

**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
AFTER
HEARING**

Adjud. Case #:

[REDACTED]
[REDACTED]

Vulnerable Persons' Central Register
Justice Center for the Protection of People with
Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived

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

[REDACTED]
[REDACTED]
[REDACTED]

By: Margaret J. Fowler, Esq.
Levene Gouldin & Thompson, LLP
PO Box F-1706
Binghamton, New York 13902-0106

██████████

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 ██████████ that the report "substantiated" on ██████████
██ dated and received on ██████████
██████████ be amended and sealed is denied. The Subject has been shown by a
preponderance of the evidence to have committed abuse (physical abuse
and deliberate inappropriate use of restraints) and neglect.

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

The request of ██████████ that the report "substantiated" on ██████████
██ dated and received on ██████████
██████████ be amended and sealed is denied. The Subject has been shown by a
preponderance of the evidence to have committed abuse (deliberate
inappropriate use of restraints).

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

The request of ██████████ that the report "substantiated" on ██████████
██ dated and received on ██████████
██████████ be amended and sealed is denied. It is determined that the Subject
has withdrawn the Subject's request for a hearing to challenge the

substantiated report. Accordingly, the record of this report shall be retained by the Vulnerable Person's Central Register.

NOW THEREFORE IT IS DETERMINED that Category 2 conduct under this paragraph shall be elevated to Category 1 conduct when such conduct occurs within three years of a previous finding that the Subject engaged in Category 2 conduct. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years. 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)(b).

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

DATED: November 6, 2015
Schenectady, New York



David Molik
Administrative Hearings Unit

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

In the Matter of the Appeal of

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

████████████████████
██████████

Before: Gerard D. Serlin
Administrative Law Judge

Held at: New York State Office Building
333 East Washington Street, Hearing Room 115
Syracuse, New York 13202
On: ██████████

Parties: Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
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By: Thomas C. Parisi, Esq.

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By: Margaret J. Fowler, Esq.
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PO Box F-1706
Binghamton, New York 13902-0106

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains reports substantiating [REDACTED] (the Subject) for abuse and/or neglect. The Subject requested that the VPCR amend the reports to reflect that the Subject is not a subject of the substantiated reports. 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:

Report of [REDACTED]

1. The VPCR contains a report "substantiated" on [REDACTED], dated and received on [REDACTED] of abuse and/or neglect by the Subject, [REDACTED] of a Service Recipient. This report resulted in two substantiated allegations as to Subject [REDACTED].

2. The New York State Justice Center for the Protection of People with Special Needs (Justice Center) concluded that:

Offense 1

It was alleged that on [REDACTED], on Unit [REDACTED] at the [REDACTED], located at [REDACTED], while acting as a custodian (YDA-3), you committed physical abuse when you entered a service recipient's room and engaged in an altercation with him, causing physical injury, serious or protracted impairment of the service recipients physical, mental or emotional condition or the likelihood of such injury or impairment.

This allegation has been SUBSTANTIATED as Category 2 physical abuse pursuant to Social Services Law § 493. (Justice Center Exhibit 2)

Offense 2

It was alleged that on [REDACTED], on Unit [REDACTED] at the [REDACTED] [REDACTED], located at [REDACTED], while acting as a custodian (YDA-3), you committed abuse when you deliberately inappropriately used a restraint on a service recipient, in that you entered the service recipient's room and physically held and assaulted him.

This allegation has been SUBSTANTIATED as Category 2 deliberate and inappropriate use of a restraint pursuant to Social Services Law § 493. (Justice Center Exhibit 2)

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

4. The facility, [REDACTED], located at [REDACTED] [REDACTED], is a limited secure facility for male youths who are placed in the custody of the New York State Office of Children and Family Services (OCFS), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the reports addressed herein, the Subject was employed by the OCFS at the [REDACTED] in the title of Youth Division Aide -3 (YDA-3) and the Service Recipient was a young person who was residing at the [REDACTED] [REDACTED].

6. On or about [REDACTED] at approximately 4:37 p.m., the Subject was working on Unit [REDACTED] of the facility. The Service Recipient was in his bedroom on Unit [REDACTED] at the time of the incident. (Justice Center Exhibit 7)

7. Subject [REDACTED] entered the Service Recipient's room to confront the Service Recipient about his negative behaviors. Another YDA-3, [REDACTED], arrived and remained in the doorway during the interaction between Subject [REDACTED] and the Service Recipient. (Justice Center Exhibit 21: video surveillance)

8. After entering the bedroom¹, Subject ██████ directed that the Service Recipient “lock-into” his room, and when the Service Recipient failed to do so, Subject ██████ physically engaged the Service Recipient and executed a maneuver on the Service Recipient’s hand and wrist. (Justice Center Exhibit 21: audio recorded interview with the Service Recipient) Eventually, Subject ██████ and the Service Recipient ended up in a tug-of-war over control of the Service Recipient’s bedroom door. At some point during the conflict, the Service Recipient kicked at Subject ██████. However, the Service Recipient is the person who sustained an unspecified, but minor leg injury. (Justice Center Exhibit 21) The entirety of these events was observed by YDA-3 ██████. Subject ██████ remained in the bedroom for approximately 2 minutes and 25 seconds. During this time, Subject ██████ was not in view of the facility surveillance camera perspective which was ultimately obtained by the Justice Center.² (Justice Center Exhibit 21)

9. At approximately 4:40 p.m. Subject ██████ exited the bedroom, and shut the door. At 4:48 p.m., YDA-3 ██████ opened the Service Recipient’s bedroom door. The Service Recipient exited his bedroom and as he walked past YDA-3 ██████, he was noticeably limping. (Justice Center Exhibit 21: video surveillance) The Service Recipient sustained a minor and unspecified leg injury during the altercation in his bedroom and was seen by a nurse for the leg

¹ OCFS Policy limits those instances where a staff member may enter a Service Recipient’s bedroom to emergent situations in order to prevent harm, OCFS PPM 3247.03.

² More than one, and perhaps as many as three, video surveillance perspectives of the incident were captured by OCFS cameras. It is likely that a perspective was captured of some portion of the activity which occurred in the Service Recipient’s bedroom. Justice Center Investigator ██████ relied on a facility staff member to preserve the video perspectives and to transfer the video perspectives to a CD for review by Justice Center Investigator ██████. However, the video system parameters employed by this OCFS facility caused a re-write over all video after 7 days. There was a significant delay in the report to VPCR (5 days), and consequently a delay in initiating the investigation. Justice Center Investigator ██████ requested the video (day 7 post-incident) from OCFS, but relied upon an OCFS employee to review the existing video perspectives and determine which video perspectives if any, revealed information about what occurred in the bedroom. The OCFS employee ultimately represented to the Investigator that only the perspective ultimately admitted into evidence at the hearing provided useful information. While other video perspectives existed, the Investigator did not review or secure those perspectives because of the representation made by the OCFS employee.

injury two days later. (Testimony of Justice Center Investigator [REDACTED] and Justice Center Exhibit 13)

10. Subject [REDACTED] made several entries in the unit activity log before and after the incident occurred. A log entry made by Subject [REDACTED] at 5:20 p.m. indicated that unit staff called other facility staff for assistance because the Service Recipient and another youth were fighting over the television. The log entry also stated that the Service Recipient grabbed Subject [REDACTED] who then “grabbed his hand off, and shut the door to his room until Code [call for assistance] was over.” (Justice Center Exhibit 13)

Report of [REDACTED]

11. The VPCR contains a report "substantiated" on [REDACTED], dated and received on [REDACTED] of abuse and/or neglect by the Subject [REDACTED] of a Service Recipient. The report resulted in one substantiated allegation as to [REDACTED].

12. The Justice Center concluded that:

Offense 2³

It was alleged that on [REDACTED], in the gym at the [REDACTED], located at [REDACTED], while acting as a custodian (YDA-3), you committed abuse – deliberate inappropriate use of a restraint – when you initiated a restraint against a service recipient under circumstances in which it was inappropriate, and without attempting de-escalation, after the service recipient threw juice on you.

This offense has been SUBSTANTIATED as Category 3 abuse (deliberate inappropriate use of a restraint) pursuant to Social Services Law § 493. (Justice Center Exhibit 1A)

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

³ The first substantiated allegation (Offense 1) was determined to be unsubstantiated by the Office of General Counsel.

14. At the time of the alleged abuse and/or neglect, the Service Recipient was 16 years of age, and had been a resident of the facility for at least nine months.

15. On [REDACTED] at approximately 4:39 p.m., Subject [REDACTED] was supervising service recipients in the facility gym. Subject [REDACTED] approached the Service Recipient and another service recipient who were sitting midway-up, in the bleachers. Subject [REDACTED] sat on the riser behind the Service Recipient and the other service recipient, approximately 2-3 feet away. Subject [REDACTED] engaged the Service Recipient and the other service recipient in conversation. (Justice Center Exhibit 17A: Video)

16. The service recipient who was sitting between Subject [REDACTED] and the Service Recipient stood up and turned to face Subject [REDACTED]. The Service Recipient then tossed the liquid contents of a cup at Subject [REDACTED]. Subject [REDACTED] immediately lunged at the Service Recipient. After a brief struggle on the bleachers, resulting in the Service Recipient banging his knee, the Service Recipient was restrained by Subject [REDACTED]. Thereafter, the Service Recipient was escorted from the gym. (Justice Center Exhibit 17A)

Report of [REDACTED]

17. The VPCR contains a report “substantiated” on [REDACTED], dated and received on [REDACTED] of abuse and/or neglect by the Subject [REDACTED] of a Service Recipient. The report resulted in one substantiated allegation as to the Subject [REDACTED].

18. The Justice Center concluded that:

Offense 1

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian (YDA-3), you committed neglect when you failed to provide proper supervision by violating policy and engaging in horseplay with a service recipient, resulting in

physical injury or the likelihood of such injury.

This offense has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493. (Justice Center Exhibit 1B)

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

20. On or about [REDACTED] at the date and time of the hearing on this report and on the record, the Subject, [REDACTED], withdrew his request for an amendment of this report.

ISSUES

- Whether the Subject and/or Subjects have been shown by a preponderance of the evidence to have committed the act or 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 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 reports of abuse and neglect presently under review were 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 and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1)(a)(d) and (h), to include:

"Physical abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient or causing the likelihood of such injury or impairment. Such conduct may include but shall not be limited to: slapping, hitting, kicking, biting, choking, smothering, shoving, dragging, throwing, punching, shaking, burning, cutting or the use of corporal punishment. Physical abuse shall not include reasonable emergency interventions necessary to protect the safety of any person.

"Deliberate inappropriate use of restraints," which shall mean the use of a restraint when the technique that is used, the amount of force that is used or the situation in which the restraint is used is deliberately inconsistent with a service recipient's individual treatment plan or behavioral intervention plan, generally accepted treatment practices and/or applicable federal or state laws, regulations or policies, except when the restraint is used as a reasonable emergency intervention to prevent imminent risk of harm to a person receiving services or to any other person. For purposes of this subdivision, a "restraint" shall include the use of any manual, pharmacological or mechanical measure or device to immobilize or limit the ability of a person receiving services to freely move his or her arms, legs or body.

"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.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 2 physical abuse, and deliberate and inappropriate use of a

restraint. Also cited are the reports of Category 3, deliberate and inappropriate use of a restraint and neglect. All of which are defined as follows:

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

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(s) committed the act or acts of abuse and/or neglect alleged in the substantiated report(s) that is 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(s). Title 14 NYCRR § 700.10(d).

If the Justice Center proves the alleged abuse and/or neglect, the reports 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 and/or neglect cited in the substantiated reports constitute the category of abuse and/or neglect as set forth in the substantiated reports. If a Category 2 finding of abuse or neglect is upheld, under this paragraph it shall be elevated to Category 1 conduct when such conduct occurs within three years of a previous finding that such custodian engaged in Category 2 conduct. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years.

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

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DISCUSSION

This decision addresses three substantiated reports against the Subject, ■■■■■. The report of ■■■■■, is shared in common with YDA-3 ■■■■■. YDA-3 ■■■■■ actions are discussed in a separate decision.

Report of ■■■■■

In support of its case, the Justice Center presented numerous documents obtained during the course of its investigation. (Justice Center Exhibits 1-21) The most pertinent exhibits include audio recorded interviews and a video perspective of the incident. (Justice Center Exhibit 21)

Justice Center Investigator ■■■■■ testified on behalf of the Justice Center and was the only Justice Center witness, as to this report, to testify on behalf of the Justice Center. Both Subject ■■■■■ and YDA-3 ■■■■■ testified at the hearing.

The Justice Center alleged that Subject ■■■■■ committed physical abuse against the Service Recipient and also engaged in the deliberate inappropriate use of a restraint against the Service Recipient on ■■■■■.

The Justice Center concluded that Subject ■■■■■ entered the Service Recipient's room "to confront negative behaviors" and that doing so was a violation of OCFS policy. (Justice Center Exhibit 19) Subject ■■■■■ testified that when he entered the Service Recipient's room, he did so because the Service Recipient was "banging around" and Subject ■■■■■ opened the door to make certain that the Service Recipient was not injuring himself. (Hearing testimony of Subject ■■■■■)

However, in the unit activity log from that day, Subject ■■■■■ made a notation regarding this incident at 5:20 p.m. Subject ■■■■■ wrote that he "...went to see if [the Service Recipient]

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was going to process.” Subject ██████ did not note, in the log book, any concern about the Service Recipient engaging in self-harm as a predicate for entering the Service Recipient’s bedroom. (Justice Center Exhibit 13)

About one hour after the incident, Subject ██████ made an entry in the unit activity log, but only noted that there was a dispute between two service recipients over the television. At the hearing, it was not established whether the dispute between the service recipients resulted in the Service Recipient being in his room and ultimately refusing to lock in, or if the two events were unrelated. In any event, the record does not support the conclusion that Subject ██████ entry into the Service Recipient’s bedroom was necessary to protect the Service Recipient.

The video provided during the investigation establishes that Subject ██████ entered the Service Recipient’s bedroom. Shortly thereafter, YDA-3 ██████ came into the frame of the video and is captured standing in the doorway of the Service Recipient’s bedroom. Subject ██████ can be seen bent at the waist, either pulling or tugging vigorously, while YDA-3 ██████ stands at the doorway, clearly observing the entire incident. (Justice Center Exhibit 21)

Another service recipient was in the common area during the incident. This service recipient provided an audio statement to Investigator ██████ that corroborated much of the Service Recipient’s allegations. (Justice Center Exhibit 21) The other service recipient confirmed that he heard the Service Recipient yell for Subject ██████ to, “get off me” and “you’re hurting my leg.” The other service recipient also reported that he observed the Service Recipient limping when he left his bedroom. (Justice Center Exhibit 21: recorded audio interview of resident witness)

Subject ██████ argued that the recorded interview of the witness service recipient was not persuasive and should not be accorded appreciable weight because the service recipient who

█████ claimed to have witnessed the incident in the Service Recipient's bedroom was not seated in a position to have seen the incident as he claimed to have, particularly since the doorway was blocked by YDA-3 █████.

Some factors considered by the Administrative Law Judge presiding over a hearing in weighting recorded or written witness statements against conflicting hearing testimony include: the circumstances under which the statements were initially made, information bearing upon the credibility of the person who made the statement, and his or her motive to fabricate, and the consistency and degree of inherent believability of the statements, the degree of detail provided in the statement, the completeness of the interviewer's questions and the credibility assessed to any sworn hearing testimony, including the self-serving motive of the Subject to testify in a manner favorable to him or herself.

At the hearing, Subject █████ testified that while in the bedroom, the Service Recipient reached his hand out as if to push Subject █████, so Subject █████ pushed the Service Recipient's hand away. Subject █████ denied grasping the Service Recipient's hand, or pushing the Service Recipient as alleged by the Service Recipient. However, the Subject's hearing testimony is not credited evidence. Subject █████ failed to recall simple details in his hearing testimony and could not adequately explain major discrepancies in his documentation, which were raised on cross-examination. The recorded statements of the Service Recipient and the resident witness are credited evidence. These statements are corroborated in part by the video evidence.

Subject █████ entered the Service Recipient's bedroom contrary to OCFS policy. Subject █████ performed a maneuver on the hand and wrist of the Service Recipient contrary to OCFS policy. A tug-of-war over control of the door ensued between Subject █████ and the

Service Recipient and the Service Recipient's leg was injured. The maneuver of immobilizing the Service Recipient's hand constitutes a restraint,⁴ and this maneuver was not a prescribed OCFS restraint. There were no exigent circumstances which statutorily justified performing that restraint; in fact, all conduct of the Service Recipient after the Subject entered the room directly resulted from the Subject entering the Service Recipient's room in violation of OCFS policy. Therefore, the Justice Center established that Subject [REDACTED] performed a deliberately inappropriate use of a restraint and also committed physical abuse when he performed a non-sanctioned maneuver on the hand and wrist of the Service Recipient "intentionally or recklessly causing, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of [the] service recipient or causing the likelihood of such injury or impairment." SSL § 488 (1)(a).

The Justice Center has shown by a preponderance of the evidence that the Subject, [REDACTED], committed the prohibited act described as Offense 1 in the substantiated report. The act committed by Subject [REDACTED] constitutes physical abuse. The category of the affirmed substantiated abuse that such act constitutes is Category 2.

In addition, the Justice Center has proven by a preponderance of the evidence that the Subject, [REDACTED] committed the prohibited act described as Offense 2 in the substantiated report. The act committed by Subject [REDACTED], deliberate inappropriate use of restraint, constitutes abuse.

After considering the entire record, it is determined that the substantiated allegations are properly categorized as Category 2 acts. The Subject's actions seriously endangered the health,

⁴ 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. SSL § 488 1(d)

■■■■■

safety or welfare of the Service Recipient, which was evidenced by the fact that the Subject caused a leg injury to the Service Recipient. Category 2 acts under this paragraph shall be elevated to a Category 1 act when such act occurs within three years of a previous finding that the Subject engaged in a Category 2 act. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years.

Report of ■■■■■

The Justice Center has established by a preponderance of the evidence that the Subject, ■■■■■ committed a prohibited act, described as Offense 2 in this substantiated report. The act committed by the Subject constitutes abuse (deliberate inappropriate use of a restraint.)

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-17 A) The Administrative Law Judge presiding over the hearing took notice of OCFS policies germane to this hearing. The investigation underlying the substantiated report was conducted by Justice Center Investigator ■■■■■, who was the only Justice Center witness who testified at the hearing in support of this report. Subject ■■■■■ testified on his own behalf and provided no other evidence. The Justice Center submitted a visual only video recording of the incident with respect to the substantiated allegations, (Justice Center Exhibit 17 A) and audio recordings of interviews with each witness and the Subject ■■■■■. (Justice Center Exhibit 17 B)

The Justice Center proved by a preponderance of the evidence that the Subject, ■■■■■ committed the abuse alleged in the substantiated report.

The relevant statute in this matter is Social Services Law §488(1)(d), which sets forth several situations where restraints cannot be used, including when the use of restraints would violate applicable agency policies. The relevant OCFS policy limits the use of restraints to

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situations where a youth is attempting to escape, or to protect the safety of any individual. (OCFS Crisis Prevention and Management PPM 3247:12)⁵

Subject █████ testified that he employed the restraint as a safety measure because he was not sure what the Service Recipient would do after throwing the juice. Indeed, the relevant statute carves out an exception for the use of a restraint as a “reasonable emergency intervention to prevent imminent risk of harm...to any other person.” SSL §488(1)(d). During his interrogation, Subject █████ stated that he was momentarily blinded by the juice. (Justice Center Exhibit 17 B) However, that statement is not consistent with the video evidence which reveals that Subject █████ had a clear understanding of the Service Recipient’s location and Subject █████ was able to grab the Service Recipient without hesitation. (Justice Center Exhibit 17 A)

Subject █████ could have easily protected himself by stepping away from the Service Recipient. The liquid was neither hot, nor caustic and Subject █████ was clearly not blinded, as he alleged. There was sufficient room for Subject █████ to retreat, as he was already seated a riser above and outside of the Service Recipient’s reach. Subject █████ contention that he acted in self-defense is not supported by the evidence.

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

After considering the entire record, it is determined that the substantiated allegation is properly categorized as a Category 3 act. A substantiated Category 3 act of abuse and/or neglect will not result in the Subject’s name being placed on the VPCR Staff Exclusion List and the fact

⁵ Judicial notice was taken by the Administrative Law Judge presiding over the hearing of this OCFS policy.

that the Subject has a Substantiated Category 3 act will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject to disclosure pursuant to NY SSL § 496 (2). This report will be sealed after five years.

Report of [REDACTED]

At the hearing, on the record and with the advice of counsel, Subject [REDACTED] withdrew his request for an amendment of the substantiated report for this report. Therefore, it is determined that Subject [REDACTED] has withdrawn his request for a hearing to challenge the specified substantiated report. Accordingly, this allegation shall be retained by the Vulnerable Person's Central Register.

Therefore, the substantiated report will not be amended or sealed. Further, the Category will remain a Category 3 act. A substantiated Category 3 act of abuse and/or neglect will not result in the Subject's name being placed on the VPCR Staff Exclusion List and the fact that the Subject has a Substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject to disclosure pursuant to NY SSL § 496 (2). This report will be sealed after five years.

DECISION:

The request of [REDACTED] that the report "substantiated" on [REDACTED] [REDACTED] dated and received on [REDACTED] [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse (physical abuse and deliberate inappropriate use of restraints) and neglect.

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

█

The request of █ that the report “substantiated” on █
█ dated and received on █
█ be amended and sealed is denied. The Subject has been shown by a
preponderance of the evidence to have committed abuse (deliberate
inappropriate use of restraints).

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

The request of █ that the report “substantiated” on █
█ dated and received on █
█ be amended and sealed is denied. It is determined that the Subject
has withdrawn the Subject’s request for a hearing to challenge the
substantiated report. Accordingly, the record of this report shall be
retained by the Vulnerable Person’s Central Register.

This decision is recommended by Gerard D. Serlin, Administrative Hearings Unit.

DATED: September 8, 2015
Schenectady, New York



Gerard D. Serlin, ALJ