

**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: Juliane O'Brien, Esq.

[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 neglect.

The substantiated report is properly categorized as a Category 3 act.

NOW, THEREFORE, IT IS DETERMINED that the record of this report shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(c).

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: November 9, 2016
Schenectady, New York



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:

Gerard D. Serlin
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
333 East Washington Street
Syracuse, New York 13202
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: Juliane O'Brien, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for 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 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 an agency vehicle away from the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you drove at excessive speeds while a service recipient was your passenger.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493(4)(c)

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

4. The facility, the [REDACTED] located at [REDACTED], is a residential home for adolescents who are unable, for a variety of reasons, to reside with their family of origin. The facility is licensed by the New York Office of Children and Family Services (OCFS) and is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged neglect, the Subject had been employed by [REDACTED] since [REDACTED]. The Subject was employed as a Youth Development Professional (YDP). (Hearing testimony of OCFS Investigator [REDACTED])

6. At the time of the alleged neglect, the Service Recipient was approximately fifteen years of age and had been a resident of the facility for about eleven months. (Hearing testimony of OCFS Investigator [REDACTED])

7. During the relevant time period, the Subject was assigned to do much of the transport of the service recipients from the [REDACTED] to their home visits. (Hearing testimony of the Subject)

8. At approximately 5:00 p.m. on [REDACTED], the Subject and the Service Recipient departed from the [REDACTED] area in a provider agency owned van, and travelled via the New York State Thruway to the Service Recipient's home. (Justice Center Exhibit 8 and Hearing testimony of OCFS Investigator [REDACTED]) Initially, there was a combination of snow and sleet on the Thruway and the Subject drove slow, perhaps slower than nearby traffic, and below the posted speed limit. (Hearing testimony of the Subject and Justice Center Exhibits 8, 9, 10)

9. Sometime thereafter, the snow cleared (Justice Center Exhibit 8), and at approximately 5:43 p.m., the Subject drove the motor vehicle at a speed of 83 miles per hour (MPH) which is 18 MPH in excess of the posted 65 MPH speed limit. (Justice Center Exhibit 11) This activity was observed by a New York State Police Officer (Trooper). (Justice Center Exhibit 11) It was dark or nearly dark outside by this time. (Hearing testimony of the Subject)

10. The Trooper accelerated his vehicle rapidly to catch up to the Subject and did not initially activate his emergency lights. The Trooper's rapid approach caused both the Subject and the Service Recipient to become concerned for their safety, as they were unaware that the

approaching car was a police vehicle. Consequently, the Subject increased the speed of the vehicle out of fear that he was going to be struck from behind. (Justice Center Exhibit 8 and 9, Hearing testimony of the Subject) The trooper then activated his emergency lights, pulled over the Subject's vehicle, and issued the Subject a traffic summons alleging that he was operating the motor vehicle at the speed of 83 MPH. (Justice Center Exhibits 9 and 11)

11. The provider agency had a written policy that required all employees to abide by the New York State Vehicle and Traffic Law while operating provider agency owned vehicles. (Justice Center Exhibit 7, first page)

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 abuse and/or 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 3, which is defined as follows:

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

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject committed the act or acts of 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 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 neglect cited in the substantiated report constitutes the category of neglect as set forth in the substantiated report.

If the Justice Center did not prove the 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 an act, described as “Allegation 1” in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-14) The investigation underlying the substantiated report was conducted by [REDACTED] New York State OCFS Child Abuse Specialist-1 (Investigator), who was the only witness who testified at the hearing on behalf of the Justice Center. The Subject testified in his own behalf and provided no other evidence.

The Justice Center proved by a preponderance of the evidence that on [REDACTED], the Subject operated a motor vehicle, in which the Service Recipient was a passenger, on the New York State Thruway at a speed of 83 MPH which was 18 MPH over the posted speed limit, and that the weather conditions within the thirty minutes prior to this breach had included sleet and snow.

The Subject testified that he was obeying all speed limits while operating the motor vehicle and that he did not exceed the speed limit until he and the Service Recipient noticed a rapidly approaching motor vehicle at the rear with no emergency light on. The Subject testified that, out of fear for his and the Service Recipient’s safety, he then accelerated his vehicle to pass a vehicle in the right lane so that he could safely move to the right lane, and out of the way of the quickly approaching vehicle.

The Service Recipient’s statement does corroborate the rapidly approaching Trooper with no emergency lights and the evasive maneuvers taken by the Subject. Both the Service Recipient’s statement and the Subject’s testimony on this issue are credited evidence. (Justice Center Exhibit 8)

However, it can be reasonably concluded from the evidence presented, specifically the Uniform Traffic Ticket and accompanying affirmed supporting deposition of the Trooper, which is credited evidence (Justice Center Exhibit 11), that the Trooper observed the Subject operating the motor vehicle at 83 MPH at a time before the Trooper pursued the vehicle.

After considering all of the evidence, it is concluded that the Subject's operation of the motor vehicle at the speed of 83 MPH, while transporting the Service Recipient, was likely to result in a vehicle collision and injury, and or serious or protracted impairment of the Service Recipient.

Consequently, the Justice Center proved by a preponderance of the evidence the Subject had a duty to operate any motor vehicle in which the Service Recipient was a passenger in compliance with all New York State Vehicle and Traffic Laws, and generally in a safe manner, and that the Subject breached his custodial duty by operating a motor vehicle in excess of the posted speed limit by 18 MPH. The Subject's actions or inactions were likely to have resulted in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

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 neglect alleged. The substantiated report will not be amended or sealed.

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of 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 is properly categorized as a Category 3 act.

DECISION:

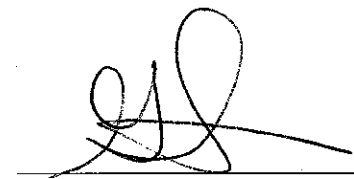
The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED], [REDACTED] be amended and sealed is denied.

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

The substantiated report is properly categorized as a Category 3 act.

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

DATED: October 20, 2016
Schenectady, New York


Gerard D. Serlin, ALJ