



State of New Jersey

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DEPARTMENT OF HUMAN SERVICES  
OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY  
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DIRECTOR

**FINAL AGENCY DECISION**

**S.H.**,  
Petitioner,

OAL DKT. NO. HSL 03703-20  
AGENCY DKT. NO. DRA# 20-004

v.

**DEPARTMENT OF HUMAN SERVICES**,  
Respondent.

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**Statement of the Case**

Petitioner-appellant, S.H. appeals his 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 he physically abused an individual receiving services from the Division of Developmental Disabilities (DDD) on June 12, 2018. After an investigation, respondent, Department of Human Services, Office of Program Integrity and Accountability (DHS), substantiated the charges and placed S.H.'s name on the Central Registry. S.H. denied committing any act of physical abuse against the individual, C.W.

**PROCEDURAL HISTORY:**

By letter, dated July 3, 2019, DHS notified S.H. of its investigative findings and its determination to place his name on the Central Registry. (R-1.) S.H. filed an appeal and DHS transmitted this matter to the Office of Administrative Law (OAL), where it was filed as a contested case on March 11, 2020, 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 issued. Due to the COVID-19 pandemic and the public health emergency declared in Executive Orders issued by the Governor of New Jersey, in-person proceedings at the OAL were suspended since approximately March 19, 2020. The hearing was held on January 11, 2021, via Zoom remote platform by consent of the parties. Respondent

submitted a written summation on April 21, 2021. After inquiring about Petitioner's written submission, and receiving no response,<sup>1</sup> the ALJ closed the record on April 27, 2021.

### **EXCEPTIONS:**

Respondent submitted exceptions asking that the Director reject the ALJ's legal conclusions and application of agency policy which directly conflict with the controlling regulation and the testimony. The court's credibility finding was thought inconsistent. The ALJ's findings were deemed to be unsupportable on the record and used an incorrect standard for placement upon the Central Registry.

No exceptions were received from the Petitioner.

### **INITIAL DECISION:**

#### **Testimony and Evidence**

The first issue in this proceeding is whether S.H. committed substantiated acts of physical abuse against C.W., an individual receiving services from DDD, with known Intermittent Explosive Disorder ("IED") by allegedly punching him in the face and kicking him in the back during a chaotic scene at the group home on June 12, 2018. The second issue is whether S.H. should be placed on the Central Registry.

### **FACTUAL DISCUSSIONS AND FINDINGS:**

#### **Laurie Zambriczki**

Laurie Zambriczki (Zambriczki) is a quality assurance specialist with DHS and testified on behalf of respondent. Her responsibility was to document the level of injury to C.W. noted in the Unusual Incident Report (UIR) by taking photographs. (R-3.)

On June 16, 2018, Zambriczki went to the group home where the victim, C.W., resided to document the reported injuries from the June 12, 2018 incident. (R-2 at 274-275.) The bruises to C.W.'s face were clearly visible. Zambriczki photographed C.W.'s face (R-12) and right upper arm (R-13.) In the UIR, there was a report of an alleged mark on the victim's back. Zambriczki was unable to document that mark because C.W. refused to show her his back or shoulders.

Using a pre-printed diagram of the human body, Zambriczki marked the areas of the visual injuries she identified on C.W. to include two black-eyes, and a bruise on the inside of his right upper arm. (R-14.)

There was no dispute that these photographs were taken by Zambriczki and depict the bruises to C.W.'s face and right upper arm on June 16, 2018. Therefore, the ALJ **FOUND** that

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<sup>1</sup> There was no requirement for Petitioner to submit a written summation; and the ALJ stated there was no adverse inference or inference of any kind for his decision not to submit a closing summation.

as indicated in the photographs, C.W.'s both eyes were bruised and there was a large bruise on his right upper arm. (R-12 and R-13.)

### **Lynielle Moore**

Lynielle Moore (Moore) testified for respondent. She currently works as a quality assurance specialist with DDD within its risk management unit. On June 12, 2018, she worked for the Office of Investigations in the DHS. Moore has a Bachelor of Science degree in criminal justice and received training in investigative-related work. She has been a DHS employee for fourteen years in various fields. As an investigator, she investigated allegations of abuse, neglect, and exploitation against individuals with developmental disabilities. As of the date of this incident, June 2018, Moore had performed over one hundred such investigations. Less than half of all cases are substantiated. After an investigation, Moore would make a referral, not a determination, regarding a caregiver's placement on the central registry.

Moore was assigned this matter after the UIR was generated. (R-3.) Before beginning her investigation, Moore reached out to law enforcement for permission to proceed. After receiving clearance from the local law enforcement, Moore was able to schedule interviews with the victim, the alleged perpetrator, and witnesses. Moore compiled information from her entire investigation into an Investigation Report (IR or report.) (R-2.)

On June 21, 2018, Moore visited C.W. at his day program to interview him and take pictures of his injuries. C.W. showed Moore a picture of his back that was saved on his iPod. He told her that he had asked a nurse to take the picture for him while he was in the hospital after the incident on June 12, 2018. Moore took a photograph of the picture on C.W.'s iPod. (R-8.) C.W. told Moore that the print mark in the photograph was caused by S.H. kicking him. There appeared to be other marks on C.W.'s back, but C.W. did not identify those marks to Moore or explain where he got them.

Moore took another photograph of C.W.'s iPod that showed bruises under C.W.'s eyes and a bruise on his right upper arm. (R-9.) According to C.W. these photographs were also taken by a nurse using C.W.'s iPod on June 12, 2018. On June 21, 2018, Moore took a photograph of C.W.'s face, showing two black eyes, a bandage on the bridge of his nose, and a cut inside his lower lip. (R-10.) At C.W.'s request, Moore also took a close-up photograph of the injury to C.W.'s inside lower lip. (R-11.) C.W. was unable to tell Moore how he sustained the injury inside his lower lip but told her that he was punched in the face by S.H.

Moore was comfortable communicating and discussing the incident with C.W., who appeared to understand all her questions. She had two interactions with C.W. The first one was on June 21, 2018, when she took the pictures and the second one was on November 13, 2018. Moore documented a synopsis of each encounter into her report. (R-2.)

On November 13, 2018, Moore interviewed C.W. at his day program. (R-2 at DHS 278-279.) C.W. recalled the June 12, 2018 incident, and explained to Moore that he was upset because he was not going to get a computer, as promised. He tried to leave the group home, but S.H. attempted to stop him by grabbing him, punching him in the face and throwing him to the

ground. To defend himself, C.W. bit S.H.'s leg as S.H. was kicking him. C.W. identified another staff member, Elizabeth Beaulieu, who allegedly watched the attack. After breaking free, C.W. ran back inside the house and pulled the fire alarm for help. C.W. recalled grabbing the fire extinguisher but did not recall whether he threw any objects at anyone or whether he fell while in the house. The fire department, the Woolwich Police Department, and the Gloucester County Emergency Medical Services (EMS) responded to the alarm.

Before transporting C.W. to the hospital, the EMS responder interviewed and examined C.W. and prepared a narrative report. (R-4.) The next day, June 13, 2018, C.W. contacted the police to file charges against S.H. (R-5.)

On July 30, 2018, Moore interviewed M.B., a developmentally disabled resident of the group home where C.W. lived. She included her interview with M.B. in her report. (R-2 at DHS 266-277.) M.B. reported that he witnessed C.W. punch S.H., who responded by punching C.W. in the face. M.B. also claimed that S.H. kicked C.W. on the leg and back. In response to Moore's question, M.B. told her he witnessed the incident from outside the house.

On July 30, 2018, Moore interviewed staff member James Okeke (Okeke), who was working in the group home at the time of the incident which was approximately 7:30 p.m. on June 12, 2018. (R-2 at DHS 260-261.) Okeke did not see anything that occurred outside the home. He witnessed C.W.'s actions inside the home which included throwing the fire extinguisher at S.H., throwing other objects, and falling, while attempting to jump over the dining room table, and hitting his face. Okeke told Moore that after C.W. threw the fire extinguisher, it bounced back and hit C.W. in the face.

On July 30, 2018, Moore interviewed Elizabeth Beaulieu (Beaulieu), a staff member working at the group home, who was outside with C.W. and S.H. and witnessed C.W. bite S.H. in two places. (R-2 at DHS 281-282.)

Finally, on July 30, 2018, Moore interviewed S.H. while he was working at a day program. (R-2 at DHS 265-266.) On June 12, 2018, S.H. arrived for work at the group home at 6:30 p.m. for his 7:00 p.m. to 7:00 a.m. shift. He was immediately approached by a resident who told him Beaulieu needed his help because C.W. was attempting to leave the residence. When S.H. went outside, C.W. was by the road throwing rocks. S.H. told C.W. to stop throwing rocks. C.W. ran toward S.H. and tripped on the gravel driveway. C.W. fell into S.H., causing them both to fall to the ground. As S.H. tried to stand up, C.W. bit him near his ankle and threatened to bite his penis. S.H. had bite marks from C.W. on his ankle and upper thigh near his groin area.

Moore asked S.H. if he knew how C.W. sustained the injuries to his face. S.H. indicated that when C.W. ran back inside the house, he was out of control. C.W. attempted to throw a fire extinguisher at S.H. who was standing in the doorway. S.H. put his arms in front of his face to protect himself from being struck by the fire extinguisher. The fire extinguisher bounced off the doorjamb and hit C.W. in the face. Moore also asked S.H. how he acquired the footprint on his back. S.H. denied placing his foot anywhere on the victim's body and could not account for how C.W. acquired that mark. At the time of his interview, on July 30, 2018, S.H. provided a handwritten witness statement, which was consistent with his interview. (R-7.)

Moore also reviewed the Unusual Incident Reporting and Management System (UIRMS) to determine whether the victim or accused had a history of other incidents. Between April 17, 2015 and July 11, 2017, S.H. had eight accusations of physical abuse in his file, but none were substantiated. S.H. had one incident of substantiated neglect. (R-2 at DHS 262-264.) Moore stated that she did not expect to see so many allegations against a staff member. Although these allegations were unsubstantiated, Moore used them as a factor in her analysis.

Moore also reviewed S.H.'s training history which included training on positive behavioral supports<sup>2</sup> <sup>3</sup>. (R-2 at DHS 264.) C.W. had a level-three individual behavior plan due to his aggression<sup>4</sup>. (R-2 at DHS 271.) It was noted in the IR that C.W.'s history of aggression posed a risk of injury to himself and others. He could be physically violent by punching, choking, biting, and scratching staff members. C.W. also had a history of making unsubstantiated allegations regarding staff members<sup>5</sup>. These violent tendencies were part of C.W.'s characteristics and known to staff members.

Moore found that physical abuse was substantiated against S.H. (R-2 at 286.) She determined that during the altercation between C.W. and S.H., S.H. punched C.W. in the face and kicked him in the back. As a result of S.H.'s actions, C.W. sustained bruises on his face and back. Moore relied on her interviews with C.W. and the resident witness, M.B. Moore used the EMS report to confirm the boot/shoe print on C.W.'s back (R-4) and the Woolwich Police Report to confirm the bruise around C.W.'s left eye. (R-5.) Those markings were also confirmed by the pictures from C.W.'s iPod. (R-8 and R-9.) According to Moore, the number of unsubstantiated accusations against S.H. was a related concern.

On cross-examination, Moore confirmed that she was not present when an officer from the Woolwich Township Police Department was on the scene. S.H. asked Moore whether the witness, M.B., ever changed his statement. She responded that there were no changes to his statement during the time of her investigation. Moore did not interview any other residents. Moore stated that she prefers to get written statements from staff but did not explain why written statements were not provided for Okeke and Beaulieu.

Moore did not include any pictures of the injuries sustained by S.H. in her investigation, but she was aware that C.W. had bitten S.H. in his left ankle and his right thigh close to his groin area.

Moore stated she used her interview with Beaulieu to try and understand how C.W. sustained his injuries. Beaulieu indicated that the fire extinguisher thrown by C.W. bounced off S.H. and hit C.W. in the face as a rationale for C.W.'s facial injuries. However, Beaulieu had no

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<sup>2</sup> There was no requirement for Petitioner to submit a written summation; and the ALJ stated there was no adverse inference or inference of any kind for his decision not to submit a closing summation.

<sup>3</sup> Training reports were not provided to this tribunal for review and the document is not in evidence.

<sup>4</sup> Individual Behavior Program was not provided to this tribunal for review and the document is not in evidence.

<sup>5</sup> Moore's investigation identified thirty-one additional UIRs and IRs since C.W.'s admission into Bellwether. The nine deemed relevant by Moore were included in her report. (R-2 at DHS 267-270.)

explanation for how C.W. received the mark on his back. Beaulieu was present during the alleged assault but denied seeing S.H. punch or kick C.W.

No other witnesses were called by DHS.

### **S.H.**

S.H. testified on his own behalf. In May 2014, S.H. graduated Bloomfield College with a degree in sociology and criminal justice. He started working with disabled adults immediately after graduation and found the work rewarding. S.H. was also a member of the United States Air Force Reserves for seven years.

S.H. was very familiar with C.W. having cared for him in two different Bellwether group homes. C.W. was brought to Bellwether after he stabbed his roommate with a screwdriver at a different facility. Bellwether's staff was advised of C.W.'s aggressive behavior. C.W. is about six feet two inches and weighs approximately two hundred and seventy-five pounds. On his first day at Bellwether, C.W. ripped the cord from the back of the television and beat a staff member. When C.W. acted out, he was put in a mechanical restraint or a wrap mat. Additional staffing was required to deal with C.W. as well as modifications, including keeping utensils and other instruments away from C.W.

C.W.'s aggressive behavior intensified when he did not get his way. C.W. had been promised his own computer by his therapist. S.H. and the other staff knew that the promised computer was not going to be provided.

On the night of the incident, after a telephone call, C.W. learned from his clinician that he was not going to get his promised computer. Beaulieu needed S.H.'s assistance because C.W. had left the house after the telephone call. When S.H. went outside, C.W. was standing in the driveway near the road and a truck was driving towards him. S.H. attempted to guide C.W. away from traffic by putting his hand on C.W.'s shoulder and elbow. The driver of the truck stopped and asked what was going on. S.H. explained that this was a group home and C.W. was having a behavior. After the driver left, S.H. walked toward Beaulieu and C.W. started throwing rocks at the staff members and the passing cars. S.H. told C.W. to stop throwing rocks and C.W. charged at him and tripped on the gravel knocking S.H. to the ground. As S.H. tried to stand up, C.W. started to bite his ankle. C.W. held S.H.'s ankles while biting him. Beaulieu helped to free S.H. from the bite by performing a technique to release the bite. C.W. released his bite on S.H.'s left ankle, and then bit him in the right thigh near his groin. He threatened to bite S.H.'s penis. S.H. held C.W.'s forehead and chin to keep C.W. from biting deeper into his leg. C.W.'s bite broke the skin, and S.H.'s bite wounds were bleeding.

C.W. released his hold on S.H. and ran back to the house. When he got inside, C.W. pulled the fire alarm which required the other residents to exit. C.W. grabbed the fire extinguisher and threw it at S.H., who was standing in the kitchen doorway. S.H. put his arms up to block the fire extinguisher from hitting him. The fire extinguisher hit the doorjamb and bounced back hitting C.W. in the face. C.W. picked up a chair and tried to climb on top of the dining room table, but he tripped and fell on his face. After falling, C.W. ran out the back door. S.H. did not follow C.W. because emergency personnel had arrived, and he needed to tend to his

bite wounds. S.H. called his supervisor and took pictures of his bite marks. The supervisor told S.H. to go to the hospital. After a few hours at the hospital, S.H. returned to work at the group home.

S.H. heard from other members of the group home that C.W. was going to get him fired. S.H. was put on leave but later returned to work. Upon returning to work, S.H. could not be around C.W.

In the past, C.W. had made other accusations against S.H. but he always rescinded them. Despite other accusations by C.W., S.H. remained assigned to C.W.'s care. S.H. spoke with C.W.'s family members, and they understood that C.W. would do things in order to get his own way. S.H. believed he had a good relationship with C.W., who enjoyed going on outings. C.W. liked to go bowling with S.H. According to S.H., C.W. was very high functioning. S.H. stated that he had no ill will against C.W.

On cross-examination, S.H. stated that he had been assigned to C.W.'s care for about two years. S.H. did not know how the footprint got on C.W.'s back. S.H. stated that C.W. was known to get into fights with his housemates. The staff was not required to do body checks on C.W., so S.H. had no information about the marks.

S.H. denied striking and kicking C.W. S.H. had no idea how C.W. sustained his injuries, however, he did say they could have been caused when C.W. attempted to throw the fire extinguisher or when he fell off the chair and landed on his face.

Although S.H. had been assaulted by C.W. biting him, S.H. did not retaliate. If S.H. had retaliated or defended himself, he understood that such actions would constitute abuse.

On cross-examination, S.H. suggested that M.B. had changed his story, but he did not have any documents to prove it. S.H. disagreed with Moore's assertion that M.B.'s statement was consistent with C.W.'s statement about the incident. According to M.B., the altercation started when C.W. punched S.H. but C.W. never said he punched S.H.

S.H. was questioned why pictures were not taken of the destruction caused by C.W. inside the house. S.H. did not think to take any pictures because he was concerned with going to the hospital for treatment for his bite marks.

In view of the contradictory testimony, the resolution of the charges of physical abuse against S.H., requires that I make a credibility determination of the critical facts. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. *Carbo v. United States*, 314 F.2d 718 (9<sup>th</sup> Cir. 1963.) 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).

## INITIAL DECISION'S DISCUSSION:

In substantiating the abuse, Moore accepted the statements from the victim, C.W., and the witness, M.B., to determine that S.H. punched and kicked C.W. outside the group home. Although by all accounts, Beaulieu had directly witnessed the incident, her statement that she did not see S.H. punch or kick C.W. was discounted by Moore. Moreover, Moore did not examine the contradictions within C.W.'s and M.B.'s statements. A striking contradiction between C.W.'s and M.B.'s statement was that C.W. claimed S.H. grabbed, punched, and threw him to the ground, while M.B. claimed that C.W. was the aggressor and threw the first punch. In comparing M.B.'s and Beaulieu's witness statements, M.B. provided no explanation for how S.H. and C.W. fell on the ground and did not specify whether the alleged kicking occurred while C.W. was on the ground, as C.W. claimed. In Beaulieu's account, C.W. tackled S.H., causing both men to fall to the ground. M.B. claimed he saw S.H. kicking C.W. in the back and legs but did not see C.W. bite S.H. Beaulieu not only witnessed the biting, she was close enough to employ a maneuver in an attempt to release C.W.'s mouth from S.H.'s leg. If C.W. was kicked by S.H. while on the ground, as he claimed, Beaulieu would have been in the best position to see it, but she denied seeing S.H. kick or place his foot on C.W. The details of the interviews are clearly important. Because neither M.B. nor Beaulieu were called as witnesses by respondent, The ALJ had no way of determining their credibility.

Moore accepted C.W.'s recollection of the incident as consistent with the witness M.B. Whether C.W. punched S.H. and acted as the aggressor as indicated by M.B.'s statement is not relevant to the charge of abuse. However, it is important in determining whether M.B. and C.W. provided accurate recollections of the incident to Moore. C.W. claimed without support from any other witness that S.H. attacked him by punching him in the face and throwing him to the ground. Moore accepted C.W.'s statements about S.H.'s alleged conduct without questioning C.W.'s failure to recall other details involving his own conduct. C.W.'s conduct is not in issue but because Moore placed the greatest reliance on C.W.'s statements, his ability to accurately recollect the incident is at issue.

These distinctions are important because Moore, who was an experienced investigator, had no first-hand knowledge of the abuse. Her testimony about the physical abuse and causation was lacking. The respondent provided no medical records from C.W.'s hospital visit on June 12, 2018. The bruises to C.W.'s eyes, nose, and upper arm were photographed by Zambriczki on June 16, 2018. (R-13 and R-14.) Moore first saw C.W. on June 21, 2018. As noted in her report, C.W.'s UIRMS history showed that C.W. also sustained moderate injury on June 13, 2018, the day after this incident. (R-2 at DHS 270.) Moore's interviews with three different staff members provided her with consistent information about C.W.'s behavior inside the house. Despite this information, Moore discounted any other possibility for C.W.'s facial injuries other than a punch to the face. The only photograph of the footprint on C.W.'s shoulder was taken from C.W.'s iPod, shown to Moore on June 21, 2018. According to the testimony of Zambriczki, C.W. refused to show her his back on June 16, 2018. The document submitted by the EMS, reported that C.W. appeared to have a boot/shoe print around the back area on June 12, 2018. (R-4 at DHS 153.) As Moore noted in her IR, there were other marks on C.W.'s back area that were not explained. Neither Beaulieu nor S.H. could account for the footprint mark on C.W.'s back. There was no admission by S.H. to causing the mark and there was no direct proof

in the record to show that the print was caused by S.H. on June 12, 2018. Moore did not investigate the bruise on C.J.'s upper arm photographed by Zambriczki and did not charge S.H. with causing that bruise. (R-13.) There was no explanation for the bruise to C.W.'s upper right arm in the investigation report.

Respondent's case in chief offered no direct testimony from any witnesses to the events of June 12, 2018. Zambriczki and Moore had no first-hand knowledge. Moore conducted the investigation and interviewed the witnesses. The only witness to the incident, subject to cross-examination was S.H., the accused. Although the OPIA Investigation Report is a business record maintained in the ordinary course of business, it is replete with hearsay. While hearsay evidence is admissible in OAL hearings, N.J.S.A. 52:14B-10(a), it should be accorded whatever weight the tribunal deems appropriate after considering the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. In the final analysis, for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it." *Weston v. State*, 60 N.J. 36, 51 (1972).

S.H. spoke slowly, calmly, and deliberately during his testimony and on cross-examination. There were no inconsistencies between his reported interview and written statement on July 30, 2018, and his testimony during the hearing. Although he was assaulted by C.W., he acknowledged that any form of retaliation by him would be abuse. He denied punching and kicking C.W. His account of what occurred outside the home was corroborated by the witness statement of Beaulieu and his account of what occurred inside the home was corroborated by Beaulieu and Okeke. Therefore, the **ALJ FOUND** S.H.'s account of the incident as corroborated by the hearsay witness statements from Beaulieu and Okeke as **FACT**. S.H. was clearly motivated to have his name removed from the Central Registry and even accepting this motivation, I still deem S.H. to be a credible witness.

Respondent provided no medical records to support that C.W.'s facial injuries were caused by a punch. With the lack of direct testimony, and no corroboration for the inconsistent recollections of the incident contained in the IR, the **ALJ CANNOT FIND** that there is a preponderance of evidence showing that S.H. punched C.W. in the face on June 12, 2018.

Respondent failed to provide competent evidence to support its charge that S.H. kicked C.W. Respondent relied on the hearsay witness statements of C.W. and M.B. and the statement contained in the EMS report that noted there appeared to be a shoe/boot print on C.W.'s back area. (R-4.) Respondent also relied on the pictures taken from C.W.'s own iPod with no authentication. (R-10.) Zambriczki testified that C.W. refused to show her his back on June 16, 2018. There was no indication from Zambriczki that C.W. showed her his iPod picture on June 16, 2018. With the lack of direct testimony, and no corroboration for the inconsistent statements in the IR, the **ALJ CANNOT FIND** that there is a preponderance of evidence to show that S.H. caused the mark on C.W.'s shoulder or kicked C.W. on June 12, 2018.

## **INITIAL DECISION'S ANALYSIS AND CONCLUSIONS OF LAW:**

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:

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.

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.

Petitioner, S.H., contended that he never punched or kicked C.W. and did not, intentionally or otherwise, cause the injuries C.W. sustained on June 12, 2018. S.H. went outside to prevent C.W. from running away or harming himself on June 12, 2018. S.H. knew that C.W. had just received disappointing news about not getting a promised computer and disappointing news was known to cause a reaction of inappropriate behavior. As a caregiver, S.H. could not react to C.W.'s aggression with any type of physical abuse, even in self-defense. S.H. would not have been excused for retaliating against C.W. for biting him. The ALJ accepted S.H.'s testimony as credible when he said he did not punch or kick C.W., despite being bitten. S.H.'s testimony was corroborated by the hearsay statement of the eye-witness, Beaulieu, who assisted S.H. in helping to release him from C.W.'s bite hold. C.W.'s chaotic and violent conduct inside the home as witnessed by two disinterested staff members provided plausible explanations for all the bruises on eyes, upper arm, and inside lower lip, C.W. sustained. S.H.'s lack of knowledge of how C.W. sustained what appeared to be a footprint on his shoulder does not constitute an admission of abuse. In its summation brief, the respondent argued that the number of prior incidents of unsubstantiated accusations in S.H.'s history was relevant to whether he abused C.W. in this instance. Under Evidence Rule 404(b), prior bad acts cannot be used to prove that S.H. abused C.W. on June 12, 2018.

Respondent only relied upon hearsay statements to support the physical abuse of C.W. at the hands of S.H. Hearsay may be admitted in evidence subject to limitations on its use as a means of establishing ultimate findings of fact. The rule is codified at N.J.A.C. 1:1-15.5.

(a) Subject to the judge's discretion to exclude evidence under N.J.A.C.1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.

(b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

N.J.A.C. 1:1-15.5(b) recites what is commonly referred to as the residuum rule, which was best described in Justice Francis' foundational opinion for the New Jersey Supreme Court in *Weston v. State*, 60 N.J. 36, 50-51(1972):

It is common practice for administrative agencies to receive hearsay evidence at their hearings . . . However, in our State as well as in many other jurisdictions the rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

In this matter, respondent has provided only hearsay evidence in support of the charge of physical abuse against S.H. The investigator, Moore, completed a thorough investigation, but the end results were contradictory witness statements with no clear showing how C.W. sustained all his documented injuries. Respondent was unable to produce any competent evidence in the record to support that S.H. caused the injury to C.W. by acts of physical abuse. There was not a residuum of legally reliable or competent evidence to support the hearsay statements of C.W., and, thus, the allegations against S.H. cannot be sustained.

Based upon the testimony and findings, the **ALJ CONCLUDED** that the respondent has not satisfied its burden of proving by a preponderance of the evidence that S.H. committed acts of physical abuse against C.W., an individual receiving services from DHS. Applying the law to the facts, the **ALJ CONCLUDED** that the respondent has failed to prove abuse by a preponderance of the credible evidence.

### **INITIAL DECISION'S ORDER:**

It is hereby ORDERED that the determination of DHS, Office of Program Integrity and Accountability to place Petitioner S.H. on the Central Registry of Offenders Against Individuals with Developmental Disabilities for the incident on June 12, 2018, as to physical abuse is hereby REVERSED.

The ALJ then filed the 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. If the Director of the Office of Program Integrity and Accountability does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

### **OPIA'S REVIEW OF THE INITIAL DECISION**

The ALJ unreasonably disregarded or ignored the credible evidence and testimony; set unreasonable standards of proof for substantiating abuse; the alarming number of allegations of past abuse against S.H. were dismissed; and the ALJ made an unreasonable credibility assessment of S.H.

The ALJ rejected the version of the incident presented by the victim, C.W., an unbiased eyewitness, and M.B., another eyewitness. Both their statements detailed that S.H. kicked C.W. and punched C.W., at least once in the face. The Initial Decision explains that C.W. and M.B.'s versions had a "striking contradiction": "C.W. claimed S.H. grabbed, punched, and threw him to the ground, while M.B. claimed that C.W. was the aggressor and threw the first punch." (Initial Decision ("ID"), pg. 10). Their accounts were not contradictory as to the relevant facts, but differed as to the origin of the altercation and whether C.W. was the initial aggressor. These irrelevant details are not vital for determining whether S.H. physically abused C.W. In fact, S.H.

admitted that there is no protocol that allows a caregiver to kick someone who is developmentally disabled in the back or to punch him in the face – even when the victim shows aggression. (1T108:11-24).

The ALJ minimized M.B.’s account because he evidently “provided no explanation for how S.H. and C.W. fell on the ground and did not specify whether the alleged kicking occurred while C.W. was on the ground, as C.W. claimed.” (*See ID*, pgs. 10-11). Thus, because M.B., an individual with developmental disabilities, did not provide (or perhaps Moore simply did not record) details about how S.H. and C.W. fell to the ground or where and when the kicking occurred, the ALJ discounted M.B.’s observation that S.H., at some point, kicked and punched C.W. These details are not crucial to support M.B. or C.W.’s versions. Their accounts align in the most important respect: They both include S.H. kicking and punching C.W. That the record is silent about irrelevant details, does not disqualify either account of the incident regarding S.H. kicking and punching C.W.

One indicia of M.B.’s testimony’s reliability and neutrality was that he conveyed a sequence of events that was averse to both S.H. and C.W. For example, he stated that he first observed C.W. punch Petitioner, thereby showing that M.B. was not attempting to favor C.W. (1T50:1-5). M.B. showed that C.W. was the initial aggressor toward S.H., which is consistent with other accounts. Yet, more importantly, M.B. also reported to Moore that he then saw Petitioner punch C.W. in the face and kick C.W.’s leg and back. *Id.* However, the ALJ – because the record did not reflect whether M.B. explained several other details, as previously noted – unreasonably rejected this portion of M.B.’s statement.

Despite the ALJ acknowledgement that whether C.W. “acted as the aggressor . . . is not relevant to the charge of abuse,” the Initial Decision relied on the fact that C.W.’s version did not include that he was the aggressor to discount his statement that S.H. later punched and kicked him. (*See ID*, pg. 11). Ultimately, the Initial Decision stated that DHS’ case rested on “contradictory witness statements with no clear showing how C.W. sustained all his documented injuries.” (*See ID*, pg. 16). Although C.W. and M.B.’s statements did not align perfectly in every respect (though, if they did, it would give rise to the suspicion that they coordinated their stories), they were consistent – and not contradictory – in the most important aspect for purposes of the issues here: that S.H. kicked and punched C.W.

The ALJ unreasonably concluded that the evidence supporting the physical abuse and injuries “was lacking.” (*See ID*, pg. 11). The Initial Decision noted that there were “no medical records from C.W.’s hospital stay on June 12, 2018” – which implies that there was scant proof of injury to C.W. (*See ID*, pg. 11). This is unwarranted for several reasons. First, the ALJ even conceded that the EMS report confirmed that a “boot/shoe print [was] on C.W.’s back (R-4)” on the day of the incident. The Woolwich Police Report confirmed the bruise around C.W.’s left eye. (R-5).” (*See ID*, pgs. 7, 11). Likewise, the ALJ acknowledged that “C.W. told Moore that the print mark in the photograph was caused by S.H. kicking him.” *Id.* at pg. 4. Oddly, the Initial Decision considered the fact that C.W. had other unexplained marks on his back as problematic, rather than attributing C.W. with more credibility, as a result. *Id.* at pg. 12. C.W. could have easily stated that all of the marks were caused by S.H. to bolster his claim, but did not. Candor, here, is indicative of the truthfulness of this portion of C.W.’s statement. The ALJ relied on the

other unexplained marks on C.W.'s back to diminish his credibility about the one explained boot mark, which was unjustified.

Notably, the ALJ determined no explanation for the boot or shoe print that was left on C.W.'s back. Instead of aligning the testimonial, documentary and photographic evidence revealing that the injury was caused by S.H. kicking C.W., the ALJ asserted that S.H.'s "lack of knowledge of how C.W. sustained, what appeared to be a footprint on his shoulder, does not constitute an admission of abuse." (*See ID*, pg. 15). The opinion similarly reiterated that "[n]either Beaulieu nor S.H. could account for the foot-print mark on C.W.'s back." (*See ID*, pg. 12). Though the ALJ is content to leave the question open while rendering an opinion absolving S.H., it effectively ignores the statements in the record that provide the obvious explanation: Both C.W. and M.B. witnessed S.H. kick C.W. on the back. (*See ID*, pgs. 4-5). To ignore such evidence in the record – particularly in light of no other proffered explanation – is unreasonable.

The Initial Decision concluded that DHS failed to meet its burden as to S.H.'s punch to C.W.'s face, because it provided no medical records, direct testimony or "corroboration for the inconsistent recollections of the incident" to support that C.W.'s facial injuries were caused by a punch. (*See ID*, pg. 13). It is unclear how medical records would show the "causation" that the ALJ seems to require from them. The EMTs could only recount C.W.'s story to the medical staff and then they would treat C.W.'s facial injuries. Even so, the requirement to show a direct injury from a punch is unnecessary. That is, "physical abuse" in this context is defined as a "physical act directed" at a developmentally-disabled individual from a caregiver that causes "pain, injury, anguish, *or* suffering." N.J.S.A. 30:6D-74 (emphasis added). Thus, though the evidence reveals an injury resulted from S.H.'s punch to C.W.'s face, it also shows that pain or anguish occurred as well, thereby, meeting the statutory requisites for "physical abuse." *Id.*

There was sufficient evidence to reveal that C.W.'s injuries were from S.H.'s punch to C.W.'s face. For instance, photographs of C.W.'s two black eyes were taken, while he was in the hospital due to his injuries in the subject incident. (1T34, P-9, P-12, P-13). Additional photographs depicted the two black eyes and injuries inside C.W.'s mouth and nose, whereby C.W. explained that he suffered these injuries as a result of Petitioner punching him in the face. (1T35-36, P-10 to P-12). And, even Petitioner conceded that some of the injuries to C.W.'s face were consistent with "someone striking him in the face with a fist." (1T106:17-22).

The Initial Decision ignored a similar "striking contradiction" of testimony concerning the possible explanation of C.W.'s injuries during the events inside the house. "Beaulieu indicated that the fire extinguisher thrown by C.W. bounced off S.H. and hit C.W. in the face as a rationale for C.W.'s facial injuries." (*ID* p.7) In her interview with Moore, Beaulieu stated that C.W. "charge(d)" toward S.H. while carrying a fire extinguisher. Ms. Beaulieu stated that C.W. attempted to "charge toward S.H. repeatedly in attempts to hit S.H. with the fire extinguisher. Ms. Beaulieu reported that S.H. placed his arms and hands in front of (S.H.'s) face in order to block C.W.'s attempts. Per Ms. Beaulieu, the fire extinguisher hit C.W. his face each time he attempted to hit S.H. ... Ms. Beaulieu stated that it was possible that C.W. also injured his own eyes due to C.W. hitting himself with the fire extinguisher multiple times." (R3: DHS282) In his interview with Moore, "Mr. Okeke stated that C.W. threw a fire extinguisher at S.H., but 'somehow' bounced back toward C.W. and hit C.W. in the face." (R3: DHS261)

In his statement to Moore, “C.W. denied throwing a fire extinguisher at any staff.” (R3: DHS279) S.H. testified that, “C.W. grabbed the fire extinguisher and threw it at S.H., who was standing in the kitchen doorway. S.H. put his arms up to block the fire extinguisher from hitting him. The fire extinguisher hit the doorjamb and bounced back hitting C.W. in the face.” (ID p.9) Yet, in his interview with Moore, S.H. stated that C.W. “ran toward him and attempted to throw a fire extinguisher. S.H. reported that he blocked the fire extinguisher with his hands and the fire extinguisher hit C.W. in the face.” (R3: DHS265) In this example, one disinterested staff member gave testimony about “charging” with a fire extinguisher, another disinterested staff member recounted a thrown fire extinguisher “somehow” bouncing into C.W., the victim denied throwing a fire extinguisher, and the self-interested Petitioner gave two different accounts about throwing a fire extinguisher – one bouncing off a doorway and another blocked by his hands.

The Initial Decision treated as a “striking contradiction;” the previously described testimony concerning C.W.’s being on the ground and being kicked, as insufficient to determine the origins of the boot marks on C.W.’s back – despite the admission by S.H. that he was on the ground with C.W., the EMT’s report, and the physical evidence of the photograph. The second example of a “striking contradiction” (although not so noted in the Initial Decision) concerning the fire extinguisher is even more randomly applied by the ALJ. In the second, there were varying details – charging with the fire extinguisher repeatedly, C.W.’s denial of throwing a fire extinguisher, and an unexplained bouncing of a thrown fire extinguisher – and two inconsistent accounts from the self-interested Petitioner. Unlike the boot mark evidence, there was no additional evidence, documentary or testamentary, to support any of the five versions. Thus, there was no legally competent evidence to support a finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. (N.J.A.C. 1:1-15.5)

Notwithstanding this lack of corroboration, the Initial Decision declared, “S.H.’s account of what occurred inside the home was corroborated by Beaulieu and Okeke. Therefore, I find S.H.’s account of the incident as corroborated by the hearsay witness statements from Beaulieu and Okeke as fact.” (ID p.12) Beaulieu’s testimony was wildly different from Okeke’s testimony – the fire extinguisher being carried and “charged toward” S.H. repeatedly; versus; a single throwing of the fire extinguisher that “somehow” bounced into C.W.’s face. In S.H.’s initial statement, C.W. “attempted” to throw the fire extinguisher and S.H. blocked it with his hands into C.W.’s face. In S.H.’s testimony, C.W. threw the fire extinguisher and it bounced off the doorway, hitting C.W. in the face. There were four different versions of the fire extinguisher incident. The Initial Decision’s finding, that S.H.’s account of the incident credible, is baseless and must be considered arbitrary.

The Initial Decision next asserted that DHS failed to offer any “direct testimony from any witnesses to the events of June 12, 2018,” but rather provided only hearsay evidence. (*See ID*, pg. 12) However, hearsay evidence is admissible in hearings at the Office of Administrative Law as long as it is supported by other legal and competent evidence. *See N.J.S.A. 52:14B-10(a)*. Though C.W. and M.B. were not present at the hearing, they had first-hand knowledge of the events and conveyed such to Moore, an experienced investigator, who was credible and testified at the hearing. The photographic evidence and EMS and police reports collectively supported that S.H. kicked C.W. in the back – leaving a boot mark – and punched him in the face.

The Initial Decision only vaguely mentioned S.H.'s past abuse allegations and then dismissed them as irrelevant to prove S.H. abused C.W., by citing N.J.R.E. 404(b). (*See* ID, pg. 15). But, Rule 404(b) permits such evidence of prior bad acts for other reasons, such as "identity" and opportunity. *See State v. Gillispie*, 208 N.J. 59, 86-88 (2011). Here, the "prior bad acts" evidence showed that Petitioner – as alleged in this case – had previous allegations of kicking and punching individuals with developmental disabilities, indicating his "identity" and/or opportunity. For example, between April 17, 2015 and July 11, 2017, "there were a number of incidents in particular where individuals had made [eight different] allegations against the Petitioner of physical abuse." (1T60:13-16; 60:24-61:3). From those various allegations, six incidents involved Petitioner supposedly punching individuals and one averred that he choked an individual. (1T60:17-19). In one incident, a police officer observed Petitioner either kick or grab an individual by the neck. (1T62:7-15, P-2, DHS 263). While none of those averments was substantiated, this number of allegations against a staff member for similar, prior bad acts is noteworthy, as noted by Moore's testimony. Even so, there was an additional incident of S.H. applying an "unapproved restraint" on an individual, which resulted in a substantiated allegation of neglect. (1T61:10-14). In contrast to the ALJ's view, Petitioner's history of both the substantiated allegation and the unsubstantiated allegations – though not dispositive to whether he committed abuse in this instance – is at least relevant and should have been more properly weighed. In that connection, Petitioner testified that about once per month, C.W. made an allegation against him, but would then retract it. (1T98:12-15). Notably, C.W. has not retracted his averments from this incident.

The Initial Decision failed to properly assess the evidence in the record. S.H. is the only witness with an interest in the outcome of this matter because he is trying to avoid being placed on the Central Registry, thereby casting doubt on his testimony and credibility. By giving the Initial Decision's improperly weighed evidence more trustworthiness than it is due, the findings of fact and the decision is arbitrary and capricious. The more credible version of the incident is the one described in Moore's testimony – "an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. *Carbo v. United States*, 314 F.2d 718 (9<sup>th</sup> Cir. 1963.). (ID p 10) The testimonial and other evidence reveals that S.H. kicked and punched C.W., which "hangs together" in a more coherent explanation of the events with the remaining record than Petitioner's version. (*Id.*). The preponderance of the evidence shows that S.H. kicked C.W. in his back area leaving a shoe print mark and punched him in the face. As such, DHS must "reject" the ALJ's conclusions and find that Petitioner committed acts of physical abuse against C.W. with the requisite intent, thereby requiring his placement on the Central Registry.

#### **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 – the Initial Decision, exhibits, transcript, and submissions – I **REJECT and MODIFY** the Administrative Law Judge's findings and conclusions. Although the ALJ had the opportunity to assess the credibility and veracity of the witnesses, there were baseless veracity or credibility findings. Testimony that was supported by substantiating documentary evidence was given little credence. Self-interested testimony that was not consistent with any other

evidence was given unsupportable credence. I reject the ALJ's findings of the events described in the Initial Decision. I find that there is credible evidence, backed by residual, documentary evidence to show that S.H. physically abused C.W. Because of the Department's expertise and experience, it was necessary to bring forward this testimony from the hearing and assign it the credibility due, as previously explained. **I CONCLUDE and AFFIRM** that the Department has met its burden of proving sufficiently that S.H. committed an act of physical abuse against an individual with developmental disabilities. **I CONCLUDE and AFFIRM** that S.H. acted intentionally, recklessly or with careless disregard to the well-being of that individual, and that S.H.'s placement on the Central Registry is appropriate.

Therefore, 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 S.H.'s name on the Central Registry of Offenders Against Individuals with Developmental Disabilities.

Date: 9/2/21

*Lauri Woodward*  
Lauri Woodward, Director  
Office of Program Integrity and Accountability