

**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]

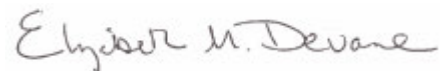
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

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 22, 2020
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
[REDACTED]
Kevin McGuckin, 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:

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: Kevin McGuckin, Esq.

[REDACTED]
By: [REDACTED]
[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for physical abuse and 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 physical abuse and neglect 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 or about [REDACTED], while in the community and away from the [REDACTED], located at [REDACTED], while a custodian, you committed physical abuse when you struck a service Recipient.

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

Allegation 2

It was alleged that on or about [REDACTED], while in the community and away from the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you directed inappropriate language and/or statements toward a service recipient.

This allegation has been SUBSTANTIATED as Category 3 neglect 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) that is operated by [REDACTED] and 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 Criminal Investigator [REDACTED] (Investigator))

5. At the time of the alleged physical abuse and neglect, the Subject was employed by [REDACTED] as a Direct Support Professional (DSP) (also referred to as Direct Care Counselor) for two and one-half years. The Subject's duties were to cook, clean, accompany the service recipients on community outings and medical appointments and to advocate for their needs. (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 physical abuse and neglect, the Service Recipient was a non-verbal adult male with diagnoses of autism and impulse control disorder and functioned within the profound range of intellectual disability. The Service Recipient had a history of pica, a disorder characterized by ingesting non-nutritive substances, and would eat anything that appeared edible to him. The Service Recipient would take food from others, food from the floor and walk up to others sniffing or smelling them. Pacing was a common calming activity for the Service Recipient that should not be discouraged, but excessive pacing was an early warning sign of pica behavior. (Hearing testimonies of the Subject and the Investigator; Justice Center Exhibits 16, 18, 19 and 20: audio recording of Justice Center interview of the Subject)

7. On [REDACTED], between 9:00 a.m. and 10:00 a.m., the Subject and the Medical

Coordinator¹ escorted the Service Recipient and service recipient A (SR A) to [REDACTED] located at [REDACTED]. The Service Recipient was waiting for a medicine management appointment with the Psychiatric Nurse Practitioner². He was restless, agitated and paced back and forth. (Hearing testimony of the Subject; Justice Center Exhibits 9, 10 and 20: audio recordings of Justice Center interviews of the Subject and the Medical Coordinator)

8. While the Medical Coordinator sat next to SR A, who was in a wheelchair, the Subject followed the Service Recipient as he paced in and out of the copy room. (Hearing testimony of the Subject; Justice Center Exhibit 20: audio recordings of Justice Center interviews of the Subject and the Medical Coordinator)

9. The Subject redirected the Service Recipient to sit in a metal chair lined across the wall next to other metal chairs. (Justice Center Exhibit 15) An unknown [REDACTED] worker was passing by with food and/or coffee and attracted the attention of the Service Recipient, who got up from the chair and was headed in the worker's direction. The Subject took the Service Recipient's hand and verbally redirected him to sit down in the chair. The Service Recipient plopped down on the chair causing the chair to hit the wall and make a sound. (Hearing testimony of the Subject; Justice Center Exhibit 20: audio recording of Justice Center interviews of the Subject and the Medical Coordinator)

10. [REDACTED] Staff 1³ stood outside the medical records office while [REDACTED] Staff 2⁴ sat inside the medical records office. [REDACTED] Staff 2 heard a "blow" sound and came out of her office. (Justice Center Exhibit 20: audio recording of Justice Center interviews of [REDACTED] Staff 1 and [REDACTED] Staff 2)

¹ The Medical Coordinator was [REDACTED].

² The Psychiatric Nurse Practitioner was [REDACTED].

³ [REDACTED] Staff 1 was Practice Administrator and Registered Nurse [REDACTED].

⁴ [REDACTED] Staff 2 was Medical Records Specialist [REDACTED].

11. After about ten to twenty seconds, [REDACTED] Staff 1 confronted the Subject because she believed she saw the Subject slap the Service Recipient hard against the back of his right shoulder, turn him around and forcefully sit him down while cursing at him to “fuckin’ sit your ass down.” The Subject denied hitting the Service Recipient. After engaging in a verbal back and forth, [REDACTED] Staff 1 said that she would contact the Subject’s supervisor and muttered “it’s too early to deal with miserable people” toward the Subject. (Hearing testimony of the Subject; Justice Center Exhibit 20: audio recording of Justice Center interviews of Medical Coordinator and [REDACTED] Staff 1 [REDACTED])

12. Upon the Service Recipient’s return to the facility, the facility Assistant Manager⁵ conducted a body check which showed no new marks and/or injuries. (Justice Center Exhibits 7, 8 and 20: audio recording of Justice Center interview of Assistant Manager)

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 and/or neglect.
- Pursuant to Social Services Law § 493(4), the category of physical 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 physical abuse and neglect presently under review was substantiated. A “substantiated report” means a report “... wherein a determination

⁵ The Assistant Manager was [REDACTED].

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 physical abuse and neglect of a person in a facility or provider agency are 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.
- (h) "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 physical abuse and 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 physical abuse and neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of physical abuse and neglect as set forth in the substantiated report. (14 NYCRR § 700.10(d))

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

If the Justice Center did not prove the physical 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 the acts described as “Allegation 1” and “Allegation 2” 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 19) The Justice Center also presented audio recordings of the Justice Center Investigator’s interviews of witnesses and the Subject and a redacted copy of the VPCR call. (Justice Center Exhibit 20) 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 her own behalf and presented no additional documents.

The facts relevant to the issues in this hearing are disputed. The Justice Center alleges that [REDACTED] Staff 1 witnessed the Subject use an open hand to slap the Service Recipient hard against the back of his right shoulder. The slap was done with such force that [REDACTED] Staff 1 was in shock for

ten to twenty seconds, [REDACTED] Staff 2 heard a blow sound, came out of the medical records office and asked [REDACTED] Staff 1 if the Subject hit the Service Recipient. Furthermore, the Justice Center alleges that both [REDACTED] Staff 1 and [REDACTED] Staff 2 heard the Subject direct inappropriate language and/or statements toward the Service Recipient when she told him to sit his “ass” down and to sit “fuckin” down.

The Subject denied the allegations. The Medical Coordinator was sitting with SR A and observed that the Subject did not slap the Service Recipient or use inappropriate language with him. Instead, the Subject took the Service Recipient’s hand and verbally redirected him to sit down. Both the Subject and the Medical Coordinator alleged that the “blow” sound was from when the Service Recipient plopped down on the chair and the chair hit the wall. The Subject alleged that [REDACTED] Staff 1 is not a credible witness who relied on her preconceived notions that the Subject was aggressive and “super ghetto” because of her employment as a DSP.

The Administrative Law Judge presiding over the hearing, having observed and evaluated the hearing testimony of the Subject on this material issue, finds her testimony to be credible.

Based on the credible evidence, it is determined that [REDACTED] Staff 1’s recollection of events was tainted by her preconceived notions of the Subject unfounded in proof or certainty and consequently lacked credibility. The United States Supreme Court described bias as follows:

Bias is a term used in the “common law of evidence” to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness’ like, dislike, or fear of a party, or by the witness’ self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.

United States v. Abel, 469 U.S. 45, 52 (1984).

The credible evidence demonstrates that [REDACTED] Staff 1 called the Subject “miserable.” The

Subject alleged that [REDACTED] Staff 1 said “you miserable people in the morning.” [REDACTED] Staff 1 told the Justice Center that she said, “it’s too early to deal with miserable people.” The Medical Coordinator overheard [REDACTED] Staff 1 call the Subject “miserable.” (Justice Center Exhibit 20: audio recording of Justice Center interviews of the Subject, [REDACTED] Staff 1 and Medical Coordinator)

Not only did [REDACTED] Staff 1 admittedly call the Subject “miserable”, she also told the Investigator that she was familiar with the Subject from prior visits even though she never had a conversation with her, she questioned her staff about their interactions with the Subject and was told that the Subject was “nasty,” “impatient,” “always talking on her phone” and “super ghetto.” (Justice Center Exhibit 20: audio recording of Justice Center interview of [REDACTED] Staff 1 [REDACTED] [REDACTED]) The ability of [REDACTED] Staff 1 to judge and misconstrue the Subject’s actions is evident by her statements to the Subject and the Investigator. Consequently, [REDACTED] Staff 1’s statement cannot be relied upon as credible evidence to support a finding that the Subject struck the Service Recipient and used inappropriate language toward him. (Justice Center Exhibit 20: audio recording of Justice Center interview of [REDACTED] Staff 1)

Similarly, [REDACTED] Staff 2’s statement cannot be relied upon as credible evidence to support a finding that the Subject struck the Service Recipient and used inappropriate language toward him. First, [REDACTED] Staff 1 was [REDACTED] Staff 2’s supervisor and had a motive to support her superior’s recollection of events. Second, [REDACTED] Staff 2 did not observe the Subject putting her hands on the Service Recipient, slapping him or hitting him because she was inside the medical records room. Knowing that the chairs were metal and clashed together, [REDACTED] Staff 2 assumed without observation that the Subject hit the Service Recipient. [REDACTED] Staff 2 also never confirmed [REDACTED] Staff 1’s statement that the Subject used the word “fuckin’” when redirecting the Service Recipient to sit down in the chair. (Justice Center Exhibit 20: audio recording of Justice Center interview of [REDACTED] Staff 2)

On the other hand, the Subject offered a reasonable, credible and supported account of the incident. Both the Subject and the Medical Coordinator stated that the Subject was calm with the Service Recipient and that the “blow sound” came from the metal chairs clashing. They both stated that the Subject did not raise her hand and that she verbally redirected the Service Recipient to sit on his chair. (Hearing testimony of the Subject; Justice Center Exhibit 20: audio recordings of Justice Center interviews of the Subject and the Medical Coordinator) The Investigator testified that the Subject welcomed him into her home for the interview and was calm when answering his questions. (Hearing testimony of the Investigator) Additionally, it is compelling evidence that [REDACTED] Staff 1 was so engrossed in what she observed, yet she did not request the Psychiatric Nurse Practitioner to evaluate the Service Recipient for any injuries that could be sustained if the Subject had actually hit the Service Recipient “really hard” on his right shoulder, such that [REDACTED] Staff 2 heard a “blow” sound. (Justice Center Exhibit 20: audio recording of Justice Center interviews of the Subject and the Medical Coordinator)

Allegation 1 – Physical Abuse

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))

Since the Justice Center did not prove that the Subject struck the Service Recipient, 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.

Allegation 2 - Neglect

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))

Since the Justice Center did not prove that the Subject directed inappropriate language and/or statements toward the Service Recipient, 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]
[REDACTED], be amended and sealed is granted.

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

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

DATED: January 16, 2020
Brooklyn, New York



Susanna Requets, ALJ