

**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

██████████

Pursuant to § 494 of the Social Services Law

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**FINAL  
DETERMINATION  
AFTER  
HEARING**

**Adjudication Case #:**

██████████

:

Justice Center for the Protection of People with  
Special Needs

By: Tracy Steeves, Esq.  
161 Delaware Avenue  
Delmar, NY 12054-1310

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By: Jennifer Zegarelli, Esq.  
CSEA, Inc.  
143 Washington Ave.  
Capitol Station Box 7125  
Albany, NY 12224

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, [REDACTED] [REDACTED], be amended and sealed is granted in part and denied in part. The Justice Center has not established by a preponderance of evidence Offense One. Therefore, the Subject's request to amend and seal the report as to Offense One is granted pursuant to SSL § 494(1) and Title 14 NYCRR § 700.6(a).

The request of [REDACTED] that the substantiated report [REDACTED] [REDACTED] be amended and sealed as to Offense Two is not granted. The Justice Center has established by a preponderance of the evidence the finding of abuse as indicated in Offense Two. Therefore, the Subject's request to amend and seal is denied as to Offense Two.

The substantiated report is properly categorized as a level three category.

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

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

**DATED:** August 25, 2014  
Schenectady, New York

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David Molik,  
Director

**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

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjudication Case #:**

██████████

Before:

Diane Herrmann  
Administrative Law Judge

Held at:

NYS Justice Center  
Administrative Hearings Unit  
401 State St.  
Schenectady, NY 12305  
On: ██████████

Parties:

Justice Center for the Protection of People with  
Special Needs  
By: Tracy Steeves, Esq.  
161 Delaware Avenue  
Delmar, NY 12054-1310

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## **JURISDICTION**

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating (the Subject) for abuse and/or neglect. The Subject requested that the Justice Center, Administrative Appeals Unit (AAU) amend the report to reflect that the Subject is not a subject of the substantiated report. The AAU 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, [REDACTED], of abuse by [REDACTED] (Subject) against [REDACTED], a service recipient. The initial report was investigated by the Justice Center for the Protection of People with Special Needs (Justice Center).
2. The initial report alleges, in pertinent part, that: On [REDACTED] the Subject committed an act of abuse: Offense One (deliberate inappropriate use of restraints) when he dragged a service recipient down a hallway and Offense Two, committed an act of abuse when he slapped a service recipient on the head.
3. The Justice Center substantiated the actions as a Category 3 offense pursuant to Social Service Law
4. An Administrative Review was conducted and as a result the substantiated report was retained.
5. At the time of the alleged abuse, the Subject was employed as a YDA [REDACTED] at

████████████████████, Office of Children and Family Services, which is an Agency or Provider that is subject to the jurisdiction of the Justice Center.

6. The Subject was working the 6:30am-2:30pm shift and was assigned to the Safety and Security Unit (SSU). The SSU responds to problems throughout the facility and assists when units are moving within the facility.

7. During the morning shift meeting the Duty Officer told the employees that there could be no “holding it up” in the medical unit. Holding it up is the phrase used to define the practice of residents refusing to leave the Medical Unit and return to their assigned units. Holding it up utilizes extra staff resources and interferes with the functioning of the medical unit.

8. On the morning of ██████████ Service Recipient, ██████████ (hereinafter SR) was taken to the Medical Unit. The staff worker who brought the SR to medical stated that he told her he was going to hold it up in medical and refuse to go back to his unit.

9. When the medical unit cleared the SR to return to his unit he left the medical unit but refused to walk down the hall. The Duty Officer was notified and the SSU was called to respond.

10. Subject ██████████ and employee ██████████ responded and found the SR in the hallway outside the medical unit. The Subject immediately went over to SR. The Subject and staff member, ██████████, each took an arm of the SR and attempted a standing PRT to get the SR back to his unit.

11. The SR was sitting on the floor and was pulled down the hall by ██████████ and the Subject. ██████████ lost his grip and almost immediately dropped the arm of the SR. The Subject continued to pull the SR for a few feet until he let go.

12. The SR then took off his shirt and leaned against the wall. The Subject walked

over to the SR, and it appears they had a brief conversation. The Subject then slapped the SR in the face.

13. The SR refused to talk to the Justice Center investigator and there is no indication that he suffered any injuries as a result of the incident.

### **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 or neglect.
- Pursuant to Social Services Law § 493(4), the category level of abuse or neglect that such act or acts constitute.

### **APPLICABLE LAW**

The Justice Center is responsible for investigating allegations of abuse or neglect in residential care facilities. SSL § 492(3) (c) and 493(1) and (3). Pursuant to SSL § 493(3), the Justice Center determined that the initial report of abuse or neglect presently under review was substantiated. A “substantiated report” means a report made “... if an investigation determines that a preponderance of evidence of the alleged neglect and/or abuse exists.”

Pursuant to SSL §§ 494(1)(a)(b) and (2), and Title 14 NYCRR § 700.6(b), this hearing decision will determine: 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, and if there is a finding of a preponderance of the evidence; whether the substantiated allegations constitute abuse or neglect; and pursuant to Social Services Law § 493(4), the category level of abuse or neglect that such act or acts constitute.

The abuse and neglect of a person in residential care is defined by SSL § 488:

- 1 "Reportable incident" shall mean the following conduct that a mandated reporter is required to report to the vulnerable persons' central register:
  - (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.
  - (b) "Sexual abuse," which shall mean any conduct by a custodian that subjects a person receiving services to any offense defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law; or any conduct or communication by such custodian that allows, permits, uses or encourages a service recipient to engage in any act described in articles two hundred thirty or two hundred sixty-three of the penal law. For purposes of this paragraph only, a person with a developmental disability who is or was receiving services and is also an employee or volunteer of a service provider shall not be considered a custodian if he or she has sexual contact with another service recipient who is a consenting adult who has consented to such contact.
  - (c) "Psychological abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by verbal or non-verbal conduct, a substantial diminution of a service recipient's emotional, social or behavioral development or condition, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor, or causing the likelihood of such diminution. Such conduct may include but shall not be limited to intimidation, threats, the display of a weapon or other object that could reasonably be perceived by a service recipient as a means for infliction of pain or injury, in a manner that constitutes a threat of physical pain or injury, taunts, derogatory comments or ridicule.
  - (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.

- (e) "Use of aversive conditioning," which shall mean the application of a physical stimulus that is intended to induce pain or discomfort in order to modify or change the behavior of a person receiving services in the absence of a person-specific authorization by the operating, licensing or certifying state agency pursuant to governing state agency regulations. Aversive conditioning may include but is not limited to, the use of physical stimuli such as noxious odors, noxious tastes, blindfolds, the withholding of meals and the provision of substitute foods in an unpalatable form and movement limitations used as punishment, including but not limited to helmets and mechanical restraint devices.
- (f) "Obstruction of reports of reportable incidents," which shall mean conduct by a custodian that impedes the discovery, reporting or investigation of the treatment of a service recipient by falsifying records related to the safety, treatment or supervision of a service recipient, actively persuading a mandated reporter from making a report of a reportable incident to the statewide vulnerable persons' central register with the intent to suppress the reporting of the investigation of such incident, intentionally making a false statement or intentionally withholding material information during an investigation into such a report; intentional failure of a supervisor or manager to act upon such a report in accordance with governing state agency regulations, policies or procedures; or, for a mandated reporter who is a custodian as defined in subdivision two of this section, failing to report a reportable incident upon discovery.
- (g) "Unlawful use or administration of a controlled substance," which shall mean any administration by a custodian to a service recipient of: a controlled substance as defined by article thirty-three of the public health law, without a prescription; or other medication not approved for any use by the federal food and drug administration. It also shall include a custodian unlawfully using or distributing a controlled substance as defined by article thirty-three of the public health law, at the workplace or while on duty.
- (h) "Neglect," which shall mean any action, inaction or lack of attention that breaches a custodian's duty and that results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient. Neglect shall include, but is not limited to: (i) failure to provide proper supervision, including a lack of proper supervision that results in conduct between persons receiving services that would constitute abuse as described in paragraphs (a) through

(g) of this subdivision if committed by a custodian; (ii) failure to provide adequate food, clothing, shelter, medical, dental, optometric or surgical care, consistent with the rules or regulations promulgated by the state agency operating, certifying or supervising the facility or provider agency, provided that the facility or provider agency has reasonable access to the provision of such services and that necessary consents to any such medical, dental, optometric or surgical treatment have been sought and obtained from the appropriate individuals; or (iii) failure to provide access to educational instruction, by a custodian with a duty to ensure that an individual receives access to such instruction in accordance with the provisions of part one of article sixty-five of the education law and/or the individual's individualized education program.

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

Substantiated reports of abuse or neglect shall be categorized into categories pursuant to SSL § 493:

4. Substantiated reports of abuse or neglect shall be categorized into one or more of the following four categories, as applicable:
  - (a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:
    - (i) intentionally or recklessly causing physical injury as defined in subdivision nine of section 10.00 of the penal law, or death, serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, or consciously disregarding a substantial and unjustifiable risk that such physical injury, death, impairment or loss will occur;
    - (ii) a knowing, reckless or criminally negligent failure to perform a duty that: results in physical injury that creates a substantial risk of death; causes death or serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse

practitioner, licensed clinical or master social worker or licensed mental health counselor; or is likely to result in either;

(iii) threats, taunts or ridicule that is likely to result in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;

(iv) engaging in or encouraging others to engage in cruel or degrading treatment, which may include a pattern of cruel and degrading physical contact, of a service recipient, that results in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;

(v) engaging in or encouraging others to engage in any conduct in violation of article one hundred thirty of the penal law with a service recipient;

(vi) any conduct that is inconsistent with a service recipient's individual treatment plan or applicable federal or state laws, regulations or policies, that encourages, facilitates or permits another to engage in any conduct in violation of article one hundred thirty of the penal law, with a service recipient;

(vii) any conduct encouraging or permitting another to promote a sexual performance, as defined in subdivision one of section 263.00 of the penal law, by a service recipient, or permitting or using a service recipient in any prostitution-related offense;

(viii) using or distributing a schedule I controlled substance, as defined by article thirty-three of the public health law, at the work place or while on duty;

(ix) unlawfully administering a controlled substance, as defined by article thirty-three of the public health law to a service recipient;

(x) intentionally falsifying records related to the safety, treatment or supervision of a service recipient, including but not limited to medical records, fire safety inspections and drills and supervision checks when the false statement contained therein is made with the intent to mislead a person investigating a reportable incident and it is reasonably foreseeable that such false statement may endanger the health, safety or welfare of a service recipient;

(xi) knowingly and willfully failing to report, as required by paragraph (a) of subdivision one of section four hundred ninety-one of this article, any of the conduct in subparagraphs (i) through (ix) of this paragraph upon discovery;

(xii) for supervisors, failing to act upon a report of conduct in subparagraphs (i) through (x) of this paragraph as directed by regulation, procedure or policy;

- (xiii) intentionally making a materially false statement during an investigation into a report of conduct described in subparagraphs (i) through (x) of this paragraph with the intent to obstruct such investigation; and
- (xiv) intimidating a mandated reporter with the intention of preventing him or her from reporting conduct described in subparagraphs (i) through (x) of this paragraph or retaliating against any custodian making such a report in good faith.
- (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.
- (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.
- (d) Category four shall be conditions at a facility or provider agency that expose service recipients to harm or risk of harm where staff culpability is mitigated by systemic problems such as inadequate management, staffing, training or supervision. Category four also shall include instances in which it has been substantiated that a service recipient has been abused or neglected, but the perpetrator of such abuse or neglect cannot be identified.

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 level of abuse set forth in the substantiated report.

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

## DISCUSSION

The Justice Center has not established by a preponderance of evidence that the Subject committed the abuse in the substantiated report alleged in Offense One. The Justice Center did establish by a preponderance of the evidence Offense Two and it was properly categorized as a Category Three level of abuse.

The Justice Center presented one witness and admitted into evidence the Incident reports completed by four staff members including the Subject, that were present during the event, and a video of the incident. The Subject testified on his own behalf.

The witness for the Justice Center was the case investigator, [REDACTED]. [REDACTED] summarized his investigation and introduced the video of the incident. The investigator testified that the Subject did not utilize a proper escort technique. The investigator stated that he had received SCIP training and escort/restraint training from OPWDD.

The Subject testified in his own defense. The Subject stated that prior to each shift there was a staff meeting. On the morning in question the Duty Officer told the staff to make sure there were no resident hold ups in the medical unit. The Subject testified that he was ordered to get the SR back to his unit and that is why the escort was performed. The Subject stated that as soon as he realized that [REDACTED] had lost his grip he let go of the SR. The Subject also testified that the staff members on duty with him in the SSU were not his regular co-workers. The Subject testified that staff members become familiar with each other's techniques and on the day in question his co-workers were there on overtime.

The Subject testified that the hit to SR's face was accidental and was meant to block the SR's hand. The Subject testified that he thought the SR was reaching up to hit his groin and he put his hand out to block the SR's hand.

### **Offense One**

The Justice Center charged the Subject with abuse based on an improper restraint. To prove that the Subject committed an act of an inappropriate restraint the Justice must prove that 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. The Justice Center witness testified that he was trained by OPWDD in proper restraint techniques, not OCFS.

The Justice Center did not admit into evidence the OCFS policy of escorting an individual down the hallway. The Justice Center admitted into evidence statements by four employees who stated that the two staff members were attempting to perform a PRT escort. In the video the length of time the Subject attempts to move the SR down the hall is 4 seconds. The Subject testified that he let go of the SR as soon as he realized his partner had lost his grip. It is reasonable to believe that it would take 4 seconds to react.

The Subject admitted into evidence an Expedited Disciplinary Arbitration Decision and Award dated [REDACTED]. OCFS charged the Subject with 6 charges and the only charge addressed in the decision was the slap. The Subjects attorney argued that OCFS did not pursue the inappropriate restraint charge and this was further proof that the technique used was appropriate.

The Justice Center has failed to support its finding that the Subject committed Offense One. The substantiated report as to Offense One will be sealed.

### **Offense Two**

The Subject's testimony that he was attempting to block the SR's hand is not credible. The SR is sitting on the floor and the Subject was standing. The SR hands do not appear to move in the video. The Subject makes clear contact with the SR's face. If the Subject was attempting to block the SR hands he would not have hit the SR in the face.

Accordingly, it is determined that the Agency has met its burden of proving by a preponderance of the evidence that the Subject committed the abuse alleged. The SR was not injured.

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes a category two level of abuse.

The legal issue to be addressed is whether [REDACTED] conduct in slapping the SR, seriously endangered the health, safety or welfare of SR. The acts of the Subject were observed to be deliberate and are in direct violation of the statute. These acts reflect a serious endangerment of the SR's health, safety or welfare.

The Justice Center has met its burden to support Offense Two as a category three level of abuse.

**DECISION:** The request of [REDACTED] that the substantiated report, [REDACTED], be amended and sealed is granted in part and denied in part. The Justice Center has not established by a preponderance of evidence Offense One. Therefore, the Subject's request to amend and seal the report as to Offense One is granted pursuant to SSL § 494(1) and Title 14 NYCRR § 700.6(a).

The request of [REDACTED] that the substantiated report [REDACTED] [REDACTED] be amended and sealed as to Offense Two is not granted. The Justice Center has established by a preponderance of the evidence the finding of abuse as indicated in Offense Two. Therefore, the Subject's request to amend and seal is denied as to Offense Two.

The substantiated report is properly categorized as a level three category.

This decision is recommended by Diane Herrmann, Administrative Hearings Bureau.

**DATED:** August 25, 2014  
Schenectady, New York

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Diane Herrmann, ALJ