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]

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: Robert T. DeCataldo, Esq.

[redacted]

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 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: March 8, 2016
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

[redacted]

Pursuant to § 494 of the Social Services Law

RECOMMENDED DECISION AFTER HEARING

Adjud. Case #: [redacted]

Before: Jean T. Carney
Administrative Law Judge

Held at: New York State Justice Center for the Protection of People with Special Needs
9 Bond Street
Brooklyn, New York 11201
On: [redacted]

Parties: Vulnerable Persons' Central Register
New York State Justice Center for the Protection of People with Special Needs
161 Delaware Avenue
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By: Robert T. DeCataldo, Esq.

[redacted]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating (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 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 , at , located at , while acting as a custodian, you committed physical abuse when you forcefully grabbed a service recipient by the wrists and pushed her, causing the service recipient and the chair she was sitting on to fall to the ground.
>
> 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 , is and is operated by , an agency that is certified by the Office for People With Developmental Disabilities

(OPWDD), 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 was employed by [redacted] as a Direct Support Professional (DSP).

6. At the time of the alleged abuse, the Service Recipient was 20 years of age, and had been a resident of the facility since [redacted] 2012. The Service Recipient is a young adult with a diagnosis of mild intellectual disability, bi-polar disorder, and ADHD. (Justice Center Exhibit 6)

7. On the morning of [redacted], the Service Recipient made her breakfast, and ate at the kitchen table. When she was finished, she attempted to take another service recipient's breakfast. The Subject told the Service Recipient that she cannot take another person's breakfast; whereupon the Service Recipient became upset and cursed at the Subject. Then she threw the house cordless telephone at the Subject. (Justice Center Exhibit 6, Hearing testimony of Subject)

8. At that point, the Subject walked to where the Service Recipient was sitting at the table, and grabbed her wrists with enough force that she fell out of her chair. The Service Recipient was checked for injuries, none were found. (Justice Center Exhibit 6)

9. The Service Recipient's Functional Behavioral Assessment identifies certain triggers for her defiant and oppositional behaviors. These triggers include being asked to do something she does not like or agree with. The Service Recipient's Behavior Management Program outlines a graduated plan for de-escalating these behaviors, including providing her with the opportunity to de-escalate in an area of her choice; telling her to "stop and calm down"; and redirecting other individuals to a different area until she calms down. Only after all verbal and nonverbal prompts have been exhausted can the Service Recipient be restrained with an

approved technique, such as touch support. (Justice Center Exhibit 8)

10. On [redacted] through [redacted], the Subject attended a three day training on Strategies for Crisis Intervention and Prevention – Revised (SCIP-R). This training outlines all strategies approved for OPWDD certified facilities. This training requires that all verbal techniques be exhausted prior to employing approved physical intervention. In addition, physical intervention is only allowed when the service recipient is in danger of hurting herself, others, or creating a dangerous environment. Even then, physical intervention is not required, rather it is discretionary and may be avoided. (Justice Center Exhibit 9)

11. Touch support is a technique used to calm someone down, or as an early intervention. It is a light, overhand touch to a person's shoulder, arm, or wrist, without force. (Justice Center Exhibit 10)

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))

The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1)(d), to include:

> (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.

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 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 the evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has established by a preponderance of the 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. (Justice Center Exhibits 1-10) The investigation underlying the substantiated report was conducted by [redacted] Investigator [redacted]. The only witness who testified at the hearing on behalf of the Justice Center was Quality Improvement Specialist [redacted].

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 committed a deliberate, inappropriate restraint when he grabbed her wrists with enough force that she fell from her chair. Specifically, the Subject did not exhaust all verbal techniques prior to resorting to a physical intervention. Further, both the technique and the force used by the Subject were inconsistent with the Service Recipient's Behavioral Management Plan.

The Service Recipient's Behavior Management Program outlines a two-prong intervention plan. The first prong is proactive, directing staff to intervene early when warning signs are noticed by redirecting and encouraging her to accept staff requests. The second prong is reactive, and should be implemented if the behavior escalates into a crisis situation. Staff should give the Service Recipient an opportunity to de-escalate in an area of her choice, speak

calmly and firmly to her, and if her behaviors continue, then redirect others away from her to ensure their safety. If the Service Recipient does not respond to verbal and non-verbal direction, then approved SCIP-R techniques may be utilized. (Justice Center Exhibit 8)

In this case, the Subject did not attempt to redirect the Service Recipient when she began to exhibit problematic behavior. Instead, the Subject told her she could not do what she wanted, which is a known trigger in her Functional Behavioral Assessment and Behavior Management Program. (Justice Center Exhibits 6 and 8, Hearing testimony of Subject)

As a result, the Service Recipient's behavior escalated and became violent. At this point, according to the Service Recipient's plan, the Subject should have removed the other service recipients from the area and allowed the Service Recipient to calm down in a quiet place. Instead, the Subject grabbed the Service Recipient's wrists and she fell out of her chair. (Justice Center Exhibits 6 and 8)

In his defense, the Subject claims that he grabbed the Service Recipient's wrists in order to prevent her from throwing a plate at another service recipient. (Hearing testimony of Subject) In other words, his action was a "reasonable emergency intervention to prevent immediate risk of harm to a person receiving services or to any other person." Social Services Law § 488(1)(d) However, the evidence does not support this contention. In her statement, the Service Recipient denies that she was going to throw her plate. In the same statement, the Service Recipient admits to throwing the phone at the Subject, therefore it may reasonably be inferred that she was being truthful in all respects, and her statement is credited evidence. (Justice Center Exhibit 6) In addition, the other witness to the event, another staff person, corroborates the Service Recipient's version of the matter. (Justice Center Exhibit 6)

As another defense, the Subject testified that he used an approved SCIP-R technique

known as touch support. This technique is described as a calming technique, used as a form of early intervention. It is an overhand touch on the shoulder, arm, or wrist, without use of force. (Justice Center Exhibit 10) However, the Subject's description of closing his hand around the Service Recipient's wrist (Hearing testimony of Subject), or holding her arm (Justice Center Exhibit 6 at page 18) do not support this contention. The Subject admitted to keeping the Service Recipient's arm or wrist immobile, which necessarily requires a certain amount of force. However, the touch support technique does not use any force at all. Therefore, if the Subject intended to use touch support, he used improper technique and force.

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 report will remain substantiated, and the next issue to be determined 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] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse.

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

This decision is recommended by Jean T. Carney, Administrative Hearings Unit.

DATED: February 18, 2016
Schenectady, New York