

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

██████████

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Adjud. Case #:

██

The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

ORDERED: The attached and incorporated Recommended Decision in its entirety is hereby adopted by the Executive Director.

ORDERED: The Vulnerable Persons' Central Register shall take action in conformity with the attached Recommended Decision, specifically the Decision section.

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 16, 2017
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
██████████, Subject
Karl E. Manne, Esq.

**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:

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Jennifer McGrath, Esq.

[REDACTED]

By: Karl E. Manne, Esq.
107 Court Street
Herkimer, New York 18850

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse. The Subject requested that the VPCR amend the report to reflect that the Subject is not a subject of the substantiated report. The VPCR did not do so, and a hearing was then scheduled in accordance with the requirements of Social Services Law (SSL) § 494 and Part 700 of 14 NYCRR.

FINDINGS OF FACT

An opportunity to be heard having been afforded the parties and evidence having been considered, it is hereby found:

1. The VPCR contains a "substantiated" report dated [REDACTED], [REDACTED] of abuse by the Subject of a Service Recipient. The VPCR contains a subsequent "substantiated" report dated [REDACTED] of abuse by the Subject of a Service Recipient.

2. The Justice Center substantiated the reports against the Subject. The Justice Center concluded that:

Allegation 1: [REDACTED]

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed physical abuse and/or abuse (deliberate inappropriate use of restraints) when you conducted a restraint with excessive force and improper technique, including slamming a service recipient onto the ground and kneeling on him and/or pushing him up against a wall and causing him to hit his head.

These allegations have been SUBSTANTIATED as Category 3 physical abuse and Category 3 abuse (deliberate inappropriate use of restraints) pursuant to Social Services Law § 493(4)(c).

Allegation 2¹:

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed abuse (deliberate inappropriate use of restraints) when you conducted a restraint with improper technique and excessive force, which included grabbing a service recipient by his shirt and/or conducting a one-person prone restraint.

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

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

4. The facility, located at [REDACTED], is a residential facility for youth ages 13-21 who have been placed through Family Court. The facility is operated by [REDACTED], and is licensed by the Office for Children and Family Services (OCFS), which is a 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 [REDACTED] since 1999. The Subject worked as a Youth Care Counselor III (YCC).

Allegation 1

6. At the time of the alleged abuse, Service Recipient 1(SR1) was 14 years of age, and had been a resident of the facility for a few weeks. (Justice Center Exhibit 6A)

7. At approximately 5:10 p.m. on [REDACTED], SR1 stated that he was going to leave campus without permission, also known as going AWOL. SR 1 then ran to one of the doors of the cottage and pushed the bar to try and open the door, setting off the door alarm. The Subject turned off the alarm, and SR1 ran to another door, pushing on that bar, setting off the alarm for that door. This happened several times and was beginning to annoy the other service recipients. (Justice Center Exhibit 6A; Hearing testimony of Subject)

¹ Allegation 1 under this case number was unsubstantiated.

8. In an attempt to distract SR1, the Subject offered to show SR1 a wrestling move called a “duck under”. The Subject made physical contact with SR1, and in the process of completing the “duck under” move, SR1 started falling to the floor and laid on his back, without hitting his head. The Subject then knelt over SR1 and explained that it was too cold outside, and SR1 was not going to leave campus. (Justice Center Exhibit 17A; Hearing testimony of Subject)

9. The situation appeared to have de-escalated, and SR1 went into another part of the common area. However, a few minutes later SR1 became agitated again. The Subject and another service recipient attempted to take SR1 outside to calm him down. SR1 and the other service recipient were walking in front of the Subject when the other service recipient told the Subject that SR1 was going to run. The Subject grabbed SR1’s coat and told the other service recipient to go inside and get help. The Subject held onto SR1’s coat until the Supervisor On Duty came outside, and assisted the Subject in bringing SR1 back inside the cottage. (Justice Center Exhibits 6A, 9A and 10A; Hearing testimony of Subject)

10. After the incident, SR1 was examined by nursing staff who found a small bump on the back of SR1’s head. (Justice Center Exhibits 7A and 11A)

Allegation 2

11. At the time of the alleged abuse Service Recipient 2 (SR2) was 15 years of age, and had been a resident of the facility for approximately three months. SR2 had diagnoses of oppositional defiant disorder, attention deficit hyperactivity disorder, mood disorder, and post-traumatic stress disorder. (Justice Center Exhibit 6)

12. During the afternoon of [REDACTED], SR2 was informed that he was being placed on “block egress” supervision due to recent AWOL, out of program, and non-compliant behaviors. Block egress is an enhanced level of supervision where staff is required to attempt to stop the

service recipient from going out of program, including the use of physical restraint. Going out of program includes going outside without permission but remaining on the facility property; and is distinguished from going AWOL, which means leaving the facility property without permission. (Justice Center Exhibits 6, 13, and 14; Hearing testimony of Justice Center Investigator [REDACTED] [REDACTED])

13. SR2 became very upset when informed of the enhanced supervision level. The Subject brought SR2 outside in an attempt to de-escalate and defuse SR2's anger. However, SR2 did not calm down. Instead, SR2 said that he was going to leave the facility, and grabbed the Subject's shirt. The Subject started losing his balance, so he reached out to grab SR2's shirt, and they both fell down a small hill into a ravine. SR2 struggled against the Subject, hit him in the head with a rock, and was swearing. When staff found them, SR2 was on his stomach, with the Subject straddling his torso and restraining his arms. (Justice Center Exhibits 6 and 22; Hearing testimony of Investigator [REDACTED]; Hearing testimony of Subject)

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])

Physical abuse and deliberate inappropriate use of restraints are defined by SSL § 488(1) as:

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

If the Justice Center proves the alleged abuse, the report will not be amended and sealed. Pursuant to SSL § 493(4) and Title 14 NYCRR 700.10(d), it must then be determined whether the act of abuse cited in the substantiated report constitutes the category of abuse as set forth in the substantiated report.

If the Justice Center did not prove the abuse by a preponderance of the evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has established by a preponderance of the evidence that the Subject committed an act of physical abuse described in “Allegation 1” of the substantiated report dated [REDACTED]. The Justice Center has not established by a preponderance of the evidence that the Subject committed acts of abuse (deliberate inappropriate use of restraints) described in “Allegation 1” of the substantiated report dated [REDACTED]; and described in “Allegation 2” of the substantiated report dated [REDACTED].

In support of its substantiated findings, the Justice Center presented several documents and recordings obtained during the investigation. (Justice Center Exhibits 1A-17A and 1-22) The investigations underlying the substantiated reports were conducted by Office of Children and Family Services (OCFS) Investigator [REDACTED]; and Justice Center Investigators [REDACTED] and [REDACTED]. Both Investigator [REDACTED] and Investigator [REDACTED] testified 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, which was somewhat helpful with respect to one of the substantiated allegations. (Justice Center Exhibit 17A)

Allegation 1: Deliberate Inappropriate Use of Restraints

In order to prove abuse (deliberate inappropriate use of restraints) the Justice Center must establish that the Subject used a restraint on the Service Recipient in which the technique used, the amount of force used or the situation in which the restraint was used, was deliberately inconsistent with the Service Recipient's individual treatment plan or behavioral intervention plan, generally accepted treatment practices and/or applicable federal or state laws, regulations or policies. The term "restraint" is defined by statute as any manual, pharmacological or mechanical measure or device used to immobilize or limit the ability of the Service Recipient to freely move his arms, legs or body. The statute allows, as an exception, the use of an unauthorized restraint as a reasonable emergency intervention in order to prevent imminent risk of harm to the Service Recipient or to any other person. (SSL § 488[1][d])

The Justice Center contends that two incidents occurred wherein the Subject used a restraint on SR1 in which the technique and amount of force were inconsistent with [REDACTED] policy. The first incident was captured on camera and shows what the Subject described as a wrestling move. The quality of the video submitted into evidence is grainy and dark, so it is difficult to see precisely what is occurring. Clearly, the Subject makes physical contact with SR1, who ends up on his back on the floor. The Subject kneels over SR1 for approximately 20 seconds, during which time SR1 moves his arms and legs freely. At one point, the Subject shifts his weight and it appears that SR1 also shifts as if to stand up; but SR1 remains on the floor for another two to three seconds before the Subject stands and holds out his arm to assist SR1 in standing.

The Justice Center argued that the Subject used improper technique in that the wrestling move was not an approved restraint under the Therapeutic Crisis Intervention (TCI) model used by [REDACTED]. (Justice Center Exhibits 16, 19, and 18A; Hearing testimony of OCFS

Investigator [REDACTED]) The Subject argued that the wrestling move was not a restraint because his intent was not to limit SR1's ability to freely move his arms, legs or body. (Hearing testimony of Subject)

The video evidence supports the Subject's contention that he did not intend to restrain SR1. The allegation specifies that the Subject's conduct included "slamming" SR1 to the ground. However, the video shows the Subject easing SR1 to the ground after SR1 appeared to lose his balance. The allegation also specifies that the Subject was "kneeling on" SR1 as part of the restraint. The video shows the Subject's right knee is on the floor, his left foot is on the floor, straddling SR1. There is a period of approximately six seconds prior to this position where the Subject either squatted over or sat on SR1's stomach; but it is impossible to tell which due to the poor quality of the video. A staff witness stated that the Subject squatted over SR1, and there was no other evidence in the record to contradict that statement. (Justice Center Exhibits 6A and 17A) Therefore, the allegation that the Subject slammed SR1 to the ground and was kneeling on him is not supported by the evidence.

The second incident occurred a short time later, when the Subject brought SR1 and another service recipient outside in another attempt to de-escalate and calm SR1 down. The Subject was walking behind SR1 and the other service recipient, letting the two youths talk to each other. At some point, the other service recipient informed the Subject that SR 1 was going to run. With his left hand, the Subject grabbed SR1's right jacket sleeve and held him there until assistance arrived.

During her testimony, the investigator agreed that the Subject had to either hold on to SR1 or let him go AWOL. (Hearing testimony of OCFS Investigator [REDACTED]) The record establishes that the temperature was below zero that day, and that SR1 was wearing a winter jacket, sneakers, and a knit cap. (Hearing testimony of Subject; Justice Center Exhibit 17A) SR1 was not

adequately dressed to walk from the facility, which is in a rural area, to [REDACTED], his stated goal. Therefore, the Subject had no other choice but to grab SR1 and hold on to him until another staff came outside to assist. The Subject's actions constitute a reasonable emergency intervention to prevent imminent risk of harm to SR1.

Allegation 1: Physical Abuse

In order to sustain an allegation of physical abuse in this matter, the Justice Center must show that the Subject was a custodian who 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 a Service Recipient's physical, mental or emotional condition; or caused the likelihood of such injury or impairment. (SSL §488[1][a]) Social Services Law defines "intentionally" and "recklessly" as having the same meaning as provided in New York Penal Law § 15.05. (SSL § 488[16]) Under New York State Penal Law, a person acts "intentionally" with respect to a result or conduct when a person has a "... conscious objective ..." to cause a result or engage in such conduct. (PL §15.05[1]) Under New York Penal Law, a person acts "recklessly with respect to a result or to a circumstance" when the person is "aware of and consciously disregards a substantial and unjustifiable risk that such result will occur." (PL §15.05[3])

In this case, when the Subject grabbed SR1 to demonstrate a wrestling move, the Subject intentionally had physical contact with SR1. The Subject testified that his intent was to make physical contact in the form of a wrestling move in order to distract SR1, and hopefully de-escalate the situation. (Hearing testimony of Subject) The record does not clearly indicate whether this wrestling move caused any injury to SR1. After the second incident, SR1 was seen by a nurse who found a bump on the back of SR1's head. However, in reviewing the video of the first

incident, it does not appear that SR1 hit his head when he went to the floor. Additionally, SR1 reported to the investigator that the Subject pushed him into a brick wall when he was being restrained outside, and that he hit his head at that point. (Justice Center Exhibit 6A) As a result, it is not likely that SR1 sustained an actual injury as a result of going to the floor during the wrestling move.

However, the preponderance of the evidence supports the likelihood of SR1 sustaining either an injury or a serious or protracted impairment of his physical, mental or emotional condition. SR1 told OCFS Investigator [REDACTED] that he was upset after the wrestling move, and the record reflects that rather than calming down, SR1 escalated after the incident, eventually attempting to leave the property and walk to [REDACTED]. Consequently, the Justice Center has shown by a preponderance of the evidence that the Subject committed physical abuse by placing SR1 in a wrestling maneuver.

This leads to the second incident where the Subject grabbed SR1 outside the cottage, preventing SR1 from leaving the property. Again, the Subject intentionally made physical contact with SR1. However, in this instance, the physical contact was a reasonable emergency intervention in order to protect SR1's safety. Due to the weather conditions, SR1 was at risk of harm if he had been allowed to leave the property. Therefore, the Justice Center has not shown by a preponderance of the evidence that the Subject committed physical abuse in this instance.

Allegation 2: Deliberate Inappropriate Use of Restraints

In order to prove abuse (deliberate inappropriate use of restraints) the Justice Center must establish that the Subject used a restraint on the Service Recipient in which the technique used, the amount of force used or the situation in which the restraint was used, was deliberately inconsistent with the Service Recipient's individual treatment plan or behavioral intervention plan, generally

accepted treatment practices and/or applicable federal or state laws, regulations or policies. The term “restraint” is defined by statute as any manual, pharmacological or mechanical measure or device used to immobilize or limit the ability of the Service Recipient to freely move his arms, legs or body. The statute allows, as an exception, the use of an unauthorized restraint as a reasonable emergency intervention in order to prevent imminent risk of harm to the Service Recipient or to any other person. (SSL §488[1][d])

In this incident, SR2 grabbed the Subject by his shirt, causing him to lose his balance and sending them tumbling down a hill. The Subject landed on top of SR2, and proceeded to restrain him in self-defense. The credible evidence shows that SR2 continued to struggle; he attempted to head-butt the Subject, he managed to hit the Subject in the head with a rock, and there was no other staff available to intervene. Admittedly, the restraint was not TCI approved, however, it was a reasonable emergency intervention in order to prevent harm to both the Subject and SR2.

The Justice Center argued that the Subject should have maintained a greater distance from SR2 thereby denying SR2 the ability to grab the Subject by the shirt. The Justice Center also argued that the Subject should have let SR2 go AWOL, rather than restrain him. (Hearing testimony of Justice Center Investigator [REDACTED]) However, the Subject had a duty to prevent SR2 from leaving the facility property. SR2 was not safe when he was unsupervised. His history of impulsive behavior and going out of program formed the basis for the change in his service plan to a “block egress” enhanced level of supervision. (Justice Center Exhibit 22) In any event, the record shows that when SR2 grabbed the Subject and they tumbled down the hill, the resulting restraint at the bottom of the hill was a reasonable emergency intervention. Therefore, the Justice Center has not shown by a preponderance of the evidence that the Subject committed abuse (deliberate inappropriate use of restraints) in this instance.

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed physical abuse as alleged in Allegation 1. The substantiated report will not be amended or sealed. The Justice Center has not met its burden of showing by a preponderance of the evidence that the Subject committed abuse (deliberate inappropriate use of restraints) as alleged in Allegation 1 and Allegation 2. Those substantiated reports will be amended and sealed.

The next question to be decided is whether the remaining 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 as to part of Allegation 1. The Subject has been shown by a preponderance of the evidence to have committed physical abuse.

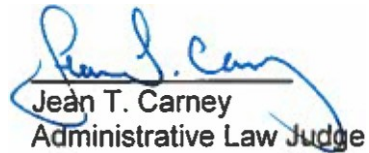
The substantiated report is properly categorized as a Category 3 act.

The request of [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] be amended and sealed is granted as to part of Allegation 1. The Subject has not been shown by a preponderance of the evidence to have committed abuse (deliberate inappropriate use of restraints).

The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED] be amended and sealed is granted as to
Allegation 2. The Subject has not been shown by a preponderance of the
evidence to have committed abuse (deliberate inappropriate use of
restraints).

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

DATED: August 10, 2017
Schenectady, New York


Jean T. Carney
Administrative Law Judge