

**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

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**FINAL  
DETERMINATION  
AND ORDER  
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: Theresa Wells, Esq.

[REDACTED]  
[REDACTED]  
[REDACTED]

By: Law Offices of Bradley Anthony Smith  
Bradley A. Smith, Esq., of Counsel  
3927 Pratt Avenue  
Bronx, New York 10466

██████████

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 abuse (deliberate inappropriate use of restraints).

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:** June 30, 2016  
Schenectady, New York

  
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David Molik  
Administrative Hearings Unit

**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

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Pursuant to § 494 of the Social Services Law

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**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

██████████

Before:

Louis P. Renzi  
Administrative Law Judge

Held at:

New York State Justice Center for the Protection of  
People with Special Needs  
Adam Clayton Powell State Office Building  
163 West 125<sup>th</sup> Street  
New York, New York 10027  
On: ██████████

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  
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161 Delaware Avenue  
Delmar, New York 12054-1310  
By: Theresa Wells, Esq.

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██

By: Law Offices of Bradley Anthony Smith  
Bradley A. Smith, Esq., of Counsel  
3927 Pratt Avenue  
Bronx, New York 10466

### **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 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 abuse (deliberate inappropriate use of restraint) when you used an improper restraint on a service recipient by actions which included grabbing her arms and pushing her, contrary to approved Therapeutic Crisis Intervention (TCI) procedures and the service recipient's Individual Crisis Management Plan (ICMP).

This allegation has been SUBSTANTIATED as Category 3 abuse (deliberate inappropriate use of restraint), pursuant to § 493 of the Social Services Law.

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 program for youth with various diagnoses

including Asperger's Syndrome and ADHD (Hearing testimony of [REDACTED]), and is licensed by the New York State Office of Children and Family Service (OCFS) which is a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of [REDACTED], LCSW) The facility, a non-secure facility, was comprised of both a residential component and school component. (Hearing testimony of [REDACTED], LCSW)

5. At the time of the alleged abuse, the Subject had been employed by [REDACTED] for approximately four (4) years. The Subject worked as a Milieu therapist, which is a direct care staff position. She has since become an English teacher at the facility school. (Hearing testimony of the Subject) The Subject was a custodian as that term is defined in Social Services Law § 488(2).

6. At the time of the alleged abuse, the Service Recipient was thirteen (13) years of age, and had been a resident of the facility for approximately sixteen (16) months. The Service Recipient is a young female with a primary diagnosis of post-traumatic stress syndrome (PTSD), chronic and severe. (Hearing testimony of [REDACTED], LCSW; Justice Center Exhibits 22, 23, 24, 25, 27 and 28)

7. At the time of the alleged abuse, the Subject was current in her Therapeutic Crisis Intervention (TCI) training, had received and completed refresher TCI training in [REDACTED] of [REDACTED]. (Hearing testimony of [REDACTED]; Justice Center Exhibit 19)

8. The Service Recipient's Individual Crisis Management Plan (ICMP) was updated [REDACTED]. The plan states that Service Recipient becomes agitated when she is told 'no' and when her immediate needs are not fulfilled; and that approved TCI methods include redirection, distraction and active listening. (Hearing testimony of [REDACTED]; Justice Center Exhibit 25 )

9. On [REDACTED], in the facility's [REDACTED], the Service Recipient observed

facility staff using a restraint on another service recipient. The Service Recipient became upset and wanted to ensure that facility staff was conducting a proper restraint on the other service recipient. The Service Recipient further escalated when several staff members including the Subject redirected her. The Subject then pushed the Service Recipient with two hands to remove her from the area. (Hearing testimony of Justice Center Investigator [REDACTED]; Justice Center Exhibit 10)

10. Later that day in the facility dining room, the Service Recipient sprayed ketchup on the back of a staff's jacket (staff A). That staff member initially appeared to be unaware that ketchup was being sprayed on his back, but eventually moved away from the Service Recipient, who remained in place and did not pursue him. At about that time, the Subject walked up to the Service Recipient and grabbed the Service Recipient's upper arms. The Service Recipient next extended her right arm forcing the left shoulder and head of the Subject back. At that point the Subject's right hand is squarely on the upper left outer bicep of the Service Recipient. The Service Recipient then swung at the Subject and the Subject deflected the punches while pushing into the Service Recipient. At some point during this exchange the Service Recipient forced the Subject off balance and nearly threw the Subject into a window. Other staff intervened and a physical takedown and restraint resulted. (Hearing testimony of [REDACTED]; Justice Center Exhibit 29)

11. This physical interaction was not prescribed by TCI training or the Service Recipient's ICMP. Under TCI, physical intervention at [REDACTED] is warranted only if a service recipient is harming themselves or others. Further, physical restraints are warranted for this particular Service Recipient only when she is in the "outburst/crisis" stage as defined by her ICMP. Additionally, even while the Service Recipient is in the outburst/crisis stage, the staff is required

to first attempt to use the “crisis co-regulation and hurdle help” to keep the Service Recipient safe. Verbally prompting the Service Recipient is a method for de-escalation. (Hearing testimony of [REDACTED]; hearing testimony of [REDACTED], LCSW; Justice Center Exhibits 20, 21 and 25)

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

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 of abuse as set forth in the substantiated report.

If the Justice Center did not prove the abuse 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 the acts described in Allegation 1 of the substantiated report. The Justice Center has established by a preponderance of the evidence that the Subject committed the prohibited act described in “Allegation 1” of the substantiated report described as the deliberate inappropriate use of restraints. The Justice Center has further proved by a preponderance of the evidence that the assigned category of the offense, Category 3, is appropriate.



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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 1-30), and called three witnesses. The investigation underlying the substantiated report was conducted by Justice Center Investigator II ██████████, who testified at the hearing in behalf of the Justice Center. TCI Trainer ██████████ testified in behalf of the Justice Center, as did Licensed Clinical Social Worker ██████████, who was the Clinical Director employed by ██████████ at the time of the report.

The Subject testified in her own behalf and called one additional witness, ██████████, who was previously employed by ██████████ as a direct care staff member and supervisor. The Subject 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 29)

In order to establish abuse under the theory that a custodian committed an act of deliberate inappropriate use of restraints, the Justice Center must prove three elements: (1) that a custodian used any manual, pharmacological or mechanical measure or device; (2) to immobilize or limit the ability of a service recipient to move his or her arms, legs or body freely; (3) and the technique used, the amount of force used and/or the situation in which the restraint was used was deliberately inconsistent with a service recipient's treatment or behavioral plan, generally accepted practices and/or federal or state laws, regulations or policies.

The evidence showed that in the ██████████ facility, restraints of residents are only permitted in very limited circumstances. A restraint may be used only where a service recipient presents a clear and immediate physical danger to him/herself, or to others. (Hearing testimony of ██████████, LCSW; Justice Center Exhibit 20, at p.S-64; Justice Center Exhibit 25)

After a thorough review of all of the testimony and documentary evidence presented at the hearing, most particularly the video of the incident, it is concluded that the Subject was a custodian, who deliberately initiated a restraint by grasping the Service Recipient's arms, which then limited the ability of the Service Recipient to freely move her arms and body. This restraint was deliberately inconsistent with the Service Recipient's Individual Crisis Management Plan and the tenets of Therapeutic Crisis Intervention (TCI) as they apply in this facility, which operates under the Sanctuary program model.

A preponderance of the evidence established that the Subject, by her intentional and/or reckless conduct, initiated and employed a physical restraint that immobilized or limited the Service Recipient's ability to move her body freely. The video evidence showed that the Subject recognized that the Service Recipient was misbehaving in spraying ketchup on the clothing of a fellow staff member. The Subject immediately walked directly and purposefully toward the Service Recipient, and without any hesitation or any apparent attempt to re-direct or de-escalate the Service Recipient, reached out and grabbed both of the Service Recipient's arms above the elbow, at which point the Service Recipient reacted negatively and began to thrash and swing her arms and hands at the Subject. The Subject then reciprocated in an attempt to deflect the Service Recipient's attempts to strike her. Thus, by grabbing the Service Recipient, thereby exerting physical control over her, and limiting the Service Recipient's movements, the Subject initiated a physical restraint. (Justice Center Exhibit 29, at 01:49)

██████████ testified that he is a Therapeutic Crisis Intervention (TCI) trainer employed by ██████████. This witness presented the TCI handbook used to instruct employees of the provider agency facility. (Justice Center Exhibit 21) The purpose of TCI is to focus on preventing crisis and reducing escalation of behaviors by service recipients, as well as assisting the service

recipients with appropriately reacting to situations and de-escalating themselves. Techniques taught in TCI training include hurdle help and co-regulation. Physical interventions are a last resort technique.

Facility staff members undergo monthly refresher training in TCI training. Staff members are expected to be familiar with all residents ICMP and are advised to review the ICMP for each resident, which is stored in digital format and available to provider agency staff. (Hearing testimony of ██████████)

At the hearing, TCI Trainer ██████████ reviewed the video and testified that he did not observe anything that would have warranted a physical restraint of the Service Recipient. The witness further testified that this physical interaction was not prescribed by TCI training or the Service Recipient's ICMP. The Service Recipient's ICMP dictates that a physical restraint may be employed when the Service Recipient is in the "outburst" stage. The witness testified that in his opinion, when the Service Recipient squirted ketchup on staff A, the Service Recipient was not in the "outburst" stage, but rather was in the "escalation" stage and did not pose a threat to staff A. Finally, the witness testified that the Service Recipient reached the "outburst" state when she attempted to hit the Subject. Additionally, the witness testified that mechanics of the restraint that the Subject used were not consistent with TCI trained restraint techniques. More precisely, ██████████ testified that ██████████ and TCI have no permitted or trained technique which allows staff to grab residents by the arms as was done here. Thus, a preponderance of the evidence showed that the restraint was deliberately inconsistent with both the Service Recipient's behavior plan and facility policy. (Hearing testimony of ██████████; Justice Center Exhibit 25)

The hearing evidence showed that prior to the restraint complained of here, there had been some behavioral issues involving the Service Recipient and others, including a physical restraint

of another resident which had been witnessed by the Service Recipient. The Subject claims that this in part justified her actions because the Service Recipient was in the “outburst” stage as described under TCI as a point in time where a restraint might be appropriate. This claim is controverted and unsupported in this record. The restraint by the Subject occurred prior to the Service Recipient escalating into an “outburst” stage, and in fact, such “outburst” was a direct result of the restraint employed by the Subject. (Justice Center Exhibit 29)

Social Services Law § 488(1)(d) also offers an exception to the violation charged, which applies in very specific circumstances. A restraint which is used as a reasonable emergency intervention to prevent imminent risk of harm to a service recipient or another person would not violate SSL 488(1)(d). This exception does not apply in this case. In her request for amendment and her testimony, the Subject claimed she was acting in self-defense after initiating the restraint of the Service Recipient. Nevertheless, the Subject did not offer any credible evidence to prove that her actions in initiating the restraint were justified by any emergency which is contemplated by the statute. At the time of the restraint, no one present, including the Service Recipient, was in any physical danger. If the Subject found a need to defend herself, it was solely as a result of the restraint she herself initiated, and cannot be a defense to using the restraint in the first instance. (Justice Center Exhibit 29)

In summary, the technique utilized by the Subject limited the ability of the Service Recipient to freely move her arms and therefore constituted a restraint. The Subject made no attempt to verbally de-escalate the Service Recipient prior to aggressively placing her hands on the Service Recipient, and as noted above, the physical intervention was not necessary to protect the safety of the Service Recipient or any other person. The resulting contact between the Subject and the Service Recipient was not warranted by TCI, the Service Recipient’s Individual Crisis

Management Plan, or any policy.

Therefore, it must be concluded that the restraint of the Service Recipient by the Subject was deliberately inconsistent with the Service Recipient's Individual Crisis Management Plan and the tenets of Therapeutic Crisis Intervention (TCI) as they apply in this facility, which operates under the Sanctuary program model. As such, the Subject's actions constitute a deliberate inappropriate use of restraints as defined by SSL § 488 (1)(d).

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 alleged. The substantiated report will not be amended or sealed.

The next question to be decided is whether the substantiated report constitutes the category of abuse 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 abuse (deliberate inappropriate use of restraints).

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

This decision is recommended by Louis P. Renzi, Administrative Hearings  
Unit.

**DATED:** June 20, 2016  
Schenectady, New York



Louis P. Renzi, ALJ