

**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**

**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: Theresa Wells, Esq.

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████████████████████  
██

By: Eric E. Wilke, Senior Assoc. Counsel  
CSEA, Inc.  
143 Washington Avenue  
Capitol Station Box 7125  
Albany, New York 12224-0125

██████████

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 ██████████ ██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse.

The substantiated reports are properly categorized as Category 2 acts.

NOW THEREFORE IT IS DETERMINED that 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 Persons' 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:** December 14, 2015  
Schenectady, New York



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David Molik  
Administrative Hearings Unit

**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

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Pursuant to § 494 of the Social Services Law

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**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

██████████

Before:

Louis P. Renzi  
Administrative Law Judge

Held at:

New York State Justice Center for the Protection  
of People with Special Needs  
401 State Street  
Schenectady, New York 12305  
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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██

By: Eric E. Wilke, Senior Assoc. Counsel  
CSEA, Inc.  
Capitol Station Box 7125  
Albany, New York 12224-0125

**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 [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 [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (deliberate inappropriate use of restraints) when you used an improper technique and/or excessive force to restrain a service recipient.

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

**Allegation 2**

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed physical abuse when you threw a service recipient to the floor and/or kned him in the ribs.

This allegation has been SUBSTANTIATED as Category 2 physical abuse pursuant to Social Services Law § 493(4)(b). (Justice Center Exhibit 1)

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

4. The facility, located at [REDACTED], [REDACTED], [REDACTED], is a secure residential facility for boys, ages 10 to 21 years old, and is operated by the NYS Office of Children and Family Services (OCFS), which is a provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse, the Subject had been employed by OCFS for approximately fifteen years. The Subject worked as a Youth Development Aide 3 (YDA-3).

6. At the time of the alleged abuse, the Service Recipient was 13 years of age and had been a resident of the facility for approximately three weeks, having been admitted on [REDACTED]. (Justice Center Exhibit 30) The Service Recipient is a male with a history of asthma, and an injury to his left elbow which occurred prior to his admission [REDACTED]. (Justice Center Exhibits 25, 26 and 29)

7. The Subject, at the outset of the hearing, admitted the following facts:

- i. He was on duty at the [REDACTED] facility on [REDACTED], the date of the incident.
- ii. He was a custodian, charged with the care and safety of the service recipients residing in the facility.
- iii. During the incident charged, he deliberately placed his hands upon the Service Recipient, and threw the Service Recipient to the floor, causing the Service Recipient to sustain one or more physical injuries. (Allocation of the Subject)

8. Prior to the date of the incident, he had been off duty for several months due to physical injuries and substance abuse issues. He had attended three counseling sessions prior to the date of the incident: two before returning to work and one after his return, which was on or about [REDACTED]. (Justice Center Exhibit 6; Hearing testimony of the Subject)

9. At the time of the incident, the Subject was under a written facility order to refrain from performing or attempting to perform any type of restraint upon any of the service recipients in the facility. The Subject was required to summon assistance from other staff in the event any physical restraint of a service recipient became necessary. The written order was created by the Subject's superiors at his own request upon his return to duty, and the Subject was aware of the existence and the content of the order. (Justice Center Exhibit 6; Hearing testimony of the Subject)

10. At the time of the incident, the Subject was aware that the Individual Intervention Plan for the Service Recipient prohibited any staff from performing a prone or supine restraint upon him. (Justice Center Exhibit 14; Hearing testimony of the Subject)

11. The Service Recipient sustained a nosebleed, an abrasion of his eyebrow area and soreness of his left ribcage area as a result of the incident. (Justice Center Exhibits 13, 14 and 28)

12. While the Service Recipient was lying on the floor, face down during the latter portion of the restraint, the Subject kned him in the left side of his body. (Justice Center Exhibit 33)

### **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 initial report of abuse presently under review was substantiated. A “substantiated report” means a report “... wherein a determination has been made as a result of an investigation that there is a preponderance of the evidence that the alleged act or acts of abuse or neglect occurred...” (Title 14 NYCRR 700.3(f))

SSL § 488(1) defines eight types of abuse and/or neglect of a person in a facility or provider agency, two of which are relevant in this matter. First, SSL § 488(1)(a), defines “physical abuse” as:

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.

SSL § 488(1)(d) defines a type of abuse known as “deliberate inappropriate use of restraints” as:

the use of a restraint when the technique that is used, the amount of force that is used or the situation in which the restraint is used is deliberately inconsistent with a service recipient's individual treatment plan or behavioral intervention plan, generally accepted treatment practices and/or applicable federal or state laws, regulations or policies, except when the restraint is used as a reasonable emergency intervention to prevent imminent risk of harm to a person receiving services or to any other person. For purposes of this subdivision, a "restraint"

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

Substantiated reports of abuse and/or neglect shall be categorized into one or more categories pursuant to SSL § 493. Category one conduct is the most serious type of abuse or neglect, and is defined in SSL § 493(4)(a). As relevant in this matter, the Justice Center found that the Subject's substantiated acts of abuse constituted Category 2 conduct. SSL § 493(4)(b) defines Category 2 conduct as:

- (a) 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.

In addition, Category 3 conduct is defined as:

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

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject committed the act or acts of abuse and/or neglect alleged in the substantiated report that 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. Title 14 NYCRR § 700.10(d).

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

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

### **DISCUSSION**

As a result of the allocution and hearing testimony of the Subject, the issues of whether the acts charged were proven to have occurred, and were further proven to be abuse, have been proven by the Justice Center by a preponderance of the evidence, to wit: admissions by a subject against his or her own interest are the strongest possible evidence.

Thus, the only issue to be determined by this hearing is the proper category of abuse that such act or acts constitute, pursuant to Social Services Law § 493(4). Although the Subject admitted to the conduct alleged in both Allegation 1 and Allegation 2, he disputes that Category 2 is the correct category in either case, and claims that Category 3 is the correct designation for each.

As noted above, the Justice Center has established by a preponderance of the evidence that the Subject committed the prohibited acts of abuse, described as “Allegation 1” and “Allegation 2” in the substantiated report. (Justice Center Exhibit 1)

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-19 and 21-33) The Justice Center called no witnesses, relying upon its exhibits, and upon the allocution and sworn testimony of the Subject.

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

#### **Allegation 1- Deliberate Inappropriate Use of Restraints**

The Justice Center proved by a preponderance of the evidence that the Subject committed abuse by the deliberate inappropriate use of a restraint. In order to establish abuse under the

theory that a custodian committed a deliberate inappropriate use of restraints, the Justice Center must prove four elements: (1) that a custodian used any manual, pharmacological or mechanical measure or device; (2) to immobilize or limit the ability of a service recipient to move his or her arms, legs or body freely; (3) that the techniques used, the amount of force used or the situation in which the restraint is used; (4) is/are deliberately inconsistent with a service recipient's treatment or behavioral plan, generally accepted practices and/or federal or state laws, regulations or policies.

The Subject admitted that he used a manual restraint that immobilized or limited the service recipient's ability to move his body freely. The Subject's testimony and the videotape of the incident proved that the Subject intentionally grabbed Service Recipient's upper arms or torso, lifted him off the floor, turned to his left and forcefully slammed the Service Recipient on his back onto a plastic chair, and then to the floor, with the Subject initially lying on top of him. The Service Recipient sustained physical injury as a result of the incident. (Justice Center Exhibits 13, 17 and 33)

The preponderance of the evidence further established that the technique used by the Subject, the amount of force used and the situation in which it was used, violated SSL § 488(1)(d). The Subject acknowledged being prohibited by OCFS from performing any restraints whatsoever, and further acknowledged being aware that the Individual Intervention Plan for the Service Recipient prohibited any use of a prone or supine restraint for medical reasons. (Justice Center Exhibits 6, 24 and 29; Hearing testimony of the Subject) Thus, no part of the procedure utilized by the Subject, however conducted, is supported as proper on this record. As a result, a preponderance of the evidence establishes that both the technique used and the situation in which the restraint was used were deliberately inconsistent with the Service Recipient's behavioral

plan, generally accepted practices and/or federal or state laws, regulations or policies.

Although the term “deliberately inconsistent” is not defined in statute, an act is generally considered to be “deliberate” if it is done purposefully, consciously and/or not accidentally. Here, the Subject’s admitted conduct and the video evidence support the conclusion that the Subject intervened not for the safety or well-being of the Service Recipient, but for his own purposes, a reason that is deliberately inconsistent with accepted justifications for using a restraint. In addition, OCFS Policies and procedures prohibit the use of inappropriate or excessive force, including lifting and throwing service recipients during a physical restraint attempt. (Justice Center Exhibits 21, 22 and 23)

A preponderance of the evidence establishes that the Subject’s use of the restraint was not only inconsistent with generally accepted practices and/or federal or state laws, regulations or policies, but was deliberately so. Thus, it is concluded that the Subject’s admitted conduct constituted a deliberate inappropriate use of a restraint, and further, that such conduct constituted abuse of the Service Recipient. (Justice Center Exhibits 2, 5, 28 and 33; Hearing testimony of the Subject)

### **Allegation 2 – Physical Abuse**

The Justice Center proved by a preponderance of the evidence that the Subject committed physical abuse by improperly and inappropriately lifting the Service Recipient off the floor, and then forcefully slamming him on his back over a chair and then to the floor, on his back with the Subject’s weight on top of him. (Justice Center Exhibit 2, 5 and 33; Hearing testimony of Subject)

To establish physical abuse, the Justice Center must prove, by a preponderance of the evidence, three elements: (1) conduct by a custodian; (2) that results in physical contact with a

service recipient; (3) that intentionally or recklessly causes either: (a) physical injury to a service recipient; or (b) serious or protracted impairment of the physical, mental or emotional condition of a service recipient; or (c) the likelihood of such injury or impairment. Thus, the Subject's physical acts, and the actual or likely results of such acts, are what give rise to the allegations charged. The conduct admitted to by the Subject on the record at the hearing, and shown by the Justice Center's exhibits, clearly establish by a preponderance of the evidence that there was intentional or reckless conduct by a custodian that resulted in physical contact with a Service Recipient that included slamming the Service Recipient to the floor, causing physical injury.

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 alleged. The substantiated report will not be amended or sealed.

### **The Categories of Allegations 1 and 2**

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category level of abuse set forth in the substantiated report. The Justice Center submitted a 'visual only' video of the incident, which was extremely helpful and illuminating evidence with respect to the category of the substantiated allegations. (Justice Center Exhibit 33) Category 2 offenses are defined by SSL § 493 as "...conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse.... Category 3 is defined by SSL § 493 as "...abuse or neglect by custodians that is not otherwise described in Categories one and two." It is clear from the evidence that the Subject committed abuse, and equally clear that the Service Recipient was physically injured as a result of that abuse. Thus, there is no question that the health, safety and welfare of the Service Recipient were "seriously endangered", as clearly described in the

statutory definition of Category 2, rendering Category 3 inapplicable to the facts of this matter. It must then be concluded that the Allegations in this matter were properly substantiated as Category 2 offenses and that substantiation should be upheld.

Based upon the totality of the circumstances surrounding the incident and the evidence presented, it is determined that the substantiated report is properly categorized as a Category 2 act as to both "Allegation 1" and "Allegation 2".

**DECISION:** The request of [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse.

The substantiated reports are properly categorized as Category 2 acts.

This decision is recommended by Louis P. Renzi, Administrative Hearings Unit.

**DATED:** December 11, 2015  
Schenectady, New York

  
Louis P. Renzi, ALJ