provided no other evidence.

For a finding of physical abuse, a preponderance of the evidence must establish that the Subject 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.

The undisputed facts in this case are that the Service Recipient entered the Activity Room where the Subject was conducting an activity with a group of other service recipients; that the Service Recipient was being harassed and pursued by three or four other female service recipients who attempted to follow him into the Activity Room; that the Service Recipient was extremely agitated; that while standing next to the wall, the Service Recipient struck the Subject when the Subject attempted to shield him from his pursuers; that the Subject physically ejected the Service Recipient from the Activity Room; that the Service Recipient's behavior escalated immediately thereafter; and that the Service Recipient required medication and seclusion to calm down.

(Hearing testimony of the Subject and Justice Center Exhibits 24(f) and 25: audio interview of the Subject)

The issues to be resolved are whether the Subject pushed the Service Recipient against a wall and/or whether the Subject placed his hands on or near the Service Recipient's neck.

In both his interview statement (Justice Center Exhibits 24(f) and 25: audio interview of the Subject) and his testimony, the Subject vehemently denied pushing the Service Recipient against a wall or putting his hands on the Service Recipient's neck. The Subject stated that at the time that he was standing between the Service Recipient and the female service recipients who were harassing him, the Subject turned around after the Service Recipient hit him, and the Service Recipient was standing near a wall. It is interesting to note that during his interview, the Subject did not initially admit to having touched the Service Recipient, but only disclosed that he put his hands on the Service Recipient's shoulders after being told that several witnesses reported that he put both of his hands around the Service Recipient's neck, which he denied.

The primary evidence relied upon by the Justice Center are the statements of the Service Recipient, Service Recipients 1, 2 and 3, and the Peer Youth Advocate. (Justice Center Exhibits 24(a), (b), (c), (d), and (e) and 25: audio interview of the Service Recipient, Service Recipients 1, 2 and 3, and the Peer Youth Advocate) While quite different in many details, these witness statements possess one commonality, which is that they unanimously report that, at the relevant time, the Subject put both of his hands on the Service Recipient's neck.

Service Recipient 1 was extremely reluctant to disclose the full extent of what she observed but, ultimately, she responded to the Justice Center investigators' persuasion by stating, in relevant part, that the Subject pushed the Service Recipient up against the wall; that the Subject held the Service Recipient by his neck; that the Service Recipient could not breathe and looked like he was

going to faint; that the Service Recipient said, “You’re hurting me” and that, after the Subject released him, the Service Recipient’s neck was red and his face was puffy. (Justice Center Exhibits 24(e) and 25: audio interview of Service Recipient 1)

Service Recipient 2 stated, in relevant part, that the Subject choked the Service Recipient and that the Subject had both of his hands on the Service Recipient’s neck and his back against the wall. (Justice Center Exhibits 24(b) and 25: audio interview of Service Recipient 2)

Service Recipient 3 was extremely reluctant to disclose the full extent of what she observed but, ultimately, she responded to the Justice Center investigators’ persuasion by stating, in relevant part, that the Subject grabbed the Service Recipient by the neck and choked or tried to choke him and that the Service Recipient said, “Stop.” (Justice Center Exhibits 22, 24(d) and 25: audio interview of Service Recipient 1)

The Peer Youth Advocate stated that the Subject pushed the Service Recipient into the wall, choked him and took him out of the Activity Room with both hands around his neck. (Justice Center Exhibits 24(c) and 25: audio interview of the Peer Youth Advocate)

Other than the audio statements, the only other corroborating evidence is an email from the Peer Youth Advocate to her supervisor (Justice Center Exhibit 22), the relevant part of which states that she observed the Subject grab the Service Recipient with both hands by the neck and force him out of the room. The email also states that the Subject’s conduct caused the Service Recipient to become more upset, resulting in the Service Recipient being medicated and put into seclusion.

The Service Recipient’s Progress Notes (Justice Center Exhibit 18) and the Incident Report (Justice Center Exhibit 16) both indicate only that the Service Recipient struck the Subject and that he was subsequently medicated and put into seclusion. The fact that the Service Recipient’s behavior became so uncontrollable that it required the intervention of medication and seclusion to

calm down supports the theory that something happened in the Activity Room that caused him to escalate, and it is logical and consistent with the witnesses' statements and the Peer Youth Advocate's email to extrapolate that it was the Subject's treatment of him that caused the escalation.

The facility Patient Care Log/Intershift Report Form (Justice Center Exhibit 20) is an undated document that appears to reference the [REDACTED] incident and it indicates that the Service Recipient threatened to make false allegations against staff and that he calmed down thereafter. If not for the evidence of Service Recipients 1, 2 and 3 and the Peer Youth Advocate, the Service Recipient's documented threat may have supported an effective defense.

While the Service Recipient was forthcoming regarding his version of the surrounding circumstances of the incident, he did not mention that the Subject touched his neck until he was specifically asked by the Justice Center investigator, whereupon the Service Recipient stated that the Subject had choked him. The Service Recipient indicated that he did not want to talk about it because it would bring back bad memories and make him angry, but he did respond affirmatively when asked if the Subject put both of his hands around his neck and negatively when asked if he could breath. (Justice Center Exhibits 24(a) and 25: audio interview of the Service Recipient)

Although the fact that the Service Recipient's version of the relevant aspects of the incident was almost completely responsive to the suggestive questions asked of him could support the contention that he fabricated the allegation, the Service Recipient immediately corrected himself and provided credible details regarding the incident and, given the corroborating statements of the other witnesses, it is credited.

Counsel for the Subject argued that there was a general lack of sufficient evidence, citing that, save and except for the email of the Peer Youth Advocate, there was no documentary evidence

corroborating the allegation; that the investigation failed to secure any other available evidence, citing the lack of video tapes, which undoubtedly existed, given the facility's use of video monitoring; that what evidence does exist, namely the statements of the Service Recipient, Service Recipients 1, 2 and 3, and the Peer Youth Advocate are so inconsistent and contradictory in their respective versions of events that they cannot be taken together to credibly support the allegation; that the fact that the Subject was not put on notice of the allegation until he was first interviewed on [REDACTED], seven months after the alleged incident, prejudiced the Subject's defense against the allegation and that the Subject's unblemished twenty-seven year record of employment at the facility should weigh in his favor.

While it is true that no video evidence was offered as evidence, the Subject himself indicated during his interviews (Justice Center Exhibits 24(f) and 25: audio interview of the Subject) that the video camera was outside the Activity Room. In any case, this ostensible lack of evidence does not detract from the credibility of the evidence that was otherwise proffered.

The argument that the delay from [REDACTED], when the incident occurred, to [REDACTED], when the Subject was first interviewed was prejudicial to the Subject's defense was not supported by any tangible evidence of any adverse impact on him and, accordingly, is not a determinative factor in this analysis.

Despite the significant inconsistencies in the five versions of the incident, the unanimous concurrence that the Subject put his hands on the Service Recipient's neck provides a convincing basis to find that the Subject did, in fact, do so. Furthermore, both Service Recipients 1 and 3 were extremely reluctant to disclose their perception of the Subject's conduct, not from fear of retaliation, but from a desire to protect the Subject from the consequences of his actions. Their strong loyalty to the Subject makes their narrative that the Subject placed his hands on the Service

Recipient's neck that much more compelling. Accordingly, it is found that the Subject engaged in the physical contact of putting both of his hands on the Service Recipient's neck and the fact that the Service Recipient's neck was red thereafter further proves that the Subject committed the deed, as alleged. Furthermore, Service Recipients 1 and 2 and the Peer Youth Advocate stated that the Subject also pushed the Service Recipient into a wall which, taken together with the Subject's admission that the Service Recipient was near a wall at the relevant time, leads to the determination that the Subject engaged in the physical contact of pushing the Service Recipient into a wall.

Based on statements of Service Recipient 1, the Peer Youth Advocate and the Service Recipient that the Service Recipient was unable to breath during the incident and based on statements of Service Recipients 1 and 2, the Peer Youth Advocate and the Service Recipient that the Service Recipient's neck was red immediately after the Subject released him, it is found that the Subject intentionally or recklessly caused, by physical contact, physical injury to the Service Recipient. Furthermore, based on the fact that the Service Recipient's behavior became so escalated as a result of the incident that he required medication and seclusion to calm down, it is found that the Subject's conduct intentionally or recklessly caused, by physical contact, serious impairment of the Service Recipient's physical, mental or emotional condition. Accordingly, a preponderance of the evidence establishes that the Subject committed physical abuse under SSL § 488(1)(a).

The report will remain substantiated and the next issue to be determined 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 physical and emotional effect that it 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] of physical abuse by the Subject of the Service Recipient 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 Sharon Golish Blum, Administrative Hearings Unit.

DATED: April 17, 2019
Plainview, New York


Sharon Golish Blum, Esq.
Administrative Law Judge