

**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
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: Christopher Mirabella, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: Jonathan G. Johnsen, Esq.
Creighton, Johnsen & Giroux
500 Ellicott Square Building
296 Main Street
Buffalo, New York 14203

██████████

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



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:

John T. Nasci
Administrative Law Judge

Held at:

West Seneca DDSO
1200 East and West Road
Building 16
West Seneca, New York 14224
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: Christopher Mirabella, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By: Jonathan G. Johnsen, Esq.
Creighton, Johnsen & Giroux
500 Ellicott Square Building
296 Main Street
Buffalo, New York 14203

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse (deliberate inappropriate use of restraints). 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 (deliberate inappropriate use of restraints) 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 [REDACTED], at the [REDACTED] of the [REDACTED], located at [REDACTED], while acting as a custodian, committed abuse (deliberate inappropriate use of restraint) when you used an inappropriate restraint technique that resulted in a service recipient falling to the floor and hitting his head.

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

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

4. The facility, [REDACTED], located at [REDACTED]

██████████, is a secure residential facility for youth who have been adjudicated juvenile delinquents by a Family Court Judge, and is operated by the New York State Office of Children and Family Service (OCFS), which is an agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse, the Subject was employed by the OCFS as a Youth Division Aide 3 since approximately ██████████ 2012. (Hearing testimony of the Subject)

6. At the time of the alleged abuse, the Service Recipient was a fifteen year old male who stood approximately 6' 2" and weighed approximately 240 pounds. (Justice Center Exhibits 2 and 10, and Hearing testimony of the Subject) The Service Recipient had diagnoses of conduct disorder, adolescent-onset type - moderate. (Subject Exhibit M)

7. On ██████████, at approximately 3:08 p.m. the Subject, Staff A, Staff B and Staff C were sitting around a table in a common area of the ██████████ residential unit awaiting their shift change. The Service Recipient was sitting nearby in a chair against the wall. An unknown number of other service recipients were sitting nearby in a lounge area. At that time, Staff A was talking with the Service Recipient about an incident that had just taken place in which the Service Recipient had improperly taken the snack of another service recipient. (Justice Center Exhibits 18: video of incident, 19: audio recording of Subject interrogation, and Hearing testimony of the Subject)

8. When the Service Recipient became increasingly disrespectful to Staff A, the Subject interjected himself into the conversation by telling the Service Recipient that he has had a good day and that his behavior was putting him at risk of losing points¹. When the Service Recipient continued to escalate his behavior, the Subject retrieved the "point book" from the floor

¹ ██████████ uses the New York State Data Accountability System to reward and/or punish service recipients for their behavior by starting each service recipient with five points each day and deducting points for improper behavior. (Hearing testimony of the Subject)

and repeated his warning to the Service Recipient. After the Service Recipient ignored the Subject's warnings and continued to escalate his behavior, the Subject marked the loss of points in the point book and then told the Service Recipient that he had just lost points. (Justice Center Exhibits 18: video of incident, 19: audio recording of Subject interrogation, and Hearing testimony of the Subject)

9. The Subject's comments served to escalate the Service Recipient's behavior further, which was manifested by the Service Recipient cursing and threatening Staff A. In response, the Subject moved his chair to a point between the Service Recipient and Staff A. The Subject placed his chair approximately eight feet away from the Service Recipient and sat backwards in the chair, straddling the chair facing the Service Recipient with his back to the other staff. (Justice Center Exhibits 14, 18: video of incident and 19: audio recording of Subject interrogation; Subjects Exhibits E, F, G, H, I and L; and Hearing testimony of the Subject)

10. When Staff A made a reference to writing up the Service Recipient for his bad behavior, the Service Recipient stood up and walked toward Staff A. In response, the Subject and Staff B stood up and the Subject moved between the Service Recipient and Staff A. The Subject moved his chair to his right toward the wall and stood between the Service Recipient and the other staff. (Justice Center Exhibits 14, 18: video of incident and 19: audio recording of Subject interrogation; Subjects Exhibits A, E, F, G, H, I and L; and Hearing testimony of the Subject)

11. When the Service Recipient attempted to walk by the Subject, the Subject backed up, turned to face the Service Recipient and attempted to grab his arm. The Service Recipient then raised his arms and hands to the Subject's chest and in response the Subject raised his hands and arms to the Service Recipient's chest. The Subject then pushed the Service Recipient backward while moving toward him, resulting in the Service Recipient losing balance and falling backward to the floor and into the wall. The Subject fell on top of the Service Recipient and remained with

his body on the Service Recipient's body attempting to restrain the Service Recipient. (Justice Center Exhibits 2, 14, 18: video of incident and 19: audio recording of Subject interrogation; Subjects Exhibits E, F, G, H, I and L; and Hearing testimony of the Subject)

12. While the Subject was attempting to restrain the Service Recipient, the Service Recipient was struggling against the Subject's efforts, spitting at the Subject, hitting the Subject in the head with the closed fist of his free hand, and biting the Subject. While the Subject struggled with the Service Recipient on the floor, Staff A and Staff B became involved and assisted in the restraint. The Service Recipient continued to spit, hit and bite the Subject for approximately one minute before he calmed down and succumbed to the restraint. (Justice Center Exhibits 2, 14, 18: video of incident and 19: audio recording of Subject interrogation; Subjects Exhibits C, D, E, F, H, I and L; and Hearing testimony of the Subject)

13. The Subject was current with Crisis Prevention Management (CPM) training. (Justice Center Exhibit 17) Staff C was on "documented instruction" and, as such, he was not permitted to be involved in a restraint. (Justice Center Exhibits 2 and 19: audio recording of Subject interrogation; and Hearing testimony of the Subject)

14. Neither forward facing standing restraints nor pushing a Service Recipient backwards are approved or taught OCFS techniques. (Justice Center Exhibit 15 and Hearing testimony of [REDACTED], OCFS Assistant Director of Training)

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 (deliberate inappropriate use of restraints) 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:

"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:

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 an act, described as “Offense 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 1-17) The Justice Center also presented an audio recording of the Justice Center Investigator’s interrogation of the Subject (Justice Center Exhibit 19) and a visual only video of the incident. (Justice Center Exhibit 18) The investigation underlying the substantiated report was conducted by Justice Center Internal Investigator [REDACTED], who testified at the hearing on behalf of the Justice Center. OCFS Assistant Director of Training [REDACTED] also testified on behalf of the Justice Center.

The Subject testified in his own behalf and presented a number of documents. (Subject Exhibits A through M)

The Justice Center proved by a preponderance of the evidence that the Subject deliberately performed a restraint technique on the Service Recipient that was inconsistent with the generally accepted treatment practices in place at the OFCS at time of the incident.

The Justice Center contends that while a restraint was proper under the circumstances, the Subject used an inappropriate restraint technique that resulted in the Service Recipient falling to the floor and hitting his head. [REDACTED], OCFS Assistant Director of Training, testified in support

of the Justice Center's position stating that a forward restraint is not an approved technique, referring to the Subject's attempt to restrain the Service Recipient while facing him. (Justice Center Exhibit 15 and Hearing testimony of [REDACTED], OCFS Assistant Director of Training)

The Subject stated in his request for amendment, and he argued at the hearing, that he and the Service Recipient tripped over his chair as he was attempting to perform a single person standing restraint on the Service Recipient. (Justice Center Exhibit 2 and Hearing testimony of the Subject) However, in a written statement that he made as part of the Activity/Rule Violation/Incident Report, he stated that it was the Service Recipient's aggression and awkward positioning that caused them to fall to the floor (Justice Center Exhibit 14), and in the Subject's Justice Center interrogation, he stated that he was not sure whether he and the Service Recipient fell or tripped over the chair. (Justice Center Exhibit 19)

It is clear from the video evidence that, although the Subject did attempt to secure one of the Service Recipient's arms in an apparent attempt to perform a single person standing restraint on the Service Recipient, he was unsuccessful and ended up facing the Service Recipient with his hands on the Service Recipient's chest and the Service Recipient's hands on his chest. The record reflects that, at this point, the Subject should have backed away from the Service Recipient. (Hearing testimony of [REDACTED], OCFS Assistant Director of Training) It is also clear that, instead of backing away, the Subject then pushed the Service Recipient causing the Service Recipient to become off balance and fall backward to the floor. (Justice Center Exhibit 18: video of the incident)

Restraint is defined in Social Services law as "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. (SSL § 488(1)(d)) By grabbing the Service Recipient's forearm and pushing the Service Recipient backward, causing him to go off balance,

the Subject's actions limited the Service Recipient's ability to freely move his body. Therefore, the Subject's conduct constitutes a restraint as defined by law.

It is evident that the Subject's actions were deliberate insofar as he was attempting to move the Service Recipient away from the other staff. In his Justice Center interrogation, the Subject stated that it was his initial goal to push the Service Recipient away from Staff A, who was the target of the Service Recipient's aggression. The Subject further stated in the interrogation that he and the Service Recipient fell to the floor when he was trying to push the Service Recipient away. (Justice Center Exhibit 19)

It is concluded from the credible evidence in the record that the Subject attempted but failed to perform a standing restraint on the Service Recipient and, thereafter, the Subject intentionally pushed the Service Recipient with such force that it caused the Service Recipient to lose his balance and fall backward to the floor. It is further concluded that this technique was deliberately performed by the Subject and was not a technique that was either approved or taught by the OCFS.

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed abuse (deliberate inappropriate use of restraints). 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 abuse (deliberate inappropriate use of restraints).

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

This decision is recommended by John T. Nasci, Administrative Hearings Unit.

DATED: June 22, 2016
Schenectady, New York



John T. Nasci, ALJ