

**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]

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: Jennifer Oppong, Esq.

[REDACTED]  
[REDACTED]  
[REDACTED]

By: Jeremy Ginsburg, Esq.  
CSEA, Inc.  
143 Washington Ave.  
Capitol Station Box 7125  
Albany, New York 12224

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 substantiated report dated [REDACTED]  
[REDACTED], [REDACTED] be amended and sealed is granted.  
The Subject has not been shown by a preponderance of the evidence to have committed abuse.

NOW, THEREFORE, IT IS DETERMINED that the record of this report shall be amended and sealed by the Vulnerable Persons Central Register, pursuant to SSL § 493(3)(d).

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:** January 10, 2017  
Schenectady, New York

  
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David Molik  
Administrative Hearings Unit

**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:

Gerard D. Serlin  
Administrative Law Judge

Held at:

New York State Justice Center for the Protection of  
People with Special Needs  
333 East Washington Street  
Syracuse, New York 13202  
Administrative Hearings Unit  
On: [REDACTED]

Parties:

Vulnerable Persons' Central Register  
New York State Justice Center for the Protection  
of People with Special Needs  
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Delmar, New York 12054-1310  
Appearance Waived

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### **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], [REDACTED] [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 the [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (deliberate inappropriate use of restraints) when you conducted a restraint with improper technique, which included pushing and/or turning a service recipient's face to the side with your hand when he was engaged in a behavior.

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] located at [REDACTED] is an [REDACTED] for adult individuals with developmental

disabilities, which is operated by the New York State Office for People With Developmental Disabilities (OPWDD), a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of OPWDD Investigator [REDACTED]) At the time of the alleged abuse, the facility provided residential services to four service recipients. (Hearing testimony of the Subject)

5. At the time of the alleged abuse, the Subject was employed by OPWDD as a Direct Support Assistant (DSA), and had been so employed for seventeen years. At the time of the alleged abuse, the Subject was assigned to provide the Service Recipient with one-to-one supervision. (Hearing testimony of the Subject) 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 had been a resident of the facility for approximately six months. (Justice Center Exhibit 5, sixth page) The Service Recipient was a fifty-four year old male (Justice Center Exhibit 5, sixth page) with diagnoses including developmental disabilities, as well as multiple mental health and behavioral issues. (Justice Center Exhibit 16; Hearing testimony of OPWDD Investigator [REDACTED])

7. The Service Recipient was prone to becoming physically aggressive. During his first week at the residence, he pulled a TV off a wall, punched the house Registered Nurse (RN) and attempted to bite, kick and punch other service recipients and staff in the house. (Hearing testimony of the Subject) The Service Recipient could also become self-injurious, punching his own ears and smashing his head into hard objects. (Hearing testimony of the Subject) Hand mitts were prescribed for the Service Recipient in order to prevent the Service Recipient from hurting himself while punching his head. (Hearing testimony of the Subject) The mitts were applied several times a week, sometimes daily, to the Service Recipient. (Justice Center Exhibit 23, interrogation of the Subject, 10/21/14)

8. Following dinner on the evening of [REDACTED], (Justice Center Exhibit 5), the Service Recipient became agitated. (Hearing testimony of the Subject) During this behavior, the Service Recipient, who was on the floor, scooted to an area of the living room where he had, in the past, smashed his head against a hard object. (Hearing testimony of the Subject) The Service Recipient began to punch his head with his fists. (Justice Center Exhibit 23, interrogation of the Staff-1, [REDACTED])

9. The Service Recipient then raised himself off the floor and into the chair closest to the television in the living room. (Justice Center Exhibit 23, interrogation of the Subject, [REDACTED]) While the Service Recipient was sitting in the chair, the Subject told him that she was going to put the mitts on his hands. (Justice Center Exhibit 23, interrogation of the Subject, [REDACTED]) The Subject and Staff-1 began the process of applying the mitts. (Hearing testimony of the Subject) The Service Recipient clasped his hands together to prevent application of the mitts. Staff-1 separated and secured the Service Recipient's hands so that the mitts could be applied. (Justice Center Exhibit 23, interrogation of the Staff-1, [REDACTED])

10. Staff-1 positioned herself at the Service Recipient's legs and secured them because he kicked at both Staff-1 and the Subject. Staff-1 also secured one of the Service Recipient's hands so that he would not hit the Subject. The Subject placed and secured the mitt on the Service Recipient's right hand. As the Subject leaned towards the Service Recipient to tie the mitt, he attempted to bite her right arm by lunging at it with his mouth open and his teeth bared. (Justice Center Exhibits 8 and 23, interrogation of Subject, [REDACTED])

11. The Subject then used an open hand to press against the Service Recipient's head and turned the Service Recipient's head to face away from her to avoid being bitten. (Justice Center Exhibit 23, interrogation of Staff-1, [REDACTED]) There is no SCIP-R sanctioned technique

for application of prescribed mitts to a combative service recipient. (Hearing testimony of OPWDD [REDACTED], Psychologist-2)

12. Strategies for Crisis Intervention Prevention-Revised (SCIP-R) does not train specifically for defending against an attempted bite. The one anti-bite technique taught is a bite release technique that can only be used to defend against a bite already in progress. (Justice Center Exhibit 5, ninth page and Hearing testimony of OPWDD Psychologist-2 [REDACTED]) Otherwise, staff members are taught by SCIP-R to create distance as a first line of defense when fending off aggressive behavior. (Hearing testimony of OPWDD Psychologist-2 [REDACTED])

13. Staff-1 and the Subject then applied the mitt to the Service Recipient's left hand. The process of applying the mitts may have taken as long as fifteen minutes. (Justice Center Exhibit 23, interrogation of Subject, [REDACTED])

14. Thereafter, the Service Recipient continued to strike himself with his mitts. (Justice Center Exhibit 7; Justice Center Exhibit 23, interrogation of Staff-1, [REDACTED]) The Subject accompanied the Service Recipient to his room, which required only redirection. (Justice Center Exhibit 23, interrogation of Subject, [REDACTED]) The Subject sat outside of the Service Recipient's room and continued the one-to-one supervision of him. The Service Recipient eventually calmed down and, after about fifteen minutes, the mitts were removed. (Justice Center Exhibit 23, interrogation of the Subject, [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 allegations constitute abuse and/or neglect.
- Pursuant to Social Services Law § 493(4), the category of abuse and/or neglect that such act or acts constitute.

### **APPLICABLE LAW**

The Justice Center is responsible for investigating allegations of abuse and/or neglect in a facility or provider agency. (SSL § 492(3)(c) and 493(1) and (3)) Pursuant to SSL § 493(3), the Justice Center determined that the initial report of abuse presently under review was substantiated. A “substantiated report” means a report “... wherein a determination has been made as a result of an investigation that there is a preponderance of the evidence that the alleged act or acts of abuse or neglect occurred...” (Title 14 NYCRR 700.3(f))

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

(d) "Deliberate inappropriate use of restraints," which shall mean the use of a restraint when the technique that is used, the amount of force that is used or the situation in which the restraint is used is deliberately inconsistent with a service recipient's individual treatment plan or behavioral intervention plan, generally accepted treatment practices and/or applicable federal or state laws, regulations or policies, except when the restraint is used as a reasonable emergency intervention to prevent imminent risk of harm to a person receiving services or to any other person. For purposes of this subdivision, a "restraint" shall include the use of any manual, pharmacological or mechanical measure or device to immobilize or limit the ability of a person receiving services to freely move his or her arms, legs or body.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 3, which is defined as follows:

(c) Category three is abuse or neglect by custodians that is not otherwise described in categories one and two. Reports that result in a category three finding shall be sealed after five years.

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject committed the act or act 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 the evidence, the substantiated report must be amended and sealed.

### **DISCUSSION**

The Justice Center has not established by a preponderance of the evidence that the Subject committed the prohibited act described in “Allegation 1” of the substantiated report described as deliberate inappropriate use of restraints (abuse).

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-24) The investigation underlying the substantiated report was conducted by Investigator [REDACTED] who was, at the time of the investigation, employed by OPWDD. Investigator [REDACTED] testified on behalf of the Justice Center at the hearing. Investigator [REDACTED] is currently employed by the Justice Center. [REDACTED], a Psychologist-2, employed by OPWDD, also testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and provided no other evidence.

The Justice Center proved by a preponderance of the evidence that the Subject turned the Service Recipient's face to the side with her hand when he was engaged in a behavior. However, the Subject's action was a reasonable emergency intervention to prevent imminent risk of harm to the Service Recipient and to prevent the Subject from being bitten.

The SCIP-R manual contains six units or modules. Module 5 consists of core techniques, specialized techniques and restrictive techniques. Staff members are routinely trained in core

techniques, but are only trained in specialized techniques if the staff members provide care for a service recipient whose plan calls for the use of specialized techniques. The restrictive techniques, like the specialized techniques, would likewise need to be a part of the behavior support plan in order to be taught to staff members and to be authorized for use. (Hearing testimony of OPWDD Psychologist-2 [REDACTED])

The SCIP-R manual<sup>1</sup> (Justice Center Exhibit 24, p. 59, unit 5.2) illustrates the “Approach Prevention” technique, which is a specialized bite avoidance technique. (Hearing testimony of OPWDD Psychologist-2 [REDACTED]) This is not generally a trained technique and staff are not taught this technique unless a service recipient under their care has a plan that specifies the use of this technique. This technique is used against an advancing service recipient who is approaching a staff to bite them. The staff stands, hands outstretched at chest height, knees slightly bent, feet shoulder-width apart with his/her arms raised to a level just above chest height, and hands cupped. As the service recipient approaches, the staff moves his/her forearms between the service recipient’s shoulders or upper torso and then places his/her own two cupped hands around the service recipient’s jaw line (thumbs in contact with the chin or under the chin) and fingers pointing toward the bottom of the Service Recipient’s nose. This technique is used to fend against a service recipient attempting to bite the face area of staff. (Hearing testimony of OPWDD Psychologist-2 [REDACTED])

The second technique, a general technique, is the bite release technique and is specified in Justice Center Exhibit 24, p. 24, unit 5.2. This technique is used to defend against a service recipient who is actively biting a staff. The technique is used when a staff’s arm is being bitten. The staff member pushes their arm further into the mouth to prevent mouth breathing while

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<sup>1</sup> Only unit 5 of the manual was offered into the record.

simultaneously gently pressing the nostrils in an effort to force a bite release. (Hearing testimony of OPWDD Psychologist-2 [REDACTED])

The only SCIP-R technique that allows a staff member who is being bitten to place their hands on a service recipient's face, is a two staff technique for bite release and hair pull release. This technique involves a second staff covering the eyes of the hair pulling or biting service recipient in an effort to startle a release of the bite or the hair pull. The hand is cupped over the eyes and the thumb is tucked in to avoid being bitten. Additionally, the second staff would also secure one of the service recipient's hands to pre-empt the service recipient from punching. (Hearing testimony of OPWDD Psychologist-2 [REDACTED])

Staff members are always taught to increase distance between themselves and the service recipient who is acting out aggressively. There is no SCIP-R sanctioned technique for application of prescribed mitts. (Hearing testimony of OPWDD [REDACTED], a Psychologist-2)

On cross-examination, OPWDD Psychologist-2 [REDACTED] acknowledged that there was another sanctioned technique that involved staff placing their hands on a service recipient's face, but that technique was prescribed to defend against a head butting service recipient. (Justice Center Exhibit 24, p. 57, unit 5.2) This is a specialized technique that is not routinely trained and, unless this is part of a service recipient's specific plan, staff members are not trained in this technique.

The Subject was interrogated on [REDACTED] and [REDACTED]. During the first recorded interrogation, the Subject denied making intentional contact with the Service Recipient's face or pushing the Service Recipient's face during the application of the mitts. During the first interrogation, the Subject stated that she lifted her arm to avoid being bitten. (Justice Center Exhibit 23, interrogation of the Subject, [REDACTED]) During the second interrogation, the Subject indicated that her arm might have had inadvertent contact with the Service Recipient's forehead

when she elevated her arm to create distance between her and the Service Recipient in order to avoid being bitten. (Justice Center Exhibit 23, interrogation of staff-1, [REDACTED])

At the hearing, the Subject testified, as she had in the two previous recorded interrogations, that when the Service Recipient attempted to bite her or did successfully strike her, she did not push and/or turn his face to the side with her hand. However, when interviewed by the police on [REDACTED], the Subject told the police officer that the Service Recipient struck her on the thigh and attempted to bite her, and that she responded with a common open-handed technique that is often used to prevent the Service Recipient from biting staff. (Justice Center Exhibit 21, p.2) The Subject provided a copy of the police report (see Justice Center Exhibit 21) to Investigator [REDACTED].

After listening to the interrogation of [REDACTED] (Justice Center Exhibit 23), it is obvious that the Subject was eager to provide the police report to the Investigator and when she did so, the Subject did not make any claim to Investigator [REDACTED] that there was an error in the police officer's characterization of what she (the Subject) had told the officer during the police investigation. (Justice Center Exhibit 23, interrogation of the Subject, [REDACTED]) The police report (Justice Center Exhibit 21) is credited evidence in the entirety.

It is noteworthy that in both a subsequent interrogation and her testimony the Subject stated unconvincingly that she did not apply an open-handed technique to reposition the Service Recipient's head. Ultimately, during their review, the Justice Center did not credit the Subject's recantation and neither did the Administrative Law Judge presiding over the hearing.

Additionally, Staff-2 made a number of more troubling allegations pertaining to the Subject and this incident. (Justice Center Exhibit 7) However, owing to a number of factors, including a well-documented and on-going dispute between Staff-2 and the Subject that included an allegation

that threats of physical harm were made toward the Subject by Staff-2, the Justice Center did not credit allegations made by Staff-2. (Justice Center Exhibit 5, p. 16, paragraph numbered 18)

The most convincing evidence in the record pertaining to the relevant events came from Staff-1 in her recorded interrogation and ultimately her characterization of the events is credited in its entirety. (See Justice Center Exhibit 23, interrogation of the Staff-1, [REDACTED])

The mechanics of the technique used by the Subject are not trained or sanctioned by SCIP-R. There was no evidence that any specialized techniques were sanctioned or taught to staff for addressing the Service Recipient's behaviors. The Justice Center argued that the Subject could have backed away from the Service Recipient when he attempted to bite her, but instead chose to use a non-sanctioned physical intervention.

However, the proof establishes that the mitts were applied to the Service Recipient for his own safety and there is no SCIP-R sanctioned technique for application of prescribed mitts to a combative service recipient. (Hearing testimony of OPWDD [REDACTED], Psychologist-2) The Service Recipient was punching his own head and this is not a situation where retreating would have left the Service Recipient in a safe position. After considering all of the evidence, the Subject's action was a reasonable emergency intervention to prevent imminent risk of harm to the Service Recipient.

Accordingly, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed abuse (deliberate inappropriate use of restraints). The substantiated report will be amended and sealed.


**DECISION:**

The request of [REDACTED] that the substantiated report dated [REDACTED]  
[REDACTED] be amended and sealed is granted.

The Subject has not been shown by a preponderance of the evidence to have committed abuse.

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

**DATED:** December 28, 2016  
Schenectady, New York

  
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Gerard D. Serlin, ALJ