Arizona Department of Child Safety

Douglas A. Ducey
Governor

Gregory McKay
Director

February 5, 2016

Mark Brnovich
Attorney General
1275 W. Washington
Phoenix, Arizona 85007

Re: Request for Attorney General Opinion

Dear Attorney General Brnovich:

Pursuant to A.R.S. § 41-193(A)(7), the Department of Child Safety ("Department") requests an official Attorney General Opinion. The Department is the State's child welfare agency and is charged with investigation of reports of child abuse and neglect. A.R.S. § 8-451(B)(1). As part of its investigation of those reports, the Department must interview a number of individuals, including the child victim(s) and other children residing in the home. Longstanding Department policy has been to conduct those child interviews without prior parental consent in most cases. As set forth in detail below, it is the Department's belief that this policy is an appropriate interpretation of A.R.S. §§ 8-471 and 8-802, which contain provisions specifically relating to child interviewing. However, individuals outside the Department have recently expressed that they believe that the Department's policy is inconsistent with the interview provisions of §§ 8-471 and 8-802. Specifically, it has been alleged that the Department may only interview children without parental consent in abuse and abandonment cases, but that parental consent is required to interview children in neglect cases. This issue of statutory interpretation has never been addressed by the courts. Because this issue is one that affects a core function of the Department, the Department believes that it is appropriate to seek an Attorney General Opinion. The specific question that the Department requests be addressed is:

The Department investigates reports of child abuse and neglect. The Department is required to conduct a thorough investigation of each report of abuse and neglect. To conduct a thorough investigation, the Department must be able to interview children connected to the report. Under the current statutory scheme, may the Department lawfully interview a child without prior written parental consent in 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?

Set forth below is background information on the Department, its statutory obligations, and the legal underpinnings of the Department's current policy regarding interviewing of children.

The Duties of the Department

The Department of Child Safety is charged with the investigation of reports of child abuse and neglect. A.R.S. § 8-451(B)(1). The Department operates a Child Abuse Hotline that receives communications of suspected abuse and neglect. The Hotline is required to take a report for investigation when all of the following criteria are met:

1. The suspected conduct would constitute abuse or neglect.
2. The suspected victim of the conduct is under eighteen years of age.
3. The suspected victim of the conduct is a resident of or present in this state or any act involved in the suspected abuse or neglect occurred in this state.
4. The person suspected of committing the abuse or neglect is the parent, guardian or custodian of the victim or an adult member of the victim's household.

A.R.S. § 8-455(D). Pursuant to A.R.S. § 8-456, upon receipt of a report for investigation, an investigator must "[m]ake a prompt and thorough investigation. An investigation must evaluate and 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. If an investigator has sufficient information to determine that the child is not a victim of abuse or neglect, the investigator may close the investigation." A.R.S. § 8-456(C)(1). Based on the information gathered during the investigation, the Department may take a child into temporary custody if it determines that temporary custody is

clearly necessary to protect the child from suffering abuse or neglect. A.R.S. §§ 8-456(C)(2), 8-821(A).

Conducting an Investigation and Interviewing a Child

At the core of all Department investigations is the child safety assessment. This assessment is what allows the Department to determine whether the allegations in the report are true and whether or not the child can safely remain with her family. The quality of a child safety assessment is directly related to the quality of the information gathered by the investigator. A critical component of a child safety assessment is the child interview. Indeed, except in very rare cases, without a child interview (or observation of a non-verbal child) an investigation cannot truly be thorough, as required by A.R.S. § 8-456.

It is best practice to interview a child alone in a neutral, non-threatening environment and before the alleged perpetrator has an opportunity to talk to the child about the allegations. To that end, Department policy states:

> A Child Safety Specialist shall investigate allegations of abuse or neglect by interviewing:
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> •The alleged victim;
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> •The alleged victim's caregiver who allegedly committed the abuse;
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> •Other adults and children residing in the home;
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> •Other persons who may have relevant information, including the reporting source, medical personnel, relatives, neighbors, and school personnel; and
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> • Consulting with law enforcement.

DCS Policy and Procedure Manual, Chapter 2, Section 3. This policy is consistent with the requirements of rule and with the statutory mandate to conduct a thorough investigation. Because it is important that a child feel that he is able to safely speak freely to an investigator, Department policy advises, "Whenever possible, the child and his/her siblings, and all other children living in the home should be interviewed in a safe and neutral location. Ensure the child is interviewed alone for all or part of the interview. Ask the parent, who is not alleged to have abused or neglected the child, to be present for the child interview if the child refuses or is reluctant to be interviewed without the parent being present." DCS Policy and Procedure Manual, Chapter 2, Section 3. For a school-age child, the interview is often conducted at school,

as that is a safe and neutral location, and the investigator can interview the child there without notifying the parent in advance (thus minimizing the opportunity for a parent to coach the child or intimidate the child).

Current Department policy states that a Child Safety Specialist must obtain prior written consent from a parent prior to interviewing a child unless the child initiates contact with DCS, is identified in a report alleging a criminal conduct allegation, is the subject of a DCS investigation, the sibling of a subject of a DCS investigation, or living in the home with the subject of a DCS investigation. DCS Policy and Procedure Manual, Chapter 2, Section 3. Policy also states that the alleged perpetrator may be excluded from participating in an interview with the alleged victim, alleged victim's siblings, or other children in the alleged victim's household. Departmental policy regarding child interviews and parental consent has been substantially the same for at least the past twenty years, per our review of policy manuals.

There are two statutes that pertain to the Department's ability to interview children: A.R.S. §§ 8-471 and 8-802. The interview provisions of these statutes are substantially similar and read as follows:

A.R.S. § 8-471:

> E. A child welfare investigator shall:
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> . . .
>
> 3. Not interview a child without the prior written consent of the parent, guardian or custodian of the child unless either:
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> (a) The child initiates contact with the investigator.
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> (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.
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> (c) The interview is conducted pursuant to the terms of the protocols established pursuant to section 8-817.

A.R.S. § 8-802:

> 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.

Although the language of each of these provisions references interviews that occur during an "abuse or abandonment" investigation, these provisions refer to investigations conducted pursuant to A.R.S. §§ 8-471(E)(4)(b) and 8-456. Those cross-referenced provisions refer to "abuse and neglect" investigations, not "abuse and abandonment" investigations. As explained below, the Department has consistently read these interview provisions to permit the Department to interview a child without prior parental consent in <u>any</u> case being investigated by the Department, whether it is characterized as abuse, neglect, or abandonment,[1] so long as that child is the alleged victim, the sibling of the alleged victim, or lives with the alleged victim.
The Department believes that this reading of the interview provisions is consistent with the overall statutory scheme governing the Department and its obligations to protect children and investigate reports of child abuse and neglect. The Department cannot adequately fulfill its statutory duties without being able to interview children without parental consent if those children are the subject of a DCS investigation, the sibling of a subject, or living with a subject. The "primary purpose of the department is to protect children." A.R.S. § 8-451 (B). If the Department is unable to interview children in neglect cases (which is likely the result if consent must always be sought from the parents), there will be an adverse impact on child safety. Additionally, the inability to interview children would also hinder our ability to comply with our statutory obligation to "[m]ake a ***prompt and thorough*** investigation. An investigation must evaluate and 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

[1] The Department's Child Abuse Hotline categorizes reports as either abuse (physical, sexual, or emotional) or neglect reports and does not break out abandonment as a separate category. Because abandonment is a form of neglect, reports alleging abandonment are categorized by the Hotline as neglect reports.

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(B) (emphasis added).

A child interview is a crucial part of any investigation of child abuse or neglect. Indeed, it is virtually impossible to deem an investigation "thorough" without an interview of the victim child. This imperative was noted in a 1988 Arizona Attorney General Opinion, which stated, "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.* Thus, without the ability to interview children without parental consent, the Department could be rendered unable to comply with its statutory obligations; accordingly, the ambiguities in the interview provisions are therefore most reasonably resolved in favor of the interpretation that will permit the Department to comply with its statutory duties.

Relevant Attorney General Opinions

Attorney General Opinions support the Department's reading of the interview provisions. Although no Attorney General Opinion has squarely addressed the issue of parental consent for interviews in neglect cases, Opinions on the more general issue of child interviews by CPS at schools are instructive and support the conclusion that a child who is the subject of any DCS investigation may be interviewed without prior parental consent. Opinion I88-062 held that A.R.S. § 8-546.01(C)(2) (the predecessor to A.R.S. § 8-802(B)(2)) granted CPS the authority to interview children without parental consent and noted that a prior AG opinion (I75-219) had also 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. *Id.* Opinion I98-008 contained a significant discussion of the statutory and constitutional underpinnings of the Department's right to intervene in the lives of families to protect children who may be victims of abuse or neglect. Specifically, the opinion stated:

> 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 and 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. 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.

Ariz. Atty. Gen. Op. I98-008 (internal citations omitted) (see attached). Moreover, the opinion stated in Footnote 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)." 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 <u>all</u> investigations, not just those involving abuse or abandonment.

Removal of a Child vs. Interviewing a Child

Under A.R.S. § 8-821, the Department may remove a child without parental consent. A child may be removed if "temporary custody is clearly necessary to protect the child from suffering abuse or neglect." A.R.S. § 8-821(A). However, a child also may be removed for the purpose of a medical or psychological examination to diagnose serious physical or emotional injury. A.R.S. § 8-821(B)(2). It would not be logical 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). Thus, the reasonable interpretation is that interviews without parental consent are in fact permitted by A.R.S. § 8-802 in any type of case, so long as the interview is of the victim child, a sibling of the victim child, or another child in the home of the victim child.

Legislative History

The legislative history is also instructive. 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 from the statutory lexicon.[2] In 1970, the Arizona Revised Statutes were amended to create a Child Protective Services unit within the Arizona Department of Public Welfare. Even then, a wide variety of terminology was in use. For example, one definition of a "dependent child" was a child "whose home is unfit for him by reason of abuse, neglect, cruelty, or depravity. . . ." "Protective services" was defined as "a program of identifiable and specialized child welfare which seeks to prevent dependency, abuse and exploitation of children. . ." while protective services workers were to "receive reports of dependent, abused or abandoned children." A protective services worker was authorized 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"—grounds that notably lack any reference to abuse, abandonment, neglect, dependency, cruelty, depravity, or exploitation. That year, "neglect" was added to Title 8 as a defined term in a bill addressing the grounds for termination of parental rights, but it was not a defined term in the bill creating Child Protective Services and describing the duties of protective services workers.

Provisions specifically addressing the interview of a child by a protective services worker were added to Title 8 in 1981. At that time, the statute in question was A.R.S. § 8-546.01 (later to be renumbered to 8-802), and after the 1981 amendments, it read in pertinent part as follows:

C. A protective services worker shall:

1. Be prepared to receive reports of dependent, abused or abandoned children and be prepared to provide temporary foster care for such children on a twenty-four hour basis.

2. Receive from any source oral or written information regarding a child who may be in need of protective services. A worker shall not interview a child without the prior written consent of the parent, guardian or custodian or the child unless:
(a) The child initiates contact with the worker.

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[2] A.R.S. § 8-802 is not the only example of old statutory terminology currently in use. The voluntary placement statute, A.R.S. § 8-806, also uses the abuse and abandonment terminology but makes no mention of neglect ("G. The fact of voluntary placement does not constitute abandonment, abuse or dependency as defined in this article. . . .").

(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.

3. After receipt and initial screening pursuant to regulations promulgated by the department under title 41, chapter 6, article 1 of any report or information pursuant to paragraph 1 or 2 of this subsection immediately:

(a) Notify the municipal or county law enforcement agency; and

(b) 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 and the name, age, and condition of other children in the home.

The 1981 version of the statute was the first time that the interviewing of children was addressed, and it utilized the terms operative in the statutory scheme at that time—abuse, abandonment, and dependency (via the reference to 8-546.01(C)(3)(b)). Similar to today's version of the statute, the interviewing subsection referred to an "abuse or abandonment" investigation and cross referenced a statutory section regarding investigations. Also 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.

Finally, just as the Supreme Court in *King v. Burwell* looked to the purpose of the Affordable Care Act and how the statutory provision at issue served the overall purpose, in interpreting the interview provisions, we look to the purpose for which the Department of Child Safety was created. In November 2013, Arizona was rocked by the revelation that more than 6000 reports of child abuse and neglect had gone uninvestigated. Immediately, then-Governor Brewer took action to ensure that eyes were laid on the children, that child safety was assessed, and the reports were investigated as required by law. The Governor also took the dramatic step of declaring her intention to create a stand-alone child welfare agency. A working group labored throughout the spring of 2014, drafting the legislation that would create what is now the Department of Child Safety. This effort culminated in a special legislative session in which comprehensive legislation was passed creating the Department of Child Safety.

Child safety was manifestly the top priority of those that acted to create the agency. It is evident in the agency's name, the renaming of Title 8 from Children to Child Safety, and in the statute setting forth the purpose of the Department. That statute says that the "primary purpose of the department is to protect children." A.R.S. § 8-451 (B). The interview of a child is a crucial step in assessing child safety—often the most crucial step. In order to be most effective, an investigator should interview a child alone and before a parent, guardian, or custodian has the opportunity to talk to the child about the investigation and coach the child about what he should and should not say. Practically speaking, this means that the interview of a child will often need to be done without prior parental consent or prior parental notification. For school-age children, an interview is thus best done at school prior to an investigator contacting the parent, guardian, or custodian.

The drafters of the legislation knew all of this—indeed, one member of the workgroup was the Department's current Director, Greg 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 of the legislation 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. The drafters were also well aware of the Department's long-standing policy regarding interviewing of children. 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.

Conclusion

Having considered all of the above, the Department has concluded that the most reasonable interpretation of A.R.S. §§ 8-471(E)(4) and 8-802(B) 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).

As noted at the outset of this request, the Department's interpretation of these statutes has been brought into question, and given the significance of the issue to the Department's investigative function, the Department requests that the Attorney General issue an opinion interpreting these statutes as they relate to the Department's ability to interview children in neglect cases without prior parental consent.

Sincerely,

Gregory McKay
Director