



PHILIP D. MURPHY
Governor

State of New Jersey
Department of Human Services
Office of Program Integrity and Accountability
P.O. Box 700
Trenton, NJ 08625-0700

SARAH ADELMAN
Commissioner

SHEILA Y. OLIVER
Lt. Governor

DEBORAH ROBINSON
Director

FINAL AGENCY DECISION

OAL DKT. NO. HSL 07432-21 AGENCY
DKT. NO. DRA 21-012

A.M.,

(RECORD UNSEALED)

Petitioner,

v.

**DEPARTMENT OF HUMAN
SERVICES, OFFICE OF PROGRAM
INTEGRITY AND ACCOUNTABILITY,**

Respondent.

Albert Van-Lare, Esq., appearing for petitioner (attorney)

Elizabeth M. Tingley, Deputy Attorney General, appearing for respondent Department of Human Services, Office of Program Integrity and Accountability (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: November 7, 2022

Decided: February 10, 2023
BEFORE **KIM C. BELIN**, ALJ:

INITIAL DECISION

STATEMENT OF THE CASE

Petitioner, A.M., appeals her placement on the Central Registry of Offenders Against Individuals with Developmental Disabilities (Central Registry), pursuant to N.J.S.A. 30:6D-73 et seq., on charges that she physically and verbally abused an individual receiving services from the Division of Developmental Disabilities (DDD) on January 6, 2021. After an investigation, respondent, Department of Human Services' Office of Program Integrity and Accountability

(OPIA), substantiated the charges and placed A.M.'s name on the Central Registry. A.M. denied committing any act of physical or verbal abuse against the individual, A.C.

PROCEDURAL HISTORY

By letter, dated June 1, 2021, OPIA notified A.M. of its investigative findings and its determination to place her name on the Central Registry. A.M. filed an appeal and OPIA transmitted this matter to the Office of Administrative Law (OAL), where it was filed as a contested case on September 1, 2021, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

An Order to Seal was entered in the case. However, the Department of Human Services maintains that Initial Decisions and Final Agency Decisions involving the Central Registry Act, N.J.S.A. 30:6D-77 to 82, were never intended to be sealed from the public. Where, it is stipulated in a protective order, the decisions, the initials of the petitioner and service recipients - as opposed to full names - are used, that practice suffices to safeguard the identities of victims and petitioners. Having Initial Decisions and Final Agency Decisions available in Central Registry cases promotes transparency in the adjudicatory process, educates the public and members of the bar on this developing area of the law, and provides an invaluable precedential resource for use in the Office of Administrative Law. Therefore, in this Final Agency Decision, it is **ORDERED** that the order to seal is removed and all parties privy to this case shall abide by the protective order, return all discovery materials, and continue to refer to the Petitioner and the victim in this case by their initials in all public documents concerning this case.

The hearing was held on July 20, 2022, via Zoom, on a remote platform by consent of the parties. Transcripts were ordered and the record was held open pending receipt of same. Petitioner and Respondent submitted written summations on November 7, 2022, and the record closed on that date.

ISSUES

The first issue in the Initial Decision proceeding is whether A.M. committed substantiated acts of physical and verbal abuse against A.C., an individual receiving services from DDD, with a history of verbal and physical aggression against staff which includes hitting, breaking items, and screaming. The second issue is whether A.M. should be placed on the Central Registry.

FACTUAL DISCUSSION AND FINDINGS

The parties set forth the following joint stipulation of facts. Accordingly, I adopt the following undisputed **FACTS**:

1. Allies, Inc. (Allies) provides services and housing for individuals living with special needs, including group homes for individuals living with developmental disabilities. Allies receives funding from the New Jersey Department of Human Services, Division of Developmental Disabilities.
2. In January of 2021, Allies operated a group home in Berlin, New Jersey on Pump Branch Road (Pump Branch).

3. In January of 2021, A.C. and R.P. resided at Pump Branch and received group home services from Allies.
4. On January 6, 2021, A.C. and R.P. were present at Pump Branch.
5. A.C. has a developmental disability as defined in N.J.S.A 30: 6D- 25(b) and N.J.S. A. 30:6D-3 and receives services from the Division of Developmental Disabilities.
6. R.P. has a developmental disability as defined in N.J.S.A 30: 6D- 25(b) and N.J.S. A. 30:6D-3 and receives services from the Division of Developmental Disabilities.
7. In January of 2021, A.M. worked for Allies as a support manager.
8. On January 6, 2021, A.M. was present at Pump Branch.
9. A.M. received training on A.C.'s Individualized Service Plan on April 13, 2020.
10. A.M. received training on A.C.'s Behavior Support Plan on March 9, 2020, and July 14, 2020.

Testimony

For Petitioner

A. M. (A.M.) is a licensed social worker. She began working for Allies, Inc. on January 28, 2020, and was a residential manager. She stated that on January 6, 2021, she was working in the basement of the house, which she used as her office, when she heard A.C. screaming. She knew that screaming was a part of A.C.'s behavior when he did not get what he wanted so she did not respond right away. However, the screaming continued, and she went upstairs to see what was going on. When she arrived in the kitchen, she saw Ms. Comer pushing A.C. with her left hand and A.C. lunging toward her. There was a pot on the stove, so she decided she needed to remove A.C. from the kitchen. She was concerned that A.C. might get hurt by knocking the pot off the stove because he did not like what was cooking. She placed her right hand on his right shoulder and her left hand on his left shoulder and led him out of the kitchen. The assistant manager was coming up the stairs from the basement and offered to help, so he took A.C.'s arm and A.M. held A.C.'s other arm and walked him through the living room to his bedroom.

They sat him on the bed to find out what was happening, but he continued to scream and started to fight. A.M. blocked him from returning to the kitchen and A.C. started kicking her and spitting on her. The assistant manager offered to help by talking to A.C. A.M. stepped aside so the assistant manager could help but A.C. would not listen and continued screaming. A.M. suggested that the assistant manager put A.C. on the floor because the floor was safe, which the assistant manager did, but A.C. continued to kick his legs.

A.M. got on the floor and held A.C.'s legs and told him to calm down. She did not recall closing the bedroom door. She never slapped or kicked A.C., she had good relationships with the other clients, parents, guardians, and she cared for the staff. She frequently cooked African food for them, including Ms. Comer who repeatedly requested the food. A.M. was working on upgrading the basement so families would have a comfortable space to visit their loved ones. She brought structure to the program and had a "no nonsense" approach but it produced positive results. Ms. Comer told her that A.M. was the best manager she ever had.

She did not promise A.C. a tablet. He already had a tablet, but he could not find it. Comer started working with A.M. in 2022, but only on Wednesdays from 3:00 p.m. to 11:00 p.m. The remaining days, Comer worked the overnight shift. A.M. was not aware of any employee being retaliated against for reporting abuse. A.M. has worked for thirty-four years as a social worker in

various places and has never been accused of abusing anyone under her care.

On cross examination, A.M. stated that all clients could be restrained unless they had a specific document in their behavioral plan that prohibited restraints. If there were no restraint restrictions, three conditions had to be met prior to implementing a restraint: the client was a danger to him or herself, a danger to others, or physically destroying property. A.C. did not have any document in his behavioral plan prohibiting restraint. All restraints had to be reported within 24 to 48 hours. She did not have a chance to report the January 6, 2021, incident because she was terminated. She did not restrain A.C., she only held his legs for five to six minutes. She helped the assistant manager who was restraining A.C. She has severe arthritis in her ten fingers, so she is unable to restrain anyone. She told A.C. to calm down and she would let him go. All staff were trained on restraints.

There were four residents in the house and two to three staff per shift working for a total of six. There were three shifts: morning, afternoon and overnight. Comer complained to A.M. about other employees who were of African descent. A.M. was not verbally abusive to another client during a staff meeting. She stated that the client was disrupting the meeting by yelling intermittently. She asked the client to stop; however, the client did not comply, so A.M. escorted him upstairs to watch T.V. This was done without incident and the staff meeting continued.

For Respondent

Beth L. Greggs (Greggs) is a Quality Assurance Specialist/Investigator for the Department of Human Services' Office of Investigations, where she has been employed for the past ten years. She conducts investigations of allegations of abuse, neglect and exploitation within the developmentally disabled population, and mental health investigations. When investigating, her goal is to substantiate or unsubstantiate an allegation. Substantiation means that 51% of the evidence is in favor of the act that occurred. Greggs described how investigations were conducted including how this investigation was conducted. She was assigned the case and after collecting documents, including the Unusual Incident Report (UIR), behavioral support plan, daily logs, staff trainings completed, and individual rehabilitation plan, she scheduled interviews. She interviewed Ms. Comer, A.M., Mr. Sam Mousa, Shaquay Johnson and Tyena Rivera. Greggs was not successful in interviewing A.C. because of his low functioning level.

Greggs received an audio recording of the alleged incident by email. She listened to the audio recording of the alleged incident, however, she could not recall who sent her the recording. She spoke to Ms. Comer, Johnson and A.M. about the audio recording. Greggs listened to the recording with her supervisor.

Greggs explained that after all the interviews were completed, she reviewed the testimony and evidentiary evidence and determined that the allegations of physical and verbal abuse were substantiated.

On cross-examination, Greggs testified that she did not know who sent her the audio recordings. Greggs also stated that Ms. Comer did the recording and sent Greggs the audio recording in three separate emails because it was too large. Greggs did not know the manner Ms. Comer used to separate the recordings. Greggs sent the emails to her IT department to get the recordings converted onto a MP3 format. The IT team was unable to get the third tape to work. Greggs played at least two of the recordings when Greggs interviewed A.M., and A.M. confirmed that her voice was on the audio tapes. During the interview, A.M., who is of African descent, stated that Ms. Comer did not like people of African descent. In response, Gregg reported this allegation

to her supervisor. They contacted Allies and found no record of problems between A.M. and Ms. Comer.

Danielle Comer (Comer) stated that she was employed by Allies, Inc., as a Community Support Staff for two and one-half years. Her responsibilities are to assist with daily living activities with the residents including cooking, hygiene, doctor's appointments, and individual skills. Comer has worked with A.C. every day for the past two and one-half years. She described A.C. as happy unless he could not have one of his items. When that happened, A.C. would yell and spit. The staff must respond by trying to de-escalate or redirect him to another activity or item.

On January 6, 2021, she was in the kitchen preparing dinner and A.C. was upset because he didn't have a tablet. The staff tried to redirect him. He started yelling. A.M. came from the basement, asked what was going on, and took A.C. from the kitchen into the living room where A.C. sat on the couch. Comer saw A.M. slap A.C. and A.M., and the assistant manager dragged A.C. to his bedroom, where Comer could hear A.C. yelling from the closed bedroom door. Comer heard scuffling in A.C.'s bedroom. Comer put her ear to the bedroom door and could hear A.M. tell A.C. to calm down and that he could not have dinner until he calmed down. Comer heard what she thought were "hits."¹

The alleged incident lasted about ten minutes. When he came into the kitchen for dinner, he seemed tired and drained. A.C. told her that A.M. hit him in response to her question.

When redirecting A.M., Comer never touched him when he was yelling or screaming. Physical restraint is only permitted if the resident is physically harming him or herself or another person or destroying property.

Comer took three audio recordings of the sounds from A.C.'s bedroom. She provided the recordings to the UIR Department, the Executive Director and quality assurance at Allies. She sent the recordings through her cell phone. She did not edit them in order to send them. She reported the incident anonymously to Allies on January 6, 2021, and to DDD the following day. She also sent a copy of the recordings to the OPIA investigator who interviewed her after A.M. was suspended.

On cross-examination, Comer stated that she sent all the recordings to her employer and the DDD. She did not edit the recordings or send them in separate emails. She could not remember how many people she sent the recordings to, and no one asked her to provide her phone to listen to the recordings on the phone.

Comer previously recorded A.M. during a staff meeting being allegedly verbally abusive to a client who was attending the meeting. Although the incident occurred prior to January 6, 2021, Comer did not report this incident to the DDD until after the January 6, 2021 incident because she was afraid of retaliation from A.M. Comer felt safe to report the earlier incident once A.M. was no longer at the group home. Comer was required to report abusive behavior by staff, but she did not this time because she feared for herself and other individuals.

On redirect, Comer stated that A.M. was Comer's supervisor. Comer thought A.M. was a good manager but lacked people skills and was controlling. A.C. was not harming himself or anyone when he was in the kitchen and A.M. slapped him in the living room where A.M. dragged him.

In response to this tribunal's questions, Comer stated she made no attempts to stop A.M. She and the other co-worker were shocked. When A.C. sat on the couch, the assistant manager came and helped A.M. drag A.C. to his bedroom. Comer stated that she could not really hear

¹ Transcript, dated July 20, 2022, page 106, line 14; page 107, lines 6-7.

anything through the door, and she was trying to record discreetly so that management (i.e., A.M. and the assistant manager) would not see her.

Comer believed the whole incident could have been avoided if A.M. had given A.C. the tablet he asked for, but A.M. was controlling when she would release the tablet.

ADDITIONAL FACTUAL FINDINGS

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See, Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it “hangs together” with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, “[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier-of-fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After carefully considering the testimonial and documentary evidence presented and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, there are inconsistencies. First, A.M. testified that she did not restrain A.C. but only held his legs for five to six minutes; she helped the assistant manager who was restraining A.C. (Transcript of July 20, 2022, hearing, p.195:4-6). However, in the OPIA Investigation Report dated May 4, 2021, Gregg reported that A.M. said that she and the assistant manager restrained A.C. in his bedroom but did not utilize a “full restraint.” (J-1,DHS 004).

Second, in the OPIA Investigation Report, A.M. at one point left the bedroom and returned. (J-2, DHS 011.) This is inconsistent with her testimony that she was in the room for the entire ten-minute episode.

Third, in the OPIA Investigation Report dated January 14, 2021, A.M. admitted to restraining A.C, but that it was not a “full restraint.” (J-3, DHS 020, ¶41.) In the OPIA Investigation Report dated March 16, 2021, A.M. reportedly stated that she restrained A.C. but it was a “one-time thing.” (J-4, 029, 20.)

Fourth, A.M. testified initially that she guided A.C. out of the kitchen by putting her right hand on his right shoulder and her other hand on his other shoulder (Transcript of July 20, 2022 hearing, p. 165:14-16). Upon further questioning, she later stated that she put her arm around him using her left arm to hold his left arm to lead him out of the kitchen. (Transcript of July 20, 2022 hearing, p. 166:18-20). However, in her statement to the OPIA investigator, A.M. said she “grabbed A.C.’s arm to remove him from the kitchen.” (J-1, DHS 004.) When interviewed on January 14, 2021, A.M. stated that she took A.C. “by the hand” to remove him from the kitchen. (J-3, DHS 019, 19.) In 20 of this same report, A.M. reportedly had her hand on A.C.’s forearm and she “grabbed A.C.’s arm enough to take him out of the kitchen.” Ibid. at 21.

Fifth, in the OPIA Investigation Report dated January 29, 2021, it states that Comer said A.M. hit A.C. in the face and shoulders. (J-2, DHS012). However, Comer’s testimony was that A.M. slapped A.C.’s head (Transcript of July 20, 2022 hearing, p. 105:17–18; 118:3-5).

Most of the inconsistencies arise around whether A.M. restrained A.C. I consider the testimony of A.M. on this issue lacking in credibility. A.M. stated that she merely assisted the person restraining A.C. but admitted to holding A.C.'s legs down for five or six minutes. It strains logic that such action is not a form of restraint. By A.M.'s actions, A.C.'s movements were restricted. This is the very definition of restraint. Accordingly, I **FIND** that A.M. restrained A.C. by holding his legs for five or six minutes.

Regarding whether A.M. hit or slapped A.C., Comer's testimony also lacked credibility. The employee who was in the kitchen with Comer at the start of A.C.'s behavioral episode on January 6, 2021, did not corroborate Comer's claim that A.M. slapped A.C. (J-7.) Comer testified that A.C. told Comer that A.M. hit him in the bedroom; however, in his statement to the OPIA investigator, A.C. said his roommate hit him. (J-9.) Accordingly, I **FIND** that there is insufficient evidence to support Comer's allegation that A.M. slapped or hit A.C.

I further **FIND** that Comer took no action to stop the alleged verbal and/or physical abuse of A.C. despite her responsibility to do so.

Ms. Greggs provided credible testimony about her investigation of the incident of January 6, 2021. She did not appear to have any bias toward or against the petitioner, and I can see no motive on her part for untruthful testimony.

After hearing the testimony and reviewing the evidence, I **FIND** the following **FACTS** by a preponderance of the credible evidence:

1. A.C. is a resident of the Pump Branch facilities operated by Allies, Inc. A.C. has a history of verbal aggression that includes yelling, screaming, cursing, making derogatory comment, and/or making threats of harm directed at others. He also has a history of physical aggression that includes, but is not limited to, hitting, kicking, punching, smacking and spitting. (J-11.)
2. On January 6, 2021, A.C. became upset and started screaming in the kitchen. Danielle Comer was in the kitchen preparing dinner along with another employee and they attempted to redirect A.C. to stop him from screaming. However, they were unsuccessful.
3. A.M. was in the basement, which she uses as her office. She heard the yelling and came upstairs and proceeded to remove A.C. from the kitchen. She believed A.C. was causing danger to Ms. Comer or would create danger because of the pots on the stove.
4. Comer testified that A.M. grabbed A.C. by the collar and dragged A.C. into his bedroom where a scuffle ensued and A.C. could be heard screaming.
5. Shaquay Johnson, the other employee in the kitchen with Ms. Comer, provided a written statement that she did not see A.M. hit A.C.; however, Ms. Johnson said she saw A.M. and the assistant manager grab A.C. by the collar and drag A.C. into his bedroom where a scuffle ensued and A.C. could be heard screaming.
6. A.M. held down A.C.'s feet for five to six minutes to stop him from kicking. She repeatedly told A.C. to calm down and she would release him.
7. After approximately ten minutes, A.C. quieted down and A.M. released him and allowed him to go to dinner after taking a shower.
8. A bruise was identified on A.C.'s shoulder, however, it is unclear whether it was a new bruise or an old bruise. A.C. said his roommate hit him.
9. Ms. Comer recorded the incident using her cell phone and reported the incident anonymously to Allies, Inc. on January 6, 2021 and to the DDD on January 7, 2021. She sent the audio recordings to Ms. Greggs.

10. A.M. received training on A.C.'s Behavior Support Plan (BSP) on March 9, 2020, and July 14, 2020.
11. A.C.'s BSP provides that staff are not to argue with A.C. and “**Avoid** all power struggles and confrontation” (Emphasis in original) (J-11, DHS054.) It further provides that when A.C. engages in verbal aggression such as yelling, screaming, making derogatory statements or making threats against others, staff is to:
 - a. “Minimize the audience by escorting individuals, including other staff, to another room, away from A.C.
 - b. One staff will take the lead and provide A.C. one verbal prompt to calm down [such as] ‘A.C., once you stop displaying _____, I will be able to assist you.’ . . .
 - c. If A.C. continues to engage in verbal aggression, cease all verbal communication with A.C. including eye contact and increase your distance. Do not further engage A.C. but monitor A.C. closely to ensure he remains safe.
 - d. If at any time A.C. ceases concerning behaviors, redirect A.C. to a neutral activity making no mention of the concerning behaviors. Re-introduce other individuals and staff back into the environment.” (Ibid. at DHS056.)
12. The New Jersey Elwyn Handbook for Crisis Management (Handbook) provides that staff are not to “give vague direction such as repeating ‘calm down’ over and over; be more descriptive of specific action (what does calming down look like?)” (J-15, DHS089.)
13. The Handbook does not endorse using physical restraints as punishment or to make individuals follow instruction but limits physical restraint to the following conditions:
 - a. The individual is placing himself or herself in clear physical danger.
 - b. The individual is placing others in clear physical danger.
 - c. The individual is engaging in property destruction that may lead to physical harm to himself or herself or others. (Ibid. at DHS091.)

LEGAL ANALYSIS AND CONCLUSIONS

It is the policy of this State to provide for the protection of individuals with developmental disabilities. N.J.S.A. 30:6D-73(a). The Central Registry is intended to prevent caregivers who become offenders against individuals with developmental disabilities from working with individuals with developmental disabilities. N.J.S.A. 30:6D-73(d). A caregiver may be placed on the Central Registry in cases of substantiated abuse, neglect or exploitation. N.J.S.A. 30:6D-77(b). A “caregiver” is defined in N.J.A.C.10:44D-1.2 as “a person who receives State funding, directly or indirectly, in whole or in part, or who volunteers to provide services or supports, or both, to an individual with a developmental disability.”

“Abuse” is defined in N.J.A.C. 10:44D-1.2, as “wrongfully inflicting or allowing to be inflicted physical abuse, sexual abuse or verbal or psychological abuse or mistreatment by a caregiver upon an individual with a developmental disability.”

“Neglect,” is defined in N.J.A.C. 10:44D-1.2 as “willfully failing to provide proper and sufficient food, clothing, maintenance, medical care or a clean and proper home; or failure to do, or permit to be done, any act necessary for the well-being of an individual with a developmental disability.” “Inadequate supervision” may constitute neglect. N.J.A.C. 10:44D-2.1(e)1.

“Physical Abuse,” defined in N.J.A.C. 10:44D-1.2, means “a physical act directed at an individual with a developmental disability by a caregiver of a type that causes one or more of the

following: pain, injury, anguish or suffering. Such acts include, but are not limited to, the individual with developmental disability being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged or stuck with a thrown or held object.”

In order to be included on the Central Registry, due to an act of physical or verbal abuse, it must be determined whether the caregiver acted with intent, recklessness, or with careless disregard to the well-being of the service recipient resulting in injury or that could potentially cause injury to an individual with a developmental disability. N.J.S.A. 30:6D-77(b)(1), N.J.A.C. 10:44D-4.1(b). The second inquiry is whether Petitioner “acted intentionally, recklessly or with careless disregard to the well-being of the service recipient resulting in an injury to an individual with a developmental disability or by exposing the latter to a potentially injurious situation.” N.J.A.C. 10:44D-4.1(b). The regulation defines each mental state:

1. Acting intentionally is the mental resolution or determination to commit an act.
2. Acting recklessly is the creation of a substantial and unjustifiable risk of harm, to others by a conscious disregard for that risk.
3. Acting with careless disregard is the lack of reasonableness and prudence in doing what a person ought not do or not doing what ought to be done.

The burden of proof falls on the agency in enforcement proceedings to prove a violation. Cumberland Farms, Inc., v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). In this matter, DHS bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate “if it establishes ‘the reasonable probability of the fact.’” Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must “be such as to lead a reasonably cautious mind to the given conclusion.” Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

The record here reflects that petitioner A.M. was familiar with A.C.’s BSP and her employer’s policy on restraints. Yet she failed to adhere to either. Specifically, she ignored A.C.’s BSP which states that staff are to avoid confrontation with A.C. and not to argue with him. She contended that removing him from the kitchen was warranted because she was concerned with A.C.’s safety in the kitchen, however, she failed to use the physical techniques authorized by her employer to do so. Ms. Comer and Ms. Johnson stated that A.M. grabbed A.C.’s collar and dragged him out of the kitchen. A.M. initially stated that she grabbed A.C.’s arm. She later stated she took his hand, later she said she used his shoulders to guide him and finally, she said used his forearm. None of these techniques are sanctioned by A.M.’s employer.

The Handbook recommends the use of the “Lead Along” when trying to lead a person in a specific direction. Using this technique, staff holds the person’s wrists with one hand and holds the upper part of the same arm above the elbow with the other hand. The handbook states that staff must “use only enough pressure to contain the individual - match his/her energy.” (J-15, DHS094). Although A.C. was yelling, there is no indication that his level of energy at this point required A.M. to grab his collar or arm. A.M. contends that this aggressive move was justified because A.C. was lunging at Ms. Comer and Ms. Comer was pushing him away. However, neither Ms. Comer nor Ms. Johnson corroborated this allegation.

N.J.A.C. 10:44D-1.2, which defines physical abuse, does not require any actual physical injury to substantiate an allegation of physical abuse. It is enough that two eye witnesses reported

that A.M. grabbed A.C.'s collar and dragged him into his bedroom, and A.M. also admitted to the investigator that A.M. grabbed A.C.'s arm to remove him from the kitchen. Accordingly, the ALJ **CONCLUDED** that A.M. acted with careless disregard to the well-being of A.C. that could have potentially caused injury to A.C., an individual with a developmental disability.

When an individual is kicking or pushing violently, holding the individual's legs down is an appropriate technique in a "two person lay down" which involves one person holding the individual's upper body and the second person holding down the violent individual's legs by laying on top of the individual's legs. (J-15, DHS 113). However, in the present case, the need for this type of restraint could have been avoided if A.M. had engaged A.C. in accordance with his BSP. There is no evidence that A.M. attempted to redirect A.C. To the contrary, the evidence shows that A.M. immediately engaged in confrontation and physical restraint. Accordingly, the ALJ **CONCLUDED** that A.M. acted with careless disregard for the well-being of A.C. that could have potentially caused injury to A.C., an individual with a developmental disability.

"Verbal abuse" is defined in N.J.A.C. 10:44D-1.2 as any verbal act that inflicts "emotional harm; mental distress; or invocation of fear, humiliation, intimidation or degradation to an individual with a developmental disability. The respondent contends that A.C. was yelling in a demeaning manner and threatening to withhold A.C.'s dinner. This evidence was presented by an audio recording from Ms. Comer. There were reportedly three recordings, however, this tribunal was only presented with one, and that recording did not discern A.M. threatening to withhold A.C.'s dinner. Rather, A.M. was trying to get A.C. to calm down and due to the volume and high pitch of A.C.'s yelling, A.M.'s voice was elevated so he could hear her, but not to the point of screaming at him.

Moreover, it is not contested that A.C. has a history of physical and verbal aggression detailed in his BSP that includes screaming. Thus, his screaming, which started before his interaction with A.M. and continued while A.M. was talking to him, is insufficient evidence to support a claim of verbal abuse. A.M. is heard on the audio recording repeatedly telling A.C. to calm down. This is specifically not recommended by the Handbook guidelines as not being descriptive enough. However, without more, there is insufficient evidence that A.M. engaged in verbal abuse that caused A.C. emotional harm, mental distress, fear, humiliation, intimidation or degradation. This tribunal was not privy to the contents of the other two audio tapes and thus they could not be authenticated. Accordingly, the ALJ **CONCLUDED** that A.M. did not engage in verbal abuse of A.C.

The ALJ **CONCLUDED** that the DHS has sustained its burden of proving by a preponderance of the evidence that A.M.'s actions rise to the level of abuse, as defined in N.J.A.C. 10:44D-2.1(c), physical acts of aggression including grabbing and dragging. Further, the ALJ **CONCLUDED** that A.M. acted intentionally, recklessly, or with careless disregard to the well-being of A.C., an individual protected by N.J.S.A. 30:6D-73, justifying that her name shall be entered onto the Central Registry.

N.J.S.A. 30:6D-75a (1) mandates that a person employed or volunteering in a program, facility, community care residence, or living arrangement licensed or funded by the department, "having reasonable cause to believe that an individual with a developmental disability has been subjected to abuse, neglect, or exploitation by a caregiver, shall report the same immediately to the department by telephone or otherwise." This statute further provides:

A person employed or volunteering in a program, facility, community care residence, or living

arrangement licensed or funded by the department, or a person providing community-based services with indirect State funding to a person with a developmental disability, as applicable, who fails to report an act of abuse, neglect, or exploitation against an individual with a developmental disability while having reasonable cause to believe that such an act has been committed, is a disorderly person. [N.J.S.A.30:6D-75(c)1]

It is undisputed that Comer believed that a client at the Pump Branch facility was being verbally abused and, as such, she had a statutory obligation to report the abuse immediately and she did not. Accordingly, the ALJ **CONCLUDED** that Comer has violated N.J.S.A. 30:6D-75a1. However, because she eventually reported the suspected abuse, she is not deemed a disorderly person. Staff, like Comer, employed to care for individuals with developmental disabilities must make the safety of these vulnerable members of our society a paramount concern. N.J.S.A. 30:6D-73.

ORDER

It is hereby **ORDERED** that the determination of abuse by the Respondent Department of Human Services against A.M. is hereby **AFFIRMED**. It is further **ORDERED** that A.M.'s name be placed on the New Jersey Central Registry of Offenders Against Individuals with Developmental Disabilities.

The ALJ hereby **FILED** this initial decision with the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY** for consideration.

PETITIONER'S EXCEPTIONS

Petitioner files this exception to the Decision of Hon. Kim C. Belin dated February 10, 2023 in the above matter. The decision recommended that petitioner, A.M., should have her name placed on the central registry.

The recommendation was based on the conclusion by the ALJ that A.M. employed an improper restraint method that should not have been needed had A.M. engaged the client with proper intervention methods that comports with A.C.'s behavioral support plan (BSP.) A.M.'s conduct, however, was not inconsistent with the care that needed to be given to A.C. The restraint employed here did not violate any state rule or A.M.'s BSP.

As the ALJ properly noted on page 16 of the decision:

When an individual is kicking or pushing violently, holding the individual's legs down is an appropriate technique in a two person lay down which involves one person holding the individual's upper body and the second person holding down the violent individual's legs by laying on top of the individual's legs. (J-15, OHS 113).

A.M. testified that A.C. was kicking violently and was constituting a danger to himself and others and it was necessary to restrain him for safety reasons. The situation was escalating and A.M. attempted to deescalate the tension and violence. There is nothing in his BSP that forbids the kind of restraint reference in J-15, DHS113 that was used by A.M.

As A.M. testified, she only crossed her hands to stop A.C. from throwing his legs around and kicking in a way that may cause injury to himself and others. It was a reasonable application for a woman in her sixties suffering from severe arthritis. A.M. has also engaged A.C. in de-

escalation tactics for about ten minutes attempting to cool him and make him comfortable but he got louder and more violent toward A.M.

Restraint was not an aggressive restraint and was done as a last resort after non-restraining method failed. There is nothing abusive about this method of restraint and nothing in A.C.'s BSP prohibits this manner of restraint.

The ALJ has no basis in law or in fact based on the evidence presented for this finding as A.M. did not violate any rule especially as A.M. properly engaged A.C. before the restraint was used as a last resort to prevent harm to A.C. and the workers caring for him.

Faced with the violent acts of A.C. who was violent to himself and others and A.M. acting as reasonably as condition permits on that day, without the benefit of hindsight exercised reasonable judgment to prevent violence and or injury to A.C. and to others.

Nothing about A.M.'s action should have amounted to abuse. The ALJ did not consider the peculiar situation of A.M. who exercised due diligence, on that day.

It is improper to impose the severe sanction of reporting a name to central registry for an action that did not violate A.C.'s BSP or state restraining methods. The ALJ stated that A.M. violated employer's policy but there is no testimony in support of that conclusion.

The ALJ found violation because of the restraint method used and not because the restraint method was not allowed for A.C. but because the ALJ believes restraining would have been unnecessary if a different approach were used. This reasoning is, however, speculative and cannot be a basis for finding violation as it is in this instance. The issue here is that A.M. did not use an improper or prohibited restraining method.

A.M. complied with the employer's guideline and nothing in the guidelines prohibits the restraining method she applied. Confronted with a situation where A.C. was acting dangerously and likely to inflict harm on himself and others, A.M. acted reasonably to prevent a disastrous situation on the day in question.

CONCLUSION

For the foregoing reasons, A.M. should not be put on the central registry of offenders against individuals with developmental disabilities.

RESPONDENT'S EXCEPTIONS

This Office represents Respondent, the Department of Human Services (DHS), in this matter. Please accept this reply in opposition to Petitioner's February 22, 2023 Exceptions to the Initial Decision issued by Administrative Law Judge (ALJ) Kim C. Belin on February 10, 2023. For the reasons set forth in Respondent's post-hearing submission brief and set forth below, the Initial Decision affirming the placement of A.M.'s name on the Central Registry of Offenders against Individuals with Developmental Disabilities (the Central Registry) should be adopted.

In the Initial Decision, the ALJ correctly concluded that A.M. committed two distinct acts of physical abuse against A.C., each of which necessitates placement on the Central Registry. First, the ALJ found that A.M. grabbed A.C.'s collar and arm, and dragged him from the kitchen to the bedroom, thus acting with careless disregard to his well-being. Initial Decision at 15-16. Second, the ALJ found that A.M. engaged in an impermissible restraint by holding A.C.'s legs

for five to six minutes before following A.C.'s Behavioral Service Plan (BSP). Initial Decision at 10; 16.

Petitioner argues that no act of physical abuse occurred because "A.M. did not use an improper or prohibited restraining method." Exceptions at 3. This argument misinterprets the limited circumstances in which restraints may be used on individuals with developmental disabilities. Petitioner is correct that A.C.'s BSP does not explicitly prohibit the use of the Two Person Lay Down restraint. See Exceptions at 2; J-11.² However, the absence of restraint information in a BSP does not mean that any and all restraints are permitted to be performed on that individual at any time. Rather, Investigator Beth Greggs testified that the absence of restraint information in a BSP indicates that the individual is not to be restrained. T58:22-T59:7; T77-78:3. The ALJ found Ms. Greggs to be credible, and Petitioner has not argued otherwise.

As Ms. Greggs testified, staff working with individuals with developmental disabilities are not permitted to use restraint methods unless a restraint protocol has been approved by the human rights committee and documented in the BSP. T59:2-60:17. When an emergency situation arises, certain personal control techniques may be used. See N.J.S.A. 30:6D-5(a)(3); J-15. One such technique is the Two Person Lay Down, which "is appropriate if you are having a very difficult time controlling the individual in the regular Adult Take Down Position." J-15 at DHS 113. The ALJ correctly concluded that this technique could have been permissible, had the proper prior steps been taken.

The Two Person Lay Down is used when the staff member is already holding the individual and has already attempted a less restrictive personal control technique. See J-15 at DHS 111; 113. Here, there is no testimony indicating that A.M. had already performed a Basket Hold or an Adult Take Down maneuver to restrain A.C. Rather, A.M. testified that A.C. was on his bed and that she instructed the Assistant Manager to "put him on the floor." T169:1-5. Moreover, verbal intervention must be used before any physical interventions, and physical intervention may be used only in emergencies when physical injury is imminent. N.J.S.A. 30:6D-5(a)(3); J-15 at DHS 090. Therefore, the ALJ was correct in concluding that A.M. holding A.C.'s legs amounted to a physical restraint, and that this restraint was not performed in accordance with A.C.'s BSP, the Elwyn Crisis Management Handbook, or State regulations. Thus, the ALJ correctly concluded that A.M.'s actions met the statutory criteria for placement on the Central Registry.

Petitioner's Exceptions do not address the ALJ's conclusion that A.M. committed a separate act of physical abuse by grabbing A.C. and dragging him the bedroom, without adhering to the appropriate Lead Along physical control technique. The ALJ's findings of fact are supported by A.M.'s own testimony at the hearing, as well as the testimony of an eyewitness. See T105:12-106:7; T118-21:119:23. The ALJ's findings are also consistent with the evidence gathered during Ms. Greggs' investigation. See J-7 at DHS 041; J-8 at DHS047; J-2 at DHS004. The ALJ's finding that A.M.'s actions amount to physical abuse are consistent with the applicable regulations, which state that use of an unapproved restraint constitutes abuse and that physical injury is not required to substantiate an act of abuse. N.J.A.C. 10:44D-2.1(d); N.J.A.C. 10:44D-1.2. Thus, the ALJ correctly concluded that A.M.'s actions met the statutory criteria for

² "J" refers to the parties' Joint Exhibits.

placement on the Central Registry.

For all of these reasons, the Initial Decision should be adopted and DHS's decision to place A.M. on the Central Registry should be affirmed.

RESPONSE TO EXCEPTIONS

As to the "improper restraint method," The ALJ "considered the testimony of A.M. on this issue lacking in credibility." (ID p.10) The improper restraint was placed on A.C. after being dragged into his bedroom and placed on his bed. On his bed, A.C. was only screaming, according to A.M. After A.C. got off the bed, A.M. confronted A.C. by standing in front of the doorway. A.C. continued to scream and began to spit – behaviors for which the approved responses are defined in his BSP. The ALJ noted, "The record here reflects that petitioner A.M. was familiar with A.C.'s BSP and her employer's policy on restraints. Yet, she failed to adhere to either. Specifically, she ignored A.C.'s BSP which states that staff are to avoid confrontation with A.C. and not to argue with him." (ID p.15) There is no evidence that, had A.C. been left alone in his bed, he presented a danger to himself. There was no danger to others and he was not endangering property.

Petitioner quotes the ALJ's citation concerning restraints but leaves out the ALJ's reasoning that followed in the very next sentences. "However, in the present case, the need for this type of restraint could have been avoided if A.M. had engaged A.C. in accordance with his BSP. There is no evidence that A.M. attempted to redirect A.C. To the contrary, the evidence shows that A.M. immediately engaged in confrontation and physical restraint. Accordingly, I **CONCLUDE** that A.M. acted with careless disregard for the well-being of A.C. that could have potentially caused injury to A.C., an individual with a developmental disability." (ID p.16) There is no evidence that A.C. presented a danger of physical harm to himself or others, or that he was destroying property, outside of A.M.'s discounted testimony.

The ALJ also criticized A.M.'s grabbing A.C.'s collar and dragging him to his bedroom instead of employing the "Lead Along" method. (ID p.15) The ALJ had the opportunity to hear the testimony at the hearing and review the policies and evidence. The ALJ pointed to several instances where A.C.'s BSP and the Elwyn Handbook for Crisis Management (Handbook)'s policies were ignored or breached by A.M.

FINAL AGENCY DECISION

Pursuant to N.J.A.C. 1:1-18.1(f) and based upon a review of the ALJ's Initial Decision and the entirety of the OAL file, I concur with the Administrative Law Judge's findings and conclusions. The ALJ had the opportunity to assess the credibility and veracity of the witnesses; I defer to the ALJ's opinions concerning these matters, based upon the detailed and reasoned observations described in the Initial Decision. I **CONCLUDE and AFFIRM** that the Department has met its burden of proving sufficiently that A.M.'s action's rise to the level of abuse, as defined in N.J.A.C. 10:44D-2.1(c), physical acts of aggression including grabbing and dragging. I **CONCLUDE and AFFIRM** that that A.M. acted intentionally, recklessly, or with careless disregard to the well-being of A.C. that could have potentially caused injury to A.C., an individual with developmental disabilities. I **CONCLUDE and AFFIRM** that A.M. acted intentionally,

recklessly, or with careless disregard to the well-being of A.C., an individual protected by N.J.S.A. 30:6D-73. I **CONCLUDE and AFFIRM** that A.M.'s placement on the Central Registry is appropriate. Deferring to the ALJ's review of the evidence and the recordings made at the hearing, I **CONCLUDE and AFFIRM** that the ALJ found insufficient evidence that A.M. engaged in verbal abuse that caused A.C. emotional harm, mental distress, fear, humiliation, intimidation or degradation.

Pursuant to N.J.A.C 1:1-18.6(d), it is the Final Decision of the Department of Human Services that I **ORDER** the placement of A.M.'s name on the Central Registry of Offenders Against Individuals with Developmental Disabilities, having committed the enumerated abusive acts of grabbing and dragging A.C., with intention, recklessly or with careless disregard for A.C.'s safety.

Date: March 21, 2023 *Deborah Robinson*
Deborah Robinson, Director
Office of Program Integrity and Accountability