

**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
AFTER HEARING**

Adjud. Case #:

[REDACTED]

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Jennifer Oppong, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: Eric E. Wilke, Esq.
CSEA, Inc.
143 Washington Avenue
Capitol Station Box 7125
Albany, New York 12224

██████████

The Findings of Fact and Conclusions of law are incorporated from the Recommendations of the presiding Administrative Law Judge's Recommended Decision.

ORDERED: The request of ██████████ that the substantiated report dated ██████████, ██████████ be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed abuse.

NOW, THEREFORE, IT IS DETERMINED that the record of this report shall be amended and sealed by the Vulnerable Persons' Central Register, pursuant to SSL § 493(3)(d).

This decision is ordered by David Molik, Director of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

DATED: Schenectady, New York
March 8, 2016



David Molik
Administrative Hearings Unit

**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:

Administrative Hearings Unit
New York State Office Building
333 East Washington Street
Syracuse, New York 13202
On: [REDACTED]

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived.

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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) 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 "substantiated" report dated [REDACTED], [REDACTED] of 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 [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed physical abuse when you held a service recipient's wrists/arms and pulled him off a toilet.

This allegation has been SUBSTANTIATED as Category 3 physical abuse, 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 [REDACTED] for adult individuals with developmental disabilities, and is operated by the New York State Office for People With Developmental

Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (See Justice Center Exhibit 6 and Hearing testimony of OPWDD Investigator

)

5. At the time of the alleged abuse, the Subject was employed by the OPWDD as a Direct Support Assistant (DSA) and had been employed by the OPWDD for six years. (See Justice Center Exhibit 22, and Hearing testimony of the Subject)

6. At the time of the alleged abuse, the Service Recipient was a forty-two year old male who had been a resident of the facility for twelve years. The Service Recipient is an adult with diagnoses of severe mental retardation, autism, seizure disorder and Von Willebrand's disease. The Service Recipient is nonverbal and communicates through gestures and grunting. (See Justice Center Exhibits 6, 17 and 18)

7. On [REDACTED], the Service Recipient was placed on hip precautions as a result of previously having suffered a broken hip. The Service Recipient's hip precautions included one-to-one staffing for twenty-four hours per day and for seven days per week. As part of the hip precautions, the Service Recipient had restrictions such as prohibitions against bending his hip past ninety degrees, crossing his legs and rotating his hip inwards, and prescriptions for the use of a raised toilet seat while toileting and a gait belt for ambulation. (See Justice Center Exhibits 11, 12 and 18; and Hearing testimony of DSA [REDACTED])

8. The Service Recipient has a history of aggressive behaviors which include grabbing, pulling, scratching, biting, kicking, hitting and severe clothes pulling and grabbing. Due to his history of aggressive behaviors, the use of protective hand mitts on the Service Recipient is permitted after he has grabbed someone or has pulled someone's hair a second time within the same day. (See Justice Center Exhibits 16, 17 and 18)

9. On [REDACTED], at approximately 6:00 a.m. the Subject started her work shift at the facility and was assigned that day to one-to-one supervision of the Service Recipient. The Subject commenced her shift by relieving DSA [REDACTED], who was also working a shift at the [REDACTED], and who was at the time supervising the Service Recipient as he was toileting in the facility bathroom. DSA [REDACTED] left the bathroom upon the Subject's entry into the bathroom. (See Justice Center Exhibits 15 and 22, and Hearing testimony of the Subject)

10. When the Service Recipient was finished toileting, he attempted to stand, which is his normal routine. In an attempt to steady the Service Recipient as he rose from the toilet, the Subject grabbed the Service Recipient's gait belt with one hand and used her other hand to direct the Service Recipient's hand to the handicap bar on the side of the toilet. The Service Recipient then grabbed the Subject's shirt collar and as a result ripped a button off her shirt which prompted the Subject to yell out to DSA [REDACTED] to come help her. The Subject then attempted with one hand to remove the Service Recipient's hands from her shirt while continuing to hold his gait belt with her other hand. (See Justice Center Exhibit 22 and Hearing testimony of the Subject)

11. When DSA [REDACTED] arrived at the bathroom, she entered and helped remove the Service Recipient's hands from the Subject. The Subject then directed the Service Recipient to the sink where he washed his hands while DSA [REDACTED] left to retrieve a pair of mitts. After DSA [REDACTED] returned to the bathroom with the mitts, she and the Subject placed the mitts on the hands of the Service Recipient. Thereafter, DSA [REDACTED] left the bathroom and the Subject escorted the Service Recipient, using the gait belt, to the Service Recipient's bedroom. (See Justice Center Exhibit 22, Hearing testimony of DSA [REDACTED] and Hearing testimony of the Subject)

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 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 and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1). Physical Abuse under SSL § 488(1)(a) is defined as:

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

If the Justice Center proves the alleged abuse, 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 abuse cited in the substantiated report constitutes the category of abuse as set forth in the substantiated report.

If the Justice Center did not prove the abuse 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 (See Justice Center Exhibits 1-21), as well as an audio recording of the interrogation of the Subject. (See Justice Center Exhibit 22) The investigation underlying the substantiated report was conducted by the OPWDD Internal Investigator [REDACTED], who, along with DSA [REDACTED], testified at the hearing on behalf of the Justice Center.

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

The Justice Center contended at the hearing that the Subject intentionally pulled the Service Recipient by the Service Recipient’s hands and/or arms in an attempt to move the Service Recipient from the toilet and, while doing so, bent the Service Recipient at his waist to

an angle more acute than ninety degrees. The Justice Center further contended that the Subject's conduct created a likelihood of physical injury to the Service Recipient. The main evidence offered by the Justice Center to support its allegations were the statements and hearing testimony of DSA [REDACTED], who was the only person, other than the Subject, in the facility at the time of the incident. (See Hearing testimony of DSA [REDACTED] and Hearing testimony of the Subject)

The Subject contends that she did not pull the Service Recipient off the toilet but instead was attempting to help the Service Recipient rise from the toilet, and while doing so, the Service Recipient became aggressive and grabbed her. The Subject offered her hearing testimony as evidence in support of her contention.

DSA [REDACTED] testimony is determined to lack credibility and is discounted for the following reasons. In her testimony, DSA [REDACTED] downplayed the Service Recipient's behavior stating that he gets aggressive "at times". However, the record establishes that the Service Recipient's aggression is a major concern to DSAs and other facility staff, and is triggered by transitions from activity to activity and from place to place, and when the Service Recipient perceives others to be in his personal space. (See Justice Center Exhibits 16, 17 and 18)

DSA [REDACTED] also provided conflicting and inconsistent testimony concerning the role of the Service Recipient's gait belt in the Service Recipient's daily activities, stating initially that the Service Recipient "needed a gait belt", but later in her testimony stating that the gait belt was "not something we use every day." (See Hearing testimony of DSA [REDACTED]) However, it is clear from the record that the use of a gait belt by staff is not optional but instead is required for all ambulation. (See Justice Center Exhibit 18)

Staff [REDACTED] also testified that, upon the Subject's arrival at the facility and the commencement of the Subject's shift, the Subject took over from DSA [REDACTED] who was, at the time, in the bathroom toileting the Service Recipient. However, DSA [REDACTED] made no mention of DSA [REDACTED] in either of the two written statements which she made contemporaneously to the incident. (See Justice Center Exhibits 8 and 9)

Furthermore, the Subject's testimony (that she met DSA [REDACTED] as she was signing in and he was signing out) directly contradicts DSA [REDACTED] testimony (that the Subject relieved DSA [REDACTED] in the bathroom where he was supervising the Service Recipient). The Subject's version of events is supported by evidence in the record which reflects that DSA [REDACTED] shift ended at 6:00 a.m., the exact time that the Subject's shift started. (See Justice Center Exhibit 15 and Hearing testimony of the Subject)

The Subject further testified that it was DSA [REDACTED] who was in the bathroom with the Service Recipient when the Subject started her shift. The OPWDD Internal Investigator could have obtained more definitive evidence in an effort to resolve this discrepancy by interviewing DSA [REDACTED], but no such evidence was presented at the hearing.

DSA [REDACTED] testified further that, when she witnessed the Subject pulling the Service Recipient, she was outside the bathroom walking by the bathroom. She also testified that it was "not usual to leave door open ..." (See Hearing testimony of [REDACTED]) However, the Subject testified that the bathroom door was only slightly ajar when she was struggling with the Service Recipient, and that, as such, no one could have seen her and the Service Recipient from outside the bathroom. (See Hearing Testimony of the Subject) The Subject's testimony on this point is supported by facility procedure that is outlined in the Service Recipient's IPOP which states that "staff may need to close bathroom door ..." (See Justice Center Exhibit 18)

DSA [REDACTED] statements and hearing testimony were inconsistent with each other. In her testimony, Staff [REDACTED] stated that she heard the Subject say: "[REDACTED], come on" but she could not remember what she said in response. (See Hearing Testimony of Staff [REDACTED]) In her first written statement on [REDACTED], she wrote that she said to the Subject: "Do you have to pull him?" to which the Subject responded: "Yeah, help me", and thereafter she left without helping the Subject. (See Justice Center Exhibit 8) In her second written statement on [REDACTED], Staff [REDACTED] did not mention saying anything to the Subject or the Subject saying anything to her. (See Justice Center Exhibit 9)

Having had the opportunity to hear and view the live witness testimony of DSA [REDACTED], the Administrative Law Judge presiding over the hearing does not find this witness' testimony to be credited evidence. In contrast, the Subject's testimony was both credible and largely consistent with her prior statements to the OPWDD Internal Investigator, and is therefore credited evidence.

In order to prove physical abuse, the Justice Center must first establish that the Subject acted intentionally or recklessly through physical contact with the Service Recipient. (See NYS SSL§488(1)(a)) With the testimony of DSA [REDACTED] being discredited, the Justice Center's remaining evidence fails to establish that the Subject pulled the Service Recipient from the toilet in a violation of the hip precautions.

Furthermore, there is no evidence in the record that the Subject's conduct, as she described it in her hearing testimony and in her statement to the OPWDD Internal Investigator, was conduct "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." (See NYS SSL§488(1)(a))

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 abuse 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 abuse.

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

DATED: March 8, 2016
Schenectady, New York



John T. Nasci, ALJ