

**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
Justice Center for the Protection of People with
Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived

Justice Center for the Protection of People with
Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Todd Sardella, Assistant Counsel

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By: Aaron E. Kaplan, Esq.
Associate Counsel
CSEA, Inc.
143 Washington Avenue
Capitol Station, Box 7125
Albany, New York 12224-0125

[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 [REDACTED] that the report "substantiated" on [REDACTED] [REDACTED], dated and received on [REDACTED] be unsubstantiated is denied. The Subject has been shown by a preponderance of the evidence to have committed physical abuse and deliberate inappropriate use of restraints as alleged.

The substantiated allegations 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: November 20, 2015
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

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjudication 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.

New York State Justice Center for the Protection
of People With Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Todd Sardella, Assistant Counsel

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By: Aaron E. Kaplan, Esq.
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143 Washington Avenue
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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 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. On [REDACTED], the VPCR received a report [REDACTED] that the Subject was alleged to have engaged in conduct constituting the abuse or neglect of a vulnerable person, as defined in SSL § 488(15).

2. On [REDACTED], the Justice Center substantiated the report against the Subject.

The Justice Center concluded that:

Offense 1

It was alleged that on [REDACTED], on a bus at the [REDACTED] program, located at [REDACTED], while acting as a custodian you committed physical abuse when you dragged and pulled a service recipient off the bus.

This allegation has been SUBSTANTIATED as Category 2 physical abuse pursuant to Social Services Law § 493.

Offense 2

It was alleged that on [REDACTED], on a bus at the [REDACTED] program, located at [REDACTED], while acting as a custodian you committed abuse (deliberate inappropriate use of restraints) when you dragged and pulled a service recipient off the bus.

This allegation has been SUBSTANTIATED as Category 2 abuse (deliberate

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

5. At the time of the incident, the Subject had been employed by OPWDD since 1984, working with challenged populations, and was most recently employed for eight years at the [REDACTED]. The Subject worked as a Direct Support Assistant (DSA) for the entire time of her employment by OPWDD. (Justice Center Exhibit 6; Hearing testimony of the Subject)

7. The alleged incident occurred at approximately 9:00 A.M. on [REDACTED], on the bus transporting service recipients, which was positioned curbside, adjacent to the facility. (Justice Center Exhibit 6; Subject's Exhibit A; Hearing testimony of the Subject; Hearing

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testimony of ██████████)

8. At the time of the incident, the Subject was assigned to classroom number █; the Service Recipient was assigned to classroom number █ and was not one of the Subject's regular charges. Nevertheless, the Subject was familiar with the Service Recipient and her target behaviors. (Justice Center Exhibit 6; Hearing testimony of the Subject)

9. The Subject was a custodian, and was on duty at the time in question. The Subject and two other staff were in the process of unloading service recipients from their arriving transport buses. (Justice Center Exhibits 3, 5, 6; Hearing testimony of the Subject)

10. The Service Recipient's bus arrived at the unloading point for ambulatory persons, with the Service Recipient secured in her bus seat with either a harness or straps. The Service Recipient was observed to be in an agitated state and exhibiting several of her target behaviors, including flailing, bucking and thrashing. During the process of unbuckling and assisting the Service Recipient from the bus, which was performed by bus aide ██████████, the Service Recipient ended up seated on the floor of the bus, facing her seat. She was continually agitated and exhibiting her target behaviors. (Justice Center Exhibits 6, 8; Subject's Exhibit A; Hearing testimony of ██████████; Hearing testimony of the Subject; Hearing testimony of ██████████; Hearing testimony of ██████████)

11. The Subject then entered the bus and ascended the steps. The Subject made an attempt to verbally coax the Service Recipient to cooperate in descending the steps and exiting the bus, but quickly became very impatient, verbalizing her frustration by saying, "I'm not putting up with this today," or words to that effect. She reached her arms underneath those of the Service Recipient, turned her so that she was facing the driver, with her back to the door, lifted the Service Recipient off the floor some 5 or 6 inches, and backed down the steps to exit the bus,

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carrying the Service Recipient backwards down the steps and out the door of the bus, with the Service Recipient's upper back and head against the Subject's chest and her feet dragging along, unsupported, down the steps. (Justice Center Exhibit 6, 7, 8, 9; Hearing testimony of ██████████
██████████)

12. While dragging the service recipient from the bus in this manner, the Subject momentarily lost her footing and her balance, which were restored with the help of other staff waiting at the curb below her. (Hearing testimony of the Subject)

13. The Subject acknowledged having had SCIP-R training. This training prohibits physically restraining or escorting and removing a service recipient down stairs while performing a restraint or escort. It further prohibits lifting a service recipient who has dropped to the floor and either refuses to or cannot walk. (Hearing testimony of the Subject; Justice Center Exhibits 3, 6, 14; Hearing testimony of Investigator (Inv.) ██████████)

14. The Service Recipient sustained no physical injury as a result of the incident. (Subject's Exhibit A; Hearing testimony of Inv. ██████████)

APPLICABLE LAW

The Justice Center is responsible for investigating allegations of abuse and 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 or 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))

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. As relevant here, SSL § 493(4)(b) defines Category 2 conduct as:

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.

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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 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 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 of abuse or neglect cited in the substantiated report constitutes the category of abuse or neglect as set forth in the substantiated report.

If the Justice Center did not prove the abuse or neglect by a preponderance of 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 prohibited acts, described as “Offense 1” and “Offense 2” in the substantiated report. The acts committed by the Subject constitute abuse. In addition, the Justice Center categorized the substantiated offenses as Category 2 abuse.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-14) The investigation underlying the substantiated report was conducted by ██████████, OPWDD Lead Investigator, who testified at the hearing on behalf of the Justice Center. The Justice Center also called as a witness ██████████, a Bus Aide employed by ██████████, the transport contractor for ██████████.

The Subject offered two exhibits that were received into evidence as Subject’s Exhibits A

██████████ and B. The Subject testified on her own behalf and called two additional witnesses, her co-workers: ██████████ and ██████████.

Offense 1 – 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 from under her arms until her buttocks were approximately five inches off the floor, and then pulling her backwards down the steps of the school bus while the Service Recipient's legs and feet dragged on the floor and steps. (Justice Center Exhibit 9; Hearing testimony of ██████████; Hearing testimony of the Subject; Hearing testimony of Inv. ██████████)

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 hearing evidence established that there was intentional or reckless conduct by a custodian that resulted in physical contact with a Service Recipient that included dragging the Service Recipient off the bus. The definition of physical abuse contained in SSL § 488(1)(a) includes "dragging" as one of the enumerated prohibited acts.

According to the testimony and written statements submitted by ██████████ and the written statements of ██████████, the bus driver, the Subject made an attempt to verbally coax the Service Recipient to cooperate in descending the steps and exiting the bus, but quickly

██████████ became very impatient, verbalizing her frustration by saying, “I’m not putting up with this today,” or words to that effect. ██████████ further testified that she observed the Subject’s conduct in physically reaching her arms under those of the Service Recipient, lifting the Service Recipient’s buttocks off the floor, and stepping backwards down the steps while carrying the Service Recipient – with the Service Recipient’s legs and feet being dragged down the steps and out the door. ██████████ written report to her employer immediately following the incident clearly stated that the Subject “grabbed” the Service Recipient under the arms and “forcibly dragged” her off the bus. The bus driver’s written statement twice described the actions of the Subject as “dragg[ing]” the Service Recipient. (Hearing testimony of ██████████; Justice Center Exhibits 7, 8, 9)

During her testimony and in her written statement, the Subject admitted to being a custodian. She also admitted to removing the Service Recipient from the bus down the bus steps, backwards, while physically holding her under the arms. (Hearing testimony of the Subject; Subject’s Exhibit A) Accordingly, the credible evidence adduced at the hearing was sufficient to meet the Justice Center’s burden to establish the first two elements of physical abuse by a preponderance of the evidence,

A preponderance of the evidence further established the third element of physical abuse: that the Subject’s acts intentionally or recklessly caused the likelihood of either physical injury or serious or protracted impairment of the physical, mental or emotional condition of the service recipient.

The hearing evidence, including the testimony of the Subject, established that the Subject momentarily lost her footing while descending the bus steps backwards while carrying and dragging the Service Recipient. Specifically, the evidence established that the Service Recipient

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has serious developmental challenges; she is blind, non-verbal and exhibits several challenging behaviors, described as “biting” her own arms, “flailing” of her arms and torso, along with “bucking” her torso and head back and forth, which could cause her head to hit the seatback or whatever object might be present, including a caregiver’s head or face during close contact. It is uncontroverted that the Service Recipient can be difficult to handle at times due to her infirmities. If she were having a particularly “bad day,” as witnesses for both sides testified she was, the Service Recipient could become extremely uncooperative and difficult for staff to handle. As a result, removing the Service Recipient from the bus by physically dragging her down the steps, as described in the record, easily could have led to a physical, mental or emotional injury to the service recipient. (Hearing testimony of the Subject; Hearing testimony of Inv. ██████████; Justice Center Exhibit 6)

Indeed, but for the intervention of other staff, such an injury would have occurred in this case. As the Subject admitted in her hearing testimony, while she was walking down the steps backwards pulling (“dragging”) the Service Recipient with her, she stumbled. This created the likelihood of a fall that could have injured them both, perhaps very seriously. The fact that the Subject stumbled during this process (by her own admission) only serves to support the determination that her conduct intentionally or recklessly created the “likelihood” of injury to the Service Recipient. The Subject and the Service Recipient were fortunately saved by other staff. It was a disaster narrowly averted, the Subject’s reckless conduct compensated for by a fortunate assist from other staff.

Accordingly, the Justice Center proved the three elements of physical abuse by a preponderance of the evidence. To the extent that the Subject alleges that she could not be found responsible for physical abuse because her acts were justified as a “reasonable emergency

intervention”, this issue is discussed below.

Offense 2 – Deliberate Inappropriate Use of Restraints

The Justice Center also 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 preponderance of the evidence established that the Subject used a manual restraint that immobilized or limited the service recipient’s ability to move her body freely. The Subject and [REDACTED], the bus aide, both testified that the Subject intentionally reached under the Service Recipient’s arms, lifted her up, and moved her. Testimony about the Service Recipient was that she was at least partially ambulatory under the right circumstances. Thus, by “grabbing” and “dragging” the Service Recipient, thereby exerting physical control over her, the Subject eliminated any possibility that the Service Recipient could have controlled her own movements. (Hearing testimony of Inv. [REDACTED]; Hearing testimony of the Subject; Hearing testimony of [REDACTED])

The preponderance of the evidence further established that both the technique used by the Subject, and the situation in which it was used, were deliberately inconsistent with generally accepted practices and policies. The Subject acknowledged having had SCIP-R training. The

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evidence at the hearing established that this training prohibits physically restraining or escorting and removing a service recipient down stairs while performing a restraint or escort. It further prohibits lifting a service recipient who has dropped to the floor and either refuses to or cannot walk. No part of the procedure utilized by the Subject, however conducted, is supported as proper in this record. On the contrary, the record supports a conclusion that removals and escorts down stairs are prohibited. As a result, a preponderance of the evidence establishes that both the technique used and the situation in which the restraint was used were inconsistent with generally accepted practices and/or federal or state laws, regulations or policies.

A preponderance of the evidence also establishes that the Subject's use of the restraint was deliberately inconsistent with those practices, 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, as noted above, the Subject admitted that she had participated in SCIP-R training and the credible evidence at the hearing established that that such training prohibited removing a service recipient down stairs while performing a restraint. (Hearing testimony of the Subject; Hearing testimony of Inv. ██████████; Justice Center Exhibits 6, 14) Moreover, the Subject's motive for the restraint was apparent in her statement that she was "not putting up with this today," or words to that effect (Hearing testimony of ██████████; Justice Center Exhibits 6, 8, 9) This statement supports the conclusion that the Subject intervened not for the safety or well-being of the Service Recipient, but for her own convenience, a reason that is deliberately inconsistent with accepted justifications for using a restraint. Thus, 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.

Accordingly, the Justice Center proved the four elements of deliberate inappropriate use of restraints by a preponderance of the evidence.

The Subject's Acts were not Justified as a Reasonable Emergency Intervention

Contrary to the Subject's claim at the hearing, neither the restraint nor the physical contact with the Service Recipient was justified as an emergency intervention to prevent imminent risk of harm to the service recipient. Subsections (a) and (d) of SSL § 488(1) each set forth an emergency situation as an exception to the prohibitions against physical abuse and deliberate inappropriate use of restraints contained therein. With respect to physical abuse, subsection (a) states that physical abuse shall not include "a reasonable emergency intervention necessary to protect the safety of any person." Similarly, subsection (d) creates an exception to the finding of deliberate inappropriate use of restraints, 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." In both cases, it is clear that there must exist both a bona fide emergency and a reasonable intervention by staff to trigger the exception.

Here, the Subject has taken the position that she was indeed faced with an emergency and that her actions, to the extent they otherwise violated the statute, were justified or excused. The evidence at the hearing does not support this contention.

The credible evidence showed that the Service Recipient was initially seated at the top of the steps near the bus driver, and, if left alone, she may have fallen down the steps and been badly injured. Nevertheless, there is no support in the record for the Subject's claim that the removal was necessary because there were no other options available to her. The Subject was not alone; other staff were available to assist in, first, securing the Service Recipient in a position so that she did not fall down the steps, and, only then, in removing her from the bus in a manner

consistent with the Service Recipient's behavior plan and regulations and policies governing custodian conduct as it relates to this incident.

It is determined that while there was certainly reason for staff to be concerned for the safety of the Service Recipient, this was not an emergency as that term is understood in this context. There were several factors which lead to that determination: the presence of other staff to assist, and the presence of a wheelchair at the scene. In addition, the bus was equipped with a wheelchair lift. More importantly, there was no fire or other calamity which would have required extreme measures by staff in order to prevent imminent harm to the Service Recipient or others. (Hearing testimony of Inv. [REDACTED]; Hearing testimony of [REDACTED]; Justice Center Exhibits 4, 6, 7, 8) Although it may have required others to wait their turn to disembark from the bus, staff had time to stabilize the Service Recipient, and formulate a less-intrusive, and less dangerous, plan for her removal using the resources at hand. Unfortunately, the Subject failed to avail herself of those resources and, instead, acted unreasonably and for her own convenience in her intervention with the Service Recipient.

Thus, the Subject's claim that the substantiated findings that she committed physical abuse and deliberate inappropriate use of restraints cannot be sustained because her intervention in this case was a reasonable reaction to an emergency situation finds no support in the hearing record.

Credibility

The Justice Center's witnesses were more credible than the Subject's witnesses. With respect to the veracity of the witnesses, the Subject is understandably self-interested. At the same time, her co-workers, [REDACTED] and [REDACTED], were supportive while testifying. It is understandable that they would share a close relationship with the Subject in a

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small work environment. The co-workers testified that their views of the Service Recipient were blocked once she mounted the steps, yet at the same time they testified that the Subject's actions in performing the restraint and removal were appropriate. The Subject described during her testimony the restraint she attempted, and her claim that her training had never included any prohibition against lifting a service recipient under similar circumstances, or from a removal down stairs. Those claims were supported by her co-workers. In the face of credible testimony by the agency's investigator that these are clear prohibitions due to the inherent safety risk and are always part of the training curriculum, the testimony of the Subject's witnesses in this regard is not credible.

With respect to the testimony of bus aide ██████████, nothing in the record would explain any motive for ██████████ to falsely report the incident, to claim that the Subject exhibited impatience in dealing with the Service Recipient, or that the Subject stated on that occasion: "We're not dealing with this today" or "I'm not having this" or words to that effect. It is determined that ██████████ testimony was both credible and persuasive.

It is thus found that there is a preponderance of the evidence that the Subject, while acting as a custodian committed both physical abuse and deliberate inappropriate use of restraints, when she attempted to remove the Service Recipient from the bus in the manner described.

The Category of the Offenses

Although the report will remain substantiated, the next question to be decided is whether the category of abuse or neglect set forth in the substantiated report is proper. A Category 2 violation is defined as "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.” SSL § 493(4)(b).

As stated above, it is determined that the Subject, who placed her arms under those of the Service Recipient, lifted the Service Recipient’s torso off the floor and then stepped backwards, carrying her down the steps of the bus, seriously endangered the well-being of the Service Recipient. While the Service Recipient was not physically injured by these actions, she was nevertheless placed in a position where injury was likely, and such injury, had it occurred, would have seriously endangered her health, safety or welfare. Indeed, the evidence at the hearing established that the Subject nearly stumbled down the stairs while dragging the Service Recipient, and she was prevented from doing so only because other staff members intervened. Falling backwards down stairs is an inherently dangerous mishap for any person. Coupled with the infirmities of the Service Recipient, the negative results of such a fall are clearly within the intended scope of SSL § 493(4)(b). (Hearing testimony of the Subject and Inv. [REDACTED]; Justice Center Exhibit 6)

Accordingly, it is determined that the substantiated report is properly categorized as a Category 2 act as to each of the offenses charged.

DECISION:

The request of [REDACTED] that the report "substantiated" on [REDACTED] [REDACTED], dated and received on [REDACTED] be unsubstantiated is denied. The Subject has been shown by a preponderance of the evidence to have committed physical abuse and deliberate inappropriate use of restraints as alleged.

The substantiated allegations are properly categorized as Category 2 acts.

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

DATED: November 19, 2015
Schenectady, New York



Louis P. Renzi, ALJ