

**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**

Adjudication Case #:

[REDACTED]

Held at:

New York State Justice Center for the Protection
of People with Special Needs
2165 Brighton Henrietta Town Line Road
Rochester, New York 14623
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: Laurie Cummings, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: Robin Marable, Esq.
Legal Assistance of Western New York
1 West Main Street, Suite 400
Rochester, New York 14614

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject), for serious physical abuse, neglect and abuse (deliberate inappropriate use of restraints) against a Service Recipient. The Subject invoked an internal administrative review which was denied. An administrative hearing was then held, on [REDACTED], in accordance with the requirements of Social Services Law § 494 and Part 700 of 14 NYCRR.

PROCEDURAL HISTORY

The VPCR contains a substantiated report, [REDACTED], for serious physical abuse, neglect and abuse (deliberate inappropriate use of restraints) against a Service Recipient. The report was investigated by the Justice Center for the Protection of People with Special Needs (Justice Center). The substantiated report as against the Subject, dated [REDACTED], 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 dragged a service recipient by the ankles to the bathroom, causing physical injury to her and/or consciously disregarding a substantial and unjustifiable risk of injury or impairment to the service recipient.

This allegation has been SUBSTANTIATED as Category 1 serious physical abuse pursuant to Social Services Law § 493(4)(a).

Allegation 2

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect and/or abuse (deliberate inappropriate use of restraints) when you breached your duty to a service recipient by using the unapproved technique of dragging by the ankles to move the service recipient to the bathroom.

These allegations have been SUBSTANTIATED as Category 2 neglect and Category 2 abuse (deliberate inappropriate use of restraints) pursuant to Social Services Law § 493(4)(b). Justice Center Exhibit 1.

An Administrative Review was conducted at the request of the Subject to amend the report and the Justice Center Administrative Appeals Unit denied the request. On [REDACTED] a Hearing (the Hearing) was held.

The Administrative Law Judge issued a Recommended Decision after Hearing (Recommended Decision). The Recommended Decision recommended that the allegation of serious physical abuse remain substantiated as a Category 1 act and that the allegations of neglect and abuse (deliberate inappropriate use of restraints) remain substantiated, but recommended that these allegations be reduced from Category 2 acts to Category 3 acts. That Recommended Decision is rejected in part and adopted in part by the Executive Director pursuant to 14 NYCRR 700.13.

The Executive Director adopts the Recommended Decision insofar as it recommends that the allegation of serious physical abuse remain substantiated as a Category 1 act and that the allegations of neglect and abuse (deliberate inappropriate use of restraints) remain substantiated, and incorporates the attached Recommended Decision into this Final Determination and Order after Hearing to the extent that the Recommended Decision recommended that the allegations of serious physical abuse remain substantiated as a Category 1 act and that the allegations of neglect and abuse (deliberate inappropriate use of restraints) remain substantiated. The Executive Director rejects that portion of the Recommended Decision that recommended that the substantiated allegations of neglect and abuse (deliberate inappropriate use of restraints) be reduced from Category 2 acts to Category 3 acts and for the reasons set forth herein determines that the substantiated allegations of neglect and abuse (deliberate inappropriate use of restraints)

remain substantiated as Category 2 acts.

As the allegation of serious physical abuse in the Recommended Decision is being adopted and incorporated herein, in its entirety, for the reasons and Conclusions of Law set forth therein, and the allegations of neglect and abuse (deliberate inappropriate use of restraints) in the Recommended Decision are being adopted and incorporated herein, as to substantiation only, this Final Determination and Order after Hearing will only substantively address the appropriate category levels of the allegations of neglect and abuse (deliberate inappropriate use of restraints).

The following constitutes the Final Determination of the Executive Director under 14 NYCRR 700.13.

FINDINGS OF FACT

The Executive Director adopts the "Findings of Fact" set forth in the Recommended Decision and incorporates them herein.

DISCUSSION

The Justice Center has established by a preponderance of evidence that the Subject committed serious physical abuse as defined in Social Services Law § 488(1)(a) and that the serious physical abuse is properly categorized as a Category 1 offense under Social Services Law § 493(4)(a)(i), and that the Subject committed neglect and abuse (deliberate inappropriate use of restraints) as defined in Social Services Law § 488(1)(h) and (d) and that the neglect and abuse (deliberate inappropriate use of restraints) are properly categorized as Category 2 offenses under Social Services Law § 493(4)(b). As set forth above, as the Executive Director has adopted and incorporated the Recommended Decision insofar as it recommends that the allegation of serious physical abuse remain substantiated as a Category 1 act and also adopts and incorporates the Recommended Decision insofar as the Recommended Decision recommended that the

allegations of neglect and abuse (deliberate inappropriate use of restraints) remain substantiated. As such, this Final Determination and Order after Hearing will only substantively address the appropriate category levels of the allegations of neglect and abuse (deliberate inappropriate use of restraints).

Neglect and Abuse (Deliberate Inappropriate Use of Restraints)

Category 2 conduct is defined in Social Services Law § 493(4)(b). Category 3 conduct is defined in Social Services Law § 493(4)(c). As is relevant here, the Subject was substantiated for Category 2 conduct for neglect and abuse (deliberate inappropriate use of restraints) under Social Services Law § 488(1)(h) and (d) respectively.

As relevant to the present analysis, Social Services Law § 493(4)(b) and (c) define Category 2 and 3 conduct 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.
- (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.

As set forth in the Recommended Decision the Subject “grabbed each of the Service Recipient’s feet and pulled the Service Recipient from her bedroom across the hall to the bathroom while the Service Recipient was on her back. The Subject pulled the Service Recipient across a carpet in the hallway and a tiled floor in the bathroom.” Recommended Decision, Findings of Fact ¶ 8. As a result of this conduct on the part of the Subject the Service Recipient

sustained “rug burns all over [the Service Recipient’s] back, including two dime-sized burns that were bleeding. Recommended Decision, Findings of Fact ¶ 9.

The Recommended Decision also found that the Subject’s conduct in grabbing each of the Service Recipient’s feet and pulling the Service Recipient from her bedroom across the hall to the bathroom while the Service Recipient was on her back across a carpet and a tiled floor was intentional. Recommended Decision at page 9.

Additionally, the Recommended Decision found that, as a result of the Subjects intentional conduct, the Service Recipient sustained rug burns all over [the Service Recipient’s] back, including two dime-sized burns that were bleeding. Recommended Decision, Findings of Fact ¶ 9.

Moreover, the Recommended Decision found that the Subject committed Category 1 serious physical abuse, and in doing so found that the Service Recipient sustained “physical injury” as defined in penal law § 10.00 (9). Recommended Decision at page 9.

However, the Administrative Law Judge in the Recommended Decision recommended that the allegations of neglect and abuse (deliberate inappropriate use of restraints) remain substantiated, but that these allegations be reduced from Category 2 acts to Category 3 acts, essentially based on the nature of the injuries sustained by the Service Recipient.

In this regard the Recommended Decision states “ [t]he Subject’s conduct resulted in the Service Recipient suffering rug burns. However, there is no evidence in the record that the Service Recipient’s injuries required hospitalization or the assistance of a medical professional. The record reflects that the rug burns were treated using first aid which included cleaning the wounds and applying polysporin ointment to the wounds. The record also reflects that the abrasions were resolved without concern. (Hearing testimony of [REDACTED], [REDACTED]

Supervisor of Investigations) The only other evidence in the record concerning the Service Recipient's health, safety or welfare is the Service Recipient's diagnosis of osteoporosis. (Hearing testimony of [REDACTED], [REDACTED] Supervisor of Investigations) However, the Justice Center offered no evidence to establish the effect, if any, that the Subject's conduct had on the Service Recipient's osteoporosis condition or on any other condition of the Service Recipient.

Consequently, there is insufficient evidence in the record to establish that the Subject's conduct seriously endangered the health, safety or welfare of the Service Recipient."

Recommended Decision at page 11.

This rationale, contained in the Recommended Decision is rejected because it legally misconstrues the requirements of Social Services Law § 493(4)(b), as to Category 2 determinations and because, to the extent actual injuries sustained by a service recipient, while not required for Category 2 determination, can certainly contribute, in part to the basis of a Category 2 determination, the injuries sustained by the Service Recipient clearly were of the nature which could demonstrate that the Service Recipient's health, safety or welfare were seriously endangered by the Subject's conduct.

Social Services Law § 493(4)(b) provides in pertinent part, "[c]ategory 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." *Emphasis added.*

In other words, Social Services Law § 493(4)(b) focuses on conduct by custodians which seriously endangers the health, safety or welfare of a service recipient. In fact, a Category 2 finding here, does not necessitate any actual injury on the part of the Service Recipient. A Category 2 finding under Social Services Law § 493(4)(b) requires conduct on the part of a

custodian which endangers the health, safety or welfare of a service recipient.

The Recommended Decision recognized that the conduct of the Subject in grabbing each of the Service Recipient's feet and pulling the Service Recipient from her bedroom across the hall to the bathroom while the Service Recipient was on her back across a carpet and a tiled floor was intentional. Recommended Decision at page 9.

Not only was this conduct, on the part of the Subject intentional, but it was inexcusable and unnecessary. This conduct did in fact seriously endanger the health, safety or welfare of the Service Recipient, with or without a known diagnosis of osteoporosis.

Finally, as a result of the Subjects intentional conduct, the Service Recipient sustained rug burns all over [the Service Recipient's] back, including two dime-sized burns that were bleeding. Recommended Decision, Findings of Fact ¶ 9. Photographs of the injuries taken on the day of the incident, admitted into evidence at the Hearing, show the diffuse rug burns and areas of bleeding. Justice Center Exhibit 12. As set forth above, to the extent that an actual injury, while not required for a Category 2 determination, can certainly contribute, in part to the basis of a Category 2 determination, the injuries sustained by the Service Recipient clearly were of the nature which could demonstrate that the Service Recipient's health, safety or welfare were seriously endangered by the Subject's conduct.

Accordingly, based on the foregoing it is hereby:

ORDERED:

The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the

evidence to have committed serious physical abuse, neglect and abuse (deliberate inappropriate use of restraints).

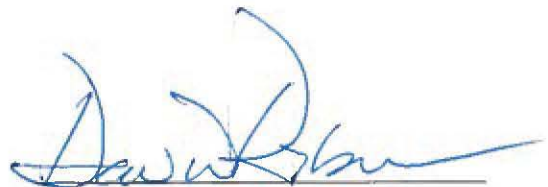
The substantiated report for the serious physical abuse is properly categorized as a Category 1 act.

The substantiated reports for neglect and abuse (deliberate inappropriate use of restraints) are properly categorized as Category 2 acts.

NOW THEREFORE IT IS DETERMINED that the record of this report shall be retained by the Vulnerable Persons' Central Register.

This decision is ordered by Davin Robinson, Chief of Staff, who has been designated by the Executive Director to make such decisions.

DATED: September 1, 2016
Delmar, New York



Davin Robinson
Chief of Staff

**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:

New York State Justice Center for the Protection
of People with Special Needs
2165 Brighton Henrietta Town Line Road
Rochester, New York 14623
On: [REDACTED]

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
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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
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By: Laurie Cummings, Esq.

[REDACTED]
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By: Robin Marable, Esq.
Legal Assistance of Western New York
1 West Main Street, Suite 400
Rochester, New York 14614

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and 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] [REDACTED] of abuse and 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] [REDACTED], while acting as a custodian, you committed physical abuse when you dragged a service recipient by the ankles to the bathroom, causing physical injury to her and/or consciously disregarding a substantial and unjustifiable risk of injury or impairment to the service recipient.

This allegation has been SUBSTANTIATED as Category 1 serious physical abuse pursuant to Social Services Law § 493(4)(a).

Allegation 2

It was alleged that on [REDACTED] at the [REDACTED], located at [REDACTED] [REDACTED], while acting as a custodian, you committed neglect and/or abuse (deliberate inappropriate use of restraints) when you breached your duty to a service recipient by using the unapproved technique of dragging by the ankles to move the service recipient to the bathroom.

These allegations have been SUBSTANTIATED as Category 2 neglect and Category 2 abuse (deliberate inappropriate use of restraints) 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 [REDACTED] is an [REDACTED] for adults with developmental disabilities, and is operated by [REDACTED]. [REDACTED] is certified by the New York State Office for People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. The [REDACTED] was a residence for six service recipients. (Hearing Testimony of [REDACTED] Director of Quality Assurance [REDACTED])

5. At the time of the alleged abuse and neglect, the Subject was employed by [REDACTED] as a Direct Support Professional (DSP), and had been employed by [REDACTED] in this capacity for approximately fifteen years preceding the date of the alleged abuse and neglect. As a DSP, the Subject's duties included providing for the daily care and supervision of service recipients who reside at the [REDACTED] (Hearing testimony of the Subject).

6. At the time of the alleged abuse and neglect, the Service Recipient was fifty years of age, and had been a resident of the facility for approximately fifteen years. The Service Recipient is an adult female with diagnoses of mental retardation (profound) and multiple seizure disorder. (Justice Center Exhibit 13)

7. On [REDACTED], DSP [REDACTED] and DSP [REDACTED] were working at the [REDACTED]. Before breakfast at approximately 10:45 a.m., DSP [REDACTED] was with the Service Recipient in the Service Recipient's bedroom getting ready to take the Service Recipient to the shower. The Service Recipient resisted DSP [REDACTED] efforts to get her to go to the bathroom for a shower by

sitting down on the floor and screaming. The Subject came into the Service Recipient's bedroom in response to DSP [REDACTED] request for help. (Justice Center Exhibits 8, 9 and 10 and Hearing testimony of the Subject)

8. The Subject first attempted to lift the Service Recipient off the floor by putting her arms under the arms of the Service Recipient and lifting. However, the Subject was unable to get the Service Recipient off the floor. The Subject then grabbed each of the Service Recipient's feet and pulled the Service Recipient from her bedroom across the hall to the bathroom while the Service Recipient was on her back. The Subject pulled the Service Recipient across a carpet in the hallway and a tiled floor in the bathroom. Once the Service Recipient was in the bathroom, the Subject left the bathroom and went back to the Service Recipient's bedroom to tell DSP [REDACTED] that the Service Recipient was ready for a shower. (Justice Center Exhibits 8, 9 and 10 and Hearing testimony of the Subject)

9. When DSP [REDACTED] returned to the bathroom, she found the Service Recipient still on the floor. After DSP [REDACTED] removed the Service Recipient's clothing in preparation for the shower, she noticed rug burns all over the Service Recipient's back, including two dime-sized burns that were bleeding. After completing the shower, DSP [REDACTED] went to DSP [REDACTED] and told him about the rug burns on the Service Recipient's back. (Justice Center Exhibits 9, 10, 11 and 12)

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 neglect of a person in a facility or provider agency is defined by SSL § 488(1)(a), (d) and (h), 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.

(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.

(h) "Neglect," which shall mean any action, inaction or lack of attention that breaches a custodian's duty and that results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition

of a service recipient. Neglect shall include, but is not limited to: (i) failure to provide proper supervision, including a lack of proper supervision that results in conduct between persons receiving services that would constitute abuse as described in paragraphs (a) through (g) of this subdivision if committed by a custodian; (ii) failure to provide adequate food, clothing, shelter, medical, dental, optometric or surgical care, consistent with the rules or regulations promulgated by the state agency operating, certifying or supervising the facility or provider agency, provided that the facility or provider agency has reasonable access to the provision of such services and that necessary consents to any such medical, dental, optometric or surgical treatment have been sought and obtained from the appropriate individuals; or (iii) failure to provide access to educational instruction, by a custodian with a duty to ensure that an individual receives access to such instruction in accordance with the provisions of part one of article sixty-five of the education law and/or the individual's individualized education program.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Categories (1, 2 and 3), which are defined as follows:

- (a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:
 - (i) intentionally or recklessly causing physical injury as defined in subdivision nine of section 10.00 of the penal law, or death, serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, or consciously disregarding a substantial and unjustifiable risk that such physical injury, death, impairment or loss will occur;
- (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.
- (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 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 neglect as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

If the Justice Center proves the alleged abuse and 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 neglect cited in the substantiated report constitutes the category of abuse and neglect as set forth in the substantiated report.

If the Justice Center did not prove the abuse and 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 in “Allegation 1” and “Allegation 2” of the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-19) The investigation underlying the substantiated report was conducted by [REDACTED], [REDACTED] Quality Assurance Coordinator/Primary Investigator. (Justice Center Exhibit 7) [REDACTED] Supervisor of Investigations ([REDACTED] supervisor), was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and provided one exhibit containing various documents. (Subject Exhibit A)

The facts are largely undisputed and the Subject admitted in her [REDACTED] written statement, and in her hearing testimony, that she pulled the Service Recipient by the her feet across the carpeted floor of the hallway from the Service Recipient’s bedroom to the tiled floor of the bathroom. However, the Subject denies that she left the Service Recipient alone after she dragged

her into the bathroom. (Justice Center Exhibit 8 and Hearing testimony of the Subject)

Physical Abuse

The Justice Center proved by a preponderance of the evidence that the Subject committed physical abuse of the Service Recipient. Specifically, the evidence establishes that the Subject dragged the Service Recipient by her feet across a carpeted floor causing rug burns on the Service Recipient's back.

To prove physical abuse the Justice Center must first establish that the Subject's conduct was intentional or reckless. Such conduct is defined as including dragging. (SSL §488(1)(a)) The terms "intentional" and "reckless" are defined by Penal Law. (SSL §488(16) and PL 15.05(1) and (3)) The term "intentionally" is defined by Penal Law as follows: "A person acts intentionally with respect to a result or to conduct ... when his conscious objective is to cause such result or to engage in such conduct." (PL 15.05(1)) The record reflects that the Subject made a conscious decision to engage in the conduct of dragging the Service Recipient by her legs several feet across a carpeted floor, for the purpose of moving the Service Recipient from her bedroom to the bathroom. The Subject then proceeded to drag the Service Recipient in such a manner. Consequently, the Subject intentionally dragged the Service Recipient.

The Justice Center must next prove that the Subject's intentional conduct caused, "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." The record reflects that the Subject's conduct constitutes physical contact between the Subject and the Service Recipient, and that the Subject's conduct resulted in physical injury to the Service Recipient, namely, rug burns on her back.

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 with respect to the allegation of physical abuse will not be amended or sealed.

Although the report with respect to the allegation of physical abuse will remain substantiated, the next question to be decided is whether it constitutes the category of abuse set forth in the substantiated report. The report was substantiated Category 1 physical abuse. To prove Category 1 conduct, the Justice Center must establish that the Subject's conduct was "serious physical abuse", which is defined as including "intentionally or recklessly causing physical injury." (SSL §493(4)(a)(i)) Social Services Law refers to the Penal Law for the definition of the term "injury" which is defined therein as "impairment of physical condition or substantial pain." (SSL §493(4)(a)(i) and PL §10.00(9))

The Subject's conduct was intentional (see analysis above), and resulted in the Service Recipient suffering rug burns on her back, which constitute an impairment of the Service Recipient's physical condition. Therefore, based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report, with respect to the allegation of physical abuse, is properly categorized as a Category 1 act.

Abuse (Deliberate Inappropriate Use of Restraints)

The Justice Center proved by a preponderance of the evidence that the Subject committed abuse (deliberate inappropriate use of restraints) of the Service Recipient. Specifically, the evidence establishes that the Subject's conduct, dragging the Service Recipient by her feet across a carpeted floor causing rug burns on the Service Recipient's back, was a restraint as defined by law, was not a procedure that was approved for the Service Recipient and was not necessary as a reasonable emergency intervention.

To prove abuse (deliberate inappropriate use of restraints), the Justice Center must first

establish that the Subject used a restraint on the Service Recipient. 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 feet and pulling her across the floor, the Subject used a manual measure that limited the Service Recipient’s ability to move her body freely. Consequently, the Justice Center has sufficiently established that the Subject’s conduct constitutes a restraint.

The Justice Center must next establish that the restraint was “deliberately inconsistent with [the] Service Recipient’s individual treatment plan or behavioral intervention plan, generally accepted treatment practices ... except when the restraint is used as a reasonable emergency intervention ...” (SSL § 488 (1)(d)) The record reflects that the subject’s conduct did not conform to any of the Service Recipient’s individual plans and policies or to any facility policies. (Justice Center Exhibits 13, 14 and 15; and Hearing testimony of [REDACTED]) Furthermore, the record contains no evidence that the Subject’s conduct was a necessary emergency intervention. Indeed, the Subject admitted that, immediately before dragging the Service Recipient across the floor, she could have and should have walked away from the Service Recipient. (Hearing testimony of the Subject)

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 (deliberate inappropriate use of restraints) alleged. The substantiated report with respect to the allegation of abuse (deliberate inappropriate use of restraints) will not be amended or sealed.

Although the report with respect to the allegation of abuse (deliberate inappropriate use of restraints) will remain substantiated, the next question to be decided is whether it constitutes the

category of abuse set forth in the substantiated report. The report was substantiated a Category 2 abuse (deliberate inappropriate use of restraints). To prove Category 2 conduct, the Justice Center must establish that Subject's conduct "seriously endanger[ed] the health, safety or welfare of [the] Service Recipient ..." (SSL §493(4)(b))

The Subject's conduct resulted in the Service Recipient suffering rug burns. However, there is no evidence in the record that the Service Recipient's injuries required hospitalization or the assistance of a medical professional. The record reflects that the rug burns were treated using first aid which included cleaning the wounds and applying polysporin ointment to the wounds. The record also reflects that the abrasions were resolved without concern. (Hearing testimony of [REDACTED] Supervisor of Investigations) The only other evidence in the record concerning the Service Recipient's health, safety or welfare is the Service Recipient's diagnosis of osteoporosis. (Hearing testimony of [REDACTED], [REDACTED] Supervisor of Investigations) However, the Justice Center offered no evidence to establish the effect, if any, that the Subject's conduct had on the Service Recipient's osteoporosis condition or on any other condition of the Service Recipient.

Consequently, there is insufficient evidence in the record to establish that the Subject's conduct seriously endangered the health, safety or welfare of the Service Recipient.

Therefore, based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report, with respect to the allegation of abuse (deliberate inappropriate use of restraints), does not rise to the level of Category 2, but instead is properly categorized as a Category 3 act.

Neglect

The Justice Center proved by a preponderance of the evidence that the Subject committed

neglect of the Service Recipient. Specifically, the evidence establishes that the Subject breached her duty to the Service Recipient by dragging the Service Recipient by her feet across a carpeted floor, and that the Subject's breach of duty resulted in the Service Recipient suffering rug burns on her back.

To prove neglect the Justice Center must establish that the Subject breached "a custodian's duty and that result[ed] in or is likely to result in physical injury ..." (SSL §488(1)(h))

The record establishes that neither the facility policies nor the Service Recipient's plans provided or allowed for moving or transporting the Service Recipient by dragging her by her feet across a floor. Therefore, the Subject's unauthorized conduct constitutes a breach of her custodian's duty to the Service Recipient. Furthermore, the Subject's conduct resulted in physical injury to the Service Recipient, namely rug burns to the Service Recipient's back.

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 neglect alleged. The substantiated report with respect to the allegation of neglect will not be amended or sealed.

Although the report with respect to the allegation of neglect will remain substantiated, the next question to be decided is whether it constitutes the category of neglect set forth in the substantiated report. The report was substantiated a Category 2 neglect. To prove Category 2 conduct, the Justice Center must establish that Subject's conduct "seriously endanger[ed] the health, safety or welfare of [the] Service Recipient ..." (SSL §493(4)(b))

For the reasons stated in the abuse (deliberate inappropriate use of restraints) analysis above, there is insufficient evidence in the record to establish that the Subject's conduct seriously endangered the health, safety or welfare of the Service Recipient. Therefore, based upon the totality of the circumstances, the evidence presented and the witnesses' statements, and for the

reasons stated above, it is determined that the substantiated report, with respect to the allegation of neglect, does not rise to the level of Category 2, but instead is properly categorized as a Category 3 act.

DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] with respect to Allegation 1, be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed the physical abuse alleged.

The substantiated report is properly categorized, as a Category 1 act.

The request of [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] with respect to Allegation 2, be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed the abuse (deliberate inappropriate use of restraints) and neglect alleged.

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

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

DATED: July 19, 2016
Schenectady, New York

A handwritten signature in dark ink, consisting of a large, stylized 'J' followed by a horizontal line and a small 'N'.

John T. Nasci, ALJ