

**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 27, 2020
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Amanda Smith, Esq.
[REDACTED], Subject, Pro se

**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:

Keely D. Parr
Administrative Law Judge

Held at:

Adam Clayton Powell Jr. State Office Building
163 W. 125th Street
New York, New York 10027
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: Amanda Smith, Esq.

[REDACTED]

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], 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 or about [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you directed derogatory language toward a service recipient and/or failed to provide adequate care to him.

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

Allegation 2

It was alleged that on or about [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed physical abuse when you struck a service recipient on the head with an object.

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 an individualized residential alternative (IRA) operated by [REDACTED] and certified by the Office for People With Developmental Disabilities (OPWDD), which is a provider agency that is subject to the jurisdiction of the Justice Center. (Justice Center Exhibit 7)

5. At the time of the alleged incidents, the Subject had been employed by [REDACTED] (previously [REDACTED]) as a direct care worker since [REDACTED] 2011. The Subject worked from [REDACTED] on [REDACTED]. (Hearing Testimony of Subject; Justice Center Exhibits 12 and 18)

6. At the time of the alleged incidents, the Service Recipient was a 26-year old male, diagnosed with autism with a history of physical assault and aggression. The Service Recipient had a history of grabbing individuals when he wanted a task or activity to stop or when he did not want to participate in a task or activity. (Justice Center Exhibit 8)

7. Staff #1¹ stated that the correct date of the alleged incidents was [REDACTED] as it was the date after the snowstorm. She stated that she and Staff #2² were with the Service Recipient and other service recipients when the Subject began to antagonize the Service Recipient by speaking very nasty to him. She further stated that the Service Recipient went to attack the Subject and that she and Staff #2 intervened. Staff #1 stated that Staff #2 asked the Subject to stop and that she and Staff #2 moved the other Service Recipients out of the area. (Justice Center Exhibit 20)

¹ [REDACTED]

² [REDACTED]

8. Staff #2 stated that she had no knowledge of the alleged incidents because she was not in the living room when the Subject was alleged to have antagonized the Service Recipient. Staff #2 further stated that she did not remember an incident between the Service Recipient and a staff member. (Justice Center Exhibit 20)

9. Staff #1 stated that after she and Staff #2 moved the service recipients out of the room that she went back to the living room and saw the Service Recipient sitting on the couch and the Subject standing over him, hitting the Service Recipient in the back of his head with a three-hole puncher, which Staff #1 described as a “3-hole puncher big industrial one”. Staff #1 stated that she did this about three to four times and when asked what she was doing replied that you have to show these guys that you are not afraid of them. Staff #1 stated that she did not report this to management as they would sweep it under the rug. She further stated that she checked the Service Recipient after the Subject left but did not see any injuries. (Justice Center Exhibit 20)

10. On [REDACTED], the Service Recipient was checked by the facility and no bumps or bruises were found on the Service Recipient’s head. On [REDACTED], the Service Recipient was examined by the nurse at the facility with no visible injury observed and no signs of pain/discomfort. Also, on [REDACTED], the Service Recipient was examined at [REDACTED] with no evidence of residual deficit from head injury found. The report stated that there were no marks or bruises noted and no cuts or abrasions on the Service Recipient’s head. (Justice Center Exhibits 7, 16 and 17)

11. Staff #1 stated repeatedly that she did not get along with the Subject, that the Subject was nasty to the service recipients and the staff and that Staff #1 did not want to work with the Subject because the Subject was always telling her what to do. Staff #3³ stated that Staff #1

³ [REDACTED]

did not care for the Subject as the Subject liked to tell people how to do things the right way.
(Justice Center Exhibit 20)

12. The communication log for [REDACTED] indicates that the Service Recipient had a behavior because he wanted to go to church. The assignment sheet for [REDACTED] indicates that Staff #4⁴ was assigned to the Service Recipient and had the responsibility to write in the communication book. (Justice Center Exhibits 12 and 13)

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 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 and/or neglect of a person in a facility is defined by SSL § 488(1) as:

- (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

⁴ [REDACTED]

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 abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Categories 2 and 3, which are 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.

(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/or neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the

categories of physical abuse and neglect as set forth in the substantiated report. (Title 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 Title 14 NYCRR 700.10(d), it must then be determined whether the act of physical abuse and neglect cited in the substantiated report constitutes the categories 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

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-20) The investigation underlying the substantiated report was conducted by Justice Center Criminal Investigator [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and provided no other evidence.

Allegation of Neglect

The Justice Center has not established by a preponderance of the evidence that the Subject committed an act, described as “Allegation 1” in the substantiated report. Specifically, the evidence does not establish that the Subject committed neglect.

Staff #1 stated that the correct date of the alleged incident was [REDACTED] as it was the date after the snowstorm. She stated that she and Staff #2 were with the Service Recipient and other service recipients when the Subject began to antagonize the Service Recipient by speaking very nasty to him. She further stated that the Service Recipient went to attack the Subject and that she and Staff #2 intervened. Staff #1 stated that Staff #2 asked the Subject to stop and that she and

Staff #2 moved the other Service Recipients out of the area. However, when Staff #2 was interviewed, she stated that she had no knowledge of the alleged incident because she was not in the living room when the Subject was alleged to have antagonized the Service Recipient. Staff #2 further stated that she did not remember an incident between the Service Recipient and a staff member. (Justice Center Exhibit 20)

The Subject credibly testified that nothing at all happened between herself and the Service Recipient. Staff #1 stated repeatedly that she did not get along with the Subject, that the Subject was nasty to the service recipients and the staff and that Staff #1 did not want to work with the Subject because the Subject was always telling her what to do. Staff #3 stated that Staff #1 did not care for the Subject as the Subject liked to tell people how to do things the right way. (Hearing Testimony of Subject; Justice Center Exhibit 20)

The communication log for [REDACTED] indicates that the Service Recipient had a behavior because he wanted to go to church. The assignment sheet for [REDACTED] indicates that Staff #4 was assigned to the Service Recipient and had the responsibility to write in the communication book and that the Subject only worked from [REDACTED] (Justice Center Exhibits 12 and 13)

Based upon Staff #1's animosity towards the Subject, admitted by her and confirmed by Staff #3, the inability of Staff #2 to corroborate any of Staff #1's statements, the Subject's credible testimony and the fact that the Service Recipient was assigned to Staff #4 on the date of the alleged incident, 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.

Allegation of Physical Abuse

The Justice Center has not established by a preponderance of the evidence that the Subject committed an act, described as “Allegation 1” in the substantiated report. Specifically, the evidence does not establish that the Subject committed physical abuse.

Staff #1 stated that the correct date of the alleged incident was [REDACTED] as it was the date after the snowstorm. Staff #1 stated that after she and Staff #2 moved the service recipients out of the room that she went back to the living room and saw the Service Recipient sitting on the couch and the Subject standing over him, hitting the Service Recipient in the back of his head with a three-hole puncher. Staff #1 stated that she did this about three to four times and when asked what she was doing replied that you have to show these guys that you are not afraid of them. Staff #1 stated that she did not report this to management as they would sweep it under the rug. She further stated that she checked the Service Recipient after the Subject left but did not see any injuries. (Justice Center Exhibit 20)

The Subject credibly testified that nothing at all happened between her and the Service Recipient. She additionally argued that the 3-hole puncher weighed about three pounds and that surely the Service Recipient would have had some mark on his head if the allegation was true. The photograph of the 3-hole puncher presented by the Justice Center lends credence to the Subject’s testimony as does Staff #1’s description of the hole puncher as a “3-hole puncher big industrial one”. On [REDACTED], the Service Recipient was checked by the facility and no bumps or bruises were found on the Service Recipient’s head. On [REDACTED], the Service Recipient was examined by the nurse at the facility with no visible injury observed and no signs of pain/discomfort. Also, on [REDACTED], the Service Recipient was examined at [REDACTED] with no evidence of residual deficit from head injury found. The report stated that there were no marks or bruises noted and no cuts or abrasions on the Service Recipient’s head. (Hearing Testimony of Subject; Justice Center Exhibits 7, 16, 17 and 20)

The Subject additionally argued that it made no sense that she was standing in front of the Service Recipient while hitting him in the back of the head, as Staff #1 reported. The Service Recipient had a history of grabbing individuals when he wanted a task or activity to stop or when he did not want to participate in a task or activity. Surely, the Service Recipient would have made some kind of an attempt to grab the Subject in order to stop getting hit in his head with a heavy metal object. (Hearing Testimony of Subject; Justice Center Exhibit 8)

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 physical abuse 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 and physical abuse.

This decision is recommended by Keely D. Parr, Administrative Hearings Unit.

DATED: January 10, 2020
Brooklyn, New York


Keely D. Parr, ALJ