



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>March 28, 2016</p>	<p>No. I16-004 (R16-001)</p> <p>Re: DCS Authority to Interview Children</p>
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To: Gregory McKay, Director
Arizona Department of Child Safety

Questions Presented

Under the current statutory scheme, may DCS lawfully interview a child without prior written parental consent when investigating a report of neglect, if the child is the alleged victim, sibling of the alleged victim, or lives in the home with the alleged victim?

Summary Answer

Yes. DCS may legally interview the children specified in the exception provisions without parental notice as long as doing so is part of a statutorily authorized DCS investigation.

Background

DCS History, Purpose, and Functions

The Arizona Legislature created the Department of Child Safety (DCS) in 2014, separating its functions from the Department of Economic Security (DES). At that time the Legislature promulgated a number of the statutes cited in this opinion, and it amended and

re-numbered other provisions already in statute. Arizona's laws regarding the state's role in protecting children date back to 1970.

In other words, while DCS itself is a new entity, the legal backdrop against which this agency works is extensive and complex.

DCS is tasked with the primary purpose of protecting children. Ariz. Rev. Stat. (A.R.S.) § 8-451(B). DCS achieves this purpose through four functions: (1) investigating "reports of abuse and neglect"; (2) assessing, promoting, and supporting child safety through appropriate placements in response to "allegations of abuse or neglect"; (3) cooperating with law enforcement regarding criminal conduct allegations; and (4) coordinating services to "achieve and maintain permanency" for children and families. *Id.*

Investigations pursuant to the Department's authority are conducted in order to "determine the nature, extent and cause of any condition created by the parents, guardian or custodian, or an adult member of the victim's household that would tend to support or refute the allegation that the child is a victim of abuse or neglect and determine the name, age and condition of other children in the home." A.R.S. § 8-456(C)(1).

Reports of child abuse and neglect primarily come to the Department through its statutorily mandated centralized intake hotline (Child Abuse Hotline). *See* A.R.S. § 8-455. Hotline employees must take a report for investigation when various criteria are met, one of which is that the "suspected conduct would constitute abuse or neglect." *Id.* at § 8-455(D)(1). In fact, if a Department employee receives communications regarding suspected abuse or neglect outside the context of the Hotline, the employee must refer the communicator to the Hotline. *Id.* at § 8-455(A).

In summary, there are three current statutes that set forth the purpose and obligations of DCS relating to investigations: Sections 8-451, 8-455, and 8-456. All three exclusively refer to child “abuse and neglect” and do not use the term “abandonment.”

Current Statutes at Issue

There are two Arizona statutes that contain the language primarily at issue in the underlying request. Section 8-471 creates and sets forth the duties of the Office of Child Welfare Investigations (OCWI), and Section 8-802 describes the duties of DCS Child Safety Workers (CSW). Both contain substantially similar language with regard to the interview provisions for these workers. The OCWI statute is implicated by reports of criminal conduct, while the CSW statute relates to all other reports, demonstrating that DCS’ general obligations and authority regarding all investigations remain the same.

The OCWI statute provides:

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 § 8-817.

A.R.S. § 8-471(E). The internal reference to “paragraph 4, subdivision (b)” leads to the following language:

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 § 8-817.

A.R.S. § 8-471(E). The CSW statute provides:

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 § 8-456.
3. The interview is conducted pursuant to the terms of the protocols established pursuant to § 8-817.

A.R.S. § 8-802(B). The cross-reference in subsection (2) here to Section 8-456 relates to the training required for and the conduct of investigations into allegations of child abuse and neglect. Section 8-456 refers to the reports received via the Hotline described in Section 8-455. Neither of these two statutes include any reference to “abandonment investigations.” Indeed, neither statute contains the term “abandonment” yet together these constitute primary statutory authority and direction related to DCS’s investigative function. Rather, consistent with the internal

cross-references in the OCWI and CSW statutes, as well as the Hotline statutes, DCS takes only two types of reports for investigation: abuse reports and neglect reports. *See* A.R.S. § 8-455(D).

Relevant Statutory History

Arizona first codified the authority of “protective service workers” to receive reports that a child is maltreated and investigate such reports in 1970. 1970 Ariz. Sess. Laws, ch. 192, § 1 (enacting A.R.S. §§ 8-531 to -536 providing for protective service for children). At that time, these designated state employees had authority to “receive reports of dependent, abused or abandoned children” and generally to “receive . . . information regarding a child who may be in need of protective services.” (*Id.* at A.R.S. §8-532(C)(1) and (C)(2)). Having received such reports or information, workers were required to “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[.]” *Id.* at A.R.S. §8-532(C)(3). In the event “reasonable grounds” existed, workers could remove a child temporarily into the State’s custody. *Id.* at A.R.S. § 8-532(C)(4). At the time, these statutes did not discuss interview authority, and the term “neglect” did not appear among the definitions provided.

In 1981, the exemption language at issue in this Opinion first appeared in what was at that time Section 8-546.01. The language adopted in 1981 has remained virtually identical with the language in the current provision (now Section 8-802): “2. A worker shall not interview a child without the prior written consent of the parent, guardian or custodian of the child unless: . . . (b) The child interviewed is the subject of or the sibling 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.” 1981 Ariz. Sess. Laws, ch. 293, § 4. The cross referenced paragraph

(paragraph 3, subdivision (b)) previously existed and contained the language codified in 1970 regarding the investigation requirement. *Id.*

The 1981 amendments, in addition to adding the exemption, also amended the language of the investigation requirement to read: “Make 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.” 1981 Ariz. Sess. Laws ch. 293, § 4, A.R.S. § 8-546.01(C)(3)(b). As of 1981, “dependent child” was a statutorily defined term that effectively included abused, neglected, and abandoned children--though only the terms “abandoned” and “abuse” were defined at that time. 1981 Ariz. Sess. Laws, ch. 293, § 1 (codified at A.R.S. § 8-201) (“‘Dependent child’ means . . . by reason of abuse, neglect, cruelty, or depravity...”). The statutes did not include a definition of “neglect” until 1994. Laws 1994, Ch. 325 §§ 2-3 (codified at A.R.S. §§ 8-531, 8-546). In 1997, the interview exceptions at Section 8-546.01 became today’s Section 8-802. 1997 Ariz. Sess. Laws, ch. 222 §§ 53, subsec. A, 54.

Two years ago, in May 2014, the Legislature created DCS in its current form during a special session; the resulting Session Laws document is almost 200 pages, indicating the complexity and comprehensiveness of this effort. *See* 2014 Ariz. Sess. Laws, 2nd Spec. Sess., ch. 1, § 56. While this legislation created DCS, and set forth the sections of law relating to the investigation authority, the relevant exemption provisions for OCWI and CSW received no substantive amendments. *See* 2014 Ariz. Sess. Laws, 2nd Spec. Sess., ch. 1, §§ 21, 56. In other words, the DCS statutory scheme adopted these exemptions without treatment at the same time it delineated the obligations to take and investigate reports of “abuse and neglect” without recognizing “abandonment” reports.

Interpretation Principles

Certain principles of statutory and constitutional interpretation are relevant here, in particular those principles related to the “Fair Reading Method” of interpretation:

The [endorsed] interpretive approach . . . is that of the “fair reading”: determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued. . . . [The endeavor] requires an ability to comprehend the *purpose* of the text, which is a vital part of its context. But the purpose is to be gathered only from the text itself, consistently with the other aspects of its context. This critical word *context* embraces not just textual purpose but also (1) a word’s historical associations acquired from recurrent patterns of past usage, and (2) a word’s immediate syntactic setting—that is, the words that surround it in a specific utterance.

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (2012) (emphasis in original). Notably,

[a]dhering to the *fair meaning* of the text . . . does not limit one to the hyperliteral meaning of each word in the text. In the words of Learned Hand: “a sterile literalism . . . loses sight of the forest for the trees.” The full body of a text contains implications that can alter the literal meaning of individual words.

Reading Law at 356 (quoting *New York Trust Co. v. Commissioner*, 68 F.2d 19, 20 (2d Cir. 1933) (per L. Hand, J.)).

A specific principle or canon of interpretation key to this Opinion is the harmonious reading canon, which tells us that we presume there to be harmony among related provisions because we do not presume that drafters have contradicted themselves. See *Reading Law* at 180; *Cf. State v. Bowsher*, 225 Ariz. 586, 589, ¶ 14 (2010) (en banc) (“When construing two statutes, this Court will read them in such a way as to harmonize and give effect to all of the provisions involved.” (quoting *Pima County ex rel. City of Tucson v. Maya Constr. Co.*, 158 Ariz. 151, 155, 761 P.2d 1055, 1059 (1988)); *Sw. Gas Corp. v. Indus. Comm’n*, 200 Ariz. 292, 297, ¶ 16 (App. 2001) (Arizona courts construe statutory provisions “to harmonize rather than contradict

one another” and construe one statute “together with other related statutes, as though they constituted one law.”) (internal quotation marks and citations omitted).

Analysis

In determining the contours of the authority set forth in the relevant statutes, we look first at their plain text. *State ex rel. Dept. of Economic Sec. v. Hayden*, 210 Ariz. 522, 523, ¶ 7 (2005). Interpreting statutory text requires that effect be given to all parts of the text. *Id.* “Statutes that are in *pari materia*—relating to the same matter—are construed together as though they constituted one law.” *Id.*

As noted above, the two statutes that provide an exception allowing DCS to interview children absent notification to their parents employ substantially similar text. A.R.S. §§ 8-471(E)(3)(b) and 8-802(B)(2). The relevant text sets forth two limitations on the exception: (1) based on the target of the investigation (purported victim; sibling of purported victim; or living with purported victim); and (2) based on the existence of a statutorily authorized DCS investigation.

There appears to be no conflict or disagreement regarding the first limitation, the question is as to the second limitation: whether the plain language of the statute renders the exception applicable in some DCS investigations but not in others. In other words, considering the plain language of the text leads to two possible conclusions: either there is a conflict between the “abuse and abandonment” and “abuse and neglect” language, or the two terms may be read together as harmonious.

Both provisions at issue contain an internal cross-reference to clarify when the DCS investigations are statutorily authorized. With regard to the OCWI statute, the exception to parental notification applies to "an abuse and abandonment investigation pursuant to

paragraph 4, subdivision (b) of this subsection." A.R.S § 8-471(E)(3)(b). The cross-referenced language serves as the directive to OCWI investigators that they must, "immediately" take two steps after receiving a report or information of criminal conduct: (a) notify law enforcement, and (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. . . ." A.R.S. § 8-471(E)(4). The authorized investigation that the interview exception applies "pursuant to" contains no reference to abandonment, but does reference "the report of child abuse or neglect." A.R.S. § 8-471(E)(4)(b).

Similarly, the CSW statute limits the exemption to "an abuse and abandonment investigation pursuant to § 8-456." A.R.S. § 8-802(B)(2). Section 8-456 is the statutory provision that sets out DCS's investigative authority and is tied to the Hotline provision; it references only "abuse and neglect" investigations thus establishing two categories of investigations DCS is explicitly authorized to conduct. A.R.S. § 8-456. As with the previous cross-reference, the term "abandonment" does not appear in Section 8-456.

Taking into account the context of the statutory scheme, and the statutory history of the particular provisions at issue, the plain language interpretation here must result in a recognition that the law permits investigators to interview children without parental notification only when two parameters are met: (1) the child falls into one of the identified categories, and (2) the law authorizes a DCS investigation.

This conclusion is consistent with the long-standing practice of DCS and its predecessors. *See* Request for AG Opinion (R16-001) at 4 (referencing DCS Policy and Procedure Manual, Chapter 2, Section 3, and noting the relevant policy has remained static for at least 20 years). It is also consistent with this Office's previous statements generally relating to DCS interview

authority. *See* Ariz. Att’y Gen. Op. I88-062 (applying the exception language to allow interviews when investigating “reports that a child is dependent or abused” where the definition of “dependent child” included neglected children); Ariz. Att’y Gen. Op. I98-008 (allowing for child interviews absent parental notification on private school grounds “during an investigation to evaluate allegations of abuse, dependency, neglect, or exploitation.”).¹

This Office recognizes that its conclusion is contrary to that reached by the Arizona Ombudsman-Citizens’ Aide. *See* Report of Investigation (Feb. 16, 2016). That report, however, failed to consider the statutory context or the plain language of the provisions contained in the internal cross-references, which calls into question the hypertechnical textual analysis. Respectfully, this Office explicitly rejects the conclusions reached in the Report of Ombudsman-Citizens’ Aide.

Conclusion

DCS may legally interview the children specified in the exception provisions without parental notice as long as doing so is part of a statutorily authorized DCS investigation. This is consistent with a plain text review of the statute, when taking into account the explicit internal cross-references and the relevant context.

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¹ An earlier AG Opinion also recognized interview authority absent parental notification during statutorily authorized investigations. Ariz. Att’y Gen. Op. I75-219. That opinion was issued before the 1981 introduction of the exception language into the statutory scheme. Both of the subsequent opinions in 1988 and 1998 were issued after that introduction, and both cite its text.