

**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: Theresa Wells, Esq.

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

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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 ██████████
██████████, ██████████: received and dated ██████████
██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse (deliberate inappropriate use of restraints, physical abuse).

The substantiated allegation 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: Schenectady, New York
December 3, 2015



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**

Adjud. Case Id #:

██████████

Before:

Gerard D. Serlin
Administrative Law Judge

Held at:

New York State Justice Center
New York State Office Building
333 East Washington Street
Syracuse, New York 13202
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: Theresa Wells, Esq.

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████████████████████
████████████████████ ██████████

By: Eric E. Wilke, Esq.
CSEA Legal Department
143 Washington Avenue
Albany, New York 12210

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse. The Subject requested that the VPCR amend the report to reflect that the Subject is not a subject of the substantiated report. The VPCR did not do so, and a hearing was then scheduled in accordance with the requirements of Social Services Law (SSL) § 494 and Part 700 of 14 NYCRR.

FINDINGS OF FACT

An opportunity to be heard having been afforded the parties and evidence having been considered, it is hereby found:

1. The VPCR contains a "substantiated" report dated [REDACTED], received and dated [REDACTED] of abuse and/or neglect by the Subject of a Service Recipient.

2. After investigation, the Justice Center substantiated the report against the Subject. The Justice Center concluded that:

Offense 1

It was alleged that on [REDACTED], at [REDACTED], located at [REDACTED], while acting as a custodian, you committed physical abuse and/or abuse (deliberate inappropriate use of restraints) when you dragged a service recipient across a floor.

This allegation has been SUBSTANTIATED as Category 3 physical abuse and/or abuse (deliberate inappropriate use of restraints) pursuant to Social Services Law § 493.

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

4. The facility, [REDACTED], located at [REDACTED], is operated by 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] and had been so employed for 24 years ago. (Hearing testimony of the Subject) The Subject worked as a Direct Assistant-3 (DA3). (Hearing testimony of OPWDD Investigator [REDACTED]) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged abuse, the Service Recipient was in her mid-forties, and had been in the care of OPWDD for most of her life. The Service Recipient is a person with bipolar disorder and severe mental retardation. The Service Recipient is ambulatory. The Service Recipient would sometimes engage in self-injurious behaviors, such as banging her head on the floor, and also property destruction. (Hearing testimony of OPWDD Investigator [REDACTED] and Hearing testimony of OPWDD Treatment Team Leader (TTL) [REDACTED])

7 At the time of the report, the Subject, in her role as a DA3, had oversight of various provider agency [REDACTED]. Her duties included staff assignment and training compliance oversight. (Hearing testimony of OPWDD Investigator [REDACTED])

8. On the morning of [REDACTED], the Subject arrived at the facility at 7:50 a.m. and worked until 3:40 p.m. The Subject visited the facility in part, because she wanted to observe the provider agency's Registered Nurse (RN) having had concerns about the medical care being provided to a service recipient by the RN. (Hearing testimony of the Subject)

9. On [REDACTED], the Service Recipient was in the living room of the facility, waiting to be transported to her Day-Hab program. The Service Recipient began playing with another service recipient's magnetic letters and eventually scattered the box of letters on the

floor. The service recipient who owned the magnetic letters was nonverbal and prone to become very agitated when his belongings were disturbed and, ultimately, he became very distraught. (Hearing testimony OPWDD Investigator [REDACTED]) That service recipient entered the room, crying with his arms flailing. A nearby DA3 began picking up the letters, but did not make any effort to calm that service recipient. The DA3 went to her knees in front of the Service Recipient and picked up letters. The Service Recipient, while seated on the floor, kicked at the letters and used her hands and feet to disperse the letters. This activity continued to agitate the other service recipient. (Justice Center Exhibit 34: audio interrogation of the Subject)

10. The Service Recipient was amused that she had upset the other service recipient and she continued to move her body around and flailed her legs. (Hearing testimony OPWDD Investigator [REDACTED] and Hearing testimony of the Subject) The Subject then positioned herself behind the Service Recipient, secured the Service Recipient's arms with her hands, raised her arms over the Service Recipient's head, and dragged the Service Recipient across the floor for a distance of between four and five feet. (Hearing testimony of OPWDD Investigator [REDACTED], Justice Center Exhibit 5, Seventeenth Page, and Justice Center Exhibit 34: audio interrogation of the Subject)

11. The Service Recipient's Behavior Support Plan has delineated strategies for staff to use in addressing the Service Recipient's challenging behaviors. These strategies included, among others strategies, ignoring and also re-directing the Service Recipient to another activity. (Justice Center Exhibit 22, Page 9) If unable to be redirected, a one or two person escort of the Service Recipient to a quieter area of the facility was sanctioned. The Subject did not utilize these strategies in addressing the situation with the Service Recipient.

12. On [REDACTED], the Subject completed SCIP-R refresher training (Justice

Center Exhibit 15), as well as PROMOTE training in [REDACTED]. (Justice Center Exhibit 19) Neither SCIP-R, nor PROMOTE prescribe, teach or recommend a physical technique for moving a service recipient from a seated position on the floor. (Hearing testimony of Dr. [REDACTED] and Justice Center Exhibit 22)

13. A post incident physical examination of the Service Recipient completed on [REDACTED], revealed a red area on the right anterior hand of the Service Recipient. (Justice Center Exhibit 25-Body Check Assessment) However, the Service Recipient was involved in two other physical incidents between [REDACTED] and [REDACTED]. (Hearing testimony of OPWDD Investigator [REDACTED])

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

“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.

“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:

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

██████████

If the Justice Center proves the alleged abuse, 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 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 abuse by a preponderance of evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has established by a preponderance of evidence that the Subject committed the act described as “Offense 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 1-34)¹ The investigation underlying the substantiated report was conducted by OPWDD Investigator ██████████ ██████████.² The Justice Center also presented the testimony of ██████████ Psychologist, ██████████, Psy.D and Treatment Team Leader (TTL) ██████████, who was assigned to this facility. The Subject testified on her own behalf and provided no other evidence.

The provider agency RN was interviewed by OPWDD Investigator ██████████ on ██████████. The RN told the investigator that she was present during the incident and had witnessed the Subject grab the Service Recipient’s wrists and “drag her half way across the living room.” (Hearing testimony OPWDD Investigator ██████████ and Justice Center Exhibit 5, Fifteenth Page, and Justice Center Exhibit 34: audio interrogation of provider agency

¹ Including Justice Center Exhibit 21 A.

² This investigator is now employed by the New York State Justice Center but at the time of the investigation, was employed by OPWDD.

RN)

During the interview, the provider agency RN also told the investigator that she was at the facility for ninety minutes on the morning of the incident. However, OPWDD Investigator [REDACTED] gathered visitor logs, with which she ultimately confronted the provider agency RN, which indicated that the RN arrived at the facility at 8:15 a.m. and departed from the facility at 8:45 a.m. After being confronted with this log, the provider agency RN agreed that the log correctly reflected the time of her departure. (Justice Center Exhibit 5, Fifteenth Page, and Justice Center Exhibit 34: audio interrogation of provider agency RN)

The DA3 involved in picking up the magnetic letters was interviewed by OPWDD Investigator [REDACTED] on [REDACTED]. She told OPWDD Investigator [REDACTED] that she observed the Subject secure the Service Recipient's arms, raise them up over the Service Recipient's head, and drag her across the floor. During the interview, the DA3 estimated the distance that the Service Recipient was dragged to have been between four and five feet. The DA3 also stated that the RN was present during the incident. (Hearing testimony of OPWDD Investigator [REDACTED], Justice Center Exhibit 5, Seventeenth Page, and Justice Center Exhibit 34: audio interrogation of the DA3)

During the course of the investigation, the Subject told OPWDD Investigator [REDACTED] that she secured the Service Recipient by the wrists because she believed that the Service Recipient was going to harm the DA3 who was picking up the magnetic letters. (Hearing testimony of OPWDD Investigator [REDACTED] and Justice Center Exhibit 34: audio interrogation of the Subject)

The Subject's hearing testimony was that while the Service Recipient continued to kick, the Subject walked over to her and said "come on ...". The Subject testified that she then said:

“let’s get up and I offered my hands and she took my hands.” The Subject also testified that “I tried to get her to stand up, but she was very resistive...” At this time the Subject was facing the Service Recipient and was holding her hands. According the Subject’s testimony, the Service Recipient then pulled back and went “back on her bottom.” The Subject then continued to hold the Service Recipient’s hand and got behind the Service Recipient as the Service Recipient scooted backwards. The Subject continued to hold the Service Recipient’s hand and walked backward with the Service Recipient. The Subject also testified that by the time this incident occurred, the provider agency RN had left the facility. Having evaluated, considered, and assessed the credibility of the hearing testimony of the Subject, the Administrative Law Judge presiding over the hearing does not find the Subject’s hearing testimony to be credited evidence.

However, the information provided to the OPWDD Investigator by the DA3 who was in the living room at the time of the incident, in particular the recorded audio statement is credited evidence. (See Hearing testimony of OPWDD Investigator [REDACTED], Justice Center Exhibit 5, Fifteenth Page, and Justice Center Exhibit 34: audio interrogation of the DA3)

Physical Abuse

The Subject’s actions in dragging the Service Recipient on her behind, while her arms were secured above her head, for a distance of four to five feet constitutes physical contact which caused the likelihood of serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. Therefore, the Subject committed Physical Abuse of the Service Recipient.

Deliberate Inappropriate use of Restraints

[REDACTED], Psy.D, who in addition to her duties as a provider agency psychologist is also a [REDACTED] trainer for SCIP-R, testified at the hearing that SCIP-R has been in

place since the late 1990s and is being replaced by “PROMOTE.” PROMOTE began in 2012 and the emphasis is on non-physical de-escalation skills. Some techniques include “learning how to breathe, think, and act (BTA) and reminding the service recipients of their coping strategies. (Hearing testimony of [REDACTED], Psy.D)

[REDACTED], Psy.D, testified that the specific needs of each service recipient ultimately dictate the Behavior Support Plan, a plan which is drafted by the psychologist and then reviewed by a committee. [REDACTED] also testified that there is no authorized technique for moving a service recipient from a seated to a standing position, and that there is no authorized technique for moving a service recipient from the floor. [REDACTED] testified that if a situation such as this were to occur routinely, then the team would have to create a “new technique,” which would then require approval and consent of management. Neither SCIP-R, nor PROMOTE provide physical technique for addressing this specific type of situation.

The Service Recipient’s Behavior Support Plan delineates strategies for staff to use in addressing the Service Recipient’s challenging behaviors. These strategies include, among others strategies, ignoring and also re-directing to another activity. (Justice Center Exhibit 22, Page 9) If unable to be re-directed, a one or two person escort of the Service Recipient to a quieter area of the facility is sanctioned. (Hearing testimony of [REDACTED] Psy.D) The Subject did not utilize these strategies in addressing the situation with the Service Recipient, and the intervention technique used was, neither a one, nor a two person approved escort.

The technique utilized by the Subject was a mechanical measure which limited the ability of the Service Recipient to freely move her arms and therefore, constitutes a restraint. Further, the technique used was deliberately inconsistent with this Service Recipient's behavioral

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

The Subject testified that she could not ignore the situation of the Service Recipient kicking her legs in the vicinity of the DA3 and the other service recipient, as this was a dangerous situation. The Subject testified that therefore she had to act immediately. However, after considering all of the evidence, the situation as presented did not warrant a reasonable emergency intervention necessary to prevent imminent risk of harm to a person receiving services, or to any other person.

The Justice Center proved by a preponderance of the evidence that the Subject secured the Service Recipient's arm, pulled them up over the Service Recipient's head, and dragged the Service Recipient, who was seated on her bottom on the floor, a distance of four to five feet. This restraint is contrary to any prescribed training of the provider agency and contrary to the Service Recipient's Behavior Support Plan.

The Justice Center further proved by a preponderance of the evidence that the Subject committed both physical abuse and the deliberate inappropriate use of restraints.

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 and/or neglect 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 or neglect 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]: received and dated [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse (deliberate inappropriate use of restraints, physical abuse).

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

This decision is recommended by Gerard D. Serlin, Administrative Hearings Unit.

DATED: November 20, 2015
Schenectady, New York


Gerard D. Serlin, ALJ