

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

In the Matter of the Appeal of

████████████████████

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Adjud. Case #:

████████████████

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.

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By: Glenn Pincus, Esq.
Hogan & Willig
2410 North Forest Road, Suite 301
Amherst, New York 14068

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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 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: June 30, 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

████████████████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

████████████████

Before:

Mary Jo Lattimore-Young
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
Administrative Hearings Unit
1200 East and West Road
West Seneca, New York 14224
On: ██████████

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
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JURISDICTION¹

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] 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], during an outing from the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you provided inadequate supervision for service recipients by transporting them in a van while speeding, driving erratically, and utilizing your personal cell phone while driving.

This allegation has been SUBSTANTIATED as Category 2 neglect pursuant to Social Services Law § 493(4)(b).

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

¹ The Subject has submitted a Motion to Vacate. This motion will not be addressed here. The Administrative Law Judge lacks authority to consider a dispositive motion such as a Motion to Vacate because the decision rendered here is submitted to the Executive Director as a recommendation and is not the final agency determination. (Part 700.12 and 700.13 of Title 14 of the NYCRR)

was retained.

4. The facility address is [REDACTED], which is located in the hamlet of [REDACTED] within the Town of [REDACTED]. It is a non-residential day habilitation center which provides care, treatment and programs for disabled people. The facility is operated by the NYS Office for People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of [REDACTED], OPWDD Investigator)

5. At the time of the alleged neglect on [REDACTED], the Subject was employed at the OPWDD and was working the 7:30 a.m. to 3:30 p.m. shift as a Habilitation Specialist 1. (Justice Center Exhibit 12) On that date, the Subject was the only staff member assigned to transport three Service Recipients in a service van during an outing to various locations. Of the three Service Recipients, two were non-verbal, all three of the Service Recipients had various levels of disabilities and engaged in many challenging behaviors. (Justice Center Exhibit 5) The Subject was a custodian as that term is so defined in SSL §488(2).

6. At the time of the alleged neglect, Service Recipient 1 was a fifty-seven year old non-verbal female who was diagnosed with a profound intellectual disability. She was unable to fasten her seat belt and needed staff to do it for her. Although she responds to her name and simple directives paired with gestures, she did not possess the capacity to recognize dangerous situations. She required contact guard supervision when ascending or descending stairs to get on or off the transport vehicle. Service Recipient 1 also had a Behavior Support Plan to address screaming episodes and self-injurious behavior. (Justice Center Exhibits 5 and 10)

7. Service Recipient 2 was a sixty-four year old non-verbal male who was diagnosed with a profound intellectual disability and anxiety. He requires range of scan supervision in the

community and must be within arm's length of staff to prevent him from wandering into traffic. He responds to his name and simple routine one-step directives when paired with gestures. He indicates his wants by reaching for the desired items. (Justice Center Exhibit 5)

8. Service Recipient 3 was a fifty-five year old verbal male who is able to independently ambulate. He can independently fasten and unfasten his seat belt with verbal reminders. He has diagnoses of Bipolar Disorder, Seizure Disorder, Psychiatric Disorder and Explosive Disorder. He has a range of scan level of supervision while in the community. Although he is overly friendly, he can make inappropriate remarks to people. He also has a Behavior Support Plan that addresses his emotional outbursts and self-injurious behaviors. (Justice Center Exhibit 5)

9. At approximately 10:30 a.m. on [REDACTED], the Subject, along with three Service Recipients, left the facility in a facility van and proceeded to a church located in [REDACTED] so that the Service Recipients could participate in an activity referred to as the "bulletin." At some point while they were at the church, the Subject received a telephone call from a co-worker informing her that there was no one available at the church to conduct the activity. The Subject then proceeded to take the Service Recipients in the van to the [REDACTED] Center located in downtown [REDACTED]. They arrived at the Center at about 11:15 a.m. and stayed for a while to view art exhibits. At about 12:15 p.m., they left the [REDACTED] Center in the van via the [REDACTED] Expressway from downtown [REDACTED] to the [REDACTED] Community Recreation Center gym located at [REDACTED] in the Town of [REDACTED]. There, the Service Recipients were to eat lunch before returning to the facility. (Hearing testimony of the Subject and Justice Center Exhibits 8 through 10)

10. At approximately 1:00 p.m., a concerned citizen (Witness A), while driving

██████████, noticed a green service van speeding past him. The van had a New York State insignia on its license plate and was numbered ██████████. As the van sped down the Interstate ██████████ and passed Witness A's vehicle which was traveling sixty-eight miles per hour. At that point, Witness A noticed that there were at least two or three passengers in the van and that the driver was holding a white cellular telephone in the left hand, which was also positioned at the top of the steering wheel. Witness A observed the van weaving in and out of lanes several times in order to pass traffic, all the while traveling at a high rate of speed and without utilizing the van's turn signals. At approximately 1:04 p.m., upon seeing this and while still driving, Witness A called his mother on his telephone to report the events as they were unfolding ██████████

██████████. ██████████
██████████ (Justice Center Exhibits 8 through 12) At some point, Witness A saw the service van drive off of Interstate ██████████ via Exit ██████████ heading towards ██████████ Highway. (Justice Center Exhibits 7 and 16)

11. After exiting Interstate ██████████, the Subject drove the van to the ██████████ Recreation Center gym where she and the three Service Recipients stopped to eat lunch. (Hearing testimony of the Subject) At approximately 1:30 p.m., after Witness A had reached his destination, he pulled his vehicle over and memorialized in a writing his observations about the incident. (Justice Center Exhibits 7 and 16) At some point later, the Subject and the Service Recipients left the ██████████ Recreation Center to return to the facility after purchasing gas. (Hearing testimony of the Subject and Justice Center Exhibits 8 and 11)

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

"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 neglect shall be categorized into categories pursuant to SSL § 493(4)(b), including Category 2, which is defined as follows:

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.

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject(s) 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 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 the acts, described as “Allegation 1” in the substantiated report, but not the claim that she was talking on her cellular telephone while driving. The record shows that the Subject committed neglect when she failed to provide proper supervision of three Service Recipients in her custody during an outing and while transporting the Service Recipients in a service van on a busy highway known as Interstate [REDACTED]. During the transport, while the Subject was driving westbound on the interstate at a high rate of speed with both hands on the steering wheel and holding a cellular telephone in her left hand, the Subject drove erratically by weaving in and out of lanes to pass traffic and by failing to use her signal lights. The Subject’s failure to properly supervise the Service Recipients constituted a breach of her custodial duty to the Service

Recipients that was likely to result in physical injury or serious protracted impairment of the physical, mental or emotional condition of the Service Recipients. However, the record was insufficient to establish by a preponderance of the evidence that the Subject was using a cellular telephone while driving the Service Recipients.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation and a CD which contains audio recordings of the OPWDD Investigator interviews and interrogations obtained during the course of the investigation. (Justice Center Exhibits 1-16) The investigation underlying the substantiated report was conducted by [REDACTED], OPWDD Investigator, who was the only witness who testified at the hearing on behalf of the Justice Center. With regards to the investigation conducted by [REDACTED], OPWDD Investigator, none of the three Service Recipients could provide relevant information about the incident. Two of the Service Recipients were non-verbal and could not communicate anything about that day. The third Service Recipient wanted to talk about coffee and was not able to communicate anything about the relevant events that occurred that day. (Justice Center Exhibits 5 and 16) The Subject testified in her own behalf and provided physical evidence to support her defense. (Subject's Exhibits A, B and C)

The evidence presented by the Justice Center is found to be credible. While Witness A could not tell whether the driver of the green service van was male or female, the Subject admits that she was the driver of the van (License Plate [REDACTED]), transporting the three Service Recipients on [REDACTED], that was identified by Witness A. Further corroboration contained in the record includes the van log sheet, the [REDACTED] Job Assignment Sheet, the [REDACTED] Community Outing Form, a gas receipt signed by the Subject and the Subject's Time Sheet Report. (Justice Center Exhibits 8 through 12)

The Justice Center's main evidence is the eyewitness account of Witness A. The compelling eyewitness account of Witness A is found to be credible, highly detailed and a reliable account of what transpired on [REDACTED]. Witness A is an independent source with no motive to be untruthful and has no interest whatsoever in the outcome of the case. While the witness stated during the investigative interview that he did not know whether the van driver was male or female, he documented his other observations of the incident by preparing detailed notes contemporaneously with the events that he witnessed. (Justice Center Exhibits 7 and 16)

At approximately 1:00 p.m. on the day in question, Witness A was driving his vehicle westbound on Interstate [REDACTED] when he saw a green service van with a New York State insignia on its license plate. The van, that was also traveling westbound, had just sped past his vehicle, which was traveling at a rate of speed of about sixty-eight miles per hour. Witness A then observed that the driver of the van, while holding a white cellular telephone in the driver's left hand, repeatedly changing lanes without signaling and while traveling at a high rate of speed. (Justice Center Exhibits 7 and 16) Witness A told Investigator [REDACTED] that [REDACTED] [REDACTED] the green van as a service vehicle and after seeing at least two or three passengers in the van which was being operated in such an unsafe manner. He then called his mother, who happened to be a mandated reporter and who was employed by WNYDDSO, in order to obtain guidance on how to report the incident. (Justice Center Exhibits 6, 7 and 16)

At no time did Witness A see the van driver talking or utilizing the personal cellular telephone. The cellular telephone records produced by the Justice Center do not show that the Subject, at or about the time she was seen driving the van improperly and unsafely, was also talking on her cellular telephone or otherwise using it. (Justice Center Exhibits 16) Nevertheless, the Justice Center has met its burden of proof by a preponderance of the evidence as to the remaining

parts of the allegation. As such, the Justice Center has sufficiently proven that the Subject has committed neglect.

Given the totality of the circumstances, the Justice Center has proved by a preponderance of the evidence that the Subject's failure to properly supervise the Service Recipients, by driving in an improper and unsafe manner, constitutes a breach of her custodial duties that was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipients.

The Subject denied that she engaged in any of the conduct in dispute and raised several defenses to support her claims. Although the Subject admitted that she drove the state service van on [REDACTED], while transporting the three Service Recipients, she was silent during her testimony as to whether she had taken the Interstate [REDACTED] as one of the roadways on the route from downtown [REDACTED] to the [REDACTED] gym in [REDACTED]. (Hearing testimony of the Subject, Subject's Exhibit A through C, and Justice Center Exhibits 5) Rather, she implies that she was not the driver of the van seen by Witness A at about 1:05 p.m. on that day. Witness A's credible eyewitness account of the incident is uncontroverted in that the Subject never stated where she was at the relevant time in question. The Subject testified that at about 12:15 p.m. she left downtown [REDACTED] via the [REDACTED] Expressway to the [REDACTED] gym, but she did not state what time she actually arrived at the [REDACTED] gym. Additionally, according to Subject's Exhibits "A" and "B," the [REDACTED] Expressway does not provide a direct route from downtown [REDACTED] to the [REDACTED] gym. Therefore, the Subject would necessarily have had to take other roadways after exiting the [REDACTED] Expressway in order to reach the [REDACTED] gym destination. The Subject did not deny at the hearing that the Interstate [REDACTED] was one of the roadways she used to get to the [REDACTED] gym.

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The Subject also testified that she mistakenly told the investigator that she traveled on the Interstate ██████ when she left the ██████ gym about 1:15 p.m. to purchase gas on her way back to the facility. Even if this account was true, it is irrelevant. The relevant time period is the period of time prior to her arrival at the ██████ gym. Although the Subject did not testify as to when she arrived at the ██████ gym, the credible testimony of Witness A placed the green van on Interstate ██████ traveling westbound at approximately 1:05 p.m. (Hearing testimony of the Subject and Justice Center Exhibits 5, 11 and 16)

Moreover, the Subject's testimony is inconsistent with what she told ██████, the OPWDD Investigator, who interrogated her on two occasions. The Subject's first interrogation was on ██████, where she stated that she drove on the Interstate ██████ from the ██████ Recreation Center gym to the Mobil gas station located at ██████ and ██████ in ██████. During the second interrogation on ██████, the Subject had an opportunity to clarify and correct any erroneous information about other routes or roadways she traveled, but she failed to do so.

Additionally, the Subject claimed that she was set up by ██████ staff to be the target of these allegations, but failed to posit a rationale for this claim. In any event, there was insufficient evidence presented by the Subject regarding this defense. Furthermore, this defense does not seem plausible since Witness A does not appear to have had a prior encounter with the Subject and Witness A stated that he could not even tell whether the van driver was a male or female. (Hearing testimony of the Subject, Subject's Exhibit A through C and Justice Center Exhibits 2, 7 and 16)

The Subject's defenses have been considered and are found to lack merit, except, as previously mentioned, the defense that she was driving while talking on her cellular telephone.

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. The Subject argues as a defense that because the Justice Center has failed to prove that part of the allegation alleging that the Subject was talking on a cellular telephone while driving the van, the Category level should be reduced from a Category 2 substantiation to a Category 3 substantiation. This Administrative Law Judge disagrees. Based upon the totality of the circumstances, the credible evidence presented and Witness A's compelling eyewitness account of the Subject's driving in such an improper and unsafe manner, it is determined that the substantiated report is properly categorized as a Category 2 act. The Subject's conduct seriously endangered the health, safety or welfare of the Service Recipients.

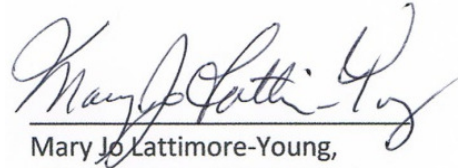
Category 2 conduct under SSL §493(4)(b) shall be elevated to Category 1 conduct when such conduct occurs within three years of a previous finding that such custodian engaged in Category 2 conduct. Reports that result in a category 2 finding not elevated to a category 1 finding shall be sealed after five years.

DECISION: The request of [REDACTED] that the substantiated report dated [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 2 act.

This decision is recommended by Mary Jo Lattimore-Young,
Administrative Hearings Unit.

DATED: June 16, 2016
Schenectady, New York



Mary Jo Lattimore-Young,
Administrative Law Judge