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: Juliane O'Brien, Esq.

[redacted]
By: Renate Lunn, Esq.
Legal Aid Society
Criminal Defense Practice
111 Livingston Street
Brooklyn, New York 11201

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

Allegation 1 of the substantiated report is properly categorized as a Category 2 act.

NOW THEREFORE IT IS DETERMINED that reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years. 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)(b).

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: December 31, 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

Adjudication 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

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

[redacted]
By: Renate Lunn, Esq.
Legal Aid Society
Criminal Defense Practice
111 Livingston Street
Brooklyn, New York 11201

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 "substantiated" report dated , of physical abuse by the Subject of a Service Recipient.

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

Allegation 1

> It was alleged that on , at the , located at , while acting as a custodian, you committed physical abuse when you hit a service recipient four times with a broom handle, leaving bruises and scratches.
>
> This allegation has been SUBSTANTIATED as Category 2 physical abuse pursuant to Social Services Law § 493(4)(b).

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

4. The facility, , located at , is a residence for adults with developmental disabilities and psychiatric diagnoses, which is certified by the New York State Office for People With Developmental Disabilities (OPWDD) and 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, [redacted], who had been employed at the facility as a Direct Care Counsellor (DCC) for approximately seven years, had arrived at the facility at approximately 9:30 p.m. for her regular shift, which started two and a half hours later at 12:00 a.m. The Subject was waiting for her shift to start in the common room of the facility's second floor apartment, where the Service Recipient resided together with two other service recipients. The Subject was a custodian as that term is so defined in Social Services Law § 488 (2). (Hearing testimony of the Subject)

6. At the time of the alleged physical abuse, the Service Recipient was a twenty-four year old resident of the facility. The Service Recipient is a person with diagnoses of moderate mental retardation, pervasive developmental disorder, impulse control disorder and psychosis. The Service Recipient exhibits several extreme, unpredictable and frequent maladaptive difficult behaviors, often together, which include physical and verbal aggression towards others and self-injurious conduct, such as head banging and scratching herself. (Hearing testimony of the Subject and Justice Center Exhibits 6, 7 and 19)

7. At the time of the alleged physical abuse, the Service Recipient had just returned to the facility from a regular appointment with the other service recipients and the staff members on duty. Although it was not the mandated procedure, DCC [redacted], who was dispensing medication on the first floor, allowed the Service Recipient to go to the second floor apartment unsupervised. When the Service Recipient entered the common area of the second floor apartment, where the Subject was watching television, the Service Recipient immediately walked towards the refrigerator. At that point, the Subject reminded the Service Recipient to wash her hands before opening the refrigerator. The Service Recipient immediately responded by

exhibiting difficult behavior which quickly escalated out of control. The Service Recipient began screaming and cursing at the Subject while attempting to tear off her own clothes and scratch herself. Service Recipient A entered the room and attempted to restrain the Service Recipient. The Subject instructed Service Recipient A to stop, as she was not a staff member. Service Recipient A then exited the room, leaving the Service Recipient and the Subject alone while the Service Recipient continued to exhibit difficult behavior. (Hearing testimony of the Subject)

8. A broom was in plain sight in the common area of the second floor apartment. At some point shortly after Service Recipient A exited the apartment, the Subject wound up holding the broom[1] and she struck the Service Recipient with it multiple times, leaving a bruise on the Service Recipient's right shoulder and another bruise on the Service Recipient's left arm. The bruises were not visible at that time as they were covered by the Service Recipient's clothing. (Justice Center Exhibits 14, 15 and 16 and Justice Center Exhibit 22: audio interview of the Service Recipient)

9. After the Service Recipient's difficult behavior subsided, DCC came upstairs, entered the second floor apartment and observed scratch marks on the Service Recipient's neck. DCC asked the Subject about the scratches and the Subject responded that the Service Recipient did it to herself. DCC then advised the Subject that she should call Residential Manager , who was not on duty, to report the scratch marks and that she should record the matter on an incident sheet. (Justice Center Exhibit 5 and Justice Center Exhibit 22: audio interview of DCC)

[1] The Subject testified that the Service Recipient had grabbed the broom from its place to use as a weapon and that she had taken it from the Service Recipient. The Service Recipient's recorded audio statement (Justice Center Exhibit 22) states that the Subject picked up the broom. For the purpose of this analysis, it is not necessary to make a determination as to how the Subject came into possession of the broom.

10. At 6:00 a.m. on , the morning after the incident, the Subject telephoned Residential Manager at home to notify her that the Service Recipient had scratched herself on her neck during a behavior the preceding night. (Hearing testimony of the Subject, Justice Center Exhibit 5 and Justice Center Exhibit 22: audio interviews of the Subject and Residential Manager)

11. Shortly afterwards, DCC , who was assisting the Service Recipient with her morning shower, discovered the two bruises on the Service Recipient while she was undressed. (Justice Center Exhibit 22: audio interviews of Residential Manager and DCC)

12. DCC asked the Service Recipient about the bruises. The Service Recipient replied that Service Recipient A had caused the bruises.[2] Service Recipient A was nearby and she denied that she had hurt the Service Recipient. The Subject, who was also nearby at the time, told the Service Recipient that Service Recipient A had not done anything to her. DCC then asked the Subject about the bruises and the Subject responded that the Service Recipient must have done it to herself during her difficult behavior the previous evening. (Justice Center Exhibit 22: audio interview of DCC)

13. Thereafter, DCC sent a cell phone text message to Residential Manager , to advise her of the bruises. Residential Manager responded by requesting that pictures of the bruises be sent to her. Subsequent to reviewing the pictures of the bruises, Residential Manager arranged to go straight to the facility. (Justice Center Exhibit 22: audio interview of Residential Manager)

14. When Residential Manager arrived at the facility, Service

[2] Although it was uncontroverted that the Service Recipient initially blamed Service Recipient A for her bruises, it was never the Subject's position that Service Recipient A was responsible for causing the bruises.

Recipient A immediately approached her protesting her innocence regarding the Service Recipient's bruises. Residential Manager sent Service Recipient A to her day program and then contacted the nurse on duty, who advised that the Service Recipient's injuries should be assessed by a doctor. DCC transported the Service Recipient to the Medical Center , where the Service Recipient was examined by , who made a note of the bruises. (Justice Center Exhibit 14) After her examination, the Service Recipient was transported back to the facility. (Justice Center Exhibit 22: audio interview of Residential Manager)

15. Prior to her appointment with , the Service Recipient had repeatedly stated that Service Recipient A had caused the bruises. (Hearing testimony of the Subject, Justice Center Exhibit 4 and Justice Center Exhibit 22: audio interviews of the Subject, DCC , Residential Manager and DCC)

16. After the Service Recipient returned from the doctor, Residential Manager attempted to question her about the origins of the bruises but the Service Recipient indicated that she did not want to discuss it with her. Residential Manager then sent the Service Recipient to her day program. (Justice Center Exhibit 22: audio interview of Residential Manager)

17. At approximately 3:30 p.m. on , facility Assistant Director , who speaks , as does the Service Recipient, was at the facility. She spoke with the Service Recipient privately and the Service Recipient told her in that the Subject was the one who had hit her with the broom and caused the bruises. (Justice Center Exhibit 22: audio interview of Assistant Director)

18. Subsequent to the Service Recipient's disclosure to Assistant Director

[redacted]

[redacted], the Service Recipient's allegation that the Subject was the person who had caused her bruises by hitting her with the broom remained consistent. (Justice Center Exhibit 22: audio interviews of the Service Recipient, Residential Manager [redacted], Assistant Director [redacted], DCC [redacted], and Assistant Manager [redacted])

ISSUES

- Whether the Subject has been shown by a preponderance of the evidence to have committed the act or acts giving rise to the substantiated report.
- Whether the substantiated allegation constitutes abuse and/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) to include:

> (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.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 2, which is defined as follows:

> (b) Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one finding shall be sealed after five years.

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 evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has established by a preponderance of the evidence that the Subject committed an act of physical abuse under SSL § 488(1)(a) by hitting the Service Recipient with a broom multiple times and leaving two bruises on the Service Recipient's body.

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-22) The investigation underlying the

substantiated report was conducted by Justice Center Investigator , who testified at the hearing on behalf of the Justice Center.

The Subject testified at the hearing on her own behalf. DCC also testified at the hearing for the Subject and the Subject proffered five exhibits. (Subject Exhibits A-E)

The determination of this matter turns on a question of fact as to whether the Subject struck the Service Recipient with a broom multiple times at a time when the Service Recipient was exhibiting difficult behavior while the two of them were alone.

The Subject consistently denied the allegation during the investigation and at the hearing. The Subject contended that, since she had not caused the bruises, the bruises were probably self-inflicted during the Service Recipient's difficult behavior on , when, while she was sitting in a chair, the Service Recipient was "bucking her head" back and forth against the chair and against the window sill behind the chair. The Subject also suggested an alternative theory that the bruises may have been inflicted at some point earlier that day, during one of the Service Recipient's prior difficult behaviors. (Hearing testimony of the Subject)

The main underpinning of the Subject's defense was based upon the assertion that Residential Manager , who had a history of unfairly targeting the Subject, persuaded the Service Recipient to fabricate the allegation in this case as part of Residential Manager relentless effort to terminate the Subject's employment or make the Subject quit. The Subject explained at length, both in her hearing testimony and in her recorded interview with Justice Center Investigator , how Residential Manager had repeatedly harassed and mistreated the Subject. Additionally, the Subject asserted that the Service Recipient's story changed from blaming Service Recipient A to blaming the Subject for her injuries only after the Service Recipient had spoken privately with Residential

Manager . The Subject further contended that the Service Recipient can be easily persuaded to believe that something occurred when, in fact, it had not. (Hearing testimony of the Subject and Justice Center Exhibit 22: audio interview of the Subject)

Both the Subject and her witness, DCC provided evidence that the Service Recipient's statement that the Subject hit her with a broom, thereby causing the bruises, is not credible because the Service Recipient makes things up and is easily persuadable. (Hearing testimony of the Subject and DCC and Justice Center Exhibit 22: audio interviews of the Subject and DCC)

A substantial quantity of documentary evidence was provided with respect to the Service Recipient's diagnoses and targeted difficult behaviors. The Plan of Protective Oversight with an effective date of (Justice Center Exhibit 6), the Individual Behavior Plan dated (Justice Center Exhibit 7), the Individual Behavior Plan dated (Justice Center Exhibit 19), the Monthly Behavioral Summary for (Subject Exhibit B), and the Monthly Behavioral Summary for (Subject Exhibit C), all discuss the Service Recipient's diagnoses and targeted difficult behaviors. However, none of these documents mention that the Service Recipient has any type of history of making false allegations or lying in general. Accordingly, that aspect of the Subject's evidence, including the statements and testimony of DCC , regarding the unreliability of the Service Recipient's statement is not credited.

With respect to the argument that the Service Recipient was persuaded by Residential Manager to change her story and blame the Subject for her bruises, the evidence is similarly without merit. While there may be some legitimacy to the Subject's feelings of having been targeted by Residential Manager prior to the incident, a sufficient

connection between the Subject's grievances against Residential Manager and the allegation in this case was not established.

It is true that the Service Recipient initially accused Service Recipient A of injuring her, and only later stated that it was the Subject who caused the bruises with a broom. The logical explanation for this is that the Service Recipient was afraid to blame the Subject for her bruises when they were first noticed because the Subject was present or working nearby at the time. It was only later the same day that the Service Recipient was given the opportunity to speak privately with Assistant Director in their shared language of . In that conversation, the Service Recipient felt comfortable enough to disclose that, in actuality, the Subject had hit her with a broom and caused the bruises.

The Service Recipient's disclosure was immediately communicated to Residential Manager , who then acted appropriately upon the information. It is worthwhile noting here that Residential Manager did not attempt to hide the fact that the Service Recipient had provided a different explanation for her bruises, prior to disclosing that it had been the Subject that had hit her with a broom and she reported that fact clearly. (Justice Center Exhibit 4 and Justice Center Exhibit 22: audio interview of Residential Manager)

A close examination of the evidence provided by the Subject reveals significant inconsistencies when comparing her versions of the incident. During the Subject's interrogation on , the Subject described in detail how the Service Recipient exhibited a difficult behavior and that the Service Recipient grabbed the broom and hit the Subject with it. The Subject further described that she got the broom away from the Service Recipient and then performed an authorized "wrap" restraint on the Service Recipient to curtail her self-harming

behavior. At no time during the interview did the Subject mention anything about a knife. (Justice Center Exhibit 22: audio interview of the Subject)

The Subject's Request for Amendment contains a completely different description of the incident which details the onset of the Service Recipient's difficult behavior and then states that the Service Recipient "... ran and found a knife which was put up in a linen closet. She also grabbed a broom and began swinging them both wildly." No explanation is provided therein as to if or how the Subject disarmed the Service Recipient, or as to how the incident concluded. (Justice Center Exhibit 2)

In the Subject's hearing testimony, she stated that after the Service Recipient's difficult behavior began, the Service Recipient went to a kitchen drawer in search of knives but that they had been moved to the linen closet. When questioned about this aspect of the incident, the Subject testified specifically that the Service Recipient did not find a knife, but instead that she got the broom. The Subject further described that she got the broom away from the Service Recipient and then performed an authorized "wrap" restraint on the Service Recipient to curtail her self-harming behavior. The Subject said nothing about being struck by the Service Recipient with the broom. (Hearing testimony of the Subject)

Another discrepancy in the Subject's account of the incident, which further diminishes her credibility, appears in her Request for Amendment, in which the Subject indicated that DCC told her that before the incident, the Service Recipient had exhibited a difficult behavior while returning to the facility in the van. (Justice Center Exhibit 2) In her hearing testimony, the Subject repeatedly mentioned that no one had warned her of the Service Recipient's prior behavior. (Hearing testimony of the Subject)

Additionally, the fact that the Subject did not heed the advice of DCC , to

report the incident to Residential Manager and to fill out the incident sheet right after it occurred, but instead waited until the following morning to contact Residential Manager , raises significant concerns regarding the Subject's conduct.

Lastly, it is noteworthy that it was only after the Service Recipient accused the Subject of having hit her with a broom, that the Subject mentioned the fact that a broom was involved in the incident. Prior to that, the Subject had spoken to Residential Manager , DCC and DCC regarding the incident and she had not mentioned anything about the Service Recipient attempting to use a broom against her.

The incontrovertible conclusion that emerges from the Subject's own inconsistencies, allegations and actions is that her repeated denials of having caused the Service Recipient's bruises by striking her with a broom multiple times were self-serving statements made solely to hide her own misconduct in order to preserve her employment and her reputation.

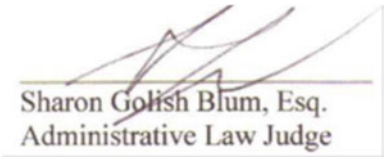
Accordingly, in the final analysis, based on all of the evidence, it is concluded that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed physical abuse as defined in SSL § 488(1)(a) and as specified in Allegation 1 of the substantiated report.

The report will remain substantiated and the next issue to be determined is whether the substantiated report constitutes the category of abuse or neglect set forth in the substantiated report. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report is properly categorized as a Category 2 act. The Subject's conduct of striking the Service Recipient repeatedly with a broom seriously endangered the health, safety and welfare of the Service Recipient. A Category 2 act under this paragraph shall be elevated to a Category 1 act when such an act occurs within three years of a

previous finding that such custodian engaged in a Category 2 act. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years.

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

Allegation 1 of the substantiated report is properly categorized as a Category 2 act.

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

DATED: December 21, 2015
Plainview, New York