

C S E A

# *REPRESENTING MEMBERS AT THE JUSTICE CENTER*



MARY E. SULLIVAN, PRESIDENT  
[cseany.org](http://cseany.org)

CSEA Legal Department

## TABLE OF CONTENTS

	Page
What is the Justice Center for Protection of People with Special Needs? .....	1
What to Expect if You are Involved in a Justice Center Investigation .....	2
Making a Report .....	2
During the Investigation .....	3
The Three Types of Justice Center Cases .....	4
Disciplinary Investigations .....	5
Criminal Investigations .....	7
After the Investigation is Completed .....	9
What is a Report of Substantiated Finding? .....	11
The Definitions of Abuse and Neglect .....	12
The Categories of Abuse and Neglect .....	13
Your Right to Appeal .....	14
Investigation Flow Chart .....	16

## **What is the Justice Center for Protection of People with Special Needs?**

The Justice Center was created by Executive Law, Article 20, and Social Services Law, Article 11. Its purpose is to strengthen and standardize the safety net for people who, due to physical or cognitive disabilities, or the need for services or placement, are receiving services from a facility or provider agency (referred to as “vulnerable persons”). This includes common definitions of abuse and neglect to be used for the reporting of incidents for investigation by the Justice Center, or by those to whom the Justice Center delegates responsibility for investigations. These standards apply to programs in the 6 agencies subject to the Justice Center’s jurisdiction.

- ▶ **Office for People with Developmental Disabilities (OPWDD)**
- ▶ **Office for Mental Health (OMH)**
- ▶ **Office of Alcoholism and Substance Abuse Services (OASAS)**
- ▶ **Department of Health (DOH)**
  - Adult homes that have over 80 beds, and where at least 25% of the residents are persons diagnosed with a serious mental illness and have fewer than 55% of the beds designated as Assisted Living Program beds.
  - Overnight summer day camps and traveling summer day camps for children with developmental disabilities.
- ▶ **Office of Children and Family Services (OCFS)**
- ▶ **State Education Department**
  - New York State School for the Blind
  - New York State School for the Deaf
  - State-supported (4201) schools that have a residential component
  - Special act school districts
  - In-state private residential schools approved by the New York State Education Department.

This includes all facilities, private or public, operated, licensed or certified by these agencies.

The Justice Center’s investigative responsibilities include:

- ▶ Receiving reports of allegations of reportable incidents through a 24/7 hotline.
- ▶ Investigate reportable incidents.

After accepting reports of allegations of abuse or neglect, the Justice Center either investigates the case itself, or delegates the investigative responsibilities to the applicable State Oversight Agency. The Justice Center employs investigators with law enforcement experience to investigate the most egregious cases. The Justice Center is charged with developing standards and training curricula, and to provide training for all investigators who will be assigned to investigate reportable incidents involving vulnerable persons.

The Justice Center also works with local law enforcement to coordinate investigation of potential criminal cases.

After the investigation, the Justice Center will review investigative findings to determine whether allegations of abuse or neglect have been **substantiated** or **unsubstantiated**. Senior investigators at the Justice Center review the adequacy of ALL investigations of reported abuse or neglect. Then attorneys at the Justice Center review ALL findings of substantiated or unsubstantiated allegations of abuse or neglect.

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

The Justice Center is charged with investigating the most serious allegations of abuse and neglect, including allegations that appear to be criminal in nature.

If you are involved in a Justice Center investigation either as a subject or as a witness, the following information explains the reporting and investigation process, the appeals process, and how to get additional information.

If you are the subject of a report, you should contact CSEA as soon as possible for assistance and/or representation.

## **MAKING A REPORT**

### **Who can report an allegation of abuse or neglect?**

Anyone can make a report to the Vulnerable Persons Central Register (VPCR), which is a statewide toll-free hotline and incident reporting system for allegations of abuse and neglect. However, some people are required to report to the VPCR. These “mandated reporters” include provider agency staff and human service professionals who by nature of their job must report allegations of abuse and neglect.

## When should mandated reporters contact the VPCR?

Whenever a mandated reporter has reasonable cause to suspect an incident occurred, he or she is required to immediately report to the VPCR. Reporting may be delayed to ensure the safety of staff and people receiving services, but a report must be made to the VPCR within 24 hours of the mandated reporter's discovery of the allegation that a reportable incident has occurred. Failure by a mandated reporter to report suspected abuse or neglect to the VPCR is a serious matter and possible consequences include discipline, termination, and prosecution. The phone number for the VPCR is 1-855-373-2122. A report can also be made through the Justice Center's website at [www.justicecenter.ny.gov](http://www.justicecenter.ny.gov) or through an app for Android devices.

## What happens after a report is made?

Intake ⇨	Classification ⇨	Assignment
A call center representative collects information from the reporter and an incident number is assigned. Confidentiality laws protect reporters.  The call is recorded.	The incident is then classified. Reportable: <ul style="list-style-type: none"><li>• Abuse or neglect</li><li>• Significant incident</li><li>• Death</li><li>• Financial</li></ul> Non-Reportable: <ul style="list-style-type: none"><li>• General Inquiry</li><li>• Non-Justice Center</li></ul>	The incident is then assigned to the appropriate entity for investigation. The Justice Center conducts investigations for serious abuse or neglect incidents, financial misconduct, and deaths. Less serious incidents are delegated to the appropriate State Oversight Agency, which may delegate to the provider agency.

Witness interviews do not require the presence of a representative or legal counsel. Custodians are duty-bound to cooperate with an investigation regarding the abuse or neglect of vulnerable persons. However, if the employee believes he or she is at risk of an adverse employment consequence then he or she has a right to request union representation.

## DURING THE INVESTIGATION

### Who can be interviewed during an investigation?

For allegations of abuse or neglect, investigators will conduct interviews of people who receive services, witnesses and subjects. Most interviews are recorded. (A "subject" refers to the individual named in the allegation as committing the act of abuse or neglect. Only custodians may be considered to be subjects.)

## **How will I know if I am the subject of an investigation?**

When you are a subject in an abuse or neglect investigation, you will receive a notification from your employer. This notification will indicate that you are a subject and it will include either an incident or case serial number from the VPCR.

You should contact your CSEA Labor Relations Specialist or Local President immediately and provide them with a copy of this notice.

## **What can I expect if I am a witness to an incident?**

If you are a witness to an incident of abuse or neglect, you may be interviewed by Justice Center investigators.

## **What can I expect if I am a subject of an investigation?**

As part of the investigation, Justice Center investigators will obtain and review documentation from the facility, and elsewhere, when appropriate. Interviews for non-criminal investigations typically occur at the facility or program of your employment. Interviews for criminal investigations may occur at the facility or program, at a Justice Center office, or at a local police station, depending on the circumstances. Investigators will inform you of the location.

You should not provide false documentation or information during an investigation. Interfering with the discovery, reporting or investigation of abuse or neglect, falsifying records or intentionally making false statements is obstruction. This conduct can be classified as abuse and can be prosecuted.

## **THE THREE TYPES OF JUSTICE CENTER CASES**

You should be aware that there are three types of Justice Center cases. You may encounter the Justice Center as part of a disciplinary case through your employer. The Justice Center may also be investigating for the purposes of bringing criminal charges against you. In any circumstance the Justice Center investigation could lead to a Substantiated Report of abuse or neglect, which is an administrative finding that you may wish to appeal through the hearing process outlined below.

1. Disciplinary
  - The Justice Center can take the role of the employer agency in performing investigations and at Article 33 proceedings
2. Criminal
  - The Justice Center can act as law enforcement and conduct

criminal investigations then prosecute offenses

3. Substantiated Reports of Abuse or Neglect
  - The Justice Center can institute an administrative proceeding alleging abuse and neglect

## DISCIPLINARY INVESTIGATIONS

**Can I have representation or legal counsel with me during a disciplinary interrogation?**

For non-criminal investigations, you may have union representation during an interrogation.

The union representative cannot interfere with, disrupt, or otherwise undermine management's right to investigate and/or conduct an interrogation.

The employer cannot, however, insist that the union representative be quiet; the representative has a right to represent the employee in a meaningful way.

**\*\*NOTE:** Even though an employee may be entitled to interrogation representation, he/she has the obligation to respond to and answer the employer's questions at an interrogation. There is **no Constitutional Fifth Amendment right** against self-incrimination at an employee interrogation that is being conducted solely by the employer/management. Any refusal to answer questions can (and no doubt will) result in an additional charge of insubordination.

The representative's specific role at the interrogation serves several important purposes, including:

- ▶ To advise the employee properly so as to avoid a charge of insubordination for refusing to answer questions;
- ▶ To assist a frightened or inarticulate employee in explaining his/her conduct;
- ▶ To caution against wholesale denials which might create the appearance of dishonesty or cause unnecessary contradictions;
- ▶ To prevent unwarranted fatal admissions [The key here being, don't volunteer unsolicited information!];

- ▶ To point out mitigating and/or extenuating matters which may have influenced the employee's conduct;
- ▶ To serve as a witness against future false accounts by management relating to answers/statements made during the interrogation.

The union representative should be assertive when representing an employee at an interrogation, and should request the right:

- ▶ To be informed of the subject matter of the interrogation, including the nature of the charges and allegations, prior to the commencement of the interrogation;
- ▶ To confer with the employee prior to the commencement of the interrogation;
- ▶ To speak and to request clarification of question(s) if the employee does not understand the question(s) during the interrogation;
- ▶ To offer further information following the interrogation.

### **What is use immunity and how do I get it?**

“Use Immunity” is a court driven doctrine that protects an employee’s Fifth Amendment right against self-incrimination in disciplinary interrogations where an employee has been compelled to answer management’s questions under the threat of insubordination. Under the precept of “Use Immunity,” any statements made under the threat of insubordination cannot be used against the employee in a criminal prosecution.

Although the courts have held that “Use Immunity” attaches as a matter of law and without declaration by the employee, the employee (or the union representative) should assert the right for the record.

**The employee/representative should ask if he/she is compelled to answer questions or face insubordination.** If the employer says YES, the employee/representative should recite the “Use Immunity” right.

The employee/representative should know or ask who is conducting the questioning.

In situations where an employee knows, suspects or has been informed that his/her answers could lead to a subsequent criminal investigation, the employee has certain decision options: (a) request time to secure legal representation, and (b) decide between accepting a charge of insubordination or risking an

investigation which may lead to an arrest.

Remember, although police cannot use statements made by an employee under the doctrine of “Use Immunity,” they can conduct an independent investigation on their own or at the request of the employer.

## CRIMINAL INVESTIGATIONS

### **What rights do I have during a criminal interrogation?**

In any criminal investigation, you have certain constitutional rights, which may include a right to have legal counsel present under some circumstances.

Where the Justice Center Investigators are present during questioning or are conducting the questioning, the employee’s Fifth Amendment right against self-incrimination may attach.

**The representative/employee should ask whether he/she is a target and whether the investigation is of a criminal or civil (employment related only) nature. If the investigator refuses to answer, ask if the employee is subject to discipline for insubordination if he/she refuses to answer. If the answer is yes then it is a civil interrogation. If the answer is no then it is a criminal investigation. If the investigator refuses to answer then treat it as a criminal investigation.**

People are often surprised to learn that if a person hasn’t yet been arrested, the Justice Center Investigator may question the person and use the answers in court without first providing the Miranda warning.

### **Does a person have to respond to Justice Center Investigator questions if he or she hasn’t been arrested?**

**Generally, no.** A person generally cannot be arrested simply for failure to respond to questions.

The Fifth Amendment to the U.S. Constitution guarantees the “right of silence.” This means that unless there is “probable cause” to make an arrest or a “reasonable suspicion” to conduct a “stop and frisk,” a person approached by the Justice Center Investigator has the legal right to refuse to answer questions.

*Indeed, a person who has reason to believe that he or she is a potential suspect should politely decline to answer questions, at least until after consulting an attorney.*

Whether or not the employee is a target **in a criminal investigation**

**there is no duty to cooperate.** Where the investigation is employment related only (non-criminal), then the rights of employees at interviews/interrogations, discussed before, applies.

If a Justice Center Investigator wishes to conduct a criminal interview:

- ▶ There is no right to Union Representation.
- ▶ You do not have to cooperate.
- ▶ If the Justice Center wishes to compel your cooperation, it can secure a subpoena from the District Attorney or Attorney General.

### **What do I do if I am arrested?**

If you are arrested or placed in custody (i.e., handcuffs), you should be given your Miranda Warnings, and therefore cannot be compelled to answer any questions.

### **What are your Miranda rights?**

Popularly known as the Miranda warning, a defendant's rights consist of the following:

- ▶ You have the right to remain silent.
- ▶ If you do say anything, what you say can be used against you in a court of law.
- ▶ You have the right to consult with a lawyer and have that lawyer present during any questioning.
- ▶ If you cannot afford a lawyer, one will be appointed for you if you so desire.
- ▶ If you choose to talk to the Justice Center Investigator, you have the right to stop the interview at any time.

### **When is the Miranda warning required?**

It doesn't matter whether questioning occurs in a jail, at the scene of a crime, on a busy downtown street, or the middle of an open field: If a person is in custody (deprived of his or her freedom of action in any significant way), the Justice Center Investigator must read them their Miranda rights if they want to question the

suspect and use the suspect's answers as evidence at trial.

If a person is not in custody, however, no Miranda warning is required and anything the person says can be used at trial if the person is later charged with a crime. This exception most often comes up when the person blurts out a confession before an opportunity to deliver the warning has arisen.

Once given Miranda warnings, you have the right to remain silent (except for general questions such as name, address, etc.). If you waive your right to remain silent, your answers to questions may be used against you in a criminal proceeding.

### **What should I do if I am questioned after I am arrested?**

The almost-universal advice of defense attorneys is to remain silent when being questioned after an arrest, at least until after consulting an attorney. Suspects all too frequently unwittingly reveal information that can later be used as evidence of their guilt.

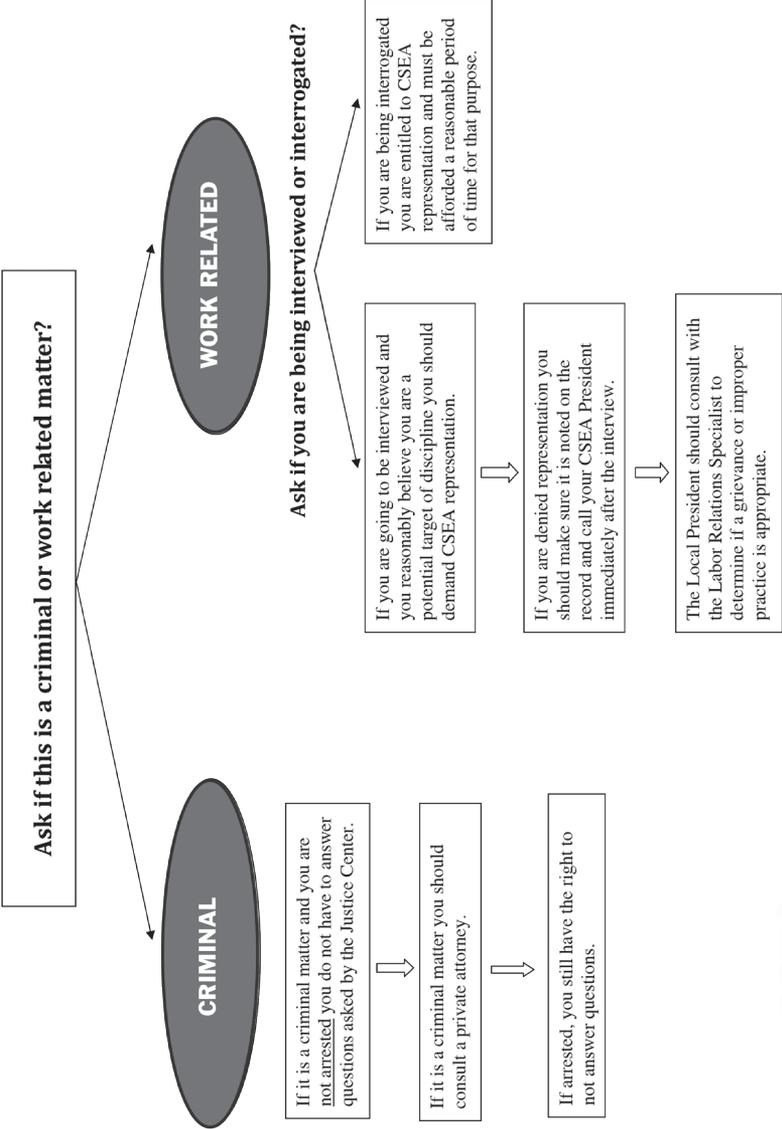
**\*\* NOTE:** The Act that established the Justice Center also amended the Penal Law to include new Class A misdemeanors for falsely reporting abuse and neglect, and for recklessly endangering the welfare of a person unable to care for him or herself because of physical disability, mental disease or defect. Furthermore, knowingly acting in a manner likely to injure such a person is now a Class E felony (formerly a Class A misdemeanor).

## **AFTER THE INVESTIGATION IS COMPLETED**

### **What are the potential determinations of the investigation?**

1. The employer may bring a notice of discipline through Article 33 of the State Contracts.
2. If there is a criminal investigation, criminal charges can be brought against the employee.
3. If the Justice Center determines that the investigation substantiates the report of abuse or neglect it will send the member a "Report of Substantiated Finding."

# Have you been contacted by the Justice Center?



## **What is a Report of Substantiated Finding?**

Reports of abuse or neglect are to be determined to be substantiated or unsubstantiated. Reports may be substantiated if an abuse or neglect investigation determines that there is a preponderance of evidence to support the allegation. Substantiated reports of abuse or neglect are classified into one of four categories. Unsubstantiated reports are immediately sealed.

### **Who makes the determination on the investigative findings?**

The Justice Center's Office of General Counsel (OGC) makes a final determination about whether an allegation of abuse or neglect is substantiated and, if substantiated, the category level. In every allegation of abuse or neglect, the Justice Center will issue a finding of substantiated or unsubstantiated as to each person who is a subject.

### **How will I find out the results of an investigation?**

If you are the subject of an investigation, a letter of findings will be issued to you directly. This letter is sent to your residential address. The notice will contain a short statement of the accusation against you, the type of abuse or neglect that was found, and the category that was found to apply.

On the same date, the Justice Center will notify the director of your facility or provider, the State Oversight Agency that licenses or certifies your facility or provider, and the service recipient named as a victim in the investigation or their personal representative of the outcome of the investigation. These same parties are notified whether the allegation is substantiated or unsubstantiated. (A "personal representative" is someone who is legally permitted to act on behalf of the service recipient, e.g. guardian, spouse, adult child. A "State Oversight Agency" licenses or certifies the provider, e.g. Office of Mental Health.)

**You should immediately provide a copy of the letter of findings to your CSEA Local President and/or Labor Relations Specialist.**

### **Who has access to information about the investigation?**

State law provides for confidentiality protections and identifies who can obtain records pertaining to substantiated and unsubstantiated reports. The Justice Center's records of investigations are confidential but can be given to certain authorized persons, including the subject of the investigation.

## THE DEFINITIONS OF ABUSE AND NEGLECT

### What constitutes abuse or neglect?

The Act defines Abuse and Neglect of Vulnerable Persons in broad terms, including both actual harm and the risk of harm:

Terms	Examples of Custodian Behaviors
Physical Abuse	Intentional contact (hitting, kicking, shoving, etc.) corporal punishment, injury which cannot be explained and is suspicious due to extent or location, the number of injuries at one time, or the frequency over time.
Psychological Abuse	Taunting, name calling, using threatening words or gestures.
Sexual Abuse	Inappropriate touching, indecent exposure, sexual assault, taking or distributing sexually explicit pictures, voyeurism or other sexual exploitation. All sexual contact between a Custodian and a service recipient is sexual abuse, unless the Custodian is also a person receiving services.
Neglect	Failure to provide supervision, or adequate food, clothing, shelter, health care, or access to an educational entitlement.
Deliberate misuse of restraint or seclusion	Use of these interventions with excessive force, as a punishment, or for the convenience of staff.
Controlled Substances	Using, administering or providing any controlled substance contrary to law.
Aversive conditioning	Unpleasant physical stimulus used to modify behavior without person specific legal authorization.
Obstruction	Interfering with the discovery, reporting or investigation of abuse/neglect, falsifying records or intentionally making false statements.

**\*\*NOTE:** The statutory definitions are **not dispositive** of whether disciplinary charges may be brought against an employee, or to the determination of whether an employee committed misconduct. The definitions are relevant to what is reportable to the Justice Center and to the categorization of the seriousness of substantiated abuse and neglect.

# THE CATEGORIES OF ABUSE AND NEGLECT

## What are the categories of abuse or neglect?

The Justice Center will categorize the report of abuse or neglect into one of four categories. Categories one through three can be alleged against an employee. One is the most serious and three is the least.

Categories of Findings At-a-Glance
<b>Category 1</b> is a serious physical abuse, sexual abuse, or other severe conduct by a custodian. A Category 1 substantiation places the custodian on the Staff Exclusion List. It also includes a second instance of Category 2 conduct that occurs within three years of a prior Category 2 finding.
<b>Category 2</b> is when a custodian significantly endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. A report of Category 2 conduct that is not elevated to a Category 1 finding will be sealed after five years.
<b>Category 3</b> is for less serious incidents of abuse or neglect. Reports are sealed after five years.
<b>Category 4</b> covers systemic, provider-based incidents including instances when abuse or neglect has been substantiated but staff conduct is mitigated by systemic conditions. It also includes substantiated abuse or neglect against a service recipient in which a perpetrator cannot be identified.

## What happens if I am found responsible for a Category 1 offense?

The Justice Center maintains a statewide register known as the Staff Exclusion List that contains the names of custodians (e.g., employee, volunteer, intern, consultant, contractor) found responsible for Category 1 offenses, which include certain serious or repeated acts of abuse or neglect. Individuals on the Staff Exclusion List will be prohibited from being hired by any state operated, certified or licensed agencies or providers that serve people with special needs.

## How will I know if I have been placed on the Staff Exclusion List?

The letter you receive at the conclusion of an investigation will tell you if you have been found responsible for a Category 1 substantiated offense. If you receive such a finding, you have been placed on the Staff Exclusion List, subject to your appeal of that finding.

## **Will I lose my employment if I am placed on the Staff Exclusion List?**

The statute indicates that if the employee is represented by a union, the disciplinary procedure in the contract will be followed. According to the Governor's Office for Employee Relations, if an employee is placed on the Staff Exclusion List, but is reinstated through Article 33, the employee will continue his/her employment with the State.

### **YOUR RIGHT TO APPEAL**

If you are the subject of a substantiated report of abuse or neglect, you have the right to challenge the findings within 40 days. Any substantiated report may be challenged, regardless of the category determination. Information about the appeals process will be included in your findings letter.

#### **Step 1: Administrative Review**

The first step is to submit a written request for an amendment of the substantiated report. **This request and any included statement will become evidence at any subsequent hearing.**

The Justice Center's Administrative Appeals Unit reviews the record on appeal which includes: the investigative file; substantiated report; your request for amendment; and any additional evidence you submit.

The Administrative Appeals Unit determines whether there is a preponderance of the evidence to uphold the finding that you committed an act or acts of abuse or neglect as indicated in the substantiated report. If the report of abuse or neglect is substantiated, you have the right to a hearing before an Administrative Law Judge (see Step 2). If the report of abuse or neglect is unsubstantiated, the report will be sealed.

#### **Step 2: Administrative Hearing**

After the Administrative Appeals Unit's review, if the report remains substantiated, you have the right to a hearing before an Administrative Law Judge. Prior to the hearing, you will receive a notice of conference, usually held by telephone. At the conference, any disclosure of evidence will be discussed and a hearing date will be set. If there is a novel issue of law or a party wishes to make a motion, the time frame will be set by the Administrative Law Judge.

The Justice Center will send a witness list and copies of the exhibits they wish to present in the case. Interview or interrogation transcripts and any videos will be provided on a CD. If the Justice Center intends to use the service recipient's medical information they may require a Qualified Protective and Confidentiality Order, which is an agreement by the parties and ordered by the Judge requiring the parties keep all such information confidential and limiting

use of the information to the hearing and any appeals. At the conclusion of the case the parties must return or destroy any copies.

You or your representative must provide the Justice Center with all exhibits that the member may present at the hearing and provide a witness list.

At the hearing, the Justice Center will be required to produce evidence to support the findings of the investigation. The questions to be addressed at the hearing are whether there is a **preponderance of evidence** to support a finding of abuse or neglect, and the category level of abuse or neglect. The formal rules of evidence do not apply (hearsay evidence is permitted). During the hearing:

- ▶ The parties attempt to stipulate to exhibits
- ▶ The attorneys will make opening statements (Justice Center first) laying out what evidence they intend to provide
- ▶ The Justice Center will present its witnesses
- ▶ All witnesses are subject to cross-examination
- ▶ The member will present witnesses
- ▶ The parties will make closing arguments (member first) summarizing the evidence presented and applying the legal standards
- ▶ Written briefs are not permitted unless there is an issue of law

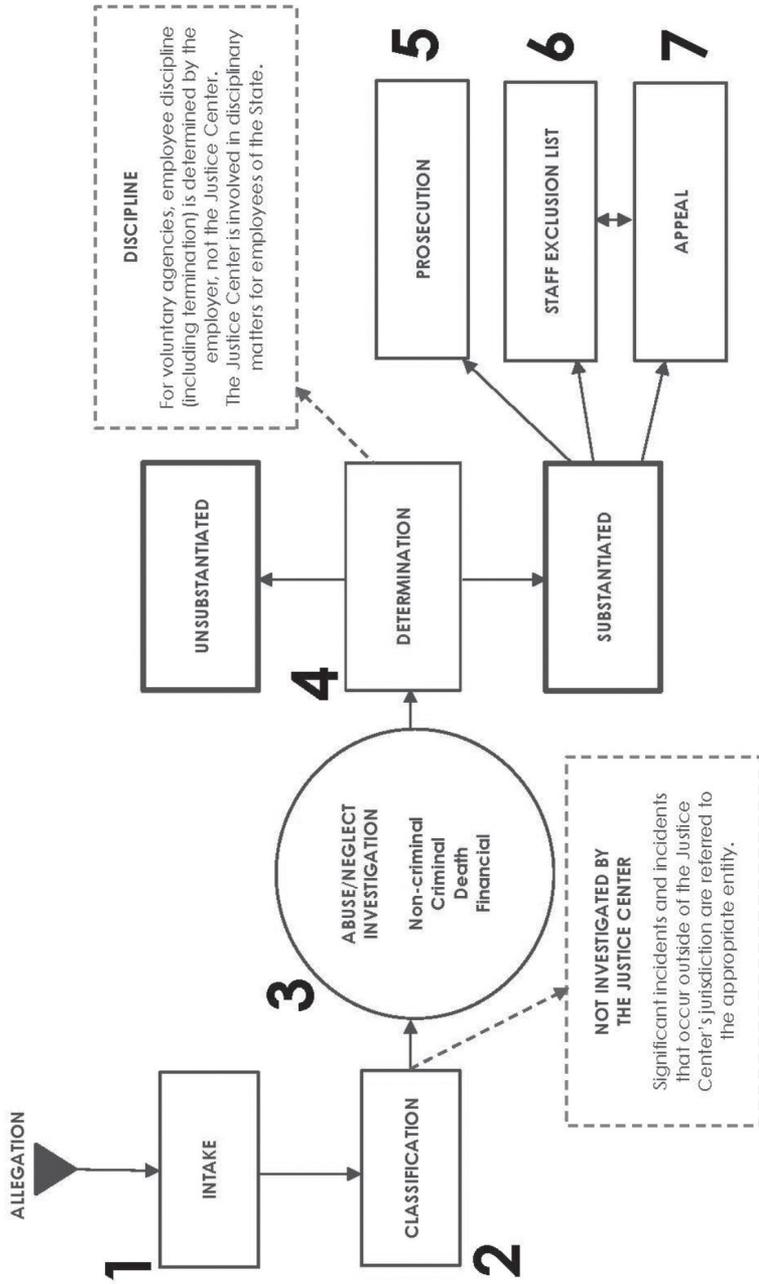
At the conclusion of the hearing, the Administrative Law Judge will issue a report and recommendation to the Executive Director of the Justice Center. The Executive Director or his designee will make a final determination (issued in the form of an Order), which is not subject to further administrative review. The decision will contain findings on three issues for each substantiated report:

- ▶ Did the alleged acts occur?
- ▶ Does the conduct constitute abuse or neglect as defined by the statute?
- ▶ What category level does the abuse or neglect constitute?

### **If the Substantiated Report is upheld can I appeal?**

You can appeal this decision to the New York courts by bringing an “Article 78 Proceeding” within **4 months** of the decision. The standard of review the court will use is Substantial Evidence in the Record. The appeal will most likely be transferred to the Appellate Division for decision.

# Investigation Flow Chart



<b>Incident Review Process</b>		
1	Intake	An allegation is reported to the Vulnerable Persons Central Register.
2	Classification	The allegation is classified as either a reportable incident (e.g. incident of abuse) or a non-reportable incident (e.g. general inquiry).
3	Investigation	For abuse and neglect investigations, the Justice Center will assume the responsibility for investigating the most serious allegations and will delegate less severe incidents to the appropriate State Oversight Agency. If the Justice Center investigates, the case will be assigned to a Justice Center investigator.
4	Determination	After the investigation of abuse or neglect is completed - regardless of whether the Justice Center, the State Oversight Agency, or the service provider completes the investigation - the Justice Center's Office of General Counsel reviews the case and determines whether each allegation shall be substantiated or unsubstantiated. Reports that are unsubstantiated are immediately sealed. An unsubstantiated finding does not preclude other consequences, including disciplinary action.
5	Prosecution	For substantiated criminal cases, prosecution is pursued.
6	SEL	Custodians with Category 1 findings will be placed on the Staff Exclusion List (SEL).
7	Appeal	Custodians have the right to challenge the findings of an investigation.

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Prepared by the

**CSEA Legal Department**  
**LOCAL 1000, AFSCME, AFL-CIO**

143 Washington Avenue  
Albany, New York 12210

Mary E. Sullivan, President

