

A new Part 705 is added to title 14 to read as follows:

Part 705 The Justice Center Protocols for Interviewing People Who Receive Services

Sec.

705.1 Background and Intent

705.2 Applicability.

705.3 Legal Authority.

705.4 Definitions.

705.5 Notification Protocols.

705.6 Interview Protocols.

§ 705.1 Background and Intent

(a) The Protection of People with Special Needs Act (the “Act”) established the Justice Center for the Protection of People with Special Needs (the “Justice Center”). The Act charges the Justice Center with establishing consistent safeguards for vulnerable persons to protect against abuse, neglect and other conduct that may jeopardize their health, safety and welfare.

(b) To accomplish this goal, the Act requires the Justice Center to establish procedures for the timely response to, and effective investigation of, allegations of reportable incidents against individuals who receive services. During the course of an investigation of abuse and neglect it is often necessary for individuals who receive services to be interviewed. This regulation outlines the procedures developed by the Justice Center to ensure that interviews of individuals who receive services during the course of an investigation of alleged abuse and neglect are conducted in a safe and appropriately sensitive manner.

§ 705.2 Applicability

This regulation applies to all investigations of alleged abuse and neglect conducted by the Justice Center, as well as investigations conducted by state agencies whose programs are under the jurisdiction of the Justice Center and by the facilities and programs defined in section 488(4) of the Social Services Law when acting as the delegate investigatory entity.

§ 705.3 Legal Authority

Subdivision 28 of section 553 of the Executive Law requires the Justice Center to develop protocols to ensure the safety of individuals receiving services who may have evidence relevant to an investigation of alleged abuse or neglect and requires that the protocols be developed in consultation with the Justice Center's statutorily created Advisory Council and the relevant State Oversight Agencies. These agencies include: the Office of Mental Health, the State Education Department, the Office of Alcoholism and Substance Abuse Services, the Office for People With Developmental Disabilities, the Office of Children and Family Services and the Department of Health.

§ 705.4 Definitions

Whenever used in this Part:

(a) "Delegate Investigatory Entity" shall mean a facility or provider agency, or any other entity authorized by the regulations of a state oversight agency or the Justice Center to conduct an investigation of a reportable incident.

(b) "Justice Center" means the Justice Center for the Protection of People with Special Needs.

(c) "Personal Representative" shall mean a person authorized under state, tribal, military or other applicable law to act on behalf of a vulnerable person in making health care decisions or, for programs that serve children under the jurisdiction of the State Education Department or the Office of

Children and Family Services, the service recipient's parent, guardian or other person legally responsible for such person as defined in subdivision 10 of section 488 of the Social Services Law. For other programs that serve children, the personal representative of the child would be the parent, guardian or other person authorized under law to make health care decisions.

(d) "Potential Witness" shall mean any service recipient known to be physically present in the place and at the time of the alleged abuse or neglect. It can also include any service recipient who it is believed may have information that could be useful to an investigation.

(e) "Service Provider" shall mean a provider of services as defined in subdivision 4 of section 488 of the Social Services Law.

(f) "Service Recipient" shall mean an individual who resides or is an inpatient in a residential facility or who receives services from a facility or provider agency, as defined in subdivision 9 of section 488 of the Social Services Law.

(g) "Confidential information" shall mean information that is protected from disclosure to a personal representative by any federal or state law or regulation.

§ 705.5 Notification Protocols

(a) Process for providing notification to alleged victims and/or their personal representatives.

(1) When a service provider is notified that a report of alleged abuse or neglect in their program has been accepted by the Justice Center, the service provider or state oversight agency, as appropriate, shall immediately attempt to notify any service recipients who are alleged victims of that alleged abuse or neglect, and/or their personal representatives, that the

service recipient may be interviewed as part of the investigation. This notification may be completed through oral communication or in writing.

(2) The service provider or state oversight agency shall not make such notification to a personal representative if the alleged victim objects to such notification or if it would violate relevant confidentiality laws, be contrary to court order, or is otherwise contrary to the best interests of the alleged victim or if the investigator has notified the service provider or state oversight agency that such notification would compromise the investigation. Objections by a service recipient to a personal representative being notified should be reviewed on an individual basis consistent with the existing standards that the relevant state oversight agency requires to be used to determine the ability of a service recipient to consent to services, programs and treatment. Service providers who are required to provide notifications pursuant to section 33.23 of the Mental Hygiene Law shall do so regardless of the exemptions outlined here.

(3) The service provider or state oversight agency shall document in writing that such notification was made or that there was a diligent effort to make such notification. If an alleged victim's personal representative is not notified for the reasons outlined in Part 705.5(a)(2), the service provider or state oversight agency shall document the reason. All such documentation shall be maintained in a consistent manner and be readily available for inspection upon request of the Justice Center or a state oversight agency. Service providers and state oversight agencies shall make this information available immediately upon request of the investigator

(b) Process for providing notification to potential witnesses and/or their personal representatives.

(1) When a service provider is notified that a report of alleged abuse or neglect in their program has been accepted by the Justice Center, the service provider or state oversight agency, as appropriate, shall make a good faith effort to ascertain whether any service recipients in its program are potential witnesses to such incident, and shall attempt to notify those service recipients and/or their personal representatives that the service recipient may be interviewed as part of the investigation. This notification may be completed through oral communication or in writing.

(2) The service provider or state oversight agency shall not make such notification to a personal representative if the potential witness objects to such notification or if such notification would violate relevant confidentiality laws, be contrary to court order, or is otherwise contrary to the best interests of the potential witness or if the investigator notifies the service provider that such notification would compromise the investigation. Objections by a service recipient to a personal representative being notified should be reviewed on an individual basis consistent with the existing standards that the relevant state oversight agency requires to be used to determine the ability of a service recipient to consent to services, programs and treatment.

(3) The service provider or state oversight agency shall document in writing that such notification was made or that there was a diligent effort to make such notification. If a potential witness' personal representative is not notified for the reasons outlined in Part 705.5(b)(2), the service provider or state oversight agency shall document the reason. All such documentation shall be maintained in a consistent manner and be readily available for inspection upon request of the Justice Center or a state oversight agency. Service providers and state oversight agencies shall make this information available immediately upon request of the investigator

(4) If the personal representative of a potential witness is contacted, the service provider or state oversight agency shall not disclose confidential information regarding the allegation of abuse or neglect to the personal representative.

(c) Inquiry of personal representative. The service provider shall ask the personal representative if he or she has additional information not known to the service provider concerning the most effective ways to communicate with the service recipient in order to support the interview process.

(d) Exceptions to notification requirements.

(1) Those service providers who are required to provide notifications pursuant to section 33.23 of the Mental Hygiene Law are not required to provide additional notification pursuant to this regulation.

(2) If an alleged victim or potential witness does not have a personal representative, there is no need for a service provider to comply with these notification and documentation requirements pertaining to personal representatives.

§705.6 Interview Protocols

(a) Determinations regarding appropriateness of conducting an interview.

(1) Prior to commencing an interview, an investigator must determine if the interview can be conducted in a safe, sensitive and timely manner. To make this determination, an investigator may consider any relevant facts or circumstances, including: the setting where and circumstances under which the interview is to be conducted; the opinion of a service recipient's personal representative; the service recipient's diagnosis; any information received after consulting with the service recipient's licensed health professionals; information in the service

recipient's files; observations of the service recipient's behavior; information obtained from service provider employees; the service recipient's capability to provide information to assist the investigation; and information obtained from engaging in preliminary inquiries with service recipients to establish that proceeding with an interview would be appropriate.

(2) A formal clinical assessment is not required prior to interviewing a service recipient.

(3) If conducting an interview of the service recipient would be clinically contraindicated, despite the provision of appropriate accommodations, the interview shall not take place, except where circumstances exist which support a determination that there exists an overriding health and safety need to proceed with the interview. Such circumstances may include but not be limited to: an investigator reasonably believes that a service recipient has information relevant to maintaining or securing the safety of service recipients and is capable of reliably communicating that information; an investigator reasonably believes that failure to interview a service recipient may allow for the destruction of evidence or for a subject to evade law enforcement; or a delay in interviewing a service recipient may allow a subject to evade law enforcement. Prior to proceeding with the interview, the investigator shall consult with and obtain approval of his or her supervisor. Further, such investigator shall document in the investigative record the reason why it was appropriate to proceed with the interview and include the steps taken to protect the service recipient's health, safety, and wellbeing during the interview.

(b) Information from a service provider.

(1) An investigator must notify a service provider if he or she will need specific information from a service provider to determine whether to proceed with an interview, including the identity of

any additional service recipient witnesses for whom the service provider did not make the required notification as set forth in Section 705.5(b)(1).

(2) The service provider shall supply the Justice Center or the delegate investigatory entity with the requested information within 72 hours of receiving such notification from an investigator.

(3) The requested information may be conveyed verbally or in writing.

(c) Communication. If an investigator determines that a service recipient may have difficulty comprehending questions due to linguistic or other barriers, such investigator shall work with a service provider to provide the service recipient with the means to communicate with the investigator.

(d) Personal Representative Presence at an Interview.

(1) A personal representative may be permitted to accompany a service recipient who is an alleged victim or a potential witness during an interview, except when: (i) the service recipient objects to the personal representative being present during the interview; or (ii) the investigator believes the presence of the personal representative would impede the investigation.

Objections by a service recipient to a personal representative being present during an interview should be reviewed on an individual basis consistent with the existing standards that the relevant state oversight agency requires to be used to determine the ability of a service recipient to consent to services, programs and treatment.

(2) When a service recipient is being interviewed as a potential witness, the investigator should be especially sensitive to the presence a personal representative if the service recipient witness will be questioned about injuries or other confidential information relating to the alleged victim of abuse or neglect. In any instance in which confidential information will be discussed, the investigator may require that: (i) the personal representative leave the interview during the time in which

confidential information is discussed; or (ii) the personal representative be present outside the interview room or available by telephone, to provide any needed support to the service recipient during the interview process.

(3) If a personal representative is allowed to be present during an interview, the personal representative may not interfere with the interview. If an investigator believes that the personal representative is interfering with the interview, the investigator may take appropriate actions to prevent such interference, including speaking with the personal representative or stopping the interview. If an investigator determines that a personal representative should not be present or should leave an interview once it is underway, the investigator must document the rationale for such decision in the investigative record.

(4) If a personal representative cannot attend an interview in a timely manner, the service provider may provide appropriate technology to allow the personal representative to participate in the interview. This may entail the use of a conference call line or a video conference, if available. An investigator shall not be required to unreasonably delay an interview to allow for a personal representative to participate.

(e) Information for service recipients. Prior to beginning an interview with a service recipient, the investigator shall advise service recipients and/or their personal representatives about what to expect in an interview. The investigator shall explain that participation in an interview is voluntary. In addition, and as applicable, the investigator shall advise the service recipient and/or his or her personal representative about searches of the service recipient's personal property and searches of the service recipient's person for the purposes of non-criminal investigations.