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: November 18, 2020
Schenectady, New York

Elizabeth M. Devane

Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Matthew Ross, Esq.
Peter Brill, 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: 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, Suite 104
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: Mathew Ross, Esq.

[redacted]
By: Peter Brill, Esq.
Brill Legal Group, P.C.
64 Hilton Avenue
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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [redacted] (the Subject) for 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 abuse and neglect by the Subject of a Service Recipient.

2. The Justice Center's Report of Substantiated Finding concluded that:

Allegation 1

It was alleged that on or about or between [redacted] and [redacted], while at [redacted], located at [redacted], you committed Physical Abuse against/to a Service Recipient.

This allegation has been SUBSTANTIATED as Category 1 Physical Abuse pursuant to Social Services Law § 493(4)(a).

The investigation revealed the Subject struck the Service Recipient in the chest, during which time he sustained a broken rib.

Allegation 2

It was alleged that on or about or between [redacted] and [redacted], while at [redacted], located at [redacted], you committed Neglect against/to a Service Recipient.

This allegation has been SUBSTANTIATED as Category 2 Neglect pursuant to Social Services Law § 493(4)(b).

The investigation revealed the Subject failed to provide proper supervision to the Service Recipient.

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], which is certified by the New York State Office for People With Developmental Disabilities (OPWDD) and is, therefore, a provider 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 abuse and neglect, the Service Recipient was a fifty-nine-year-old ambulatory verbal male whose diagnoses included mild intellectual disability, autism, schizoaffective disorder and bipolar disorder, and whose behaviors included verbal aggression, physical aggression, manic behavior and noncompliance. (Justice Center Exhibit 8)

6. At the time of the alleged abuse and neglect the Subject had been employed at the facility for approximately thirteen years as a Direct Support Professional (DSP) and also performed the function of Approved Medication Assistive Personnel (AMAP). (Hearing testimony of the Subject; Justice Center Exhibit 18: audio interrogation of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

7. On Friday, [redacted], the Service Recipient reported to the Assistant Residential Manager that the Subject had struck him hard in the chest on the preceding Tuesday when the Service Recipient was trying to telephone his sister and that he wanted to go to the hospital because his chest hurt. When questioned later, the Service Recipient was unsure as to which day the incident had occurred. The Assistant Residential Manager reported the disclosure to the facility Program Manager, the facility Vice President [redacted] and had the

Service Recipient examined by the facility Registered Nurse (RN). (Justice Center Exhibits 10 and 21: audio interview of the Assistant Residential Manager)

8. Although the body check performed by the RN revealed no marks, redness or bruising, she ordered that the Service Recipient be taken to an Urgent Care Medical Center. (Justice Center Exhibit 11)

9. Later that night the Service Recipient underwent an x-ray, which revealed that he had sustained a left sixth rib fracture. (Justice Center Exhibit 16)

10. When questioned later by the facility Behavior Intervention Specialist (BIS) and by the Investigator about the incident, the Service Recipient reported that when he had become upset because the Subject did not assist him in telephoning a sibling, he punched the Subject in the stomach and that the Subject then punched him in the chest. (Hearing testimony of the Investigator; Justice Center Exhibit 21: audio interview of the Service Recipient and the BIS)

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 allegation constitutes abuse and neglect.
- Pursuant to Social Services Law § 493(4), the category of abuse and 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 serious physical 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…" (14 NYCRR 700.3(f))

The physical abuse of a person in a facility or provider agency is defined by SSL § 488(1)(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.

The neglect of a person in a facility or provider agency is defined by SSL § 488(1)(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.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4)(a) including Category 1 conduct. Category 1 conduct includes serious physical abuse and other serious conduct by custodians. Serious physical abuse is defined by SSL § 493(4)(a)(i):

> Intentionally or recklessly causing physical injury as defined in subdivision nine of section 10.00 of the penal law, or death, serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, or consciously disregarding a substantial and unjustifiable risk that such physical injury, death, impairment or loss will occur;

SSL § 493(4)(a)(i) refers to subdivision nine of Section 10.00 of the Penal Law for the definition of "physical injury". Under New York Penal Law 10.00(9) "physical injury" means impairment of physical condition or substantial pain.

SSL § 493(4)(a)(i) requires that a Subject's actions be "intentional" or "reckless." SSL § 488(16) defines "intentional" and "reckless" as follows:

> "Intentionally" and "recklessly" shall have the same meanings as provided in subdivisions one and three of section 15.05 of the penal law.

New York Penal Law 15.05 provides the following definitions:

> (1) "Intentionally." A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.
>
> (3) "Recklessly." A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation...

Category 2 conduct is defined by SSL § 493(4)(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.

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject committed the acts of abuse and/or neglect alleged in the substantiated report that is the subject of the proceeding and that such 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, 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 of abuse and/or neglect cited in the substantiated report constitutes 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 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 Category 1 physical abuse and Category 2 neglect as described in Allegations 1 and 2 of the substantiated report.

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1 through 21). The investigation underlying the substantiated report was conducted by the Investigator, who was the sole witness for the Justice Center.

The Subject testified at the hearing and provided one document (Subject Exhibit 1) as evidence in his own behalf.

The Subject testified and stated (Justice Center Exhibit 18: audio interrogation of the Subject) that on [redacted] he was not assigned supervision of the Service Recipient, as he was the AMAP for that shift; that, while he was working in the medication room, he left the room to investigate noises that the Service Recipient was making; that when asked what was wrong, the Service Recipient complained that he had been unable to telephone his sister; that, unprovoked, the Service Recipient punched the Subject; that, when the Service Recipient attempted a second punch, the Subject blocked the strike; that the Subject did not reciprocate by striking the Service Recipient in any way; that the Service Recipient calmed down and cooperated by going to his bedroom thereafter; that there were no witnesses to the incident; and that, on that date, he left a message for the BIS to report the Service Recipient's physical aggression. The Subject testified that, although he had previously complained to the BIS about the Service Recipient's use of racial slurs, his relationship with the Service Recipient was good and without issues. The Subject told the Investigator that, because he was a kidney transplant recipient, he had trained himself to avoid physical confrontations and had stepped back after the Service Recipient punched him in the

stomach. The Subject testified that the Service Recipient punched him in the lower left kidney, and, because of a previous surgery, the area was sensitive and that he was surprised by the blow, which he described as a "shocker."

While the Subject testified that he blocked the Subject's second punch by raising and crossing his arms to protect his face, he told the Investigator that he crossed his arms in front of himself. The Subject admitted during his interrogation that his block "could have made contact"; that it was "possible" that he caused the Service Recipient's injury; that sometimes when "emotion takes over you don't know what happened" but, "if that happened, it was not purposefully done" and that even if he had hurt the Service Recipient, he "would have known" about it at the time.

The Subject testified and told the Investigator that he telephoned the BIS after the incident to report the Service Recipient's physical aggression and testified that he recorded the incident in an unidentified log distinct from the Log Notes (Justice Center Exhibit 12), however, the Subject told the Investigator that the fact that there was no written record of the incident "could have been an oversight" on his part. The Subject testified that he thought the reason the BIS denied receiving his voice message regarding the Service Recipient's physical aggression (Justice Center Exhibit 18: audio interview of the BIS) was because she did not like the Subject, which he discerned from her body language.

The BIS told the Investigator (Justice Center Exhibit 18: audio interview of the BIS) that approximately two weeks prior to the incident she conducted an in-service training featuring a Crisis Intervention Specialist to provide instruction to staff, including the Subject, who was present, to manage the Service Recipient's physical aggression; that at that time, the Subject expressed frustration and resistance to crisis intervention techniques and told the BIS that she did not know what she was talking about; that the training included the instruction that staff telephone the Crisis Intervention Line and make a written record in the event of the Service Recipient's

physical aggression, neither of which the Subject had done in this case; that she never received a voice message from the Subject regarding the incident and; that the Subject had "a personality issue" with the Service Recipient where there was "tension" between them that was reflected by the Subject being standoffish and demonstrating a lack of patience with the Service Recipient; that when the Service Recipient reported to her directly that he had punched the Subject when he was upset because he had not been able to speak to his sibling and the Subject had punched him back in the chest, she observed a yellow bruise in the area where the Service Recipient said he had been struck.

The Log Notes (Justice Center Exhibit 12) contain a notation dated [redacted], directing staff to call the BIS for all behaviors involving the service recipients.

It was argued on behalf of the Subject that the fact that there was a two or three day delay between the incident and the [redacted] report of the incident and discovery of the Service Recipient's injury supports the Subject's denial of the allegation, as the Service Recipient could have sustained the injury at any point during the intervening time; that there was no causal relationship between the encounter wherein the Service Recipient struck the Subject and the Service Recipient's injury; that the Investigator admitted in testimony that there is no way to tell when and how the Service Recipient's injury occurred; that the fact that there was no evidence other than the BIS's statement that the Service Recipient sustained a bruise on his chest demonstrates that the BIS had a bias against the Subject and was embellishing her evidence; that the Investigator based his conclusions on the Subject's interrogation even though the Subject never admitted to hitting the Service Recipient; that the Subject's admission to the Investigator that his unconscious or involuntary response to the Service Recipient's punch would not have been hard enough to fracture a rib; that there was no medical evidence provided by the Justice Center establishing that a punch caused the Service Recipient's injury; and that the Service Recipient was

the only witness to the alleged punch by the Subject and he was not a reliable reporter.

The Subject's denial that he struck the Service Recipient in the chest in response to the Service Recipient's punch is not credible. Despite his statements, the Subject did not establish that he reported or recorded the Service Recipient's physical aggression pursuant to the training the Subject had received shortly before the incident and, according to the BIS, the Subject did not leave a voice message for her when the incident occurred, as he alleged. These facts support the theory that the Subject had attempted to conceal the incident to protect himself from the consequences of his conduct. Furthermore, the Subject's medical history provided him with a unique but understandable concern regarding protecting his abdomen from receiving another blow, which supports the theory that the Subject struck the Service Recipient back immediately after he received the first punch to deter any further physical aggression. While the Subject admitted to reporting to the BIS that the Service Recipient was racist, he testified that he had an amicable relationship with him, which was unconvincing and contradicted by the BIS's evidence. This evidence also underpins a motive for the Subject's physical retaliation against the Service Recipient. Accordingly, it is found that when the Service Recipient punched the Subject, the Subject hit him back in the chest.

Allegation 1 - Physical Abuse

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 definition of physical abuse under SSL § 488(1)(a) specifically includes the act of hitting, which was perpetrated by the Subject upon the Service Recipient in this case.

The Service Recipient attributed the pain in his chest, which was a symptom of his

diagnosed fractured rib, to the Subject's punch and, without any other contradictory evidence, the Service Recipient's consistent statement that the Subject's punch caused his chest pain proves by a preponderance of the evidence that the Subject did, in fact, cause the Service Recipient's physical injury by physical contact with him. Furthermore, there is evidence that the Subject's striking of the Service Recipient was intentional. It has been found that the punch was retaliatory conduct, the conscious objective of which was to deter the Service Recipient from hitting the Subject again and also, possibly, to express the Subject's justified sensitivity to the Service Recipient's overt racism. There is also evidence that the Subject's striking of the Service Recipient was reckless. In order to deliver a punch, the strength of which fractured the Service Recipient's rib, it is found that the Subject was aware of and consciously disregarded a substantial and unjustifiable risk that the Service Recipient would be injured by his conduct. 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. Because the Justice Center substantiated this allegation of physical abuse as a Category 1 act, which is the most serious category determination, the elements as set out in SSL § 493(4)(a)(i) must be met. Accordingly, a finding of serious physical abuse in this case requires that a preponderance of the evidence establishes that the Subject intentionally or recklessly caused physical injury, as defined in subdivision nine of section 10.00 of the penal law, or death, serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, or consciously disregarded a substantial and unjustifiable risk that such physical injury, death, impairment or loss would occur.

The determination that the Subject's conduct was intentional or reckless pursuant to SSL § 488(1)(a) has been reached and applies to the same terms as found in SSL § 493(4)(a)(i). The

Service Recipient's physical injury meets the criteria of SSL § 493(4)(a)(i) as it constituted an impairment of physical condition and substantial pain under New York Penal Law 10.00(9). Accordingly, the Subject's actions constituted serious physical abuse under SSL § 493(4)(a)(i).

Given the finding that the Subject's conduct met the test of serious physical abuse under SSL § 493(4)(a)(i) in Allegation 1, it is determined that the category of the affirmed substantiated allegation was properly substantiated as a Category 1 act.

A substantiated Category 1 finding of physical abuse will result in the Subject being placed on the VPCR Staff Exclusion List, and the fact that the Subject has a substantiated Category 1 report will be disclosed to entities authorized to make inquiry to the VPCR. Substantiation of a Category 1 offense permanently places the Subject on the Staff Exclusion List.

Allegation 2 - Neglect

A finding of neglect requires that a preponderance of the evidence establishes that the Subject was a custodian who owed a duty to the Service Recipient, that he breached that duty, and that the breach either 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)).

Regarding the Subject's duty to the Service Recipient, it was established that the Subject was trained to use crisis intervention techniques to avoid physical confrontations and the Subject acknowledged in his testimony and to the Investigator that he knew that he was not to use physical intervention and only verbal prompts. Here, it has already been determined that the Subject struck the Service Recipient in the chest, which is clearly outside of any authorized use of force or emergency intervention. Furthermore, the Subject, like all custodians, was bound by a fundamental general duty to not cause physical injury to service recipients. The Subject breached that duty when he struck the Service Recipient in the chest, causing a physical injury to him.

Accordingly, it is found that the Subject's conduct constituted neglect as specified in Allegation 2 of the substantiated report.

The report will remain substantiated and the next issue to be determined is whether the substantiated report constitutes the category of neglect set forth in the substantiated report. With respect to the substantiated conduct of neglect in Allegation 2, it is clear that the Subject's conduct, which caused a physical injury, did seriously endanger the health, safety and welfare of the Service Recipient. Accordingly, it is determined that the category of the affirmed substantiated neglect was properly substantiated as a Category 2 act.

Category 2 conduct under this paragraph shall be elevated to Category 1 conduct when such conduct occurs within three years of a previous finding that the Subject 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] of serious physical abuse and neglect 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 serious physical abuse and neglect.

The substantiated report is properly categorized as Category 1 and 2 acts.

This decision is recommended by Sharon Golish Blum, Administrative Hearings Unit.

DATED: November 12, 2020
Plainview, New York