§ 493. Abuse and neglect findings; consequences. 1. Within sixty days of the vulnerable persons' central register accepting a report of an allegation of abuse or neglect, the justice center shall cause the findings of the investigation to be entered into the vulnerable persons' central register. The justice center may take additional time to enter such findings into the vulnerable persons' central register; provided, however, that the reasons for any delay must be documented and such findings submitted as soon thereafter as practicably possible.

2. For substantiated reports of abuse or neglect in facilities or provider agencies in receipt of medical assistance, such information shall also be forwarded by the justice center to the office of the Medicaid inspector general when such abuse or neglect may be relevant to an investigation of unacceptable practices as such practices are defined in regulations of the office of the Medicaid inspector general.

3. (a) A finding shall be based on a preponderance of the evidence and shall indicate whether: (i) the alleged abuse or neglect is substantiated because it is determined that the incident occurred and the subject of the report was responsible or, if no subject can be identified and an incident occurred, that, the facility or provider agency was responsible; or (ii) the alleged abuse or neglect is unsubstantiated because it is determined not to have occurred or the subject of the report was not responsible, or because it cannot be determined that the incident occurred or that the subject of the report was responsible. A report shall not be determined to be substantiated or unsubstantiated solely because the subject of a report resigns during an investigation.

(b) In conjunction with the possible findings identified in paragraph (a) of this subdivision, a concurrent finding may be made that a systemic problem caused or contributed to the occurrence of the incident.

(c) The justice center shall notify the subject of the report, the facility or provider agency where the abuse or neglect was alleged to have occurred, the applicable state oversight agency and other persons named in the report, which includes the service recipient's parent, guardian or other person legally responsible for such person, of the

findings of the investigation and, as applicable, the local social services commissioner or school district that placed the individual in the facility or provider agency, the office of children and family services and any attorney for the individual whose appointment has been continued by a family court judge during the term of an individual's placement, in accordance with applicable state and federal laws and regulations governing the use and disclosure of records. If the report is substantiated, the justice center shall also notify the subject of the report of his or her rights to request that the report be amended and the procedure by which he or she may seek to amend the report in accordance with section four hundred ninety-four of this article.

(d) A report that is found to be unsubstantiated shall be sealed immediately.

4. Substantiated reports of abuse or neglect shall be categorized into one or more of the following four categories, as applicable:

(a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:

(i) intentionally or recklessly causing physical injury as defined in subdivision nine of section 10.00 of the penal law, or death, serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, or consciously disregarding a substantial and unjustifiable risk that such physical injury, death, impairment or loss will occur;

(ii) a knowing, reckless or criminally negligent failure to perform a duty that: results in physical injury that creates a substantial risk of death; causes death or serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor; or is likely to result in either;

(iii) threats, taunts or ridicule that is likely to result in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical

assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;

(iv) engaging in or encouraging others to engage in cruel or degrading treatment, which may include a pattern of cruel and degrading physical contact, of a service recipient, that results in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;

(v) engaging in or encouraging others to engage in any conduct in violation of article one hundred thirty of the penal law with a service recipient;

(vi) any conduct that is inconsistent with a service recipient's individual treatment plan or applicable federal or state laws, regulations or policies, that encourages, facilitates or permits another to engage in any conduct in violation of article one hundred thirty of the penal law, with a service recipient;

(vii) any conduct encouraging or permitting another to promote a sexual performance, as defined in subdivision one of section 263.00 of the penal law, by a service recipient, or permitting or using a service recipient in any prostitution-related offense;

(viii) using or distributing a schedule I controlled substance, as defined by article thirty-three of the public health law, at the work place or while on duty;

(ix) unlawfully administering a controlled substance, as defined by article thirty-three of the public health law to a service recipient;

(x) intentionally falsifying records related to the safety, treatment or supervision of a service recipient, including but not limited to medical records, fire safety inspections and drills and supervision checks when the false statement contained therein is made with the intent to mislead a person investigating a reportable incident and it is reasonably foreseeable that such false statement may endanger the health, safety or welfare of a service recipient;

(xi) knowingly and willfully failing to report, as required by paragraph (a) of subdivision one of section four hundred ninety-one of this article, any of the conduct in subparagraphs (i) through (ix) of

this paragraph upon discovery;

(xii) for supervisors, failing to act upon a report of conduct in subparagraphs (i) through (x) of this paragraph as directed by regulation, procedure or policy;

(xiii) intentionally making a materially false statement during an investigation into a report of conduct described in subparagraphs (i) through (x) of this paragraph with the intent to obstruct such investigation; and

(xiv) intimidating a mandated reporter with the intention of preventing him or her from reporting conduct described in subparagraphs (i) through (x) of this paragraph or retaliating against any custodian making such a report in good faith.

(b) Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one finding shall be sealed after five years.

(c) Category three is abuse or neglect by custodians that is not otherwise described in categories one and two. Reports that result in a category three finding shall be sealed after five years.

(d) Category four shall be conditions at a facility or provider agency that expose service recipients to harm or risk of harm where staff culpability is mitigated by systemic problems such as inadequate management, staffing, training or supervision. Category four also shall include instances in which it has been substantiated that a service recipient has been abused or neglected, but the perpetrator of such abuse or neglect cannot be identified.

5. (a) Category one findings shall result in permanent placement of the subject of the report on the vulnerable persons' central register in accordance with section four hundred ninety-five of this article.

(b) Except when a custodian has a category two finding elevated to a category one finding pursuant to this section, a custodian with a

category two finding shall be subject to progressive discipline. (For state entities bound by collective bargaining, such discipline established by collective bargaining shall govern.) In conjunction with such disciplinary action, the facility or provider agency shall develop a plan for training and any other actions to reduce the risk of recurrence of such conduct. Such plan must be approved by and its implementation monitored by the justice center or the state oversight agency, as appropriate.

(c) With respect to a category three or four finding, the justice center shall require the facility or provider agency to develop and implement a plan of prevention and remediation of the deficient conditions. Such plan shall identify any systemic problem that led to the determination of a category three or four finding and include suggested corrective measures. Such plan must be approved by and its implementation monitored by the justice center or the state oversight agency, as appropriate. In reviewing the continued qualifications of a facility or provider agency for an operating certificate, the state oversight agency shall evaluate such facility or provider agency's compliance with any plans of prevention and remediation resulting from category three or four reports and take appropriate enforcement action, which may include, but not be limited to, closing intake to the facility or provider agency or terminating operating certificates for prolonged or repeated failure to correct identified problems in accordance with applicable state law or regulation.