

**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

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**FINAL  
DETERMINATION  
AND ORDER  
AFTER HEARING**  
Adjud. Case #: [REDACTED]

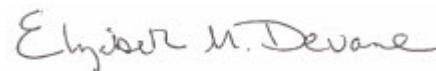
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

ORDERED: The attached and incorporated Recommended Decision is hereby adopted in its entirety.

ORDERED: The Vulnerable Persons' Central Register shall take action in conformity with the attached Recommended Decision, specifically the Decision section.

This decision is ordered by Elizabeth M. Devane, ALJ, of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: November 16, 2020  
Schenectady, New York



Elizabeth M. Devane, Esq.  
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register  
Kevin McGuckin, Esq.  
[REDACTED], Subject  
Lawrence Schaefer, Esq.

**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

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

[REDACTED]

Before:

Susanna Requets  
Administrative Law Judge

Held at:

Administrative Hearings Unit  
New York State Justice Center for the Protection  
of People with Special Needs  
9 Bond Street – 3<sup>rd</sup> Floor  
Brooklyn, New York 11201  
On: [REDACTED]

Parties:

Video Conference Hearing  
New York State Justice Center for the Protection  
of People with Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
By: Kevin McGuckin, Esq.

[REDACTED]

By: Lawrence Schaefer, Esq.  
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54 State Street, Suite 1001  
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### **JURISDICTION**

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for physical abuse and abuse (deliberate inappropriate use of restraints). 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 physical abuse and abuse (deliberate inappropriate use of restraints) 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 or about [REDACTED], while at [REDACTED], located at [REDACTED], you committed Physical Abuse against/to a Service Recipient.

This allegation has been SUBSTANTIATED as Category 3 Physical Abuse pursuant to Social Services Law § 493(4)(c).

The investigation revealed that the subject struck the service recipient during a restraint.

**Allegation 2**

It was alleged that on or about [REDACTED], while at [REDACTED], located at [REDACTED], you committed Deliberate Inappropriate Restraint against/to a Service Recipient.

This allegation has been SUBSTANTIATED as Category 3 Deliberate Inappropriate Restraint pursuant to Social Services Law § 493(4)(c).

The investigation revealed that the subject used excessive force against the service recipient during a restraint.

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

4. The facility, [REDACTED], located at [REDACTED], provides a continuum of inpatient, outpatient and related psychiatric services with inpatient hospitalizations and is operated by the New York State Office of Mental Health (OMH), which is an agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Justice Center Investigator [REDACTED] (Investigator))

5. At the time of the alleged physical abuse and abuse (deliberate inappropriate use of restraints), the Subject had been employed as a Sergeant (also known as Safety and Security Officer 2 (SSO)) in the facility for almost four years and had thirteen years of prior experience working at another facility as an SSO. (Hearing testimony of the Subject) Under the direction of the Chief SSO, the Subject supervised SSO 1's on his assigned shift. (Justice Center Exhibit 15) The Subject was [REDACTED] Instructor for Defensive Tactics and Principles of Control Training (Defensive Training) [REDACTED], which includes safely subduing and gaining control of the patients. (Hearing testimony of the Subject; Subject Exhibit A) The Subject was a custodian as that term is defined in Social Services Law § 488(2).

6. At the time of the alleged physical abuse and abuse (deliberate inappropriate use of

restraints), the Service Recipient was forty-one years old, and resided in one of the transitional outpatient units in the facility. The Service Recipient was an adult male with relevant diagnoses of bipolar disorder type 1 with psychosis, borderline intellectual functioning and alcohol and substance abuse disorder. (Justice Center Exhibits 5, 6, 12, 25 and 34: audio recording of Justice Center interview of Medical Specialist 2<sup>1</sup>)

7. On [REDACTED], the Subject worked the evening shift from [REDACTED]. During the evening hours, the Service Recipient was drinking whiskey in his bedroom with Service Recipient 2. The Service Recipient and Service Recipient 2 had an argument which led to a physical altercation and to the Service Recipient destroying his room. The nurses called Security for assistance. (Justice Center Exhibits 6, 11, 19, 21, 22, 23, 25, 27 and 34: audio recording of Justice Center interviews of Service Recipient 2, SSO A<sup>2</sup>, SSO B<sup>3</sup>, SSO C<sup>4</sup>, Medical Specialist 2 and the Subject)

8. Several SSOs, including, SSO A, SSO B, SSO C, SSO D<sup>5</sup>, SSO E<sup>6</sup> and the Subject responded to investigate. The LPN<sup>7</sup> directed the Service Recipient to be transported to the local hospital as an Emotionally Disturbed Person (EDP). The Service Recipient calmed down as 911 was called, but became agitated again when the Subject tried to talk to him, so the Subject was removed from the Service Recipient's room. (Justice Center Exhibits 7, 21, 23 and 34: audio recording of Justice Center interviews of SSO B and SSO C)

9. At approximately 10:47 p.m., SSO A went downstairs and escorted two EMTs to the ward upstairs. The SSOs and EMTs then followed the Service Recipient to the elevator.

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<sup>1</sup> The Medical Specialist 2 was [REDACTED].

<sup>2</sup> SSO A was [REDACTED].

<sup>3</sup> SSO B was [REDACTED].

<sup>4</sup> SSO C was [REDACTED].

<sup>5</sup> SSO D was [REDACTED].

<sup>6</sup> SSO E was [REDACTED].

<sup>7</sup> LPN was [REDACTED].

(Justice Center Exhibits 7, 19, 33 and 34: audio recording of Justice Center interview of SSO A)

10. Inside the elevator, the Service Recipient continued to direct verbal aggression toward the SSOs and EMT workers. Upon exiting the elevator and walking toward the lobby, the Service Recipient threatened to break SSO C's jaw. SSO C, also a Sergeant, directed the SSOs to initiate a takedown and a restraint. SSO C controlled the Service Recipient's shoulders, SSO D controlled the Service Recipient's legs and the Subject applied the handcuffs. (Justice Center Exhibits 7, 21, 22 and 34: audio recording of Justice Center interviews of SSO C and the Subject)

11. The SSOs took down the Service Recipient in the supine position and then turned him around to the prone position. SSO C released the Service Recipient's arms so that the Subject could handcuff the Service Recipient's wrists. (Hearing testimonies of the Investigator and the Subject; Justice Center Exhibits 19, 20, 21, 24 and 34: audio recording of Justice Center interviews of SSO A, SSO C, SSO D, SSO E and the Subject)

12. SSO C then directed the Subject to double lock the handcuffs. In the process of double locking the handcuffs<sup>8</sup>, the Subject twisted the Service Recipient's hands. (Justice Center Exhibits 19 and 34: audio recording of Justice Center interview of SSO A)

13. SSO A went to the security office to retrieve the ankle restraints. (Justice Center Exhibits 19, 23, 24, 33 at 10:58 and 34: audio recording of Justice Center interviews of SSO A, SSO B and SSO D) In the meantime, the Service Recipient was turned on his side, and the Subject punched him in the stomach several times. (Hearing testimony of the Investigator; Justice Center Exhibits 20, 34: audio recording of Justice Center interview of SSO E)

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<sup>8</sup> The Subject testified that handcuffs are applied back of hand to back of hand to minimize pain if an individual is moving. To apply the handcuffs, the officer applies one link to one wrist and another link to the other wrist. Double locking prevents the handcuffs from getting tighter and causing injury. Depending on the type of handcuffs, the officer would have to use the handcuff key and slide the lock on the ratchet, or take a pin and push in the pin. The handcuffs the Subject used were the lock type. (Hearing testimony of the Subject)

14. As the Service Recipient started to calm down, SSO A came back with the ankle restraints. In the process of locking the ankle restraints while the Service Recipient was still laying on the floor, the Subject kned the Service Recipient on his right back side. (Hearing testimony of the Investigator; Justice Center Exhibits 19 and 34: audio recording of Justice Center interview of SSO A)

15. The Service Recipient did not complain about any pain or bruising and did not sustain any injuries. (Justice Center Exhibit 6) The Service Recipient was transported to [REDACTED] Hospital for further evaluation. (Justice Center Exhibits 7, 9 and 11)

16. After the incident, SSO A approached the Subject and told him that his conduct was unnecessary because handcuffs and leg cuffs were already applied on the Service Recipient. (Justice Center Exhibits 19, 21 and 34: audio recording of Justice Center interviews of SSO A and SSO C)

17. The facility restraint policy stated that the SSO will “[u]se only the amount of force necessary to restrain the patient.” (Justice Center Exhibit 16) Some of the objectives of Defensive Training is to “[e]xplain and demonstrate the importance of having situational awareness, self-control and balance”, to “[e]ffectively demonstrate how to control a subject taken to the ground” and to “[e]ffectively demonstrate application and use of handcuffs.” SSOs are taught that “[o]nce you have gained control of a subject, you must reduce the level of force to that needed to maintain control.” (Justice Center Exhibit 18)

### **ISSUES**

- Whether the Subject has been shown by a preponderance of the evidence to have committed the acts giving rise to the substantiated report.
- Whether the substantiated allegations constitute abuse.
- Pursuant to Social Services Law § 493(4), the category of abuse that such 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 report of physical abuse and abuse (deliberate inappropriate use of restraints) 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...” (14 NYCRR § 700.3(f))

The physical abuse and abuse (deliberate inappropriate use of restraints) of a person in a facility or provider agency is defined by SSL § 488(1), as follows:

- (a) "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.
- (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 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 acts of physical abuse and abuse (deliberate inappropriate use of restraints) alleged in the substantiated report that is the subject of the proceeding and that such acts constitute the category of abuse as set forth in the substantiated report. (14 NYCRR § 700.10(d))

If the Justice Center proves the alleged physical abuse and abuse (deliberate inappropriate use of restraints), the report will not be amended and sealed. Pursuant to SSL § 493(4) and 14 NYCRR § 700.10(d), it must then be determined whether the acts of physical abuse and abuse (deliberate inappropriate use of restraints) 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 physical abuse and abuse (deliberate inappropriate use of restraints) 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 acts described as “Allegation 1” and “Allegation 2” 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 through 28 and 32) The Justice Center also presented audio recordings of the Justice Center Investigator’s interview of witnesses and interrogation of the Subject, and a video of the checkpoint exit/entry point of the lobby area that did not include a view of the incident. (Justice Center Exhibits 33 and 34) The investigation underlying the substantiated report was conducted by the Investigator, who testified at the hearing on behalf of the Justice Center. The Subject testified in his own behalf and presented one document. (Subject Exhibit A)

The Justice Center relied on statements from SSO A and SSO E to allege that the Subject twisted the Service Recipient’s wrists unnecessarily while double locking the Service Recipient’s handcuffs, and that he intentionally and recklessly put his knee into the Service Recipient’s back and struck the Service Recipient in his stomach while the Service Recipient was restrained on the floor. SSO A was an 18-year veteran of the facility who observed the Subject twist the Service Recipient’s wrists while locking the handcuffs and knee the Service Recipient after being restrained. SSO A was shocked by her observations and confronted the Subject telling him that his conduct was unnecessary. SSO C confirmed that he heard SSO A tell the Subject that his conduct was wrong. (Justice Center Exhibits 19, 21 and 34: audio recording of Justice Center interviews of SSO A and SSO C) At the moment when SSO A left to retrieve the leg cuffs, SSO E credibly relayed his observations to the Investigator that the Subject punched the Service Recipient in his stomach several times. (Justice Center Exhibits 20 and 34: audio recording of

Justice Center interview of SSO E)

The Subject alleged that the Justice Center cannot establish that the force used was unnecessary, deliberate or intentional. The Subject denied twisting the Service Recipient's wrists when double locking the handcuffs, using or placing his knee on the Service Recipient's back, or striking the Service Recipient. The Subject alleged that he only used the force reasonably necessary to lock the hand and leg cuffs. (Hearing testimony of the Subject; Justice Center Exhibits 22 and 34: audio recording of Justice Center interview of the Subject)

The Administrative Law Judge presiding over the hearing, having observed and evaluated the hearing testimony of the Subject on these material issues, does not find his testimony to be credible. Neither SSO A nor SSO E had any motive to fabricate their observations, were credible in their statements to the Investigator and SSO A confronted the Subject because she was concerned about the Subject's conduct.

### **Allegation 1 – Physical Abuse**

In order to sustain an allegation of physical abuse in this matter, the Justice Center must show that the Subject had physical contact with the Service Recipient; that such contact was either intentional or reckless; and that such contact caused either physical injury or serious or protracted impairment of a Service Recipient's physical, mental or emotional condition; or caused the likelihood of such injury or impairment. The statute allows, as an exception, the use of physical contact as a reasonable emergency intervention necessary to protect the safety of any person. (SSL § 488[1][a])

Social Services Law defines "intentionally" and "recklessly" as having the same meaning as provided in New York Penal Law § 15.05. (SSL § 488[16]) Under the New York Penal Law, a person acts "intentionally" with respect to a result or conduct when a person has a "... conscious

objective ...” to cause a result or engage in such conduct. (PL § 15.05[1]) Under the New York Penal Law, a person acts “recklessly with respect to a result or to a circumstance” when the person is “aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstances exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.” (PL § 15.05[3])

The credible evidence establishes that the Subject intentionally punched the Service Recipient in his stomach while the Service Recipient was already handcuffed and laying on the floor. SSO E observed the Subject punch the Service Recipient in the stomach several times while the Service Recipient was laying on the floor with his wrists in handcuffs. At least five SSOs assisted with deescalating and restraining the Service Recipient. (Justice Center Exhibits 19, 20, 21, 23, 24 and 34: audio recording of Justice Center interviews of SSO A, SSO B, SSO C, SSO D and SSO E) At that point, the Subject had a conscious objective to engage in such conduct because there was no reason to punch the Service Recipient, who was restrained and on the floor and there were at least five SSO’s working together to deescalate the Service Recipient.

The credible evidence also establishes that the Subject’s intentional and unnecessary conduct, which did not result in physical injury, was likely to cause physical injury.

The Subject alleged that any force used was reasonable based on the overwhelming documented evidence from multiple witnesses establishing that the Service Recipient was extremely aggressive and volatile at the time. The Justice Center alleged that at the moment the Service Recipient was handcuffed, he was immobilized, restrained and not a threat. Punching a Service Recipient, who is on the floor and handcuffed, is inexcusable, unnecessary and unreasonable, even if the Service Recipient was still hostile. SSO A, SSO B, SSO C, SSO D and

SSO E all told the Investigator that they are not allowed to use physical force once a patient is restrained. (Justice Center Exhibits 19, 20, 21, 24 and 34: audio recording of Justice Center interview of SSO A, SSO B, SSOC, SSO D, SSO E) The Service Recipient posed no imminent risk to the safety of any person, and the Service Recipient's verbal threats do not excuse the Subject from using unnecessary and unreasonable physical force to punch the Service Recipient.

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 physical abuse alleged. The substantiated report will not be amended and sealed.

### **Allegation 2 – Deliberate Inappropriate Use of Restraints**

In order to prove abuse (deliberate inappropriate use of restraints) the Justice Center must establish that the Subject used a restraint on the Service Recipient in which the technique used, the amount of force used or the situation in which the restraint was used, 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 term "restraint" is defined by statute as any manual, pharmacological or mechanical measure or device used to immobilize or limit the ability of a service recipient to freely move his or her arms, legs or body. The statute allows, as an exception, the use of an unauthorized restraint as a reasonable emergency intervention in order to prevent imminent risk of harm to the Service Recipient or to any other person. (SSL § 488(1)(d))

Despite the Subject's denials, the preponderance of the evidence demonstrates that the Subject used excessive force when he twisted the Service Recipient's hands while double locking the handcuffs and placed his knee on the Service Recipient's side at a moment when the Service Recipient was laying on his stomach and side, restrained with handcuffs, leg cuffs and at least four

or five SSOs that were present to assist with any escalation. (Justice Center Exhibits 19 and 34: audio recording of Justice Center interview of SSO A) Such conduct further immobilized the Service Recipient unnecessarily and was deliberately inconsistent as to what the Subject was taught as a Sergeant and what he taught as a defense force instructor. (Justice Center Exhibits 16, 18 and Subject Exhibit A)

The moment that temporary restraints in the form of handcuffs were placed on the Service Recipient, continuation of force was prohibited. (Justice Center Exhibits 18, 19, 20, 21, 24 and 34: audio recording of Justice Center interviews of SSO A, SSO B, SSOC, SSO D and SSO E) During his testimony, the Subject admitted that it was improper to knee a Service Recipient once restrained. During his Justice Center interview, the Subject stated that he was not trained to place his knee on the right side of someone's body and that he is aware of the consequences of such action. The Subject further conceded that twisting someone's wrists in handcuffs to cause pain was improper. (Hearing testimony of the Subject; Justice Center Exhibit 34: audio recording of Justice Center interview of the Subject)

While the Subject argued that his conduct fell into the reasonable emergency exception, the Subject only admitted that he used reasonable force to lock the handcuffs and denied placing his knee on the Service Recipient's back. As set forth above, it is found that the Subject unnecessarily and unreasonably twisted the Service Recipient's hands while double locking the handcuffs and kned the Service Recipient in his back. Justice Center Exhibits 19 and 34: audio recording of Justice Center interview of SSO A) The situation did not warrant the use of any unwarranted or excessive force while the Service Recipient was on the floor, handcuffed and no longer a threat.

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 and sealed.

Since 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.

Substantiated Category 3 findings of abuse 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 SSL § 496 (2). The report will be sealed after five years.

**DECISION:**

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

The substantiated report is properly categorized as Category 3 acts.

This decision is recommended by Susanna Requets, Administrative Hearings Unit.

**DATED:** November 9, 2020  
Brooklyn, New York

  
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Susanna Requets, A/E