



February 8, 2016

Dennis Wells  
Arizona Ombudsman-Citizens' Aide  
3737 N. 7<sup>th</sup> 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,

A handwritten signature in black ink, appearing to read "Greg McKay", with a long horizontal flourish extending to the right.

Greg McKay  
Director