

**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]

The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

ORDERED: The attached and incorporated Recommended Decision is hereby adopted in its entirety.

ORDERED: The Vulnerable Persons' Central Register shall take action in conformity with the attached Recommended Decision, specifically the Decision section.

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: December 12, 2017
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject
William Burke, Esq.

**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:

Jean T. Carney
Administrative Law Judge

Held at:

New York State Justice Center for the Protection of
People with Special Needs
401 State Street
Schenectady, NY 12305
On: [REDACTED]

Parties:

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

[REDACTED]

By: William Burke, Esq.
O'Neil & Burke, LLP
135 North Water Street
Poughkeepsie, NY 12601

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] of neglect by the Subject of Service Recipients.

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

Allegation 1

It was alleged that on [REDACTED], while in the agency van and away from the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you failed to provide proper supervision to service recipients by not buckling them into their seats and/or by not ensuring that they were buckled in their seats prior to the start of the van trip.

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

Allegation 2

It was alleged that on [REDACTED], while in the agency van and away from the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you failed to provide proper supervision to service recipients by talking on your personal cellular 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 the substantiated report was retained.

4. The facility, located at [REDACTED], is an Individualized Residential Alternative (IRA) and is operated by the Office for People With Developmental Disabilities (OPWDD) which is a facility or provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged neglect, the Subject had been employed by OPWDD since 1987 and was the House Manager of the [REDACTED].

6. At the time of the alleged neglect, the Service Recipients were residents of the [REDACTED]. (Justice Center Exhibit 6; Hearing testimony of Justice Center Investigator [REDACTED] [Investigator [REDACTED]])

7. On [REDACTED], the Subject and another staff member (Staff A) were picking up Service Recipients from two different day programs. The Subject drove to the first stop, then got out of the van to get the Service Recipients ready while Staff A drove to the other day program and picked up two Service Recipients. The van seats 11 people, including the driver. It has bucket seats in the front, and three rows of bench seats that can hold three people each. Staff A assisted the two Service Recipients into the van, buckling one in to her seatbelt. The other Service Recipient, who was wearing a helmet, buckled herself in without assistance. Staff A then drove back to the first stop, where she and the Subject loaded two more Service Recipients into the van. One Service Recipient sat in the last row and buckled his seatbelt without assistance. The other Service Recipient, an elderly woman, sat in the first row directly behind Staff A, and did not buckle her seatbelt. The Subject sat in the driver's seat. (Justice Center Exhibit 16)

8. Staff A stood up and reached between two Service Recipients in the first row to take a pair of glasses from the Service Recipient in the third row, telling him that she would give them back when they arrived at the IRA. At the same time, the Subject pulled out into traffic causing Staff A to nearly lose her balance. The Subject informed Staff A that she had just received a text notifying her that a service recipient had been left alone in the IRA. (Hearing testimony of Subject; Justice Center

Exhibit 16)

9. While the vehicle was moving, the Subject took a brief call on her cell phone from her supervisor, she also texted staff at the IRA while the van was stopped at a light, and spoke on speaker phone to another staff member. All conversations concerned the service recipient that had been left alone in the IRA, ensuring that the service recipient was safe. (Justice Center Exhibit 16; Hearing testimony of Subject)

10. The vehicle was moving for approximately six minutes, traveling on city streets at approximately 30 miles per hour. There were approximately three or four traffic lights along the route, and the weather that day was sunny and clear. (Hearing testimonies of Subject and Staff A; Justice Center Exhibit 16)

11. OPWDD policy requires that all passengers and drivers wear seatbelts while in agency vehicles. OPWDD policy also requires that when more than one staff accompany service recipients in agency vehicles, the additional staff must sit with the service recipients, not in the front passenger seat, next to the driver. (Justice Center Exhibit 14)

12. OPWDD policy requires that staff comply with all state traffic laws. The same policy prohibits cell phone use by the driver “unless it is an emergency”. (Justice Center Exhibit 14)

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) as:

(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 and Category 3, which are 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.

(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 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 1-15) The investigation underlying the substantiated report was conducted by Investigator [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf, and Staff A also testified on the Subject’s behalf.

The Justice Center submitted a video with audio of the incident, and a separate audio recording of witness interviews. (Justice Center Exhibit 16) On consent of the parties, the Administrative Law Judge presiding over this hearing took judicial notice of New York State Vehicle and Traffic Law §§ 1225-c and 1229-c; U.S. Department of Transportation National Highway Traffic Safety Administration (NHTSA) Traffic Safety Facts Research Note Report No. DOT HS 812 326, NHTSA Traffic Safety Facts Report No. DOT HS 812 374, NHTSA Traffic Safety Facts Report No. DOT HS

812 413; and NHTSA CODES Report to Congress 1996: Benefits of Safety Belts and Motorcycle Helmets.

In order to sustain an allegation of neglect, the Justice Center must prove that the Subject was a custodian who owed a duty to the Service Recipient, that she breached that duty, and that her breach either resulted in or was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. (SSL § 488[1][h])

Allegation 1

The Subject does not dispute the material facts regarding this allegation. She admitted that she owed a duty of care to the Service Recipients to ensure that they were all buckled into their seatbelts, and that she breached this duty due to lack of attention on her part. The Subject also admits that her breach could have resulted in physical injury to the Service Recipients. The record, including the video and audio recordings support these concessions. Specifically, the Service Recipient sitting in the first row, next to the van door, appeared frail and needed to use a walker. Justice Center Exhibit 16) If there had been a sudden stop, or a quick turn during this trip, it was likely that this Service Recipient could have fallen off the bench seat. Accordingly, the substantiated report will not be amended or sealed.

The sole issue to be decided is whether the Subject's conduct seriously endangered the health, safety or welfare of the Service Recipients. While it is well settled that wearing a seat belt is safer than travelling unrestrained, there was no evidence introduced at the hearing to show that the Subject's conduct seriously endangered the Service Recipients' health, safety or welfare. The vehicle was travelling with moderate to light traffic on a clear day, and the trip was relatively short.

However, the Subject's conduct violated OPWDD policy, and placed the Service Recipients at risk of physical injury. Therefore, based on the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report should be properly categorized as a Category 3 act.

Allegation 2

Again, the Subject does not dispute the material facts of this allegation. She admits that she responded to two phone calls on her cell phone from her supervisors regarding the service recipient that had been left alone in the IRA. In her defense, the Subject argued that the phone use was allowed under OPWDD policy because she was addressing an emergency situation. (Justice Center Exhibit 14; Hearing testimony of Subject)

OPWDD policy is inconsistent in that it requires staff to comply with New York State Vehicle and Traffic Law, yet it carves out an emergency exception that is not consistent with the emergency exception in that law. (NY CLS Veh & Tr § 1225-c[3]) In this case, the Subject's brief use of the cell phone was excusable under that exception in the policy. In the first conversation, the Subject told her supervisor that she could not talk and ended the conversation within a few seconds. The Subject had her phone on speaker for at least a portion of the second conversation. (Hearing testimony of Subject; Justice Center Exhibit 16) The Subject's testimony regarding this material fact is credited evidence. The Justice Center argued that the Subject should have pulled over to speak on her phone. However, that would have delayed her returning to the IRA where, to her knowledge at the time, the other service recipient was unsupervised. The Subject was faced with an impossible decision where any action on her part could theoretically constitute a breach of her duty to one or more service recipients. Under these circumstances, where the Subject had conflicting duties, she cannot be held to have neglected the Service Recipients by using her cell phone.

Accordingly, the Justice Center has not proven by a preponderance of the evidence that the Subject committed neglect as alleged. The substantiated report will be amended and sealed.

DECISION:

The request of [REDACTED] that Allegation 1 of the substantiated report dated [REDACTED] be amended and sealed is

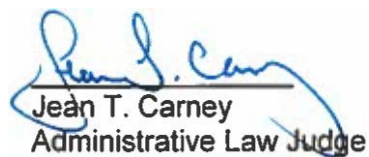
denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

The substantiated report should be properly categorized as a Category 3 act.

The request of [REDACTED] that Allegation 2 of the substantiated report dated [REDACTED] be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed neglect.

This decision is recommended by Jean T. Carney, Administrative Hearings Unit.

DATED: December 1, 2017
Schenectady, New York


Jean T. Carney
Administrative Law Judge