

**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: Juliane O'Brien, Esq.

[REDACTED]
[REDACTED]
[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 the abuse alleged.

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: February 1, 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:

Mary Jo Lattimore-Young
Administrative Law Judge

Held at:

Western New York DDSO
1200 East and West Road
West Seneca, New York 14224
On: [REDACTED]

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

[REDACTED]
[REDACTED]
[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and/or neglect. 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] 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 failed to adhere to SCIP guidelines in responding to a behavioral episode that a service recipient was having and instead used improper and unsafe methods to restrain her.

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, the [REDACTED] is located at [REDACTED]. The [REDACTED] is a residence for individuals with

developmental disabilities. The facility is operated by [REDACTED], a Not-for-Profit agency certified by the New York State Office for People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of [REDACTED] Quality Improvement Investigator [REDACTED])

5. At the time of the alleged abuse, the Subject had worked for [REDACTED] as an [REDACTED] Specialist in various locations for eleven years. The Subject's regular assignment was at the [REDACTED], but on about [REDACTED], the Subject was assigned as a "floater" staff member at the [REDACTED]. The Subject was a custodian as that term is so defined in Social Services Law § 488(2). (Hearing testimony of the Subject and Justice Center Exhibit 5, page 13)

6. At the time of the alleged abuse, the Service Recipient was approximately twenty-one years old and had been a resident of the facility since [REDACTED]. The Service Recipient is approximately five-feet four inches tall [REDACTED]. (Hearing testimony of the Subject) The Service Recipient has diagnoses of cerebral palsy, mild to moderate intellectual disability, impulse control disorder, a history of putting small objects in her mouth and ears (known as Pica), as well as other medical conditions. (Justice Center Exhibit 13) The Service Recipient has a history of exhibiting aggressive and destructive behaviors that are self-injurious or against staff. The Service Recipient's behaviors include kicking, scratching, biting and removing her clothing. Additionally, the Service Recipient has a known history of kicking out windows of facility vehicles and attempting repeatedly to elope from facility vehicles while being transported. (Justice Center Exhibits 5, 13 and 15)

7. On [REDACTED] at approximately 1:30 p.m., the Service Recipient was attending the [REDACTED] located at [REDACTED]. At that time, the Subject and Staff Member A had arrived early at the program to transport

the Service Recipient to the facility. The Service Recipient was resistant to leaving the day program, partially because she was already upset from an incident at the program and also because the two staff members had arrived early to pick her up. (Justice Center Exhibit 5, page 13 and Justice Center Exhibit 13) The Service Recipient was uncooperative with the Subject and Staff Member A. The Service Recipient began exhibiting difficult behavior that included yelling and spitting. The Subject and Staff Member A managed to get the Service Recipient to exit the program building, but, while outside, the Service Recipient fell to the ground and continued her behavioral episode. (Justice Center Exhibits 7 - 9)

8. After some further difficulties, the Service Recipient walked to where the agency van was parked. She entered the van and buckled herself into the seat directly in front of the rear window. The Subject sat in the seat in front of the Service Recipient's seat and Staff Member A positioned herself in the driver's seat, as she was the van driver. Foam bolsters, the function of which is to be used by staff to block exits in the event that service recipients attempt to elope, were located in the rear of the van. (Hearing testimony of the Subject and Justice Center Exhibit 14) Once everyone was seated, the Service Recipient's behaviors escalated again. She used her foot to kick and push out the side vent rear window of the van and attempted to elope out of the window. (Justice Center Exhibit 5, page 14) The Subject and Staff Member A were able to safely guide the Service Recipient back inside the van and escort her back to her seat. The Service Recipient re-fastened her seat belt and the Subject again sat directly in front of the Service Recipient's seat. (Hearing testimony of the Subject) Staff Member A began to drive the van through the [REDACTED] parking lot. As soon as the van started to move, the Service Recipient released her seat belt and ran towards the front of the vehicle. The Subject pursued the Service Recipient from behind. Upon reaching the Service Recipient, the Subject initiated an

unspecified “wrap” restraint technique. While standing behind and to the side of the Service Recipient, the Subject placed her arms around the Service Recipient’s shoulders and then her waist area. (Hearing testimony of the Subject) The Service Recipient continued to struggle. The Subject then tried to grab the Service Recipient’s wrists to secure them in a crisscrossed fashion in front of the Service Recipient’s waist. The Subject then attempted to “remove” or drag the Subject back to her seat, but was unsuccessful. (Hearing testimony of the Subject) The Service Recipient continued struggling against the Subject’s attempts to restrain her. (Hearing testimony of the Subject, Hearing testimony of [REDACTED] Quality Improvement Investigator [REDACTED], Justice Center Exhibit 5, page 4; and Justice Center Exhibits 10 and 16, page 29) The Service Recipient then dropped to the van floor on her knees. In an attempt to maintain her hold of the Service Recipient, the Subject then also dropped to her knees. While they were both kneeling on the floor, the Subject maintained her hold of the Service Recipient. Meanwhile, the van drove a short distance outside of the [REDACTED] parking lot, then looped around into an adjacent parking lot along the roadway and stopped. At that point, the Subject finally released the Service Recipient. (Hearing testimony of the Subject) At no time during the incident did the Subject tell the driver, Staff Member A, to stop driving the van. (Hearing testimony of [REDACTED] Quality Improvement Investigator [REDACTED])

9. Later that day, the Subject entered a computerized “Therap Note” documenting the incident in detail. (Justice Center Exhibit 10) The Subject identified that the physical restraint that she had used on the Service Recipient was a “One Person Removal” restraint or “One Person Wrap/Removal” restraint under the guidelines for Strategies for Crisis Intervention and Prevention – Revised (SCIP-R). (Justice Center Exhibits 10 and 16, Unit 5.2 - pages 99 - 101)

10. During the incident, the Service Recipient was not injured and did not receive any medical treatment. (Hearing testimony of [REDACTED] Quality Improvement Investigator [REDACTED] and Justice Center Exhibit 12)

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 and neglect 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 or neglect of a person in a facility or provider agency is defined by SSL § 488(1). Under SSL § 488(1)(d), abuse is defined as:

"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)(c), which defines a Category 3 as follows:

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

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

If the Justice Center does not prove the abuse 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 the act described as Allegation 1 in the substantiated report. The act committed by the Subject constitutes a deliberate inappropriate use of restraints, which is defined as abuse under SSL § 488(1)(d).

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1 - 23) The investigation underlying the substantiated report was conducted by [REDACTED] Quality Improvement Investigator [REDACTED]

██████████, who was the only witness to testify at the hearing on behalf of the Justice Center.

The Subject testified on her own behalf, together with two other witnesses, ██████████ Specialist ██████████ and ██████████ Specialist ██████████, neither of whom were present during the incident. The Subject provided no documentary evidence.

The key issues in this case are whether the physical restraint used by the Subject upon the Service Recipient was an authorized restraint under the Guidelines for Strategies for Crisis Intervention and Prevention-Revised (SCIP-R), and if not, whether the use of that restraint fell within the reasonable emergency intervention exception pursuant to SSL §488(1)(d).

Abuse: Deliberate Inappropriate Use of Restraints

The Justice Center contends that the Subject, while acting as a custodian, failed to adhere to SCIP-R guidelines in responding to the Service Recipient's behavioral episode, and, instead, used a method that was improper and unsafe to restrain her.

On ██████████ and again on ██████████, the Subject was trained in crisis prevention and intervention by using and implementing authorized SCIP-R Personal Intervention Techniques. (Justice Center Exhibits 16 and 17) SCIP-R mandates that staff's use of Personal Intervention Techniques follow a gradient system of implementation focusing on a sequence of least restrictive techniques, least amount of force and least amount of time to achieve the use of the minimal amount of intervention to help an individual having a behavior regain self-control. In determining the use of various strategies to handle a crisis phase, SCIP-R states that "[p]ersonal interventions are designed to protect people from injury and should only be used after all less intrusive interventions on the SCIP Gradient have been carefully considered and/or tried...." (Justice Center Exhibit 16, page 72) Accordingly, SCIP-R requires that personal interventions are to be used only after other methods of intervention have been tried such as,

early intervention, and non-verbal and verbal calming techniques. (Justice Center Exhibit 16, page 75)

In this case, the Subject performed a restraint that involved wrapping her arms around the Service Recipient's shoulders and waist, while attempting to hold her wrists and drag the Service Recipient back to her seat. (Hearing testimony of the Subject) When the Service Recipient dropped to the floor on her knees, the Subject followed and continued her attempts to restrain the Service Recipient while in the moving van. (Hearing testimony of the Subject) During the hearing, the Subject testified that since she had been concerned about the Service Recipient's safety, she deliberately did not release her hold of the struggling Service Recipient until after the van had stopped. (Hearing testimony of the Subject)

The Subject's actions were not consistent with prescribed SCIP-R techniques. The SCIP-R protocol prescribes that when the Service Recipient dropped to the floor, the Subject should have carefully lowered herself with the Service Recipient to avoid back injury then release the Service Recipient. This would have given the Subject a moment to step back, reassess the situation and to try to calm or redirect the Service Recipient. (Refer to Justice Center Exhibit 16, Unit 5.2 - page 7) Keeping the SCIP-R gradient system in mind, when determining how to properly redirect the Service Recipient, the Subject should have used the least restrictive method to help the Service Recipient restore self-control such as verbal calming. Then if that was unsuccessful, try the next intervention level to try to stabilize the situation. (Hearing testimony of [REDACTED] Quality Improvement Investigator [REDACTED] and Justice Center Exhibit 16) If verbal calming was successful, the Subject could have tried a "One Person Escort" of the Service Recipient safely back to her seat. (Hearing testimony of [REDACTED] Quality Improvement Investigator [REDACTED])

Moreover, if the van had pulled over to stop, it would have allowed the Subject and Staff Member A to utilize a “Two Person Escort” of the Service Recipient safely to her seat. However, the Subject never told the driver, Staff Member A, to stop the van. (Hearing testimony of [REDACTED] Quality Improvement Investigator [REDACTED]) There were also other acceptable techniques pursuant to the SCIP-R guidelines that the Subject could have considered initiating such as a “pin” (loose hug) restraint, leading up to a more physically restrictive “wrap” (tight hold). However, the “wrap” hold was the type of hold that the Subject commenced using and continued to use until the van stopped. This use of the “wrap” hold was inappropriate in that it was the Subject’s attempt to gain control of the situation, instead of following SCIP-R guidelines, SCIP-R objectives and the Service Recipient’s Behavior Support Plan to assist the Service Recipient in regaining self-control. (Refer to hearing testimony of [REDACTED] Quality Improvement Investigator [REDACTED]; and Justice Center Exhibits 14 and 16)

Though there were proper less intrusive techniques under SCIP-R available to the Subject under the circumstances, the Subject chose not to follow them. The Subject violated SCIP-R guidelines by failing to release the Service Recipient after she fell to the floor and by deliberately continuing her unauthorized restraint of the Service Recipient. (Hearing testimony of the Subject and hearing testimony of [REDACTED] Quality Improvement Investigator [REDACTED]) The Subject’s actions were also improper as they were contrary to the Service Recipient’s Behavioral Support Plan which described appropriate reactive measures to use in order to address the Service Recipient’s aggressive behavior and to prevent elopement from agency vehicles, such as the use of foam bolsters to block exit buttons. (Justice Center Exhibits 14 and 16)

Therefore, it is found that the Subject’s restraint of the Service Recipient was an unauthorized manual measure which immobilized or limited the Service Recipient’s ability to

freely move her arms, legs or body. Given that the restraint used by the Subject was contrary to SCIP-R protocols and the Service Recipient's Behavior Support Plan, the Subject's actions constituted a deliberate inappropriate use of restraints as defined by SSL §488(1)(d).

In her defense, the Subject claimed that with the exception of the SCIP-R escort techniques, that SCIP-R training never taught which techniques were appropriate to use on a moving vehicle. (Hearing testimony of the Subject) The Subject's witness, [REDACTED] also testified that SCIP-R training did not discuss which techniques should be used during transporting service recipients in vehicles. However, [REDACTED] further testified that if a crisis were to arise, the SCIP-R techniques that were taught should be followed for the protection of the service recipient. (Hearing testimony of [REDACTED]) [REDACTED] testimony then supported the Subject's claim that SCIP-R did not discuss the use of proper techniques in a moving vehicle, but also contradicted the Subject's claim when [REDACTED] stated that during a crisis the SCIP-R techniques taught should be used. Additionally, [REDACTED], [REDACTED] Quality Improvement Investigator provided credited testimony that SCIP-R techniques were to be utilized anywhere, because a service recipient can have a behavioral episode anywhere. (Hearing testimony of [REDACTED] Quality Improvement Investigator [REDACTED] and Justice Center Exhibit 16) Therefore, the Subject's defense lacks merit.

Emergency Intervention Exception Under SSL §488(1)(d) Does Not Apply

At the hearing, the Subject also testified that her actions to continue her restraint of the Service Recipient while kneeling on the van floor were justified under the statute's emergency exception, in order to protect the safety of the Service Recipient and Staff Member A. (Hearing testimony of the Subject and Justice Center Exhibit 2) Though the Subject indicated that she had concerns that the Service Recipient may try to exit through a nearby van door, she also stated

that there were foam bolsters in the rear of the van, which would have prevented the Service Recipient from eloping from the van. Even though the Subject explained the purpose of the bolsters, she did not mention that under the Service Recipient's Behavior Support Plan, the bolsters are specifically to be used to block vehicle exit buttons and handles to prevent eloping and keep the Service Recipient safe. The foam bolsters can also be defensively used to keep staff safe from being hit by the Service Recipient during a behavioral episode. (Justice Center Exhibits 13 and 14) [REDACTED] Specialist [REDACTED], explained that after the Service Recipient dropped to the floor, she would have released the Service Recipient and then she would have stood in front of the van door to prevent any elopement by the Service Recipient. (Hearing testimony of [REDACTED] Specialist [REDACTED])

Though the situation required the Subject to act swiftly, she still had enough time and a reasonable opportunity to follow SCIP-R procedures to protect the Service Recipient's safety and to redirect her from eloping.

The record shows by a preponderance of the evidence that the Subject's continued use of the unauthorized manual restraint while kneeling was not warranted and immobilized the Service Recipient's ability to freely move her arms, legs or body. This restraint was unauthorized because it was improper and there were other appropriate measures consistent with SCIP-R and the Service Recipient's Behavior Plan that could have been safely implemented. Given this, the Subject's actions were not justified under the reasonable emergency intervention exception pursuant to SSL §488(1)(d).

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.

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.

A substantiated Category 3 finding of abuse will not result in the Subject 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 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 the abuse alleged.

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

This decision is recommended by Mary Jo Lattimore-Young,
Administrative Hearings Unit.

DATED: December 31, 2015
West Seneca, New York



Mary Jo Lattimore-Young,
Administrative Law Judge