

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

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In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**FINAL  
DETERMINATION  
AND ORDER  
AFTER HEARING**

**Adjud. Case #:**

[REDACTED]

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 is hereby adopted in its entirety.

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:** January 2, 2018  
Schenectady, New York



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David Molik  
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register  
Administrative Appeals Unit  
[REDACTED], Subject

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

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In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

[REDACTED]

Before:

Sharon Golish Blum  
Administrative Law Judge

Held at:

New York State Justice Center for the Protection  
of People with Special Needs  
125 East Bethpage Road, Suite 104  
Plainview, New York 11803

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: Amanda Smith, Esq.

[REDACTED]

### **JURISDICTION**

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] 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] of abuse (deliberate inappropriate use of restraints) and physical abuse 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], while a custodian, you committed abuse (deliberate inappropriate use of restraints) and/or physical abuse when you conducted a restraint with improper technique and excessive force, which included pushing a service recipient's face to the ground.

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

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

4. The facility, a short-term evaluation placement for youth, located at [REDACTED] is operated by the New York State Office of Children and Family

Services (OCFS), which is a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Justice Center Investigator [REDACTED])

5. At the time of the alleged abuse, the Subject had been employed at the facility as an Assistant Director since [REDACTED]. (Hearing testimony of the Subject) The Subject was a custodian as the term is so defined in SSL § 488(2).

6. At the time of the alleged abuse, the Service Recipient was a fifteen year old male facility resident. (Justice Center Exhibit 13)

7. At the time of the alleged abuse, the Subject had been trained in Crisis Prevention Management (CPM), an approach used by facility staff to address service recipients' behaviors. (Hearing testimony of the Subject)

8. Under CPM, staff were authorized to use physical restraints to protect the safety of any person or to prevent a service recipient from escaping the facility or evading custody during off grounds transport. Facility staff were permitted to use the mechanical restraints of handcuffs and foot cuffs when justified. (Justice Center Exhibits 7, 12 and 17)

9. At the time of the alleged abuse, the Service Recipient's Individual Intervention Plan did not prohibit physical or mechanical interventions. (Justice Center Exhibit 13)

10. At 8:42 a.m. on [REDACTED], the Subject entered the common room of facility unit [REDACTED], where several service recipients, including the Service Recipient, were situated, together with staff, including Youth Development Aide (YDA) 1, who was playing a game with three service recipients, including the Service Recipient, at a coffee table in the center of the room. (Hearing testimony of the Subject and Justice Center Exhibit 22: cameras 525 and 527)

11. When the Service Recipient observed the Subject crossing the room and entering the facility office, the Service Recipient greeted the Subject in a friendly manner. The Service

Recipient followed the Subject into the facility office. Inside the office, the Subject reprimanded the Service Recipient regarding an incident that had occurred the preceding day. When the Service Recipient exited the office a few moments later, he was obviously upset. The Service Recipient overturned furniture, threw numerous items against walls, punched the facility common room television screen and attempted to pull it down, and angrily paced around the common room.

12. The Service Recipient returned to the office twice, whereupon he displayed violence against the Subject and, both times, YDA 1 physically forced him to exit the office. Thereafter, the Service Recipient approached the office again, where the Subject had remained, and at the door to the office, the Service Recipient physically pushed past the Subject. (Hearing testimony of the Subject and Justice Center Exhibit 22: cameras 525 and 527 at 8:42)

13. The Subject and YDA 1 employed a restraint on the Service Recipient from behind and, as they were bringing the Service Recipient down onto the floor in a seated position, the Subject handcuffed the Service Recipient's hands behind his back. While YDA 1 remained behind the Service Recipient, restraining his arms, the Subject moved to the front of the Service Recipient, positioned the Service Recipient's legs out in front of him and held his legs down to prevent him from kicking. In this position, as the Subject attempted to counsel the Service Recipient to calm down and deescalate, the Service Recipient leaned forward to close the space between his face and the Subject's face. During this time, the Service Recipient's aggression did not diminish and he repeatedly spat in the Subject's face, hitting him in the eyes and mouth, and threatened to bite the Subject's face. (Hearing testimony of the Subject and Justice Center Exhibit 21, statement of YDA 2 and Exhibit 22: cameras 525 and 527 at 8:45)

14. As this was occurring, several service recipients were still in the area, ignoring staff instructions to leave the room, and were moving around while watching the struggle. All of the

other staff who were present were occupied with supervising and calming the other service recipients. Service Recipient A became agitated and hastily put on his shoes and socks in preparation to join in the fight, to aid the Service Recipient. (Hearing testimony of the Subject and Justice Center Exhibit 22: cameras 525 and 527 at 8:46)

15. As the Service Recipient continued to resist the restraint, YDA 2, a CPM trainer who was nearby, told the Subject and YDA 1 to put the Service Recipient on his side. At that point, the Service Recipient was leaning forward towards the Subject's face, spitting and threatening to bite him. The Subject released his right hand from the Service Recipient's legs and pushed the Service Recipient away and downwards and, with YDA 1's assistance, repositioned the Service Recipient onto his side. As this occurred, Service Recipient A ran towards the Subject and attacked him. The Subject pushed Service Recipient A away and two other staff physically restrained him. (Hearing testimony of the Subject and Justice Center Exhibit 22: cameras 525 and 527 at 8:46)

16. After some continued struggling, the Subject disengaged from the restraint and another staff took over. Approximately ten minutes later, after he calmed down, the Service Recipient was escorted to another area and released from the handcuffs. (Justice Center Exhibit 22: camera 525 and 527 at 8:50 and camera 518 at 8:55)

17. The Service Recipient received a short medical evaluation, wherein it was noted that other than red marks on his wrists, the Service Recipient sustained no physical injuries and he was arrested and charged with assault of the Subject. (Hearing testimony of the Subject and Justice Center Exhibits 10 and 11)

18. After the incident, the Subject was taken to a hospital emergency room for treatment of the injuries that he sustained during the incident. (Hearing testimony of the Subject)

### **ISSUES**

- Whether the Subject has been shown by a preponderance of the evidence to have committed the acts giving rise to the substantiated reports.
- 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 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 abuse of a person is defined by SSL § 488(1) to include the following:

(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 and/or neglect alleged in the substantiated report that are the subject of the proceeding and that such act or acts constitute the category of abuse and/or neglect as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged abuse and/or neglect in a report, 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 acts of abuse and/or neglect cited in the substantiated report constitute the category of abuse and/or neglect as set forth in the substantiated report.

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

### **DISCUSSION**

The Justice Center has not established by a preponderance of the evidence that the Subject committed the acts described as Allegation 1 in the substantiated report.

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-23) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who testified on behalf of the Justice Center.



The Subject testified at the hearing and provided one document as evidence in his own behalf. (Subject Exhibit A)

In support of the substantiation, the Justice Center relied mainly on two video recordings from different vantage points of the facility unit [REDACTED] common room during the incident (Justice Center Exhibit 22: cameras 525 and 527) and the statements of YDAs 2 and 3 (Justice Center Exhibit 21) to establish that, during a restraint of the Service Recipient, the Subject used improper technique and excessive force, by pushing the Service Recipient's face to the ground. The Justice Center argued, in specificity, that the Subject used his right hand to make contact with the Service Recipient's face and, thus, pushed the Service Recipient's head to the floor and that such contact was not taught or sanctioned under CPM.

The Subject testified that once the Service Recipient was in the seated handcuffed restraint, he continued to resist by kicking his legs and leaning forward towards the Subject. The Subject testified that he did not push the Service Recipient's face, but that he used an open hand on the Service Recipient's shoulder or chest to direct his body away, to prevent the Service Recipient from continuing to spit in his face and from biting him. The Subject testified that the presence of the service recipients, who did not comply with staff directions to clear the area, contributed to a pervasive atmosphere of volatility and danger which did, in fact, culminate in the Subject having to physically ward off Service Recipient A before he, too, was physically restrained. The Subject testified that even if his conduct had been prohibited under CPM, it was a reasonable emergency intervention.

Of the four video recordings, only the video recordings of cameras 525 and 527 are relevant and neither of them provide a clear and complete perspective of the alleged misconduct. In both videos, it is clear that the Service Recipient forcefully resisted the restraint both before and after

the Subject's alleged misconduct; that the Subject pushed the Service Recipient away from him; that the Service Recipient was repositioned onto his side by the Subject and YDA 1; and that the common room in which the incident occurred had many people, both service recipients and staff, milling around, creating a volatile atmosphere. In fact, as soon as the Subject and YDA 1 moved the Service Recipient from sitting to lying on his side, Service Recipient A, who, like everyone else, had been watching the struggle, charged at the Subject, who had to push him away while still restraining the Service Recipient. Thereafter, Service Recipient A was subject to a team restraint by YDA 2 and another staff, right beside the Service Recipient. (Justice Center Exhibit 22: cameras 525 and 527)

During his interview (Justice Center Exhibit 21) YDA 3, who witnessed the incident, stated that after the Service Recipient was restrained, he became more aggressive, by kicking and spitting in the Subject's face and mouth and that the Subject "mushed" the Service Recipient, which YDA 3 then described as a push. YDA 3 stated that, due to a gap in his training, he was not allowed to have physical contact with service recipients at the time of the incident, and therefore, was not able to assist the Subject with the Service Recipient's restraint. YDA 3 was shown what can reasonably be assumed to be the video recordings of cameras 525 and 527 (Justice Center Exhibit 22) and, when asked if he was watching what he had referred to as the "mush," he answered affirmatively and commented that "it was hard to tell."

During her interview (Justice Center Exhibit 21) YDA 2, who witnessed the incident, stated that she went to the facility unit [REDACTED] in response to a code call; that when she arrived at unit [REDACTED], it was in disarray, with chairs knocked over and secure doors open; that service recipients were not complying with staff's attempts at a lockdown; that she observed the Subject and YDA 1's restraint of the Service Recipient and that the Service Recipient had spit in the Subject's face "quite

a few times.” YDA 2 stated that the Service Recipient’s restraint had been difficult, due to the Service Recipient’s size and the fact that he kept spitting in the Subject’s face; that Service Recipient A was being verbally aggressive during the Service Recipient’s restraint; that when Service Recipient A attacked the Subject, he was restrained by her and another staff; that the Subject and YDA 1 did their best and that the Service Recipient’s restraint had gone well and had been successful, as no one had been injured.

Counsel for the Justice Center argued that the situation was not an emergency because, rather than push the Service Recipient’s face or head to the ground, the Subject had the sanctioned options of either retreating, with another staff replacing him, or donning a faceguard to protect him from the continued spitting. Given the rapidity with which events unfolded and the fact that all of the other staff who were present were engaged in supervising and managing the other service recipients, the Subject could not have safely removed himself from the restraint at the relevant time, nor did he have immediate access to a faceguard.

The Subject’s testimony that, at the time that he used his right hand to push the Service Recipient away, he was in danger of being injured by the Service Recipient was persuasive, credible and supported by all of the other evidence in the record. The Subject was in an emergency situation that necessitated immediate action to protect his own safety and to prevent imminent risk of harm to himself.

Having determined that the Subject’s conduct was an emergency intervention, the next issue is whether it qualified as a reasonable emergency intervention exception under SSL § 488(1)(d), relating to the allegation of abuse (deliberate inappropriate use of restraints) and under SSL § 488(1)(a), relating to the allegation of physical abuse.

The Subject’s act of pushing the Service Recipient away and downwards achieved the

desired result of preventing the Service Recipient from continuing to spit at him and from biting his face, without having caused any injury to the Service Recipient. Furthermore, the Subject's contact with the Service Recipient's head or face was of extremely short duration and was executed with an open hand, in a pushing, not striking motion. Under the circumstances, the Subject's emergency intervention was reasonable.

Accordingly, as the Subject's conduct met the reasonable emergency intervention exception under SSL § 488(1)(d) to prevent imminent risk of harm to himself, the Subject did not commit abuse (deliberate inappropriate use of restraints). Similarly, as the Subject's conduct met the reasonable emergency intervention exception under SSL § 488(1)(a) as necessary to protect his own safety, the Subject did not commit physical abuse.

**DECISION:**

The request of [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] of abuse (deliberate inappropriate use of restraints) and/or physical abuse by the Subject of a Service Recipient be amended and sealed is granted.

This decision is recommended by Sharon Golish Blum, Administrative Hearings Unit.

**DATED:** December 14, 2017  
Plainview, New York



Sharon Golish Blum, Esq.  
Administrative Law Judge