



THE LAW APPLIED[®]

Putting Justice Back in the
Justice Center:
An Update from the HR
Trenches

Linda J. Clark, Esq.

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Audience Participation

- What has your experience been with the Justice Center?
- What do you see at the benefits of the agency?
- What problems have you experienced?
- What impact has this had on your staff?
- Are the people you serve better “protected”?
- Has quality improved?
- What should be the focus of the Justice Center?
- **What problems have you had?**

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Top issues?

- Staffing/oversight
- Staff Boundaries
- False Reporting
- V&T violations
- Wrongful Conduct
- Death reviews
- Interviews/Interrogations
 - Right to Counsel
 - Upjohn Warnings
 - Use immunity statements
- Appeals /Investigative Summary

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Justice Center Audits and Investigations

- Justice Center has broad authority for tracking, investigating, prosecuting or otherwise pursuing serious abuse and neglect complaints.
- Jurisdiction reaches to facilities overseen by (OMH), (OPWDD), (OCFS), and (OASAS). Also covered are certain adult homes operated by the Department of Health (DOH), and residential schools operated by NYSED.

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Intent of PPSNA

“The purpose of this legislation is to create a durable set of consistent safeguards for all vulnerable persons that will protect them against abuse, neglect and other conduct that may jeopardize their health, safety and welfare, **and to provide fair treatment to the employees upon whom they depend.**”

Primary objective... creation of the Justice Center for the Protection of People With Special Needs

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Implementation Problems

Unprepared for the volume of calls and faxes received

Background screening delays

Lack of trained staff to investigate fully and in timely fashion

Lack of guidance on definitions of abuse/neglect

Inconsistent conduct by investigators

Inconsistent classification of cases

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Why Is This So Important?

More
confusing than
ever

No one knows
what to report
to just report
everything

Obstruction
charges
looming

Inspector
General
Bureau
surveying too

Expansion of
Justice Center
authority

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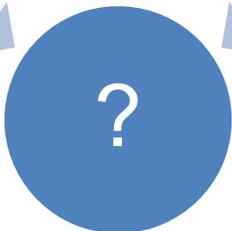
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Perfect Storm... Management Risks!

Unclear
regulations

Obstruction!

Lack of
guidance



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Justice Center Updates



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Five Year Progress Report

- **Focus:** Data and initiatives information
- **Some Highlights:**
 - 1,153,000 checks of the Staff Exclusion List by Providers
 - 175 investigators dedicated to agency investigations
 - 3,300 investigators trained by agency Law Enforcement Training Academy
 - Justice Center attorneys represented the State in nearly 800 disciplinary hearings

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Five Year Progress Report

- Investigation highlights:
 - 46,000 investigations
 - 16,000 (33%) cases substantiated
 - Nearly 80% in Categories 3 or 4
 - Less than 3% in Category 1
 - 450 former staff put on Staff Exclusion List
 - 550 prosecutions conducted
 - 85% prosecutorial conviction rate

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3/19 Data Report: Substantiated Abuse & Neglect Cases by Category

LESS THAN
4% of substantiated abuse and neglect cases have a Category One finding.

Category One: is defined generally as serious physical abuse, sexual abuse or other serious conduct by custodians. Certain sub-categories of category one conduct may not involve actual harm to a service recipient; however, more often than not, category one conduct has resulted in harm.

	March	2019 YTD
Category One Cases	6	31
State Operated	1	5
Non-State Operated	5	26

Category Two: is defined as conduct where the custodian seriously endangers the health, safety, or welfare of a service recipient by committing an act of abuse or neglect. Category two includes conduct that does not result in actual harm.

	March	2019 YTD
Category Two Cases	69	163
State Operated	10	36
Non-State Operated	59	127

Category Three: there is a preponderance of the evidence to establish every element of at least one of the eight types of abuse or neglect defined in the Social Services Law.⁵

	March	2019 YTD
Category Three Cases	275	664
State Operated	34	87
Non-State Operated	241	577

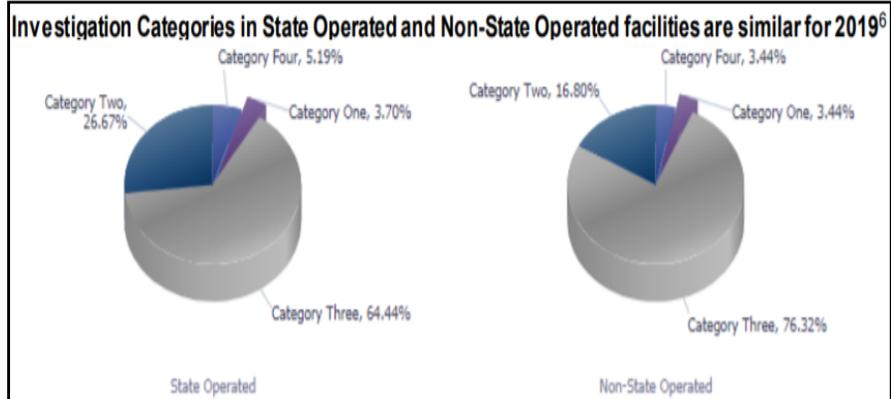
Category Four: this category refers to conditions at a facility or provider agency that expose service recipients to harm or risk of harm, but where individual staff culpability for the abuse or neglect is mitigated by systemic problems, such as inadequate staffing, management, training or supervision. It also applies when abuse or neglect against a service recipient has been substantiated, but the responsible person cannot be identified. Category four findings are made against organizations and providers, not individuals.

	March	2019 YTD
Category Four Cases	9	33
State Operated	2	7
Non-State Operated	7	26

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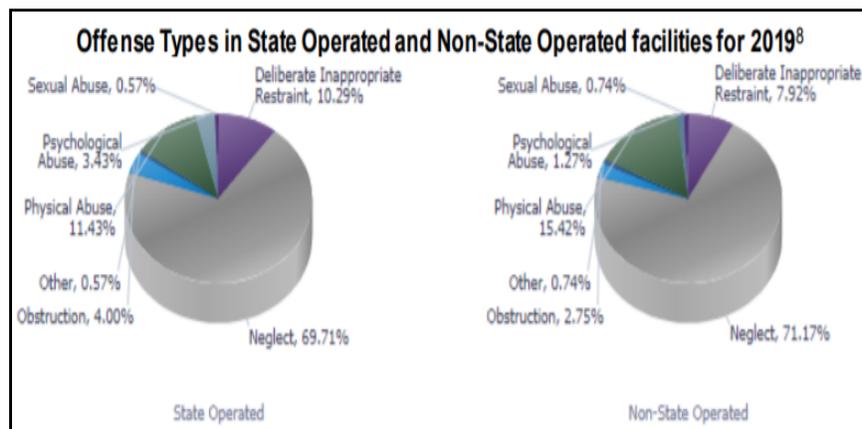
Substantiated Abuse & Neglect Cases by Category, cont.



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Data Report: Substantiated Abuse & Neglect Cases by Offense



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Data Report: Staff Exclusion List

538 individuals have been placed on the Staff Exclusion List since July 30, 2013, preventing them from ever securing a position in an agency that serves vulnerable populations.



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Data Report: Criminal Prosecutions

652 criminal prosecutions have been initiated since July 30, 2013, by the Justice Center or by local district attorney offices.

- Arrest can be by the Justice Center or other law enforcement agencies
- Justice Center prosecutors “are empowered” to handle all aspects of criminal prosecutions
- May also provide assistance to local DAs, as needed

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Data Report: Death Assessments & Reviews

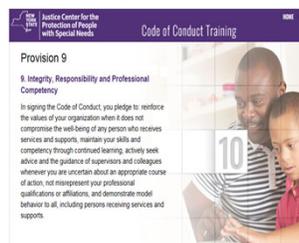
- In 2019, Justice Center closed 29 abuse and neglect investigation cases in which a death was involved
 - 13 of these cases had at least 1 substantiated allegation of abuse or neglect, which may or may not have caused or contributed to the death in question

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Online Code of Conduct Training

- Justice Center released online Code of Conduct training
 - <https://www.justicecenter.ny.gov/resources-provider-agencies>
- Interactive training:
 - Overview of Code of Conduct
 - Scenarios asking viewers to apply provisions
- Not mandatory – can be used as a resource and completed at own pace



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Guidance on Reducing the Use of Restraints

- Justice Center reviewed data from 2.5 years of substantiated abuse cases
 - Inappropriate use of restraints results in physical injury 60% of the time
- Published 6-part toolkit on reducing the use of restraints:
 - Information on using other de-escalation methods to prevent a crisis
 - Fact sheets for providers, direct-care staff, and advocates
 - Post-restraint debriefing for staff
 - Staff check-in sheet

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Optics- Recent Media Reports

Fuel the Fire

timesunion News Sports Business Entertainment Living Blogs Jobs Hon

Investigation opened into Schenectady group home death Family alleges Wally Lassiter, 26, was found unresponsive, bundled up in a hot bedroom

By Lauren Stanforth · Published 4:04 pm EDT, Monday, July 16, 2018



Photo: Provided By Katarina Lassiter

IMAGE 1 OF 18

Photos of Wally Lassiter, 26, who died at a group home in Schenectady on July 4, 2018. Photos provided by Katarina Lassiter.

NEW CARD.
MORE GETAWAYS.
NO ANNUAL FEE.*

SCHENECTADY — The state's Justice Center has opened an investigation into the recent death of a 26-year-old man at a group home on Londonderry Road.



FROM THE WEB



Beverly Hills Surge To Wrinkles™ (Try 1)
Beverly Hills MD



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News

Investigation underway after man found dead for 37 days inside Albany-area recovery center

By: WTEN

Posted: Jun 04, 2018 05:09 PM EDT
Updated: Jun 04, 2018 05:09 PM EDT




TROY, N.Y. (NEWS10) - - For 37 days, no one realized a New Jersey man was dead inside his room at a local halfway house. His grieving mother is now looking for answers.

"This is what my mission has been since January 12th when I first came up here," Yvonne Ketter-Walls said.

Ketter-Walls wants to know her son's body was left to decompose inside a halfway house in Troy

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Activist IDs dozens of sex offenders placed in group homes for disabled

Should the state investigate?

By Rachel Silberstein Updated 12:56 pm EDT, Friday, September 21, 2018



ALBANY – An activist has identified at least 25 registered sex offenders that are being housed at state-run homes and facilities for the developmentally disabled.

Carey argues that placing sex offenders among the general population of disabled individuals violates a state law that prohibits endangering the welfare of an incompetent and physically disabled person, a **class E felony**.

"Moving convicted sex offenders in with the developmentally disabled, which in most cases is no different than moving them in with children, knowingly places our most vulnerable in a likely position of being sexually assaulted or raped," Carey said.

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Perceptions of Progress

timesunion News Sports Business Entertainment Living Blogs Jobs Homes Cars

Five years in, critics say NY agency offers little justice for disabled

The Justice Center was created to prevent, prosecute abuse against the vulnerable

By Bethany Bump Updated 8:13 pm EDT, Monday, July 23, 2018

Critics of the agency maintain it's much more interested in protecting the due process rights of state employees than it is in pursuing criminal justice for victims.

Critics note that since it began, there have been only two known cases in which the center pursued criminal charges following the death of a vulnerable person: **one in 2014** when a disabled man with breathing difficulties didn't get enough oxygen after his nurse fell asleep on the job; **another in 2017** when a 35-year-old disabled woman suffered internal bleeding and broken ribs after being slammed on the ground by staff.

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A Federal Probe of the Justice Center?

NEWS/REGION/STATE

Zeldin, King, others seek federal probe of NY Justice Center

The Republicans say the center, created to protect vulnerable populations, has failed to properly address reports of abuse, sex assault and death at the institutions it is supposed to oversee.

NY reps ask DOJ to investigate agency for 'failure' to protect disabled

State Justice Center doesn't do its job and has no oversight, they say

By Bethany Bump Updated 5:11 pm EST, Tuesday, December 11, 2018

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Congress of the United States
Washington, DC 20515

December 10, 2018

The Honorable Eric S. Dreiband
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Office of the Assistant Attorney General, Main
Washington, D.C. 20530

Since its inception in 2013, the Center has failed to take meaningful steps to address systematic failures, and as such, we request the Department of Justice investigate due process violations and other criminal offenses that the Center has not addressed. While the Center claims to have the legal authority to prosecute criminal cases against disabled persons, the Center brings criminal charges against less than 2.5% of total cases of substantiated abuse or neglect of disabled persons and has declined to investigate nearly 1,400 deaths of developmentally disabled individuals residing in state care.

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Schenectady abuse case used to promote new laws

Advocates say bills would drastically reduce incidents of abuse

[Steven Cook](#)  [@ByStevenCook](#) | May 2, 2018

THE DAILY GAZETTE

ALBANY -- Allegations of physical abuse of a 12-year-old boy at Northeast Parent and Child Society in Schenectady are being used to promote improved safety for those with disabilities in care facilities.

One proposed law would require caregivers to call 911 and the local district attorney's office, as well as a central register, if they suspect abuse. A second bill would require facilities that provide services to developmentally disabled children to have surveillance cameras in facility common areas.

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Fair Chance Act & Criminal Background Checks

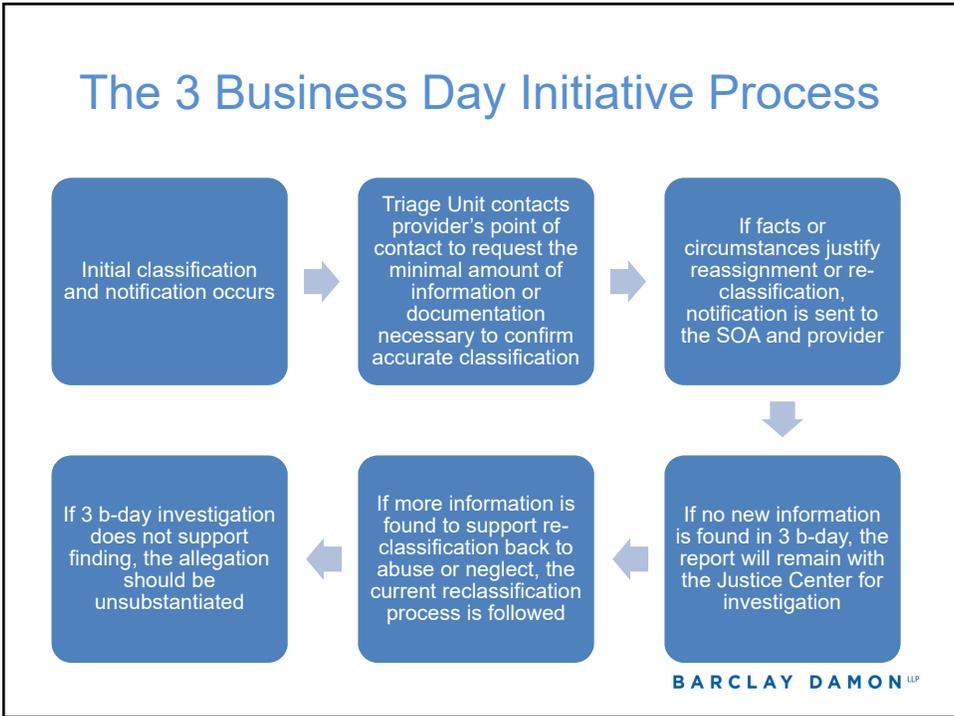
▶ **Does the Fair Chance Act or Ban to Box laws apply to criminal background checks conducted by the Justice Center?**

No, laws prohibiting an employer from asking an applicant about his or her criminal record until after offering a job **do not apply** to criminal background checks conducted by the Justice Center. Applicants for OMH, OPWDD and covered OCFS programs are still required to complete and sign the Applicant Consent Form for Fingerprinting, including answering question #7, as they have done in the past.

Also, countervailing claims and concerns of discriminatory targeting of employees by reporters based upon race

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Reporting Requirements

- Where multiple reports to the VPCR would be made regarding the same incident, a mandated reporter is not required to report the allegation to the VPCR when both of the following elements are met:
 1. When the mandated reporter has actual knowledge that the incident was already reported to the VPCR; **and**
 2. The mandated reporter has actual knowledge that he or she was named in the report as a person with knowledge of the incident.

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Reporting Requirements

- **Actual Knowledge** = Direct and clear awareness that the report was made.
 - Witnessing, reading, overhearing the report being made.
- Justice Center recommends documenting the basis for decision not to report.
 - Location and form of documentation is left to the discretion of the provider agency.
- If exception applies and decision not to report was reasonable and in good faith, no obstruction charges for failing to report.

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Vehicle & Traffic Infractions

- Guidance on whether vehicle and traffic infraction incidents are reportable to the Justice Center
- Must have a service recipient present and/or involved to be reportable
- Includes:
 - Nature of allegation
 - Factors to consider for determining classification
 - Presumptive classification
 - Factors to consider for determining assignment
 - Presumptive assignment

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Vehicle and Traffic Infraction Classification and Assignment Guidance

For incidents to be considered reportable to the NYJC (Significant incidents or Abuse and Neglect) a service recipient must be a victim or have the potential to be considered a victim under the statute. Therefore, all vehicle and traffic infraction incidents must have a service recipient present/involved to be considered for a reportable classification.

Events that occur only when staff are present (when a service recipient is not involved or does not have the potential to be impacted), are Non-NYJC reports and are referred to the SOA for the appropriate administrative follow-up.

Nature of Allegation	Factors to consider for determining classification	Presumptive Classification	Factors to consider for determining assignment	Presumptive Assignment
Vehicle accident	<ul style="list-style-type: none"> Appears to be the fault of the custodian 	A/N	<ul style="list-style-type: none"> Infraction given to driver Witness reports or report of recorded evidence Known or suspected harm/impact to SR reported 	NYJC <i>*Accidents where the custodian appears to be at fault will always be assigned to NYJC</i>
	<ul style="list-style-type: none"> No fault accidents (no fault or appearance of fault of custodian at time of report) 	SI	<ul style="list-style-type: none"> No harm/impact to SR reported 	
Appears to be under the influence of alcohol or drugs while operating motor vehicle	<ul style="list-style-type: none"> Harm/likelihood for harm is assumed 	A/N	<ul style="list-style-type: none"> Direct/ Eye witness Odor Erratic driving 	NYJC
			<ul style="list-style-type: none"> No direct evidence/no eye witness 	SOA

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Justice Center for the Protection of People with Special Needs

[About](#) [Service Recipients and Families](#) [Custodians](#) [Service Providers](#)

Death Review and Investigations Unit

When the death of a vulnerable person occurs in a certain residential facilities or residential programs under the jurisdiction of the Justice Center, it is required to be reported immediately to the Vulnerable Persons Central Register (VPCR) Death Reporting Line. Unit investigators, which include registered nurses, screen all death reports to determine whether or not further investigation is warranted.

The Justice Center may conduct an on-site investigation when:

- An individual commits suicide, either while in a hospital or licensed residential facility, or shortly after discharge from the facility;
- There is an allegation of abuse involving the circumstances of death;
- A death appears to be the result of restraint or seclusion; and/or
- A death appears to be a result of inadequate supervision or medical care from a residential setting.

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Professional Boundaries Prevention Toolkit

Spotlight on Prevention

Partnering to Protect People with Special Needs

Professional Boundaries:

- *Spotlight on Prevention:* Uses Justice Center data to analyze trends and produce materials to prevent abuse and neglect
- Audits, reviews, and investigations have revealed a wide range of boundary concerns exhibited by staff in their work with vulnerable people
- Toolkit was developed to highlight the importance of, and how to develop and maintain, professional boundaries

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Professional Boundaries Prevention Toolkit

Spotlight on Prevention

Partnering to Protect People with Special Needs

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Data Report: Case Outcomes

ON AVERAGE
33% of abuse and neglect cases are substantiated by the Justice Center each year.¹

Case Outcomes
Abuse and neglect case outcomes are determined by the outcome of the allegation(s) within the case. A single case may contain multiple allegations due to multiple subjects, multiple victims or multiple offenses. Cases with at least one substantiated allegation outcome are considered to be substantiated cases. Cases without any substantiated allegations are considered to be unsubstantiated cases. During an investigation, a small percentage of cases are discovered to be outside of the jurisdiction of the Justice Center. These cases are classified as "No Justice Center Jurisdiction."

	March	2019 YTD
Total Closed Abuse and Neglect Cases	1,039	2,836
State Operated Total	197	654
Substantiated	47	135
Unsubstantiated	150	419
No Justice Center Jurisdiction	0	0
Non-State Operated Total	642	2,282
Substantiated	312	756
Unsubstantiated	528	1,519
No Justice Center Jurisdiction	2	7

Investigation Outcomes in State Operated and Non-State Operated facilities are similar for 2019¹



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Legal Updates

Debate Over Justice
Center Authority

Category 4 Cases

Authority to Overturn
Administrative Law
Judges



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State v. Akande

Bronx Sup. Ct. – Dec. 2017

- Charges = Assault and endangering the welfare of a child
- Is the statute authorizing prosecutions by unelected special prosecutors appointed by the governor was constitutional?
 - Court says YES, statute is constitutional on its face
 - Special prosecutor consulted with DA's office
 - Office provided valid, written consent for special prosecutor to present case to grand jury and to prosecute
 - DA need not be present at every hearing

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Matter of Anonymous v. Molik

Court of Appeals – June 2018

- Justice Center findings: Intermediate care facility failed to establish clear supervision protocols for staff after a resident's repeated incidents of improper sexual conduct with other residents
- Is the Justice Center empowered to make and enforce findings of Category 4 abuse or neglect against a facility, regardless of whether specific employees can be identified?
 - Court of Appeals says YES
 - Category 4 is an appropriate findings for failure to implement effective remedial measures regardless of whether specific employees can be identified

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Kelly v. Justice Center

App. Div. 3rd Dep't – May 2018

- Kelly used the word “retarded” while in a classroom discussing mandatory overtime work with staff; heard by two service recipients
- ALJ recommended no preponderance of the evidence to prove neglect
- Justice Center rejected recommendation – substantiated
- Does Social Services Law § 494 prevent the Executive Director from overturning an ALJ?
 - Court says NO
 - Justice Center (through Executive Director or Chief of Staff) has authority to overrule an ALJ

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JC Tactics

- Still overly law enforcement approach
 - Can hide behind law enforcement entities by partnering with them
- Still “guilty” until proven innocent mindset
 - Neglect
 - Obstruction
 - Category 4’s against Provider Agency
- Employee rights still not a priority
- Recent examples of questionable tactics
 - Written statements
 - Working through counsel
 - Unannounced visits to employee homes
 - Misleading employees during interviews
 - Exculpatory omissions

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Issue # 1: Representation

- Justice Center’s Evolving Position:
 - *Previous Position:* For **non-criminal** investigations, you may not have representation or legal counsel during an interview **unless** you are a member of a union and representation is allowed under your collective bargaining agreement.
 - More recent statements suggest counsel will be permitted but not encouraged?

What to Expect if You Are Involved in a Justice Center Investigation | 7

In any criminal investigation, you have certain constitutional rights, which may include a right to have legal counsel present under some circumstances. The Justice Center will respect, and advise you of, those constitutional rights as required by law.

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NEW YORK
STATE OF
OPPORTUNITY.

Justice Center for the
Protection of People
with Special Needs

**What to Expect if You Are Involved in a
Justice Center Investigation**

Guidance for Staff and Volunteers

If you are not a member of a union, you may have an attorney accompany you during questioning. In order to protect your interests, the Justice Center will take steps to ensure that you are aware of any conflicts the attorney representing you may have (e.g., if the attorney representing you also works for your employer).

August 2018

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If Only It Were That Easy...

PPSNA § 552(1):

“If, during an investigation, what appeared to be a non-criminal matter warrants consideration for criminal charges, the matter shall be promptly referred to the criminal unit.”

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Issue # 2: Cooperation & Obstruction

“A mental health provider and its employees are required to cooperate fully with the office (OMH) regarding such investigations....”

“Patients, employees and any other persons may be interviewed in conjunction with any such investigation.”

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Obstruction As A Weapon

- Justice Center threatening “obstruction” charge now rampant
- Triaging of incidents has become a focus
- This creates significant issues given confusing terms and definitions
 - Conduct between patients?
 - Abuse – “or causing the likelihood of”
 - Neglect – “any action, inaction or lack of attention”
- Places providers in a bad position of Monday morning quarterbacking by the Justice Center

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Obstruction



What we think it is:

- Destroying evidence
- Intimidating witnesses
- Falsifying records
- Lying during questioning



What we think it is NOT:

- Declining to speak with the Justice Center
- Requesting representation or an attorney
- Determining that something is not a reportable incident based on a good faith examination of the facts
- Conducting an investigation, including interview of witnesses

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Employee Rights During an Investigation

1. To remain silent (you do not have to agree to be interviewed);
2. To ask if you are a target (subject) of the investigation;
3. To ask if the investigation is criminal in nature OR *has the potential to become criminal in nature*;
4. To request immunity from prosecution if you agree to be interviewed;
5. To pick a location to meet. You can refuse to meet investigators either at work or at another private or public location (park, coffee shop, etc.);
6. To have someone present if you decide to speak with investigators (and if this is not provided – then to end the questioning); **and**
7. Not to be a witness in any trial (unless you're subpoenaed)

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Witness Obligations During an Investigation: DON'T

1. Obstruct the investigation in any way
2. Alter or destroy documentation
3. Fabricate information or documentation
4. Guess at answers or make assumptions
5. Give an answer if you are confused by the question
6. Coordinate with others to give a consistent description of the incident
7. Attempt to influence someone else's testimony
8. Retaliate in any manner against a person who reported or was involved in the incident
9. Assume your cooperation will mean you will be "cut a break" or "let off the hook"

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Appeals Process

- Within 30 days after the subject of the report is notified that the report is substantiated, the subject may request that the vulnerable persons' central register amend the findings of the report. Request is reviewed by Administrative Appeals Unit.
- If the register does not amend the findings of the report in accordance with such request, the subject shall have the right to be heard before an administrative law judge (ALJ), with a de novo standard of review.
- ALJ decisions can be challenged through an Article 78 action.

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Problems with Appeals Process

- Subjects do not get copy of investigation summary until after 30 days
- Reports cherry pick evidence to include – exculpatory evidence omitted
- Subjects cannot afford counsel to defend themselves
- ALJs are employees of the JC
- Can take months/years for appeal to be heard
- Category 4 cases “on hold”
- Executive Director can overturn decisions of ALJs

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My Advice

- Share information
- Document, Document, Document
- Train, Train, Train
- Proactively Monitor Operations
- Provide employees with resources and info
- Demand accountability
- Develop positive relationship with JC investigators
- Appeal substantiated findings
- Review cases where the agency may want to assist with legal fees

Quality



Compliance + Risk Management

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How to Protect Yourself: Incident Response

1. Follow your mission and internal policies and procedures!
 - Ask questions
2. Safeguard patient
3. Report (right away) **OR** document reasons if you don't report
 - To VPCR, Supervisor, and Compliance
4. Take all investigations seriously- Protect Your Pedigree as a Provider

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Updated Guidance for Staff

Guidance for staff can be found on the Justice Center website under the Custodian Tab including:

- Reporting incidents
- Investigation process
- Appeals process

NEW YORK STATE

Services News Government Local

Justice Center for the Protection of People with Special Needs

About Service Recipients and Families Custodians Service Providers

Our Vision

People with special needs shall be protected from abuse, neglect and mistreatment. This will be accomplished by assuring that the state maintains the nation's highest standards of health, safety and dignity, and by supporting the dedicated men and women who provide services.

READ MORE...

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Abuse Prevention Resources

Spotlight on Prevention

Found at: <https://www.justicecenter.ny.gov/spotlight-prevention/home>

- Tool Kits
 - Caregiver Fatigue
 - Dangers of Being Left Unattended in Vehicles
 - **NEW** Reducing the Use of Restraints
- Self-Assessment for an Abuse Free Environment (SAAFE)
- Model Abuse Prevention Policy
- Abuse Prevention Links: Includes training material, 'how to' guides and web information

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Linda Clark is a nationally recognized litigator and chair of the firm's Health Care Controversies practice. She has served as lead litigation counsel, as well as national, regional and local counsel, in a range of administrative proceedings, hearings and appeals before various federal and state regulatory agencies including the New York Office of the Medicaid Inspector General, New York State Department of Health, and New York State Workers' Compensation Board.

New York State Justice Center Matters

Linda has represented numerous not-for-profit and for-profit entities and individuals in investigations commenced by the New York State Justice Center for the Protection of People With Special Needs, including

- Providing management and staff with training related to their duty to report and their rights and obligations related to Justice Center investigations and requests.
- Advising providers on issues related to a provider's civil liability where a Justice Center investigation has the potential to result in a substantiated finding.
- Providing effective representation during all aspects of Justice Center Proceedings from the moment an allegation of abuse or neglect is reported to the Justice Center through completion of the administrative appeals process.

Barclay Damon has been on the front lines advocating for transparency in Justice Center investigations including the successful appeal and challenge of substantiated findings, both administratively and in Court proceedings.

For more information, including alerts and blogs on Justice Center matters, go to:

<http://barclaydamon.com/profiles/Linda-J-Clark>

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