

**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]

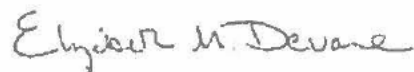
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

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 Elizabeth M. Devane, ALJ, of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: October 22, 2019
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Robert DeCataldo, Esq.
[REDACTED], Subject

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

In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

John T. Nasci
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
333 East Washington Street, Room 115
Syracuse, New York 13202
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: Robert DeCataldo, Esq.

[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for 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] of 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], at the [REDACTED], located at [REDACTED], while a custodian, you committed abuse (deliberate inappropriate use of restraints) when you placed your arm around a service recipient's head and neck during a restraint.

This allegation has been SUBSTANTIATED as Category 2 abuse (deliberate inappropriate use of restraints) pursuant to Social Services Law § 493(4)(b).

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

4. The facility, the [REDACTED], located at [REDACTED], is a [REDACTED] residential treatment facility for male youth ages [REDACTED]

██████████. The ██████████ is operated by the New York State Office of Children and Family Service (OCFS), which is an agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Justice Center Investigator ██████████ (Investigator))

5. At the time of the alleged abuse (deliberate inappropriate use of restraints), the Subject was employed by the OCFS as a Youth Developmental Aide (YDA) at ██████████ for a little less than two years. (Hearing testimony of the Subject) The Subject was a custodian as that term is defined in Social Services Law § 488(2).

6. At the time of the alleged abuse (deliberate inappropriate use of restraints), the male Service Recipient was fifteen years old and was a resident of the ██████████. The Service Recipient weighed approximately 240 pounds and stood approximately six feet one inch tall. (Justice Center Exhibit 24: audio recording of Justice Center interview with the Service Recipient and interrogation of ██████████ YDA ██████████ (YDA 1) and the Subject; and Hearing testimony of the Investigator)

7. On ██████████, the Subject was assigned to and worked the evening shift from ██████████ in Unit █ of the ██████████. At approximately 2:56 p.m., the Subject and YDA 1 were in the Unit █ common area with the Service Recipient. The Service Recipient had just met with and received a disciplinary violation from his Youth Counselor and was upset. (Justice Center Exhibits 9 and 24: audio recording of Justice Center interview with the Service Recipient and interrogation of YDA 1 and the Subject; Justice Center Exhibit 24: video recording of the incident; and Hearing testimony of the Subject)

8. The Subject and YDA 1 were sitting at a table in the middle of the common area while the Service Recipient was sitting in his brick (chair) with his leg shaking. Then the Service

Recipient got up from his brick, walked around the common area, got a drink of water from the water fountain and returned to his brick and sat on the edge of it. YDA 1 told the Service Recipient not to sit on the edge of the brick and to ask permission to get up from the brick. In response, the Service Recipient told YDA 1 to stop talking to him. (Justice Center Exhibits 9 and 24: audio recording of Justice Center interview with the Service Recipient and interrogation of YDA 1 and the Subject; Justice Center Exhibit 24: video recording of the incident; and Hearing testimony of the Subject)

9. The Service Recipient removed his outer shirt, stood and walked toward a garbage can which was against the same wall as the drinking fountain. YDA 1 called a Code Yellow on his radio, indicating that assistance was needed. Both YDA 1 and the Subject stood and walked quickly toward the Service Recipient. When YDA 1 was approximately four feet from the Service Recipient, the Service Recipient grabbed and threw the garbage can at him. The Service Recipient then squared up with the Subject with his arms cocked and his fists clenched. (Justice Center Exhibits 9 and 24: audio recording of Justice Center interview with the Service Recipient and interrogation of YDA 1 and the Subject; Justice Center Exhibit 24: video recording of the incident; and Hearing testimony of the Subject)

10. The Service Recipient backed up to the wall and YDA 1 and the Subject engaged the Service Recipient physically, attempting to restrain him. At the same time, another YDA (YDA 2) entered the common area and engaged in the restraint attempt. The Service Recipient struggled against the restraint attempt and they all fell to the floor. The Service Recipient ended up on his back with the three staff on top of him. (Justice Center Exhibits 9 and 24: audio recording of Justice Center interview with the Service Recipient and interrogation of YDA 1 and the Subject; Justice Center Exhibit 24: video recording of the incident; and Hearing testimony of the Subject)

11. During the restraint attempt, from approximately 2:56:33 p.m. until 2:56:35 p.m. (two seconds), the Subject's arm was positioned around the Service Recipient's neck or head. (Exhibit 24: video recording of the incident - file V3) Before, during and after this timeframe, the Service Recipient kept his hands locked together and continued to struggle violently against the Subject and the other two staff who were attempting to restrain him. (Justice Center Exhibits 9 and 24: audio recording of Justice Center interrogation of YDA 1 and the Subject; Justice Center Exhibit 24: video recording of the incident - V3; and Hearing testimony of the Subject)

12. From approximately 2:56:36 p.m. until approximately 2:56:39 p.m. (three seconds), the Subject used his left arm and hand to put pressure on the upper part of the Service Recipient's body in an attempt to secure of the Service Recipient. (Exhibit 24: video recording of the incident - file V1) Before, during and after this timeframe, the Service Recipient continued to struggle violently against the Subject and the other two staff who were attempting to restrain him. (Justice Center Exhibits 9 and 24: audio recording of Justice Center interrogation of YDA 1 and the Subject; Justice Center Exhibit 24: video recording of the incident; and Hearing testimony of the Subject)

13. Thereafter, numerous staff responded and became involved in the restraint and, at approximately 2:57:25 p.m., the Service Recipient was secured in a sitting supine restraint and he ceased his resistance. At approximately 3:05 p.m., the Service Recipient was released from the supine restraint and escorted out of the common area with a one-person escort performed by another staff. (Exhibit 24: video recording of the incident)

14. The OCFS utilizes the Crisis Prevention and Management (CPM) protocol for physical interventions with youth in OCFS facilities. The CPM regulations provide that "Staff will only utilize physical restraint techniques as taught in OCFS training." (Justice Center Exhibit

14 Bates stamped p.71)

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 report of abuse (deliberate inappropriate use of restraints) 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 (deliberate inappropriate use of restraints) of a person in a facility or provider agency is defined by SSL § 488(1)(d), as follows:

"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 (deliberate inappropriate use of restraints) shall be categorized into categories pursuant to SSL § 493(4), including Category 2, which is defined as follows:

(b) Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one finding shall be sealed after five years.

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject committed the acts of abuse (deliberate inappropriate use of restraints) alleged in the substantiated report that is the subject of the proceeding and that such acts constitute the category of abuse (deliberate inappropriate use of restraints) as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged 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 abuse (deliberate inappropriate use of restraints) cited in the substantiated report constitutes the category of abuse (deliberate inappropriate use of restraints) as set forth in the substantiated report.

If the Justice Center did not prove the 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 not established by a preponderance of the evidence that the Subject committed the acts of abuse (deliberate inappropriate use of restraints) 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 1B, 2B, 3B, 4B, 5B, 6 through 14, 16, 18, 20, 23 and 25) The Justice Center also presented audio recordings of the Justice Center Investigator's interview of the Service Recipient, interviews and interrogations of witnesses and interrogation of the Subject, and video recordings of multiple aspects of the incident. (Justice Center Exhibit 24) The investigation underlying the substantiated report was conducted by the Investigator, who testified at the hearing on behalf of the Justice Center. OCFS Training Specialist 1 [REDACTED] (Trainer) also testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and presented no other evidence.

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 a service recipient to freely move his or her 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 the Subject used a restraint technique on the Service Recipient that was deliberately inconsistent with the facility's CPM protocol, specifically that, while restraining the Service Recipient, the Subject placed his arm around the Service Recipient's head and or neck at one point and that the Subject placed his hand on the Service Recipient's neck

at a later point in the restraint.

The Subject admits that he used a restraint on the Service Recipient and that, during the restraint, his arm was around the Service Recipient's head for a short period of time. The Subject argues that the placement of his arm around the Service Recipient's head was inadvertent and that once he realized the placement of his arm, he moved it. The Subject denies that his hand was on the Service Recipients neck in the later instance but, instead, that he was putting pressure on the Service Recipient's shoulder in an attempt to secure him.

The record is clear that neither "arm around the neck or head" nor "hand to neck" are techniques taught or sanctioned by CPM. (Justice Center Exhibit 25 and Hearing testimonies of the Trainer and the Subject).

The record reflects that during the timeframe of the restraint in which the inappropriate techniques were alleged to have been used by the Subject, the Service Recipient was violently resisting and struggling against the Subject and other staff's efforts to restrain him.

The Trainer testified that, during a restraint, in the event staff find themselves in a non-authorized position, they are required to move to an appropriate position as soon as possible. (Hearing testimony of the Trainer)

The record reflects that the Subject had his arm around the Service Recipient's head or neck from approximately 2:56:33 p.m. until 2:56:35 p.m. (approximately two seconds). (Justice Center Exhibit 24: video recording of the incident – V3) The Subject stated in the Activity Rule Violation - Incident Report that he did not realize that his arm went around the Service Recipient's head, and in his Justice Center interrogation and in his hearing testimony that the placement of his arm around the Service Recipient's head or neck was unintentional. In all three instances, the Subject stated that once he realized that his arm was around the Service Recipient's head or neck,

he immediately moved it. (Justice Center Exhibits 9 and 24: audio recording of Justice Center interrogation of the Subject; and Hearing testimony of the Subject)

The Administrative Law Judge presiding over the hearing, having observed and evaluated the hearing testimony of the Subject on this material issue, finds his testimony to be credible. Because the Subject's placement of his arm around the Service Recipient's head and/or neck was not intentional and because the Subject moved his arm upon realizing where his arm was, the Subject's conduct cannot be found to have been deliberate.

The record reflects that a few seconds later in the restraint, the Subject was positioned on top of the Service Recipient while the Service Recipient was on his back on the floor continuing to resist the restraint. From approximately 2:56:36 p.m. to approximately 2:56:39 p.m. (approximately three seconds), the Subject used his left arm to push down on the Service Recipient's upper body. (Justice Center Exhibit 24: video recording of the incident – V3) While it is clear from a review of the video evidence that the Subject used his left arm in an attempt to secure the Service Recipient, it is not clear that the Subject's hand was on the Service Recipient's neck and there is no other evidence in the record independent of the video evidence that supports the Justice Center's contention. Therefore, the Subject cannot be found to have deliberately used a non-authorized technique by placing his hand on the Service Recipient's neck.

Accordingly, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the abuse (deliberate inappropriate use of restraints) alleged. The substantiated report will be amended and sealed.

DECISION:

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

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 John T. Nasci, Administrative Hearings
Unit.

DATED: October 18, 2019
Schenectady, New York



John T. Nasci. ALJ