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Director

FINAL AGENCY DECISION
OAL DKT. NO. HSL 09176-2021
AGENCY DKT. NO. DRA 21-018

D.B.2¹,
Petitioner,

v.

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

Ty Hyderally, Esq., for petitioner, D.B. (Hyderally & Associates, P.C., attorneys)

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

STATEMENT OF THE CASE –INITIAL DECISION

On September 23, 2020, A.M., an individual with developmental disabilities, attacked her caregiver, D.B. In D.B.'s reasonable attempts to free herself from A.M.'s grip, A.M. suffered minor injuries. Should charges of physical abuse and D.B.'s placement on the Central Registry be affirmed? No. Under N.J.S.A. 30:6D-77b (1), such placement for abuse requires a determination that the caregiver acted with intent, recklessness, or careless disregard to cause or potentially cause injury to a developmentally disabled individual.

PROCEDURAL HISTORY

On October 23, 2021, D.B. appealed the Department of Human Services (DHS), Office of Program and Integrity and Accountability's determination that D.B. abused a developmentally disabled individual under her care, seeking to remove that finding from the Central Registry.

On October 28, 2021, DHS transmitted this case to the Office of Administrative Law (OAL) as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to-15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to-13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

¹ The "2" designation was part of the transmittal to the OAL but does not represent another case regarding petitioner. However, this decision will use the initials D.B. without the "2."

On December 21, 2021, The Administrative Law Judge (ALJ) issued a confidentiality protective Order.² On May 16 and 19, 2022, hearings were conducted in this case via Zoom. The parties filed post-hearing summations on November 22, 2022, and the record was closed. The ALJ issued her Initial Decision on December 14, 2022. Respondent requested, and was granted an extension of the deadline to file exceptions, until January 4, 2023. Respondent filed exceptions to the Initial Decision on January 4, 2023. Petitioner submitted a Letter Brief in response to Petitioner's exceptions on January 9, 2023.

INITIAL DECISION

DISCUSSION AND FINDINGS OF FACT

The parties presented a joint stipulation of facts. The ALJ **FOUND** the following as **FACT**:

The Center for Family Support, Inc. (CFS) operates group homes from individuals living with developmental disabilities. CFS receives funding from the Department of Human Services (DHS), Division of Developmental Disabilities (DDD). Delta-T Group is a referral agency for independent contractors who are behavioral healthcare professionals.

On September 23, 2020, D.B. worked for CFS as an independent Contractor registered with Delta-T Group. On that date, CFS operated a group home in Old Bridge, New Jersey, and at Extended Stay America in Elizabeth, New Jersey.

On September 23, 2020, A.M. resided at Extended Stay America and received group home services from CFS, and D.B. worked for CFS at that location on that date.

A.M. 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 DDD.

On September 23, 2020, A.M. grabbed D.B.'s ponytail and D.B. attempted to get A.M. to release D.B.'s ponytail. Another CFS employee, Marguerite Clerge-Crepsac, was in the hotel room with D.B. and A.M.

CFS must ensure that all personnel receive orientation and complete training per N.J.A.C. 10:44A-2.6 and N.J.A.C. 10:44A-2.7. However, before September 23, 2020, CFS did not provide D.B. with training in restraint methods.

Further, A.M., an individual with a developmental disability, has an individualized service plan (ISP) dated August 25, 2020. The ISP sets forth information about A.M., including her medical conditions, level of independence, goals, support services, and various concerns. The ISP highlights that A.M. has an intellectual developmental disability, chronic schizoaffective disorder, bipolar type complex, and post-traumatic stress disorder. The ISP also discusses A.M.'s behavior stating that "she verbally and physically threatens others" and "will be aggressive towards others," including hitting, pulling hair, scratching, and punching. Further, the ISP addresses self-harm, noting that A.M. will scratch her arms. Indeed, the ISP also documents that A.M. has an Emotional Safety Plan (ESP) to avoid suicidal attempts or gestures by helping A.M. cope, identify individuals to assist her, or make environmental changes when she is in emotional distress. A.M.'s ISP required 1:1 support, meaning that A.M. could not be without supervision or, at a minimum, within the sightline of staff.

D.B. was neither shown the ISP or ESP before September 23, 2020, nor made aware of their contents. Further, D.B. received no training on implementing the ISP or ESP's recommendations. Still, D.B. worked with A.M. before September 23, 2020, experiencing A.M.'s aggressive and often violent behavior. D.B. also knew that A.M. could not have sharp objects or items she could use to harm herself or others.

² The ALJ did not seal the record. DHS maintains that Initial Decisions and Final Agency Decisions involving the Central Registry Act, N.J.S.A. 30:6D-77 to 82, should not be sealed from the public. The Initial Decision and the Final Agency Decision use initials, as opposed to full names, to safeguard the identities of victims and petitioners.

On September 23, 2020, A.M. resided in a hotel because she had a physical altercation at her previous residence.

TESTIMONY AND DOCUMENTARY EVIDENCE:

D.B. and Patricia Nevarez testified for petitioner in this case. Allison Capelli and Marguerite Clerge-Crepsac testified for respondent.

The ALJ FOUND that Ms. Capelli, Patricia Nevarez, and D.B. were credible witnesses. Ms. Capelli was clear and straightforward in her testimony. Her answers were without hesitation, and she could fully explain the steps she took regarding her investigation. Ms. Capelli's testimony was consistent with her investigative report and showed no animosity towards D.B.

Ms. Nevarez was frank in her limited interaction and work with D.B. Yet, Ms. Nevarez was sincere and described significant difficulties with A.M.'s behavior towards staff consistent with the documents in this case. D.B. was sure and genuine in her testimony regarding the events of September 23, 2020, and did not attempt to deny that an upsetting altercation with A.M. occurred or that she had physical contact with A.M. in defense of being attacked by A.M. Her distress about accusations that she abused A.M. was heartfelt. Her desire to clearly express her actions was also apparent. Further, D.B. was forthright in her responses to questions for which she did not know the answer or steps she did not take but could have. D.B.'s frustration about the lack of assistance from Ms. Clerge-Crepsac with A.M. that day was reasonable. D.B.'s testimony was consistent with her statements during the internal investigation and to DHS personnel. In other words, **The ALJ FOUND:** D.B. credible, and her account was believable.

However, while Ms. Clerge-Crepsac appeared earnest in her concern for A.M., she admitted to lying during her testimony. Her answers were sometimes contradictory, and many of her statements seemed designed to protect herself from responsibility in the incident with A.M. on September 23, 2020. Her testimony was often at odds with statements to investigators regarding the September 23, 2020, event, or the contemporaneous daily report she authored. Thus, **the ALJ FOUND:** Ms. Clerge-Crepsac's testimony lacked much credibility about what she witnessed and her actions during and after the altercation.

Based upon the testimony provided and her assessment of its credibility, together with the documents submitted and her evaluation of their sufficiency, **The ALJ FOUND** the following additional **FINDINGS of FACT:**

Allison Capelli is a Quality Assurance Specialist (QAS) with DHS investigating abuse, neglect, and exploitation cases of individuals receiving services from DHS, such as A.M. In that position, Ms. Capelli gathers facts by reviewing documents and conducting interviews of the victim, the alleged perpetrator, staff members, and witnesses. After that assessment, Ms. Capelli determines whether a preponderance of the evidence demonstrates that the incident did or did not happen. In other words, whether the allegations are substantiated. An injury need not be present to substantiate abuse. If Ms. Capelli substantiates the claims, like in this case, her supervisor reviews her investigation for accuracy. Thereafter, the Chief and Director of the Office of Investigations (OI) evaluate whether the incident fits the criteria for the abuser's placement on the Central Registry of Offenders.

Ms. Capelli began her investigation of the events on September 23, 2020, involving A.M. following DDD's receipt of an incident report from CFS in February 2021. Here, Ms. Capelli reviewed A.M.'s ISP, ESP, staff training documents, the CFS investigation report, the Injury Verification Unit (IVU) report, photographs, and D.B.'s statement regarding the September 23, 2020, incident. Notably, CFS determined that abuse of A.M. by D.B. was unsubstantiated. However, the CFS determination is only one piece of Ms. Capelli's investigation. The DHS IVU could not verify A.M.'s reported minor injury or abuse by D.B. on September 23, 2020, because the IVU could not take a picture of A.M. given the lapse of time. Indeed, CFS first reported the incident in February 2021 when Ms. Clerge-Crepsac mentioned the incident in another investigation.

Ms. Capelli also interviewed A.M., D.B., Ms. Clerge-Crepsac, and another CFS employee. As with all investigations she conducts, Ms. Capelli completed a report memorializing her interviews and review of materials.

On February 26, 2021, Ms. Capelli interviewed A.M. by telephone and found her account credible about the altercation with D.B. on September 23, 2020. A.M. did not testify at the hearing. A.M. maintains that D.B. sat on her, choked her, and she could not breathe, which upset A.M. Further, A.M. reported that she suffered chest fractures down to her breast during the altercation. When asked, A.M. admitted that she had turned furniture over in her room. Although Ms. Capelli asked A.M. what happened leading up to the event, A.M. did not volunteer what actions she took during that altercation. Ms. Capelli also did not ask A.M. whether she pulled D.B.'s ponytail or slapped D.B. that day, whether A.M. attacked staff members, or why A.M. was residing in a hotel rather than the group home. In other words, Ms. Capelli's interview was limited, covering only what she considered relevant to the September 23, 2020, dispute. Still, Ms. Capelli acknowledges that D.B.'s actions were responsive to and in defense of A.M.'s initially pulling D.B.'s hair.

After speaking with A.M., Ms. Capelli interviewed Ms. Clerge-Crepsac. Ms. Clerge-Crepsac has worked for CFS for two years as a Direct Service Support Provider (DSP) to individuals with developmental disabilities, starting a few months before the September 23, 2020, incident. During her interview with Ms. Capelli, Ms. Clerge-Crepsac confirmed that A.M. grabbed D.B.'s ponytail on September 23, 2020 and pulled D.B. back towards her. Ms. Clerge-Crepsac provided Ms. Capelli with a screenshot of two photos she took of marks on A.M.'s neck and right wrist, which she sent to her supervisor, Roscoe Simpson, immediately after the incident. The September 23, 2020, photos show a scratch and red mark on the left side of A.M.'s neck and collarbone and a red spot or scratch on one wrist. Ms. Clerge-Crepsac told Ms. Capelli she observed D.B. sitting on top of A.M. and pressing down on A.M.'s neck. A.M. did not request medical attention, and no one called medical personnel to the scene. Instead, A.M. was concerned about reporting D.B. to Mr. Simpson.

On September 23, 2020, at 9:33 p.m. Ms. Clerge-Crepsac also reported the event in a daily report or "T-Log" for the 3:00 p.m. to 11:00 p.m. shift as "another episode" involving A.M. and staff. Specifically, A.M. grabbed the staff member's ponytail with a "good grip" and the staff member had to roll onto A.M. to get free. Ms. Clerge-Crepsac reported that in the end, A.M. had a bruise on her neck and right hand, which Ms. Clerge-Crepsac photographed and sent to her supervisor. Notably, Ms. Clerge-Crepsac makes no mention of D.B. choking A.M. Ms. Clerge-Crepsac also wrote that she tried unsuccessfully to "break [A.M. and D.B.] apart." Yet, during her testimony and her interview with Ms. Capelli, Ms. Clerge-Crepsac only reported verbal assistance, telling the parties to stop their actions. Ms. Clerge-Crepsac testified that she told A.M. to let go because D.B. was "going to kill her," even though she had never reported such comments before. Undeniably, Ms. Clerge-Crepsac did not physically assist D.B. during the altercation with A.M., a patient in her care, despite D.B.'s requests for help. Indeed, she told Ms. Capelli that she did not want "to put her hands on anyone."

Ms. Clerge-Crepsac sent D.B. an image from her cell phone months after the event depicting A.M. lying on the bed and D.B. on her knees to the left of A.M., leaning over A.M. The photo does not show either A.M.'s face or where D.B.'s hands are. Ms. Clerge-Crepsac did not provide this picture to Mr. Simpson after the incident or offer the image during CFS's investigation or her initial interview with Ms. Capelli. Instead, Ms. Capelli spoke with Ms. Clerge-Crepsac about the photo after receiving it from D.B., and Ms. Clerge-Crepsac confirmed that she took the photo but no video. At no time during the investigation or to D.B. did Ms. Clerge-Crepsac suggest that the picture was unrelated to the September 23, 2020, incident. Yet, during her testimony, Ms. Clerge-Crepsac incredibly states that the image was another event between D.B. and A.M., that she did not report or share with a supervisor.

Ms. Clerge-Crepsac sent the photo with a text message to D.B. stating: "Baby girl you remember this. I will pray for you when the state get (sic) to you. That's a pic. I got video you want." (punctuation added). However, Ms. Clerge-Crepsac testified that she had no video and lied about having it in the text. Instead, she was concerned that D.B. would get her into trouble regarding the incident, so she wanted to protect herself by implying she had evidence.

Notably, Ms. Nevarez also reported an incident in the T-Log on September 23, 2020, at 3:02 p.m. following her earlier shift with A.M. that day. Ms. Nevarez wrote that A.M. was upset with staff for no reason and threw her shoes at staff. A.M. would calm down for a few minutes and then begin fighting with staff again. Ms. Nevarez wrote that A.M. told her that she was going to "lie about that staff lied of (sic) her and hurts staff." Ms. Nevarez found that A.M. was often untruthful. Indeed, no evidence suggests that A.M. suffered chest fractures or a significant injury during the September 23, 2020, altercation.

CFS did not reassign D.B. despite her multiple requests not to work with A.M. because she feared A.M. injuring her. Indeed, Ms. Nevarez had similar fears and asked not to work with A.M. alone, given A.M.'s behavioral volatility. Ms. Nevarez acknowledges being present during other incidents with A.M. and D.B., but Ms. Nevarez would intervene to resolve the situation quickly. Ms. Nevarez worked with D.B. only a few times but never witnessed D.B. act inappropriately with individuals in her care. Both Ms. Nevarez and D.B. described Ms. Clerge-Crepsac as unwilling to help with patient care, consistent with Ms. Clerge-Crepsac's testimony and interview with Ms. Capelli that she declined to assist D.B. physically during the scuffle.

D.B. has a nephew and stepsister with developmental disabilities and understands the need for compassionate caregivers. D.B. has worked as a DSP with Delta-T since 2013. After CFS assigned A.M. to the hotel, D.B. began working with A.M. about a month before the September 23, 2020, incident. Although the ISP states that A.M. had "1:1" supervision, CFS put A.M. on "2:1" supervision after her hotel placement. Thus, two staff members were present in case A.M. tried to hurt herself or the staff or tried to escape. D.B. worked with A.M. until November 16, 2020.

On March 9, 2021, D.B. emailed CFS explaining the incident with A.M. on September 23, 2020, along with the text and photograph she received from Ms. Clerge-Crepsac. D.B. highlighted that Ms. Clerge-Crepsac did not want to be near A.M. that day. Ms. Clerge-Crepsac was sitting in the recliner chair in A.M.'s room on her cell phone, and D.B. was sitting at the bottom of A.M.'s bed. Ms. Clerge-Crepsac's phone use upset A.M., who kept loudly asking Ms. Clerge-Crepsac with whom she was talking. D.B. attempted to intervene and turned to face A.M., telling A.M. it was rude to ask about personal calls. When D.B. turned away from A.M., A.M. grabbed D.B.'s ponytail and would not let go despite D.B.'s asking her to do so, pulling D.B. towards A.M.'s body. D.B. immediately asked for Ms. Clerge-Crepsac's help to no avail. Instead, Ms. Clerge-Crepsac turned her cell phone towards A.M. and D.B. to document the incident.

D.B. turned around to face A.M., grabbing A.M.'s wrist and hand, trying to remove A.M.'s hands from her hair, one finger at a time. A.M. then began slapping D.B. Finally, D.B. freed A.M.'s hand from her ponytail, and A.M. grabbed her shirt. D.B. grabbed A.M.'s free hand and moved it next to the one holding her shirt near A.M.'s upper chest and the base of her neck while leaning over A.M. D.B. verbally attempted to get A.M. to calm down without success.

D.B. acknowledges she was likely on A.M. because A.M. pulled her back when A.M. grabbed her ponytail. D.B. also admits to pressing down on A.M.'s chest when holding A.M.'s hands to keep them from moving, grabbing, or slapping her again. A.M. began kicking and screaming, trying to release her hands. During the struggle, A.M. ended up with scratches on her neck area in the location D.B. was holding her hands.

D.B. told A.M. that if she let go of D.B.'s shirt, she would let A.M.'s hands go if she agreed not to kick, spit, or hit D.B. A.M. agreed and released D.B.'s shirt. On the count of ten, D.B. let A.M. go. A.M. told Ms. Clerge-Crepsac to call the supervisor, blaming D.B. for scratching and choking her. In turn, D.B. showed Ms. Clerge-Crepsac her hands and fingers, asking her to confirm that no blood or skin was under her nails. However, no one checked A.M.'s nails. Ms. Clerge-Crepsac left the room to call Mr. Simpson, leaving D.B. alone with A.M.

D.B. also spoke to Mr. Simpson after the incident, who did not commence an investigation or report the event.

On November 16, 2020, D.B. contacted Ms. Clerge-Crepsac after CFS let her go for the incident with A.M. on September 23, 2020, looking for the video believing it would support her actions. In response, she received the photo and text but no video. According to D.B., the image depicts the point where she was holding both of A.M.'s hands while A.M. was holding her shirt, and she readily supplied the photo during the investigation. D.B. believed that Ms. Clerge-Crepsac had a video given the time she held her phone up during the incident and because Ms. Clerge-Crepsac's text said she had one.

While at Delta-T, D.B. underwent training on "what is patient abuse?" and how to prevent abuse, but not how to respond to or restrain violent patients. Notably, CFS did little to address A.M.'s known aggressive behavior towards caregivers. Ms. Capelli also acknowledged that Mr. Simpson, D.B.'s supervisor, advised her that staff

members may grab a client's hand if the client pulls their hair. Further, the staff member can perform a test release, meaning that the staff member immobilizes the client until the client calms down before releasing the client

Ultimately, **the ALJ FOUND:** that A.M.'s statement to Ms. Capelli about being upset by the incident, that D.B. leaned onto A.M. during the altercation, and that A.M. had scratches from the incident as credible. These statements are consistent with the contemporaneous T-Log report, photos, and testimony of D.B. and Ms. Clerge-Crepsac. Yet, A.M. relayed injury information to Ms. Capelli that was undoubtedly inaccurate. Notably, A.M.'s recount to Ms. Capelli also omitted that she started the altercation by grabbing D.B.'s ponytail or that she slapped D.B. and grabbed her shirt. Further, I give minimal weight to Ms. Clerge-Crepsac's testimony about the event, whose self-interest was obvious and is an admitted liar. Indeed, the more reliable contemporaneous T-Log Ms. Clerge-Crepsac completed makes no mention of D.B. choking A.M. and confirms that D.B. had to roll over onto A.M. to free herself when A.M. would not let go of D.B.'s ponytail. Further, Ms. Clerge-Crepsac reported the injuries she photographed but did not state that D.B. caused them.

Here, **the ALJ FOUND** that a preponderance of the evidence does **NOT** exist to support that D.B. choked A.M. Instead, **the ALJ FOUND** that D.B., faced with A.M.'s aggressive and violent actions without assistance from Ms. Clerge-Crepsac, had to act to defend herself and deescalate the situation. Indeed, D.B. grabbed A.M.'s free hand while A.M. was slapping her, moved it to A.M.'s hand holding onto her shirt, and pressed them down to immobilize A.M.'s hands after unsuccessfully telling A.M. to calm down and let D.B. go. Further, **the ALJ FOUND** that D.B. ultimately reduced the situation by verbal direction, holding A.M. hands still until she was more composed and let D.B. go. In other words, **the ALJ FOUND** that D.B. acted reasonably under the circumstances and that D.B. did not intend injury to A.M. even though minor injuries occurred.

ANALYSIS AND CONCLUSIONS OF LAW

New Jersey adopted legislation recognizing the need to protect individuals with developmental disabilities. N.J.S.A. 30:6D-73(a). To assist this goal, the New Jersey Legislature created the Central Registry to identify caregivers who wrongfully injured individuals with developmental disabilities and to prevent such caregivers from working with such vulnerable individuals. N.J.S.A. 30:6D-73(a), 30:6D-73(d); N.J.S.A. 30:6D-77; N.J.A.C. 10:44D-1.3. 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); N.J.A.C. 10:44D-4.1.

The issue here is two-fold. First, did D.B. commit an act of abuse against A.M. on September 23, 2020? Second, were D.B.'s actions intentional, reckless, or with careless disregard to the well-being of D.B., which could have resulted in fear or injury to her or potentially exposed her to an injurious situation?

Abuse is defined 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." N.J.S.A. 30:6D-74; N.J.A.C. 10:44D-1.2. "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." Undeniably, none of these examples apply to this situation.

For registry placement in a substantiated incident of abuse, the caregiver must act with intent, recklessness, or careless disregard to cause or potentially cause injury to an individual with a developmental disability. N.J.S.A. 30:6D-77b (1). The statutes and regulations define the mental states of intent, recklessness, and careless disregard to cause or potentially cause injury to an individual with a developmental disability as follows:

Acting intentionally is the mental resolution or determination to commit an act.

Acting recklessly is the creation of a substantial and unjustifiable risk of harm, to others by a conscious disregard for that risk.

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.

[N.J.A.C. 10:44D-4.1(b).]

DHS has the burden to establish, by a preponderance of the evidence, that petitioner's actions constituted abuse, requiring listing D.B.'s name on the Central Registry. N.J.S.A. 30:6D-77(b); N.J.A.C.10:44D-3.2; See, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); and Cumberland Farms, Inc., v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). Indeed, a substantiated finding requires that "the superior evidentiary weight . . . though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a reasonable person to conclude that an allegation is more likely true than not. N.J.A.C. 10:44D-3.2. One can describe preponderance as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). 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).

Here, **the ALJ FOUND** D.B. was protecting herself from A.M., who suddenly grabbed her ponytail, slapped her, and held onto her shirt. D.B. asked A.M. to let her go, but A.M. did not. A.M.'s actions in pulling her backwards led D.B. to an awkward physical position to defend herself. The ALJ also found that Ms. Clerge-Crepsac did not assist D.B., leaving D.B. to deescalate A.M.'s violent behavior alone. D.B. did apply pressure to A.M.'s upper chest, near her neck, in holding A.M.'s hands still after being grabbed and slapped, but the ALJ found this immobilization was reasonable under the circumstances. A.M., in struggling to remove her hands from D.B.'s grip, suffered minor injuries. While a physical altercation occurred that upset A.M. and left scratches. **The ALJ CONCLUDED** that D.B. did not intentionally harm, act recklessly, carelessly, or unreasonably regarding A.M. Thus, **the ALJ CONCLUDED** that DHS had not sustained its burden that D.B.'s actions warrant placement on the Central Registry.³

INITIAL DECISION ORDER

The ALJ ORDERED that the determination of the Office of Program Integrity and Accountability to place petitioner D.B. on the Central Registry of Offenders Against Individuals with Developmental Disabilities for the incident on September 23, 2020, be **REVERSED**.

The ALJ FILED her initial decision with the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY** for consideration. The recommended decision may be adopted, modified, or rejected by the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY**, who by law is authorized to make a final decision in this matter.

EXCEPTIONS FILED TO INITIAL DECISION

Summary of Respondent's exceptions:

The Deputy Attorney General (DAG), representing the Department of Human Services, argued that the initial decision was faulty because; first, the Initial Decision failed to make a finding on whether an act of abuse occurred. The ALJ found that "D.B. did apply pressure to A.M.'s upper chest" which "upset A.M. and left scratches." (Initial Decision at 14). The factual findings amount to a physical act directed at A.M. that caused injury and suffering.

Second, the Initial Decision concludes that D.B. applying pressure to A.M.'s neck "was reasonable under the circumstances" and that "D.B. did not intentionally harm, act recklessly, carelessly, or unreasonably regarding A.M." (Initial Decision at 14) Arguing that "acting reasonably" is not a component of the standard for placement on the Central Registry; where N.J.S.A. 30:6D-77b(1) provides that "the caregiver shall have acted with intent, recklessness, or careless disregard to cause or potentially cause injury to an individual with a developmental disability."

Summary of Petitioner's exceptions

³ Although D.B. requested that the ALJ award her counsel fees for her defense in this case if she prevails, the ALJ stated that no mechanism or authority exists to support that request.

The attorney for the Petitioner argued that the Respondent claims that the ALJ did not properly apply the standard for “abuse” under N.J.A.C. 10:44D-1.2. When the Respondent substitutes the definition of “physical abuse” under N.J.A.C. 10:44D-1.2 for the definition of “abuse.” N.J.A.C. 10:44D-1.2 defines “abuse” as “*wrongfully* inflicting ... physical abuse ... by a caregiver upon an individual with a developmental disability.” N.J.A.C. 10:44D-1.2⁴

Respondent maintains that the ALJ considered properly all requirements for placement on the Central Registry, finding that D.B. did not act with the requisite “intent, recklessness, or careless disregard to cause or potentially cause injury to an individual with a developmental disability.” (Initial Decision at p. 13 and 14).

FINAL AGENCY DECISION

As the Initial Decision manifestly shows, the ALJ made a thorough examination of the interactions between D.B. and A.M. on September 23, 2020. The ALJ heard the testimony of four witnesses, reviewed the initial report of the incident, the Office of Investigation’s investigation report of the incident, and other documentary evidence produced at the hearing. The ALJ scrupulously and meticulously weighed the evidence and the reliability of each of the witnesses’ testimony and the proffered documentation.

In particular, the ALJ found that D.B. leaned onto A.M., upset A.M. and that A.M. incurred scratches; evidently based upon a photograph attached to the initial report of the incident made by the witness – which, as the ALJ noted in her Initial Decision, “At no time during the investigation or to D.B. did Ms. Clerge-Crepsac suggest that the picture was unrelated to the September 23, 2020, incident. *Yet, during her testimony, Ms. Clerge-Crepsac incredibly stated that the image was another event between D.B. and A.M., that she did not report or share with a supervisor.*”

The ALJ deemed D.B.’s testimony to be credible and consistent with the contemporary reporting of the incident. The testimony of the other witness to the incident was justifiably discounted by the ALJ. The ALJ determined Ms. Clerge-Crepsac to have “admitted to lying during her testimony,” her testimony was “sometimes contradictory”, “designed to protect herself from responsibility” in a later incident with A.M., and “often at odds with statements to investigators concerning both incidents.”

Although the ALJ found the victim’s statement to investigators (made months after the incident) about “being upset by the incident, that D.B. leaned onto A.M. during the altercation, and that A.M. had scratches from the incident as credible.” The ALJ found that a preponderance of the evidence does not exist to support that D.B. choked A.M. The ALJ went on to describe D.B.’s actions to deescalate the situation. The ALJ found that D.B. reduced the situation with verbal direction and holding A.M.’s hands still until A.M. was more composed. The ALJ found that D.B. acted reasonably under the circumstances and that D.B. did not intend injury to A.M. even though minor injuries occurred.

The ALJ correctly stated the two-step process for placement on the Central Registry – determining whether an act of abuse had committed and then whether the act had been committed intentionally, recklessly, or with careless disregard. The Department has the burden of establishing each of these two elements by a preponderance of the evidence. One of the exceptions to the Initial Decision cited “a failure to make a finding on whether an act of abuse occurred.” There was, however, a finding that choking (one of the allegations that the victim had alleged) had not been established.

⁴ Full citation of the Petitioner’s edited, definition of the generic term abuse at, N.J.A.C. 10:44D-1.2: “Abuse” means 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. (omitting sexual abuse, verbal or psychological abuse or mistreatment - each of which are separately defined, as is physical abuse later in the same set of definitions in N.J.A.C. 10:44D-1.2)

The Initial Decision found that D.B. leaned onto A.M., upset A.M. and that A.M. incurred scratches. Without a finding of causation relevant to the Central Registry - whether the act had been committed intentionally, recklessly, or with careless disregard - those injuries, alone, would not warrant placement on the Central Registry. The ALJ's description of A.M. being leaned on, upset, and incurring scratches may be indicia of abuse, but does not define an act of abuse as defined by the Central Registry regulations. Nevertheless, placement on the Central Registry is a two-step process. A finding of injuries, by itself, is not enough to define an act of abuse, without an examination of the causation of the injuries.

The ALJ made an intense inquiry into all aspects of the altercation between D.B. and A.M. on September 23, 2020. The ALJ found D.B. was protecting herself from A.M., who suddenly grabbed her ponytail, slapped her, and held onto her shirt. D.B. asked A.M. to let her go, but A.M. did not. The ALJ found A.M.'s actions in pulling D.B. backwards led D.B. to an awkward physical position. The ALJ also found that the other employee assigned to A.M. did not assist D.B., leaving D.B. to deescalate A.M.'s violent behavior alone. The ALJ found D.B. did apply pressure to A.M.'s upper chest, near her neck, in holding A.M.'s hands still, after being grabbed and slapped. The ALJ found this immobilization was reasonable under the circumstances. The ALJ concluded that D.B. did not intentionally harm, act recklessly, carelessly, or unreasonably regarding A.M. By finding that A.M. had suddenly grabbed D.B. the ALJ seemed to have ruled out an intentional act by D.B. to cause harm. The ALJ also found that D.B.'s actions were reasonable under the circumstances. Acting reasonably would preclude findings of recklessness or careless disregard. Thus, the ALJ concluded that DHS had not sustained its burden that D.B.'s actions warrant placement on the Central Registry.

The ALJ had the opportunity to assess the credibility and veracity of the witnesses; I defer to her opinions concerning the trustworthiness, reliability, integrity, and character of the witnesses, based upon her reasoned observations, as described in the Initial Decision. I **CONCLUDE and AFFIRM** that the DHS has failed to sustain its burden of proving, by a preponderance of the credible evidence, that the actions of D.B. rose to the level of abuse as defined in N.J.S.A. 30:6D-74. I **CONCLUDE and AFFIRM** that the DHS has failed to sustain its burden of proving, by a preponderance of the credible evidence, that the actions of D.B. did not act intentionally harm, recklessly, or with careless disregard as defined in N.J.S.A. 30:6D-74.

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 D.B.'s name NOT** be placed on the Central Registry of Offenders against Individuals with Developmental Disabilities.

Date: _____01/24/23_____

Deborah Robinson
Deborah Robinson, Director
Office of Program Integrity and Accountability