

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Adjud. Case #:

[REDACTED]

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

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Todd Sardella, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

██████████

The Findings of Fact and Conclusions of law are incorporated from the Recommendations of the presiding Administrative Law Judge's Recommended Decision.

ORDERED:

The request of ██████████ that the substantiated report dated ██████████
██ be amended and sealed is denied.

The Subject has been shown by a preponderance of the evidence to have committed abuse and neglect.

The abuse and neglect is properly categorized as a Category 2 act.

NOW, THEREFORE, IT IS DETERMINED that reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years. The record of these reports shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(b).

This decision is ordered by David Molik, Director of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

DATED: August 3, 2016
Schenectady, New York

A handwritten signature in dark ink, appearing to read "David Molik", is written over a horizontal line.

David Molik
Administrative Hearings Unit

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

Louis P. Renzi
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
163 West 125th Street
New York, NY 10027
On: [REDACTED]

Parties:

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

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Todd Sardella, Esq., Asst. Counsel

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

JURISDICTION

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

FINDINGS OF FACT

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

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

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

Allegation 1

It was alleged that on [REDACTED], in the parking area outside of [REDACTED] at [REDACTED], located at [REDACTED], while acting as a custodian, you committed physical abuse when, while driving, you backed a car into a service recipient, striking him on the leg.

This allegation has been SUBSTANTIATED as Category 2 physical abuse pursuant to Social Services Law § 493.

Allegation 2

It was alleged that on [REDACTED], in the parking area outside of [REDACTED] at [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when, while driving, you backed a car into a service recipient, striking him on the leg.

This allegation has been SUBSTANTIATED as Category 2 neglect pursuant to Social Services Law § 493.

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

4. [REDACTED], located at [REDACTED] (the center), is a residential treatment center for children aged 10 through 20, and is licensed by the NYS Office of Children and Family Services (OCFS), which is a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Supervising Investigator [REDACTED])

5. At approximately 5:45 p.m. on [REDACTED], the time of the alleged abuse and neglect (the incident), the Subject was employed by [REDACTED] as an Educational Counselor at its [REDACTED]. She was a custodian as that term is defined in SSL § 488(2). (Hearing testimony of Subject)

6. At the time of the incident, the Service Recipient was thirteen years of age, and had been a resident of the center for approximately five months. The Service Recipient is a youth whose diagnosis is unspecified in this record. (Hearing testimony of OCFS Supervising Investigator [REDACTED])

7. At the time of the incident, the Subject was at the wheel of her personal vehicle, preparing to back out of a parking space and leave the center. She was off duty. The vehicle was in a parking lot adjacent to one of the cottages; it was parked either in front of or immediately next to a large refuse container as marked on the photographic exhibit by the Subject during her testimony. Staff [REDACTED] was in the passenger seat of the Subject's vehicle. The Subject and Staff [REDACTED] were engaged in conversation. (Hearing testimony of Subject; Justice Center Exhibit 9)

8. A vehicle owned by Staff [REDACTED] was parked to the right of the Subject's vehicle,

also facing the cottage. (Justice Center Exhibits 3, 4, 7, and 9)

9. Staff [REDACTED] was seated in her vehicle, speaking with Staff [REDACTED], who was standing between the cottage and the front of her vehicle. (Justice Center Exhibits 3, 4, 9)

10. The Service Recipient positioned himself behind the Subject's vehicle.

11. The Subject called out the car window, said "excuse me," thus acknowledging her realization that the Service Recipient was behind her vehicle, in its intended path. The Service Recipient refused to move.

12. Staff [REDACTED] observed this and positioned himself at the rear of the Subject's vehicle in order to move the Service Recipient away from the vehicle. He attempted to verbally de-escalate and relocate the youth. Eventually he had to put his hands on the Service Recipient for that purpose. The vehicle began to back up; Staff [REDACTED] witnessed the Service Recipient then deliberately extend his leg into the path of the backing vehicle, causing the bumper of the vehicle to strike his leg. (Hearing testimony of Subject: Justice Center Exhibit 3, 4)

13. The Service Recipient refused a medical exam and denied any injury; it was later concluded by Investigator [REDACTED] that he was not physically injured. (Justice Center Exhibit 3)

14. The initial investigation was conducted by [REDACTED] Unit Director [REDACTED]. The OCFS investigation was conducted by Investigator [REDACTED]. (Hearing testimony of OCFS Supervising Investigator [REDACTED]; Justice Center Exhibits 4, 7)

ISSUES

- Whether the Subject has been shown by a preponderance of the evidence to have committed the act or acts giving rise to the substantiated report.
- Whether the substantiated allegations constitute abuse and/or neglect.

- Pursuant to Social Services Law § 493(4), the category of abuse and/or neglect that such act or acts constitute.

APPLICABLE LAW

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

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

(a) “Physical abuse,” which shall mean conduct by a custodian intentionally or recklessly causing, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient or causing the likelihood of such injury or impairment. Such conduct may include but shall not be limited to: slapping, hitting, kicking, biting, choking, smothering, shoving, dragging, throwing, punching, shaking, burning, cutting or the use of corporal punishment. Physical abuse shall not include reasonable emergency interventions necessary to protect the safety of any person.

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

(h) “Neglect,” which shall mean any action, inaction or lack of attention that breaches a custodian's duty and that results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient. Neglect shall include, but is not limited to: (i) failure to provide proper supervision, including a lack of proper supervision that results in conduct between persons receiving services that would constitute abuse as described in paragraphs (a) through (g) of this subdivision if committed by a custodian; (ii) failure to provide adequate food, clothing, shelter, medical, dental, optometric or surgical care, consistent with the rules or regulations promulgated by the state agency operating, certifying or supervising the facility or provider agency, provided that the facility or provider agency has reasonable access to the provision

of such services and that necessary consents to any such medical, dental, optometric or surgical treatment have been sought and obtained from the appropriate individuals; or (iii) failure to provide access to educational instruction, by a custodian with a duty to ensure that an individual receives access to such instruction in accordance with the provisions of part one of article sixty-five of the education law and/or the individual's individualized education program.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 2 which is defined as follows:

(b) Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one finding shall be sealed after five years.

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject committed the act or acts of abuse and/or neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of abuse and/or neglect as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

If the Justice Center proves the alleged abuse and/or neglect, the report will not be amended and sealed. Pursuant to SSL § 493(4) and Title 14 NYCRR 700.10(d), it must then be determined whether the act of abuse and/or neglect cited in the substantiated report constitutes the category of abuse and/or neglect as set forth in the substantiated report.

If the Justice Center did not prove the abuse and/or neglect by a preponderance of the evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has established by a preponderance of the evidence that the Subject committed abuse, described as “Allegation 1” in the substantiated report, and that the act was

properly categorized as a Category 2 act.

The Justice Center has established by a preponderance of the evidence that the Subject committed neglect, described as “Allegation 2” in the substantiated report, and that the act was properly categorized as a Category 2 act.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-12) The Justice Center called one witness, OCFS Supervising Investigator [REDACTED].

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

Allegation 1 – Physical Abuse

In order to prove physical abuse, the Justice Center must prove by a preponderance of the evidence produced at the hearing that the Subject (i) was a custodian, who (ii) intentionally or recklessly caused (iii) physical contact with the service recipient, and (iv) thereby caused either physical injury, or serious or protracted impairment of the physical, mental or emotional condition of a service recipient, or the likelihood of such injury or impairment.

Here, the Justice Center proved by a preponderance of the evidence that at the time of the incident, the Subject was a custodian as that term is defined in SSL § 488(2), and that, while driving her automobile in reverse, the rear bumper made physical contact with the Service Recipient’s leg. The Justice Center further proved that the Subject recklessly caused the physical contact, notwithstanding the contributing conduct of the Service Recipient. Finally, despite the lack of conclusive evidence in this record that the Service Recipient did not sustain any physical injury, or serious or protracted impairment of his physical, mental or emotional condition, there is no doubt that a vehicle backing into a person - no matter the reason or circumstance - creates a likelihood that a serious injury or impairment could occur.

The sole witness called by the Justice Center, Investigator [REDACTED], is the Supervising Investigator at OCFS. She testified in that capacity, and stated that she had no personal knowledge of the individuals from whom statements were taken, or the facts and circumstances surrounding the incident. She stated that she had carefully reviewed the file created by OCFS Investigator [REDACTED], who conducted the investigation¹. (Hearing testimony of OCFS Supervising Investigator [REDACTED]; Justice Center Exhibits 3, 4)

There were five witnesses to the incident: the Service Recipient, the Subject, Staff [REDACTED], Staff [REDACTED] and Staff [REDACTED]. Each witness provided one or more unsworn statements during the investigation. The Subject, Staff [REDACTED] and Staff [REDACTED] were all sitting in parked vehicles facing the cottage, engaged in conversation. The incident took place behind the Subject's vehicle, where the Service Recipient and Staff [REDACTED] were located. Due in large part to the necessarily limited ability of the three witnesses seated inside vehicles to observe the entire incident, much greater weight is assigned to the statements of Staff [REDACTED] and the Service Recipient.

The administrative law judge conducting this hearing did not have the benefit of testimony from staff [REDACTED], Investigator [REDACTED] or Unit Director [REDACTED], who apparently conducted the original investigation on behalf of the [REDACTED]. (Justice Center Exhibit 7) Nevertheless, the inconsistencies between statements given by Staff [REDACTED] and Staff [REDACTED] must be resolved. The evidence produced at the hearing supports the following conclusions:

Staff [REDACTED] was seated in her parked vehicle, which was facing the opposite direction during the incident. Although she presumably turned in her seat to observe the activity taking

¹ Investigator [REDACTED] was unavailable to testify. Supervising Investigator [REDACTED] appeared in his place.

place behind Subject's vehicle, it is concluded that her line of sight to the rear of the Subject's vehicle was far inferior to that of Staff [REDACTED], the person standing and who placed himself at the rear of Subject's vehicle and immediately alongside the Service Recipient. Staff [REDACTED] participated in the incident, and was therefore in the best position to observe what happened. There is no evidence in this record to suggest that Staff [REDACTED] fabricated any portion of his statement; that statement is credited evidence and given substantial weight. In contrast, Staff [REDACTED] assertion that the Subject moved her car "intentionally" to strike the Service Recipient is not credited. On this record, there is no way Staff [REDACTED] could have known the Subject's state of mind, and that particular statement attributed to Staff [REDACTED] is not credited.

Conversely, Staff [REDACTED] statement corroborates most of the information offered by Staff [REDACTED], the Subject and the Service Recipient, yet adds an important detail which, given their physical positions, the other three staff witnesses were unlikely to have observed: it was the Service Recipient who was very likely the actual cause of the physical contact with the vehicle's bumper, by deliberately extending his leg into the path of the backing vehicle. The record contains no clear statement that the youth had been pulled clear of the vehicle prior to it moving in reverse; it is presumed that he had been, thus requiring the Service Recipient to extend his leg in order to reach the bumper. Conversely, it is not presumed that the Subject was aware of that, since she testified to having had no awareness of any of the activity behind her vehicle. The Subject's testimony that she was completely unaware that the youth was ever behind her vehicle at any time during the incident is not credited evidence. Aside from it being self-serving testimony, the Subject was observed by the Service Recipient to have called out "excuse me" early in the transaction. (Justice Center Exhibit 3) That conduct clearly supports the conclusion that the Subject was aware that her intended path was obstructed by a service recipient, which calls for

extreme caution. The Subject testified that she did observe the Service Recipient kicking the front of her vehicle. Taken as true, even that conduct should have triggered an acute awareness in a reasonable and prudent driver that there was a continuing problem adjacent to her vehicle which demanded her full attention. Rather, instead of remaining in place until she could confirm that it was safe to proceed, the Subject failed to use even ordinary caution and wait for the incident with the Service Recipient to be resolved, thereby making absolutely certain there was no risk to his safety. Even if, assuming *arguendo*, she had clearly observed the Service Recipient being pulled aside by Staff [REDACTED] (there is no evidence of this in the record), it is undisputed that the youth quickly broke free of Staff [REDACTED] and was then observed kicking the front of the vehicle. Thus, the incident was not yet resolved and serious risk to the Service Recipient's safety remained. It is therefore concluded that the Subject acted both deliberately and recklessly in moving her car without being completely certain that the Service Recipient was safe.

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed the abuse set forth in Allegation 1.

Allegation 2 - Neglect

In order to prove neglect, the Justice Center must prove by a preponderance of the evidence that the Subject was a custodian, who breached a duty owed to the Service Recipient, and that breach caused or was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of that Service Recipient.

Here, the Subject was a custodian. She was off duty but still on the facility grounds and thus had an affirmative duty to protect the safety and welfare of the Service Recipient, even from himself. Under the facts recited above and proven by the Justice Center by a preponderance of the credible evidence, the Subject breached that duty by reversing her vehicle when there was no

justified certainty that the Service Recipient was not still in the path of the vehicle. The likelihood of injury to the Service Recipient is also discussed above and proven as well, even if there was no actual injury. This constitutes neglect under SSL § 488(1)(h).

Accordingly, the Subject is guilty of committing neglect of the Service Recipient as set forth in “Allegation 2”.

Although the reports will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse or neglect set forth in the substantiated report. Based upon the totality of the circumstances, the evidence presented and the witnesses’ statements, it is determined that the substantiated report as to both “Allegation 1” and “Allegation 2” is properly categorized as a Category 2 act.

DECISION:

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

The Subject has been shown by a preponderance of the evidence to have committed abuse and neglect.

The abuse and neglect is properly categorized as a Category 2 act.

This decision is recommended by Louis P. Renzi, Administrative Hearings
Unit.

DATED: July 28, 2016
Schenectady, New York



Louis P. Renzi, ALJ