

**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: Juliane O'Brien, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: Claire T. Sellers, Esq.
Associate Counsel
New York State Unified Teachers
270 Essjay Road
Williamsville, New York 14221-8276

The Findings of Fact and Conclusions of law are incorporated from the Recommendations of the presiding Administrative Law Judge's Recommended Decision.

ORDERED:

The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED] be amended and sealed is denied.

The Subject has been shown by a preponderance of the evidence to have committed physical abuse and abuse (deliberate inappropriate use of restraints).

The substantiated report is properly categorized as a Category 2 act.

NOW, THEREFORE, IT IS DETERMINED that reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years. The record of these reports shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(b).

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: April 5, 2017
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:

Mary Jo Lattimore-Young
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
Administrative Hearings Unit
1200 East and West Road
West Seneca, New York 14224
On: [REDACTED]

Parties:

Vulnerable Persons' Central Register
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By: Juliane O'Brien, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

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Williamsville, New York 14221-8276

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for physical abuse and 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 physical abuse and 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:

Allegation 1

It was alleged that on [REDACTED], in a classroom at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed physical abuse and/or other abuse (deliberate inappropriate use of restraints) when you conducted a restraint with excessive force and improper technique, which included unnecessarily escalating a confrontation with a service recipient, taking the service recipient down to the ground by her head and using your arms and body weight to apply pressure to her face, causing injury to her lip, face and thigh.

This allegation has been SUBSTANTIATED as Category 2 physical abuse 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 [REDACTED] is located at [REDACTED] and is approved by the New York State Education Department, which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. The [REDACTED] is a special educational institution for kindergarten through twelfth grade students who are at risk, exhibit challenging behaviors and possess other emotional, intellectual and/or developmental challenges. (Hearing testimonies of [REDACTED] Principal [REDACTED], Justice Center Investigator [REDACTED] and [REDACTED] Training Coordinator [REDACTED])

5. At the time of the incident, the [REDACTED] had a non-traditional Intensive Behavioral Classroom (IBC) that had a separate therapy room located off of the main classroom. During IBC classes, disruptive students were routinely removed from the classroom setting and sent to the therapy room to independently de-escalate their behaviors. (Hearing testimonies of the Subject, Teacher 1 and Justice Center Investigator [REDACTED]; and Justice Center Exhibit 4)

6. The [REDACTED] is located on the same grounds as the [REDACTED], which is operated by [REDACTED], a separate and privately owned entity. The [REDACTED] and [REDACTED] coordinate their student services. Some of the students reside in cottages located on the [REDACTED] grounds and are able to walk to their classrooms to attend school. (Hearing testimonies of the [REDACTED] Training Coordinator and the [REDACTED] Principal)

7. At the time of the alleged abuse, the Subject had been employed by the [REDACTED] for over eighteen years. The Subject worked as an Internal Suspension Aide, responsible for supervising students, monitoring school cameras, providing oversight of in-school suspensions,

as well as handling routine tasks and other job duties. During the summer school session, the Subject, on [REDACTED], was working from 8:00 a.m. to 2:00 p.m. in the non-traditional Intensive Behavioral Classroom (IBC), along with Teacher 1 and the Teacher's Aide. The Subject had access to the school's public announcement system (PA) from his office, which was located off of the IBC room and adjacent to the therapy room. (Hearing testimony of the Subject; Justice Center Exhibits 4 and 11)

8. At the time of the incident, the Subject weighed approximately 240 pounds, stood 6'1" tall, was familiar with the Service Recipient's Individual Safety and Support Plan (ISSP) and had received annual training in Therapeutic Crisis Intervention (TCI). (Hearing testimonies of the Subject, [REDACTED] Training Coordinator and the [REDACTED] Principle; Justice Center Exhibits 4, 9 and 12)

9. TCI sets forth the approved physical intervention techniques to be used when appropriate at the [REDACTED]. TCI techniques facilitate crisis prevention and de-escalation of a potential crisis, manage physical behavior, reduce actual and potential injury to service recipients and staff, as well as teach coping skills to service recipients. Staff are expected to use non-physical de-escalation techniques as an alternative to physical intervention. Under TCI, physical intervention can only be utilized after best efforts to utilize less intrusive methods have been unsuccessful and when necessary to ensure the safety of service recipients and others. Should physical intervention become necessary, it must be therapeutic and follow a number of specific authorized procedures. These procedures include assessing the environmental situation so as to not increase the possibility of harm, assuring there is adequate staffing to employ a hold, remaining calm, using the minimum amount of force necessary to ensure safety and making every effort to employ the least restrictive hold. (Justice Center Exhibits 9 and 9a)

10. TCI specifies that when dealing with physical violence, staff's options include eliminating one of the elements of the violent situation, such as removal of the target or trigger to the violence; making a directive statement that "clearly communicates that the violence must stop;" using releases or protective interventions, if necessary and "maintain[ing] a safe distance with a protective stance;" leaving the situation to obtain assistance and employing those physical restraint techniques indicated on the individual crisis management plan that have been determined to be the "least risky intervention at that moment." (Testimony of [REDACTED] Training Coordinator; Justice Center Exhibits 6, 9 and 9a)

11. Moreover, TCI indicates that there are notable situations that may be indicative of the use of a physical restraint, but should be avoided at all cost, even if an imminent risk of harm may exist. These notable situations involve those occasions when staff become angry or over-reacts; and/or when a service recipient threatens bodily harm to staff who becomes the target of the service recipient's aggression; and/or when a service recipient has a medical condition such as asthma that would be aggravated by a physical restraint. Additionally, Section 5.2 of the TCI Student Workbook, entitled "Safety Concerns," specifically states that staff is to consider the dangers of asphyxia during a physical restraint on a floor and that staff should not "...place their weight or put pressure on the young person's back, stomach, or torso, or place the young person in a position that restricts breathing..." (Hearing testimony of [REDACTED] Training Coordinator; Justice Center Exhibits 9 and 9a)

12. At the time of the alleged abuse, the Service Recipient was attending summer school in the IBC. She was an intelligent fifteen year old ninth grader at the [REDACTED] who wore glasses, spoke fluent spanish and had been a student there since [REDACTED] 2014. The Service Recipient stood approximately 5'7" tall and had an above average weight for a student of

her age. She resided in one of the campus cottages and was able to walk to the IBC with a staff escort. The Service Recipient had been diagnosed with a history of asthma, kidney stones and conduct disorder. The Service Recipient has an [REDACTED] ISSP and [REDACTED] Individualized Education Plan (IEP). (Hearing testimonies of Subject, Teacher 1, [REDACTED] [REDACTED] Principal and Justice Center Investigator [REDACTED]; Justice Center Exhibits 4, 6 and 8; and Justice Center Exhibit 13: an audio recording of the Service Recipient's interview)

13. The Service Recipient's [REDACTED] ISSP specifically noted that she had a history of asthma, kidney stones and that her conduct disorder was a safety concern. The ISSP referenced the Service Recipient's history of being absent without leave (AWOL) and engaging in difficult behaviors, such as yelling, swearing, making threats, physical aggression, throwing items or flipping desks. The ISSP further noted that in order to address the Service Recipient's outbursts or violence, staff were required to properly utilize a two-person TCI physical restraint technique. The ISSP also noted that staff can protect themselves or others from harm by first considering the type of hold to be used and then ensuring that the area to be used to conduct a physical intervention is a safe one. (Justice Center Exhibits 4, 6 and 8)

14. The Service Recipient's ISSP noted that her agitation can be triggered by the tone of another person's voice and her feeling that people are not listening to her or believing her. The Service Recipient's ISSP explained the many stages of a behavioral episode and specifies what specific intervention strategies staff should undertake to address her behavioral issues at each stage. When the Service Recipient is angry ("Triggering/Agitation" mode), her ISSP required staff to prompt or encourage the Service Recipient to "take five" (meaning relax or take a five minute break) and that the Service Recipient will talk when she is ready but "...likes to be left alone until then..." The ISSP directed staff to consider placing her in a separate location (such as the therapy

room), to use a calm voice, to use TCI de-escalating techniques, such as a “caring gesture” when appropriate, and to re-direct her focus. When the Service Recipient’s behavior escalated or became aggressive, her ISSP noted that staff should use management techniques, such as calling specific staff listed in her ISSP to assist in de-escalating the behavior. (Hearing testimonies of the Subject, Justice Center Investigator [REDACTED]; Justice Center Exhibits 4, 6, 9 and 9a)

15. In the morning of [REDACTED], the Service Recipient was in the IBC with about four or five other students. At approximately 11:55 a.m., the Service Recipient became disruptive and sat on top of her desk located in the rear of the classroom. The Subject and other staff asked her to go into the therapy room, but she refused to do so. Following protocol, the Teacher’s Aide began to remove and escort the other students out of IBC through the front door. A few minutes later, the Subject and Teacher 1 stood near the Service Recipient who was still sitting on her desk and they asked her again to go into the therapy room. The Service Recipient got off of the desk and proceeded to walk towards the therapy room. She then sat on the floor outside the therapy room door with her back against the wall. (Justice Center Exhibit 13: non-audio DVD footage at 12:03:11:703¹) The Subject and Teacher 1 approached the Service Recipient from the front at different sides, grabbed her under the arms, then lifted the Service Recipient in the “yoke” position from the floor. The Subject and Teacher 1 then proceeded to drag the struggling Service Recipient into the therapy room. Both staff then came out of the therapy room and closed the door.² During the transfer into the therapy room, the Service Recipient spat in Teacher 1’s face. Teacher 1 then left the IBC to wash his face and did not return until after the Subject had physically restrained the

¹ The references herein to the DVD video footage represent actual or real time designations located in the upper left corner of the video recorder screen.

² The “yoke” is a team prone restraint technique where two assisting adults approach the young person from either side to eventually slide their free hand under the young person’s armpit. This is TCI maneuver is described in detail on page 10 of “Module Five: Safety Intervention of the Therapeutic Crisis Intervention Activity Guide.” (Justice Center Exhibit 9a)

Service Recipient by himself. (Hearing testimony of the Subject; Justice Center Exhibits 4, 9, 9a and 13)

16. Minutes later, while the Service Recipient was still in the therapy room, the other students began to come back into IBC with the Teacher's Aide. The Service Recipient came out of the therapy room and began walking quickly along the IBC's wall headed towards the Subject's office, which was located next to the therapy room. The Teacher's Aide ran towards the Service Recipient. The Subject began running behind the Service Recipient, touching her right shoulder, grabbing and pulling her right arm from behind. The Service Recipient kept pushing the Subject away from her and continued to walk forward. The Service Recipient stopped walking and stood with her back near a desk. (Justice Center Exhibit 13: non-audio DVD footage at 12:04:42:468)

17. When he reached the desk, the Subject stood in a confrontational face to face stance with the Service Recipient and with his legs spread apart and arms crossed holding a "walkie talkie" in one hand. (Justice Center Exhibits 9 and 9a) The Subject tried to speak to the Service Recipient, but the Service Recipient was visibly angry and shouted something at him. The Subject called for assistance on the "walkie talkie." (Justice Center Exhibit 13: non-audio DVD footage at 12:04:49:140) The Subject moved closer into the Service Recipient's left side, then touched her left shoulder. (Justice Center Exhibit 13: non-audio DVD footage at 12:05:10:234) The Service Recipient stepped away from the Subject, then turned to her left to face the Subject where she continued to shout at him. (Justice Center Exhibit 13: non-audio DVD footage at 12:05:13:437) At that time, the Subject and Service Recipient were face to face. The Subject continued to step closer towards the Service Recipient, while continuing to talk to her and pointing towards the therapy room. The Service Recipient was agitated and kept backing away from the Subject. The Subject attempted TCI "caring gestures" by placing his hand on the Service Recipient's left arm

or back with his right hand. However, the Service Recipient continued to back away from him. (Justice Center Exhibit 13: non-audio video footage at 12:05:19:031 to 12:05:21:437) The Subject then stepped away from the Service Recipient and tried to speak to her as he leaned against a nearby desk with a more relaxed stance with ankles crossed. The Service Recipient remained nearby. Shortly thereafter, the Subject again proceeded to move closer toward the Service Recipient on a face to face basis. The Service Recipient warned the Subject that she was going to punch him if he did not stop touching her. The Subject continued to speak to the agitated Service Recipient and again pointed to the therapy room as he continued to move closer towards her on a face to face basis. The Service Recipient then swiftly swung her right arm and punched the Subject in the face. (Justice Center Exhibit 13: non-audio video footage at 12:05:45:984)

18. Within seconds, the Subject reacted to the Service Recipient's punch by grabbing her right wrist/arm and placing his left forearm/hand around the back of her head/neck and swung her down to the carpeted floor. The Subject then fell to the floor on his knees in a squatted position while continuing his hold of the struggling Service Recipient. (Justice Center Exhibit 13: non-audio video footage at 12:05:47:328) At some point, the Subject went from a squatted position on his knees to lying on top of the struggling Service Recipient's left hip. The Subject then turned the Service Recipient onto her stomach, spread her legs open and held down the side of her face with his forearm. The Subject was then on top of the Service Recipient's back side using his right forearm to apply pressure to the Service Recipient's left cheek to hold the right side of her face down on the carpeted floor. While continuing to hover over the Service Recipient's back side and using his upper body strength to maintain his hold, the Subject then re-positioned himself into a squatted position on the floor within the open space between the Service Recipient's legs. (Justice Center Exhibit 13: non-audio video footage at 12:05:53:203) The Service Recipient continued to

struggle. At some point during the restraint, the Subject moved both knees to the Service Recipient's right side while continuing to hold the side of her head down on the floor. The Subject then released his hold of the Service Recipient, ran into his office to use the PA system to call for assistance and then proceeded to come out of his office. (Justice Center Exhibit 13: non-audio DVD video at 12:06:59:671) The Service Recipient arose from the floor onto her knees and held her head in her hands. She retrieved her glasses that had fallen off of her face onto the floor. She then stood up, grabbed a chair and threw it at the Subject as he was coming out of his office. The chair did not hit him. The Service Recipient picked up a second chair but, as she was about to throw it, the Subject was able to take it from her. (Justice Center Exhibit 13: non-audio DVD video footage from 12:06:59:671 to 12:07:22:093)

19. Seconds later, another staff person came into the IBC, followed eventually by other staff, who instituted another restraint taking the Service Recipient to the floor to subdue her. (Justice Center Exhibit 13: non-audio DVD video footage at 12:07:22:093) While the other staff continued their restraint hold of the Service Recipient, the Subject left the IBC and did not return. The other staff eventually released their hold of the Service Recipient, who went towards the wall and sat on the floor with her back against it. (Justice Center Exhibit 13: non-audio DVD video footage at 12:07:22:093 to 12:12:41:359)

20. Thereafter, the school nurse entered the IBC room. At that time, the Service Recipient refused an assessment by the nurse, but did complain of a swollen lip. The nurse then went within five to six feet of the Service Recipient to try to observe any visible injuries as the Service Recipient continued to sit with her back against the wall. The Service Recipient wore a short sleeved shirt and the nurse could observe that the Service Recipient had sustained superficial brush burns on her right eyebrow and left elbow. (Hearing testimony of [REDACTED])

Registered Nurse; Justice Center Exhibits 4-5 and 10)

21. Subsequently, the Service Recipient was escorted by staff to her residential cottage and at about 1:45 p.m., the Service Recipient saw the cottage nurse. The cottage nurse entered a progress note that the inside of the Service Recipient's upper lip was slightly abraded and swollen with complaints of tenderness of the upper lip extending up to the base of the nostrils. The nurse further noted that the "area between the Service Recipient's lip and nostrils [were] very slightly swollen." (Justice Center Exhibit 4 and Justice Center Exhibit 13: an audio recording of the Service Recipient's interview)

22. The Subject sustained a right knee abrasion and swollen gums from Service Recipient's punch to his face. (Hearing testimonies of the Subject and [REDACTED] Registered Nurse; Justice Center Exhibits 4, 7 and 13)

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 physical abuse and/or abuse (deliberate inappropriate use of restraints).
- Pursuant to Social Services Law § 493(4), the category of physical abuse and/or abuse (deliberate inappropriate use of restraints) 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 physical abuse and abuse (deliberate inappropriate use of restraints) of a person in a facility or provider agency is defined by SSL § 488(1)(a) and SSL § 488(1)(d) as follows:

"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.

"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 shall be categorized into categories pursuant to SSL § 493(4), including Category 2, which is defined under SSL § 493(4)(b) as follows:

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.

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 physical abuse and abuse (deliberate inappropriate use of restraints) 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 physical abuse and abuse (deliberate inappropriate use of restraints), 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 physical abuse and abuse (deliberate inappropriate use of restraints) 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 physical abuse and abuse (deliberate inappropriate use of restraints) 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 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 1-13) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who testified at the hearing on behalf of the Justice Center. The [REDACTED] Training Coordinator also testified on behalf of the Justice Center.

The Subject testified on his own behalf and Subject’s Exhibits A, C and D were received into evidence.³ The other witnesses who testified at the hearing on the Subject’s behalf were the Teacher’s Aide, Teacher 1, the Principal of [REDACTED] and the Registered Nurse of [REDACTED].

³ During the hearing, the Subject withdrew Subject’s Exhibit B.

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 13)

In this case, there is no dispute that the Subject's one person takedown of the Service Recipient was not an authorized restraint technique under the Service Recipient's ISSP that required a two person physical restraint. The Subject argues that, because he was the only staff person in the IBC with the Service Recipient, he could not have initiated a two person TCI restraint. The Subject further argues that his physical contact with the Service Recipient was warranted in order to protect himself from further harm after the Service Recipient had punched him. (Hearing testimonies of the Subject, Justice Center Investigator [REDACTED], [REDACTED] Training Coordinator; Justice Center Exhibits 4, 6, 9 and 9a)

The narrow issue then to be determined in this case is whether the Subject's unauthorized physical restraint of the Service Recipient was warranted as a reasonable emergency intervention exception under SSL §§ 488 (1)(a) and (d).

At the hearing, the Subject testified that he attempted many TCI recommended techniques to de-escalate the Service Recipient's behavior, including, but not limited to, a "calm voice" and a pat on the back or "caring gesture." The Subject also testified that, in hindsight, he probably should not have touched the Service Recipient. However, in spite of his efforts, the Service Recipient's behavior continued to escalate. The Subject testified that during the initial behavioral episode prior to the punch, he called for assistance on his "walkie talkie" at least two times but no one responded. The Subject testified that after the Service Recipient punched him in the face, he grabbed her head and shoulder to take her down to the floor and that while he was on top of the Service Recipient, he never had his full body weight on her back side. The Subject testified that,

subsequent to being punched, he was neither angry at the Service Recipient nor intended to harm her. The Subject testified that he undertook the restraint as an emergency measure to protect himself from further harm, that he had the right to protect himself and that he was a former wrestler doing what he had to do to defend himself. The Subject testified that he had received TCI training annually, read the Service Recipient's ISSP and knew that the one-person restraint maneuver he utilized was not authorized by TCI. He also testified that at the time of the incident he was 6'1" tall, weighed approximately two-hundred and forty pounds and was a former wrestler. On cross-examination, the Subject testified that he knew that, prior to the incident, the Service Recipient had issues with him and asked to move her seat but did not elaborate as to what those issues involved.

At the hearing, the Subject had a number of witnesses who testified on his behalf. However, none of them was present at the time of the Subject's unauthorized restraint. The Principal also testified that there are about ten to fifteen staff who have "walkie talkies" and that they should have responded to the scene when the Subject called for assistance at the time of the incident. (Hearing testimony of Principal)

At no time during the Subject's testimony did he explain or offer proof as to why he believed the Service Recipient was an ongoing or imminent threat to his safety after she threw one punch. Nor did the Subject testify as to what other options he considered immediately after being punched or why no other safer option was available for him to use to protect himself until assistance arrived. The Subject implies that the only reason the unauthorized physical restraint was warranted was because the Service Recipient punched him, but that is not the case where other safer options are available. Among the other options available to the Subject were the use of a protective stance to deflect any further punches from the Service Recipient. The Subject could

have also requested help earlier during the initial phase of the incident by using the school's PA system. The Subject also failed to explain during his testimony why it would have been impossible or unreasonable under the circumstances to have followed TCI and avoid the use of a physical intervention. TCI clearly indicates that when safer options are available staff should avoid the use of physical restraints. TCI also indicates that even if the situation presented an imminent risk of harm, a physical restraint should be avoided at all cost in a situation, as indicated here, where the youth has a history of asthma that may increase her risk of asphyxia. This is especially so in light of the Subject's actions as seen on video that shows him lying on top of the Service Recipient's back side and torso, which TCI prohibits due to the potential risk of asphyxia. (Hearing testimony of [REDACTED] Training Coordinator and Justice Center Exhibit 13: non-audio DVD video footage at 12:05:51:328 through 12:06:57:00)

During the Service Recipient's interview, she admitted that at the time of the incident she was upset, non-compliant, spat in Teacher 1's face and acknowledged that her actions were wrong. The Service Recipient explained to the investigator that she told the Subject that if he kept touching her, she was going to hit him and he replied "[s]o then hit me." The Subject denies this was said. The Service Recipient also told the investigator that, during the physical restraint, the Subject forcibly pressed his forearm into her face pushing her face down into the carpet on the floor. The Service Recipient told the investigator that she sustained a "swollen lip" and "brush burn[s]" on her face. She also told the investigator that the [REDACTED] [REDACTED] physical restraint was harsh and that she had never been through anything like that before. During her interview, the Service Recipient told the investigator that her issues with the Subject involved the fact that he reminded her of someone who upsets her, however, she did not further elaborate as to why she had a problem with the Subject. Additionally, the Service

Recipient's ISSP does not indicate that she has a history of fabricating or that untruthfulness is a targeted behavior.

It is determined that the portion of the Subject's testimony that the Service Recipient never warned him that she was going to hit him if he did not stop touching her, that he never replied "so go ahead" to her threat of bodily injury to him and that he never had his full body weight on the Service Recipient is not credited evidence. It is further determined that the Service Recipient's firsthand account of the incident is credited evidence. The Service Recipient's version of the event is consistent with her injuries, photographs of the injuries and the video of the incident. (Justice Center Exhibits 10 and 13)

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.

To prove abuse (deliberate inappropriate use of restraints) under SSL §488(1)(d), the Justice Center must first establish that the Subject used a restraint on the Service Recipient. Restraint is defined in Social Service 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." By grabbing the back of the Service Recipient's head/neck, dropping her to the floor then the Subject lying on top of her back side while forcefully holding her down by using his forearm and/or body weight and upper body strength, constituted the use of a manual measure by the Subject that limited the Service Recipient's ability to move her body freely. Consequently, the Justice Center has sufficiently established that the Subject's conduct constituted 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.” (SSL §488(1)(d))

The record establishes that the Subject’s conduct did not conform to the Service Recipient’s ISSP, to TCI policies or to any other facility policies. The Service Recipient’s ISSP clearly stated that in situations involving outbursts and violence, staff was required to use a two-person TCI restraint in order to protect the Service Recipient from harming herself or others. (Justice Center Exhibit 6) The Subject had safer measures that he could and should have undertaken after being punched. Even if the Service Recipient’s agitation against the Subject had continued after she threw the punch and there existed an imminent risk of harm to the Subject, TCI required that the physical restraint still be avoided at all costs. The Service Recipient had a history of asthma that would likely be aggravated by the physical restraint. The said restraint could have affected her ability to breathe and the Subject knew it. (Justice Center Exhibits 4, 9 and 9a)

The Subject argued that, even though he did commit a deliberate inappropriate use of restraints, he did so as a reasonable emergency intervention to prevent imminent risk of harm to himself. The record contains no persuasive evidence supporting this argument. The Subject had argued that, after trying TCI de-escalation techniques that failed to work, he used reasonable force to bring the Service Recipient to a safe position and that he was entitled to use such reasonable emergency measures to protect himself from further injury. The Subject offered no reason as to why other safer options to resolve the situation were not available to him or were not viable ones.

All of the Subject’s assertions and defenses raised at the hearing were unpersuasive under these circumstances and the record establishes that the Subject’s use of the physical restraint was unreasonable and excessive. 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. That aspect of the substantiated report will not be amended or sealed.

Physical Abuse

The Justice Center proved by a preponderance of the evidence that the Subject committed physical abuse of the Service Recipient.

A finding of physical abuse under SSL § 488(1)(a) requires that a preponderance of the evidence shows that the Subject intentionally or recklessly caused, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient or caused the likelihood of such injury or impairment.

The term “intentionally” is defined by the 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 term “recklessly” is defined by the Penal Law as follows: “A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists.”

The record establishes that the Subject’s conduct was a spontaneous and reckless reaction to being punched in the face by the Service Recipient. The video illustrates that just seconds after being punched, the Subject reacted by immediately grabbing the back of the Service Recipient’s head/neck area to take her down to the floor where he turned her onto her stomach, laid on top of her back side while using his body weight and/or upper body strength to forcefully press down on the side of her face with his forearm to hold her down on the floor.

Given the extreme use of force by the Subject, it is clear that he was aware of, but

consciously disregarded a substantial and unjustifiable risk of the likelihood of physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. The Subject's unauthorized physical contact caused physical injury to the Service Recipient, who suffered abrasions to her right eyebrow, left elbow and a swollen lip. Additionally, the Service Recipient's history of asthma and the potential increased risk of asphyxia when the Subject's 240 pound male body weight was totally or partially weighing on the top of the back side of the fifteen year old female Service Recipient was a very dangerous situation. (Hearing testimony of [REDACTED] Training Coordinator; Justice Center Exhibits 9 and 9a) Furthermore, as the Service Recipient believed that the restraint was harsh and that she had never been through anything like that before, the Subject's conduct was also likely to have caused serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. (Justice Center Exhibits 6, 9 and 9a)

As discussed herein, there was no persuasive evidence that the Subject's physical contact with the Service Recipient was a reasonable emergency intervention necessary to protect his safety. It is clear that the Subject's conduct was an overreaction to having been punched. He could have withdrawn or called for and awaited assistance at that point. 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. That aspect of the substantiated report will not be amended or sealed.

Category 2

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of physical abuse and abuse (deliberate inappropriate use of restraints) as set forth in the substantiated report.

In order to prove Category 2 conduct, the Justice Center must establish that the Subject seriously endangered the health, safety or welfare of the Service Recipient. The Subject's conduct of committing physical abuse and abuse (deliberate inappropriate use of restraints) by using his body weight to pin the Service Recipient onto the floor and forcefully holding her head against the floor with his arm, especially given her asthma and the Subject's much larger size, was particularly unsafe. Therefore, based upon the totality of the circumstances and the evidence presented, it is determined that the substantiated report is properly categorized as a Category 2 act as the Subject's conduct seriously endangered the Service Recipient's health, safety or welfare. A Category 2 act under this paragraph shall be elevated to a Category 1 act when such an act occurs within three years of a previous finding that such custodian engaged in a Category 2 act. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years.

DECISION:

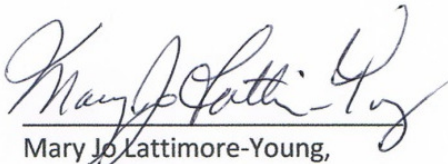
The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED], [REDACTED] be amended and sealed is denied.

The Subject has been shown by a preponderance of the evidence to have committed physical abuse and abuse (deliberate inappropriate use of restraints).

The substantiated report is properly categorized as a Category 2 act.

This decision is recommended by Mary Jo Lattimore-Young,
Administrative Hearings Unit.

DATED: March 20, 2017
West Seneca, New York



Mary Jo Lattimore-Young,
Administrative Law Judge