

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

In the Matter of the Appeal of

██████████

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Adjud. Case #:

██████████

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: Robert T. DeCataldo, Esq.

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By:

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

ORDERED:

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

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 Persons' 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: April 19, 2016
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

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before:

Jean T. Carney
Administrative Law Judge

Held at:

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

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
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By:

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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse. The Subject requested that the VPCR amend the report to reflect that the Subject is not a subject of the substantiated report. The VPCR did not do so, and a hearing was then scheduled in accordance with the requirements of Social Services Law (SSL) § 494 and Part 700 of 14 NYCRR.

FINDINGS OF FACT

An opportunity to be heard having been afforded the parties and evidence having been considered, it is hereby found:

1. The VPCR contains a "substantiated" report dated [REDACTED], [REDACTED] of 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 [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed physical abuse when you shoved a service recipient twice.

This allegation has been SUBSTANTIATED as Category 3 physical abuse pursuant to Social Services Law § 493(4)(c).

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

4. The facility, [REDACTED], located at [REDACTED], is a residential treatment center that serves troubled males ages 12 through 18. [REDACTED] is licensed by the New York State Office of Children and Family Services (OCFS), which is a facility or provider agency that is subject to the jurisdiction

of the Justice Center. (Hearing testimony of OCFS Investigator [REDACTED])

5. At the time of the alleged abuse, the Subject had been employed by the facility for approximately 6 years and was working as a Youth Care Counselor (YCC). YCCs at the facility work directly with and have regular contact with the service recipients, provide 24 hour supervision, ensure safety within the cottages and facilitate programs. (Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of Subject and Hearing testimony of YCC [REDACTED])

6. At the time of the alleged abuse, the Service Recipient was 17 years old and was a resident of the facility's [REDACTED]. He had been a resident of the facility for approximately one year at the time of the incident. (Justice Center Exhibits 6 and 8)

7. Prior to the time of the alleged abuse, the Subject acknowledged his understanding of, and agreed to abide by, a number of the facility's policies. In particular, he agreed to abide by the Behavior Management Policy, the Code of Conduct for Custodians of People with Special Needs and the Facility Code of Conduct. (Hearing testimony of Subject, Hearing testimony of OCFS Investigator [REDACTED] and Justice Center Exhibit 7)

8. The Subject had been trained in Therapeutic Crisis Intervention (TCI), which sets forth the approved techniques for use of physical intervention when necessary at [REDACTED]. (Hearing testimony of Subject and Justice Center Exhibits 7 and 13)

9. TCI facilitates crisis prevention and de-escalation of potential crisis, management of physical behavior, reduction of actual and potential injury to service recipients and staff and teaches service recipients coping skills. Staff are expected to use non-physical de-escalation techniques as an alternative to physical intervention. Physical intervention can only be utilized after best efforts to utilize less intrusive methods have been unsuccessful and when necessary to

ensure the safety of service recipients and others. Should physical intervention become necessary, it must be therapeutic and follow a number of specific procedures. These procedures include assessing the environmental situation so as to not increase the possibility of harm, assuring there is adequate staffing to employ a hold, remaining calm, using the minimum amount of force necessary to ensure safety and making every effort to employ the least restrictive hold. (Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of Subject and Justice Center Exhibit 13)

10. Pursuant to the Behavior Management Policy, staff are required to recertify on TCI every 6 months by attending a six-hour refresher training. On [REDACTED], the Subject participated in a refresher and he passed a written physical intervention skills test. (Hearing testimony of OCFS Investigator [REDACTED] and Justice Center Exhibits 7 and 13)

11. [REDACTED] Code of Conduct was established to guide staff in their interactions with all stakeholders, including service recipients. The Code dictates that Staff model behavior reflecting best practices and standards, and to be courteous and professional to successfully serve service recipients. Modeling behavior includes positive problem solving strategies. Staff is only to use TCI procedures when physically intervening with service recipients. The use of physical violence or intimidation toward service recipients is prohibited. (Justice Center Exhibits 12 and 13)

12. Interventions allowed to be utilized are described in each service recipient's Individual Crisis Management Plan (ICMP). The Service Recipient's ICMP states that when he demonstrates agitation he should be immediately removed from the environment. Coping skills indicated as effective for the Service Recipient include having him take a walk, go to the gym, go to his room, or listen to music. The Service Recipient's triggers include being touched and

being cursed at. Should crisis intervention be required, the approved techniques in regard to the Service Recipient are a standing hold, a team hold or the breaking up fights techniques. (Hearing testimony of OCFS Investigator [REDACTED], Justice Center Exhibits 8 and 13)

13. On [REDACTED], the Subject was on duty working as a YCC. The Service Recipient was agitated and was outside of his cottage. The Subject observed the Service Recipient outside of the cottage and directed him to return to the cottage. The Service Recipient became upset and knocked over a grill that was outside. He then entered the cottage and headed down the hallway. Halfway down that hallway is a perpendicular hall that leads to a common area. This space is called the T area. The Service Recipient was followed into the building by the Subject and a service recipient. Another service recipient was standing at the T area. The Service Recipient walked down the hallway to the T and flipped a table over. The Service Recipient and the Subject then faced one another in the hallway and appeared to exchange words. The situation became physical as the Subject pushed the Service Recipient. The Service Recipient responded by pushing the Subject back. The Subject in return shoved the Service Recipient with sufficient force that the Service Recipient lost his balance, stumbled several steps backward and backed into a wall at the T before regaining his balance. Witness [REDACTED] then entered the T from the common area and intervened to create space between the Service Recipient and the Subject. The parties went into the common area where the Service Recipient shoved back at the Subject. The Subject fell to the floor, narrowly missing a service recipient in the area. (Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of YCC [REDACTED], Hearing testimony of Subject, Justice Center Exhibits 6, 9 and 14 and Subject Exhibit B)

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 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:

- (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 3, which is defined as follows:

- (c) Category three is abuse or neglect by custodians that is not otherwise described in categories one and two. Reports that result in a category three finding shall be sealed after five years.

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject(s) committed the act or acts of abuse 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.

DISCUSSION

The Justice Center has established by a preponderance of the evidence that the Subject committed an act, described as “Allegation 1” in the substantiated report. Specifically, the evidence establishes that the Subject committed physical abuse on [REDACTED] when, while acting as a custodian, he shoved the Service Recipient twice.

In order to sustain an allegation of physical abuse in this matter, the Justice Center must show that the Subject was a custodian who had physical contact with the Service Recipient; that such contact was either intentional or reckless; and that such contact caused either physical injury or serious or protracted impairment of a Service Recipient’s physical, mental or emotional condition; or caused the likelihood of such injury or impairment.

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In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-13) In addition to documentary evidence, the Justice Center submitted a visual only video of the incident which was extremely helpful evidence with respect to the substantiated allegations. (Justice Center Exhibit 14) The investigation underlying the substantiated report was conducted by OCFS Investigator █, Child Abuse Specialist 1, who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject presented co-worker and YCC █ as a witness. The Subject testified in his own behalf. The Subject also supplied a visual only video from the incident. (Subject Exhibit B) The videos submitted by both parties depicting the time of the event are identical.

The Subject was working at the facility on █ and was a custodian as that is defined in Social Services Law § 488. It is undisputed that the Subject put his hands upon the Service Recipient. The video depicts the Subject initiating physical contact and pushing the Service Recipient. Subsequent to being shoved by the Subject, the Service Recipient returned physical contact. The Subject then proceeded to shove the Service Recipient a second time with enough force that the Service Recipient lost his balance and fell back a number of steps into a wall. Pursuant to SSL § 488(1)(a), “shoving”, is a specific example of conduct constituting physical abuse. (Hearing testimony of OCFS Investigator █, Hearing testimony of Subject, Justice Center Exhibits 9 and 14 and Subject Exhibit B)

The Subject acted intentionally, or at the least, recklessly. The Subject himself stated he wanted to create space. Shoving the Service Recipient was his way of creating that space. The Subject was trained how to respond in such situations, knew the parameters of the Service

Recipients ICMP and was aware there were a number of service recipients in the vicinity. He consciously and recklessly disregarded these factors as well as the risks present. (Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of Subject, Justice Center Exhibits 6, 7, 8, 9 and 14 and Subject Exhibit B)

The Subject's intentional or reckless behavior had or was likely to have had a serious or protracted impairment of the physical, mental or emotional condition of a Service Recipient. The facility is a therapeutic setting. The Service Recipient was there to curb his anger issues. The subject was to nurture him and model appropriate behavior. The Service Recipient's ICMP notes that a trigger for him is when someone hits him, exactly the situation that occurred here. After the Service Recipient was antagonized and triggered further by the Subject's contact with him, the situation became increasingly dangerous. The Subjects actions were in direct contradiction to the Service Recipients ICMP, the details of which he was aware of, and were in fact actions that are identified as triggers of the Service Recipient. (Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of Subject, Justice Center Exhibits 6, 7, 8, 9,12, 14, and Subject Exhibit B)

In his defense, the Subject testified that the Service Recipient initiated physical contact and pushed the Subject. The Subject told the Service Recipient to calm down after which the Service Recipient proceeded to push the Subject again. At the hearing, the Subject testified that the Service Recipient went toward him a third time and he became concerned. Therefore, in an effort to make space, he stated he pushed the Service Recipient away. In a prior statement taken days after the incident, the Subject reported that he extended his arms to create space. He made no mention of pushing. The Subject's testimony at the hearing contradicts his previous statement. Further, both statements contradict what is evident on video, that the Subject initiated

the physical contact and that he pushed the Service Recipient twice. The Subject stated that at the time of the incident he did not think force was used. However at the hearing he conceded that after viewing the video he used more force than he had originally thought. (Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of Subject, Justice Center Exhibits 6, 9, 14, and Subject Exhibit B)

The Subject stated he felt unsafe as the facility was short staffed that day and he could not engage in a one man hold. Even if that were the case, there was no indication of any immediate danger or any justification to put the Service Recipient in a hold. Further, if physical defense becomes necessary, under TCI the appropriate defensive technique is to position one's body and hold a protective stance or to block blows. The Subject did not follow TCI standards. The Subject testified that, after the Service Recipient flipped the table, he was concerned as there were other service recipients in the area and he did not want the Service Recipient to attack one of them. There was no indication that the Service Recipient showed aggression toward any of the service recipients or that there were any exigent or emergent circumstances when the Subject initiated physical contact. The Subject did not use crisis prevention or de-escalation techniques and did not follow TCI standards. The Subject's shoving of the Service Recipient increased the possibility of harm to those in the vicinity. (Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of Subject and Justice Center Exhibit 13)

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed the physical abuse alleged. The substantiated report will not be amended or sealed.

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse or neglect set forth in the substantiated

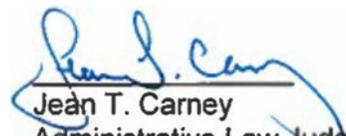
report. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report is properly categorized as a Category 3 act.

DECISION: 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 a Category 3 act.

This decision is recommended by Jean T. Carney, Administrative Hearings Unit.

DATED: March 17, 2016
Schenectady, New York


Jean T. Carney
Administrative Law Judge