

**STATE OF NEW YORK  
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE  
WITH SPECIAL NEEDS**

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In the Matter of the Appeal of

██████████

Pursuant to § 494 of the Social Services Law

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**FINAL  
DETERMINATION  
AND ORDER  
AFTER HEARING**

**Adjudication Case #:**

██████████

Held at:

NYS Justice Center for the Protection of People  
with Special Needs

401 State Street

Schenectady, New York 12305

On: ██████████

Parties:

Justice Center for the Protection of People with  
Special Needs

By: Tracy Steeves, Esq.

161 Delaware Avenue

Delmar, New York 12054-1310

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By: Eric E. Wilke, Esq.

CSEA Legal

143 Washington Avenue

Albany, NY 12210

## **JURISDICTION**

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject), for physical abuse against a Service Recipient. The Subject invoked an internal administrative review which was denied. An administrative hearing was then held, on [REDACTED], in accordance with the requirements of Social Services Law § 494 and Part 700 of 14 NYCRR.

## **PROCEDURAL HISTORY**

The VPCR contains a substantiated report, [REDACTED], of physical abuse by the Subject against the Service Recipient. The report was initially investigated by the New York State Office for People With Developmental Disabilities (OPWDD). The substantiated report, made by the New York State Justice Center for the Protection of People with Special Needs (Justice Center), as against the Subject, dated [REDACTED], concluded that:

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED] [REDACTED], you committed an act of physical abuse when you intentionally and forcefully punched a service recipient in the chest, causing the service recipient to express pain.

This offense has been SUBSTANTIATED as a Category 3 offense pursuant to Social Services Law § 493. Justice Center Exhibit 1.

An Administrative Review was conducted at the request of the Subject to amend the report and the Justice Center Administrative Appeals Unit denied the request. On [REDACTED], a Hearing (the Hearing) was held.

The Administrative Law Judge issued a Recommended Decision after Hearing (Recommended Decision). That Recommended Decision is rejected by the Executive Director pursuant to 14 NYCRR 700.13 and the following constitutes the Final Determination of the

Executive Director under 14 NYCRR 700.13.

### **FACTS**

At the time of the alleged physical abuse, the Subject was employed by New York State Office for People With Developmental Disabilities (OPWDD), and was working at a residence known as [REDACTED] located in [REDACTED], which is a facility or provider agency subject to the jurisdiction of the Justice Center.

At the time of the alleged physical abuse the Service Recipient was a person with impulse control disorder, seizure disorder, defiant disorder, among other diagnoses. The Service Recipient was historically physically aggressive and this behavior, at times resulted in significant injury to himself and others. The Service Recipient also objected to reasonable requests for routines, which included a refusal to get up on program mornings and attend Day Program and as a result of his self-injurious behavior and physical aggression he required one to one supervision on Day Program mornings. *Justice Center Exhibits 13 and 14.*

On the morning of [REDACTED] the Service Recipient was in the living room of the residence, along with the Subject and there was a physical altercation between the Service Recipient and the Subject. Staff member [REDACTED] was present during the incident and was located approximately twenty-five to thirty feet away from the location of the incident. *Hearing Testimony of the Subject.* [REDACTED] witnessed the Subject deliberately and with force punch the Service Recipient in his chest area, at which time the Service Recipient exclaimed “ouch fuck”. *Justice Center Exhibit 6.* Following the incident the other staff members and residents went into the dining room, with the exception of [REDACTED], which was unusual for [REDACTED]. The Subject observed [REDACTED] at the end of the hallway on his cell phone appearing as though

something was bothering him. Thereafter the bus arrived to take them to the Day Program.

Hearing Testimony of the Subject.

The police responded and spoke to the Service Recipient and no arrest was made. The Service Recipient, while waiting for the police to arrive, along with staff member [REDACTED], stated to [REDACTED] that he and the Subject were only playing around and further told [REDACTED] “you don’t know what this is going to do to me” and that he was worried about [REDACTED] and her brother. When [REDACTED] asked the Service Recipient what [REDACTED] he was talking about, he replied that [REDACTED] was the Subjects girlfriend. Justice Center Exhibit 11. [REDACTED] is also the sister of [REDACTED] staff member [REDACTED]. Justice Center Exhibit 4. The Service Recipient was examined by an LPN after the incident and no injuries were noted but for an apparent bug bite and old discolored areas on one of his lower legs. Justice Center Exhibit 12.

**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 physical abuse.
- Pursuant to Social Services Law § 493(4), the category level that the physical abuse constitutes.

**APPLICABLE LAW**

The Justice Center is responsible for investigating allegations of abuse or neglect in facilities and provider agencies. Social Services Law § 492(3) (c) and 493(1) and (3). Pursuant to Social Services Law § 493(3), the Justice Center determined that the initial report of physical 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 ...” (14 NYCRR 700.3(f))

Pursuant to Social Services Law §§ 494(1)(a)(b) and (2) and 14 NYCRR 700.13 this Final Determination of the Executive Director will determine: 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, and if there is a finding of a preponderance of the evidence; whether the substantiated allegations constitutes physical abuse; and pursuant to Social Services Law § 493(4), the category level that the physical abuse constitutes.

Physical abuse of a service recipient is defined by Social Services Law § 488 (1)(a) 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 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 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 alleged in the substantiated report and that such act or acts constitute the category level of physical abuse set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

As is relevant to this proceeding, substantiated reports of abuse or neglect shall be categorized pursuant to Social Services Law § 493(4) (a-c). The Subject has been substantiated for a Category 3 level offense, which is abuse and/or neglect committed by a custodian, not otherwise described in categories one and two. Social Services Law § 493 states in pertinent part:

4. Substantiated reports of abuse or neglect shall be categorized into one or more of the following four categories, as applicable:

(a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:

(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;

(ii) a knowing, reckless or criminally negligent failure to perform a duty that: results in physical injury that creates a substantial risk of death; causes death or serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor; or is likely to result in either;

(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.

If the Justice Center proves the alleged physical abuse, the report will not be amended and sealed. Pursuant to Social Services Law § 493(4) and Title 14 NYCRR 700.10(d), it must then be determined whether the act of physical abuse cited in the substantiated report constitutes a Category 3 level offense, as set forth in the substantiated report.

If the Justice Center did not prove the physical abuse by a preponderance of evidence, the substantiated report must be amended and sealed.

## THE HEARING

The Justice Center called one witness, the OPWDD investigator who conducted the investigation of the incident, [REDACTED] and offered eighteen exhibits which were admitted into evidence. OPWDD investigated the subject report of physical abuse and the investigation report was admitted into evidence as *Justice Center Exhibit 4*. *Justice Center Exhibit 18* is a CD which contains recorded statements of two individuals, the Subject and the Service Recipient obtained during the course of the investigation and the Justice Center played the recorded statements of the Subject and the Service Recipient at the Hearing.

The Service Recipient, at the time of the incident, was a twenty-five year old man with impulse control disorder, seizure disorder, defiant disorder among other diagnoses. The Service Recipient was historically physically aggressive and this behavior, at times resulted in significant injury to himself and others. The Service Recipient also objected to reasonable requests for routines, which included a refusal to get up on program mornings and attend Day Program and as a result of his self-injurious behavior and physical aggression he required one to one supervision on Day Program mornings. *Justice Center Exhibits 4, 13 and 14*.

The investigation report, authored by Investigator [REDACTED], documents the investigation into the incident and recommended that the allegation of physical abuse against the Subject be substantiated. In part, this recommendation was based on the investigative conclusion that staff [REDACTED] observed the Subject deliberately and with force punch the Service Recipient in the chest and that the Service Recipient responded “ouch fuck”, that [REDACTED] observed no “horseplay” prior to the punch and that [REDACTED] had no ulterior motive in making this allegation against the Subject.

Investigator [REDACTED] testified at the Hearing in relevant part as follows: She had, at the time of the investigation into the subject incident, substantial experience investigating allegations

of abuse and neglect. She testified about areas of the Service Recipient's Behavior Support Plan and Plan of Protective Oversight (*Justice Center Exhibits 13 and 14*), relative to the Service Recipient's diagnosis and history of physically aggressive behavior and how the the Service Recipient objected to reasonable requests for routines, which included a refusal to get up on program mornings and attend Day Program and as a result of his self-injurious behavior and physical aggression he required one to one supervision on Day Program mornings.

Investigator [REDACTED] testified about the two statements provided by [REDACTED] regarding the incident. The first, made on the date of the incident [REDACTED], states that [REDACTED] witnessed the Subject punch the Service Recipient in the chest with a fist and that the Service Recipient exclaimed "ouch fuck" (*Justice Center Exhibit 6*) and the second, actually taken by [REDACTED] on [REDACTED], which states that [REDACTED] observed a deliberate and forceful punch to the Service Recipient by the Subject and also that prior to the incident that morning he did not observe any "horseplay" between the Subject and the Service Recipient. *Justice Center Exhibits 4 and 6*.

Investigator [REDACTED] also testified about a statement taken from staff member [REDACTED] [REDACTED], on [REDACTED], who was the Service Recipient's one to one staff at the time of the incident. [REDACTED] states that he observed the Subject and the Service Recipient "screwing around" on the morning of the incident, but that at no time did he see what he "considered to be abuse". [REDACTED] added that occasional "horseplay" has occurred among staff and the younger Service Recipients at [REDACTED], but in his opinion the activity was never "meant to cause harm to anyone". *Justice Center Exhibits 4 and 7*. Additionally, Investigator [REDACTED] testified about the statement she obtained from staff member [REDACTED], on [REDACTED] and her interview of [REDACTED]. [REDACTED] statement provides that, following the incident, while she was with the Service Recipient, waiting for the police to arrive, the Service Recipient stated to [REDACTED] that

he and the Subject were only playing around and further told ██████ “you don’t know what this is going to do to me” and that he was worried about ██████ and her brother. When ██████ asked the Service Recipient what ██████ he was talking about, he replied that ██████ was the Subject’s girlfriend. *Justice Center Exhibit 11.* ██████ is also the sister of ██████ staff member ██████ ██████ *Justice Center Exhibit 4.* There were other statements taken of staff members who were at ██████ on the date of the incident, such as ██████ (*Justice Center Exhibit 8*), ██████ ██████ (*Justice Center Exhibit 9*) and ██████ (*Justice Center Exhibit 10*), who all in essence, indicated that they did not observe the Subject punch the Service Recipient.

Investigator ██████ testified that, in her opinion, the Service Recipient was “downplaying” the incident as he seemed anxious during the recorded statement she took and was rocking back and forth in his chair. Finally, Investigator ██████ testified that her investigative conclusion was that the allegation of physical abuse against the Subject should be substantiated.

The Service Recipient gave a recorded statement to Investigator ██████ on ██████ ██████. The Service Recipient indicated that this has nothing to do with him and that he was just fooling around with “her boyfriend”. He then followed up that the boyfriend is the Subject and ██████ is the Subject’s girlfriend and in essence, that ██████ is ██████ sister.

Specifically regarding the incident, the Service Recipient stated that they always fool around, initially by saying words to the effect of “you want to go” and then he and the Subject will horse around, adding that the Subject “messes with me because I mess with him”. The Service Recipient added that the Subject was not trying to hurt him. Finally, the Service Recipient stated that he was not hit by the Subject and words to the effect of they “don’t try to hurt each other on purpose”. *Justice Center Exhibit 18.*

The Subject was interrogated by Investigator [REDACTED] on [REDACTED]. In pertinent part, he stated that on [REDACTED] he was assigned to [REDACTED]. In the morning the residents were getting up to have breakfast and he was in the living room. The Service Recipient was also in the living room along with his one to one, which he thought was [REDACTED]. He indicated that the Service Recipient was saying things to the effect of “I can take you” and starting to wrestle with him, but there was no intention to hurt anyone. When asked if he punched the service Recipient in the chest, the Subject replied in effect that they “were definitely playing around that morning”, that he did not recall punching him in the chest and that he never intentionally punched the Service Recipient in the chest. Later in the interrogation he denied punching the Service Recipient in the chest and said that he never heard the Service Recipient say “ouch” or words to that effect. Justice Center Exhibit 18.

The Subject testified at the Hearing, in relevant part, as follows: He was working on [REDACTED] the 7a.m. to 3p.m. shift. The Subject was in the living room of [REDACTED] and the Service Recipient was in a playful mood that morning. Other staff members were in the vicinity including [REDACTED], [REDACTED] and [REDACTED] who was in the hallway. The Subject testified that [REDACTED] was at the end of the hallway, behind [REDACTED]. The Subject testified that [REDACTED] was twenty-five to thirty feet from him, and that the hallway, from end to end is seventy-five to one hundred feet long.

Specifically regarding the incident the Subject testified that the Service Recipient said to him words to the effect of “I bet I can take your girl” to which the Subject replied “if you can take her you can have her”. The Service Recipient then said “I bet I can take you to” and the Subject replied words to the effect of “I don’t think so”, at which point the Service Recipient started hopping around like a boxer, moving towards the Subject throwing jabs. The Subject put

his hands up to block the jabs and the Service Recipient was rushing him and wrestling with him. The Subject then testified that he pushed the Service Recipient back, but not with force. The Subject characterized this as “horseplay” and it continued until around 7:30 a.m when they were called into the dining room for breakfast. He denied punching the Service Recipient.

Following the incident the other staff members and residents then went into the dining room, with the exception of [REDACTED], which was unusual for [REDACTED]. The Subject observed [REDACTED] at the end of the hallway on his cell phone appearing as though something was bothering him. At around 8:15 a.m. the bus arrived to take them to the Day Program.

Finally, the Subject testified that he was familiar with the Service Recipient’s Behavior Support Plan and Plan of Protective Oversight. *Hearing Testimony of the Subject and Justice Center Exhibits 13 and 14.*

### **DISCUSSION**

The Justice Center has established by a preponderance of evidence that the Subject committed physical abuse, as defined in Social Services Law § 488(1)(a), against the Service Recipient and that the physical abuse is properly categorized as a Category 3 offense under Social Services Law § 493(4)(c).

The observation of staff member [REDACTED], who was present during the incident and was located approximately twenty-five to thirty feet away from the location of the incident, (*Hearing Testimony of the Subject*), that the Subject deliberately and with force punched the Service Recipient in his chest area, at which time the Service Recipient exclaimed “ouch fuck”, support the core allegations in the substantiated report, specifically that the Subject committed an act of physical abuse when he intentionally and forcefully punched a service recipient in the chest, causing the service recipient to express pain. *Justice Center Exhibit 1.* Moreover, it is

noteworthy that following the incident all other staff members and residents went into the dining room, with the exception of [REDACTED], which was unusual for [REDACTED] and that the Subject observed [REDACTED] at the end of the hallway on his cell phone appearing as though something was bothering him. *Hearing Testimony of the Subject.* This conduct on the part of [REDACTED] and that it was observable by the Subject is important for two reasons. First, it establishes, in conjunction with the Subject's own testimony, that the Subject could see [REDACTED] from twenty-five to thirty feet from him prior to the incident, that subsequent to the incident, the Subject could still see [REDACTED] and could discern that he was talking on his cell phone and appeared to be in some distress. *Hearing Testimony of the Subject.* This testimony of the Subject, demonstrates, by a preponderance of the evidence, that [REDACTED] was in a position to observe, exactly what he said he observed, namely that the Subject deliberately and with force punched the Service Recipient in his chest area, at which time the Service Recipient exclaimed "ouch fuck". Secondly, it is important as the conduct of [REDACTED], observed by and testified to by the Subject, that following the incident while all other staff members and residents went into the dining room, with the exception of [REDACTED], which was unusual for [REDACTED] and that [REDACTED] was at the end of the hallway on his cell phone appearing as though something was bothering him, is consistent with what [REDACTED] claims to have observed and is conduct made under conditions which support the reliability of [REDACTED] observations.

Additionally, statements attributed to the Service Recipient by [REDACTED] and [REDACTED] support the reliable account provided by eyewitness [REDACTED] that the Subject deliberately and with force punched the Service Recipient in his chest area, at which time the Service Recipient exclaimed "ouch fuck". [REDACTED] observation that at the time of the punch the Service Recipient exclaimed "ouch fuck" (*Justice Center Exhibit 6*) and [REDACTED] statement that following the incident while waiting for the police, the Service Recipient told [REDACTED] "you don't know what this is going to

do to me” and that he was worried about [REDACTED] and her brother. When [REDACTED] asked the Service Recipient what [REDACTED] he was talking about, he replied that [REDACTED] was the Subject's girlfriend.

Justice Center Exhibit 11.

These statements of the Service Recipient, coupled with conditions under which they were made lead to the conclusion that they are reliable. In addition, these statements, taken together with the consistent eyewitness account of [REDACTED], support the core allegations in the report, specifically, that the Subject committed an act of physical abuse when he intentionally and forcefully punched a service recipient in the chest, causing the service recipient to express pain. Justice Center Exhibit 1.

Likewise, the statements attributable to the Service Recipient by [REDACTED], when coupled with the fact that [REDACTED], the girlfriend of the Subject is also the sister of another staff member of [REDACTED], [REDACTED] (Justice Center Exhibit 4), only serve to undermine the Service Recipient's version of events and support Investigator [REDACTED] testimony that the Service recipient was “downplaying” the incident and seemed anxious during recorded statement she took and was rocking back and forth in his chair.

In short, the unreliable account of the event offered by the Service Recipient, in conjunction with the reliable statements attributed to the Service Recipient and the conditions under which they were made, provide further support for the observations of [REDACTED] that the Subject deliberately and with force punched the Service Recipient in his chest area, at which time the Service Recipient exclaimed “ouch fuck”. In addition, the Hearing record is devoid of any basis which would motivate [REDACTED] to provide a less than forthright account of what he observed.

Accordingly, the eye witness account of [REDACTED], the proximity of [REDACTED] to the incident and the clear line of sight of [REDACTED], as testified to by the Subject, coupled with the reliable statements of the Service Recipient and the reliable conduct of [REDACTED] subsequent to the incident, all provide a preponderance of the evidence to establish the core allegations in the substantiated report, that the Subject intentionally and forcefully punched a service recipient in the chest, causing the service recipient to express pain. Justice Center Exhibit 1.

The evidence set forth above and the conditions under which they arose, in conjunction with the other proof admitted into evidence at the Hearing, clearly establish by a preponderance of the evidence, the Subject's alleged conduct in the substantiated report. Justice Center Exhibit 1.

While the Subject denied the core allegations in the substantiated report, he did testify that the Service Recipient said to him words to the effect of "I bet I can take your girl" to which the Subject replied "if you can take her you can have her". The Service Recipient then said "I bet I can take you to" and the Subject replied words to the effect of "I don't think so", at which point the Service Recipient started hopping around like a boxer, moving towards the Subject throwing jabs. The Subject put his hands up to block the jabs and the Service Recipient was rushing him and wrestling with him. The Subject then testified that he pushed the Service Recipient back, but not with force. The Subject characterized this as "horseplay" and it continued until around 7:30 a.m when they were called into the dining room for breakfast. He also testified that that [REDACTED] was twenty-five to thirty feet from him. Hearing Testimony of the Subject.

Likewise ██████ who was the Service Recipient's one to one staff at the time of the incident stated that he observed the Subject and the Service Recipient "screwing around" on the morning of the incident, but that at no time did he see what he "considered to be abuse".

Even the Subject admits to physical contact, wrestling with the Service Recipient and pushing the Service Recipient. His bare, conclusory denial that he intentionally and forcefully punched the Service Recipient in the chest, causing the service recipient to express pain, is simply not enough to overcome the reliable, consistent eye witness account of ██████, the proximity of ██████ to the incident and the clear line of sight of ██████, as testified to by the Subject, together with the reliable statements of the Service Recipient and the reliable conduct of ██████ subsequent to the incident which along with the totality of evidence provide a preponderance of the evidence to establish the core allegations in the substantiated report, that the Subject intentionally and forcefully punched a service recipient in the chest, causing the service recipient to express pain. Justice Center Exhibit 1.

Finally, physical abuse, in relevant part, is defined by Social Services Law § 488(1)(a) as "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".

Although there is nothing in the record to support that an actual injury or impairment was sustained by the Service Recipient as a result of the incident, actual injury or impairment is not a

necessary element of physical abuse under Social Services Law § 488(1)(a). While physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient can certainly establish an element of physical abuse, “causing the likelihood of such injury or impairment”, is also an element of physical abuse, which when accompanied by the requisite conduct, establishes physical abuse under Social Services Law § 488 (1)(a).

Here, it is clear from the record that the Subject caused, by physical contact the likelihood of physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. Clearly, the Subject intentionally and forcefully punching the Service Recipient in the chest, causing the service recipient to express pain, in and of itself is sufficient to establish the likelihood of this conduct causing physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

The likelihood of this conduct causing physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient is even more pronounced given the Service Recipient’s history of physically aggressive behavior and this behavior, at times resulting in significant injury to himself and others, among the other behaviors contained in Justice Center Exhibits 13 and 14.

Not only has the Justice Center established by a preponderance of evidence that the Subject committed physical abuse, as defined in Social Services Law § 488(1)(a), against the Service Recipient, but it has also established that the physical abuse is properly categorized as a Category 3 offense under Social Services law § 493(4)(c).

The Administrative Law Judge in the Recommended Decision, recommended that this case be unsubstantiated, essentially based on two grounds: 1) The Justice Center did not established by a preponderance of evidence that the Subject abused the Service Recipient

because all staff on duty during the relevant time frame denied witnessing the Subject punch the Service Recipient, with the exception of [REDACTED] and that the [REDACTED] and Service Recipient statements could not be credited evidence and 2) that the recorded statements were hearsay.

As to the portion of the recommendation, based on ground one, the Administrative Law Judge discounted all recorded statements of the Justice Center, other than the [REDACTED] and Service Recipient statements, based on the premise that their location to the incident was never established.

As to the statements of [REDACTED], the Administrative Law Judge discredited the statements on the basis that the evidence in the record put him as much as seventy-five feet from the incident.

As set forth above this is simply not an accurate statement of the record. The Subject himself places [REDACTED] twenty-five to thirty feet from the incident and the Subject could see [REDACTED], with some specificity both before and after the incident. For this and all the other reasons set forth above the statements of [REDACTED] are determined to be reliable, relevant and probative.

As to the statement of the Service Recipient, the Administrative Law Judge found it was credited evidence, because the only reason offered by the Justice Center to discredit the statement was Investigator [REDACTED] testimony that the Service Recipient was nervous during the taking of the statement and because of getting staff in trouble. However as set forth above, the statement of the Service Recipient as to the core allegations in the substantiated report are unreliable, based in part on the statements attributed to the Service Recipient made to [REDACTED] and [REDACTED] and the conditions under which they were made. These statements also support Investigator [REDACTED] conclusion that the Service Recipient was downplaying the incident.

Finally, as to ground two based on hearsay, hearsay is admissible in administrative proceedings and hearsay evidence can form the basis of an administrative determination. *Gray v. Adduci*, 73 N.Y.2d 741 (1988). Here, for the reasons set forth above, the evidence offered by the Justice Center and admitted into evidence, including, but not limited to the recorded statements of eyewitness [REDACTED], [REDACTED], portions of the Hearing testimony of the Subject and the statements attributable to the Service Recipient were sufficiently relevant and probative to establish, by a preponderance of the evidence, that the Subject committed physical abuse and that such physical abuse is properly set at Category 3.

Accordingly, based on the foregoing it is hereby:

**ORDERED:** The request of [REDACTED] that the substantiated report dated [REDACTED] [REDACTED], [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed physical abuse.

The substantiated report is properly categorized as Category 3 physical abuse.

NOW THEREFORE IT IS DETERMINED that the record of this report shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(c).

This decision is ordered by Davin Robinson, Chief of Staff, who has been designated by the Executive Director to make such decisions.

**DATED:** September 1, 2015  
Delmar, New York

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Davin Robinson  
Chief of Staff

**STATE OF NEW YORK  
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE  
WITH SPECIAL NEEDS**

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In the Matter of the Appeal of

██████████

Pursuant to § 494 of the Social Services Law

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**RECOMMENDED  
DECISION  
AFTER  
HEARING**

████████████████████

Before: Gerard D. Serlin  
Administrative Law Judge

Held at: NYS Justice Center for the Protection of People  
with Special Needs  
401 State Street  
Schenectady, New York 12305  
On: ██████████

Parties: Justice Center for the Protection of People with  
Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
By: Tracy Steeves, Esq

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By: Eric E. Wilke, Esq.  
CSEA Legal  
143 Washington Avenue  
Albany, NY 12210

## JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating ██████████, (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: ██████████ of abuse by the Subject of ██████████
2. The initial report alleges, in pertinent part, that on or about ██████████, at ██████████, located at ██████████, that the Subject punched service recipient ██████████ in the chest. ██████████ then walked away from the Subject and remained separate from the Subject. (Justice Center Exhibit 4).
3. This offense has been substantiated as a Category 3 offense.
4. The initial report was investigated by the Justice Center for the Protection of People with Special Needs. (Justice Center)
5. On or about ██████████ the Justice Center substantiated the report against the Subject for abuse. The Justice Center concluded that:
 

[O]n ██████████, at the ██████████, located at ██████████ ██████████, ... [the Subject] committed an act of physical abuse when... [he] intentionally and forcefully punched a service recipient on the chest, causing the service recipient to express pain. (Justice Center Exhibit's 1 & 5)5.
6. An Administrative Review was conducted and as a result the substantiated report

was retained.

7. At the time of the alleged abuse, the Subject was employed by OPWDD in a residence known as ██████ located in ██████. The Subject was employed as a *Direct Supervision* staff person and was employed by an *Agency* or *Provider* that is subject to the jurisdiction of the Justice Center.

8. The alleged abused service recipient ██████ resided at ██████: facility (behavior-house). This particular ██████ is utilized for persons who have more challenging behaviors. At the time of the report, eight to ten residents resided within ██████. ██████ is a person with pervasive, impulse control, seizure disorder, defiant disorder, and developmentally disabled on other diagnoses. ██████ was historically physically aggressive both outwardly and inwardly. Sometimes, this behavior resulted in injury to himself and sometimes this behavior resulted in injury to others. ██████ was also non-compliant with medicine, doctors, eating, hygiene and used swear words frequently. (Justice Center Exhibit 13; testimony of ██████ ██████ OPWDD investigator, ██████)

9. The ██████ where ██████ resided had a number of young adult male residents. “Horseplay” between staff and residents was not uncommon. (Testimony of ██████ OPWDD investigator, ██████)

10. At approximately 7:15 a.m. on ██████ ██████ was in a common area adjacent to the kitchen. ██████, the other residents and staff were preparing for breakfast. ██████ was scheduled to attend program at the ██████. ██████ was assigned one-to-one supervision with staff member, ██████. (Justice Center Exhibit 14) ██████ stood about one foot from ██████ and the Subject. ██████ said jokingly to the subject that: “I bet I can take your girl...” The Subject replied if you can “take her, you can have her.” ██████ then

said “I bet that I can take you too” and the Subject said “I don’t think so.” [REDACTED] and the Subject then hopped around, like boxers in a ring. (Justice Center Exhibit 18: recorded interview with the subject; testimony of the Subject, [REDACTED]) In the past, the Subject and [REDACTED] engaged in horseplay at [REDACTED]. (Justice Center Exhibits 4&7, statements of [REDACTED] employees [REDACTED] and [REDACTED], respectively)

11. [REDACTED], a staff member at [REDACTED] was present during this incident and was located approximately 75 feet away from [REDACTED] and the Subject at the end of a hallway. [REDACTED] believed that he witnessed the Subject punch [REDACTED] forcefully in the torso. (Justice Center Exhibit 6) A few minutes after the horseplay ended, the residents and staff went into the dining room to eat breakfast. The only staff member who did not join the residents in the dining room was [REDACTED]. (Testimony of Subject, May 21, 2014)

12. [REDACTED] was examined by an LPN at his *Day-Hab* program. The examination revealed no marks or bruises on [REDACTED] torso.<sup>1</sup> (Justice Center Exhibit 12) Later that day, while awaiting police arrival, [REDACTED] was supervised one-on-one by staff [REDACTED]. [REDACTED] reported that [REDACTED] said to her that “...him and [REDACTED] were playing around. ..[REDACTED] stated that ‘you don’t know what this is going to do to me.’ He mentioned he worried about [REDACTED] and her brother<sup>2</sup> and what they were going to do...” (Justice Center Exhibit 11) The police arrived, interviewed [REDACTED] and made no arrest.<sup>3</sup>

### 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.

<sup>1</sup> The investigator testified that she did not interview the LPN who conducted the exam and that she was unaware as to whether [REDACTED] shirt had been removed for the exam, or merely pulled upward.

<sup>2</sup> [REDACTED] is the girlfriend of the Subject and is also the sister of [REDACTED] staff [REDACTED].

<sup>3</sup> A copy of the police report and or any notes generated by the police officer who interviewed [REDACTED] were apparently not obtained by the investigator. (See Justice Center Exhibit 4, page 5, paragraph 15)

- Whether the substantiated allegations constitute abuse or neglect.
- Pursuant to Social Services Law § 493(4), the category level of abuse 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/or 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))

Pursuant to SSL §§ 494(1)(a)(b) and (2), and Title 14 NYCRR § 700.6(b), this hearing decision will determine: 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, and if there is a finding of a preponderance of the evidence; whether the substantiated allegations constitute abuse or neglect; and pursuant to Social Services Law § 493(4), the category level of abuse or neglect that such act or acts constitute.

The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488:

- 1 "Reportable incident" shall mean the following conduct that a mandated reporter is required to report to the vulnerable persons' central register:
  - (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.

- (b) "Sexual abuse," which shall mean any conduct by a custodian that subjects a person receiving services to any offense defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law; or any conduct or communication by such custodian that allows, permits, uses or encourages a service recipient to engage in any act described in articles two hundred thirty or two hundred sixty-three of the penal law. For purposes of this paragraph only, a person with a developmental disability who is or was receiving services and is also an employee or volunteer of a service provider shall not be considered a custodian if he or she has sexual contact with another service recipient who is a consenting adult who has consented to such contact.
- (c) "Psychological abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by verbal or non-verbal conduct, a substantial diminution of a service recipient's emotional, social or behavioral development or condition, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor, or causing the likelihood of such diminution. Such conduct may include but shall not be limited to intimidation, threats, the display of a weapon or other object that could reasonably be perceived by a service recipient as a means for infliction of pain or injury, in a manner that constitutes a threat of physical pain or injury, taunts, derogatory comments or ridicule.
- (d) "Deliberate inappropriate use of restraints," which shall mean the use of a restraint when the technique that is used, the amount of force that is used or the situation in which the restraint is used is deliberately inconsistent with a service recipient's individual treatment plan or behavioral intervention plan, generally accepted treatment practices and/or applicable federal or state laws, regulations or policies, except when the restraint is used as a reasonable emergency intervention to prevent imminent risk of harm to a person receiving services or to any other person. For purposes of this subdivision, a "restraint" shall include the use of any manual, pharmacological or mechanical measure or device to immobilize or limit the ability of a person receiving services to freely move his or her arms, legs or body.
- (e) "Use of aversive conditioning," which shall mean the application of a physical stimulus that is intended to induce pain or discomfort in order to modify or change the behavior of a person receiving services in the absence of a person-specific authorization by the operating, licensing or certifying state agency pursuant to governing state agency regulations.

Aversive conditioning may include but is not limited to, the use of physical stimuli such as noxious odors, noxious tastes, blindfolds, the withholding of meals and the provision of substitute foods in an unpalatable form and movement limitations used as punishment, including but not limited to helmets and mechanical restraint devices.

- (f) "Obstruction of reports of reportable incidents," which shall mean conduct by a custodian that impedes the discovery, reporting or investigation of the treatment of a service recipient by falsifying records related to the safety, treatment or supervision of a service recipient, actively persuading a mandated reporter from making a report of a reportable incident to the statewide vulnerable persons' central register with the intent to suppress the reporting of the investigation of such incident, intentionally making a false statement or intentionally withholding material information during an investigation into such a report; intentional failure of a supervisor or manager to act upon such a report in accordance with governing state agency regulations, policies or procedures; or, for a mandated reporter who is a custodian as defined in subdivision two of this section, failing to report a reportable incident upon discovery.
- (g) "Unlawful use or administration of a controlled substance," which shall mean any administration by a custodian to a service recipient of: a controlled substance as defined by article thirty-three of the public health law, without a prescription; or other medication not approved for any use by the federal food and drug administration. It also shall include a custodian unlawfully using or distributing a controlled substance as defined by article thirty-three of the public health law, at the workplace or while on duty.
- (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.

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

Substantiated reports of abuse or neglect shall be categorized into categories pursuant to SSL § 493:

4. Substantiated reports of abuse or neglect shall be categorized into one or more of the following four categories, as applicable:

(a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:

(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;

(ii) a knowing, reckless or criminally negligent failure to perform a duty that: results in physical injury that creates a substantial risk of death; causes death or serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor; or is likely to result in either;

(iii) threats, taunts or ridicule that is likely to result in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;

(iv) engaging in or encouraging others to engage in cruel or degrading treatment, which may include a pattern of cruel and degrading physical contact, of a service recipient, that results in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;

(v) engaging in or encouraging others to engage in any conduct in violation of article one hundred thirty of the penal law with a service recipient;

(vi) any conduct that is inconsistent with a service recipient's individual treatment plan or applicable federal or state laws, regulations or policies, that encourages, facilitates or permits another to engage in any conduct in violation of article one hundred thirty of the penal law, with a service recipient;

(vii) any conduct encouraging or permitting another to promote a sexual performance, as defined in subdivision one of section 263.00 of the penal law, by a service recipient, or permitting or using a service recipient in any prostitution-related offense;

(viii) using or distributing a schedule I controlled substance, as defined by article thirty-three of the public health law, at the work place or while on duty;

(ix) unlawfully administering a controlled substance, as defined by article thirty-three of the public health law to a service recipient;

(x) intentionally falsifying records related to the safety, treatment or supervision of a service recipient, including but not limited to medical records, fire safety inspections and drills and supervision checks when the false statement contained therein is made with the intent to mislead a person investigating a reportable incident and it is reasonably foreseeable that such false statement may endanger the health, safety or welfare of a service recipient;

(xi) knowingly and willfully failing to report, as required by paragraph (a) of subdivision one of section four hundred ninety-one of this article, any of the conduct in subparagraphs (i) through (ix) of this paragraph upon discovery;

(xii) for supervisors, failing to act upon a report of conduct in subparagraphs (i) through (x) of this paragraph as directed by regulation, procedure or policy;

(xiii) intentionally making a materially false statement during an investigation into a report of conduct described in subparagraphs (i) through (x) of this paragraph with the intent to obstruct such investigation; and

(xiv) intimidating a mandated reporter with the intention of preventing him or her from reporting conduct described in subparagraphs (i) through (x) of this paragraph or retaliating against any custodian making such a report in good faith.

- (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.
- (d) Category four shall be conditions at a facility or provider agency that expose service recipients to harm or risk of harm where staff culpability is mitigated by systemic problems such as inadequate management, staffing, training or supervision. Category four also shall include instances in which it has been substantiated that a service recipient has been abused or neglected, but the perpetrator of such abuse or neglect cannot be identified.

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 level of abuse set forth in the substantiated report.

If the Justice Center did not prove the abuse by a preponderance of evidence, the substantiated report must be amended and sealed.

## DISCUSSION

The Justice Center has not established by a preponderance of evidence that the Subject committed the abuse alleged in the substantiated report.

In support of its indicated findings, the Justice Center presented a number of documents obtained during the course of investigation. (See Justice Center Exhibits 1-18) The investigation underlying the Substantiated report was conducted by an investigator employed by OPWDD. Both the investigator and the Subject testified at the hearing.

██████ was interviewed by police at the time of incident, and no arrest was made. ██████ was also interviewed by the OPWDD investigator and ██████ stated that he and the Subject were “fooling around” but that the Subject did not strike or hurt him. (Justice Center Exhibit 18: recorded interview with ██████ )

With the exception of ██████ all staff on duty at ██████ during the relevant time denied that they had witnessed the Subject punch ██████. (Justice Center Exhibit 6) However, the written hearsay statements of all of the employees are ambiguous. The investigator failed to clarify the relative position of all of the co-staff witnesses to the Subject and to ██████, during the incident. It is not clear from the written statements that the witnesses were paying any attention to ██████ and the Subject, at the relevant time. While the hearsay statements of the co-employees do not corroborate the punching allegation, the statements do not discredit the allegation either. For all intents and purposes, the hearsay statements of the employees are of little evidentiary value in resolving this factual dispute. (See Justice Center Exhibits 8-10)

At the hearing the Subject testified that the only employee who was in the vicinity of this event, was ██████. The Subject testified that ██████ was assigned to one-on-one supervision with ██████. The Subject argued that ██████ statement that “... he did not witness

██████ being punched by a staff...,” should be credited evidence. However ██████ statement is no less ambiguous than any other employee’s statement taken during the course of this investigation.

Upon a review of the recorded interview with ██████, it is clear that ██████ is a high functioning individual. ██████ presented as articulate during the interview. ██████ spoke about his mother’s employer. ██████ also spoke about a friend’s dog and differentiated that the dog was a “mix” and not a pure bred dog. When asked about his age, ██████ responded that he was about the same age as his nurse, ██████. ██████ also recited his birth date. ██████ articulated some information about his IPOD and ITUNES. On an unrelated matter ██████ stated that he was “on edge” with his brother now. ██████ also said that he and ██████ were “fooling around” and had done so frequently in the past. ██████ used the word “natural” to describe this horseplay. ██████ said “we don’t hit each other and don’t try to hurt each other ... it’s a fun kind of thing.” ██████ was unequivocal that this was play, that ██████ did not want to hurt him and that there was no physical contact. (Justice Center Exhibit # 18, recorded interview with ██████)

In his hearing testimony the Subject denied striking ██████ and testified that he and ██████ engaged in some shadow-boxing type play. The Justice Center argued that the Subject had, at some point, influenced ██████ to minimize what occurred. However, there was no evidence of same in the record and the Subject credibly denied influencing or having any contact with ██████ after this incident. There was likewise no evidence that ██████ employee ██████ had influenced ██████ to lie for the Subject.

Irrespective, the Justice Center argued that ██████ recorded hearsays statements should not be credited evidence. Testimony was solicited by the Justice Center from the investigator regarding ██████ demeanor during the interview. The investigator testified that ██████

appeared “nervous” and engaged in a “rocking motion” while being interviewed. From this observation and from unidentified emails, the source and substance of which were never revealed at the hearing, the investigator concluded and testified that ██████ was “nervous” during the interview about “getting staff in trouble.” Based thereupon, the Justice Center argued that ██████ recorded statement should not be credited evidence. However, it is simply not possible based upon the evidence in the record to reach such a conclusion.

Hearsay is admissible in administrative proceedings and an administrative determination may be based solely upon hearsay evidence under appropriate circumstances Gray v. Adduci, 73 N.Y.2d 741 (1988), 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y.2d 176 (1978), Eagle v. Patterson, 57 N.Y.2d 831 (1982), People ex rel Vega v. Smith, 66 N.Y.2d 130 (1985). A crucial concern with respect to hearsay evidence is the inability to cross-examine the person who originally made the statement in order to evaluate his or her credibility. Such evidence, then, must be carefully scrutinized and weight attributed to it would depend upon its degree of apparent reliability. Factors to be considered in evaluating the reliability of hearsay include the circumstances under which the statements were initially made, information bearing upon the credibility of the person who made the statement and his or her motive to fabricate, and the consistency and degree of inherent believability of the statements.

In this case the hearsay statement of ██████ is not credited evidence. The only evidence in the record regarding ██████ relative position to the incident and the actions which he ultimately came to believe that he observed was that ██████ was as much as seventy-five feet from the Subject and ██████.<sup>4</sup> There was no evidence in the record which could directly or even indirectly refute this testimony. The investigator testified that she did not ask ██████ where he was in the ██████, relative to the Subject and to ██████ when ██████ witnessed this event. The

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<sup>4</sup> Hearing Testimony of Subject, ██████.

investigator testified that she did not visit the [REDACTED] in the course of her investigation of this incident.

[REDACTED] did not corroborate that anything other than horseplay occurred on the date in question. The recorded hearsay statement of [REDACTED] is credited evidence. The Subject testified credibly at the hearing that he did not strike [REDACTED]. It is well established that hearsay evidence cannot prevail against a witness's sworn and not inherently incredible testimony. *Matter of Perry* 37 AD2d 367 (3<sup>rd</sup> Dept. 1971). E.g., *In the Matter of the Claim of Lucy Lopez v. the Commissioner of Labor*. Slip Opinion 514794 (3<sup>rd</sup> Dept. January 17, 2013).

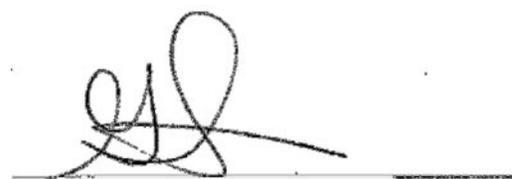
Accordingly, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the abuse alleged. The substantiated report will be amended or sealed. In as much as the substantiated report will be amended and sealed there is no need to assess whether the category level is properly constituted.

**DECISION:**

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

This decision is recommended by Gerard D. Serlin, Administrative  
Hearings Bureau.

**DATED:** July 31, 2014  
Schenectady, New York



Gerard D. Serlin, ALJ