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: Jennifer DeStefano, Esq.

[redacted]

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

[redacted]

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 [redacted] that the substantiated report dated [redacted] received and dated [redacted] be unsubstantiated is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse (deliberate inappropriate use of restraint).

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: Schenectady, New York
November 19, 2015

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: 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: [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: Jennifer DeStefano, Esq.

[redacted]

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

[redacted]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [redacted] (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 [redacted] received and dated [redacted] 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:

Allegation 1

> It was alleged that on [redacted] at the [redacted], located at [redacted] while acting as a custodian, you committed abuse (deliberate inappropriate use of restraints) when you used an unauthorized restraint technique that resulted in a service recipient being thrown and pushed against a wall.
>
> This allegation has been SUBSTANTIATED as Category 3 abuse (deliberate inappropriate use of restraints), pursuant to Social Services Law § 493(4)(c).

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

4. The facility, located at [redacted], is a secure facility for adjudicated juvenile males, and is operated by the Office of Children and Family

[redacted]

Services (OCFS), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse and/or neglect, the Subject was employed by OCFS as a Youth Division Aide IV (YDA IV). He had been employed in that capacity at [redacted] since [redacted] 2012. (Justice Center Exhibit 5 and Hearing testimony of Subject)

6. At the time of the alleged abuse and/or neglect, the Service Recipient had been a resident of the facility since [redacted] 2012. The Service Recipient had a diagnosis of conduct disorder and substance abuse. (Justice Center Exhibit 5)

7. Every afternoon at 2:15 p.m., the residents of [redacted] are locked down for shift change. There are certain exceptions to this rule; those residents who have exhibited excellent behavior and have been given Honor status do not always have to be locked down. (Hearing testimony of Subject)

8. On [redacted] the Service Recipient was not given Honor status, and the Subject told him to go into his room to be locked down. The Service Recipient refused to be locked in to his room, so the Subject went into the staff office to write up the Service Recipient. There are three levels of infractions for which a service recipient may be written up. Level 1 is a rule violation, level 2 is an intermediate violation, and level 3 is the harshest infraction. The Subject informed the Service Recipient that he was being written up as a level 3 infraction. (Hearing testimony of Subject)

9. The Service Recipient followed the Subject into the staff office, upset at being written up. Another service recipient was in the staff office, along with a new employee, Trainee [redacted] The Subject directed both service recipients to leave the office. One left, but the Service Recipient refused, so the Subject placed his hand on the Service Recipient's chest and

guided him out of the office. The Service Recipient immediately went back into the office, his behavior appearing to escalate and becoming agitated. Shortly thereafter the Subject can be seen grappling with the Service Recipient, holding him in a bear hug from behind. They exit the office and the Subject throws the Service Recipient onto the floor, falling to one knee, and hitting his head on a plastic laundry basket in the hallway. (Hearing testimony of Subject and Justice Center Exhibit 16)

10. The Service Recipient jumped up and came at the Subject, who wrapped his arm around the Service Recipient's torso from the front, pinning his arms, and struggled with him against the wall of the office. Another staff person arrived and tried to assist the Subject, at one point appearing to intervene and separate them. A careful viewing of the video shows the Subject drawing his arm back a couple of times; but the video does not clearly show whether he is punching or merely trying to get a solid grip on the Service Recipient. At that point seven members of the Security Services Unit (SSU) arrive on the scene and separate the Subject and the Service Recipient. Finally, the Service Recipient is escorted out of the office by another service recipient, followed by most of the SSU team. One SSU team member stays behind with the Subject. (Hearing testimony of Subject and Justice Center Exhibits 5 and 16)

11. The Subject had been trained in Crisis Management/Physical Restraint (CM/PR) when he was hired in 2012. OCFS policy requires all direct care workers, including YDA IV's, to take at least 2 refresher courses in CM/PR, at least 4 months apart. The Subject's training records show that he did not take any refresher course between the time he took the basic course and the time of the incident. (Justice Center Exhibits 13 and 15)

12. OCFS policy also requires staff to exhaust all appropriate de-escalation techniques prior to employing a restraint. As part of that process, the policy prohibits the use of

[redacted]

"touch controls", such as tapping or prodding when directing a youth. (Justice Center Exhibit 13, page 5)

13. Restraints can only be used under specific circumstances, including prevention of injury to the service recipient, to staff, or to others. Staff are taught the proper procedure for employing restraints, and are taken through several scenarios in order to give them the tools to properly restrain a service recipient. If the employee is unable to properly complete the restraint, then staff is trained to stop and try the restraint again until it is properly executed. (Hearing testimony of Training Specialist II [redacted] Justice Center Exhibits 13 and 14)

14. Trained techniques include hooking a service recipient's arms from behind and standing, or lowering to the floor in a prone position. Pinning a service recipient's arms in a bear hug from the front, and holding a service recipient against the wall are not approved techniques. (Hearing testimony of Training Specialist II [redacted], Justice Center Exhibit 14)

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 neglect presently under review was substantiated. A "substantiated report" means a report "… wherein a determination has been

[redacted]

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 of a person in a facility or provider agency is defined by SSL § 488(1)(d), to include:

> (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.

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.

[redacted]

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 evidence that the Subject committed a prohibited act, described as "Allegation 1" in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-15 and 18) The investigation underlying the substantiated report was conducted by Investigator [redacted] who testified at the hearing on behalf of the Justice Center. In addition, OCFS Human Services Training Specialist II [redacted] testified in behalf of the Justice Center.

The Subject testified on his own behalf and provided no other evidence.

The Justice Center submitted a visual only video of the incident, which was extremely helpful and illuminating evidence with respect to the substantiated allegations. (Justice Center Exhibit 16)[1] The Justice Center also submitted an audio recording of the interview with the Subject. (Justice Center Exhibit 17)

The Justice Center proved by a preponderance of the evidence that the Subject committed abuse (deliberate inappropriate use of restraints). Specifically, the evidence establishes that the Subject failed to employ de-escalation techniques to defuse the situation prior to resorting to restraining the Service Recipient. Further, the Subject failed to utilize his training and employed an unapproved restraint that could have caused injury to the Service Recipient.

The statute describes several instances where a restraint may be deemed inappropriate. One such instance concerns the technique being inconsistent with state policy. Here, the video

[1] There was some testimony at the hearing that a second camera perspective was available to the investigator, however, only one camera perspective was submitted into evidence.

[redacted]

shows the Subject standing behind the Service Recipient, with his arms pinned to his side, and the Subject throwing him to the floor. (Justice Center Exhibit 16) According to the OCFS CM/PR Manual, an approved restraint would require the Subject to stand behind the Service Recipient, hook his arms around the Service Recipient's arms under the armpit, placing the Subject's palms against the Service Recipient's back, then lower the Service Recipient to the ground in a controlled manner by stepping back and to the side with one leg. (Justice Center Exhibit 14 at pages 45-47, Hearing testimony of [redacted] Moreover, OCFS policy specifically states that staff cannot use their full weight to gain control over the service recipient. (Justice Center Exhibit 13 at page 6) Here, the Subject used his whole weight to lift the Service Recipient off his feet and swing him to the floor. There was no evidence introduced at the hearing to support that the maneuver used by the Subject was an approved restraint technique. Therefore the Subject violated OCFS policy in restraining the Service Recipient in this manner.

Another instance outlined in the statute as being an inappropriate restraint, concerns the use of force. The Subject testified that he had been trained in a variety of de-escalation techniques. He also admitted in his testimony that he did not employ any of those techniques in this incident. The Subject was aggravated that the SSU did not respond to his call while he was on the floor because the Service Recipient refused to lock in during the shift change. When the Service Recipient initially followed the Subject into the office, he did not appear to be upset or angry. After the Subject backed him out of the office, the Service Recipient's demeanor on the video changed slightly. However, after the Subject threw the Service Recipient onto the floor, the Service Recipient's demeanor changed dramatically. He jumped up and ran at the Subject. Due to the camera angle, the view of what occurred inside the office in the 20 seconds between the time the Service Recipient entered the office after being backed out and when the Subject

[redacted]

forcibly ejected him and threw him on the floor is obscured. However, it is reasonable to deduce that the Subject used excessive force in forcibly ejecting the Service Recipient out of the office. Policy requires the employment of de-escalation techniques so that the use of force may be avoided. Here, the Subject skipped that important step and went straight to the use of force. Such use of force without first attempting to defuse the situation was inappropriate and contrary to OCFS policy.

The Subject further testified that after the Service Recipient came after him, the Subject could not get behind the Service Recipient in order to place him in an approved restraint. Instead, the Subject held the Service Recipient against the wall, facing him. However once again, the Subject placed his entire weight against the Service Recipient in order to gain control. This violates OCFS policy and goes against the Subject's training. Personnel are trained to disengage if the attempted restraint fails, and try again until an approved restraint is successfully completed. Under these circumstances, it is understandably difficult to maneuver the Service Recipient into position to effectuate an approved restraint. However, there was another staff person assisting the Subject, and what can be observed of the incident in the video, no attempt was made to turn the Service Recipient around. At this point it appears in the video that things had calmed down, and therefore an opportunity to de-escalate matters further would have been appropriate. However that did not occur. By the time the SSU arrived, it was clear that the Subject had to be restrained and separated from the Service Recipient by at least two SSU team members.

In his defense, the Subject asserts that the statute requires that the restraint must be deliberately inappropriate, and he did not deliberately try to use an inappropriate restraint. Therefore, his actions do not meet the elements of the statute. However a fair reading of the

[redacted]

statute presents a different interpretation and analysis. A determination as to whether the restraint was used deliberately requires an assessment of the situation leading up to the use of the restraint, whether a less restrictive technique could have been used safely and reasonably, whether the technique was prohibited by the service recipient's treatment plan, and whether the subject knew that the technique was prohibited.

In this case, the circumstances leading up to the use of the restraint were replete with opportunities to employ a less restrictive technique. Indeed, the video shows that the Subject likely aggravated the situation by employing "touch controls" when he backed the Service Recipient out of the office by putting his hand on the service Recipient's chest. This technique is specifically prohibited by OCFS policy, and by extension, prohibited by the Service Recipient's treatment plan. (Justice Center Exhibit 13 at page 5) Subsequently, when the Subject grabbed the Service Recipient from behind and threw him to the ground, the Subject employed a prohibited technique, that he knew was prohibited. Finally, when the Subject held the Service Recipient against the wall of the office, he was aware that he was employing a prohibited restraint technique. (Hearing testimony of Subject) There was no evidence presented at the hearing to suggest that this incident would fall under the emergency exception laid out in the statute. Therefore the Subject's actions meet the requirements of the statute in that he employed a deliberate inappropriate use of a restraint technique contrary to accepted OCFS policy and training.

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 abuse and/or neglect alleged. The substantiated report will not be amended or sealed.

[redacted]

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category level 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 (or should be categorized) as a Category 3 act.

DECISION: The request of [redacted] that the substantiated report dated [redacted] received and dated [redacted] be unsubstantiated is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse (deliberate inappropriate use of restraint).

The substantiated report is properly categorized as a Category 3 act.

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

DATED: November 12, 2015
Schenectady, New York

Jean T. Carney
Administrative Law Judge