

**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: January 16, 2020
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Kimberly Payne, Esq.
James M. Williams, Esq.
[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:

John T. Nasci
Administrative Law Judge

Held at:

New York State Office Building
333 East Washington Street, Room 115
Syracuse, New York 13202
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: Kimberly Payne, Esq.

[REDACTED]

By: James M. Williams, Esq.
Legal Services of Central New York
221 South Warren Street
Syracuse, New York 13202

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for neglect. 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 neglect 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 or about [REDACTED], while at [REDACTED], located at [REDACTED], you committed Neglect against/to a Service Recipient.

This allegation has been SUBSTANTIATED as Category 3 Neglect pursuant to Social Services Law § 493(4)(c).

The investigation revealed the Subject failed to maintain appropriate boundaries with the service recipient.

3. An Administrative Review was conducted and, as a result, the substantiated report was retained.

4. The facility, the [REDACTED], located at [REDACTED]

¹ Allegations 2, 3 and 4 were unsubstantiated prior to the hearing.

[REDACTED], is a residential treatment facility for people with developmental disabilities. The IRA is operated by the [REDACTED] which is certified by the New York State Office for People With Developmental Disabilities (OPWDD), which is an agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Justice Center Investigator [REDACTED] (Investigator))

5. At the time of the alleged neglect, the Subject had been employed by the [REDACTED] as a Direct Support Professional (DSP) for two years and worked at the IRA. (Justice Center Exhibit 23: audio recording of Justice Center interrogation of the Subject; and Hearing testimony 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 neglect, the female Service Recipient was forty-seven years old, and was a resident of the IRA. The Service Recipient had relevant diagnoses of intellectual disability and Down syndrome. The Service Recipient was ambulatory and verbal, although a little difficult to understand. The Service Recipient retired after having been employed by Walmart for more than twenty years. When the Service Recipient felt pain, she verbalized the pain and used gestures to show where she was feeling pain. (Justice Center Exhibits 10 and 11)

7. At the time of the alleged neglect, the IRA served service recipients with deficits in self-direction and independent living skills. The Service Recipient and four other service recipients including a married couple, resided at the IRA. (Justice Center Exhibits 13 and 23: audio recording of Justice Center interviews of [REDACTED] Associate Residential Manager [REDACTED] (ARM) and [REDACTED] Residential Manager [REDACTED] (RM))

8. On Friday [REDACTED], the Subject worked the [REDACTED] shift at the IRA and was the sole staff on duty. Because it was the Service Recipient's birthday, sometime between 4:00 p.m. and 4:30 p.m., the Subject asked the Service Recipient if she wanted

to play a game, to which the Service Recipient responded by saying “Okay.” Two other service recipients were present and were listening to the Subject. The Subject asked the Service Recipient and the two other service recipients if they remembered getting birthday spankings when they were children. One of the two other service recipients responded by saying “yes” and the other responded by saying that he got spankings all the time. The Service Recipient responded by smiling and nodding her head. (Justice Center Exhibit 23: audio recording of Justice Center interrogation of the Subject and Hearing testimony of the Subject)

9. The Subject then said to the Service Recipient: “If you want, when you least expect it, I’m going to come up to you and I’m going to tap you and I’m going 47.” Then the Subject asked the Service Recipient if she wanted to play this game, to which the Service Recipient responded: “Yeah.” The Subject then tapped the Service Recipient on the upper part of her buttocks and said: “Forty-seven” to demonstrate how he would play the game. In response, the Service Recipient giggled and laughed. Then the Subject explained that he would count down the years each time he tapped her. The Subject played this game with the Service Recipient for up to three hours and nine taps. When tapped by the Subject, the Service Recipient said: “Oh [REDACTED]” and performed her special dance by shuffling her feet and going in a circle. (Justice Center Exhibit 23: audio recording of Justice Center interrogation of the Subject and Hearing testimony of the Subject)

10. The [REDACTED] Code of Conduct states, in pertinent part, that “One of the most important roles of all employees and volunteers is to serve as models of appropriate and acceptable behavior and appearance for individuals supported in our programs.” (Justice Center Exhibit 14) The Justice Center Code of Conduct states, in pertinent part, that the Subject “will respect the dignity

and individuality of any person who receives services and supports from this organization ...”
(Justice Center Exhibit 15)

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 report of neglect 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...” (14 NYCRR § 700.3(f))

The neglect of a person in a facility or provider agency is defined by SSL § 488(1)(h), as follows:

"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 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 neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of neglect as set forth in the substantiated report. (14 NYCRR § 700.10(d))

If the Justice Center proves the alleged neglect, the report will not be amended and sealed. Pursuant to SSL § 493(4) and 14 NYCRR § 700.10(d), it must then be determined whether the act or acts of neglect cited in the substantiated report constitutes the category of neglect as set forth in the substantiated report.

If the Justice Center did not prove the 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 the 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 22) The Justice Center also

presented audio recordings of the Justice Center Investigator's interviews of witnesses and interrogation of the Subject. (Justice Center Exhibit 23) The investigation underlying the substantiated report was conducted by the Investigator who testified at the hearing on behalf of the Justice Center.

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

In order to prove neglect, the Justice Center must establish by a preponderance of the evidence that the Subject's action, inaction or lack of attention breached a duty that 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. (SSL § 488(1)(h))

The Justice Center contends that the Subject had a duty to maintain appropriate boundaries with the Service Recipient, that the Subject breached his duty by spanking the Service Recipient during the Subject's birthday spanking game, and that the Subject's breach of duty was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

The Subject admits that he spanked the Service Recipient as part of a birthday game, but argues that the spankings were not applied with any force and that the Service Recipient enjoyed the spankings and the game.

The Justice Center contends that the spanking game took place on the Service Recipient's birthday, Friday [REDACTED], as the Subject admits, but also on Saturday, [REDACTED], when the Subject was working with [REDACTED] DSP [REDACTED] (DSP1). The Justice Center's contention that the game took place on [REDACTED] is based solely on the Justice Center's interview of DSP1 in which DSP1 stated that she witnessed the Subject spanking the Service Recipient on [REDACTED]. (Justice Center Exhibit 23: audio recording of Justice Center

interview of DSP1)

However, it is clear from her interview that DSP1 had a bias against the Subject. In the interview, DSP1 stated that the Subject “creeps me out,” that the Subject’s “demeanor comes off as sexual predator” and that the Subject “made me cringe on multiple occasions.” (Justice Center Exhibit 23: audio recording of Justice Center interview of DSP1) Furthermore, the Subject and DSP1’s immediate supervisor stated in her Justice Center interview that, on several Saturdays starting a couple months before the incident, when DSP1 and the Subject were working together at the IRA, she received text messages from DSP1 in which DSP1 stated that she wanted to “throat punch” the Subject, and that DSP1 sent such a text Saturday morning [REDACTED], the date she claimed that she witnessed the Subject spanking the Service Recipient. (Justice Center Exhibit 23: audio recording of Justice Center interview of Associate Residential Manager [REDACTED]) Finally, DSP1 made a [REDACTED] entry in the Therap T Log concerning the Service Recipient in which she wrote: “[the Service Recipient] awoke upon my arrival. She was in good spirits and has had a good day so far. No concerns at this time.” In the [REDACTED] Therap T Log entry, DSP1 wrote nothing about the Subject spanking the Service Recipient. (Justice Center Exhibit 16) Based on the preceding evidence, DSP1 is found to be not credible and her statements are given no weight in this decision.

In the Justice Center Code of Conduct Agreement, signed by the Subject on [REDACTED], the Subject agreed to “respect the dignity and individuality of any person who receives services and supports from this organization and honor their choices and preferences whenever possible and consistent with agency policy.” The Subject also agreed in the Code of Conduct Agreement that he would “actively seek advice and guidance of others whenever I am uncertain about an appropriate course of action.” Justice Center Exhibit 15)

Spanking a service recipient, even if done as part of a game or in a playful manner or with the consent of the service recipient, is an activity that runs afoul of respect for the dignity of a service recipient. The Subject should have realized this and, prior to engaging in the activity, he should have sought the advice of a supervisor. Additionally, RM stated in his Justice Center Interview that the Subject's spanking game "shouldn't have happened in a work setting." (Justice Center Exhibit 23: audio recording of Justice Center interview of RM) Consequently, by playing the birthday spanking game with the Service Recipient, without first seeking advice from a supervisor, the Subject breached his duty to respect the Service Recipient's dignity.

However, there is no evidence in the record that the Service Recipient suffered any actual physical injury or serious or protracted impairment of her physical, mental or emotional condition as a result of the Subject's conduct. Likewise, the record does not support the Justice Center's contention that the Service Recipient was likely to suffer actual physical injury or serious or protracted impairment of her physical, mental or emotional condition.

The credible evidence in the record establishes that the Service Recipient understood and willingly agreed to play the spanking game, and that she also enjoyed the game while playing it. The Subject stated that when the Service Recipient was caught by surprise and spanked by him, she giggled, laughed and performed her special dance by shuffling her feet and going in a circle. (Justice Center Exhibit 23: audio recording of Justice Center interrogation of the Subject and Hearing testimony of the Subject)

The credible evidence in the record also establishes that the Subject's conduct did not have an adverse effect on the Service Recipient. RM stated in his Justice Center interview that he saw no change in the Service Recipient after the Subject was on leave and that the Service Recipient had asked when Subject was returning to the IRA. (Justice Center Exhibit 23: audio recording of

Justice Center interview of RM) Additionally, the IRA overnight DSP stated in his Justice Center interview that the Service Recipient has become upset from past incidents, that it was very easy to see the effect of an incident on the Service Recipient and that he saw no behavioral change in the Service Recipient after the present incident. (Justice Center Exhibit 23: audio recording of Justice Center interview of [REDACTED] overnight DSP [REDACTED]) Finally, the Service Recipient's Individual Plan of Protective Oversight stated that "[REDACTED] will verbalize pain and use physical gestures to show the area of the pain. [REDACTED] will over dramatize some events of pain such as shots, blood draws for days and at some times even for weeks afterward." (Justice Center Exhibit 11) Based on the preceding evidence, it is likely that, had the Service Recipient suffered any physical or emotional impairment, she would have outwardly expressed it. However, there is no indication in the record that the Subject's birthday spanking game had any adverse effect on the Service Recipient. Consequently, the Justice Center has not established that the Subject's conduct was likely to have resulted in physical injury or serious or protracted impairment of the Service Recipient's physical, mental or emotional condition.

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 alleged. The substantiated report will be amended and sealed.

DECISION: The request of [REDACTED], that the substantiated report dated [REDACTED] be amended and sealed, is granted. The Subject has not been shown by a preponderance of the evidence to have committed neglect.

This decision is recommended by John T. Nasci, Administrative Hearings
Unit.

DATED: January 7, 2020
Schenectady, New York

A handwritten signature in black ink, appearing to be 'J. Nasci', written over a horizontal line.

John T. Nasci, ALJ