

JUSTICE OR INJUSTICE: A HISTORY AND CRITIQUE OF THE
NEW YORK STATE JUSTICE CENTER FOR THE PROTECTION
OF PEOPLE WITH SPECIAL NEEDS

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I. INTRODUCTION

The creation of the New York State Justice Center for the Protection of People with Special Needs (“Justice Center”) was announced with great fanfare in 2013.¹ Its goal is laudable: strengthening and standardizing “the safety net for vulnerable persons, adults and children alike, who are receiving care from New York’s human service agencies and programs.”² Its jurisdiction is broad: covering residential and non-residential programs and provider agencies that come within the purview of six state oversight agencies, namely, the Office of Mental Health, the Office for People with Developmental Disabilities, the Office of Alcohol and Substance Abuse Services, the Office of Children and Family Services, the Department of Health, and the State Education Department.³ Its powers are comprehensive: investigating allegations of abuse, neglect, and significant incidents, and disciplining individuals and agencies pursuant to administrative authority. In addition, it can prosecute crimes of neglect and abuse pursuant to criminal prosecutorial authority.⁴

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¹ See Press Release, Governor Andrew Cuomo, Governor Cuomo Announces Opening of the Justice Center for the Protection of People with Special Needs (June 29, 2013), <https://www.governor.ny.gov/news/governor-cuomo-announces-opening-justice-center-protection-people-special-needs>; see, e.g., Memorandum from Elana Marton, Deputy Dir., Council on Children & Families, to the N.Y. State Legislature 50, 51 (July 6, 2016) (on file with author).

² S. B. 7749, 234th Reg. Sess. (N.Y. 2011) (enacted).

³ See *id.*

⁴ See *id.*

Given that over 270,000 vulnerable children and adults live in residential facilities overseen by the state and that numerous other individuals receive services from “day programs operated, licensed[,] or certified by the state[,]”⁵ the creation of the Justice Center is consistent with New York’s history of oversight of vulnerable individuals. The state has overseen various state and municipal programs and private organizations that have addressed the needs of vulnerable individuals practically since New York’s first poorhouse opened in 1736.⁶ The development of that oversight has been a series of responses to perceived deficiencies of an existing system, and the creation of the Justice Center is, much in the same way, a response to a 2011 study commissioned by the Governor to examine the treatment and care of vulnerable adults.⁷

The Justice Center’s jurisdiction reflects a departure, however, from traditional oversight.⁸ State administrative and regulatory review has been carried out by specialized state agencies established during the late nineteenth and twentieth centuries to address specific categories of individuals receiving care and treatment according to their needs.⁹ Residential and day treatment programs, as well as their custodians and employees, have been disciplined for abuse and neglect in accordance with state regulations created by these agencies.¹⁰ Criminal prosecutions have also been referred to county district attorneys.¹¹

The Justice Center unites all specialized agencies, all vulnerable

⁵ *Id.*

⁶ See *New York State Board of Charities: Biographical Notes*, SOC. NETWORK ARCHIVAL CONTEXT, <http://socialarchive.iath.virginia.edu/ark:/99166/w6129qv4> (last visited June 10, 2017) [hereinafter *Board of Charities Biographical Notes*].

⁷ CLARENCE J. SUNDAM, *THE MEASURE OF A SOCIETY: PROTECTION OF VULNERABLE PERSONS IN RESIDENTIAL FACILITIES AGAINST ABUSE & NEGLECT* 2, 11, 12 (2012), <http://www.essexstreet.biz/files/justice4specialneeds.pdf>.

⁸ STATE ARCHIVES & RECORDS ADMIN., N.Y. STATE EDUC. DEP’T, *PRELIMINARY GUIDE TO MENTAL HEALTH DOCUMENTARY SOURCES IN NEW YORK STATE*, 8 (2000), http://www.archives.nysed.gov/common/archives/files/res_topics_health_mh_recguide.pdf [hereinafter *PRELIMINARY GUIDE TO MENTAL HEALTH*] (discussing the Commission on Quality of Care for the Mentally Disabled).

⁹ See DAVID M. SCHNEIDER & ALBERT DEUTSCH, *THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1867–1940*, at 14 (1969); Linda S. Stuhler, *A Brief History of Government Charity in New York (1603–1900)*, SOC. WELFARE HIST. PROJECT, <http://socialwelfare.library.vcu.edu/issues/brief-history-state-charity-new-york-1603-1900/> (last visited June 12, 2017).

¹⁰ See N.Y. COMP. CODES R. & REGS. tit. 14, § 624.3(b) (2016); see also *Frequently Asked Questions—Justice Center*, JUST. CTR. FOR PROTECTION PEOPLE WITH SPECIAL NEEDS, <https://www.justicecenter.ny.gov/about/faq> (last visited June 10, 2017) (providing the types of conduct that results in discipline).

¹¹ See N.Y. COMP. CODES R. & REGS. tit. 14, § 624.5(n)(2), (q) (1985); *Frequently Asked Questions—Justice Center*, *supra* note 10.

individuals with diverse needs, and all custodians and employees trained to meet those needs under one additional layer of uniform rules and regulations, with potential administrative discipline, civil liability, and criminal prosecution also under the same umbrella.¹²

This article explores the history of state oversight in New York and the departure represented by the Justice Center. This article first traces the early history of oversight.¹³ It then discusses the role of the Commission on Quality of Care for the Mentally Disabled, an antecedent organization similar to the Justice Center. Next, it examines the Justice Center itself. Last, this article concludes with some reflections on the Center.

II. HISTORY

Poorhouses were part of New York's landscape from early colonial days as the solution for housing people in poverty who refused to work, were unable to work because of age, illness, addiction, or disability, or were willing but could not find work.¹⁴ By 1824, as a consequence of the Poorhouse Act,¹⁵ people who were elderly, orphaned, had disabilities, or a mental illness were housed together indiscriminately in poorhouses.¹⁶ New York took a significant step toward state oversight of these institutions in 1827 by requiring that local poorhouse officials submit annual reports to the Secretary of State.¹⁷ Thereafter, in 1867, the Board of State Commissioners of Public Charities ("State Board of Charities")¹⁸ was established with the purpose of inspecting all charitable institutions—including poorhouses receiving state aid—to determine whether state funds were being properly spent.¹⁹ The Governor had urged the creation of such a commission, deeming that a "reasonable degree of [state] supervision" was necessary because a great number of institutions were providing care to "the aged, the helpless, the infirm[,] and the young," using a substantial amount of public funds.²⁰

¹² See SUNDAM, *supra* note 7, at 6; N.Y. EXEC. LAW § 552(1) (McKinney 2017).

¹³ Students of state government will not be surprised to learn that the path to the creation of the six agencies that now come under the umbrella of the Justice Center was long and circuitous. This article does not attempt to recreate that path. Experts have already done so and we refer our readers to them. See, e.g., SCHNEIDER & DEUTSCH, *supra* note 9, at xvii.

¹⁴ See *Board of Charities Biographical Notes*, *supra* note 6.

¹⁵ Act of Apr. 16, 1825, ch. CXC, 1825 N.Y. Laws.

¹⁶ See SCHNEIDER & DEUTSCH, *supra* note 9, at 17.

¹⁷ See *id.* at 239, 241.

¹⁸ *Board of Charities Biographical Notes*, *supra* note 6.

¹⁹ See SCHNEIDER & DEUTSCH, *supra* note 9, at 14–15.

²⁰ *Id.*

The Board of Charities' annual reports revealed that the conditions in the poorhouses were deplorable, with overcrowding and the intermingling of the young and old, the sick and the well, and people with mental illness and disabilities.²¹ To assist it in assembling these reports, the Board of Charities created a standardized form for collecting data from the institutions it inspected.²² It used the data it amassed to consider how the individuals in the poorhouses could be categorized so that they could receive care in more appropriate settings²³—a desire that played out in various restructurings of state government that occurred throughout the years.²⁴ The Board of Charities' reports stimulated interest in the plight of these individuals and the need for corrective action.²⁵ The Board of Charities²⁶ was enshrined in Article VIII of the New York State Constitution in 1894.²⁷ Known now as the “Board of Social Welfare,”²⁸ its role has been modified through a variety of state government reorganizations.²⁹ Although today it is described as “responsible for overseeing the quality of State policies and programs relating to child and adult care to protect the welfare of needy and dependent persons,”³⁰ this role appears to have now been subsumed by the Justice Center.³¹

Among the first groups to be diverted from the poorhouse were individuals with mental illness.³² By the late 1800s, New York had

²¹ *Id.* at 16–17.

²² *Id.* at 19.

²³ *See id.* at 18–19. The Board was assisted in its work by the State Charities Aid Association (“SCAA”), a private organization created by Louisa Lee Schuyler in 1872 to “cooperate closely” with the Board. *Id.* at 20–21. The SCAA’s role became official when in 1873, the Board was authorized by state law to delegate its authority to visit and inspect to third parties, which included SCAA. *Id.* at 23–24. By 1881, SCAA had the authority to visit and inspect poorhouses in its own right. *Id.* at 24; *see* Stuhler, *supra* note 9.

²⁴ *See Board of Charities Biographical Notes, supra* note 6.

²⁵ *See* SCHNEIDER & DEUTSCH, *supra* note 9, at 96.

²⁶ *See* Stuhler, *supra* note 9 (noting that the Board’s name was changed to the “State Board of Charities” in 1873).

²⁷ *See Board of Charities Biographical Notes, supra* note 6.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *New York State Board of Social Welfare Agency History Record*, ARCHIVEGRID, <https://beta.worldcat.org/archivegrid/collection/data/86102312> (last visited June 12, 2017).

³¹ *See, e.g., Statement of Vision, Mission, Values and Guiding Principles*, JUST. CTR. FOR PROTECTION PEOPLE WITH SPECIAL NEEDS, <https://www.justicecenter.ny.gov/about/vision> (last visited June 12, 2017) (“The Justice Center is committed to supporting and protecting the health, safety, and dignity of all people with special needs and disabilities through advocacy of their civil rights, prevention of mistreatment, and investigation of all allegations of abuse and neglect so that appropriate actions are taken.”).

³² *See* SCHNEIDER & DEUTSCH, *supra* note 9, at 96.

seven state hospitals for treating individuals with mental illness.³³ Although many local asylums remained in operation, eventually those advocating for state control of these facilities carried the day, and in 1890, the State Care Act established the principal of state care, making the law a milestone in the history of the care for individuals with mental illness.³⁴ Oversight jurisdiction was transferred from the Board of Charities to the State Commission of Lunacy in 1889,³⁵ and from there, to the State Hospital Commission in 1912,³⁶ which morphed into the Department of Mental Hygiene in 1927.³⁷ As a consequence of state government reorganization in 1978,³⁸ the Department of Mental Hygiene was divided into several more specialized agencies,³⁹ including the Office of Mental Health, which today oversees twenty-five mental health residential facilities⁴⁰ and “regulates, certifies and oversees more than 4,500 programs . . . [that include] various inpatient and outpatient programs, emergency, community support, residential[,] and family care programs” operated by local governments and nonprofit agencies.⁴¹

The purpose of the legislation was to ensure that available resources were used more efficiently and effectively to provide for the unique needs of diverse populations.⁴² Part of the Office of Mental Health’s creation was the oversight component of a Board of Visitors.⁴³ Each hospital under the jurisdiction of the Office of Mental Health now has a Board of Visitors charged with visiting the facility and reporting on conditions “to the Governor, to the commissioner[,] and to the [then-existing] chairman of the state Commission on Quality of Care for the Mentally Disabled.”⁴⁴ The

³³ See Stuhler, *supra* note 9.

³⁴ See SCHNEIDER & DEUTSCH, *supra* note 9, at 96–97 (noting that the legislation also removed the term “asylum” from the title of state institutions where people with mental illness received care).

³⁵ See Stuhler, *supra* note 9.

³⁶ See SCHNEIDER & DEUTSCH, *supra* note 9, at 97–98.

³⁷ See *id.* at 98.

³⁸ See Sarah F. Liebschutz, *Executive Branch: Wielding Executive Power*, in THE ENCYCLOPEDIA OF NEW YORK STATE 537 (Peter Eisenstadt et al. eds., 2005); see also Act of Aug. 11, 1977, ch. 978, § 1, 1977 N.Y. Sess. Laws 1 (McKinney) (detailing the text of the bill).

³⁹ See Liebschutz, *supra* note 38, at 537.

⁴⁰ See *Directory of OMH Facilities*, OFF. MENTAL HEALTH, https://www.omh.ny.gov/omhweb/aboutomh/omh_facility.html (last visited June 11, 2017).

⁴¹ *About OMH*, OFF. MENTAL HEALTH, <https://www.omh.ny.gov/omhweb/about/> (last visited June 11, 2017).

⁴² See Act of Aug. 11, 1977, ch. 978, § 1, 1977 N.Y. Sess. Laws 1 (McKinney).

⁴³ See *id.* at § 7.33(a) (codified as amended at N.Y. MENTAL HYG. LAW § 7.33 (McKinney 2017)).

⁴⁴ MENTAL HYG. LAW § 7.33(h).

Board of Visitors must make an annual independent assessment of the facility.⁴⁵ The Board of Visitors is also charged with inspecting family care homes and residential care centers for adults with the same reporting requirements.⁴⁶ Adult homes, which often include residents with mental illness, ultimately have come under the supervision of the Department of Health.⁴⁷

The Office of Mental Retardation and Developmental Disabilities, discussed below,⁴⁸ and the Office of Alcohol and Substance Abuse Services, also emerged from the 1978 reorganization.⁴⁹ Today, the Office of Alcohol and Substance Abuse Services “regulates the state’s system of chemical dependence and gambling treatment agencies.”⁵⁰ It operates twelve in-patient rehabilitation facilities that provide services to over 8,000 persons annually and regulates nearly 1,000 chemical dependence programs.⁵¹

In 1851, a specialized facility to care for individuals with disabilities was established experimentally in Albany, New York,⁵² and later moved to Syracuse, New York.⁵³ At first, oversight of this hospital and others fell to the Charities Board,⁵⁴ and then to the Department of Mental Hygiene.⁵⁵ Then, as a result of the revelation that over 6,000 individuals with intellectual disabilities were housed in deplorable conditions at the Willowbrook State School on Staten Island, the Department of Mental Hygiene, which had overseen schools like Willowbrook, was divided into three agencies in 1977.⁵⁶ Out of this division came the Office of Mental Retardation and Developmental Disabilities (renamed the “Office

⁴⁵ See *id.* § 7.33(j).

⁴⁶ See *id.* § 7.33(i).

⁴⁷ See Lisa Newcomb, *Adult Home*, in *LIVABLE NEW YORK RESOURCE MANUAL* (Vera Prosper ed., 2012), <https://aging.ny.gov/livableny/ResourceManual/Housing/III1r.pdf>.

⁴⁸ See Liebschutz, *supra* note 38, at 537.

⁴⁹ See *id.*; Act of Aug. 11, 1977, ch. 978, § 1, 1977 N.Y. Sess. Laws 1 (McKinney).

⁵⁰ *OASAS Overview*, OFF. ALCOHOL & SUBSTANCE ABUSE SERVS., <https://oasas.ny.gov/pio/oasas.cfm#Overview> (last visited June 11, 2017).

⁵¹ See *id.*

⁵² See HENRY MILLS HURD ET AL., 3 *THE INSTITUTIONAL CARE OF THE INSANE IN THE UNITED STATES AND CANADA* 248 (1916).

⁵³ See *id.*

⁵⁴ See Act of Apr. 22, 1875, ch. 140, § 2, 1875 N.Y. Sess. Laws 124 (McKinney) (instructing poorhouses and almshouses to submit reports to the Board of Charities).

⁵⁵ See generally Murray Schumach, *Willowbrook is Assailed by Unit on the Retarded*, N.Y. TIMES (Oct. 12, 1974), http://www.nytimes.com/1974/10/12/archives/willowbrook-is-assailed-by-unit-on-the-retarded.html?_r=0 (stating that Willowbrook State School was overseen by the Department of Mental Hygiene).

⁵⁶ See Act of Aug. 11, 1977, ch. 978, § 1, 1977 N.Y. Sess. Laws 1 (McKinney); Dalton Brown, *The Horrifying Truth Uncovered: Willowbrook State School*, ROOTED RTS. (Oct. 15, 2014), <http://www.rootedinrights.org/the-horrifying-truth-uncovered-willowbrook-state-school>.

for People with Developmental Disabilities” in 2010), with specialized knowledge on the care of individuals with intellectual disabilities.⁵⁷

Today, the Office for People with Developmental Disabilities oversees the provision of services to approximately 130,000 individuals with developmental disabilities, including residential services to more than 41,000 individuals.⁵⁸ It also oversees self-directed care, “a service option available to any individual and family who wants to take greater control over the services and supports they receive” that also allows an individual “the fullest personalization of services.”⁵⁹ As previously stated, the 1978 reorganization also created the Board of Visitors as an oversight component for the Office for People with Developmental Disabilities.⁶⁰ Again, the Board of Visitors is charged with visiting and inspecting state operated facilities,⁶¹ family care homes,⁶² and community residences,⁶³ and reporting on conditions to the Governor, the commissioner of the Office for People with Developmental Disabilities, and the then-existing Commission on Quality of Care for the Mentally Disabled.⁶⁴

Oversight of education of children with disabilities in designated residential schools and other specialized programs ultimately has come under the jurisdiction of the State Department of Education,⁶⁵ and responsibility for children with developmental disabilities who participate in “[o]vernight, summer day and traveling summer day camps” has come under the jurisdiction of the Department of Health.⁶⁶

⁵⁷ See Liebschutz, *supra* note 38, at 537; *About OPWDD: Agency Overview*, OFF. FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, https://opwdd.ny.gov/opwdd_about/overview_of_agency (last visited June 13, 2017).

⁵⁸ See OFF. FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, PROGRESS REPORT TO THE LEGISLATURE: UPDATE ON PROGRESS IN KEY AREAS OF TRANSFORMATION 3 (2016), <https://opwdd.ny.gov/sites/default/files/documents/Oct-2016-OPWDD-Report-to-Legislature.pdf>.

⁵⁹ *Id.* at 10.

⁶⁰ See Act of Aug. 11, 1977, ch. 978, § 7.33, 1977 N.Y. Sess. Laws 15 (McKinney) (codified as amended at N.Y. MENTAL HYG. LAW § 13.33 (McKinney 2017)).

⁶¹ MENTAL HYG. LAW § 13.33(h).

⁶² *Id.* § 13.33(i)(1).

⁶³ *Id.* § 13.33(i)(2).

⁶⁴ *Id.* §§ 13.33(h), (i).

⁶⁵ See JUSTICE CTR. FOR THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS, ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE 18 (2015), <https://www.justicecenter.ny.gov/sites/default/files/documents/JusticeCenter2015AnnualReport.pdf> [hereinafter JUSTICE CENTER ANNUAL REPORT]; *Approved Private, Special Act, State-Operated and State-Supported Schools in New York State*, STATE EDUC. DEP'T: OFF. SPECIAL EDUC., <http://www.p12.nysed.gov/specialed/privateschools/home.html> (last visited June 13, 2017).

⁶⁶ See JUSTICE CENTER ANNUAL REPORT, *supra* note 65, at 18.

With the enactment of the Children's Law in 1875, children were no longer permitted to live in poorhouses.⁶⁷ The goal of the law was to see that children were placed in foster care.⁶⁸ The Board of Charities continued to oversee the implementation of this law.⁶⁹ Its reports revealed that only a small percentage of children were placed in foster care, as "[t]he large majority of dependent, neglected, and delinquent children were maintained in institutions" under appalling conditions.⁷⁰ Foster care placements were likewise inadequate, with children being treated as property to be used at will by the foster families.⁷¹

In 1898, a central agency was created to oversee the finding of homes for Catholic children across the state.⁷² Following that example, the Commission to Examine Laws Relating to Child Welfare, created in 1920, recommended that all child-caring institutions be placed under state supervision.⁷³ By 1926, these institutions had come under the jurisdiction of the Department of Charities,⁷⁴ subsequently known as the Department of Social Welfare,⁷⁵ and now known as the "Office of Children and Family Services."⁷⁶ Today, the Office of Children and Family Services "is responsible for . . . foster care, adoption and adoption assistance [programs], and child protective services."⁷⁷ It monitors regulated childcare⁷⁸ and also provides services and programs for infants, toddler, pre-schoolers, and other child-related programs.⁷⁹ It also oversees the state's juvenile justice programs, including "administering and managing residential facilities, and one reception center program for juvenile delinquents and juvenile offenders placed in the custody of the [Office of Children and Family

⁶⁷ See SCHNEIDER & DEUTSCH, *supra* note 9, at 159.

⁶⁸ See *id.* at 161.

⁶⁹ See *id.*

⁷⁰ *Id.* at 161, 162.

⁷¹ See *id.* at 163–64.

⁷² *Id.* at 166.

⁷³ *Id.* at 255, 261.

⁷⁴ See Richard Andress, *Social Welfare, Board of*, in THE ENCYCLOPEDIA OF NEW YORK STATE, *supra* note 38, at 1432.

⁷⁵ *Id.*

⁷⁶ See Jeffrey Kraus, *Family Assistance, Department of*, in THE ENCYCLOPEDIA OF NEW YORK STATE, *supra* note 38, at 544.

⁷⁷ *About the New York State Office of Children and Family Services (OCFS)*, OFF. CHILD. & FAM. SERVS., <http://ocfs.ny.gov/main/about/default.asp> (last visited June 13, 2017).

⁷⁸ *Id.* ("[These services include] family day care, group family day care, school-age child care and day care centers outside of NYC.")

⁷⁹ *Id.* ("[These services include] legally exempt child care, child care subsidies, child care resource[s] and referrals, and the Advantage After School Program.")

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Services] Commissioner.”⁸⁰

III. COMMISSION ON QUALITY OF CARE FOR THE MENTALLY DISABLED

In 1975, Congress passed the federal Developmentally Disabled Assistance and Bill of Rights Act,⁸¹ which, among other things, defined specific conditions that would be considered “developmental disabilities.”⁸² Further, this bill provided that individuals with developmental disabilities in residential programs had a right to and should be afforded “appropriate treatment, services, and habilitation in the least restrictive setting that maximizes development potential.”⁸³ To meet this goal, the Developmentally Disabled Assistance and Bill of Rights Act allowed for the withdrawal of funds from programs that did not meet “the minimum standards for nutritious diet, medical and dental services, prohibition of physical restraints, visiting rights for relatives, and compliance with fire and safety.”⁸⁴

An additional component of this bill was a requirement that all states receiving federal funding have a program in place to advocate for and protect the needs of individuals who were considered developmentally disabled.⁸⁵ This requirement influenced the creation of the Commission on Quality of Care for the Mentally Disabled in 1977.⁸⁶ Its creation was also supported by a series of reports commenting on the treatment of mental hygiene in New York State, including a report by the New York State Assembly Subcommittee on Patient Abuse, entitled: “Wards of the State,” which highlighted the ineffectiveness of the system requiring Boards of Visitors to act as “watchdogs for the mentally disabled,”⁸⁷ and a report by the Commission of Investigation, entitled: “Life and Death at the Bronx Psychiatric Center.”⁸⁸

⁸⁰ *Id.*

⁸¹ Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486 (1975).

⁸² *History of the DD Act*, U.S. DEPT HEALTH & HUM. SERVS.: ADMIN. FOR CMTY. LIVING, <https://www.acl.gov/about-acl/history-dd-act> (last visited June 14, 2017).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *See* PRELIMINARY GUIDE TO MENTAL HEALTH, *supra* note 8, at 8.

⁸⁶ *See id.*

⁸⁷ Letter from Paul Harenberg, Member, N.Y. State Assembly, to Hon. Judah Gribetz, Counsel to the Governor (July 20, 1977) (on file with author).

⁸⁸ Legislative Memorandum from James R. Slater, First Assistant Counsel, N.Y. State Comm’n Investigation, on Assembly Bill 7951-A (July 15, 1977) (on file with author).

In general, the Commission on Quality of Care was intended to protect three groups of New York residents already under the supervision and care of three agencies: (1) individuals considered mentally ill; (2) individuals considered developmentally disabled; and (3) abusers of alcohol and other substances.⁸⁹ With a focus on protecting the health and welfare of these groups, the Commission on Quality of Care administered federally funded protection and advocacy programs and provided general oversight.⁹⁰

To meet these goals, the Commission on Quality of Care was responsible for a variety of tasks and activities, including “reviewing the organizations and operations of . . . facilities and programs[,] . . . reviewing cost effectiveness[,] . . . investigating complaints . . . including allegations of patient abuse or mistreatment[,] training, orienting, and assisting members of boards of visitors of mental hygiene facilities[, and] reviewing and . . . investigating deaths.”⁹¹ Additionally, the Commission on Quality of Care was amended and expanded in both 1984—creating a system to help individuals with rehabilitation services—and 1986—expanding the oversight of additional federally funded mental health programs.⁹² Thus, similar to its successor (the Justice Center), the Commission acted as an umbrella oversight organization by monitoring individuals subject to regulatory oversight by the Office of Mental Retardation and Developmental Disabilities (now the Office for People with Developmental Disabilities), the Office of Mental Health, and the Office of Alcohol and Substance Abuse Services.⁹³

A 2012 report, entitled: “The Measure of a Society: Protection of Vulnerable Persons in Residential Facilities against Abuse & Neglect,” recommended that the responsibilities of the Commission be transferred to the proposed Justice Center,⁹⁴ and that the Justice Center’s jurisdiction be expanded beyond these three state agencies.⁹⁵ The Board of Visitors overseeing the Office for People with Developmental Disabilities clients were to work with the Justice Center Ombudsperson Program.⁹⁶

⁸⁹ PRELIMINARY GUIDE TO MENTAL HEALTH, *supra* note 8, at 8.

⁹⁰ *See id.*

⁹¹ *Id.*

⁹² *See id.*

⁹³ *See id.* at 8, 16; SUNDRAM, *supra* note 7, at 9, 63.

⁹⁴ SUNDRAM, *supra* note 7, at 63.

⁹⁵ *See id.*

⁹⁶ *Ombudsperson for Individuals with Developmental Disabilities Program*, JUST. CTR. FOR PROTECTION PEOPLE WITH SPECIAL NEEDS, <http://www.justicecenter.ny.gov/services-supports>

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IV. THE JUSTICE CENTER

The Justice Center, created through legislation,⁹⁷ was intended to serve two purposes: (1) to act as an advocacy program to support individuals with special needs and other vulnerable persons; and (2) to act as a law enforcement agency.⁹⁸

In 2011, the *New York Times* ran a series of articles, entitled: “Abused and Used,” shedding light on the systemic problems, including neglect, abuse, and mismanagement of finances, surrounding New York State’s care for people with special needs.⁹⁹ In response, Governor Andrew M. Cuomo appointed a Special Advisor on Vulnerable Persons to investigate and make recommendations about the protection and safety of individuals served in residential treatment programs.¹⁰⁰ The resulting report¹⁰¹ identified gaps and inconsistencies in the New York State system of care for individuals with special needs, exposing persons to an increased risk of harm.¹⁰² The report recommended significant reform to abuse and neglect reporting and investigation systems.¹⁰³ Furthermore, a 2012 federal Department of Health and Human Services report “sharply criticized New York’s oversight of the developmentally disabled,” and alleged that “the state agency charged with oversight lack[ed] independence from the [G]overnor’s [O]ffice, failed to account for how it [was] spending public money and ha[d] broken several requirements of federal law.”¹⁰⁴

The Justice Center was born out of these criticisms, through the enactment of the New York State Protection of People with Special Needs Act in 2012.¹⁰⁵ The Act was intended to “reform, overhaul and strengthen the system of protections from abuse and neglect for

/ombudsperson (last visited Feb. 6, 2017).

⁹⁷ See *Frequently Asked Questions—Justice Center*, *supra* note 10.

⁹⁸ See *id.*

⁹⁹ See *Abused and Used: Examining the Treatment of the Developmentally Disabled in New York State*, N.Y. TIMES, http://www.nytimes.com/interactive/nyregion/abused-and-used-series-page.html?8qa&_r=0 (last updated Apr. 23, 2012).

¹⁰⁰ See SPONSOR’S MEMORANDUM IN SUPPORT OF LEGISLATION, S. B. 7749, 234th Reg. Sess. (N.Y. 2011) (enacted) [hereinafter SPONSOR’S MEMORANDUM FOR S.7749].

¹⁰¹ *Id.*; SUNDAM, *supra* note 7, at 5.

¹⁰² See SPONSOR’S MEMORANDUM FOR S.7749, *supra* note 100, at 14.

¹⁰³ See *id.*; see also Danny Hakim, *State Faults Care for the Disabled*, N.Y. TIMES (Mar. 22, 2012), <http://www.nytimes.com/2012/03/22/nyregion/new-york-state-draft-report-finds-need-less-risk-in-care-for-the-disabled.html> (discussing a draft of the advisory report).

¹⁰⁴ Danny Hakim, *U.S. Report Criticizes New York on Monitoring Care of Developmentally Disabled*, N.Y. TIMES (Jan. 10, 2012), <http://www.nytimes.com/2012/01/11/nyregion/federal-government-criticizes-new-york-on-disabled-care.html>.

¹⁰⁵ See S. B. 7749, 234th Reg. Sess. (N.Y. 2011) (enacted).

. . . State residents with special needs who are served in facilities and programs operated [throughout the state].”¹⁰⁶ Thus, the goal of the Act was to “strengthen and standardize the safety net for . . . vulnerable children and adults who receive care from New York’s human services agencies and programs,” as well as to improve the response to abuse and neglect allegations “for individuals in both residential and non-residential treatment facilities.”¹⁰⁷ Further, the Act created the Justice Center, identified roles and responsibilities, and strengthened criminal statutes surrounding the abuse of vulnerable or disabled persons, all with the goal of addressing the gaps identified by the Special Advisor’s report.¹⁰⁸

A. “*The Measure of a Society*”

In April 2012, the report entitled: “The Measure of a Society: Protection of Vulnerable Persons in Residential Facilities against Abuse & Neglect,” was published.¹⁰⁹ This report, authored by Clarence J. Sundram, the Governor’s Special Advisor on Vulnerable Persons, compiled a great deal of information from the agencies involved in providing care for vulnerable persons.¹¹⁰ Based on this review, Sundram highlighted an overarching principle of gaps and inconsistencies in the agencies providing care to vulnerable persons.¹¹¹ The report identified eleven major gaps and inconsistencies, including:

[W]hether [the programs] require that provider agencies have an incident management program to identify and respond to unusual incidents; whether and how they define the terms ‘abuse’ and ‘neglect’ to encompass specific behaviors by employees and others; [and] whether they require that providers investigate reported allegations of abuse or neglect.¹¹²

Sundram concluded that these inconsistencies and gaps contributed to two major repercussions: (1) an increased risk of

¹⁰⁶ See Memorandum from Ellen C. Jaffee, Member, N.Y. State Assembly, to Hon. Andrew M. Cuomo, N.Y. State Governor 9 (Dec. 12, 2012) (on file with author).

¹⁰⁷ See *id.*; SPONSOR’S MEMORANDUM FOR S.7749, *supra* note 100, at 15.

¹⁰⁸ See *generally* N.Y. S. B. 7749 (discussing the purpose of the Act); SPONSOR’S MEMORANDUM FOR S.7749, *supra* note 100 (providing support for the Act and discussing the creation of protections to address the gaps that were reported by the Special Advisor).

¹⁰⁹ See SUNDARAM, *supra* note 7.

¹¹⁰ See *generally id.* at 2 (acknowledging the agencies that assisted in providing the information that was utilized and compiled within the report).

¹¹¹ See *id.* at 5.

¹¹² *Id.*

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harm to vulnerable persons; and (2) increased difficulty in training staff members, particularly direct service staff.¹¹³ These challenges were only made more difficult in situations where the provider agency was licensed by multiple state agencies.¹¹⁴ In addition to these challenges, the report identified four major barriers to consistent reporting of incidents of abuse and neglect, including:

(1) The failure to adequately differentiate between serious incidents of staff personal culpability, and lesser incidents caused or contributed to by deficient workplace conditions; (2) poor articulation of ‘zero tolerance’ policies, which discourage reporting; (3) ineffective investigations when incidents are reported; and (4) unsuccessful disciplinary actions in state agency programs.¹¹⁵

To remedy these concerns and challenges, the report recommended significant reform to both reporting and investigation systems for incidents within these facilities, as well as extending these reforms to non-residential treatment programs.¹¹⁶ The report identified seven major elements to meet when initiating these reforms:

(1) Adopting a common set of definitions that are easily understood; (2) implementing a statewide, centralized, 24-hour hotline for reporting abuse and neglect of vulnerable persons in residential care; . . . (3) shifting the responsibility for screening and making referrals to law enforcement agencies to trained staff at the hotline . . . to bring consistency, experience and judgment to this decision-making; (4) instituting common standards for investigations and requirements; (5) creating transparency of the investigative process; . . . (6) differentiating the treatment of serious and repeated acts of abuse and neglect from lesser offenses; . . . [and (7) creation of an interagency Statewide Central Register.¹¹⁷

Sundram also identified additional concerns regarding the “patchwork quilt” of related laws that were added over time by different committees.¹¹⁸ The report concluded that these laws, as well as the lack of consistent standards for both private and state-

¹¹³ *See id.*

¹¹⁴ *See id.*

¹¹⁵ *See id.* at 6.

¹¹⁶ *See id.*

¹¹⁷ *See id.* at 6–7.

¹¹⁸ *See id.* at 7.

run agencies, created additional inconsistencies within the protection of vulnerable people.¹¹⁹ In conclusion, the report recommended the creation of the Justice Center and its corresponding vision.¹²⁰

B. Vision and Mission

The Justice Center's reported vision is to protect individuals with special needs "from abuse, neglect and mistreatment," to 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."¹²¹ In addition, the Justice Center's mission is commitment to "the health, safety, and dignity of all people with special needs."¹²² This commitment and mission should be promoted "through [the] advocacy of . . . civil rights, prevention of mistreatment, and [the] investigation of all allegations of abuse and neglect so that appropriate actions are taken."¹²³

C. Values and Guiding Principles

The work of the Justice Center is focused on five values and guiding principles: (1) integrity; (2) quality; (3) accountability; (4) education; and (5) collaboration.¹²⁴ The value and guiding principle of "integrity" refers to the idea that all individuals with special needs should have their rights protected and be treated with respect.¹²⁵ Next, "quality" refers to commitment to providing superior services and a focus on ensuring quality care for individuals with special needs.¹²⁶ Third, the value of being held responsible to both the public and the people that the agency serves is encompassed within "accountability."¹²⁷ The value and guiding principle of "education" focuses on affecting change within the system of special needs caregiving, a goal that can be met through "outreach, training, and the promotion of best practices."¹²⁸ Finally,

¹¹⁹ *See id.* at 7–8.

¹²⁰ *See id.* at 8.

¹²¹ *Statement of Vision, Mission, Values and Guiding Principles, supra* note 31.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *See id.*

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“collaboration” refers to the “shared responsibility” of protecting individuals with special needs, including collaboration with service providers, agencies, and other affected individuals.¹²⁹

D. Justice Center Composition and Oversight

The composition of the Justice Center is three-pronged, focusing on civil and criminal proceedings, as well as maintaining a central register for reporting allegations of abuse or neglect.¹³⁰ The Justice Center has 160 investigators who work across New York State investigating allegations of abuse or neglect.¹³¹ Additionally, the Justice Center has Special Prosecutors, who have the authority to pursue both disciplinary and criminal cases against workers for abuse or neglect.¹³² Note that both investigation and prosecution will be discussed in more detail forthcoming. In addition to these investigators and prosecutors, the Justice Center also has an Executive Director, Advisory Council, and Medical Review Board, all focusing on providing consistent services, investigations, and conclusions surrounding reported incidents and other agency responsibilities.¹³³

1. Executive Director

An Executive Director heads the Justice Center.¹³⁴ With the advice and consent of the New York State Senate, the Executive Director is appointed by the Governor and is responsible for a variety of tasks toward the goal of effectively operating the Justice Center.¹³⁵ The Executive Director is also responsible for recommending Justice Center policies and procedures, including those, for example, regarding: (1) protecting vulnerable persons residing in, or receiving services from, provider agencies or facilities; (2) ensuring that vulnerable individuals can exercise the same rights and responsibilities enjoyed by state residents; (3) ensuring a high standard of uniform care; and (4) improving consistent investigation procedures for reportable incidents

¹²⁹ *See id.*

¹³⁰ *See* N.Y. EXEC. LAW § 552(1) (McKinney 2017).

¹³¹ *See* Brendan J. Lyons, *Probe Worry Curbs Actions*, TIMES UNION (Oct. 8, 2016), <http://www.timesunion.com/local/article/Probe-worry-curbs-actions-9957414.php>.

¹³² *See id.*

¹³³ *See* EXEC. LAW §§ 551(1), 555(a), 561(1).

¹³⁴ *See id.* § 551(1).

¹³⁵ *See id.*

regarding the care of vulnerable individuals in New York State.¹³⁶ Further, the Executive Director has the power to amend, adopt, or remove regulations and rules that are necessary to carry out the Act.¹³⁷

2. Advisory Council

The Justice Center is overseen by an Advisory Council, whose main role is to provide the Justice Center with guidance surrounding developing policies, programs, and regulations to protect individuals with special needs.¹³⁸ Moreover, the Council has the authority to hear and advise on any matter related to the quality of life of New York State residents with disabilities.¹³⁹ To meet these goals, the Council meets at least four times per year, at the request of the Executive Director or the Council chair.¹⁴⁰ The Council is comprised of at least fifteen members, all of who are appointed for three-year terms of service by the Governor, with the advice and consent of the New York State Senate.¹⁴¹ These members include service providers and individuals, family members, and advocates for individuals who have received, or are currently receiving, services from agencies governed by the Justice Center.¹⁴²

Certain factors are taken into account when appointing individuals to the Advisory Council, including: (1) knowledge, both professional and personal, surrounding care, service provisions, support, and advocacy of vulnerable persons; and (2) interest in the service system of individuals with disabilities.¹⁴³ Additionally, individuals, or their relatives, who have received or are receiving services from agencies overseen by the Justice Center, must make up at least one-half of the Advisory Council.¹⁴⁴ The Governor holds the authority to appoint an Advisory Council member as chair¹⁴⁵

¹³⁶ See *id.* § 551(2); see also N.Y. SOC. SERV. LAW § 488(4) (McKinney 2017) (describing relevant facilities and provider agencies).

¹³⁷ See EXEC. LAW § 551(3).

¹³⁸ See *About the Advisory Council*, JUST. CTR. FOR PROTECTION PEOPLE WITH SPECIAL NEEDS, <https://www.justicecenter.ny.gov/about/advisory-committee/home> (last visited June 15, 2017).

¹³⁹ See EXEC. LAW § 561(6).

¹⁴⁰ See *id.* § 561(7); *About the Advisory Council*, *supra* note 138.

¹⁴¹ See EXEC. LAW § 561(1); *About the Advisory Council*, *supra* note 138.

¹⁴² See *About the Advisory Council*, *supra* note 138.

¹⁴³ See EXEC. LAW § 561(1).

¹⁴⁴ See *About the Advisory Council*, *supra* note 138.

¹⁴⁵ See EXEC. LAW § 561(3).

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and to remove a member from the Advisory Council with good cause, so long as the individual is provided with notice and an opportunity to be heard.¹⁴⁶

3. Medical Review Board

The Justice Center also has a Medical Review Board, comprised of members appointed by the Governor, “including specialists in forensic pathology, psychiatry, internal medicine and addiction medicine.”¹⁴⁷ The Board includes up to fifteen members serving three-year terms, with one member designated as chair.¹⁴⁸ The chair of the Board has the power to appoint members onto relevant boards and committees, which meet at the request of the chair or the Justice Center’s Executive Director.¹⁴⁹ Moreover, the Governor retains the ability to remove members from the Medical Review Board if the removal is in the best interest of the public.¹⁵⁰

The Justice Center Medical Review Board has six distinct purposes, powers, and duties.¹⁵¹ The majority of these duties focus on investigating patient or resident deaths occurring in residential facilities.¹⁵² In these instances, the Medical Review Board is first tasked with making a determination surrounding whether the death should be investigated or whether it “reasonably appears” to have been caused by natural causes.¹⁵³ The second responsibility is to investigate the circumstances and causes of deaths for those that are determined to be unusual.¹⁵⁴ Specifically, the Medical Review Board is required to visit and inspect the facility¹⁵⁵ and order an autopsy of the body if “necessary to determine the cause of death.”¹⁵⁶ Further, the Medical Review Board is required to submit a report of its death investigation findings to the Justice Center’s Executive Director and provide death prevention recommendations to: (1) the Commissioner of the Department of Mental Hygiene; or (2) the Commissioner of Children and Family Services; and (3) the facility

¹⁴⁶ *See id.* § 561(2).

¹⁴⁷ *Id.* § 555(a).

¹⁴⁸ *See id.*

¹⁴⁹ *See id.* §§ 555(a), (e).

¹⁵⁰ *See id.* § 555(a).

¹⁵¹ *See id.* § 556.

¹⁵² *See id.* §§ 556(a)–(e); *see also id.* § 557 (requiring residential facilities to immediately report the death of a patient or resident at the facility).

¹⁵³ *See id.* § 556(a).

¹⁵⁴ *See id.* § 556(b).

¹⁵⁵ *See id.* § 556(c).

¹⁵⁶ *See id.* § 556(d).

director.¹⁵⁷ The final role of the Medical Review Board, which is unrelated to the investigation of deaths, includes providing advisement on medical issues relevant to the Justice Center and allegations of abuse or neglect.¹⁵⁸ Further, it is important to note that records related to the Medical Review Board, including proceedings and deliberation, are not subject to disclosure.¹⁵⁹

E. Reach of the Justice Center

The Justice Center's reach and jurisdiction encompasses a variety of agencies and facilities. To provide services and oversight to facilities and agencies throughout New York State, the state is divided into four regions for purposes of Justice Center jurisdiction.¹⁶⁰ Further, oversight of these agencies and facilities by the Justice Center surrounds particular populations and incidents.¹⁶¹ Custodians and vulnerable persons are included within these relevant populations and there is a focus on reportable incidents occurring within these agencies and facilities.¹⁶²

1. Agency and Facility Oversight

The Justice Center is responsible for the oversight of all “mental hygiene facilit[ies]” in New York State, including both family care homes and secure treatment facilities.¹⁶³ Additionally, the Justice Center also oversees “state oversight” agencies, which are responsible for certifying and licensing certain facilities or provider agencies.¹⁶⁴ There are six major state oversight agencies within the reach of the Justice Center; specifically, the: (1) Office of Mental Health; (2) Office for People with Developmental Disabilities; (3) Office of Alcoholism and Substance Abuse Services; (4) Office of

¹⁵⁷ See *id.* § 556(e).

¹⁵⁸ See *id.* § 556(f).

¹⁵⁹ See *id.* § 555(d).

¹⁶⁰ See *Regional Map*, JUST. CTR. FOR PROTECTION PEOPLE WITH SPECIAL NEEDS, <https://www.justicecenter.ny.gov/resources/district-map> (last visited June 15, 2017).

¹⁶¹ See *Frequently Asked Questions—Justice Center*, *supra* note 10.

¹⁶² See *id.*; see also *Frequently Asked Questions—VPCR Hotline*, JUST. CTR. FOR PROTECTION PEOPLE WITH SPECIAL NEEDS, <https://www.justicecenter.ny.gov/investigations-prosecution/vpcr/faq#t56n156> (last visited June 15, 2017) (discussing vulnerable persons).

¹⁶³ See EXEC. LAW § 550(2); *Who We Serve*, JUST. CTR. FOR PROTECTION PEOPLE WITH SPECIAL NEEDS, <http://www.ny.gov/agencies/justice-center-protection-people-special-needs> (last visited June 15, 2017); see also N.Y. MENTAL HYG. LAW § 1.03(6) (McKinney 2017) (defining “mental hygiene facility” further).

¹⁶⁴ See EXEC. LAW § 550(4); see also N.Y. SOC. SERV. LAW § 488(4-a) (McKinney 2017) (defining “state oversight agency” further).

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Children and Family Services; (5) Department of Health; and (6) State Education Department.¹⁶⁵

New York State is divided into four regions, each encompassing a different area of the state and its corresponding counties.¹⁶⁶ The four regions include: Region 1, Eastern New York; Region 2, Central New York; Region 3, Western New York; and Region 4, the greater New York City area.¹⁶⁷

Table 1¹⁶⁸

Region	Area of State	Encompassed Counties
Region 1	Eastern New York	Albany, Clinton, Columbia, Dutchess, Essex, Fulton, Franklin, Greene, Hamilton, Montgomery, Orange, Putnam, Rensselaer, Rockland, Saratoga, Schenectady, Schoharie, Sullivan, Ulster, Warren, Washington, and Westchester
Region 2	Central New York	Broome, Cayuga, Chemung, Chenango, Cortland, Delaware, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Otsego, Oswego, St. Lawrence, Tioga, and Tompkins
Region 3	Western New York	Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming, and Yates
Region 4	Greater New York City	Bronx, Kings, Queens, Nassau, New York, Richmond, and Suffolk

¹⁶⁵ See EXEC. LAW § 550(4).

¹⁶⁶ See *Regional Map*, *supra* note 160.

¹⁶⁷ See *id.*

¹⁶⁸ *Id.*

2. Vulnerable Persons and Custodians

In general, the Justice Center focuses on protecting individuals who are considered “vulnerable persons.”¹⁶⁹ According to the Protection of People with Special Needs Act, a vulnerable person is a person who, “due to physical or cognitive disabilities, or the need for services or placement, is receiving services from a facility or provider agency.”¹⁷⁰ Further, the facilities or provider agencies must be state operated, licensed, or certified through the State of New York, and thus, within the jurisdiction of the Justice Center.¹⁷¹

Additionally, the Justice Center reaches the conduct of those considered custodians over vulnerable persons.¹⁷² The term “custodian” covers a broad array of individuals responsible for caring for individuals with special needs. A custodian can include individuals who work or volunteer at an agency or facility that is either operated by or certified through New York State.¹⁷³ Further, custodians can include other individuals who have “regular and substantial contact” with individuals with special needs that receive services from one of these facilities or agencies.¹⁷⁴ This group can include consultants, contractors, or volunteers of contracting agencies.¹⁷⁵ To ensure appropriate care and behavior, the Justice Center is responsible for identifying a “Code of Conduct” for custodians of vulnerable individuals.¹⁷⁶ Custodians must sign this Code of Conduct both at hire and annually.¹⁷⁷

3. Reportable Incidents

Generally speaking, the reach of the Justice Center includes activities related to “reportable incident[s].”¹⁷⁸ There are nine types

¹⁶⁹ See *Frequently Asked Questions—Justice Center*, *supra* note 10.

¹⁷⁰ EXEC. LAW § 550(5); see also SOC. SERV. LAW § 488(4)(a) (defining “facility or provider agency” further).

¹⁷¹ See EXEC. LAW § 550(5); SOC. SERV. LAW § 488(4)(a).

¹⁷² See SOC. SERV. LAW § 488(2).

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ See EXEC. LAW § 554(1).

¹⁷⁷ See JUSTICE CTR. FOR THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS, CODE OF CONDUCT FOR CUSTODIANS OF PEOPLE WITH SPECIAL NEEDS (2016), https://www.justicecenter.ny.gov/sites/default/files/documents/Revised_Code_of_Conduct_0.pdf; see also Letter from Christopher Tavella, Deputy Comm’r, Off. Mental Health, to Colleagues (May 16, 2016), <https://www.omh.ny.gov/omhweb/dqm/jc/code-conduct.pdf> (clarifying that the Code of Conduct must be both acknowledged and signed).

¹⁷⁸ See SOC. SERV. LAW § 488(1); *Frequently Asked Questions—Justice Center*, *supra* note

of reportable incidents, which *can* be reported by any person,¹⁷⁹ but *must* be reported by individuals who are considered “mandated reporters.”¹⁸⁰ The nine categories of reportable incidents include: (1) physical abuse; (2) sexual abuse; (3) psychological abuse; (4) deliberate inappropriate use of restraints; (5) aversive conditioning; (6) obstructing the report of an incident that is reportable; (7) unlawful use or administration of a controlled substance; (8) neglect; and (9) any other incident deemed significant.¹⁸¹ The Protection of People with Special Needs Act provides descriptions of the nine types of reportable incidents, as well as relevant exceptions.¹⁸²

F. Roles and Responsibilities

The Justice Center consists of three units that work toward the goal of protecting individuals with special needs within New York State. These three units include: (1) the Vulnerable Persons’ Central Register; (2) a non-criminal civil proceedings unit; and (3) a criminal unit.¹⁸³ Although separate, these three units interact with one another regarding reports of abuse or neglect. For example, a reported allegation of abuse or neglect being reviewed by the non-criminal unit of the Justice Center should be referred to the criminal unit if it appears that the report should be considered for criminal charges.¹⁸⁴ Unless otherwise court-ordered, these units can share investigation information only in ways that are consistent with both state and federal constitutional protections.¹⁸⁵ The Justice Center also has a wide variety of other roles and responsibilities, including a program to ensure centralized criminal background checks for employers and employees.¹⁸⁶

1. General Roles and Responsibilities of the Justice Center

Along with facilitating the three units, the Justice Center has additional roles and responsibilities that must be met. The first of

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¹⁷⁹ See SOC. SERV. LAW § 488(1)(a)–(i).

¹⁸⁰ See *id.* § 491; see also *id.* § 492(2)(b) (discussing the Vulnerable Persons’ Central Register, where reportable incidents must be reported).

¹⁸¹ See *id.* § 488(1)(a)–(i).

¹⁸² See *id.*

¹⁸³ See N.Y. EXEC. LAW § 552(1) (McKinney 2017).

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* (noting that the Justice Center is also bound by criminal secrecy provisions).

¹⁸⁶ See *id.* § 553(5).

these responsibilities is data collection, as the Justice Center must maintain data relating to any investigations of reportable incidents.¹⁸⁷ Next, the Justice Center must identify procedures for reviewing incidents, preventative and corrective actions, and implementing those actions.¹⁸⁸ The Justice Center is also responsible for training programs for investigators, as well as orientation and training for agency and facility board members.¹⁸⁹

The oversight of facilities and agencies by the Justice Center includes visiting, inspecting, and appraising the agencies and management.¹⁹⁰ This also includes overseeing out-of-state facilities and residential schools, so long as residents of New York State are served there.¹⁹¹ When observing out-of-state facilities, the Justice Center is required to pay special attention to “safety, security and [the] quality of care provided to patients and residents.”¹⁹² Moreover, the Justice Center also provides assistance with duty performance,¹⁹³ receives and reviews facility reports,¹⁹⁴ and may assign Justice Center staff members to monitor agencies and facilities that present imminent health or safety concerns.¹⁹⁵

The Justice Center also provides assistance and advisement to a wide variety of individuals and vulnerable persons.¹⁹⁶ This assistance and advisement includes: (1) an adult resident advocacy program, which advises and assists adults with developmental disabilities in understanding, promoting, and protecting their legal rights;¹⁹⁷ (2) advising and assisting with strategies to both meet and identify the needs of vulnerable individuals;¹⁹⁸ (3) advising and assisting the Governor, public entities, and private entities surrounding developing and implementing state policies that benefit vulnerable persons;¹⁹⁹ and (4) advising and assisting “educational institutions” surrounding education programming for vulnerable and disabled individuals.²⁰⁰ Furthermore, the Justice

¹⁸⁷ *See id.* § 553(2).

¹⁸⁸ *See id.* § 553(3).

¹⁸⁹ *See id.* § 553(4), (6).

¹⁹⁰ *See id.* § 553(7)(a).

¹⁹¹ *See id.*; *see also* N.Y. SOC. SERV. LAW § 490 (McKinney 2017) (discussing incident management programs).

¹⁹² *See* EXEC. LAW § 553(7)(a).

¹⁹³ *See id.* § 553(7)(b).

¹⁹⁴ *See id.* § 553(7)(c).

¹⁹⁵ *See id.* § 553(7)(d).

¹⁹⁶ *See Frequently Asked Questions—Justice Center, supra* note 10.

¹⁹⁷ *See* EXEC. LAW § 553(10).

¹⁹⁸ *See id.* § 553(11).

¹⁹⁹ *See id.* § 553(12).

²⁰⁰ *See id.* § 553(18).

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Center holds many other responsibilities, as outlined within the Protection of People with Special Needs Act.²⁰¹

2. The Statewide Vulnerable Persons' Central Register

The Justice Center is responsible for the Vulnerable Persons' Central Register.²⁰² In this capacity, the Justice Center performs functions related to: (1) receiving and accepting allegations of reportable incidents relating to the care and treatment of vulnerable persons; (2) the investigation of these reports; (3) “the review of substantiated findings of abuse or neglect;” (4) disciplinary proceedings for state employees resulting from these findings;²⁰³ (5) the establishment of uniform character and competence review procedures for agencies; (6) procedures for reviewing performance records during license and operating certificate renewal;²⁰⁴ and (7) the establishment of notification procedures to inform individuals and agencies of reports and findings.²⁰⁵ In regard to disciplinary hearings, the Justice Center is responsible for representing the state in any administrative hearings related to disciplining employees for findings of abuse or neglect, as well as the adjudication of those employees.²⁰⁶

The Vulnerable Persons' Central Register must also maintain “a coordinated approach to avoid duplication and provide for timely responses to allegations of reportable incidents.”²⁰⁷ This responsibility includes designating a lead agency to be accountable for facility or agency responsibilities, such as management and reporting, in instances where the facility is “dually licensed or co-located.”²⁰⁸ This lead agency can be modified only in instances where the change is “necessary to protect the health, safety and welfare of vulnerable persons served by such facilities and provider agencies.”²⁰⁹ In making this designation, three factors are taken into consideration:

²⁰¹ *See generally id.* § 553 (identifying twenty-eight—with multiple subsections—distinct Justice Center powers and duties).

²⁰² *See id.* § 552(1).

²⁰³ *See id.*

²⁰⁴ *See id.* § 553(1)(e).

²⁰⁵ *See id.* § 553(1)(b).

²⁰⁶ *See id.* § 553(1)(c) (“[F]or state entities bound by collective bargaining, the disciplinary process established through collective bargaining shall govern.”).

²⁰⁷ *See id.* § 553(1)(d).

²⁰⁸ *See id.*

²⁰⁹ *See id.*

[(1) T]he proportion of services provided or recipients served in the . . . facilities and provider agencies[; (2)] the recommendations of the respective state oversight agencies that granted such licensure or certification[;] and [(3)] the designation or re-designation that would best protect the health, safety and welfare of vulnerable persons served by such facilities and provider agencies.²¹⁰

Finally, the Statewide Vulnerable Persons' Central Register also provides training and education for employers and employees providing care to vulnerable individuals.²¹¹ The Protection of People with Special Needs Act outlined a variety of training topics, including: (1) identifying and reporting incidents; (2) preventing abuse and neglect; (3) a duty to report incidents; (4) adherence to related codes of conduct; (5) rights of employees and the disciplinary proceeding process; (6) promotion of compliance through supervisors and management; and (7) the report, investigation, and prevention obligations of supervisors.²¹² The Act indicated that these trainings can be both in-person and online, and should occur on a "periodic basis."²¹³ The Statewide Vulnerable Persons' Central Register also provides hotline assistance to employees regarding compliance with obligations and duties related to the Act.²¹⁴

3. Centralized Criminal Background Checks

The Justice Center arranges centralized criminal background checks, providing information on prior crime convictions that disqualify an individual from working or volunteering with vulnerable persons,²¹⁵ as well as reviewing and evaluating this criminal history information.²¹⁶ Crimes that are considered "presumptively disqualifying" include convictions for: (1) a felony sex offense; (2) a violent felony within the past ten years; (3) abandonment of a child; (4) endangering the welfare of an incompetent or physically disabled person in the first degree; (5)

²¹⁰ *See id.*

²¹¹ *See id.* § 553(1)(f).

²¹² *See id.*

²¹³ *See id.*

²¹⁴ *See id.*

²¹⁵ *See Frequently Asked Questions—Criminal Background Checks Process*, JUST. CTR. FOR PROTECTION PEOPLE WITH SPECIAL NEEDS, <https://www.justicecenter.ny.gov/investigations-prosecutions/cbc/faq> (last visited June 15, 2017).

²¹⁶ *See* EXEC. LAW § 553(5); *see also* N.Y. SOC. SERV. LAW § 488(4) (McKinney 2017) (defining "facilities and provider agencies").

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endangering the welfare of a vulnerable elderly person, or an incompetent or physically disabled person in the first or second degree; and (6) any other similar offense outside of New York State.²¹⁷ Individuals with qualifying convictions cannot be hired to work with vulnerable persons “unless the Justice Center determines that the health, safety, and welfare of the provider’s clients would not be jeopardized.”²¹⁸ Factors such as the relationship between the past conviction and the position sought by the individual, as well as the amount of time since the conviction, can be considered in making this determination.²¹⁹

4. Civil Proceedings Unit

The civil proceedings unit focuses on resolving non-criminal matters related to reported and substantiated instances of abuse or neglect.²²⁰ In general, as expanded upon below, this unit is responsible for investigating reported incidents of abuse or neglect, determining whether the incidents are substantiated findings, and providing for relevant disciplinary actions.²²¹ Additionally, an appeals process for substantiated findings of abuse and neglect is included within this unit.²²²

a. Investigating Reported Incidents: Access to Information

The Justice Center has access to all records, data, books, and other documents that are related to the function of a facility or agency within its jurisdiction.²²³ Thus, the Justice Center can access any needed records, so long as the records are “deemed necessary for carrying out the [J]ustice [C]enter’s functions, powers

²¹⁷ See *Frequently Asked Questions—Criminal Background Checks Process*, *supra* note 215; see also N.Y. PENAL LAW § 260.00 (McKinney 2017) (detailing “abandonment of a child”); PENAL LAW § 260.25 (detailing “endangering the welfare of an incompetent or physically disabled person in the first degree”); PENAL LAW § 260.32 (detailing “endangering the welfare of a vulnerable elderly person, or an incompetent or physically disabled person in the second degree”); PENAL LAW § 260.34 (detailing “endangering the welfare of a vulnerable elderly person, or an incompetent or physically disabled person in the first degree”).

²¹⁸ See *Frequently Asked Questions—Criminal Background Checks Process*, *supra* note 215.

²¹⁹ See *id.*

²²⁰ See EXEC. LAW § 552(1).

²²¹ See *id.*

²²² See *Administrative Appeals Unit*, JUST. CTR. FOR PROTECTION PEOPLE WITH SPECIAL NEEDS, <https://www.justicecenter.ny.gov/investigations-prosecution/admin-appeals> (last visited June 16, 2017).

²²³ See EXEC. LAW § 558(a).

and duties.”²²⁴ All agencies and facilities subject to the Justice Center’s jurisdiction are required to provide any requested information, including confidential information.²²⁵ Further, the Justice Center can request records from hospitals regarding the treatment of vulnerable persons preceding or following death or a complaint of abuse or neglect.²²⁶

Both received records and the Justice Center’s findings are to be treated as personal information, which should only be disclosed to the Commissioner of the Department of Health.²²⁷ Thus, “[i]nformation, books, records or data [that] are confidential . . . shall be kept confidential by the [J]ustice [C]enter.”²²⁸ Additionally, if any party fails to comply with a records request, an order directing compliance can be requested from the county supreme court, and a continued failure to comply can therefore be considered contempt of court.²²⁹ In addition to access to records, the Justice Center has the power to: (1) issue and enforce subpoenas; (2) administer oaths; (3) examine individuals under oath; and (4) conduct hearings.²³⁰

The Justice Center must provide an annual report, which is provided to the Governor, legislature, and any independent assisting agencies, and is available to the public on the Justice Center’s website.²³¹ The annual report outlines the work of the Justice Center over the past year and identifies and discusses topics including: (1) reported incident data; (2) investigation results, separated by types of facilities and programs; (3) corrective actions taken; (4) results of research surrounding reports including “patterns and trends in the reporting of and response to reportable incidents[;]” (5) recommendations regarding corrective and preventative actions; and (6) efforts to provide relevant training.²³²

b. Substantiated Reports of Abuse or Neglect

Following the report and investigation of abuse or neglect

²²⁴ *See id.*

²²⁵ *See id.*

²²⁶ *See id.*

²²⁷ *See id.*; *see also* N.Y. PUB. OFF. LAW § 96 (McKinney 2017) (defining “treatment” as a record or personal information and disclosure requirement).

²²⁸ *See* EXEC. LAW § 558(a).

²²⁹ *See id.* § 558(d).

²³⁰ *See id.* § 558(c) (“[These powers must be exercised] in accordance with and pursuant to civil practice law and rules.”).

²³¹ *See id.* § 560.

²³² *See id.*

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allegations, the Justice Center determines whether the report is substantiated.²³³ To be substantiated, the abuse or neglect allegation must be supported by a preponderance of the evidence.²³⁴ Additionally, a substantiated report of abuse or neglect also includes: (1) a determination of the category of abuse or neglect; (2) the type of the substantiated abuse or neglect; and (3) the name of the party responsible for the abuse or neglect, which can be either an individual or a provider agency.²³⁵

Substantiated findings of abuse or neglect are divided into four categories, generally referring to the severity of the conduct.²³⁶ Category 1 offenses of abuse or neglect include “serious physical abuse, sexual abuse or other serious conduct by custodians.”²³⁷ Thus, prohibited conduct includes physical injury, failure to perform a duty that causes harm or death, cruel or degrading treatment, threats, taunts, ridicule, sexual conduct and abuse (including encouraging other’s engagement), offenses involving controlled substances, and obstructing investigation.²³⁸ Category 2 offenses include instances of abuse or neglect that do not fit into Category 1, but that “seriously endangers the health, safety or welfare of a service recipient.”²³⁹ Category 3 offenses include abuse and neglect that endangers the health, safety, or welfare of a service recipient, but that do not rise to the level of a Category 1 or 2 offense.²⁴⁰ Finally, Category 4 offenses apply specifically to provider agencies, including facility or agency service conditions that are harmful or expose individuals to a risk of harm for which a staff member could be held culpable.²⁴¹ This category also includes substantiated reports where the individual perpetrator cannot be identified.²⁴²

c. Consequences of a Substantiated Report of Abuse or Neglect

The effects of a substantiated finding of abuse or neglect are

²³³ See *Frequently Asked Questions—Administrative Appeals Process for Substantiated Cases of Abuse and Neglect*, JUST. CTR. FOR PROTECTION PEOPLE WITH SPECIAL NEEDS, <https://www.justicecenter.ny.gov/investigations-prosecution/adjudication/admin-appeals-faq> (last visited June 16, 2017).

²³⁴ See *id.*

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ See *id.*

²³⁸ See *id.*

²³⁹ See *id.*

²⁴⁰ See *id.*

²⁴¹ See *id.*

²⁴² See *id.*

dependent on the finding's category. Some substantiated findings can result in placement on the Staff Exclusion List ("SEL"), a statewide register identifying persons who have been indicated as responsible for either serious or repeated acts of abuse or neglect against vulnerable individuals.²⁴³ Those registered on the SEL are "prohibited from future care of vulnerable persons in the State of New York."²⁴⁴ Substantiated findings of abuse or neglect will result in registration on the SEL in two instances: (1) a substantiated finding of a Category 1 offense; or (2) two or more substantiated findings of a Category 2 offense within a three-year time frame.²⁴⁵ Facilities and providers in New York State are responsible for checking the SEL before hiring or approving an individual for work.²⁴⁶ In reviewing the SEL, the employer and prospective employee or volunteer will be provided with a report summarizing any substantiated findings of abuse or neglect.²⁴⁷

Not all substantiated findings will result in placement on the SEL, however. If an individual is determined to have only one substantiated finding of Category 2 abuse or neglect, for example, the finding will result in employer notification, which is not a bar to employment.²⁴⁸ Further, if there are no other substantiated Category 2 findings for a period of three years, the initial finding will be sealed after five years.²⁴⁹ For a substantiated Category 3 finding, the finding is not reported during pre-employment checks and is sealed after a five-year period.²⁵⁰ Finally, a substantiated Category 4 finding requires the employer or agency to create and implement a plan of prevention and remediation, which will be evaluated by the Justice Center.²⁵¹ If lack of compliance is found, the facility's intake may be closed or the agency's operating certificate can be terminated.²⁵²

d. Civil Proceedings Appeals Process

In general, any substantiated report of abuse or neglect can be

²⁴³ *See id.*

²⁴⁴ *See id.*

²⁴⁵ *See id.*

²⁴⁶ *See id.*

²⁴⁷ *See* N.Y. EXEC. LAW § 562(1) (McKinney 2017).

²⁴⁸ *See Frequently Asked Questions—Administrative Appeals Process for Substantiated Cases of Abuse and Neglect*, *supra* note 233.

²⁴⁹ *See id.*

²⁵⁰ *See id.*

²⁵¹ *See id.*

²⁵² *See id.*

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challenged through an administrative appeal to the Administrative Appeals Unit.²⁵³ Following review by the Administrative Appeals Unit, the party has the right to a hearing before an administrative law judge.²⁵⁴ During this hearing, the parties may present evidence, question and cross-examine witnesses, and review any relevant documents.²⁵⁵ Further, in an appeals hearing, the Justice Center carries the burden of proof by which it must demonstrate that the acts constituting abuse or neglect occurred by a preponderance of the evidence.²⁵⁶

5. Criminal Proceedings

The Justice Center has the authority to collaborate with local law enforcement and district attorneys regarding abuse or neglect that may rise to the level of a crime.²⁵⁷ Further, the Justice Center also has trained investigators on staff, who have the authority to make arrests for criminal charges.²⁵⁸ When an arrest occurs, the Justice Center's Special Prosecutor or Inspector General has the authority to bring criminal charges in New York State courts.²⁵⁹ The criminal reach of the Justice Center is intended to provide additional resources to law enforcement and district attorneys surrounding investigating and prosecuting abuse and neglect against individuals with special needs.²⁶⁰

a. Justice Center Special Prosecutor

The Justice Center Special Prosecutor focuses on the prosecution of abuse or neglect that reaches the level of a crime.²⁶¹ Pursuant to the Protection of People with Special Needs Act, the Special Prosecutor has two main duties: (1) investigating and prosecuting abuse or neglect offenses by custodians against vulnerable persons; and (2) cooperating with and assisting local district attorneys and law enforcement surrounding efforts to prevent abuse and neglect of

²⁵³ *See id.* The administrative appeals process is governed by section 494 of the Social Services Law. *See* N.Y. SOC. SERV. LAW § 494 (McKinney 2017).

²⁵⁴ *See Frequently Asked Questions—Administrative Appeals Process for Substantiated Cases of Abuse and Neglect, supra* note 233.

²⁵⁵ *See id.*

²⁵⁶ *See id.*

²⁵⁷ *See Frequently Asked Questions—Justice Center, supra* note 10.

²⁵⁸ *See id.*

²⁵⁹ *See id.*

²⁶⁰ *See id.*

²⁶¹ *See* N.Y. EXEC. LAW § 552(2)(a) (McKinney 2017).

vulnerable persons.²⁶² The Special Prosecutor may also designate the ability to exercise any of these powers to an assistant.²⁶³ Additionally, the Protection of People with Special Needs Act did not create a bar prohibiting instances from being reported to a district attorney or local law enforcement, nor did it bar district attorneys from investigating or prosecuting allegations of suspected abuse or neglect.²⁶⁴ New York State subdivisions must cooperate and assist the Special Prosecutor and the Special Prosecutor may provide assistance to any requesting district attorney or law enforcement agency surrounding investigating and prosecuting abuse or neglect.²⁶⁵

The Justice Center Special Prosecutor may also apply for search warrants.²⁶⁶ However, the Special Prosecutor must give notice of the search warrant application to the county district attorney unless there are pressing extenuating circumstances making notice impossible.²⁶⁷ In these cases, notice should be provided as soon as it is practical to do so.²⁶⁸ Although notice is required, the failure to provide notice is not a bar to subsequent government action.²⁶⁹ Thus, even if the county district attorney is not notified of the application for a search warrant, it is not considered “ground[s] to suppress the evidence seized in executing the warrant.”²⁷⁰

The Special Prosecutor may also attend court proceedings related to allegations of abuse or neglect, including grand jury, and any relevant county or supreme court proceedings.²⁷¹ To attend, the proceeding must be regarding an offense including conduct related to the abuse or neglect of a vulnerable person.²⁷² In these instances, the Special Prosecutor is permitted to perform all duties of the district attorney in the relevant actions or proceedings.²⁷³

²⁶² See *id.*; see also N.Y. SOC. SERV. LAW § 488(1) (McKinney 2017) (defining “reportable incidents of abuse or neglect”); *id.* § 488(2) (defining “custodian”).

²⁶³ See EXEC. LAW § 552(2)(b).

²⁶⁴ See *id.* § 552(2)(a).

²⁶⁵ See *id.*

²⁶⁶ See *id.* § 552(2)(b); see also N.Y. CRIM. PROC. LAW § 690.05 (McKinney 2017) (discussing the issuing of search warrants).

²⁶⁷ See EXEC. LAW § 552(2)(b).

²⁶⁸ See *id.*

²⁶⁹ See *id.*

²⁷⁰ See *id.*

²⁷¹ See *id.* § 552(2)(c).

²⁷² See *id.*; see also N.Y. SOC. SERV. LAW § 488(11) (McKinney 2017) (defining “abuse” and “neglect”).

²⁷³ See EXEC. LAW § 552(2)(c). In addition to the Special Prosecutor, the Special Prosecutor’s assistant(s) also have the power to attend these court proceedings and act on behalf of the district attorney. See *id.*

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Additionally, the Special Prosecutor can consult with the district attorney regarding attendance and the time and place of the appearance.²⁷⁴

G. Critiques and Controversies

Although the Justice Center was created to prevent abuse and neglect against vulnerable persons and provide consistent interventions, a variety of concerns have been raised regarding the Justice Center's work and the implications of these new processes. In general, there have been four major critiques of the Justice Center, as described in more detail below, including: (1) lack of prosecution of substantiated findings of abuse or neglect; (2) lack of appropriate reporting regarding investigated incidents; (3) the effects of the investigation and disciplinary process on parties including employers, employees, and local law enforcement agencies; and (4) the potential functions of the Justice Center as a burden on facilities and employees.

1. Failure to File Charges

The first critique of the Justice Center is focused on the agency's failure to file criminal charges when an individual commits abuse or neglect that rises to the level of a crime.²⁷⁵ In 2015, the Associated Press examined the Justice Center, finding that out of 7,000 substantiated abuse and neglect findings since 2014, only 169 had resulted in criminal charges.²⁷⁶ Additionally, out of the 132 allegations regarding the death of a vulnerable person, only thirty-four cases were substantiated and only one case was prosecuted.²⁷⁷

One of the challenges in prosecuting individuals appears to be the standard of evidence required.²⁷⁸ For an allegation of abuse or neglect to be substantiated, the "preponderance of the evidence" standard must be met; however, criminal courts utilize a "proof beyond a reasonable doubt" standard.²⁷⁹ Thus, the standard of proof that is used to substantiate findings is lower than that required by

²⁷⁴ *See id.*

²⁷⁵ *See* Associated Press, *NY Agency to Protect the Disabled Rarely Brings Charges*, DAILY GAZETTE (Oct. 28, 2015), <http://www.dailygazette.com/news/2015/oct/28/ny-agency-protect-disabled-rarely-brings-charges/>.

²⁷⁶ *See id.*

²⁷⁷ *See id.*

²⁷⁸ *See id.*

²⁷⁹ *See id.*

the criminal justice system, therefore increasing the difficulty of criminal prosecution for acts of abuse or neglect against vulnerable individuals.²⁸⁰ Further, difficulties with prosecutions often involve the ability to prove the allegation.²⁸¹ In some cases, establishing proof can be difficult due to many victims' physical or intellectual disabilities, which affects their ability to testify.²⁸² Additionally, custodians are often unwilling to testify against one another, further increasing difficulty.²⁸³ Finally, community disability advocates have criticized the Justice Center, alleging that the agency has minimized cases of abuse and neglect to protect the State from potential lawsuits.²⁸⁴

2. Failure to Share Records

A second criticism of the Justice Center involves the failure to adequately share records of abuse and neglect findings. Disability Rights New York, a federally designated nonprofit group, has engaged in a lengthy court battle with the Justice Center surrounding access to records of abuse and neglect allegations.²⁸⁵ Although Disability Rights New York won a suit in federal court forcing the Justice Center to provide investigative reports about abuse and neglect complaints, the records have still not been provided.²⁸⁶ Additional criticism has alleged inactivity regarding abuse and neglect allegations, and that complaints should be directed to law enforcement for investigation.²⁸⁷

Another criticism regarding sharing records involves the alleged failure to forward records to the Medicaid Inspector General. To facilitate "cracking down" on facilities with challenges in preventing abuse or neglect, these reports legally must be forwarded to the Medicaid Inspector General.²⁸⁸ The Inspector General's Office can stop Medicaid funding to troubled facilities, acting as a way to force agencies and facilities to change their protocols and custodian

²⁸⁰ *See id.*

²⁸¹ *See id.*

²⁸² *See id.*

²⁸³ *See id.*

²⁸⁴ *See id.*

²⁸⁵ See Rick Karlin, *Justice Center is Criticized for not Sharing Investigative Records*, TIMES UNION (July 21, 2016), <http://www.timesunion.com/local/article/Justice-Center-is-criticized-for-not-sharing-8399712.php>.

²⁸⁶ *See id.*

²⁸⁷ *See id.*

²⁸⁸ See Associated Press, *Agency's Referral Record Faulted*, TIMES UNION (Oct. 12, 2016), <http://www.timesunion.com/news/article/Agency-s-referral-record-faulted-9968105.php>.

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behaviors regarding abuse or neglect.²⁸⁹ Additionally, the Medicaid Inspector General can authorize an individual's immediate removal from a program if their continued participation would endanger the health or welfare of service recipients.²⁹⁰ Justice Center critics have alleged that there has been no record of forwarding reports of abuse or neglect to the Medicaid Inspector General.²⁹¹ Although the Medicaid Inspector General's Office did concede to not receiving any substantiated reports of abuse or neglect, both the Inspector General and Attorney General have claimed the occurrence of untracked "case-by-case" referrals.²⁹²

3. Contribution to Abuse and Neglect

One of the most frequent and troubling criticisms of the Justice Center are allegations that the agency's activities actually contribute to the occurrence of abuse and neglect against vulnerable individuals receiving services from state funded and certified agencies and facilities.²⁹³ Reports have demonstrated increased law enforcement presence in handling individuals within these facilities, particularly in group homes.²⁹⁴ This appears to be in response to group home workers' reluctance to use physical restraint to stop individuals from running away or acting out in a violent manner.²⁹⁵

This reluctance appears to be twofold. First, staff members appear to be fearful of restraining individuals, based on the Justice Center's in-depth review and criticism of interventions.²⁹⁶ Second, there also appears to be reservations regarding *not* using restraints, based on health and safety concerns, as well as additional disciplinary action by the Justice Center for failing to restrain.²⁹⁷ Although the Justice Center has filled a gap in investigating and prosecuting abuse and neglect allegations, the agency's investigative powers appear to be feared by both employers and

²⁸⁹ *See id.*

²⁹⁰ *See id.*

²⁹¹ *See id.*

²⁹² *See id.*

²⁹³ *See, e.g., Justice Demands Fairness*, TIMES UNION (Oct. 11, 2016), <http://www.timesunion.com/tuplus-opinion/article/Justice-demands-fairness-9965431.php> (discussing concerns that the Justice Center is contributing to, rather than curing, the problems of abuse and neglect in agencies and facilities).

²⁹⁴ *See Lyons, supra* note 131.

²⁹⁵ *See id.*

²⁹⁶ *See id.*

²⁹⁷ *See id.*

employees alike.²⁹⁸ Additionally, when an employee is accused of improper actions, the process is sometimes lengthy and the worker is often suspended without pay.²⁹⁹ Thus, this fear of investigative powers has resulted in increased use of police force by agencies under the Justice Center's jurisdiction,³⁰⁰ as well as increased safety issues and tension within agencies and facilities.³⁰¹

Multiple agencies in New York State, such as the Albany Police Officers Union, have reported an increase in help calls within group homes and psychiatric facilities.³⁰² The Albany Police Officers Union has also reported a belief that officers are being asked to assist in violent physical restraints based on employer and employee concerns about losing their jobs if they handle these interactions incorrectly.³⁰³ This increase in reported police intervention is a problem not only in Albany.³⁰⁴ Local 371, the New York City labor union for social services workers, has reported instances in which their workers have faced intense scrutiny for physical confrontations with individuals in their care, which most often appears to be dealing with violent teenagers.³⁰⁵ Additionally, members have reported that they face disciplinary charges if they do not restrain, and that they are subjected to review for restraining, potentially leading to prosecution for mistakes.³⁰⁶

In response to this criticism, the Justice Center's Executive Deputy Director has highlighted the "thorough training" received by workers, as well as the requirement of workers to take action to protect the individuals with special needs in their care, when necessary.³⁰⁷ Additionally, Local 371 and the Public Employees Federation have responded to the criticism by forming a coalition to

²⁹⁸ *See id.*

²⁹⁹ *See Justice Demands Fairness, supra* note 293.

³⁰⁰ *See Lyons, supra* note 131.

³⁰¹ *See Justice Demands Fairness, supra* note 293.

³⁰² *See Lyons, supra* note 131. In 2015, the Parsons Child and Family Center in Albany, NY, reported 692 police responses to the facility, with nineteen cases involving a fight or assault, ninety-two involving attempted suicide or another psychiatric issue, five involving a weapon, ten for individual injuries or a laceration, and 264 "get a report" incidents (a generic term used by officers to document a wide range of incidents). *See, e.g., id.* Additionally, St. Anne's in Albany, NY, reported three hundred police calls, with seventeen for a fight or assault, 134 "get a report" incidents, and forty-two calls for laceration, overdose, attempted suicide, or psychiatric issue in 2015. *See, e.g., id.*

³⁰³ *See id.*

³⁰⁴ *See id.*

³⁰⁵ *See id.*

³⁰⁶ *See id.*

³⁰⁷ *See id.*

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review the effects of the Justice Center on investigated workers.³⁰⁸ The coalition reviews relevant criticisms, including the: (1) length of time to investigate; (2) workers with founded cases often lose everything; (3) reports that individuals who are forced to restrain on a daily basis are “backing off” and are taking disciplinary actions for not restraining rather than potentially being prosecuted by the Justice Center; (4) the investigation process appears to function as if individuals are presumed guilty; and (5) the reluctance in using restraints causing a shift in agencies and facilities, such that “people with special needs [are] basically running [the] facilities.”³⁰⁹

Finally, disability advocates and other critics have called for the New York State legislature to evaluate the effectiveness of the current Justice Center system.³¹⁰ Four questions have been recommended to identify reforms: “[1] Is its enforcement, for example, too punishment-oriented? [(2)] Is there enough training in facilities on how to handle disruptive and violent clients? [(3)] Is staffing sufficient? [(4)] Are police called too often?”³¹¹ Thus, any proposed reforms should focus on creating a system that protects both vulnerable people and their custodians.³¹²

4. The Justice Center as a Burden on Providers

Although the Justice Center was initiated as a safeguard for protecting vulnerable persons and a support center for individuals and agencies providing care, the response from agency providers has not been consistently positive. In October 2016, the Coalition of Provider Associations released an executive summary of survey results regarding opinions about the impact of the Justice Center.³¹³ The majority of the survey participants included nonprofit providers who operate under, and are certified by, the Office for People with Developmental Disabilities.³¹⁴ The results of this survey identified six major conceptual survey findings, as discussed in more detail below: (1) lack of funding and increased expenses; (2) lack of improvement of vulnerable people’s quality of life; (3) pre-emptive

³⁰⁸ *See id.*

³⁰⁹ *Id.*

³¹⁰ *See Justice Demands Fairness, supra note 293.*

³¹¹ *Id.*

³¹² *See id.*

³¹³ *See* COALITION OF PROVIDER ASSOCIATIONS, THE JUSTICE CENTER: OPPORTUNITY MISSED: A REPORT ON SURVEY FINDINGS: THE NYS JUSTICE CENTER’S IMPACT ON THE DISABILITY SECTOR, at ii (2016), <http://www.cpofnys.org/wp-content/uploads/2016/10/The-Justice-Center-Opportunity-Missed.pdf>.

³¹⁴ *Id.*

action by the vast majority of nonprofit actors before the Justice Center was implemented; (4) decreased agency ability to recruit and retain staff members; (5) negative impacts of investigations; and (6) high costs per convictions.³¹⁵

a. Increased Expenses and Funding

In regard to increased expenses and lack of funding, the survey discovered that although \$149.1 million had been appropriated to the Justice Center since 2013, funding to voluntary providers was reduced by \$500 million.³¹⁶ In addition to the reduction in funding, there had been an additional \$1 million in costs for screenings prior to employment, as well as an annual spending allotment for each investigated incident of abuse or neglect.³¹⁷ Further, agency compliance costs included \$12,937 per investigation and \$2,057 per incident.³¹⁸ Finally, there had been a \$26 million per year increase in costs for investigations created by the Justice Center, as well as \$4.5 million in expenses for staffing while individuals waited for investigative action by the Justice Center.³¹⁹ In total, these considerations led to a more than \$11 million cost per conviction by the Justice Center.³²⁰

b. Quality Assurance, Improvement, and Investigation Concerns

Another portion of the report considered the effects of quality assurance activities on reporting agencies following the creation of the Justice Center. Although many of these agencies already had quality assurance programs in place, reports indicated that “almost [seventy percent] of agencies report[ed] that their attention to quality assurance and improvement activities ha[d] been diverted by the Justice Center requirements.”³²¹ Even though these activities were affected by the Justice Center, zero percent of the agencies reported that their activities were “much improved[,]” and fifty-five percent reported that activities were “slightly worse[.]”³²² Additionally, the Justice Center reporting requirements resulted in

³¹⁵ *Id.* at ii–iii.

³¹⁶ *Id.* at 5.

³¹⁷ *Id.*

³¹⁸ *Id.* at 6.

³¹⁹ *Id.*

³²⁰ *Id.* at 22.

³²¹ *Id.* at 13.

³²² *Id.*

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the creation of “tremendous work on inconsequential issues that do not rise to the level of a crime[.]” leaving providers in a poor position regarding handling employees being investigated.³²³ This also led to increased costs, as 46.7 percent of agencies reported that their employees were given paid suspension during Justice Center investigations.³²⁴ Further, this led to a high price for employees, as forty-two percent of organizations reported placing staff members on unpaid suspension during investigations.³²⁵ These complicating factors were only further affected by the length of time for investigations, with most agencies reporting a length of six months, with some reporting up to a year or more of time.³²⁶

In addition to concerns regarding the financial effects of investigations, the report also indicated challenges with the mode of investigation by the Justice Center.³²⁷ For example, “1 in 3 agencies reported that the Justice Center staff used their law enforcement authority in a manner that threatened and intimidated staff[.]” and fifteen percent “reported their employees were told that they could not have the attorney of their choice represent them when they [were] being questioned by Justice Center staff.”³²⁸ However, the Justice Center has presently incorporated a policy of allowing staff to have counsel present during investigations.³²⁹

c. Inconsistencies in State and Non-State Run Facilities

Generally speaking, distinctions have been made between private providers and state operated providers when it comes to the Justice Center. As noted by the Coalition of Provider Associations, there seems to be a distinction between the two types of agencies based on their swiftness of action.³³⁰ Thus, the Coalition of Provider Associations noted in its report that state-run facilities cannot move as quickly as private-run facilities can regarding personnel issues and incidents.³³¹ In addition, these differences between state-run and privately run facilities are evident in the amount of substantiated reportable incidents.³³² According to the Justice

³²³ *Id.* at 15.

³²⁴ *Id.*

³²⁵ *Id.* at 16.

³²⁶ *Id.*

³²⁷ *Id.* at 21.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.* at 1.

³³¹ *Id.*

³³² JUSTICE CENTER ANNUAL REPORT, *supra* note 65, at 10 tbl.2.

Center's 2016 Annual Report, there were 11,254 closed abuse and neglect cases.³³³ Out of those closed cases, 2,807 occurred in state operated facilities, while a striking 8,447 occurred in non-state operated facilities.³³⁴ Additionally, only 897 of reports in state operated facilities were substantiated, while 3,272 were substantiated in non-state operated facilities.³³⁵ Thus, approximately thirty-two percent of reports in state-run facilities were substantiated, while approximately thirty-nine percent were substantiated in non-state-run facilities.³³⁶ Further inquiry into this difference would be beneficial, particularly to determine any differences in provider care through state-run and privately run facilities, thus allowing for identification of disparities leading to increased substantiated incidents.³³⁷

d. Conclusions and Recommendations for Improvement

In addition to its representative findings, the Coalition of Provider Associations identified a variety of recommendations for better practices by the Justice Center.³³⁸ These recommendations included things such as “a complete audit of the Justice Center by the NYS Comptroller’s Office” and “public hearings on the processes of the Justice Center and its impact on the people [the agency] support[s] and the provider agencies.”³³⁹ Additionally, the report called for a more “streamlined approach” to incident reports, including both reporting and management activities, as well as a focus on “quality and best practices, rather than . . . [a focus on being] a prosecutorial entity.”³⁴⁰ In total, the report provided twenty recommendations for improvements to Justice Center oversight.³⁴¹ Although these improvements were focused on agencies overseen by only the Office for People with Developmental Disabilities, they would likely be beneficial if applied to all agencies overseen by the Justice Center.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *See id.* at 12 tbl.6.

³³⁷ *See id.* at 10 tbl.2.

³³⁸ COALITION OF PROVIDER ASSOCIATIONS, *supra* note 313, at 25–27.

³³⁹ *Id.* at 25.

³⁴⁰ *Id.*

³⁴¹ *See id.* at 25–27.

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H. New York State Constitutional Considerations

In addition to the multitude of critiques and criticisms that have already been presented regarding the Justice Center, a constitutional question has recently come to light. This question considers whether there is a constitutional bar against the creation of a Special Prosecutor within the Justice Center,³⁴² and this challenge has come in the form of a pending criminal case.³⁴³

1. The *Viviani* Case

A 2016 case has highlighted a potential constitutional concern regarding the Justice Center.³⁴⁴ In *Viviani*, a schoolteacher was charged with sexually assaulting a student—charges that were initiated by the Justice Center following allegations of sexual relations between the parties.³⁴⁵ The student is a resident at the LaSalle School in Albany, New York, which is a school “licensed by the state Office of Children and Family Services[,]” and thus, is within the Justice Center’s jurisdiction.³⁴⁶

The attorney for the defendant raised a constitutional issue in court highlighting the dissenting opinion in the New York State Court of Appeals case,³⁴⁷ *People v. Davidson*.³⁴⁸ Counsel for the defense argued that “the Justice Center trumped up the charges based on fabricated testimony and proof[,] but also pointed to . . . the constitutional questions[.]”³⁴⁹ Additionally, the defense argued that even if it was found constitutional that the statute provides concurrent authority to the Justice Center, the current case should still be dismissed because the Justice Center did not prove that it received “consultation and consent,” per the statutory requirement, from the Albany County District Attorney, David Soares.³⁵⁰ In response, the Justice Center indicated that it did in fact consult the local district attorney before prosecuting the current case.³⁵¹

³⁴² See N.Y. EXEC. LAW § 552(2)(a) (McKinney 2017).

³⁴³ See Jim Franco, *Justice Center’s Statewide Powers Questioned in Local Rape Case*, SPOTLIGHT NEWS (Dec. 19, 2016), <http://www.spotlightnews.com/news/2016/12/19/justice-centers-statewide-powers-questioned-in-local-rape-case/>.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *People v. Davidson*, 55 N.E.3d 1027 (N.Y. 2016).

³⁴⁹ Franco, *supra* note 343.

³⁵⁰ *Id.*

³⁵¹ *Id.*

The arguments in this case prompted intervention by the New York State Attorney General, Eric Schneiderman.³⁵² The Attorney General's Office sent a letter to both Judge Thomas Breslin (the presiding judge),³⁵³ and the Albany County District Attorney's Office.³⁵⁴ In contacting Judge Breslin, the Attorney General's Office reported intervention in the case based on the constitutional argument presented.³⁵⁵ Directed at the District Attorney's Office, the Attorney General's letter acknowledged the Office's intent to intervene in the case, as well as the conclusion that "the record does not make clear whether [the Albany County District Attorney's] Office retained ultimate prosecutorial responsibility . . . when authorizing this prosecution."³⁵⁶ Therefore, based on the Attorney General's intervention and the constitutional questions presented—"whether the Justice Center's Special Prosecutor may constitutionally conduct [the current] felony prosecution"³⁵⁷—the dissent in *People v. Davidson* warrants additional review.

2. *People v. Davidson*

In *People v. Davidson*, an employee of the Finger Lakes Residential Center, a center under the Justice Center's jurisdiction, was charged with assaulting a fourteen-year-old male.³⁵⁸ The Lansing Town Court judge dismissed the case, holding that the Justice Center had jurisdiction only over state court cases that appeared before a grand jury.³⁵⁹ On appeal by the Justice Center, the Appellate Division reversed, holding in favor of the Justice Center.³⁶⁰ On a final appeal to the New York State Court of Appeals, the court considered "the powers of the Special Prosecutor for the Protection of People with Special Needs, including whether they have full and complete prosecutorial authority independent from the district attorney."³⁶¹ The majority held that there was "no

³⁵² *Id.*

³⁵³ Letter from Andrew W. Amend, Senior Assistant Solicitor Gen., to Hon. Thomas A. Breslin, Albany Cty. Supreme Court (Nov. 15, 2016), <http://www.spotlightnews.com/wp-content/uploads/2016/12/AGtoBreslin.pdf> [hereinafter Letter to Hon. Breslin].

³⁵⁴ Letter from Andrew W. Amend, Senior Assistant Solicitor Gen., to Hon. P. David Soares, Albany Cty. Dist. Attorney 1 (Nov. 25, 2016), <http://www.spotlightnews.com/wp-content/uploads/2016/12/AGtoSoares.pdf> [hereinafter Letter to Hon. Soares].

³⁵⁵ See Letter to Hon. Breslin, *supra* note 353.

³⁵⁶ Letter to Hon. Soares, *supra* note 354, at 1, 2.

³⁵⁷ *Id.* at 1.

³⁵⁸ See Franco, *supra* note 343.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *People v. Davidson*, 55 N.E.3d 1027, 1029 (N.Y. 2016) (Rivera, J., dissenting).

indication that the statute govern[ed] proceedings in local courts,”³⁶² and because the constitutional issue was not preserved by the defense at the lowest level of court, the Court of Appeals was barred from deciding the constitutional question on its merits.³⁶³ The lower court’s holding on behalf of the Justice Center was affirmed and the case was remanded to Lansing Town Court.³⁶⁴

Court of Appeals Judge Jenny Rivera dissented to the majority’s opinion and was joined by Judge Sheila Abdus-Salaam.³⁶⁵ Judge Rivera highlighted the New York State constitutional principle that the powers of an elected official cannot be transferred to an appointed, unelected official.³⁶⁶ Further, Judge Rivera noted that “[t]he district attorney has the ultimate responsibility for prosecuting crimes and offenses[,] . . . and the sole discretion to conduct all phases of criminal prosecutions[,]” and therefore concluded that to appear for prosecution, any Special Prosecutor must first have the consent of the local district attorney.³⁶⁷ Although Judge Rivera agreed with the majority opinion that the Special Prosecutor is not barred from prosecuting crimes in town court, she indicated that additional inquiry was required into the exact scope of the Special Prosecutor’s role.³⁶⁸

In her dissent, Judge Rivera highlighted her interpretation of the three involved parties’ arguments.³⁶⁹ First, the defense argued not that the role of the Special Prosecutor was unconstitutional, but that “our legal system abhors unchecked prosecutorial authority, and in order to protect the population from the caprice and zealotry of an unelected Special Prosecutor there must be prescriptions on unbridled power.”³⁷⁰ The argument presented by the Attorney General in *amicus curiae* highlighted that constitutionally, the prosecutorial function of an elected person cannot be transferred to someone who has been appointed and thus, the Special Prosecutor cannot prosecute without the express consent of the district

³⁶² *Id.* (majority opinion).

³⁶³ Franco, *supra* note 343.

³⁶⁴ *Davidson*, 55 N.E.3d at 1028.

³⁶⁵ *Id.* at 1029, 1036 (Rivera, J., dissenting).

³⁶⁶ *Id.* at 1029 (citing *People ex rel. Wogan v. Rafferty*, 102 N.E. 582, 582 (N.Y. 1913)); *see also* N.Y. CONST. art. V, § 1 (discussing the election of the Attorney General); N.Y. CONST. art. XIII, § 13 (discussing the election of a district attorney).

³⁶⁷ *Davidson*, 55 N.E.3d at 1029 (Rivera, J., dissenting) (first citing *People v. Soddano*, 655 N.E.2d 161, 162 (N.Y. 1995); then citing *In re Soares v. Carter*, 32 N.E.3d 390, 392 (N.Y. 2015)).

³⁶⁸ *Davidson*, 55 N.E.3d at 1029 (Rivera, J., dissenting).

³⁶⁹ *Id.* at 1029–35.

³⁷⁰ *Id.* at 1031.

attorney.³⁷¹ Finally, the dissent highlighted the Justice Center's argument, which was that the legislature can appoint an unelected district attorney and that the Act creating the Justice Center granted independence and the power to investigate and later prosecute reported incidents at will.³⁷² The dissent rejected the Justice Center's argument, stating that case law and the New York State Constitution do "not support the sweeping independent power advocated by the Justice Center[.]" and that the appointment of a Special Prosecutor with "unfettered prosecutorial power" would be considered unconstitutional.³⁷³

In supporting her argument, Judge Rivera pointed to the holding in *Wogan v. Rafferty*,³⁷⁴ which stated that: "Where the Constitution establishes a specified office, or recognizes its existence, and prescribes the manner in which it shall be filled, the legislature may not transfer any essential function of the office to a different officer chosen in a different manner[.]"³⁷⁵ In addition to the reference to constitutional authority, the dissent also highlighted extensive case law history that has given the district attorney discretionary power regarding how, whom, and whether to prosecute an individual.³⁷⁶ Judge Rivera did acknowledge the district attorney's power to delegate duties;³⁷⁷ however, this power is limited because the district attorney is not permitted to delegate his or her official responsibilities—in this case, his prosecutorial discretion and authority—concluding: "the district attorney must retain ultimate responsibility for the prosecution."³⁷⁸

Finally, the dissent concluded: "the Special Prosecutor is not on equal footing with the local district attorney."³⁷⁹ The dissent reached this conclusion through a three-part rationale. First, the dissent concluded that the authority of the Special Prosecutor is limited by the choices of the district attorney and the Justice Center lacks complete independence from the district attorney, as evidenced by the fact that the Special Prosecutor is required to notify the district attorney of prosecution.³⁸⁰ Second, Judge Rivera

³⁷¹ *Id.* at 1032.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *People ex rel. Wogan v. Rafferty*, 102 N.E. 582 (N.Y. 1913).

³⁷⁵ *Davidson*, 55 N.E.3d at 1032 (Rivera, J., dissenting) (quoting *Wogan*, 102 N.E. at 582).

³⁷⁶ *Davidson*, 55 N.E.3d at 1033 (Rivera, J., dissenting).

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 1034.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

highlighted the fact that the Special Prosecutor would minimize the district attorney's authority—a prosecutorial power that is prescribed by the New York State Constitution.³⁸¹ Last, the dissent highlighted two distinct policy concerns regarding giving the Special Prosecutor independent prosecutorial power: (1) the independent and ultimate discretion of the district attorney to prosecute furthers the “democratic system of checks and balances[.]”³⁸² and (2) criminal charges greatly affect individuals, whether they are convicted or not, and therefore, those with prosecutorial authority must be elected, rather than appointed by the government, to allow for public oversight and input.³⁸³

3. The Attorney General's Legal Brief in the *Viviani* Case

In response to the constitutional question presented in the *Viviani* case, the Attorney General's Office submitted a brief for intervenor.³⁸⁴ In this brief—authored by Andrew W. Amend, Senior Assistant Solicitor General³⁸⁵—the constitutionality of the Justice Center's prosecution of the *Viviani* case was questioned.³⁸⁶ At present, the Justice Center works concurrently with the same prosecutorial power as the district attorney.³⁸⁷ However, according to the Attorney General's brief, this concurrent power, with the current standard of informing the district attorney of the prosecution, is not enough.³⁸⁸ According to the Attorney General, the holding of individual prosecutorial authority of the Special Prosecutor is unconstitutional, but could be made constitutional “by construing the Act to require the Special Prosecutor to act subject to the ultimate authority of a county district attorney.”³⁸⁹ Further, if express consent was given by the district attorney in the *Viviani* case, the Attorney General asserted that both the statute and the

³⁸¹ *Id.* at 1035.

³⁸² *Id.*

³⁸³ *See id.*

³⁸⁴ *See* Brief for Intervenor, *People v. Viviani*, 2017 NYLJ LEXIS 1006 (N.Y. Sup. Ct. 2016) (No. 16-6796), <https://www.scribd.com/document/334951503/People-v-Viviani-Mem-of-Law-for-Intervenor-OAG>.

³⁸⁵ *Id.* at 27.

³⁸⁶ *See* Jim Franco, *Attorney General v. Governor: Schneiderman is Setting Stage to Challenge Cuomo's Justice Center*, SPOTLIGHT NEWS (Dec. 23, 2016), <http://www.spotlightnews.com/towns/bethlehem/2016/12/23/attorney-general-v-governor-schneiderman-is-setting-stage-to-challenge-cuomos-justice-center/>.

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ Brief for Intervenor, *supra* note 384, at 2–3.

current prosecution would be considered constitutional.³⁹⁰

The brief submitted by the Attorney General's Office relied heavily on the above-mentioned dissent in *People v. Davidson*.³⁹¹ Further, the brief concluded that the "fundamental principle [of appointment] prevents the [l]egislature from creating an independent prosecutor responsible for a class of cases independent of the state's county district attorneys and Attorney General."³⁹² Thus, delegation of a district attorney's or the Attorney General's authority to any other official would violate this constitutional prohibition.³⁹³ Although this is the case, the Attorney General's brief also noted that the Justice Center Special Prosecutor is not "categorically barred from conducting prosecutions."³⁹⁴ However, the Special Prosecutor can only constitutionally prosecute a case if there is express consent from the district attorney.³⁹⁵ When questioned, an Albany County District Attorney spokesperson indicated that the office was notified of the defendant's prosecution but did not give consent, as express consent is not currently required by state law.³⁹⁶ With this report in mind, the Attorney General's brief recommended a further development of the *Viviani* case record to determine whether the Special Prosecutor was in fact authorized by the Albany County District Attorney to prosecute the current case.³⁹⁷

As an additional note and consideration, the Attorney General also submitted a letter to Governor Cuomo and the New York State legislature opposing an additional plan by Governor Cuomo to appoint a Special Prosecutor to police state agency procurement.³⁹⁸ In this letter, the Attorney General identified the same concerns as noted above regarding the Justice Center's Special Prosecutor, indicating that these would also apply to the creation of a Special Prosecutor for procurement.³⁹⁹ On March 30, 2017, the Albany County Supreme Court dismissed the indictment against Viviani,

³⁹⁰ *Id.* at 3.

³⁹¹ *Id.* at 6–12.

³⁹² *Id.* at 16.

³⁹³ *See id.* at 18.

³⁹⁴ *Id.* at 19.

³⁹⁵ *See id.*

³⁹⁶ Franco, *supra* note 386.

³⁹⁷ Brief for Intervenor, *supra* note 384, at 14.

³⁹⁸ *See* Franco, *supra* note 386; *see generally* Letter from Eric T. Schneiderman, Attorney Gen. of the State of N.Y., to Hon. Andrew M. Cuomo, N.Y. State Governor (Dec. 21, 2016), <https://www.scribd.com/document/334953362/Schneiderman-Letter> (discussing the Attorney General's opposition to the addition of another Special Prosecutor).

³⁹⁹ Franco, *supra* note 386.

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adopting the dissent's argument in *People v. Davidson* that the "[Justice Center] statute can pass constitutional muster by reading it to require the District Attorney to maintain ultimate prosecutorial responsibility for the prosecution of any case," and holding that in the absence of evidence in *People v. Viviani*, the District Attorney had retained ultimate prosecutorial authority and the Justice Center did not have authority to prosecute the case.⁴⁰⁰

V. CONCLUSION

The Justice Center for the Protection of People with Special Needs was created to protect vulnerable persons, shielding them from potential instances of abuse or neglect by the agencies that provide services to them. Although the Justice Center has been able to fill a gap in reporting and investigating these incidents, the relevant critiques of the Justice Center are concerning. Particularly, the impact of the Justice Center beyond investigating and reporting incidents has become an area of contention, which appears to have produced additional risk to vulnerable individuals. Additionally, potential constitutional concerns regarding the employment of Justice Center Special Prosecutors are lurking in the New York State court system, and thus, must be resolved. Therefore, it is important for the New York State legislature to revisit the Justice Center's goals and operations, to ensure best practices and that all parties, including vulnerable persons, employers, and employees, are being benefited and protected by the system of investigation in both civil and criminal action. In revisiting the Justice Center's goals and operations, the legislature should consider utilizing the recommendations presented within the Coalition of Provider Associations' 2016 report as a model for improvement.

⁴⁰⁰ *People v. Viviani*, 257 N.Y.L.J. 34 (Sup. Ct. Albany Co. 2017).