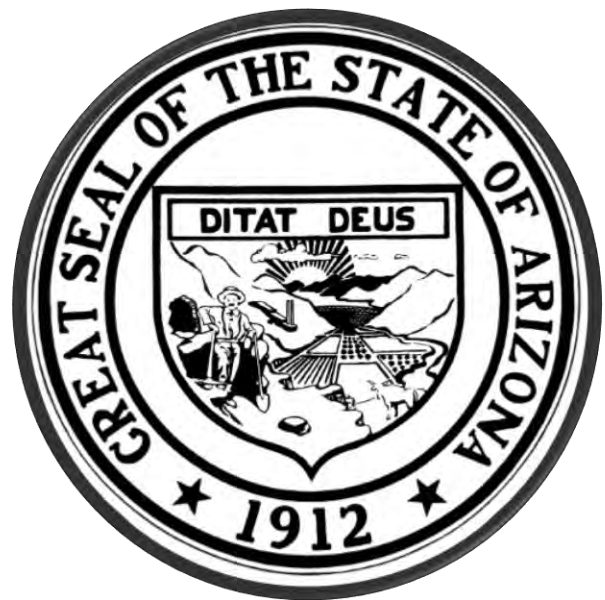
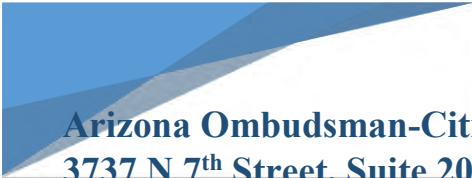


Report of Investigation



Arizona Ombudsman-Citizens' Aide
Case # 1404174
Department of Child Safety
February 16, 2016

The logo consists of a blue trapezoidal shape on the left that tapers to a point on the right, with a white diagonal line running from the bottom-left corner to the top-right corner.

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Report of Investigation
Case # 1404174
Department of Child Safety
February 16, 2016

Ombudsman Authority

The Arizona Ombudsman-Citizens' Aide conducted an investigation of the Department of Child Safety in accordance with A.R.S. §§ 41-1376-41-1380 and A.A.C. Title 2, Chapter 16.

Pursuant to our legal authority:

The Ombudsman – Citizens' Aide “shall . . . [i]nvestigate the administrative acts of agencies.” A.R.S. § 41-1376(A).

Upon receiving a complaint, the OCA “may investigate administrative acts of agencies that the ombudsman-citizens aide has reason to believe may be . . . [c]ontrary to law.” A.R.S. § 41-1377(A).

“[T]he ombudsman-citizens aide may present the ombudsman-citizens aide's opinion and recommendations to the governor, the legislature, the office of the appropriate prosecutor or the public, or any combination of these persons.” A.R.S. § 41-1376(B).

The Ombudsman – Citizens' Aide's opinion shall include “the reply of the agency, including those issues that were resolved as a result of the ombudsman-citizens aide's preliminary opinion or recommendation.” A.R.S. § 41-1376(B).

Summary

On October 9, 2014, a mother (“the Complainant”) filed a complaint with our office alleging that the Department of Child Safety (“DCS” or “the Department”) unlawfully interviewed her children without obtaining her permission.

DCS violated Arizona Revised Statutes (“A.R.S.”) § 8-802(B),¹ when it interviewed the Complainant's children without her consent. DCS policies, rules, web materials, and general practice regarding when DCS can interview children without a parent's consent conflict with A.R.S. §§ 8-802(B) and 8-471(E)(3).²

Background³

On October 9, 2014, the Complainant alleged that the Department unlawfully interviewed her children without her consent.

The Complainant alleged that an employee of the Department pulled her children out of class while they were at school in order to interview them about a matter concerning her brother's children. The Complainant further alleged that she had not granted the Department permission to interview her children.

According to the records concerning the matter in the Department's own CHILDS case system, the Department was investigating the complainant's brother for neglect. The records appear to indicate that the Department interviewed the Complainant's children as a part of this neglect investigation.

To determine whether DCS has authority to interview the children without parent permission, we first consulted the A.R.S., the Arizona Administrative Code (“A.C.C.”), DCS's Policy and Procedure Manual (“the DCS policy manual”),

¹ See Exhibit 1

² See Exhibit 2

³ See Exhibit 3 for a timeline of case events.

DCS's website, and an Attorney General opinion. We also consulted our legal counsel about the matter.

A policy in the DCS policy manual,⁴ an A.A.C. rule,⁵ DCS web materials,⁶ and a DCS school interview form⁷ all asserted that DCS has broad authority to interview children without parent permission in connection with an investigation. In our office's experience, DCS has always asserted this authority and acted accordingly.

A.R.S. §§ 8-802(B) and 8-471(E)(3), however, limit the situations in which DCS can interview a child without parental consent. A.R.S. § 8-802(B) says:

A worker shall not interview a child without the prior written consent of the parent, guardian or custodian of the child unless either: 1. The child initiates contact with the worker. 2. The child who is interviewed is the subject of or is the sibling of or living with the child who is the subject of an abuse or abandonment investigation pursuant to section 8-456. 3. The interview is conducted pursuant to the terms of the protocols established pursuant to section 8-817.

A.R.S. § 8-471(E)(3) says:

E. A child welfare investigator shall . . . 3. Not interview a child without the prior written consent of the parent, guardian or custodian of the child unless either: (a) The child initiates contact with the investigator. (b) The child who is interviewed is the subject of, is the sibling of or is living with the child who is the subject of an abuse or abandonment investigation pursuant to paragraph 4, subdivision (b) of this subsection. (c) The interview is conducted pursuant to the terms of the protocols established pursuant to section 8-817.

We consulted our legal counsel Ken Behringer, the General Counsel of Legislative Council, about the matter. On December 24, 2014, he issued a legal memorandum⁸ on the subject. He concluded that, under Arizona law, "a DCS worker cannot interview [a] child without parental consent for cases of neglect that do not involve abuse or abandonment."

In January of 2015, we brought the matter, including the Legislative Council legal memorandum, to a DCS Deputy Director's attention. We voiced our concern that DCS practice, both in this instance and generally, were in violation of A.R.S. § 8-802(B). In early February of 2015, the

⁴ See Exhibit 4.

⁵ See Exhibit 5.

⁶ See Exhibit 6.

⁷ See Exhibit 7.

⁸ See Exhibit 8.

Deputy Director set up a meeting with us to discuss the matter. The meeting was to include the Deputy Director, the Department's General Counsel, and the Department's new Ombudsman.

Before the meeting could take place, the new Governor replaced that DCS administration with the current administration. The meeting occurred on February 18, 2015 with new DCS management.

At the February 18, 2015 meeting, staff from the Ombudsman-Citizens' Aide's office ("OCA") met with two new DCS Deputy Directors, DCS's General Counsel, and DCS's new Ombudsman. OCA legal counsel Ken Behringer joined in the meeting to discuss his memorandum and the relevant laws.

DCS's General Counsel implied that Department management did not agree with the OCA's statutory interpretation, but did not explicitly state that position verbally or in writing. The Deputy Directors said the DCS's General Counsel could not speak for the agency, and they would take the issue to the agency's assistant attorneys general for legal advice and quickly get back to us with the Department's official position.

On February 20, 2015, the OCA emailed⁹ the DCS staff who had participated in the February 18, 2015 meeting. In the email, the OCA said that "DCS's ongoing non-compliance with A.R.S. § 8-802(B) is a serious issue that our office is required by law to address." Additionally, the OCA mentioned that it was aware that a DCS cleanup bill was currently moving through the Legislature and asked if DCS would propose changes to A.R.S. § 8-802 to allow the agency to lawfully interview children without parental consent in neglect investigations. The OCA also asked the DCS to give the OCA a timeframe by which it would bring the agency's interview procedures in line with statute.

On February 23, 2015, OCA General Counsel Ken Behringer emailed¹⁰ DCS's General Counsel about a 1988 Attorney General ("AG") opinion that indirectly touched on the interview issue. In his email, Behringer suggested that the 1988 AG opinion might be the source of DCS's mistaken belief that it could interview children without parental consent for all investigations. Behringer explained that the 1988 AG opinion relied on an obsolete AG opinion that was issued before the language limiting DCS's interview authority was inserted into statute.

DCS's ongoing non-compliance with A.R.S. § 8-802(B) is a serious issue that our office is required by law to address.

DCS did not address the Behringer email with the OCA, and the Agency did not address the Attorney General opinion until it responded to the OCA's preliminary report on November 6, 2015. It is unclear to the OCA why DCS management did not discuss the AG opinion with the

⁹ See Exhibit 9.

¹⁰ See Exhibit 10.

OCA or seek a new AG opinion directly on point at this time or during the eight months that followed.

On February 25, 2015, DCS Deputy Director Shalom Jacobs responded via email¹¹ to the February 20, 2015 email from the OCA. She explained that the Agency was “working on resolving [the interview issue] in both the short and longer term.” She also said, “When [DCS has] identified an approach we will get back to you.”

Our office continued to press DCS management about the interview issue over the next seven months; however, the Department did not act to correct its ongoing noncompliance with A.R.S. § 8-802(B), nor did DCS management actively discuss the issue further with us.¹² In fact, in August of 2015, it came to our attention that the Department had proposed a new set of rules, one of which asserted that the Department has statutory authority to interview children without parental consent.

The proposed rule, R21-4-102(C), reads, “A DCS Investigator may interview a child without prior parental consent under A.R.S. §§ 8-802(B) and 8-471(E)(3).”¹³ The language is very similar to a current rule, R6-5-5508(C), which reads, “A CPS Specialist may interview a child without prior parental consent under A.R.S. § 8-802(C)(2).”¹⁴ The text of the proposed rule, like the current rule and other DCS materials, suggests that DCS does not need prior parental consent to interview children in any circumstance.

On September 3, 2015, we had two meetings with DCS officials. The first meeting included DCS’s in-house General Counsel, Policy Administrator, and Ombudsman. The second meeting included these three, the Director, and a Deputy Director. We discussed the entire interview issue with DCS at both meetings.

At the first September 3, 2015 meeting, the DCS General Counsel explained that the Department disagreed with our interpretation of A.R.S. §§ 8-802(B) and 8-471(E)(3) and asserted that its practice is in compliance with statute. She said that the two controlling statutes must be read in conjunction with A.R.S. Title 8 in its entirety. She did not cite any specific provisions in Title 8 to support her interpretation. She said that the statutes “could be clearer,” but she also said the Department believed it had legal authority to interview children without parent permission.

¹¹ See Exhibit 11.

¹² See Exhibit 3 for a timeline of case events.

¹³ See Exhibit 12.

¹⁴ See Exhibit 5.

The statutes give DCS broad authority to interview children in abuse and abandonment cases, but the statutes require DCS to obtain prior written parental consent for neglect investigations.

We pointed out that the plain language of the statute says that DCS needs prior written parent permission to interview a child as part of a neglect investigation. We noted the full text of the provision also draws a distinction between abuse and abandonment investigations and neglect investigations. The statutes give DCS broad authority to interview children in abuse and abandonment cases, but the statutes require DCS to obtain prior written parental consent for neglect investigations.

Additionally, we discussed the proposed rule. We told DCS we opposed the proposed rule because we considered it misleading to the public and to DCS workers. DCS disagreed with our interpretation of the proposed rule. DCS asserted that the proposed rule reflected whatever authority A.R.S. §§ 8-802(B) and 8-471(E)(3) granted DCS.

At the second September 3, 2015 meeting, we reiterated our concerns regarding unlawful DCS staff practices in neglect cases to the Director and Deputy Director. Department management maintained that it had unrestricted legal authority to interview children without parental consent. DCS said it would not cease interviewing children without parental consent; however, DCS again said it might propose and pursue legislative changes to the relevant statutes to make the Department's authority "clear." The managers said they would not agree to issue a directive to staff to abide by the plain language of the statute in the interim. In light of that and pursuant to A.R.S. § 41-1379, we provided the Director with formal written notice of our investigation.

Authority

The Ombudsman – Citizens' Aide, pursuant to Title 41, Chapter 8, Article 5 of the Arizona Revised Statutes, has authority to investigate and issue reports on administrative acts of agencies.

Upon receiving a complaint, the OCA "may investigate administrative acts of agencies that the ombudsman-citizens aide has reason to believe may be . . . [c]ontrary to law."¹⁵ After completing an investigation and consulting with the agency about the OCA findings and recommendations, the OCA may present its opinions and recommendations to the Governor, the Legislature, an appropriate prosecutor, and the public.¹⁶

¹⁵ A.R.S. § 41-1377(A).

¹⁶ See A.R.S. § 41-1376(B).

Allegations

The Department unlawfully interviewed the Complainant's children without parental permission as part of a neglect investigation.

The Complainant's allegation produced three primary issues:

- Did the Department act unlawfully when it interviewed the Complainant's children without parental consent?
- Does the Department's standard practice of interviewing children without parental consent comport with statute?
- Does DCS's proposed rule R21-4-102(C)¹⁷ for the Arizona Administrative Code comport with statute?

Findings

To determine whether DCS acted lawfully in the instant case and generally, we consulted Arizona statutes in order to see what authority, if any, the Legislature had granted to DCS to interview children.

The Legislature addressed the Department's authority to interview children in A.R.S. §§ 8-802(B) and 8-471(E)(3).¹⁸ Under A.R.S. §§ 8-802(B) and 8-471(E)(3), DCS generally needs prior written consent from a parent before interviewing a child. The statutes, however, include a few limited exceptions. According to A.R.S. § 8-802(B),¹⁹ a DCS worker shall not interview a child without a parent's²⁰ "prior written consent" unless the child "initiates contact with the worker" or "[t]he child who is interviewed is the subject of or is the sibling of or living with the child who is the subject of an abuse or abandonment investigation pursuant to §8-456."

Under the DCS interpretation, the language of A.R.S. §§ 8-802(B) and 8-471(E)(3) has no practical meaning. If it has no meaning, why would the Legislature have inserted it?

¹⁷ The proposed rule is not yet officially part of the A.A.C. DCS has proposed that the rule be R21-4-102(C) in the A.A.C.

¹⁸ See discussion *supra* p. 2.

¹⁹ A.R.S. § 8-471(E)(3) is nearly identical to A.R.S. § 8-471; however, A.R.S. § 8-802(B) applies to DCS workers, whereas A.R.S. § 8-471(E)(3) applies only to child welfare investigators. For simplicity's sake, and because the language of A.R.S. § 8-471(E)(3) is nearly identical to that of A.R.S. § 8-802(B), we quote only A.R.S. § 8-802(B) and refer only to A.R.S. § 8-802 unless otherwise noted.

²⁰ The statute says that DCS must obtain consent from "the parent, guardian or custodian of the child." A.R.S. § 8-802(B). For simplicity, we will use "parent."

The statutes say DCS may only interview a child without a parent's consent if the child initiates contact with a DCS worker or is the subject of²¹ an abuse or abandonment investigation.

The statutes do not except children who are the subject of neglect investigations from the prior written consent requirement. As noted in the Ken Behringer memorandum,²² there is no legislative history to indicate why the Legislature did not except neglect investigations.

The text of the statute is clear. In order to interview a child that is the subject of a neglect investigation, DCS must get prior written consent from the parent. By explicitly excepting children who are the subject of an abuse or abandonment investigation from the consent requirement and not extending the exception to children who are the subject of a neglect investigation, the Legislature created a clear distinction between the types of investigation.

Although DCS did not state it to us, implicit in the Department's position is the argument that the language limiting DCS's authority to interview children without prior parental consent to abuse and abandonment investigations should either be ignored or read out of the statute. Under the DCS interpretation, the language of A.R.S. §§ 8-802(B) and 8-471(E)(3) has no practical meaning. If it has no meaning, why would the Legislature have inserted it? We could not identify a rationale for why the Legislature would author such language and intend for it to be meaningless.

Essentially, we find DCS's position unpersuasive as it runs counter to the surplusage canon of legal interpretation.²³ “ ‘Whenever a reading arbitrarily ignores linguistic components or inadequately accounts for them, the reading may be presumed improbable.’ ”²⁴ Furthermore, “[b]ecause legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether redundant.”²⁵

DCS may believe there are sound policy reasons to overlook the fact that the Legislature did not except neglect investigations from the consent requirement; however, “[a] provision that seems . . . unjust or unfortunate . . . must nonetheless be given effect.”²⁶

In light of the Legislature's decision to specifically and explicitly except two sorts of investigations from the consent requirement but not the third, the only reasonable conclusion that can be drawn is that the Legislature meant what it said – DCS cannot interview children without prior written parental consent in neglect investigations.

²¹ Although, A.R.S. § 8-802(B) also indicates that DCS may interview a child without parental consent if the child is the sibling of or living with a child who is the subject of an abuse or abandonment investigation, we will use “subject of” to refer to all three situations collectively throughout the rest of this report.

²² See Exhibit 8.

²³ See Scalia and Garner, *Reading Law - The Interpretation of Legal Texts*, pp. 174-179. West Publishing, June 19, 2012

²⁴ *Id.* at 174. (Quoting E.D. Hirsch, *Validity in Interpretation* 236 (1967)).

²⁵ *Id.* at 176.

²⁶ *Id.* at 174.

Finding 1: Substantiated

DCS violated A.R.S. § 8-802(B) by interviewing the Complainant's children without her prior written consent as part of a neglect investigation.

According to the Complainant, her children did not initiate contact with a DCS worker. The Complainant also asserted that she did not consent in any way to allowing the Department to interview her children. The Department has confirmed both points.

According to DCS records, the Complainant's children were interviewed in relation to a neglect investigation, and not an abuse or abandonment investigation. In its November 6, 2015 response to our preliminary report, DCS said, "the case was coded as a neglect case by the Child Abuse Hotline."

The DCS, however, also asserted that the case "appears to have also fit the definition of a possible abuse case, and the Complainant's children were living in the home with the alleged victim." Further, DCS said that "[t]he allegation was that the victim child had been sexually abused and the Father had allegedly allowed the alleged sexual perpetrator back into the home." DCS said that "[i]f Father was aware of the alleged sexual abuse, that would qualify as abuse under A.R.S. § 8-201."

We agree that DCS, when conducting an abuse investigation, can interview children living with the alleged victim without prior written parental consent; however, DCS classified this case as a neglect investigation. Had DCS investigated the case underlying the complaint for abuse, it could have interviewed the complainant's children without her permission.²⁷ DCS has not

DCS classified this case as a neglect investigation. Had DCS investigated the case underlying the complaint for abuse, it could have interviewed the complainant's children without her permission.

provided us with any evidence to show that it conducted an abuse investigation. Again, DCS admitted that the Child Abuse Hotline coded the case as neglect. Additionally, records in DCS's own CHILDS case system indicate that the case was handled as a neglect investigation. It is unclear why, if DCS had evidence to suspect abuse had occurred, it did not classify or reclassify the case as one of suspected abuse and investigate the case for abuse. Had DCS credibly suspected that abuse occurred in this case, and it coded (or recoded) and investigated the case as abuse, the Agency could have lawfully interviewed the Complainant's children without prior written parental consent.

In its November 6, 2015 response to our preliminary report, DCS implied that if a case could be investigated as an abuse case, even if DCS does not ever actually categorize and treat the case as

²⁷ Assuming that the Complainant's children did in fact reside in the same home as the alleged victim.

an abuse investigation, it can interview without prior written consent in accordance with A.R.S. § 8-201. We disagree. There is no language in A.R.S. § 8-802 to support this view.

Additionally, DCS either fails to or is unable to assert without reservation that it could have actually conducted an abuse investigation in this case. DCS's supposition that the alleged conduct could qualify as abuse under A.R.S. § 8-201 is dependent on whether the "Father was aware of the alleged sexual abuse." DCS has not said to us that the Father was in fact aware of the alleged sexual abuse.

DCS records indicate and DCS has explicitly admitted that DCS did not code the case as "abuse." Instead, it coded the case as "neglect." DCS has presented no evidence to support that it investigated the case for anything other than neglect. DCS has not even firmly stated that, based on the facts of the case, it could have investigated for anything other than neglect. Therefore, the Complainant's case did not meet any of the exceptions to the prior written consent requirement listed in A.R.S. § 8-802(B). As a result, DCS acted unlawfully when it interviewed the Complainant's children without her consent.

Finding 2: Substantiated

DCS's systemic practice of interviewing children without parent permission in neglect investigations violates A.R.S. §§ 8-802(B) and 8-471(E)(3).

DCS materials²⁸ and practice indicate that DCS believes it has legal authority to interview children without parental consent for all types of investigations. DCS has also explicitly asserted this authority directly to us. Initially, the Department provided no legal citation to explain or justify its position, but made the claim that Arizona Revised Statute's Title 8 alters or generally allows the Department to disregard the plain language of A.R.S. §§ 8-802(B) and 8-471(E)(3).

In its November 6, 2015 response to our preliminary report, DCS made several more specific arguments as to why the Agency is able to interview children without parental consent in neglect investigations.

First, DCS has asserted that two AG opinions support the Agency's interpretation of A.R.S. §§ 8-802(B) and 8-471(E)(3) that it can interview children without prior written parental consent in all investigations. The Agency cited *Ariz. Op. Att'y Gen. No. I88-062* (June 9, 1988)²⁹ and *Ariz. Op. Att'y Gen. No. I98-008* (October 2, 1998).³⁰ Neither opinion directly analyzed the interview issue. Furthermore, both opinions rely on old law that no longer controls. On December 11, 2015, our legal counsel Ken Behringer issued a memorandum addressing the two AG opinions.³¹

²⁸ See *supra* notes 4-7.

²⁹ See Exhibit 13.

³⁰ See Exhibit 14.

³¹ See Exhibit 15.

As previously mentioned,³² Behringer brought the 1988 AG opinion to the Agency's attention in an email³³ to the DCS General Counsel on February 23, 2015. In his email, Behringer suggested that the 1988 AG opinion might be the source of DCS's mistaken belief that it could interview children without parental consent for all investigations.

In the February 23, 2015 email and again in the December 11, 2015 memorandum, Behringer concluded that the 1988 opinion did not directly focus on the interview issue. Instead, the 1988 AG opinion concluded that school districts could not restrict DCS from or impose limitations on interviewing schoolchildren on school grounds.

Behringer also concluded that the 1988 AG opinion relied on outdated information. He explained that the 1988 AG opinion cited language substantially similar to current language in A.R.S. § 8-802(B) but relied on an outdated AG opinion from 1975³⁴ to “conclude that CPS workers have the power to interview children who are the subjects of reports of child abuse or neglect without the consent of the parents.”³⁵

Behringer explained that the 1975 AG opinion was issued before the language limiting DCS's interview authority was inserted into statute.³⁶ “The restrictions on interviewing children were enacted by Laws 1981, chapter 293, section 4.”³⁷ “There was no similar limitation on interviewing a child in the old statute.”³⁸ Hence, the 1988 AG opinion “quoted the language that is currently in law, but relied on an outdated opinion that had been superseded by the change in statute.”³⁹

DCS's reliance on the 1998 AG opinion is also problematic. The 1998 opinion drew a similar conclusion to the 1988 AG opinion but concerned private schools.⁴⁰ Like with the 1988 AG opinion, the AG did not evaluate the restrictive language of A.R.S. § 8-802(B). “The lack of a reference to neglect in this paragraph was neither raised nor discussed.”⁴¹

Second, DCS has relied heavily on the reference in A.R.S. § 8-802(B) to A.R.S. § 8-456. DCS asserted to the OCA that the reference to A.R.S. § 8-456 creates ambiguity because, while A.R.S. § 8-802(B)(2) provides an exception for only abandonment and abuse investigations, A.R.S. § 8-456 addresses DCS's investigative function in all cases.

³² See discussion *supra* p. 3.

³³ See Exhibit 10.

³⁴ The 1988 AG opinion relied on Ariz. Atty. Gen. Op 75-219 (July 28, 1975).

³⁵ See Exhibits 10 and 15 (Quoting Ariz. Op. Att'y Gen. No. I88-062 (June 9, 1988)).

³⁶ See Exhibits 10 and 15.

³⁷ See Exhibit 15

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

There is, however, no ambiguity. The reference to A.R.S. § 8-456 “was a conforming change made as part of the bill that created DCS.”⁴² “If the intent of the legislature were to allow searches without consent in all investigations, the language would have just said ‘who is the subject of an investigation pursuant to section 8-456,’ ”⁴³ and the Legislature would have simply forgone the use of “abuse or abandonment.” “Since the reference to A.R.S. section 8-456 would capture all investigations, leaving the ‘abuse or abandonment’ language must indicate that it is a limitation on the reference to A.R.S. section 8-456.”⁴⁴ Thus, the meaning of the language in A.R.S. § 8-802 is clear – DCS must have prior written parental consent in order to interview children in neglect investigations.

Third, DCS argued strongly to the OCA that the A.R.S. § 8-802 restrictions on DCS’s interview authority, particularly for neglect investigations, are unwise and will prevent the DCS from fulfilling its purpose to protect children⁴⁵ and its statutory duty to “[m]ake a prompt and thorough investigation.”⁴⁶ We do not take a position on whether DCS *should* have authority to interview children without prior written parental consent in all investigations; we simply note that DCS does *not* currently have such authority.

Although the OCA has statutory authority to evaluate whether DCS is acting contrary to law and report findings and recommendations to the Legislature, only the Legislature can weigh policy arguments and decide whether to grant DCS additional authority.

Although the OCA has statutory authority to evaluate whether DCS is acting contrary to law and report findings and recommendations to the Legislature, only the Legislature can weigh policy arguments and decide whether to grant DCS additional authority. If DCS believes it should be able to interview children in neglect investigations without prior written parental consent, it may petition the Legislature to amend A.R.S. § 8-802 to grant DCS that authority.

Finding 3: Substantiated

DCS’s proposed rule R21-4-102(C) does not comport with A.R.S. §§ 8-802(B) and 8-471(E)(3).

The proposed rule reads, “A DCS Investigator may interview a child without prior parental consent under A.R.S. §§ 8-802(B) and 8-471(E)(3).”

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ A.R.S. § 8-451(B).

⁴⁶ A.R.S. § 8-456(B).

The proposed rule purports that DCS has statutory authority to interview children without parental consent. The rule does not include or even acknowledge any restrictions on this authority. By failing to do so, it implies there are no conditions imposed on a DCS worker when interviewing a child. Because the proposed rule cites the statutes and uses the permissive term “may”; it gives the false impression that the statutes grant unrestricted authority to interview children without parental permission to the Department.

Only by reviewing A.R.S. §§ 8-802(B) and 8-471(E)(3) does one learn of the restricted authority they grant to DCS. The statutes establish the default position as one in which the Department *cannot* interview a child without prior written parental permission.

A.R.S. § 8-802(B) says, “A worker *shall not interview* a child without the prior written consent of the parent”⁴⁷ In contrast, the rule inverts the statutory paradigm and leads one to believe that the unrestricted interview authority is the default. The proposed rule says, “A DCS Investigator *may interview* a child without prior parental consent”⁴⁸ The proposed DCS rule replaces the statutes’ mandatory prohibition “shall not” with a permissive word “may” that grants discretion. Although the statutes give DCS authority to interview children without prior parental consent via several exceptions, the exceptions are explicit and limited.⁴⁹

The proposed rule is misleading at a minimum and in violation of A.R.S. §§ 8-802(B) and 8-471(E)(3) at a maximum. It seems reasonable to believe that if a DCS worker or a member of the public were to read the proposed rule, they would think that DCS had unrestricted authority under both rule and statute to interview children without parental permission. Yet, they do not have such leeway.

The proposed rule is misleading at a minimum and in violation of A.R.S §§ 8-802(B) and 8-471(E)(3) at a maximum.

For these reasons, we believe the rule is misleading, is too broad, and fails to “enhance regulatory clarity” as required in administrative provisions of Chapter 6 in Title 41 of the Arizona Revised Statutes.

⁴⁷ See Exhibit 1. (emphasis added).

⁴⁸ See Exhibit 12. (emphasis added).

⁴⁹ See discussion *supra* pp. 6-7.

Recommendations

1. We recommend that DCS comply with A.R.S. §§ 8-802(B) and 8-471(E)(3) of the Arizona Revised Statutes. We further recommend that DCS update its policy, training, and other relevant DCS materials to reflect adherence to these laws.
2. If DCS determines that A.R.S. §§ 8-802(B) and 8-471(E)(3) are not prudent, are inefficient, or are otherwise in need of change, we recommend that DCS consider proposing changes to A.R.S. §§ 8-802(B) and 8-471(E)(3) for the Legislature to consider.
3. We recommend that DCS either withdraw proposed rule R21-4-102(C) or amend it to reflect the limited authority granted to DCS by A.R.S. §§ 8-802(B) and 8-471(E)(3).

Agency Response



Douglas A. Ducey
Governor

Arizona Department of Child Safety

Gregory McKay
Director

February 8, 2016

Dennis Wells
Arizona Ombudsman-Citizens' Aide
3737 N. 7th Street, Suite 209
Phoenix, AZ 85014

Re: DCS Response to Final Report of Investigation, Case # 1404174

The Arizona Department of Child Safety ("Department") has reviewed the final report of the Ombudsman-Citizens' Aide ("OCA") in this matter and hereby submits its final response to the findings and recommendations of that report.

This matter is solely a dispute of statutory interpretation. Given the complex legal framework governing our daily lives, it is not unusual for two individuals—or even two state agencies—to disagree on what a statute means. Typically when this happens, the dispute is resolved by the parties agreeing to disagree or the dispute is resolved in a court of law, where each party can advocate for its position and a neutral arbiter can render the ultimate conclusion on which interpretation is correct. However, to the best of our knowledge, this particular issue has never come before a court for interpretation, despite the fact that child interviewing has been the subject of Arizona statutes for decades, and Department policy on child interviewing has been the same for decades.

During Director McKay's tenure, the Department has engaged in an ongoing dialogue with the OCA on a wide variety of issues. The interviewing issue was just one such issue among several dozen. It was surprising that OCA opened a formal investigation on the interviewing issue because that type of investigation is not the appropriate forum for a dispute over statutory interpretation, particularly one involving a core activity of the agency. In light of the decision of the OCA not to defer to an agency's reasonable interpretation of an ambiguous statute governing its operations, the Department has sought an official Attorney General Opinion interpreting these statutes. Providing formal opinions to clarify statute is a significant function of the Attorney General. State agencies and other eligible parties have long availed themselves of this service to help settle disputes over the interpretation of state law, and in the absence of case law on this issue, this option is the best way to address this dispute in statutory interpretation. In the event that the Attorney General Opinion does not agree with the Department's interpretation of these statutes, the Department will seek appropriate legislative authority to enable it to continue to conduct its investigations in accordance with best practices in child interviewing and assessment of child safety.

Department Response

Finding 1: Substantiated

DCS violated A.R.S. § 8-802(B) by interviewing the Complainant's children without her prior written consent as part of a neglect investigation.

Recommendation 1: We recommend that DCS comply with A.R.S. §§ 8-802(B) and 8-471(E)(3) of the Arizona Revised Statutes. We further recommend that DCS update its policy, training, and other relevant DCS materials to reflect adherence to these laws.

The Department disagrees with Finding #1. It remains the Department's position that a child may lawfully be interviewed without prior parental consent if the child is living in the home with the victim child, as was the case here. As such, the interview in this case was appropriately conducted without prior parental consent. Furthermore, it is important to note that as the facts of the case at issue fit the definition of abuse, this interview was lawful even under the OCA's more restrictive interpretation of A.R.S. § 8-802(B)(2).

The Department disagrees with Recommendation #1, as it remains the Department's position that its policies, practices, and procedures are in compliance with A.R.S. §§ 8-802(B)(2) and 8-471(E)(3). In the event that the Attorney General Opinion determines that the Department's interpretation of these statutes is in error, the Department will modify its policies and training to comply with the Attorney General's interpretation.

Finding and Recommendation #2

Finding 2: Substantiated

DCS's systemic practice of interviewing children without parent permission in neglect investigations violates A.R.S §§ 8-802(B) and 8-471(E)(3).

Recommendation 2: If DCS determines that A.R.S §§ 8-802(B) and 8-471(E)(3) are not prudent, are inefficient, or are otherwise in need of change, we recommend that DCS consider proposing changes to A.R.S §§ 8-802(B) and 8-471(E)(3) for the Legislature to consider.

The Department disagrees with Finding #2. As noted in prior communications with OCA, it is the Department's position that its policies, practices, and procedures with respect to child interviewing are in compliance with A.R.S. §§ 8-802(B)(2) and 8-471(E)(3). The Department's position on this matter was laid out in detail in prior communication with the OCA and is summarized below:

The statutory provisions at issue ("the interview provisions") are ambiguous, as they refer to "abuse and abandonment" investigations but also refer to a separate statutory provision referencing "abuse and neglect" investigations. Read together, the interview provisions are reasonably read to apply to abuse, abandonment, and neglect investigations. Additionally, the following supports this interpretation:

- The interview provisions must be interpreted in a manner that is consistent with the Department's statutory obligations. Interpreting the interview provisions as the OCA does would hinder the Department's ability to protect children and to conduct thorough investigations, both of which are required by statute. *See* A.R.S. §§ 8-451(B) and 8-456(B). A 1988 Attorney General Opinion highlights the crucial role child interviews play in investigations and safety assessments: "[A]CPS worker must have the power to interview children without notice to the parents." Ariz. Atty. Gen. Op. I88-062 (June 9, 1988). "In some cases CPS cannot adequately investigate and determine whether custody of a child is necessary without obtaining information from the child, preferably in a neutral and non-threatening environment such as a school." *Id.*
- Although no Attorney General Opinion has squarely addressed the issue of parental consent for interviews in neglect cases, AG Opinions on the more general issue of child interviews by CPS at schools support the conclusion that a child who is the subject of any DCS investigation may be interviewed without prior parental consent. Indeed, a footnote in a 1998 AG Opinion noted, "In pursuing its investigation, CPS specialists are not required to obtain parental consent to interview a child who initiates contact with the worker, a child who is the subject of the investigation, or a sibling of or a child living with the subject of the investigation. A.R.S. § 8-802(C)(2)(a-b)." This footnote is clear evidence that the Attorney General's interpretation of the interview provision was that the consent exception applied to children who were the subject of, sibling of, or living with the subject of all investigations, not just those involving abuse or abandonment.
- Current law permits the Department to remove a child under A.R.S. § 8-821 for the purpose of a medical or psychological examination to diagnose serious physical or emotional injury. A.R.S. § 8-821(B)(2). Thus, under certain circumstances Arizona law permits removal (which all will agree is a traumatic event for a child) for an investigative purpose. It defies logic to have a statutory scheme that permits removal purely for investigative purposes (i.e. an exam) but does not permit the far less invasive investigative technique of interviewing without parental consent (which could prevent removal).
- The legislative history is also instructive and supports the Department's interpretation. A review of the legislative history reveals that over the course of several decades, a wide range of terms were used, often to mean exactly the same thing, and that over time as new terminology came into use, the old terminology was not always completely eliminated. For example, in the 1981 version of what is now § 8-802, the interviewing subsection referred to an "abuse or abandonment" investigation and cross referenced a statutory section regarding investigations. Similar to today's version of the statute, the cross-referenced section used slightly different terminology than the interviewing section. Read together, however, it is clear that the interviewing provisions were intended to apply to children who are the subject of a Child Protective Services investigation of any sort.

- The legislative history cited by the OCA also supports the Department's interpretation. The House of Representatives Summary that Mr. Behringer's December 24, 2014 memo cites states that "if a child is not the subject of a services investigation, they must get parental consent." Mr. Behringer's memo states that the summary appeared to only relate to abuse, because the summary stated that a protective services worker "may interview allegedly abused children without notifying the parents," but it is likely that the term "abused" was used in a more general, colloquial sense to mean a child who has been subjected to maltreatment. This is a reasonable interpretation given that the statute explicitly states that protective services worker does not need parental consent to interview a child who is the subject of an abandonment investigation, but the summary makes no mention of an abandoned child.
- To read the interview provisions as the OCA does goes clearly against the intent of the drafters of the statutory scheme that created the Department. One member of the workgroup drafting those statutes was Director Gregory McKay. Another member of the workgroup was Maricopa County Attorney Bill Montgomery, a strong proponent of measures intended to protect the safety of children. The drafters were aware of the Department's policy on child interviews, and they were also well aware that approximately 70 percent of the Department's reports are classified as neglect reports, and also that neglect reports can be just as serious—and often more so—than abuse reports. Although A.R.S. § 8-802 was not changed significantly in the course of the 2014 revisions, it was modified slightly to reflect the new Department. It would be reasonable to conclude that had the drafters believed that the interview statute forbade interviewing children in neglect cases without parental consent, they would have modified that statute, given how crucial to child safety the interview is. It is simply not reasonable to conclude that the current version of A.R.S. § 8-802 was intended to require the Department to depart dramatically from best practice in the field of child welfare and adopt a practice that was counter to child safety.

The Department has sought an Attorney General Opinion interpreting the interview provisions. In the event that the Opinion adopts OCA's interpretation of the interview statute, the Department is likely to implement OCA's recommendation and seek statutory changes that would assist the Department in ensuring that it can effectively and thoroughly investigate *all* cases of child maltreatment, including neglect. As the Department has noted in prior communications, the ability to interview a child is a critical part of an investigation and crucial to being able to assess child safety.

Finding 3: Substantiated

DCS's proposed rule R21-4-102(C) does not comport with A.R.S §§ 8-802(B) and 8-471(E)(3).

Recommendation 3: We recommend that DCS either withdraw proposed rule R21-4-102(C) or amend it to reflect the limited authority granted to DCS by A.R.S. §§ 8-802(B) and 8-471(E)(3).

The Department disagrees with Finding #3. The rule specifically references the statutes at issue, and it therefore allows only as much as the statute allows. This is true regardless of what interpretation of the statute one adopts.

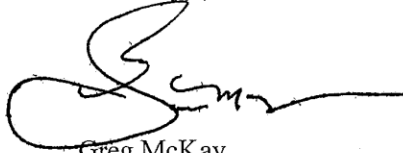
In November 2015, the Department modified the proposed language in what is now final rule A.A.C. R21-4-103(F) so that it now reads: “A DCS Investigator may interview a child without the prior written consent of the parent, guardian, or custodian of the child as set forth in A.R.S. §§ 8-802 and 8-471.” This language more clearly reflects that one must look to the cited statutes for the limitations on interviewing a child.

Conclusion

The Department has given careful consideration to the role of child interviews in its practice and the statutes governing Departmental operations. Having considered all of the above, it is the Department’s conclusion that the most reasonable interpretation of A.R.S. §§ 8-802(B) and 8-471(E)(3) is that an investigator may lawfully interview a child without prior written parental consent if that child is connected to the investigation (i.e. victim, victim’s sibling, or living with victim) but he cannot interview any other child without parental consent unless the child initiates the contact or the child is interviewed pursuant to the Joint Investigative Protocols as set forth in A.R.S. § 8-817.

This is a reasonable distinction when we consider that in the case of a child directly connected to the investigation, the State has received information suggesting that governmental intervention may be needed to protect that child, thus justifying an intrusion into the family’s life. Conversely, for children not connected to the investigation, there is no compelling state interest justifying intrusion into the family’s life, so some sort of permission is required to interview the child (either via parental consent or the child approaching the worker). In the event that the Department’s interpretation is not supported by the forthcoming Attorney General Opinion, the Department will explore all available options to ensure that it has the legal authority to conduct thorough investigations and safety assessments.

Sincerely,



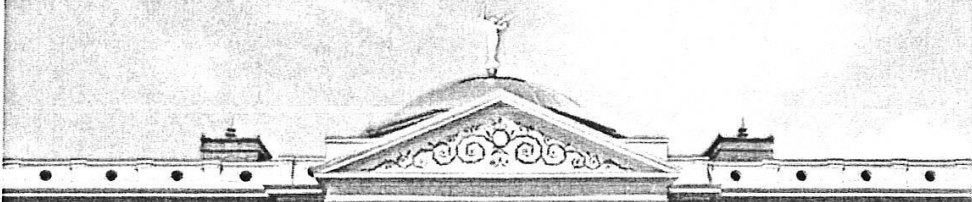
Greg McKay
Director

Exhibits

Exhibit 1

A.R.S. § 8-802

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8-802. Child safety worker; fingerprint clearance cards; interview requirements; temporary custody limit; cooperation and coordination; alteration of files; violation; classification

A. The department shall employ child safety workers. All persons who are employed as child safety workers shall have a valid fingerprint clearance card that is issued pursuant to section 41-1758.07 or shall apply for a fingerprint clearance card within seven working days of employment. A child safety worker shall certify on forms that are provided by the department and that are notarized whether the worker is awaiting trial on or has ever been convicted of any of the criminal offenses listed in section 41-1758.07, subsections B and C in this state or similar offenses in another state or jurisdiction.

B. A worker shall not interview a child without the prior written consent of the parent, guardian or custodian of the child unless either:

1. The child initiates contact with the worker.
2. The child who is interviewed is the subject of or is the sibling of or living with the child who is the subject of an abuse or abandonment investigation pursuant to section 8-456.
3. The interview is conducted pursuant to the terms of the protocols established pursuant to section 8-817.

C. A child shall not remain in temporary custody for a period exceeding seventy-two hours, excluding Saturdays, Sundays and holidays, unless a dependency petition is filed. If a petition is not filed and the child is released to the child's parent, guardian or custodian, the worker shall file a report of removal with the central registry within seventy-two hours of the child's release. The report shall include:

1. The dates of previous referrals, investigations or temporary custody.
2. The dates on which other children in the family have been taken into temporary custody.

D. All child safety workers shall be trained and demonstrate competency in:

1. The duty to protect the legal rights of children and families from the time of the initial contact through treatment. The training shall include knowledge of a child's rights as a victim of crime.
2. The legal rights of parents.
3. Impact and intervention practices related to adverse childhood experiences, culturally and linguistically appropriate service delivery, domestic violence, family engagement, communication with special populations and trauma informed responses.

E. All child safety workers shall cooperate and coordinate with the office of child welfare investigations to carry out the purposes of section 8-471.

F. All child safety workers and child welfare investigations workers shall cooperate and coordinate with the inspections bureau to carry out the purposes of section 8-458.

G. All child welfare investigations workers and inspections bureau workers shall cooperate and coordinate with the rest of the department to achieve the purposes of this title.

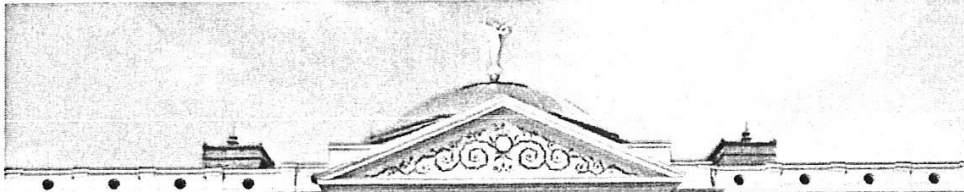
H. Any person who alters a client file for the purpose of fraud or misrepresentation is guilty of a class 2 misdemeanor.

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Exhibit 2

A.R.S. § 8-471

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8-471. Office of child welfare investigations; training; responsibilities; annual report

A. The director shall establish the office of child welfare investigations within the department. The director is responsible for the direction, operation and control of the office.

B. The duties of the office include investigating criminal conduct allegations, coordinating with other parts of the department and law enforcement, establishing task forces for the investigation of criminal conduct and other duties as may be assigned by the director.

C. The office shall employ child welfare investigators who have received training to understand law enforcement's role in cases of criminal child abuse or neglect and in social services offered by the department. The office may employ research analysts and peace officers for the purpose of obtaining an originating agency identification number to have direct access to criminal history report information. Each person hired by the office is an employee of the department, is subject to title 41, chapter 4, article 4 and shall comply with the fingerprint requirements of section 8-802.

D. The department, in coordination with the Arizona peace officer standards and training board, shall provide child welfare investigators with training. The training shall be, at a minimum, in the following areas:

1. First responder training on responding to reports of child abuse.
2. Forensic interviewing and processes.
3. Child physical and sexual abuse investigation.
4. The protocols established pursuant to section 8-817.
5. Relevant law enforcement procedures, including the collection and preservation of evidence.
6. A child's constitutional rights as a victim of a crime pursuant to article II, section 2.1, Constitution of Arizona.
7. Impact and intervention practices related to adverse childhood experiences, culturally and linguistically appropriate service delivery, domestic violence, family engagement, communication with special populations and trauma informed responses.
8. Any other training as directed by the director.

E. A child welfare investigator shall:

1. Protect children.
2. Assess, respond to or investigate all criminal conduct allegations, which shall be a priority, but not otherwise exercise the authority of a peace officer.
3. Not interview a child without the prior written consent of the parent, guardian or custodian of the child unless either:
 - (a) The child initiates contact with the investigator.
 - (b) The child who is interviewed is the subject of, is the sibling of or is living with the child who is the subject of an abuse or abandonment investigation pursuant to paragraph 4, subdivision (b) of this subsection.
 - (c) The interview is conducted pursuant to the terms of the protocols established pursuant to section 8-817.
4. After the receipt of any report or information pursuant to paragraph 2 of this subsection, immediately do both of the following:
 - (a) Notify the appropriate municipal or county law enforcement agency if they have not already been notified.
 - (b) Make a prompt and thorough investigation of the nature, extent and cause of any condition that would tend to support or refute the report of child abuse or neglect when investigating allegations pursuant to paragraph 2 of this subsection. A criminal conduct allegation shall be investigated with the appropriate municipal or county law enforcement agency according to the protocols established pursuant to section 8-817.
5. Take a child into temporary custody as provided in section 8-821. Law enforcement officers shall cooperate with the department to remove a child from the custody of the child's parents, guardian or custodian pursuant to section 8-821. A child welfare investigator who is responding to or investigating a report containing a criminal conduct allegation shall have the primary responsibility for making the decision whether to take a child into temporary custody.
6. Evaluate conditions created by the parents, guardian or custodian that would support or refute the allegation that the child should be adjudicated dependent. The investigator shall then determine whether any child is in need of child safety services.
7. Identify, promptly obtain and abide by court orders that restrict or deny custody, visitation or contact by a parent or other person in the home with the child and notify appropriate personnel within the department to preclude violations of a court order in the provision of any services.

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8. On initial contact with the parent, guardian or custodian of a child who is the subject of an investigation pursuant to this section, provide the parent, guardian or custodian with the allegation received by the department. This paragraph does not require the department to disclose details or information that would compromise an ongoing criminal investigation.

9. Have access to all records and information of the department necessary to carry out this section.

F. Unless a dependency petition is filed, a child shall not remain in temporary custody for a period exceeding seventy-two hours, excluding Saturdays, Sundays and holidays. If a petition is not filed, the child shall be released to the child's parent, guardian or custodian.

G. In conducting an investigation pursuant to this section, if the investigator is made aware that an allegation of abuse or neglect may also have been made in another state, the investigator shall contact the appropriate agency in that state to attempt to determine the outcome of any investigation of that allegation.

H. The office of child welfare investigations shall submit a report by August 15 each year to the governor, the speaker of the house of representatives, the president of the senate and the secretary of state that includes the following information for the most recently completed fiscal year:

1. The number of reports for investigation that involve criminal conduct allegations.
2. The number of joint investigations conducted pursuant to section 8-817.
3. For each case in which a joint investigation did not occur pursuant to section 8-817, the reasons why the joint investigation did not occur.

I. All records gathered or created by the department during an investigation conducted under this section are confidential and shall be protected and released as prescribed in sections 8-807 and 8-807.01, except the department shall not release records if the department determines that the release of these records may compromise an ongoing investigation.

J. Notwithstanding any other law, the office of child welfare investigations is not responsible for conducting the criminal investigation of a criminal conduct allegation.

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privacy statement

Exhibit 3

Timeline of Case Events

Timeline of Case Events

January 20, 2015 – OCA emailed¹ then DCS Deputy Director Chad Campbell regarding the interview issue. OCA email included Ken Behringer memorandum² addressing DCS's interview authority.

February 2, 2015 – DCS Deputy Director Campbell emailed³ our office that DCS had a response prepared to address our concern about the interview issue. We set a meeting for February 18, 2015. Shortly afterward, the current DCS administration was installed. We received word from DCS staff that the meeting would occur as scheduled on the 18th with staff from the new administration.

Prior to the meeting, OCA General Counsel Behringer addressed the issue with DCS Communication and Legislative Director, Jennifer Bowser. Behringer serves two roles: He is the lead author of bills relating to DCS, and he is the official attorney for the Ombudsman-Citizens' Aide Office.

February 18, 2015 – DCS Deputy Directors Shalom Jacobs and Vicki Mayo, DCS General Counsel Allister Adel, and DCS Ombudsman Marcy Morales met with OCA Deputy Ombudsman Joanne MacDonnell, Investigator Danee Garone, and Legislative Counsel's General Counsel Ken Behringer. We requested the meeting with high-ranking DCS staff so that we could specifically address the problem of DCS staff interviewing children contrary to laws specific to neglect cases.

In the February 18 meeting, the DCS agency representatives confirmed that DCS staff routinely interviewed people in neglect cases without obtaining the permission we believe is required in ARS 8-802(B). They indicated they were not ready to opine officially, but would consult with the Attorney General's Office and get back with us in approximately one week with a decision.

February 20, 2015 – OCA Investigator Danee Garone sent an email⁴ to the DCS staff that attended the February 18 meeting, including Deputy Director Shalom Jacobs. In the email, we inquired into the Department's Legislative plans and even highlighted a specific bill that the Department could add language to in order to address the interview issue. In the OCA email, we also noted that "DCS's ongoing non-compliance with [A.R.S. § 8-802(B)] is a serious issue that [the Ombudsman's office] is required by law to address."

February 23, 2015 – OCA legal counsel Ken Behringer emailed⁵ DCS General Counsel Allister Adel regarding a 1988 Attorney General Opinion.⁶ Behringer posited that the 1988 Attorney General Opinion was the origin of DCS's mistaken belief that it could interview children without parental consent in all investigations. He explained why the 1998 Attorney General Opinion was

¹ See Exhibit 16.

² See Exhibit 8.

³ See Exhibit 17.

⁴ See Exhibit 9.

⁵ See Exhibit 10.

⁶ See Exhibit 13.

incorrect in concluding that DCS had authority to interview children without parental consent in all investigations.

February 25, 2015 – Deputy Director Shalom Jacobs responded⁷ to the OCA email and said that the Department was “working on resolving this issue in both the short and long term” and would let us know when the Department “identified an approach.”

Over the next 190 days, we pressed Deputy Director Shalom Jacobs, Illya Riske (then DCS Legislative Liaison), DCS Ombudsman Marcy Morales, DCS Deputy Counsel Beth Broeker, DCS General Counsel Lauren Lowe, and DCS Policy Leader Karen Nelson Hunter on the issue, but the issue remained unresolved. DCS did not follow through on Deputy Director Jacobs’s promise to identify an approach and inform the OCA.

March 4, 2015 – OCA Deputy Ombudsman Joanne MacDonnell briefly discussed the interview issue with Assistant Attorney General James Simpson following a Court Improvement Advisory Workgroup meeting at the Arizona Supreme Court. Following the discussion, MacDonnell emailed⁸ Simpson regarding the interview issue. In the email, MacDonnell asked him or someone else at the Attorney General’s office to address the issue with the OCA. Neither he, nor anyone else from the Attorney General’s office responded to the email.

March 16, 2015 – Ombudsman Dennis Wells, Deputy Ombudsman Joanne MacDonnell, and Investigator Danee Garone met with DCS Deputy General Counsel and Legal Systems Liaison Beth Broeker. At the meeting, OCA staff addressed the interview issue with Broeker, along with a handful of other issues.

March 17, 2015 – DCS Deputy General Counsel and Legal Systems Liaison Beth Broeker emailed⁹ OCA Deputy Ombudsman Joanne MacDonnell. Broeker said she was hopeful that DCS would be able to quickly address and fix the issues we raised at the March 16, 2015 meeting. Broeker said that she emailed the DCS Director and both Deputy Directors about the issues we discussed with her at the March 16, 2015 meeting, including the interview issue.

May 6, 2015 – Ombudsman Dennis Wells and Deputy Ombudsman Joanne MacDonnell met with DCS Director Greg McKay, Deputy Director Shalom Jacobs, Illya Riske (then DCS Legislative Liaison), and DCS Management Consultant David Rataczak. The interview issue was one of many things discussed.

May 12, 2015 – OCA Deputy Ombudsman Joanne MacDonnell emailed DCS Legislative Liaison Illya Riske a list of issues developed by the Ombudsman Office, including the interview issue.

May 14, 2015 – DCS Legislative Liaison Illya Riske emailed OCA Deputy Ombudsman Joanne MacDonnell on behalf of DCS Deputy Shalom Jacobs. He said that DCS wished to cancel the May 15, 2015 meeting to discuss various DCS issues (including the interview issue) because DCS felt it needed more time to review the various issues in order to have a more productive meeting in the future.

⁷ See Exhibit 11.

⁸ See Exhibit 18.

⁹ See Exhibit 19.

May 29, 2015 – Deputy Ombudsman Joanne MacDonnell emailed DCS Deputy Shalom Jacobs and Legislative Liaison Illya Riske to send them an updated and more detailed version of the list of DCS issues developed by the Ombudsman Office (including the interview issue). The email included two exhibits on the point.

September 3, 2015 – Ombudsman Dennis Wells, Deputy Ombudsman Joanne MacDonnell, and Investigator Danee Garone had the first of two meetings that day with DCS management. OCA met with DCS General Counsel Lauren Lowe, DCS Policy Leader Karen Nelson Hunter, and DCS Ombudsman Marcy Morales about several issues and questions the OCA had regarding various DCS practices. OCA specifically addressed the interview issue with DCS's General Counsel.

September 3, 2015 – Ombudsman Dennis Wells, Deputy Ombudsman Joanne MacDonnell, and Investigator Danee Garone had the second of two meetings that day with DCS management. At the conclusion of the meeting, which included DCS Director Greg McKay, Deputy Director Shalom Jacobs, and DCS General Counsel Lauren Lowe, OCA notified the Director that the OCA was initiating a formal, statutorily prescribed investigation.

October 8, 2015 – OCA issued a preliminary report to the DCS.

October 20, 2015 – OCA Deputy Ombudsman Joanne MacDonnell and Investigator Danee Garone met with DCS Director Greg McKay and General Counsel Lauren Lowe. At this meeting, they discussed difficulties they had with the report, and Director McKay requested an extension for DCS's response to the preliminary report. MacDonnell said she would relay the message to Ombudsman Wells who had planned to attend the meeting, but was unable to due to illness.

October 21, 2015 – Ombudsman Dennis Wells, Deputy Ombudsman Joanne MacDonnell, and Investigator Danee Garone followed up the October 20, 2015 meeting with a conference call to DCS Director Greg McKay and General Counsel Lauren Lowe. Ombudsman Wells gave DCS a one-week extension for its response to the preliminary report. Wells also told Director McKay that the OCA would amend one of its report recommendations.

Following the conference call, OCA Deputy Ombudsman Joanne MacDonnell emailed DCS Director Greg McKay and General Counsel Lauren Lowe the OCA's amended recommendation as discussed in the October 21, 2015 conference call.

November 4, 2015 after 5pm – DCS General Counsel Lauren Lowe asks OCA to suspend the OCA neglect interview investigation until DCS can get the Attorney General to render a formal opinion on the interview issue. DCS estimates the process could take two months or so.

November 5, 2015 – Ombudsman Dennis Wells responds to General Counsel Lauren Lowe and declines to suspend the investigation.

November 6, 2015 – DCS formally responded to OCA preliminary report.

Exhibit 4

DCS Policy re Conducting Interviews

9/24/2015

Interviews



Arizona Department of Child Safety: Policy and Procedure Manual

Chapter 2: Section 3 Conducting Interviews

Policy

When conducting a field investigation the Child Safety Specialist must gather relevant and sufficient information through interviews, observation, and record review to determine:

- The name, age, location, and current physical and mental condition of all children in the home of the alleged victim;
- Whether the alleged incident (or any other form of) abuse or neglect occurred or is likely to occur;
- The circumstances surrounding the alleged abuse or neglect;
- Whether any child in the home where the incident occurred is unsafe due to present and/or impending danger; and
- Whether an immediate protective action or safety plan is required to ensure the child's safety;
- Whether there is risk of harm to any child in the home where the incident occurred; and
- Whether intervention is required.

A Child Safety Specialist shall investigate allegations of abuse or neglect by interviewing:

- The alleged victim;
- The alleged victim's caregiver who allegedly committed the abuse;
- Other adults and children residing in the home;
- Other persons who may have relevant information, including the reporting source, medical personnel, relatives, neighbors, and school personnel; and
- Consulting with law enforcement.

The Child Safety Specialist must show his/her DCS Identification card to everyone he or she interviews.

Prior to interviewing a child, the Child Safety Specialists shall obtain written consent from the parent, guardian, or custodian, except when the child being interviewed is:

- Subject of a DCS investigation;
- Sibling of the subject of a DCS investigation;
- Child who lives with the subject of a DCS investigation;
- Child who initiates contact with DCS; or
- Child identified in a report alleging a criminal conduct allegation (see your county's joint investigation protocols - Joint Investigation Protocols).

A Child Safety Specialist may interview a child without prior parental consent under A.R.S. § 8-

9/24/2015

Interviews

802(C)(2).

A Child Safety Specialist may exclude the alleged abuser from participating in an interview with the alleged victim, the alleged victim's siblings, or other children residing in the alleged victim's household.

Before interviewing a caregiver, a Child Safety Specialist shall:

- Orally inform the caregiver of the rights and duties under A.R.S. § 8-803(B);
- Give the caregiver a written statement summarizing the same information; and
- Ask the caregiver to sign a written acknowledgment of receipt of the information.

The department shall coordinate its investigations with law enforcement and the Office of Child welfare Investigations (OCWI), if applicable, according to protocols established with the appropriate municipal or county law enforcement agency when:

- The report alleges or the investigation indicates that the child is or may be the victim of a criminal conduct; or
- The report alleges or the investigation indicates that the child is a victim of sexual abuse; and/or
- Law enforcement is conducting a criminal investigation of the alleged child abuse and neglect or an investigation is anticipated.

Joint investigations may be initiated on other cases as determined necessary by the Child Safety Specialist and Supervisor. Most joint investigation protocols may be accessed at: [Joint Investigation Protocols](#)

Procedures

Joint Investigations and Law Enforcement

Planning for the First Interaction with the Family

Who Should Be Interviewed

The Child Safety Specialist shall first determine if the municipal or county law enforcement agency and the OCWI should be notified prior to beginning the investigation. When a DCS report includes criminal conduct allegations, interviews may be affected by your county's joint investigation protocols.

Unless case specific circumstances indicate otherwise, in-person interviews should be conducted with the following individuals:

- The reporting source (this can be conducted via phone and not required to be an in-person interview);
- The identified child victim;
- Any other child living in the home where the alleged abuse or neglect occurred;
- Any other child living in the primary home with the child victim if different than the home where the abuse or neglect occurred and there is an indication that he/she may be a victim of abuse or neglect;
- The alleged perpetrator(s);
- The primary caregiver/custodial parent; and
- Other adults living in the home (including the spouse, boyfriend, girlfriend, significant

Exhibit 5

A.A.C. R6-5-5508 re DCS Interview
Authority

Title 6, Ch. 5

Arizona Administrative Code

Department of Economic Security – Social Services

3. In a DES- or DHS-licensed or certified facility, or
4. In a DES-licensed family foster home.

Historical Note

Former Section R6-5-5507 repealed effective December 8, 1983 (Supp. 83-6). New Section adopted by final rulemaking at 5 A.A.R. 444, effective January 15, 1999 (Supp. 99-1).

R6-5-5508. Conduct of a Field Investigation

- A. When conducting a field investigation, a CPS Specialist shall determine:
1. The name, age, location, and current physical and mental condition of all children in the home of the alleged victim;
 2. Whether any child in the home has suffered maltreatment; and
 3. Whether any child in the home is at risk of maltreatment in the future.
- B. A CPS Specialist shall investigate allegations using the following methods:
1. Interview the alleged victim;
 2. Interview the alleged victim's caregiver who allegedly committed the abuse;
 3. Interview other adults and children residing in the home;
 4. Interview other persons who may have relevant information, including the reporting source, medical personnel, relatives, neighbors, and school personnel;
 5. Review available documentation including medical and psychiatric reports, police reports, school records, and prior CPS files; or
 6. Consult with law enforcement.
- C. A CPS Specialist may interview a child without prior parental consent under A.R.S. § 8-802(C)(2).
- D. A CPS Specialist may exclude the alleged abuser from participating in an interview with the alleged victim, the alleged victim's siblings, or other children residing in the alleged victim's household.
- E. Before interviewing a caregiver, a CPS Specialist shall:
1. Orally inform the caregiver of the rights and duties under A.R.S. § 8-803(B);
 2. Give the caregiver a written statement summarizing the same information; and
 3. Ask the caregiver to sign a written acknowledgment of receipt of the information.
- F. A CPS Specialist may take temporary custody of a child under A.R.S. §§ 8-821(A) and (B) and 8-802(C)(4). The CPS Specialist shall take temporary custody of an alleged victim if the alleged victim needs to be examined and the caregiver will not consent to the examination.
- G. If a CPS Specialist finds more allegations of maltreatment during the investigation, the CPS Specialist shall incorporate the allegations into the report and investigate under this Article.

Historical Note

Former Section R6-5-5508 repealed effective December 8, 1983 (Supp. 83-6). New Section adopted by final rulemaking at 5 A.A.R. 444, effective January 15, 1999 (Supp. 99-1).

R6-5-5509. Establishing Probable Cause of Child Maltreatment

To determine whether to recommend a substantiated allegation of maltreatment, the CPS Specialist shall consider all information gathered during the investigation, including:

1. Whether the alleged abuser or non-abusive caregiver admitted the maltreatment;

2. Whether a child provided a developmentally appropriate description of maltreatment;
3. Witness statements from persons other than the caregivers and the alleged victim;
4. Physical or behavioral signs of maltreatment or damage;
5. Medical opinions and opinions from treating professionals, including any conflict of opinion;
6. The consistency of the information provided; and
7. History of child maltreatment.

Historical Note

Former Section R6-5-5509 repealed effective December 8, 1983 (Supp. 83-6). New Section adopted by final rulemaking at 5 A.A.R. 444, effective January 15, 1999 (Supp. 99-1).

R6-5-5510. Investigation Findings; Required Documentation
 After completing an investigation, a CPS Specialist shall:

1. Unsubstantiate the allegations or make a proposed finding that the allegation is substantiated based on whether the CPS Specialist finds probable cause to believe maltreatment occurred, and after considering the information listed in R6-5-5509;
2. Determine whether the family has any unresolved problems involving child maltreatment and needs further services;
3. Document in the case record the reason for the finding;
4. Include in the case record any oral and written statements or other documentation provided by a caregiver;
5. Notify the PSRT of a proposed substantiated allegation finding under A.R.S. § 8-811;
6. Enter an unsubstantiated allegation finding into the CHILDS Central Registry and send the caregiver written notice of the unsubstantiated allegation finding.

Historical Note

Former Section R6-5-5510 repealed effective December 8, 1983 (Supp. 83-6). New Section adopted by final rulemaking at 5 A.A.R. 444, effective January 15, 1999 (Supp. 99-1).

R6-5-5511. Ongoing Services; Imminent Harm Not Identified; Case Closure

- A. If a finding is unsubstantiated or substantiated without unresolved problems, the CPS Specialist shall close the case.
- B. If a finding is unsubstantiated or substantiated, and there is no risk of imminent harm to a child, but the family has unresolved problems that create a potential for maltreatment, CPS shall determine whether to open the case for ongoing protective services if:
1. A family requests ongoing protective services, or
 2. A dependency action is pending.
- C. CPS shall offer a family voluntary protective services before filing a dependency action.
- D. When CPS offers a family voluntary protective services, CPS shall:
1. Document the family's acceptance or refusal of services,
 2. Document any services provided, and
 3. Document any action that CPS has taken to ensure that a child is safe.
- E. To determine how to proceed for ongoing services, CPS shall consider the following criteria:
1. Whether a family acknowledges past maltreatment or potential for future maltreatment,
 2. Whether the services are available to help a family address risk factors, and
 3. Whether a family is willing to cooperate with the provision of services.

Exhibit 6

DCS Web Material re Interview
Authority

A Guide to Department of Child Safety (DCS)

<https://www.azdcs.gov/landing.aspx?id=9670>

- [Español](#) | [DES Office Locator](#) | [DES Events](#) | [Press Room](#) | [Site Map](#)
[Basic Needs](#) | [Child & Family](#) | [Seniors](#) | [Disabilities](#) | [Employment](#) | [Online Services](#)

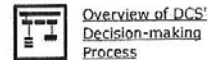
Your Partner For A Stronger Arizona LOG OUT

[Home](#) | [Department of Child Safety](#) | [Child Safety](#)

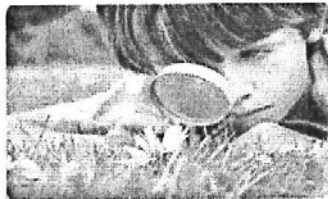
- [Home](#)
- [Prevention & Family Support](#)
- [Department of Child Safety](#)
- [Foster Care & Adoption](#)
- [CMDF](#)

Arizona Department of Child Safety
A Guide to Department of Child Safety (DCS)

DCS Guiding Principles



- Children need safe, strong families to succeed in life.
- Child safety, permanency and well-being are our top priorities.
- Families have the primary responsibility for raising their children.
- Families should be treated with respect, valuing their strengths, their culture and their involvement in decisions that affect them and their children.
- Prevention is paramount, and all actions should focus on improving family situations.
- Children belong with families-their own, when safe to do so and when it is not, with a safe, permanent family as soon as possible.
- The community must be a partner in supporting and strengthening both birth families and resource families.



I. Basic Information, Receipt and Response to a DCS Report

1. [The Goal of Department of Child Safety](#)
2. [Basic Information About Child Abuse And Neglect](#)
3. [Categories of Abuse and Neglect](#)
4. [How Does Department of Child Safety Receive Information about a Family?](#)
5. [Who Must Report Child Abuse?](#)
6. [When to Report?](#)
7. [How Does Department of Child Safety Investigate Reports of Child Abuse?](#)

The law requires Department of Child Safety to investigate reports of suspected child abuse or neglect by a parent, guardian or custodian. To do this, the law allows DCS to talk to alleged victims and their siblings without parental permission. Often this occurs at school because it is a neutral environment. A DCS Specialist, will visit the family home to discuss the report and to talk about the family situation. The DCS Specialist will talk to all children, parents, guardians or custodians and other adults living in the home but may also speak to family members or others who may provide information. It is hoped that the family will cooperate with the DCS Specialist since that will allow the family to clarify issues of concern and allow for a more accurate investigation. After gathering information, a child and family assessment will be completed by the DCS Specialist to identify services that may assist the family.

Parents and other individuals have the right to refuse to be interviewed by the DCS representative, to provide information and refuse services offered. However, DCS may proceed with the investigation and

II. When the Court becomes involved in a DCS Case

1. [What happens When an In-Home Intervention is Considered?](#)
2. [What Happens When an In-Home Dependency is Considered?](#)
3. [What happens When an Out of Home Dependency is Considered?](#)
4. [How to Get a Lawyer?](#)
5. [The Preliminary Protective Hearing](#)
6. [Initial Dependency Hearing](#)
7. [Other Hearings](#)
8. [Case Plans & Staffings](#)
9. [Foster Care Review Board](#)
10. [Court Appointed Special Advocate \(CASA\) Program](#)
11. [Foster Care](#)
12. [Services for the Family When There is Court Involvement](#)
13. [Visitation](#)
14. [Parent Responsibilities](#)
15. [When Children Are Returned Home](#)

Exhibit 7

DCS Interview Form for School Officials



Arizona Department of Child Safety

Douglas A. Ducey
Governor

Gregory McKay
Director

REQUEST FOR INTERVIEW AT SCHOOL

DATE _____

NAME OF SCHOOL _____

ADDRESS (No., Street, City, State, ZIP) _____

RE: CHILD(REN)'S NAME(S) _____

Dear School Administrator/Personnel:

I am an investigator employed by the Arizona Department of Child Safety (DCS). DCS is mandated by law to investigate allegations of child abuse and neglect. Title 8, Chapter 4 of the Arizona Revised Statutes (A.R.S.). As part of my investigation, I need to speak with one or more children at this school. Please provide me with immediate access to the above-named child(ren).

I am authorized by A.R.S. § 8-802(B), A.R.S. § 8-471(E)(3), and A.A.C. R6-5-5508(C) to interview a child without notice to or consent of the parent, guardian or custodian. See Arizona Attorney General Opinions (AG Opinions) I75-219, I75-234, I88-062, I04-003. Do not contact, directly or indirectly, the parents, guardians or custodians of the above-named child(ren) unless specifically requested or authorized by me, the assigned DCS investigator.

Because of the sensitive and confidential nature of a DCS investigation, school personnel and others are not permitted to be present during the interview(s) of the child(ren), nor can they be informed of what was discussed. See A.R.S. § 8-807, AG Opinion I98-008.

If at any time I determine, pursuant to A.R.S. § 8-821, that temporary custody is clearly necessary to protect the child(ren) from abuse or neglect, I will provide you with a Notice of Removal and provide the parents, guardians, or custodians a Temporary Custody Notice in accordance with A.R.S. § 8-823.

Under state and federal law, any information you have or may obtain during this investigation is confidential, including this form and the fact that the above-named child(ren) have been contacted regarding allegations of abuse or neglect. DO NOT disseminate this information to any person unless specifically authorized by applicable law or court order.

Thank you for your cooperation.

DCS REPRESENTATIVE'S SIGNATURE _____

DCS REPRESENTATIVE'S NAME _____

ADDRESS (No., Street, Site Code, City, State, ZIP) _____

PHONE NO. _____

FAX NO. _____

EMAIL ADDRESS _____

See reverse for EOE/ADA/LEP/GINA disclosures

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008; the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, contact your local office; TTY/TDD Services: 7-1-1 • Free language assistance for Department services is available upon request. • Ayuda gratuita con traducciones relacionadas a los servicios del Departamento está disponible a solicitud del cliente.

Exhibit 8

Ken Behringer Legal Memorandum re
Whether DCS May Interview Children
without Parent Permission

ARIZONA LEGISLATIVE COUNCIL

MEMO

December 24, 2014

TO: Danee Garone
FROM: Ken Behringer, General Counsel
RE: DCS Worker; Interview of a Child (R-51-181)

This memorandum is in response to your question about when a Department of Child Safety (DCS) worker may interview a child without the permission of the child's parent, guardian or custodian.¹

A DCS worker may not interview a child without the prior written consent of the parent unless the child initiates the contact with the worker or the child is "the subject of an abuse or abandonment investigation pursuant to section 8-456." Arizona Revised Statutes (A.R.S.) section 8-802, subsection B. The quoted language appears to exclude investigations into neglect.

The quoted language was added by Laws 1981, chapter 293, section 4. I examined the legislative history of this legislation to determine why negligence is not included, but there really is no indication. The House summary of the bill indicates a broader reading of the provision. It provides that the bill:

Clarifies certain duties of protective services workers by providing that a worker . . . may interview allegedly abused children without notifying the parents; however if a child is not the subject of a services investigation, they must get parental consent.

1981 House of Representatives Summary of Enacted Legislation, 50-51.

This summary seems to indicate that if the child is the subject of a DCS investigation, the child may be interviewed without parental consent. However, this summary does not focus on the type of investigation that gives rise to the consent exception, because it only mentions abuse. Therefore, this summary does not provide

¹ Throughout the rest of the memorandum I just refer to parent, but this applies to a guardian or custodian, also.

much assistance in looking at whether the consent exception includes investigations concerning neglect.

The statutes define the three terms abuse, abandoned and neglect. A.R.S. section 8-201. The three terms are also used together in several instances. *See* A.R.S. section 8-805, subsection A ("Any person making a complaint . . . shall be immune from any civil or criminal liability by reason of such action, . . . unless such person has been charged with . . . abusing, abandoning or neglecting the child or children in question.") and section 8-807, subsection F ("The department . . . [s]hall promptly provide DCS information to the public regarding a case of child abuse, abandonment or neglect . . .").

The consent exception only applies to abuse and abandonment investigation, however. Because the statute does not include neglect, the consent exception would not apply to an investigation purely for neglect.

While the statutes make this distinction, the real problem is applying this distinction in actual practice. Abandonment and neglect overlap. While there several specific instances of neglect are defined by the statute, general neglect and abandonment both involve a parent not providing reasonable support. *See* A.R.S. section 8-201, paragraphs 1 and 24. The difference between the two is the degree of parental contact with the child. Since abandonment can include a situation in which a parent does not provide "normal supervision," it seems that the lines between neglect and abandonment can be very blurred. Added to the problem is that the child may need to be interviewed early in the process. The DCS worker may see evidence of a problem, but without interviewing the child the worker may not be able to identify if the problem is abuse, neglect or abandonment.

CONCLUSION

I think that a DCS worker cannot interview the child without parental consent for cases of neglect that do not involve abuse or abandonment. However, because of the overlap of these concepts, especially as things appear in the early stages of an investigation, this can be a difficult rule to implement.

Exhibit 9

February 20, 2015 Email from OCA to
DCS Senior Staff re OCA Concern with
DCS Noncompliance with §A.R.S. 8-802
and Possible DCS Corrective Actions

Danee Garone

From: Danee Garone <dgarone@azoca.gov>
Sent: Friday, February 20, 2015 5:31 PM
To: vmayo@azdes.gov
Cc: Joanne MacDonnell; sjacobs@azdes.gov; Morales, Marcy; Adel, Allister
Subject: DCS Non-Compliance with ARS 802(B) -- Interviewing Children

Ms. Mayo,

We appreciate you taking the time to meet with us to discuss the issue of how DCS can comply with ARS 802(B) regarding DCS interviews of children in neglect cases. It was nice to meet you and the other DCS folks and finally be able to put faces to the names! I just wanted to follow up on some of the points discussed or alluded to at the meeting.

It is our understanding that a DCS cleanup bill is moving on Monday the 23rd and that several other DCS bills are being considered. Does DCS plan on addressing the issue via changes to the one or more of the various DCS bills? If so, how so? If not, what alternative is DCS considering?

As far as the issue of what DCS might do in the interim to comply with the statute, could you please let me know what the timeframe is for when DCS will be able to provide us with its solution? We certainly understand that you and Ms. Jacobs have had little or no time to truly delve into the issue; however, DCS's ongoing non-compliance with ARS 802(B) is a serious issue that our office is required by law to address.

Just to recap, DCS (and the Ombudsman's office) has operated under the assumption that DCS has the legal authority to interview children without parental permission in the course of any investigation. However, ARS 8-802(B) differentiates between abuse and abandonment cases and neglect cases. The statute puts parental notice requirements on neglect cases. According to the statute "[a] worker shall not interview a child without the prior written consent of the parent, guardian or custodian of the child unless" the child contacts a worker or "the child who is interviewed is the subject of or is the sibling of or living with the child who is the subject of an abuse or abandonment investigation pursuant to section 8-456."

Essentially, unless the child to be interviewed initiates contact with a worker, DCS must get prior written consent from a parent (or guardian or custodian) of the child in neglect investigations (but not in abuse or abandonment investigations) before conducting an interview with the child. DCS actions, policy, and other materials do not seem to acknowledge this legally binding distinction.

Please let me know what you think of the issue and DCS's plans for

correcting the issue.

Thank you!

--

Dance Garone, Investigator/Writer
Arizona Ombudsman-Citizens' Aide Office
602-277-7292
www.azoca.gov

Exhibit 10

February 23, 2015 Email from OCA Legal Counsel Ken Behringer to DCS General Counsel re 1988 AG Opinion (Ariz. Op. Att'y Gen. No. I88-062.)

Danee Garone

From: Ken Behringer <KBehringer@azleg.gov>
Sent: Monday, February 23, 2015 10:49 AM
To: AAdel@azdes.gov
Cc: Joanne MacDonnell; Danee Garone
Subject: Interviewing children
Attachments: DCS Doc.pdf; DCS Doc.pdf; 494.PDF#toolbar=1&navpanes=1&search=%22babbitt,%20bruce%20e.!1970s%20(1970-1979)!government%20and%20politics.PDF

Allister

In looking at the attached document and two AG opinions I think I know the source of the opinion that DCS workers may interview a child that is the subject of any DCS report without a parent. I am not sure what the document is, but it cites Ariz. Op. Atty. Gen I88-062 (1988) as the basis for this practice. It referenced language similar to what is now in A.R.S. section 8-802, subsection B, paragraph 2. However, it did not analyze this language. Instead it stated:

Ariz.Atty.Gen.Op. 75-219 concluded that CPS workers have the power to interview children who are the subjects of reports of child abuse or neglect without the consent of the parents.

Op. 75-219 was issued before the current language was placed in statute. There was no similar limitation on interviewing a child in the old statute. Therefore, in I88-062, the AG quoted the language that is currently in law, but relied on an outdated opinion that had been superseded by the change in statute.

I think this explains the confusion on the authority to interview a child without parental consent.

Kenneth C. Behringer
General Counsel
Arizona Legislative Council
(602) 926-4236
kbehring@azleg.gov

PS-020-A (1-99)

ARIZONA DEPARTMENT OF ECONOMIC SECURITY
IMPORTANT 24-HOUR PHONE NUMBERS

FOR MORE INFORMATION ABOUT CHILD PROTECTIVE SERVICES (CPS)
OR
TO REPORT CHILD ABUSE OR NEGLECT 24 HOURS/7 DAYS

STATEWIDE
TOLL-FREE

1-888-SOS-CHILD (1-888-767-2445)
1-800-530-1831 TDD

CPS AUTHORITY TO INVESTIGATE AND INTERVIEW CHILDREN

During investigations of child maltreatment, CPS Specialists, pursuant to A.R.S. § 8-802(C)(2) and (3)(b) may interview a child without parental consent and pursuant to 188-062 (R87-182) such interviews may be conducted, in a safe, neutral environment, including a school setting, or remove the child from the setting to conduct an interview.

CONFIDENTIALITY

A.R.S. § 8-807 governs CPS authority to release or disclose records or files regarding specific cases of child abuse and neglect. It is the policy of the Department of Economic Security to make efforts to protect the identity of a reporting source, the victim of child abuse or neglect, the victim's parents or foster parents and any other person the Department believes would be endangered by the disclosure.

REPORTING STATUTE

A.R.S. § 13-3620(A) and (B). Duty and authorization to report nonaccidental injuries, physical neglect and denial or deprivation of necessary medical or surgical care or nourishment of minors....

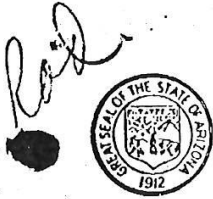
A. Any physician, hospital intern or resident, surgeon, dentist, osteopath, chiropractor, podiatrist, county medical examiner, nurse, psychologist, school personnel, social worker, peace officer, parent, counselor, clergyman or priest or any other person having responsibility for the care or treatment of children whose observation or examination of any minor discloses reasonable grounds to believe that a minor is or has been a victim of injury, sexual abuse pursuant to section 13-1404, sexual conduct with a minor pursuant to section 13-1405, sexual assault pursuant to section 13-1406, molestation of a child pursuant to section 13-1410, commercial sexual exploitation of a minor pursuant to section 13-3552, sexual exploitation of a minor pursuant to section 13-3553, incest pursuant to section 13-3608 or child prostitution pursuant to section 13-3212, death, abuse pursuant to section 8-201 or physical neglect which appears to have been inflicted upon such minor by other than accidental means or which is not explained by the available medical history as being accidental in nature or who has reasonable grounds to believe there has been a denial or deprivation of necessary medical treatment or surgical care or nourishment with the intent to cause or allow the death of an infant protected under section 36-2281 shall immediately report or cause reports to be made of such information to a peace officer or to the child protective services of the department of economic security. Such reports shall be made forthwith by telephone or in person forthwith and shall be followed by a written report within seventy-two hours. Such reports shall contain:

1. The names and addresses of the minor and his parents or person or persons having custody of such minor, if known.
2. The minor's age and the nature and extent of his injuries or physical neglect, including any evidence of previous injuries or physical neglect.
3. Any other information that such person believes might be helpful in establishing the cause of the injury or physical neglect.

B. A health care professional who is regulated pursuant to Title 32 and whose routine newborn physical assessment of an infant's health status or whose notification of positive toxicology screens of an infant gives the professional reasonable grounds to believe that the infant may be affected by the presence of alcohol or a substance prohibited by Chapter 34 of this title shall immediately report this information, or cause a report to be made, to Child Protective Services in the Department of Economic Security. For the purposes of this subsection "infant" means a newborn who is under the age of thirty days.

C. Any person other than one required to report or cause reports to be made in subsection A of this section who has reasonable grounds to believe that a minor is or has been a victim of abuse or neglect may report the information to a peace officer or to the child protective services of the department of economic security.

Reference: ARS § 13-3620(D), (E), (F), (G), (H), (I), (J), and (K) duty to make medical records available; exception; violation; notification.



OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

July 28, 1975

R75-388
BRUCE E. BABBITT
ATTORNEY GENERAL
75-219

Mr. John L. Huerta
Director
Arizona Department of
Economic Security
P. O. Box 6123
Phoenix, Arizona 85005

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Dear Mr. Huerta:

This letter is in response to Mr. Henry Diaz' June 16, 1975 request for an opinion of this office concerning whether or not it is permissible for a child protective services specialist of the State Department of Economic Security to interview a child at school without parental permission as part of that specialist's responsibility to investigate a referral to the Child Protective Services Division of the Arizona Department of Economic Security.

A.R.S. § 8-546.01.C provides, among other things, that a protective services worker shall:

3. Upon receipt of such information, make a prompt and thorough investigation which shall include a determination of the nature, extent, and cause of any condition which is contrary to the child's best interests and the name, age, and condition of other children in the home.

4. Take a child into temporary custody if there are reasonable grounds to believe that the child is suffering from illness or injury or is in immediate danger from his surroundings and that his removal is necessary. Law enforcement officers shall cooperate with the department to remove a child from the custody of his parents, guardian, or custodian when necessary.

A.R.S. § 8-223.A also authorizes a child protective services specialist of the State Department of Economic Security, as well as a law enforcement officer, to take a child into temporary custody if there are reasonable grounds to believe that the child is suffering from illness or injury, or is in immediate danger from his surroundings, and that his removal is necessary.

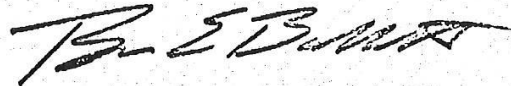


Mr. John L. Huerta
July 28, 1975
Page Two

Since a protective services worker is given the power to take a child into temporary custody under the circumstances set forth in §§ 8-223.A and 8-546.01.C.4, he is implicitly given the power to question or interview that child concerning those circumstances if he reasonably believes them to be present. Furthermore, there is nothing in the Arizona Constitution or statutes which indicates that an exception has been carved out from the application of the above-mentioned statutory provisions when children are upon school property.

Consequently, a protective services worker cannot be prohibited from coming upon school property to question a child if that worker reasonably believes that the child is suffering from illness or injury or is in immediate danger from his surroundings, provided that the questioning is limited to those matters. No parental consent is necessary. In this connection, it is our belief that the board of trustees of a school district may adopt a rule, pursuant to A.R.S. §§ 15-441.A and 14-442.A.6, prohibiting a protective services worker from questioning a child while such child is rightfully within the custody of the school authorities with respect to any matter not related to an illness of or injury or immediate danger to the child. In other words, we do not believe that A.R.S. § 8-546.01.C.3 gives a protective services worker authority to question a child while he is rightfully within the custody of the school authorities with respect to matters not encompassed within A.R.S. §§ 8-223.A.3 and 8-546.01.C.4.

Sincerely,



BRUCE E. BABBITT
Attorney General

BEB:ASK:gs

Exhibit 11

February 25, 2015 Email Response from
DCS Deputy Director Shalom Jacobs to
OCA

Danee Garone

From: Jacobs, Shalom, M <SJacobs@azdes.gov>
Sent: Wednesday, February 25, 2015 11:11 AM
To: Danee Garone; Mayo, Vicki
Cc: Joanne MacDonnell; Morales, Marcy; Adel, Allister
Subject: RE: DCS Non-Compliance with ARS 802(B) -- Interviewing Children

Mr. Garone,

Thank you for bringing this to our attention at our meeting on the 18th. We are working on resolving this issue in both the short and long term. When we have identified an approach we will get back to you. Thank you very much.

-----Original Message-----

From: Danee Garone [mailto:dgarone@azoca.gov]
Sent: Friday, February 20, 2015 5:31 PM
To: Mayo, Vicki
Cc: Joanne MacDonnell; Jacobs, Shalom, M; Morales, Marcy; Adel, Allister
Subject: DCS Non-Compliance with ARS 802(B) -- Interviewing Children

Ms. Mayo,

We appreciate you taking the time to meet with us to discuss the issue of how DCS can comply with ARS 802(B) regarding DCS interviews of children in neglect cases. It was nice to meet you and the other DCS folks and finally be able to put faces to the names! I just wanted to follow up on some of the points discussed or alluded to at the meeting.

It is our understanding that a DCS cleanup bill is moving on Monday the 23rd and that several other DCS bills are being considered. Does DCS plan on addressing the issue via changes to the one or more of the various DCS bills? If so, how so? If not, what alternative is DCS considering?

As far as the issue of what DCS might do in the interim to comply with the statute, could you please let me know what the timeframe is for when DCS will be able to provide us with its solution? We certainly understand that you and Ms. Jacobs have had little or no time to truly delve into the issue; however, DCS's ongoing non-compliance with ARS 802(B) is a serious issue that our office is required by law to address.

Just to recap, DCS (and the Ombudsman's office) has operated under the assumption that DCS has the legal authority to interview children without parental permission in the course of any investigation. However, ARS 8-802(B) differentiates between abuse and abandonment cases and neglect cases. The statute puts parental notice requirements on neglect cases. According to the statute "[a] worker shall not interview a child without the prior written consent of the parent, guardian or custodian of the child unless" the child contacts a worker or "the child who is interviewed is the subject of or is the sibling of or living with the child who is the subject of an abuse or abandonment investigation pursuant to section 8-456."

Essentially, unless the child to be interviewed initiates contact with a worker, DCS must get prior written consent from a parent (or guardian or

custodian) of the child in neglect investigations (but not in abuse or abandonment investigations) before conducting an interview with the child. DCS actions, policy, and other materials do not seem to acknowledge this legally binding distinction.

Please let me know what you think of the issue and DCS's plans for correcting the issue.

Thank you!

--

Danee Garone, Investigator/Writer
Arizona Ombudsman-Citizens' Aide Office
602-277-7292
www.azoca.gov

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Exhibit 12

DCS Proposed A.A.C. Rule R21-4-102

8/4/2015

Title 21 Chapter 4 Article 1

You are here: Title 21 Chapter 4 Article 1 Investigations > Title 21 Chapter 4 Response To Reports Article 1 Investigations DRAFT for posting 7-31-15 i.htm

TITLE 21. CHILD SAFETY

CHAPTER 4. DEPARTMENT OF CHILD SAFETY – RESPONSE TO REPORTS

ARTICLE 1. INVESTIGATIONS

Section:

R21-4-101. Definitions

R21-4-102. Methods of Investigation

R21-4-103. Coordination With Law Enforcement

R21-4-104. Investigation Findings; Required Documentation

R21-4-105. Ongoing Services; Case Closure

R21-4-106. Procedures for Temporary Custody

R21-4-101. Definitions

The definitions in A.R.S. §§ 8-101, 8-201, 8-455, 8-501, 8-531, and 8-801, and R21-3-101 apply in this Chapter.

R21-4-102. Methods of Investigation

- A. To protect the safety of children a DCS Investigator shall interview or observe the alleged child victim, if possible, and may interview other children and individuals, review documents, and use other accepted investigative techniques to:
1. Support or refute the allegation of abuse or neglect;
 2. Determine the name, age and condition of other children in the home; or
 3. Determine whether any child is in need of child safety services.
- B. A DCS Investigator shall collaborate with law enforcement when applicable.
- C. A DCS Investigator may interview a child without prior parental consent under A.R.S. §§ 8-802 and 8-471.
- D. A DCS Investigator may exclude a parent, guardian, custodian, household member, or any other individual from being present during an interview with the alleged victim, the alleged victim's siblings, or other children residing in the alleged victim's household.
- E. If a DCS Investigator discovers additional evidence regarding the allegations in the DCS Report the DCS Investigator shall incorporate the additional evidence into the DCS Report and investigate as

Exhibit 13

1988 AG Opinion – Ariz. Op. Att’y Gen.
No. I88-062 (June 9, 1988)



Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert K. Corbin

June 9, 1988

Dr. Eddie F. Brown, Director
Arizona Department of Economic Security
1717 West Jefferson
Phoenix, Arizona 85007

Re: I88-062 (R87-182)

Dear Dr. Brown:

You have asked whether school districts may impose certain requirements and limitations on interviews of school children conducted on school grounds by Child Protective Services ("CPS") workers carrying out their statutory duty to investigate reports that a child is dependent or abused. You have asked specifically if a school district may require that parents be given notice and provided an opportunity to be present at the interview or require that school personnel be present during the interview; and whether the school may refuse to allow the interview after a parental request that the school not permit it. We conclude not only that schools may not interfere with, limit or prohibit such interviews on school grounds, but also that schools must affirmatively cooperate with CPS workers conducting statutorily mandated investigations to determine whether a child is dependent or abused.

CPS has a statutory duty to investigate reports that a child is dependent or abused. A.R.S. § 8-224(B) provides that "[a] child protective services specialist of the state department of economic security shall have the responsibility for the complete investigation of all complaints of alleged dependency." A.R.S. § 8-546.01(C)(3)(b) requires protective services workers who have received information or reports, appropriately screened, regarding a child who may be dependent, abused, abandoned or otherwise in need of protective services to immediately "[m]ake a prompt and thorough investigation of the nature, extent and cause of any condition which would tend to support or refute the allegation that the child should be adjudicated dependent"

Dr. Eddie F. Brown
June 9, 1988
I88-062
Page 2

In every such investigation, CPS evaluates the conditions created by the parents, guardian or custodian and determines if further protective action is necessary. A.R.S. § 8-546.01(C)(5). In order to do this a CPS worker must have the power to interview children without notice to the parents. This power is granted to CPS by A.R.S. § 8-546.01(C)(2) where either of the following circumstances exist:

(a) The child initiates contact with the worker.

(b) The child interviewed is the subject of or living with the child who is the subject of an abuse or abandonment investigation pursuant to paragraph 3, subdivision (b) of this subsection.

In some cases CPS cannot adequately investigate and determine whether custody of a child is necessary without obtaining information from the child, preferably in a neutral and non-threatening environment such as a school. If the school does not cooperate, CPS may have to take the child into custody and from the school setting in order to carry out its duty to promptly and thoroughly investigate.^{1/} Requiring CPS to

^{1/}If the circumstances require it, a CPS worker may take a child into protective custody under the authority granted in A.R.S. § 8-223(B)(2), which reads:

A child may be taken into temporary custody:

. . . .

2. By a peace officer or a child protective services specialist of the state department of economic security if temporary custody is clearly necessary to protect the child because the child is either:

(a) Suffering or will imminently suffer abuse.

(b) Suffering serious physical or emotional damage which can only be diagnosed by a medical doctor or psychologist.

Dr. Eddie F. Brown
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take the child into temporary custody before an interview may be conducted would unnecessarily complicate and delay the investigation.^{2/}

We have issued two opinions concerning the authority of school districts to restrict the activities of CPS workers or police acting pursuant to child welfare statutes. Ariz. Atty. Gen. Op. 75-234 concluded that school districts could not adopt policies which prohibited the release of a child to CPS or prohibited an interview of a child during school hours. Ariz. Atty. Gen. Op. 75-219 concluded that CPS workers have the power to interview children who are the subjects of reports of child abuse or neglect without the consent of the parents. The opinion also stated that there is no provision in Arizona law which prohibits CPS workers from conducting such interviews upon school property.

^{2/}The legislature recognized that taking a child into temporary custody is a serious intrusion into the zone of protected family privacy, even if "clearly necessary to protect the child," A.R.S. § 8-223(B)(2). A.R.S. § 8-233(C), therefore, sets out certain due process protections:

If a child is taken into temporary custody as provided in . . . subsection B, paragraph 2 of this section, the . . . child protective services specialist . . . taking the child into custody shall provide written notice within six hours to the parent, guardian or custodian of the child, unless [a shorter longer period for notice is appropriate under the particular circumstances].

Subparagraph (D) requires that the written notice provide the parent, guardian or custodian with complete information concerning the date and time custody was taken, the agency responsible for the child, the reasons for temporary custody, how long the child may be held without a dependency petition being filed, and also contains a brief explanation of the parents' rights to a timely hearing and counsel, if a dependency petition is filed and the child declared a temporary ward of the court.

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Page 4

"School boards have only the authority granted by statute, and such authority must be exercised in a manner permitted by statute." Campbell v. Harris, 131 Ariz. 109, 112, 638 P.2d 1355, 1358 (App. 1981). Rules prescribed and enforced by school boards for the governance of the schools must be consistent with law. A.R.S. § 15-341(A)(1). By statute, school district boards and the schools they oversee have a duty to render all assistance and cooperation within their jurisdictional power to further CPS investigations of complaints alleging dependency. See A.R.S. §§ 8-237; 8-224(B). Schools must cooperate with CPS to insure that the public policy and laws relating to the protection of children are served.^{3/}

Thus, in answer to your specific questions, when CPS workers are acting pursuant to A.R.S. §§ 8-224(B) and 8-546.01(C)(2), a school district may not require that parents of a child who is to be interviewed be given notice and an opportunity to be present at the interview. Neither may a school district refuse to allow an interview conducted pursuant to A.R.S. §§ 8-224(B) and 8-546.01(C)(2).

Furthermore, a school district may not require that one of its personnel be present at such interviews conducted on school grounds, not only because it lacks the authority to impose such a requirement and is affirmatively required to cooperate with the investigation, but also because personally identifiable information concerning any person involved in a CPS

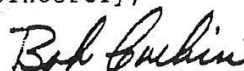
^{3/}A.R.S. § 15-203(A)(1) imposes the requirement that the State Board of Education "[e]xercise general supervision over and regulate the conduct of the school system." The State Board also has the duty to aid in the enforcement of laws relating to child conservation. A.R.S. § 15-203(A)(14). "Conservation" is defined in Webster's Third New International Dictionary (1976) at 483 as "deliberate, planned, or thoughtful preserving, guarding, or protecting." Legislation relating to child conservation, therefore, includes all child protective legislation. Thus the State Board, as part of its duty to regulate the conduct of the school system, is obligated to see that laws relating to child conservation are enforced at the local level, *i.e.*, the State Board has the duty to support CPS in the exercise of its statutory duty to investigate reports of child maltreatment.

Dr. Eddie F. Brown
June 9, 1988
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investigation is made confidential by statute, A.R.S. § 41-1959(A). A school official may be present only if such presence is necessary to the investigation. A.R.S. § 41-1959(A); Ariz.R.P.Juv.Ct. 19.1(a) (confidential information may be released to educational institutions, but only when necessary to provide for the care or safety of the child or other children who may be endangered if the information is not released.)

In summary, once a report is made which requires an investigation pursuant to A.R.S. §§ 8-224(B) and 8-546.01(C)(3), Child Protective Services must proceed in accordance with its statutory duty. Schools and school districts may impose no restrictions or limitations upon the exercise of Child Protective Services authority which would inhibit the enforcement of laws relating to child protection or constitute a failure to render all assistance and cooperation within their power.

Sincerely,



BOB CORBIN
Attorney General

BC:JNW:SSS:lkw

Exhibit 14

1998 AG Opinion – Ariz. Op. Att’y Gen.
No. I98-008 (October 2, 1998)

Dr. Linda J. Blessing, Ariz. Op. Atty. Gen. No. I98-008 (1998)

Ariz. Op. Atty. Gen. No. I98-008 (Ariz.A.G.), 1998 WL 714229

Office of the Attorney General

State of Arizona
I98-008 (R98-017)
October 2, 1998

*1 Dr. Linda J. Blessing
Director
Arizona Department of Economic Security
1717 West Jefferson Street
Phoenix, Arizona 85005

Dear Dr. Blessing:

You recently requested a formal opinion about whether private schools may impose requirements or limitations on Child Protective Services (“CPS”) specialists who seek to interview children on school property. We conclude that Arizona law authorizes a CPS specialist to interview a child on school property without school-imposed requirements or limitations. In particular, we determine that the Legislature directed CPS to “immediately” “make a *prompt and thorough* investigation” to refute or substantiate an allegation about whether a child should be adjudicated dependent.¹ Arizona Revised Statutes Annotated (“A.R.S.”) § 8-802(C)(3)(b) (emphasis added); *see also* A.R.S. § 8-304(B). Moreover, the rules of the Department of Economic Security (“DES”) relating to CPS’s investigations of child abuse, neglect, dependency, or exploitation provide that “a child may be interviewed at any site deemed appropriate by the Child Protective Services worker.” Arizona Administrative Code (“A.A.C.”) R6-5-5504(B). Personnel of both public and private schools also have a duty to protect the children under their care and to cooperate in the reporting and investigation of abuse, abandonment, dependency, or neglect. A.R.S. § 13-3620.² Consequently, we find no legal basis on which schools -- whether public (traditional and charter) or private (parochial or nonsectarian) -- may erect barriers that impede the goal of protecting the welfare of children.

Background

DES accepts reports of possible child abuse, neglect, exploitation, or abandonment twenty-four hours a day, seven days a week. A.R.S. § 8-802(C)(1) and A.A.C. R6-5-5503(A). DES operates a statewide, toll-free telephone service to receive these reports. Between July 1, 1996 and June 30, 1997, DES received 38,229 incoming communications to the Child Abuse Hotline that met the criteria of a report for investigation of maltreatment. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, DIVISION OF CHILDREN, YOUTH AND FAMILIES, Annual Report for July 1, 1996 through June 30, 1997 at 2 (September 30, 1997). Forty-five percent of the reports related to allegations of neglect, 36% relayed concerns of physical abuse, 8% of the reports alleged sexual abuse, 8% encompassed reports of abandonment, 3% of the reports noted concerns of emotional abuse, and less than 1% of the reports concerned exploitation. *Id.*

When DES receives a report of child abuse, neglect, exploitation, or abandonment its Central Intake Unit is to evaluate the information to determine if the report should be referred for field investigation. DEPARTMENT OF ECONOMIC SECURITY, CHILDREN'S SERVICES MANUAL, ADMINISTRATION FOR CHILDREN, YOUTH AND FAMILIES, *Investigation and Assessment*, Chapter 5-1 (July 21, 1997). If DES determines that a field investigation is appropriate, it is to gather further information on the specific incident and then assess previous reports about the family and the status of prior cases. *Id.* at 5-2. Next, DES is to evaluate case-specific aggravating and mitigating factors and then prioritize the report. *Id.* at 5-3. DES is to make every effort to ensure that all CPS reports in a local office are assigned for field investigation or are referred to a CPS supervisor for an alternative investigation. *Id.* at 5-4.

Dr. Linda J. Blessing, *Ariz. Op. Atty. Gen. No. 198-008 (1998)*

*2 Although DES's first priority in conducting an investigation is to determine whether the child who is the subject of the report (and all other children in the home) are safe from harm, it should also respect the rights of parents, guardians, and custodians. *Id.* at 5-8 and 5-11.³ In conducting its interviews, the CPS worker must make many judgment calls. Among the preinterview decisions that confront CPS specialists in each investigation are: who should be interviewed, where the interviews should take place, in what order interviews should occur, whether interviews should be prearranged or unannounced, and who should be present during the interviews. *See id.* at 5-10. One obvious option that allows CPS to complete its investigation promptly and immediately is to interview children at their schools.

Analysis

Parents and guardians are primarily responsible for the care and protection of their children. *See, e.g., Lehr v. Robertson*, 463 U.S. 248, 258 (1983). The State intercedes only when there is a report of abuse, neglect, or dependence where the health and welfare of a child may be imperiled. *See, e.g., A.R.S. §§ 8-304 (formerly A.R.S. § 8-224) (investigation of alleged acts of delinquency, dependency, and incorrigibility) and 8-802 (scope of responsibilities of CPS specialists); Bohn v. County of Dakota*, 772 F.2d 1433, 1439 (8th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986) (recognizing the State's strong interest in "protecting powerless children who have not attained their age of majority but may be subject to abuse or neglect").

CPS's right to interview children on private school property during an investigation to evaluate allegations of abuse, dependency, neglect, or exploitation is based solidly on its statutory mandate and the explicit and implicit power to fulfill that mandate. First, CPS is required to "immediately," "promptly and thoroughly" investigate conditions that tend to support or rebut an allegation that a child should be adjudicated dependent. A.R.S. § 8-802(C)(3)(b). This statutory authority is consistent with the traditional role of the State as sovereign and guardian of persons under legal disability such as infants and children. *See Stewart v. Superior Court*, 163 Ariz. 227, 230, 787 P.2d 126, 129 (App. 1989). Indeed, courts routinely have recognized the State's compelling interest in identifying and protecting victims of child abuse when they have balanced the parents' constitutional interests in family autonomy against the State's intrusion into that interest during a child abuse, abandonment, neglect, or exploitation investigation. *See, e.g., Watterson v. Page*, 987 F.2d 1, 8 (1st Cir. 1993) ("the government has a compelling interest in the welfare of children, and the relationship between parent and child may be investigated"); *Fitzgerald v. Williamson*, 787 F.2d 403 (8th Cir. 1986) (caseworkers do not infringe on parents' liberty interest when the caseworker takes reasonable steps to protect a child from abuse); *Doe v. Staples*, 717 F.2d 953 (6th Cir. 1983), *cert. denied*, 465 U.S. 1033 (the State can remove a child from an abusive parent for the best interest of the child). We are aware of no privacy or liberty interest that a private school might possess that would override the State's compelling interest in making a prompt and thorough investigation of reports of child abuse, abandonment, neglect, or exploitation.

*3 Second, although a private school may have a general right to prohibit entry onto its property, Arizona statutes, decisional law, and administrative rules authorize appropriate interview and intervention activities. The Arizona Court of Appeals has recognized that peace officers, with reason to believe that a child's health, morals, or welfare are being endangered, have a right and legal duty to act.⁴ *State v. Hunt*, 2 Ariz. App. 6, 12, 406 P.2d 208, 214 (App. 1965); *cf. A.A.C. R6-5-5504(F)* ("a child can be removed if suffering or in danger of imminently suffering abuse"). Authorized action includes entering onto private property, investigating, and taking the child into custody, if necessary, with or without a search warrant and with or without the consent of all persons who have a proprietary interest in the premises.⁵ *Hunt*, 2 Ariz. App. at 12, 406 P.2d at 214. When investigating allegations of child abuse, abandonment, neglect, or exploitation, we see little distinction between a peace officer's legal duty and responsibility and that of a CPS specialist.⁶ CPS specialists and peace officers have the authority to investigate and immediately take a child into temporary custody regardless of where the child is located. A.R.S. § 8-821. *Compare* A.R.S. § 8-304(A) (formerly A.R.S. § 8-224(A)) (law enforcement officers have responsibility to investigate completely alleged acts of delinquency or incorrigibility) *with* A.R.S. § 8-304(B) (formerly A.R.S. § 8-224(B)) (CPS specialists have responsibility to investigate completely all complaints of alleged dependency, and DES has responsibility for the disposition of a child unless the matter requires intervention of the juvenile court).

Dr. Linda J. Blessing, Ariz. Op. Atty. Gen. No. 198-008 (1998)

As the court recognized in *Hunt*:

Considering Bernal's obligations as a peace officer and the details of Miss Hengsteler's description of Tina's condition just related to him, he had a duty to proceed forthwith, without delaying to get anyone's permission (whether it be a magistrate's or the property owners') to extend the protective arm of the State of Arizona through its juvenile code to Tina without being concerned with what or who was responsible, or what subsequent criminal or civil proceedings might be instituted. To enter her home to protect Tina is certainly not a judicial or quasi-judicial proceeding but a matter of protective custody.

If officer Bernal had delayed his actions unreasonably under these circumstances, he would have been remiss in this duty. To require him to determine the existence and extent of each person's proprietary interest in the premises and obtain their consent before performance of his duty under A.R.S. § 8-221 would, in this case, have rendered the statute nugatory.

2 Ariz. App. at 13, 406 P.2d at 215.

Furthermore, DES rule A.A.C. R6-5-504(B) authorizes CPS specialists who investigate reports of child abuse, neglect, dependency, or exploitation to interview a child "at any site deemed appropriate" by the CPS specialist. This rule was adopted in 1983 and is legally binding on private schools. See A.R.S. § 41-1001(18) (a "'rule' means an agency statement of general applicability that implements, interprets or prescribes law or policy ..."); see also *Herzberg v. David*, 27 Ariz. App. 418, 419, 555 P.2d 677, 679 (App. 1976) (rules adopted pursuant to statutory authority have the force and effect of law).

*4 We recognize that not all CPS investigations require immediate access to a child victim or witness. The urgency of the interview will depend on the facts known to the CPS specialist at the time the specialist makes a request to interview a child at a private school. Because the CPS specialist must maintain confidentiality, the specialist is not at liberty to share this information with the school and thus must independently make a reasonable determination of urgency. See A.R.S. § 41-1959(A). For example, in some circumstances it might be reasonable and prudent for a CPS specialist to delay an interview until the end of a class to alleviate disruption to the school environment or to avoid embarrassment to the child being interviewed.⁷

Of course, when a CPS specialist arrives at a school, there are introductory and notification procedures that each CPS specialist should follow. At the outset, the specialist should (i) provide official identification to school officials, (ii) advise school officials of the specialist's need to interview the child while maintaining the confidentiality mandated by A.R.S. § 41-1959(A), and (iii) inform school officials whether parental consent is a necessary prerequisite for conducting the interview, A.R.S. § 8-802(C)(2)(a)-(b).⁸ This information will supply the school with the factual and legal prerequisites necessary to release the student to be interviewed.

Conclusion

We determine that A.R.S. § 8-802(C)(3)(b) (previously A.R.S. § 8-546.01), which requires a CPS specialist to *immediately* make a *prompt and thorough* investigation to refute or substantiate an allegation about whether a child should be adjudicated dependent, in conjunction with A.A.C. R6-5-5504(B), which provides a CPS specialist with discretion to interview a child at any site the specialist deems appropriate, authorize the CPS specialist to enter onto private school property to conduct interviews authorized by law. Personnel of both public and private schools have a duty to protect the children under their care and to cooperate in the reporting and investigation of abuse, dependency, neglect, or exploitation. Consequently, we find no legal basis on which schools -- whether public (traditional or charter) or private (parochial or nonsectarian) -- may erect barriers that impede the goal of protecting the welfare of children.

Sincerely,

Grant Woods
Attorney General

Dr. Linda J. Blessing, Ariz. Op. Atty. Gen. No. 198-008 (1998)

Footnotes

- 1 A “dependent child” is one who is (i) adjudicated to be in need of appropriate and effective parental care and control, (ii) destitute, not being provided with the necessities of life, or in a home that is unfit due to abuse, neglect, cruelty or depravity of either parent, or (iii) younger than eight and committed an act that would have resulted in the child being adjudicated delinquent or incorrigible if the child were older. A.R.S. § 8-546(A)(6).
- 2 Section 13-3620, A.R.S., requires school personnel, counselors, nurses, clergymen, priests, doctors, parents, and others responsible for the care and treatment of children who have reasonable grounds to believe that a minor has been the victim of abuse, injury, exploitation, or neglect to immediately report the information to a peace officer or CPS. That statute also requires release of confidential records to the peace officer or CPS specialist conducting the investigation and waives many of the privileges prohibiting disclosure of confidential information in litigation and administrative proceedings in which a child's abuse, abandonment, dependency, or neglect is an issue. *See also* A.R.S. § 8-805(B).
- 3 *See also* A.R.S. § 8-803(A) (“Upon initial contact with a parent, guardian or custodian under investigation pursuant to this article, a protective services worker shall inform the family that the family is under investigation ...”).
- 4 Our analysis assumes that CPS workers, before approaching private school officials to interview a student, have sufficient cause to initiate an investigation into child abuse, abandonment, neglect, or exploitation.
- 5 In 1965, when *Hunt* was decided, the statutory authority under which the peace officer acted provided as follows: “This article shall not be construed to prohibit a peace officer from taking into custody a child ... whose surroundings are such as to endanger his health, morals, or welfare unless immediate action is taken.” A.R.S. § 8-221 (1965).
- 6 The Arizona Court of Appeals recently agreed when it found that constitutional due process protections came into play when determining the voluntariness of a confession of a suspected child abuser obtained by a CPS specialist. *In Re Timothy C.*, 275 Ariz. Adv. Rep. 43 (App. August 13, 1998). In *Timothy C.*, the CPS specialist interviewed a sibling of the alleged victim. The sibling was also the suspected abuser who was subject to possible criminal action pending the outcome of the investigation. The court considered the CPS specialist's interview as an example of “State action ... under the State's police powers in the general sense.” We note that the court did not place restrictions on CPS's right to investigate or interview under A.R.S. § 8-802, only the use that criminal prosecutors could make of the information that CPS obtained.
- 7 Section 8-821(B), A.R.S., allows peace officers and CPS specialists to take children into protective custody if it is clearly necessary to protect the child. We hope that a private school would not make such measures necessary by refusing to allow the CPS specialist to interview a child on school property. Such refusal could cause additional trauma to innocent and vulnerable children and will require CPS to resort to a legal process that is both unnecessary and intrusive to the child, the school, and the child's family merely to conduct an interview.
- 8 In pursuing its investigation, CPS specialists are not required to obtain parental consent to interview a child who initiates contact with the worker, a child who is the subject of the investigation, or a sibling of or a child living with the subject of the investigation. A.R.S. § 8-802(C)(2)(a)-(b). Once the CPS specialist confirms to school officials that the investigation is one that does not require parental consent, school officials may not interfere.

Ariz. Op. Atty. Gen. No. 198-008 (Ariz.A.G.), 1998 WL 714229

Exhibit 15

Ken Behringer Legal Memorandum re
AG Opinions and § 8-451

The restrictions on interviewing children were enacted by Laws 1981, chapter 293, section 4. Therefore, Ariz. Op. Att'y. Gen. No. 75-219 (July 28, 1975) was issued before the current language was placed in statute. There was no similar limitation on interviewing a child in the old statute. Therefore, in Ariz. Op. Att'y Gen No. 188-062, the attorney general quoted the language that is currently in law, but relied on an outdated opinion that had been superseded by the change in statute.

The second opinion cited by DCS, Ariz. Op. Att'y Gen. No. 198-008 (Oct. 2, 1998), reached a similar conclusion in regard to private schools. However, like the opinion in Ariz. Op. Att'y Gen. No. 188-062, the attorney general did not analyze the language of A.R.S. section 8-802, subsection B, paragraph 2. The lack of a reference to neglect in this paragraph was neither raised nor discussed. Therefore, these opinions are not strong support for the position of DCS, especially considering that their underpinnings are based on outdated law.

DCS also argues that the reference to A.R.S. section 8-456 in A.R.S. section 8-802, subsection B, paragraph 2 creates ambiguity. This reference was a conforming change made as part of the bill that created DCS. The paragraph previously referred to another provision in A.R.S. section 8-802 that identified the investigative function of the department. Since this language was transferred to section 8-456, the reference was changed to that section. This change was not intended to expand the scope of A.R.S. section 8-802, subsection B, paragraph 2.

DCS believes the reference creates ambiguity because the exception only applies to abuse and abandonment, but A.R.S. section 8-456 addresses the investigative function of DCS in all cases. This language does not create an ambiguity. If the intent of the legislature were to allow searches without consent in all investigations, the language would have just said "who is the subject of an investigation pursuant to section 8-456" (striking "an abuse or abandonment"). Since the reference to A.R.S. section 8-456 would capture all investigations, leaving the "abuse or abandonment" language must indicate that it is a limitation on the reference to A.R.S. section 8-456.

For these reasons, the DCS arguments have not changed our office's opinion that the investigation exception to the parental consent requirement does not apply in a case only involving neglect.

Exhibit 16

January 20, 2015 Email from OCA to then
DCS Deputy Director Chad Campbell re
Interview Issue

Danee Garone

From: Danee Garone <dgarone@azoca.gov>
Sent: Tuesday, January 20, 2015 9:25 AM
To: chadcampbell@azdes.gov
Cc: Joanne MacDonnell
Subject: Fwd: DCS Interviews of Children Without Parental Permission
Attachments: 1404174 - Gutierrez -- Memo on DCS Ability to Interview Kids without Parental Permission.pdf

Chad,

Thanks for letting me know that you did not receive the email! I have reproduced below the email that I was referring to.

Thank you.

----- Forwarded Message -----

Subject:DCS Interviews of Children Without Parental Permission
Date:Mon, 05 Jan 2015 12:40:50 -0700
From:Danee Garone <dgarone@azoca.gov>
Organization:Arizona Ombudsman - Citizens' Aide
To:chadcampbell@azdes.gov
CC:Joanne MacDonnell <jmacdonnell@azoca.gov>

Mr. Campbell,

My name is Danee Garone, and I am with the Arizona Ombudsman's office.

In looking into a recent complaint we received regarding a DCS matter, we came to the realization that DCS might be improperly interviewing children without parental consent in some situations. Specifically, it appears that DCS lacks legal authority to interview children in neglect investigations without prior written consent from the parent or guardian.

A complainant contacted our office regarding a DCS matter. One of her primary issues was that a DCS worker interviewed her children at school without her permission. It had been our office's understanding that DCS had the statutory authority to interview children involved in a DCS matter without parental permission, so I told her so. When completing the written report regarding the complaint, however, I wanted to include the statutory basis for DCS's authority to conduct the interviews.

I came across ARS 8-802(B), which seemed to be the relevant section of law; however, it seemed to clash somewhat with our understanding of DCS's interview ability and seemed to partially conflict with a portion of a DCS interview policy.

ARS 8-802 (B) reads in part:

B. A worker shall not interview a child without the prior written consent of the parent, guardian or custodian of the child unless either:

1. The child initiates contact with the worker.
2. The child who is interviewed is the subject of or is the sibling of or living with the child who is the subject of an abuse or abandonment investigation pursuant to section 8-456.

According to (B)(2), it seems that, unless a child initiates contact with DCS, DCS may only interview a child without prior written parental consent for investigations of abuse or abandonment.

We asked Legislative Counsel's Ken Behringer to look into the matter and see whether our legal interpretation was sound. He agreed that ARS 8-802 (B) limits DCS's ability to interview children without prior written parental consent (when the child does NOT initiate contact with DCS) to abuse and abandonment investigations. He issued a legal memorandum on the subject. It is attached.

In sum, it appears that DCS does not have legal authority to interview a child without prior written parental consent in neglect investigations in which the child does not initiate the contact with DCS. Again, this clashes with what our understanding of the law had been. Additionally, it seems at odds with DCS policy. In particular, it seems to undermine a portion of policy appearing on pp. 49-50 of the DCS policy manual that reads as follows:

Prior to interviewing a child, the Child Safety Specialists shall obtain written consent from the parent, guardian, or custodian, except when the child being interviewed is:

- Subject of a DCS investigation;
- Sibling of the subject of a DCS investigation;
- Child who lives with the subject of a DCS investigation;
- Child who initiates contact with DCS; or
- Child identified in a report alleging a criminal conduct allegation (see your county's joint investigation protocols - Joint Investigation Protocols).

A Child Safety Specialist may interview a child without prior parental consent under A.R.S. § 8-802(C)(2)

This bit of policy seemingly fails to recognize the statutory distinction I mentioned above and overstates DCS's legal authority. It also seems to cite a portion of the statute that no longer exists.

Deputy Ombudsman Joanne MacDonnell asked me to address the matter to you for your consideration and so that we might work together to address the issue from here on out.

Thank you!

--
Danee Garone, Investigator/Writer
Arizona Ombudsman-Citizens' Aide Office
602-277-7292
www.azoca.gov

ARIZONA LEGISLATIVE COUNCIL

MEMO

December 24, 2014

TO: Danee Garone
FROM: Ken Behringer, General Counsel
RE: DCS Worker; Interview of a Child (R-51-181)

This memorandum is in response to your question about when a Department of Child Safety (DCS) worker may interview a child without the permission of the child's parent, guardian or custodian.¹

A DCS worker may not interview a child without the prior written consent of the parent unless the child initiates the contact with the worker or the child is "the subject of an abuse or abandonment investigation pursuant to section 8-456." Arizona Revised Statutes (A.R.S.) section 8-802, subsection B. The quoted language appears to exclude investigations into neglect.

The quoted language was added by Laws 1981, chapter 293, section 4. I examined the legislative history of this legislation to determine why negligence is not included, but there really is no indication. The House summary of the bill indicates a broader reading of the provision. It provides that the bill:

Clarifies certain duties of protective services workers by providing that a worker . . . may interview allegedly abused children without notifying the parents; however if a child is not the subject of a services investigation, they must get parental consent.

1981 House of Representatives Summary of Enacted Legislation, 50-51.

This summary seems to indicate that if the child is the subject of a DCS investigation, the child may be interviewed without parental consent. However, this summary does not focus on the type of investigation that gives rise to the consent exception, because it only mentions abuse. Therefore, this summary does not provide

¹ Throughout the rest of the memorandum I just refer to parent, but this applies to a guardian or custodian, also.

much assistance in looking at whether the consent exception includes investigations concerning neglect.

The statutes define the three terms abuse, abandoned and neglect. A.R.S. section 8-201. The three terms are also used together in several instances. *See* A.R.S. section 8-805, subsection A ("Any person making a complaint . . . shall be immune from any civil or criminal liability by reason of such action, . . . unless such person has been charged with . . . abusing, abandoning or neglecting the child or children in question.") and section 8-807, subsection F ("The department . . . [s]hall promptly provide DCS information to the public regarding a case of child abuse, abandonment or neglect . . .").

The consent exception only applies to abuse and abandonment investigation, however. Because the statute does not include neglect, the consent exception would not apply to an investigation purely for neglect.

While the statutes make this distinction, the real problem is applying this distinction in actual practice. Abandonment and neglect overlap. While there several specific instances of neglect are defined by the statute, general neglect and abandonment both involve a parent not providing reasonable support. *See* A.R.S. section 8-201, paragraphs 1 and 24. The difference between the two is the degree of parental contact with the child. Since abandonment can include a situation in which a parent does not provide "normal supervision," it seems that the lines between neglect and abandonment can be very blurred. Added to the problem is that the child may need to be interviewed early in the process. The DCS worker may see evidence of a problem, but without interviewing the child the worker may not be able to identify if the problem is abuse, neglect or abandonment.

CONCLUSION

I think that a DCS worker cannot interview the child without parental consent for cases of neglect that do not involve abuse or abandonment. However, because of the overlap of these concepts, especially as things appear in the early stages of an investigation, this can be a difficult rule to implement.

Exhibit 17

February 2, 2015 Email from then DCS Deputy Director Chad Campbell to OCA Explaining that DCS had a “Response” to OCA Raising Interview Issue and Requesting Meeting with OCA

Danee Garone

From: Campbell, Chad <ChadCampbell@azdes.gov>
Sent: Monday, February 02, 2015 11:45 AM
To: Danee Garone
Cc: Adel, Allister
Subject: Responding to your question

Good morning Danee,

We have a response to your question regarding " DCS interviews of Children without Parental Permission"

May I request you to provide a couple of dates and times that work for you so we sit down and discuss? I would like for the discussion to include Allister Adel, DCS General Council and myself and our new Ombudsman . I will be out of the office the remainder of the week but the following week I'm confident we can find some time.

I apologize for my delayed response.

Chad

NOTICE: This e-mail (and any attachments) may contain PRIVILEGED OR CONFIDENTIAL information and is intended only for the use of the specific individual(s) to whom it is addressed. It may contain information that is privileged and confidential under state and federal law. This information may be used or disclosed only in accordance with law, and you may be subject to penalties under law for improper use or further disclosure of the information in this e-mail and its attachments. If you have received this e-mail in error, please immediately notify the person named above by reply e-mail, and then delete the original e-mail. Thank you.

Exhibit 18

March 4, 2015 Email from OCA to James Simpson at the Attorney General's office re the Interview Issue and Seeking Attorney General Involvement

Fwd: Documents relating to DCS interviews

Subject: Fwd: Documents relating to DCS interviews
From: Joanne MacDonnell <jmacdonnell@azoca.gov>
Date: 3/4/2015 4:39 PM
To: Jim Simpson <James.Simpson@azag.gov>

Jim,

It was great meeting you today at the Court Improvement Meeting. We look forward to working with you and others at the AG Office to address legal concerns about DCS that we identify in the course of our work.

Below you will find the documents I referenced relating to the interview issue we discussed briefly earlier. Mr. Danee Garone, an attorney and investigator in our office, identified the problem initially and confirmed our Office's read of the law with Legislative Council, General Counsel Ken Behringer. Danny, Ken and I then met DCS General Counsel Allister Adel, DCS Deputies Shalom Jacobs and Vicki Mayo, and DCS Ombudsman Marcy Morales on February 18, 2015. Shalom was going to bring the matter to the Attorney General Office for consultation, but we are not sure if she has had an opportunity to do so yet. She mentioned Mike Bailey, John Johnson, and Heather Pellegrino as possible people she might approach. Allister noted that she had discussed it in passing with someone at the new AG administration too.

Beyond that background to the case, here is information to specifically illustrate the statutory concern:

1. Memo from Leg. Council General Counsel Ken Behringer [Attached]
2. [A.R.S §§8-802\(B\) ; 8-201](#)
3. [DCS Policy Manual pp. 49-50](#)
4. [DCS Web page](#) -- Scroll to left column, then click on number 7: "How Does Department of Child Safety Investigate Reports of Child Abuse?"

If you, or whoever the Attorney General's Office deems appropriate, could get with us to work this problem out, we would appreciate it.

As I mentioned, this issue is just one of many that we need to bring to the attention of the Attorney General's Office. We have additional material related to other legal policy and statutory problems we have identified relating to DCS. We know that everything is in transition, but wanted to make the AG Office aware that various issues are at hand that need attention in the not-too-distant future. We look forward to working with you and any of your colleagues to also resolve those matters. I know Ombudsman Dennis Wells plans on reaching out to Attorney General Brnovich too.

My contact information is below and on the card I gave you. Our oversight role regarding DCS is explained on our website and in the statutes relevant to our office (link below). We look forward to hearing from you.

Sincerely,

Joanne MacDonnell

Fwd: Documents relating to DCS interviews

P.S. By the way, I caught a possible typo on the web - the AG website listing for you at:
http://www.azdirect.state.az.us/AgencyView.aspx?Agency_ID=539 differs from your card. Has you as
the NW bureau chief. I thought you would want to know.

--

Joanne MacDonnell, Deputy Ombudsman
Arizona Ombudsman-Citizens'Aide Office
main line (602) 277-7292 or direct at (602)544-8704
Fax: (602) 277-7312
www.azoca.gov

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— Attachments: —

Memo.pdf

18.9 KB

Exhibit 19

March 17, 2015 Email from DCS Deputy
General Counsel and Legal Systems
Liaison re Her Addressing Interview Issue
with DCS Director and Deputy Director

Joanne MacDonnell

Subject: FW: Fw: connecting

From: Broeker, Beth, A [<mailto:bbroeker@azdes.gov>]
Sent: Tuesday, March 17, 2015 8:42 AM
To: Joanne MacDonnell
Subject: RE: Fw: connecting

Thanks Joanne. I enjoyed our meeting and found it very productive. I'm a big advocate for fixing broken things in government, and Arizona is fortunate to have an established vehicle, through your office, for the public to bring those concerns forward and work toward resolution. I'm hopeful that we will be able to get some fixes in place quickly for the issues you raised, both yesterday and in your prior conversations with DCS. I emailed the Director and both Deputies immediately upon my return yesterday with a brief description of each issue, and have already started some initial research on two of them. I will keep you posted. Please let me know if there's anything else I can do for you.

Beth

From: Joanne MacDonnell [<mailto:jmacdonnell@azoca.gov>]
Sent: Monday, March 16, 2015 9:30 PM
To: Broeker, Beth, A
Subject: RE: Fw: connecting

Beth,

My email was down most of today (change to Outlook had some snafus) so I did not see this until Monday evening. Sorry about that.

Glad you got to come over and meet today. Very helpful to us and I hope was beneficial to you too. We appreciated you time and attention to the matters we discussed. It would be great if we could all work together to effectively resolve these issues. Hope all goes positive for everyone moving forward.

Best regards,
Joanne