

**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: Benjamin Greenwald, Esq.
121 Executive Drive, Suite 200
New Windsor, New York 12553

██████████

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) and physical abuse.

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

NOW, THEREFORE, IT IS DETERMINED that the record of this report shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(c).

This decision is ordered by David Molik, Director of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

DATED: August 24, 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:

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
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Appearance Waived

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By: Christopher Mirabella, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By: Benjamin Greenwald, Esq.
121 Executive Drive, Suite 200
New Windsor, New York 12553

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] [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 2¹

It was alleged that on [REDACTED], at the [REDACTED] in a van outside unit [REDACTED] located at [REDACTED], while acting as a custodian, you committed abuse (deliberate inappropriate use of restraints) when you used an unapproved technique to restrain a service recipient.

This allegation has been SUBSTANTIATED as Category 3 abuse (deliberate inappropriate use of restraints), pursuant to Social Services Law § 493(4)(c).

Allegation 3

It was alleged that on [REDACTED], at the [REDACTED] in a van outside unit [REDACTED] located at [REDACTED], while acting as a custodian, you committed physical abuse when you grabbed and shook a service recipient while yelling that you would kill him.

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

¹ Allegation 1 was unsubstantiated.

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

4. The facility, located at [REDACTED] is a secure residential facility for adjudicated youth, and is operated by the Office of Children and Family 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, the Subject had been employed by OCFS since [REDACTED] 2004. The Subject had worked at [REDACTED] for more than eight years as a Youth Counselor II. In addition, on the date of the incident the Subject was Administrator Of the Day (AOD). (Hearing testimony of Subject)

6. At the time of the alleged abuse, the Service Recipient was 15 years of age, and had been a resident of the facility for an unknown period of time. The Service Recipient is a young person with attention deficit hyperactivity disorder (ADHD) and unknown mental health diagnoses. (Justice Center Exhibit 6)

7. During the afternoon of [REDACTED], the Service Recipient engaged in an altercation with another service recipient while in Unit [REDACTED] of the facility. As a result, the Service Recipient was escorted to an agency van in preparation for being transported to Central Services Unit (CSU). (Justice Center Exhibits 6 and 22)

8. Several staff members responded to the incident, including the Subject, who stood near the passenger side doors of the van speaking to another staff person. At that point, the Service Recipient opened the doors, and the Subject lunged into the van, grabbed the Service Recipient and pushed him onto the seat. The Subject laid on top of the Service Recipient, holding him down and yelling that he would “fucking kill” the Service Recipient. (Hearing testimony of [REDACTED])

██████████ and Justice Center Exhibits 20, 21, and 22)

9. Several staff members told the Subject to calm down, and to get off the Service Recipient; but the Subject continued to pin the Service Recipient to the seat and yell at him until the Subject was pulled off of the Service Recipient by another staff person. The Subject admitted to behaving inappropriately and to losing control of himself. (Hearing testimony of Subject, Hearing testimony ██████████ and Justice Center Exhibits 19, 20, 21, and 22)

ISSUES

- Whether the Subject has been shown by a preponderance of the evidence to have committed the act or acts giving rise to the substantiated report.
- Whether the substantiated allegations constitute abuse and/or neglect.
- Pursuant to Social Services Law § 493(4), the category of abuse and/or neglect that such act or acts constitute.

APPLICABLE LAW

The Justice Center is responsible for investigating allegations of abuse and/or neglect in a facility or provider agency. (SSL § 492(3)(c) and 493(1) and (3)) Pursuant to SSL § 493(3), the Justice Center determined that the initial report of abuse and neglect presently under review was substantiated. A “substantiated report” means a report “... wherein a determination has been made as a result of an investigation that there is a preponderance of the evidence that the alleged act or acts of abuse or neglect occurred...” [Title 14 NYCRR 700.3(f)]

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

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 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 and/or neglect 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 “Allegation 2” and “Allegation 3” 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 1-18 and 23) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED]. Supervising Investigator [REDACTED] and former Unit Clinician [REDACTED] testified at the hearing on behalf of the Justice Center. The Subject testified in his own behalf and provided no other evidence.

The Justice Center submitted a visual only video of the incident, and audio recordings of interviews with witnesses, as well as the audio recording of the interrogation of the Subject, which were extremely helpful and illuminating evidence with respect to the substantiated allegations. (Justice Center Exhibits 19-22)

The Justice Center proved by a preponderance of the evidence that the Subject committed abuse when he pinned the Service Recipient onto the back seat of the agency van and threatened to kill him. Specifically, the evidence establishes that the Subject’s acts constitute both abuse (deliberate inappropriate use of restraints) and physical abuse of the Service Recipient.

Deliberate Inappropriate Use of Restraints

In order to show abuse (deliberate inappropriate use of restraints), the Justice Center must prove by a preponderance of the evidence that either the technique used, the amount of force 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, and limits the ability of a person

receiving services to freely move his or her arms, legs or body. (SSL § 488(1)(d)) OCFS policy limits the use of restraints to very specific situations: “(i) Where emergency physical intervention is necessary to protect the safety of any person; or (ii) Where a youth is physically attempting to AWOL/escape the boundary of the facility; or (iii) Where a youth is physically attempting to AWOL/escape from custody while off-grounds.” (Justice Center Exhibit 15)

The Subject contends that he was justified in restraining the Service Recipient as an emergency intervention in order to protect other staff. The Subject described the Service Recipient as violent, trying to push by the Subject, telling the Subject to get out of his way or he would hit the Subject. The Subject testified at the hearing that he believed that all the other staff had gone into the building, and that he had no choice but to push the Service Recipient down on the van seat and hold him down. (Hearing testimony of Subject)

However, the other witnesses’ statements do not support this contention. The other witnesses to the incident consistently describe the Service Recipient as being subdued and quiet as he was sitting in the van. None of the other witnesses heard the Service Recipient threaten to hit the Subject, or say anything at all. All the witnesses heard the Subject threaten the Service Recipient. (Hearing testimony of [REDACTED] and Justice Center Exhibits 6, 20, and 21) Additionally, the surveillance video showed three other staff near the vehicle as the Subject lunged into the van. These witnesses all stated that they told the Subject to calm down, and to get off the Service Recipient. In fact, YDA Blue had to pull the Subject off the Service Recipient. Therefore, the Subject’s testimony was not credited. (Justice Center Exhibits 6, 7, 8, 19, 20, and 22)

Despite the fact that the Service Recipient opened the van doors, there was no evidence corroborating the Subject’s contention that it was an emergency situation where he had to act in

order to protect others. Nor was there any evidence that the Service Recipient was attempting to go AWOL. Therefore, the Subject violated OCFS policy when he restrained the Service Recipient by pinning him to the seat of the vehicle.

The Justice Center also presented evidence that the amount of force used was not consistent with OCFS policy. The Subject was trained in Crisis Prevention and Management (CPM) techniques in [REDACTED]. (Justice Center Exhibit 23) Pursuant to CPM, “staff will only use the amount of force necessary to stabilize the situation and only after attempting to use non-physical means to assist youth in managing their behavior and affect.” (Justice Center Exhibit 18, at page 48) The surveillance video shows the Subject reacting immediately when the van doors open, by lunging into the vehicle without hesitation. (Justice Center Exhibit 22). There was no attempt to speak with the Service Recipient, or to otherwise try to de-escalate the situation. OCFS policy clearly outlines the steps staff must take prior to engaging in physical restraint including remaining calm and demonstrating emotional control, stopping at the lowest level of intervention that is effective, and exhausting all non-physical behavior management techniques before employing physical measures. (Justice Center Exhibit 15) The Subject did not follow any of those steps. Instead, the Subject lunged at the Service Recipient, pinned him to the seat of the van, and used his body weight to keep the Service Recipient from freely moving, all in contravention of OCFS policy. (Justice Center Exhibit 15)

In his defense, the Subject asserts that he was not offered refresher training in CMP in more than one year prior to the date of the incident. Employees are mandated to have refresher training twice per year. If the Subject had not completed the requisite refreshers, then he was not authorized to conduct physical restraints, thereby making his action a deliberate inappropriate use of restraints. (Justice Center Exhibit 15)

Physical Abuse

In order to prove physical abuse, the Justice Center must show by a preponderance of the evidence that while acting as a custodian, the Subject had physical contact with the Service Recipient; that such contact was either intentional or reckless; and that such contact caused either physical injury or serious or protracted impairment of the Service Recipient's emotional condition; or the likelihood of either an injury or impairment. (SSL § 488(1)(a))

Here, there is no dispute as to whether the Subject was acting as a custodian. The Subject was on duty as the AOD when he responded to the incident. Additionally, there is no dispute as to whether there was physical contact. The Subject admitted to pushing the Service Recipient onto the seat of the van, pinning him to the seat, and holding his arms. The Subject also admitted that he acted with the intent of preventing the Service Recipient from exiting the vehicle. (Justice Center Exhibit 6, Hearing testimony of Subject, and Hearing testimony of [REDACTED] [REDACTED])

There is also no dispute between the parties that the Service Recipient was not physically injured by the Subject's actions. Rather, the parties dispute whether there was a likelihood of either physical injury, or a serious or protracted impairment of the Service Recipient's physical, mental or emotional condition. The Subject threatened to kill the Service Recipient while immobilizing the Service Recipient's arms and pinning him to the van's seat. The Subject had to be pulled off of the Service Recipient after he failed to calm down on his own accord. The record reflects that after the incident, the Service Recipient was shaken, trembling, and crying. (Justice Center Exhibits 6, 20, 21, and 22; and Hearing testimony of [REDACTED] [REDACTED] Based on the record, it is likely that the Service Recipient would suffer from a serious or protracted impairment of his physical, mental or emotional condition as a result of this incident.

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.

Although the report will remain substantiated, 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] 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) and physical abuse.

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

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

DATED: August 16, 2016
Schenectady, New York



Jean T. Carney
Administrative Law Judge