

JUSTICE CENTER

The Justice Center Real Reform for Vulnerable Individuals

by Fred Scaglione

A new centralized government bureaucracy with a mandate to investigate and prosecute the more than 10,000 annual allegations of “abuse” against vulnerable individuals housed in residential programs run or licensed by six State agencies? That might seem a little scary to nonprofit human service providers -- particularly when the initiative comes in response to a horrific series of scandals uncovered by *The New York Times*. Unfortunately, nonprofit executives are not unaccustomed to the abrupt and radical redesign of service systems, regulations and reporting requirements -- often seemingly ineffective in dealing with the real issue -- that come as a reflex to tragic and high profile service failures. “Bad cases make for bad policy,” is a common refrain.

Governor Andrew Cuomo’s proposed new Justice Center for the Protection of People with Special Needs, however, appears to be an exception to this all-too-familiar paradigm.

Under Governor Cuomo’s proposed legislation, the Justice Center will have primary responsibility for tracking, investigating and pursuing serious abuse and neglect complaints for facilities and provider agencies that are operated, certified, or licensed by six State agencies:

- Department of Health (DOH),
- Office of Mental Health (OMH),
- Office for People With Developmental Disabilities (OPWDD),
- Office of Children and Family Services (OCFS),
- Office of Alcoholism and Substance Abuse Services (OASAS), and,
- State Education Department (SED).

The Justice Center staff will include an Executive Director, Special Prosecutor and Inspector General, and a cadre of trained investigators, lawyers and administrators. It will have concurrent authority with district attorneys to prosecute abuse and neglect crimes committed against such persons.

A 24/7 centralized hotline for reporting abuse against vulnerable individuals in these service systems will be established. Justice Center staff will ensure that allegations of abuse are promptly reported to law enforcement and fully and effectively investigated.

Importantly, the legislation develops common definitions of “abuse” across all six State agencies and establishes uniform reporting requirements and standards of proof for investigations. Particularly appealing to providers and staff, the legislation also lays out separate categories for abuse allegations and the various types of discipline or corrective actions which are an appropriate response. These categories distinguish for the first time between those serious cases of physical or psychological abuse which people generally imagine when they hear the word and lesser instances of staff actions or program failure where there was no real intent to harm the individual and which may result from lack of training, staffing shortages, systemic problems, etc.

The Justice Center will maintain a central register of those workers who have committed

serious acts of abuse and who will be prohibited from working with people with disabilities or special needs. It will also consolidate the procedures and requirements for doing background checks on new employees, which now vary from agency to agency.

The Governor’s introduced his legislative proposal, Program Bill #35, on May 7th.

“This is about safeguarding the civil rights of the more than one million New Yorkers with disabilities and special needs who for too long have not had the protections and justice they deserve,” he said. “The creation of a Justice Center for the Protection of People with Special Needs will give New York State the strongest standards and practices in the country for protecting those who are often the most vulnerable to abuse and mistreatment.”

The proposal quickly drew broad support from providers, family members and self-advocates. On May 10th, the Governor announced that a coalition of 100 advocacy groups from across the state had come out in favor of the bill.

“Governor Cuomo’s proposed legislation includes real reforms that will help protect vulnerable New Yorkers and prevent further abuses from occurring,” said Paige Pierce, Executive Director of Families Together in NYS.

“This is a tremendous advance in weeding out, prosecuting and preventing any future NYS based human services work for those

who abuse New Yorkers with disabilities,” said Harvey Rosenthal, Executive Director of the New York Association of Psychiatric Rehabilitation Services, Inc. (NYAPRS).

“We applaud Governor Cuomo for this broad initiative to ensure the safety and protection of vulnerable people in New York State,” said Peter Pierri, Executive Director of the Interagency Council of Developmental Disabilities Agencies. “Safety and protection are the number one priority for the entire community. We also appreciate his acknowledgment and support for the thousands of direct care workers who are doing great work in their community every day to help people recover and move forward with their lives.”

“The New York Association of Alcoholism and Substance Abuse Providers (ASAP) are committed to working with the Governor and Legislature on this initiative,” said John Coppola, Executive Director of ASAP. “We are pleased that the Governor has actively engaged consumers and providers in the development of this important work which will not only ensure the safety of persons receiving services, but will also contribute to increased trust and better service outcomes for New Yorkers.”

Within a week, the bill was quickly passed by a unanimous vote in the State Senate. Speaker Sheldon Silver has indicated that the Assembly is also likely to pass the legislation, although possibly with a few adjustments.

The Sundram Report

The Justice Center initiative is based upon a report and recommendations submit-



Clarence Sundram

ted by Clarence J. Sundram, whom Governor Cuomo named as his Special Advisor on Vulnerable Persons in March of 2011. His appointment to this unique position came as part of a comprehensive leadership change, including the appointment of OPWDD Commissioner Courtneely Burke, following the *Times*’ reports on the agency’s failure to prevent serious cases of abuse at directly-run facilities or to terminate the employees involved. Sundram, who had been the first Chair and CEO of the Commission on Quality of Care and served in that position for 20 years from 1978 to 1998, is highly respected throughout the disabilities services community.

Sundram’s report -- *The Measure of Society: Protection of Vulnerable Persons in Residential Facilities Against Abuse & Neglect* -- did not disappoint. It is widely recognized by nonprofit executives, direct support

How Do You Define Abuse?

A major component of the Justice Center initiative is the development of a uniform definition of “abuse” across all State agencies. The new proposal also develops different categories for abuse allegations reflectioning their severity and possible source:

Category One: Serious physical and sexual abuse by employees which warrants criminal prosecution, and other serious offenses warranting termination of employment and placement on a permanent registry to ban employment in human services. Examples include the following:

1. Non-accidental conduct that causes physical injury which creates a risk of death, or which causes death or serious disfigurement, impairment of health or loss or impairment of the function of any bodily organ or part or creates a foreseeable risk of such physical injury. Examples of such physical injuries include a broken bone, tooth, or any injury that requires treatment in a hospital or emergency room.
2. Failure to perform an essential duty that causes physical injury which creates a risk of death, or which causes death or serious disfigurement, impairment of health or loss or impairment of the function of any bodily organ or part, or serious emotional harm, or creates a foreseeable risk of either.
3. Conduct including, but not limited to, threats, taunts, derogatory comments, ridicule which causes serious emotional harm or creates a foreseeable risk of serious emotional harm.
4. Engaging in, or encouraging others to engage in, cruel or degrading treatment of a service recipient.
5. Engaging in sexual conduct of any kind with a service recipient including sexual intercourse, deviate sexual intercourse, aggravated sexual contact, or sexual contact (including kissing or sexual touching).
6. Encouraging, facilitating or permitting another to engage in sexual conduct with a service recipient who is non-consenting or incapable of consent.
7. Promoting or encouraging or permitting another to promote a sexual performance of a service recipient.
8. Use or distribution of any unlawful controlled substance as defined by article 33 of the public health law at the work place or while on duty.
9. Unlawful administration of any controlled substance as defined by article 33 of the public health law to a service recipient.
10. Falsification of records related to the safety, treatment or supervision of a service recipient including medical records, fire safety inspections and drills, and supervision checks.
11. Failure to report any of the conduct in 1-10 when discovered.
12. Failure by a supervisor to act upon a report of conduct in 1-10 as directed by agency policy.
13. Making a false statement or withholding information during an investigation into a report of conduct in 1-10 or otherwise obstructing such an investigation.
14. Discouraging a report of conduct in 1-10 or retaliating against any employee making such a report in good faith or against a service recipient who makes a report or on whose behalf a report is made.

Category Two: Lesser misconduct including abuse and neglect by employees, consultants and others who have regular and substantial contact with the residents of a facility.

Category Three: Conduct between service recipients that results in harm.

Category Four: “Systemic problems” to deal with cases of harm to individuals where any staff culpability is substantially mitigated by program deficiencies such as inadequate staff, training, supervision etc.

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staff, families, and individuals with disabilities themselves as an extraordinarily honest and insightful look at the problem of institutional abuse and the State's various systems for reporting and investigating it.

The Sundram report begins by emphasizing the size and complexity of the State's system of services. It notes that there are approximately 273,600 children and adults with disabilities living in 11,700 provider sites which are operated, licensed, certified or funded by six different state agencies. In total, society spends \$17.9 billion annually on these services.

"Although all of these programs share a common obligation to protect residents and keep them safe from abuse and neglect, the execution of that obligation varies widely among the state agencies and the programs they operate or authorize, with major gaps and inconsistencies," says Sundram. "These gaps and inconsistencies expose vulnerable people to needless risk of harm and complicate the challenge of teaching and training direct service staff, especially at the 112 provider agencies which have licenses from multiple state agencies."

Sundram explains that there have been "formidable barriers to reporting abuse and neglect by the two groups of people who are most knowledgeable about such incidents – direct support staff and the residents themselves." Among these barriers is "the failure to adequately differentiate between serious incidents of staff personal culpability, and lesser incidents caused or contributed to by deficient workplace conditions".

Sundram notes that definitions of "abuse" and "neglect" vary widely among the different State agencies. "OPWDD has the broadest definitions while other agencies have definitions that are narrower but varying in scope. OPWDD's definition of physical abuse, for example, indicates that in addition to hitting, slapping, kicking, strangling, etc., 'physical contact which is not necessary for the safety of a person and/or causes discomfort' may be considered abuse. OPWDD defines neglect, in part, as a condition of deprivation in which persons 'receive insufficient, inconsistent or inappropriate services to meet their needs'."

As a result, when *The New York Times* revealed a horrifying series of individual cases involving physical and sexual abuse in OPWDD directly-run facilities, it also noted that there were "13,000 allegations of abuse in 2009 within state-operated and licensed homes" and that "fewer than 5 percent were referred to law enforcement." The implication? That more than 10,000 similar instances of equally severe physical and sexual abuse – actual crimes – were going unreported and unpunished.

"When CQC was doing one of the first studies of incident reporting, we saw such a large volume, everything from extremely serious allegations of severe abuse where real harm was being done to individuals, to things that were utterly trivial like someone sitting on a wet spot where the floor was being mopped," says Sundram. "The system just sent everything through the same process. The time consumed in processing this large volume prevented the system from focusing its energies on cases where there were serious problems."

In response, Sundram recommended – and the Governor's legislation proposes – a

four-tier categorization for abuse allegations. (See box on opposite page.) They begin with Category One offenses which represent the most serious cases of abuse which would be cause for possible criminal action, termination of employment and permanent prohibition from working in the field. A framework is also established for addressing lesser misconduct involving abuse or neglect by staff (Category Two), conduct between service recipients that results in harm (Category Three), and "systemic problems" that lead to harm to service recipients (Category Four).

The Justice Center's investigative and prosecutorial focus would be on Category One allegations of abuse. While the Justice Center will have authority to investigate any allegation it wishes – as well as a responsibility for monitoring that all reports are effectively and efficiently reviewed – it appears likely that investigation of most Category 2, 3 and 4 allegations will be handled by state agencies and provider agencies themselves. All incident investigators, however, will undergo a common training program. "In addition, every investigation done at a provider agency will be reviewed by an Incident Management Committee," says Sundram. "Those committees will include their own executives but also direct care workers, representatives of family organizations, consumer organizations and advocates. It is not a sealed process."

Confirmed Category One offenses will lead to termination and possible criminal prosecution where appropriate. The response to Category 2, 3 and 4 allegations, on the other hand, will focus on progressive discipline, retraining and other corrective actions.

Support for the Direct Support Professional

While Sundram has devoted much of his career to protecting vulnerable people from abuse, he speaks with equal passion about the value and importance of the direct support workforce who provide the day to day care these individual rely upon. And, he is extraordinarily candid about the challenges which these workers face every day in trying to meet these responsibilities.

"One might summarize the job description of the direct support worker as requiring the wisdom of Solomon, the patience of Job and the caring of Florence Nightingale," Sundram wrote in his report. "While much is said about the value of these direct support jobs, the traditional hallmarks of value are often missing – qualifying credentials, adequate pay, career ladders, attention to working conditions, adequate training, managerial and supervisory support and so on. Worse, when something goes wrong, the direct support worker is expendable, most often targeted for dismissal, justly or unjustly, especially in the private sector which generally lacks robust due process protections for employees."

To drive home his point, Sundram frequently describes an encounter he had many years ago when asking an agency executive about possible abuse in his agency. "Don't worry," Sundram was reassured. "We had a case recently but we fired the worker involved." A direct support staff had been seen hitting a female client in the face with her

tee-shirt after she had repeatedly disrobed and been re-dressed again and again and again. How long had the worker been on duty? Fourteen hours. How many clients was the staff member responsible for at that time? Dozens! Had the agency put any therapeutic approach into place to address the woman's continual disrobing behavior? No. Would the worker have been written up if the woman had been allowed to sit there naked? Yes.

"Clearly, what the employee did there was wrong," says Sundram. "But this was also a classic example of program failure. So many things had to break down in that system for the employee to be placed in that position."

Strengthening the direct support workforce is key to Sundram's proposals. He lists it as first among his Four Pillars to Support the Safety Net. "The foundation for this comprehensive approach is a dependable, competent and caring core of direct support staff," he writes. Sundram goes on to recommend development of a "core curriculum of training for all direct support workers that covers common obligations to support residents" and promulgation of a "Code of Ethics" for direct support workers."

In addition, he recommends that "each state agency should adopt a Direct Support Professional (DSP) credentialing program that certifies competency and professional ethical conduct" which "should be reinforced through compensation incentives and career pathways based on achievement. Recognizing that this effort cannot be accomplished immediately and will likely have cost im-

plications, each state agency should develop a plan to accomplish this objective over the next two years working with the voluntary agency sector as well as the state labor unions and the Department of Civil Service."

"He nailed it," says Joseph Macbeth, Albany-based Executive Director of the National Alliance for Direct Support Professionals, which expressed support for both the report and the Governor's legislation. "I was especially pleased to see that he addresses the role and value of the direct support workforce in that effort by lauding the 'tens of thousands of caring people who do their jobs quietly and unspectacularly every day'."

Macbeth did raise concerns, however, that the proposed legislation does not include language implementing Sundram's recommendations for core training and credentialing, with corresponding compensation incentives and career pathways.

"This bill includes only those things that require the legislature to act," says Sundram. Measures to strengthen the workforce along the lines of his recommendations are things that the Governor can implement that do not require legislation. "There are plans being developed by the State agencies," says Sundram.

There is no doubt about the Governor's commitment toward this overall reform effort. "All of us have seen cases where studies and reports sit on a shelf gathering dust," says Sundram. "It's great to see how strongly the Governor has embraced this issue. He put forward the legislation and is out there barnstorming for it."



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