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
Justice Center for the Protection of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived

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

[redacted]
By: Emmanuel Depas, Esq.
1105 Nostrand Avenue
Brooklyn, New York 11225

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 report "substantiated" on dated and received on be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed physical abuse.

Offense 1 of the substantiated report is properly categorized as a Category 3 act.

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

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: September 22, 2015
Schenectady, New York

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: Sharon Golish Blum
Administrative Law Judge

Held at: Adam Clayton Powell Jr. State Office Building
163 West 125th Street
New York, New York 10027
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 (the Subject) for abuse and/or 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 report "substantiated" on , dated and received on of abuse and/or neglect by the Subject of a Service Recipient.

2. The Justice Center substantiated the report against the Subject. The Justice Center concluded that:

Offense 1

> It was alleged that on , at , located at , while acting as a custodian (YDC), you committed physical abuse by hitting a service recipient in the mouth.
>
> The allegation has been SUBSTANTIATED as Category 3 physical abuse pursuant to Social Services Law § 493.

3. An Administrative Review was conducted and, as a result, the substantiated report was retained.

4. The facility, , located at , is a group home for juvenile males and is licensed by the New York State Office of Children and Family Services (OCFS), which is a facility or provider

[redacted]

agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged physical abuse, the Subject had been employed at the facility as a Youth Development Counselor (YDC) since January 25, 2012. (Hearing testimony of [redacted], Subject)

6. At the time of the alleged physical abuse, the Service Recipient was a fourteen year old resident of the facility. (Justice Center Exhibit 4)

7. On the morning of [redacted], the Subject and two other staff members were assigned to provide general supervision to the facility residents, including the Service Recipient, with the focus on getting the residents out of bed, prepared for school and onto the school van. (Hearing testimony of [redacted], Subject)

8. Because the school van waits for the residents to board some distance away from the facility exit, the residents are escorted to the van individually. The protocol is that the resident walks with his hands behind his back and the escort holds on to the resident's arm as the resident is passed from the escorting staff member to the staff member at the van. (Hearing testimony of [redacted], Subject)

9. On [redacted], the Subject was responsible for escorting the residents from the facility exit to the school van. When the Subject asked the Service Recipient to put his hands behind his back, the Service Recipient did not comply. The Subject attempted to maintain a hold on the Service Recipient's arm and the Service Recipient responded aggressively, grabbing the front of the Subject's shirt. (Hearing testimony of [redacted], Subject)

10. Tension between the Subject and the Service Recipient escalated extremely rapidly and the Subject struck the Service Recipient in the mouth. Immediately after, YDC [redacted], who had not seen the blow, intervened between the Subject and the Service

Recipient and escorted the Service Recipient directly onto the van. (Justice Center Exhibit 4)

11. The Subject said nothing about having hit the Service Recipient and he walked over to the van. The Service Recipient then threw a sneaker insole out of the van window at the Subject, striking him in the chest. In response, YDC blocked the Subject from boarding the van, and YDC employed a de-escalation technique, "tapping out," on the Subject. YDC then escorted the Subject back into the facility. (Justice Center Exhibit 4)

12. As a result of the incident, the Service Recipient sustained a small abrasion on the inside of his mouth, which had initially bled. (Justice Center Exhibits 4 and 9)

ISSUES

- Whether the Subject has been shown by a preponderance of the evidence to have committed the act or acts giving rise to the substantiated report.
- Whether the substantiated allegations constitute abuse and/or neglect.
- Pursuant to Social Services Law § 493(4), the category of abuse and/or neglect that such act or acts constitute.

APPLICABLE LAW

The Justice Center is responsible for investigating allegations of abuse and/or neglect in a facility or provider agency. SSL § 492(3)(c) and 493(1) and (3). Pursuant to SSL § 493(3), the Justice Center determined that the initial report of abuse and/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))

The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1)(a), to include:

> "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 abuse or neglect, which means:

> Category three is abuse or neglect by custodians that is not otherwise described in categories one and two.[1] 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 and/or neglect alleged in the substantiated report that is the subject of the proceeding and that such act or 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 Title 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 the evidence, the substantiated report must be amended and sealed.

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[1] Categories 1 and 2 abuse are defined in SSL § 493(4)(a) and (b).

DISCUSSION

The Justice Center has established by a preponderance of the evidence that the Subject committed a prohibited act described as Offense 1 in the substantiated report. Specifically, the evidence establishes that the Subject committed an act of physical abuse under SSL § 488(1)(a) by "intentionally or recklessly causing, by physical contact, physical injury ... of a service recipient." SSL § 488(6) defines "physical injury" as any confirmed harm, hurt or damage resulting in a significant worsening of an individual's physical condition.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-14) The investigation underlying the substantiated report was conducted by , who, together with , testified at the hearing on behalf of the Justice Center.

The Subject testified at the hearing on his own behalf and provided four documents that were entered into evidence. (Subject Exhibits 1-4)

The evidence that the Subject struck the Service Recipient came primarily from the Service Recipient and was corroborated by two other facility residents. (Justice Center Exhibits 10, 11 and 12)

The first documented report by the Service Recipient of the allegation was made after he returned from school on . The Service Recipient approached in her office and told her that after he became aggressive towards the Subject during the morning escort, the Subject punched him in the mouth. (Hearing testimony of)

On , the Service Recipient was interviewed by

, whose investigative notes state that:

> When it got time for him to go to the door suspect grabbed his arm extra tight, he pulled back his arm in a reflex action and suspect grabbed him by his shirt collar...
>
> They were both facing each other holding each other's shirt and suspect then punched him in the mouth with his left fist. It all happened very quickly and before he could retaliate, came and escorted him to the van in the parking area outside. While he was in the van he could hear suspect making threats against him saying he was going to beat him up. He waited until suspect came over to the van after all service recipients were loaded in the van and he threw a sneaker insole that was on the floor of the van at suspect.
>
> Suspect tried to grab him out the van (sic) but was stopped by other staff that was outside the van. (Justice Center Exhibit 4)

The Service Recipient had provided a handwritten statement, incorrectly dated , that was entirely consistent with the statement he subsequently made to . (Justice Center Exhibit 10)

Two other residents were present at the relevant time; both provided written statements dated that indicate that they each observed the Subject punching the Service Recipient in the mouth. (Justice Center Exhibits 11 and 12)

On , one of the residents who had provided a written statement was interviewed by , whose investigative notes indicate that the resident told him that he had witnessed the incident. Referring to his interview with that resident, investigative notes state that:

> Both suspect and victim had each other by the shirt as victim struggled and suspect hit victim in the face once.... Before victim could hit suspect back one of the staff took victim up the stairs and out the doorway to the van...
>
> When all the service recipients were loaded in the van suspect and came over to the van and victim threw a shoe insole out the van that hit suspect in the chest. Suspect tried to fight with victim but staff outside the van kept yelling at suspect to stop. And they moved suspect from the van. He stated that while in the van he spoke to victim about the incident and victim showed him his lip which was bleeding. (Justice Center Exhibit 4)

The Subject has consistently denied that he punched the Service Recipient. The Subject admitted that there had been a struggle when he had attempted to escort the Service Recipient to the van, but stated that he executed an authorized emergency restraint on the Service Recipient and that YDC intervened immediately thereafter. (Hearing testimony of , Subject)

His explanation for the allegation having been made against him was that it was fabricated by the Service Recipient and supported by his conspiring friends, who are all resentful of the authority of the YDCs. He testified that the facility's residents have an "us versus them" attitude with respect to the YDCs, although he did not provide any specific reason why he would have been singled out. (Hearing testimony of , Subject)

The Subject's request for amendment dated repeatedly denies that he had hit the Service Recipient. (Justice Center Exhibit 2)

The Incident Report completed by the Subject on , after the allegation was made, states that when the Service Recipient became aggressive, the Subject placed him "in an extended arm" hold, which the Subject later testified is an authorized emergency restraint. (Justice Center Exhibit 5 and Hearing testimony of , Subject)

The Subject also wrote in the Incident Report that after the Service Recipient had thrown "something" at him, " stepped in front of the van door and walked me back to the facility." (Justice Center Exhibit 5)

The Subject's handwritten statement dated was a verbatim repetition of his Incident Report. (Justice Center Exhibit 14)

Referring to his interview with the Subject, investigative notes state that:

> He placed his hand on victims shoulder to guide him out the door and youth pulled back and got aggressive. He grabbed youth by his collar to get control of his movement and youth grabbed him by his shirt.
>
> At this time, approached them and said he got the youth and escorted [the Service Recipient] out the door to the van... He and went over to the van to say bye and wish the group a productive day. Victim threw a shoe sole at him that hit him in the chest. He stated he did not get angry or try to fight victim he asked youth why did he do that. Another staff came over to him and taped (sp) him out and he returned to the facility. (Justice Center Exhibit 4)

The Subject testified at the hearing that the Service Recipient did not want to put his hands behind his back and the Service Recipient became aggressive. When the Subject kept his hand on the Service Recipient's arm, the Service Recipient grabbed the Subject's hoodie. The Subject testified further that he performed an "extended arm" restraint by placing his right hand on the Service Recipient's left shoulder and his left hand on the Service Recipient's left bicep. The Subject testified that at that point, YDC came over, said "I got it" and escorted the Service Recipient to the van. The Subject testified that when the Service Recipient threw the insole at him, the Subject did not try to enter the van or say anything to the Service Recipient. (Hearing testimony of , Subject)

Upon cross examination, the Subject testified that he did not initially report the incident of his use of a restraint on the Service Recipient or the incident of the Service Recipient having thrown the insole at him from the van because he did not think that they were significant, even though facility policy requires that all such incidents be reported. (Hearing testimony of , Subject)

There is a written statement from YDC that describes the Service Recipient's aggression during the Subject's attempt to escort the Service Recipient to the van and his own intervention of taking the Service Recipient from the Subject to the van. He does not

mention the brief restraint or the alleged punch. (Subject Exhibit 4)

On , YDC was interviewed by , whose investigative notes indicate that YDC heard the Service Recipient refuse to put his hands behind his back and that "a slight verbal altercation" ensued. investigative notes state further that YDC "immediately intervened" and escorted the Service Recipient to the van. The investigative notes state that:

> He stated that victim cooperated with escort to the van and did not complain of any physical altercation. He did not see any physical altercation between suspect and victim, however he cannot say if any physical altercation occurred. (Justice Center Exhibit 4
>
> After the Service Recipient threw the insole at the Subject:
>
> He immediately secured the van to keep suspect from getting to victim and to keep victim from exiting the van in an effort to deescalate the situation. Other staff who were outside the van intervened and walked suspect back to the facility. He stated that suspect did not appear to be angry about the situation but to be on the safe side they separated suspect from victim immediately. (Justice Center Exhibit 4)

There is a short written statement from YDC that states only that the Subject was "upset" because the Service Recipient threw something at him and that YDC walked the Subject back to the facility. (Subject Exhibit 2)

On November 4, 2013, YDC was interviewed by , whose investigative notes indicate that YDC observed a "small disturbance" and YDC intervention by the doorway. Referring to his interview with YDC , investigative notes further state that:

> he overheard suspect yell out 'why he do that'. He went over to the side of the van and suspect was complaining that victim threw a shoe sole at him from inside

> the van. He said staff is trained to deescalate any situation immediately so he used the tap out method and relieved suspect so he could return to facility... there was no discussion during transport in the van about what had occurred... Once the group got to the school victim reported incident to school officials. (Justice Center Exhibit 4)

Aside from arguing that the allegation was fabricated by the Service Recipient and the other residents, the Subject's counsel also argued that investigation was so poorly conducted, that it should not be relied upon.

The Subject's denials and his counsel's submissions were not persuasive. While there were three residents' statements, two of which were corroborated through an investigative interview, that indicate that the Subject did punch the Service Recipient in the mouth, none of the third party YDC witnesses were able to state that no punch was thrown by the Subject. In fact, the interviews and statements of YDC and YDC actually helped in proving the Justice Center's case.

YDC statements establish that the Subject's conduct during his attempt to escort the Service Recipient required an "immediate intervention." He specifically told that he had not seen any physical altercation between the Subject and the Service Recipient. However, he did not say that no physical altercation had occurred.

YDC observed a "small disturbance" and that YDC intervened between the Subject and the Service Recipient, completing the escort of the Service Recipient to the school van. The need for an intervention reveals that something significant had happened between the Subject and the Service Recipient; something that was not adequately explained by the Subject's account.

The fact that the Service Recipient threw the insole at the Subject from the school van

was acknowledged by all. The only logical explanation for that act is the one provided by the Service Recipient, that he had thrown the insole in retaliation for having been punched by the Subject.

Lastly, the uncontradicted evidence showed that after the insole was thrown at him, the Subject needed to be blocked from entering the van, that he needed to be separated from the Service Recipient, that his anger required the "tapping out" de-escalation technique and that he was walked back to the facility by another staff member. This all lends further credence to the Service Recipient's account. Although not conclusive of anything in and of itself, the overreaction by the Subject to having a sneaker insole thrown at him by the Service Recipient reveals an inappropriate, heightened combative attitude on the part of the Subject. It is interesting that the Subject clearly reacted to the Service Recipient's conduct at the time, but he did not subsequently report the conduct as required by facility policy.

All of these factors are more consistent with the Service Recipient's version of the incident than with the explanations provided by the Subject. The Subject had the strong motivation of the preservation of his reputation and the desire to regain his employment status to compel him to prevaricate and deny. The Service Recipient's repeated statement, corroborated by the other residents, that the Subject punched him in the mouth is accepted as credited evidence. With respect to the question of credibility, the weight of the Justice Center's evidence adds up to be significantly more persuasive than the Subject's denial.

The preponderance of the evidence establishes that the Subject did commit the act giving rise to the substantiated report, namely that he did, in fact, hit the Service Recipient in the mouth.

Having determined that the Subject committed the act as alleged, the next question is whether his conduct constitutes abuse as defined in SSL § 488(1)(a). While the Service

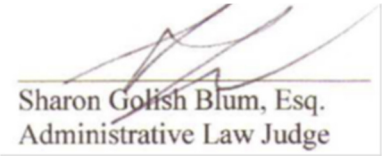
Recipient did not require any treatment as a result of the punch in the mouth, there is a Health Services Incident Report that notes an abrasion on the inside of his mouth, together with a photograph showing a small injury. (Justice Center Exhibit 9) This meets the definition of physical injury in the statute, or at least the likelihood of such injury. Also, the presence of an injury corroborates and supports the evidence from the victim and other Service Recipients that the victim was punched.

Accordingly, in the final analysis, based on all of the evidence, it is concluded that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed an act of physical abuse under SSL § 488(1)(a) by "intentionally or recklessly causing, by physical contact, physical injury..."

Moreover, based upon the totality of the circumstances, the evidence, the testimony presented and the governing legislation, it is determined that the category of the affirmed substantiated physical abuse described as Offense 1 in the substantiated report was properly substantiated as a Category 3 act. A substantiated Category 3 finding of abuse or neglect will not result in the Subject's name being placed on the VPCR Staff Exclusion List and the fact that the Subject has a substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject to disclosure pursuant to NY SSL § 496 (2). This report will be sealed after five years.

DECISION: The request of that the report "substantiated" on dated and received on be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed physical abuse.

Offense 1 of the substantiated report is properly categorized as a Category 3 act.

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

DATED: August 10, 2015
Plainview, New York