

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

In the Matter of the Appeal of

████████████████████

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AFTER HEARING**

Adjud. Case #:

██████████

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
Delmar, New York 12054-1310
By: Juliane O'Brien, Esq.

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██████████

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 substantiated report dated ██████████, ██████████ received and dated ██████████ 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.

NOW THEREFORE IT IS DETERMINED that the record of this report shall be retained by the Vulnerable Persons' 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: Schenectady, New York
December 14, 2015



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:

John T. Nasci
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.

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JURISDICTION

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

FINDINGS OF FACT

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

1. The VPCR contains a "substantiated" report dated [REDACTED], [REDACTED] [REDACTED], received and dated [REDACTED] of 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] [REDACTED], while acting as a custodian, you committed abuse (deliberate inappropriate use of restraints) when you tried to keep a service recipient from running into the kitchen of the [REDACTED] by grabbing her by the head and gait belt.

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

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

4. The facility, located at [REDACTED], is an [REDACTED] [REDACTED] for adults with various physical and mental disabilities, which

██████████ housed five residents at the time of the alleged abuse. ██████████ is operated by the Office for People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (See Hearing testimony of OPWDD Investigator ██████████)

5. At the time of the alleged abuse, the Subject had been employed by the provider agency since at least ██████ 2007. The Subject worked at the ██████████ for approximately three to four months prior to the date of the alleged abuse as a Direct Support Assistant (DSA). (See Justice Center Exhibits 18 and 21: audio recording of interrogation of the Subject; and Hearing testimony of DA1 ██████████)

6. At the time of the alleged abuse, the Service Recipient was a thirty-six year old adult female resident of the facility and had been a resident of the facility for approximately six years. The Service Recipient has a diagnosis of Profound Intellectual Disability as well as psychiatric diagnoses of Intermittent Explosive Disorder and Anxiety Disorder. The Service Recipient is ambulatory but walks with an unsteady gait and requires the use of a gait belt by facility staff to assist her. The Service Recipient is non-verbal and has a mental age of 6.6 months. (See Justice Center Exhibits 11, 13 and 14)

7. On ██████████ at approximately 9:40 a.m. while working in his capacity as a DSA at the facility, the Subject was using a gait belt to assist the Service Recipient while he was walking with the Service Recipient in the facility hallway. The Subject held one of eight loops on the rear of the gait belt with his right hand by placing his hand through the loop. As the Subject and the Service Recipient walked down the hallway, the Service Recipient saw Developmental Assistant 1 (DA1) ██████████ in the facility kitchen ahead of them, and suddenly bolted, attempting to run to her. As a result of the Service Recipient's sudden action, the Subject's right arm became fully extended due to his hand having been through the gait belt

loop. The Subject reacted by pulling the Service Recipient back to him, thereby causing the Service Recipient's body to slam into him, which in turn caused the Service Recipient to lose her balance. The Subject then grabbed the Service Recipient's forehead with his left hand in an attempt to rebalance the Service Recipient. The Subject then said to the Service Recipient: "No, you're going to the couch", and proceeded to direct the Service Recipient to a nearby couch in the adjacent living room using the gait belt with his right hand and his left hand on the Service Recipient's forehead. (See Justice Center Exhibits 2, 4 and 21: audio recording of interrogation of the Subject; Hearing testimony of OPWDD Investigator [REDACTED]; and Hearing testimony of the Subject)

8. The Service Recipient's Behavioral Support Plan that was in effect at the time of the alleged abuse states that the Service Recipient's "challenging behaviors do not warrant a physical intervention." (See Justice Center Exhibit 11) The Service Recipient's Individual Plan of Protective Oversight (IPOPO) that was in effect at the time of the alleged abuse lists the Service Recipient's behaviors that do not need monitoring as "self-injurious, property destruction, assaultive, elopement, pica." (See Justice Center Exhibit 12) The Service Recipient's Ambulatory and Mobility Routine contains the following statement concerning the Service Recipient's behavior and required level of supervision: "... stay by guard¹ to contact guard within her residence ...". The term "Stand by Guard" is defined in the document as: "Staff remain next to person (within arms reach) while they perform their mobility activity ...", and the term "Contact Guard" is defined in the document as: "Staff provide 'hands on' physical guidance during mobility activities ...". (See Justice Center Exhibit 14)

9. The Subject had completed the following training that is pertinent to the present issues: Strategies for Crisis Intervention and Prevention – Revised (SCIP-R) on [REDACTED],

¹ The use of the term "stay by guard" is an error on the document and should instead be "stand by guard".

of any manual, pharmacological or mechanical measure or device to immobilize or limit the ability of a person receiving services to freely move his or her arms, legs or body.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 3, which is defined as follows:

(c) Category three is abuse or neglect by custodians that is not otherwise described in categories one and two. Reports that result in a category three finding shall be sealed after five years.

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

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

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

DISCUSSION

The Justice Center has established by a preponderance of evidence that the Subject committed an act, 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. (See Justice Center Exhibits 1-20) The Justice Center also presented an audio recording of the OPWDD investigator’s interrogation of the Subject. (See Justice Center Exhibit 21) The investigation underlying the substantiated report

was conducted by OPWDD Investigator [REDACTED]², who testified at the hearing in behalf of the Justice Center. [REDACTED], employed by the provider agency as a Developmental Assistant 1 (DA1) also testified at the hearing in behalf of the Justice Center.

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

The Justice Center proved by a preponderance of the evidence that the Subject deliberately used an inappropriate restraint on the Service Recipient. Specifically, the evidence establishes that the Subject used a gait belt with one hand and his other hand on the Service Recipient's forehead to direct the Service Recipient to the facility living room and away from where she intended to go, and that this technique was neither allowed nor sanctioned by the SCIP-R guidelines or the Service Recipient's Behavioral Support Plan, IPOPO or Ambulatory and Mobility Routine, nor was there an imminent risk of harm to the Service Recipient or anyone else that would have warranted an emergency intervention.

Because the Subject worked at the [REDACTED] as a DSA and the Service Recipient was a resident at the [REDACTED] at the time of the alleged abuse, the Subject is found to have been a custodian within the meaning of the statute. (See SSL §488[2]).

The Justice Center's evidence was largely uncontested by the Subject. The Justice Center contends that the Subject had no legitimate purpose for physically directing the Service Recipient from the hallway to the couch in the living room. The Subject argues that his conduct was intended to prevent the Service Recipient from going into the kitchen which presented a danger to her.

To prove abuse (deliberate inappropriate use of restraints) under SSL §488, the Justice Center must first establish that the Subject used a "manual, pharmacological or mechanical

² OPWDD Investigator [REDACTED] is presently employed by the Justice Center as an Investigator. (See Hearing testimony of OPWDD Investigator [REDACTED])

measure or device to immobilize or limit the ability of a person receiving services to freely move his or her arms, legs or body” (See SSL §488[1][d])

The undisputed evidence in the record establishes that the Subject used his hands, one on the gait belt and one on the Service Recipient’s forehead, to move the Service Recipient against her will, thereby limiting her ability to move freely. Consequently, the Justice Center has established that a restraint was used by the Subject.

Next, the Justice Center must establish that the amount of force that the Subject used in applying the restraint 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 Justice Center established that the use of physical intervention by the Subject on the Service Recipient was deliberate through the Subject’s testimony in which he stated that his use of physical force to direct the Service Recipient away from the kitchen was his intentional attempt to protect the Service Recipient from encountering harm in the kitchen. Additionally, the undisputed evidence in the record establishes that neither the Service Recipient’s Behavioral Support Plan, nor the Service Recipient’s IPOP, nor the Service Recipient’s Ambulatory and Mobility Routine allow for any physical intervention with the Service Recipient. (See Justice Center Exhibits 11, 12 and 14) Finally, there is no evidence in the record to support the contention that the Subject’s actions are prescribed by the SCIP-R guidelines. (See Justice Center Exhibit 20) Consequently, the Justice Center has established that the physical force used by the Subject was intentional and not authorized by the Service Recipient’s treatment plans, behavioral intervention plans or generally accepted treatment practices.

Finally, the Subject argues that he intervened physically with the Service Recipient to prevent the Service Recipient from harming herself or others by limiting her access to kitchen

implements such as knives. Under the statute, a physical intervention is allowed, even if such intervention is not otherwise allowed, in the event of an emergency “to prevent imminent risk of harm to a person receiving services or to any other person.” (See SSL §488[1][d])

However, the Subject’s argument is speculative and remote at best. The risk of harm must be imminent. (See SSL §488[1][d]) There is no evidence in the record that establishes that any harm posed by the kitchen to the Service Recipient was imminent, and there is no evidence in the record that the Service Recipient could or was likely to obtain a knife or any other dangerous implement from the kitchen. Furthermore, the Service Recipient’s IPOPO specifically states that self-injurious, property destruction, assaultive and elopement behaviors are not concerning behaviors of the Service Recipient. Finally, there is no evidence in the record that the Service Recipient was restricted from the kitchen or any other area of the facility. Instead, the record reflects that the dining room table, located in the direction the Service Recipient was going before she was redirected by the Subject, was one of the Service Recipient’s “preferred/green zones” where the Service Recipient may go to calm herself. (See Justice Center Exhibit 8; and Hearing testimony of DA1 [REDACTED]) The Subject’s arguments are unpersuasive as there is little evidence of the presence of any emergency situation involving imminent harm to the Service Recipient or any other person which required physical intervention of the Service Recipient by the Subject.

Accordingly, it is determined that the Justice Center has 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 not be amended or sealed.

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse set forth in the substantiated report. Based upon the totality of the circumstances, the evidence presented and the witnesses’

statements, it is determined that the substantiated report is properly categorized as a Category 3 act.

DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED] received and dated [REDACTED] 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.

This decision is recommended by John T. Nasci, Administrative Hearings Unit.

DATED: November 30, 2015
Schenectady, New York



John T. Nasci, ALJ