



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

September 30, 2019

The Honorable Fred S. Martin
Idaho State Senator
3672 Tumbleweed Place
Boise, ID 83713

Re: Constitutionality of IDAPA Provisions, Child and Family Services

Dear Senator Martin:

You have inquired about the constitutionality under the Fourth and Fourteenth Amendments of IDAPA 16.06.01.559.01 and 16.06.01.559.02. The Idaho Legislature has clearly placed the authority and responsibility to investigate reports of child abuse, abandonment, and neglect in the Idaho Department of Health and Welfare. Idaho Code § 16-1631. The Department's rules provide guidance on how those assessments should be conducted. IDAPA 16.06.01.559.01 and .02. Neither provision violates the Fourth or Fourteenth Amendments on their face. However, the rules implicate some Fourth and Fourteenth Amendment protections against unwanted state interference in parent-child relationships that have been acknowledged by the courts. *See Kirkpatrick v. Cy. Of Washoe*, 843 F.3d 784, 788 (9th Cir. 2016).

Fourth Amendment

The Fourth Amendment ensures freedom from unreasonable searches and seizures. Two elements must be established for a Fourth Amendment violation: there must be government conduct that amounts to a search or seizure, and if so, then that conduct must be unreasonable. *See Illinois v. Caballes*, 543 U.S. 405, 409-10 (2005).

A search "occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. U.S.*, 533 U.S. 27, 33 (2001). A seizure is government conduct that restrains one's liberty "by means of physical force or show of authority." *Graham v. Connor*, 490 U.S. 386, 395 n. 10 (1989). In determining whether an interview constitutes a seizure, a court must determine whether a reasonable person would have believed he was free to leave. *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980). The courts consider factors such as the number of officers

present, whether weapons were displayed, whether the officer's demeanor or voice implied compliance was compelled, and whether person was advised of the right to terminate the interview. *Id.* The United States Supreme Court has not yet addressed what factors to consider for a social worker's interview of a child in a child abuse investigation, but lower courts have considered the child's age, education, mental development, sophistication and familiarity with the interview process. Aguilera v. Baca, 510 F.3d 1161, 1169-1170 (9th Cir. 2007); *see also* Doe v. Heck, 327 F.3d 492, 510 (7th Cir. 2003)(court found seizure where no reasonable child would have believed he was free to leave when removed from classroom escorted by school personnel and interviewed by caseworkers and an officer for 20 minutes).

Even if one assumes the first element is established – that interview of a child or parent amounts to a search or seizure – the mere fact of questioning does not establish the second element of unreasonableness. Thus, inquiry into whether a Child Protection social worker's interview has violated a child's or parent's Fourth Amendment rights requires examination of the facts and circumstances of that interview. Neither the United States Supreme Court nor the Ninth Circuit have addressed when a seizure of a child in the context of a child abuse investigation is unreasonable. An interview based on exigent circumstances would not be unreasonable. Arguably, an interview based on reasonable suspicion of abuse may be reasonable, as federal court cases finding an unreasonable seizure have relied on findings that the social worker lacked a reasonable articulable suspicion of child abuse. *See* Dees v. Cy. of San Diego, 302 F.Supp.3d 1168, 1180-81 (S.D. Cal 2017); Phillips v. Cy of Orange, 894 F.Supp.2d 345, 365-366 (S.D.N.Y 2012).

Fourteenth Amendment

The Fourteenth Amendment guarantees substantive due process; no one shall be deprived of life, liberty, or property without due process of law. In the child protection context, a parent's interest in the "care, custody, and management of their child" is a "fundamental liberty interest protected by the Fourteenth Amendment." Santosky v. Kramer, 455 U.S. 745, 753 (1982); State v. Doe, 144 Idaho 839, 842 (2007). However, this liberty interest is "limited by the government's compelling interest in protecting a minor child." Dees, 302 F.Supp.3d at 1180-81. The "right to family integrity clearly does not include a constitutional right to be free from child abuse investigations." *Id.* at 1181 (other citations omitted). Most Fourteenth Amendment challenges have arisen in the context of a child's removal from parental custody or directing medical care of a child contrary to parents' wishes.

To state a claim for a Fourteenth Amendment due process violation, one must show that state action "shocks the conscience" or conduct is in "conscious or reckless disregard of the consequences." *Id.* Some courts have found that a state official's seizure and subsequent interview of a minor on school grounds without judicial authorization, parental consent, or exigent circumstances amounted to unconstitutional interference with the parent-child relationship. *See* Williams v. Cy of San Diego, 2017 WL 6541251 at *7-8 (S.D. Cal. Dec. 21, 2017). However, not all courts agree that a mere investigation does not infringe on a parent's Fourteenth Amendment

right. Doe v. Heck, 327 F.3d at 524; *but see* Barber v. Miller, 809 F.3d 840, 847 (6th Cir. 2015)(mere investigation into child abuse does not infringe on parents' Fourteenth Amendment rights, so protections for in-school interview of child were not clearly established).

But again, as under a Fourth Amendment analysis, one must consider the facts and circumstances of a child protection social worker's interview of a child or parent to assess whether a substantive due process violation has occurred. The fact of an interview, by itself, does not establish a constitutional violation.

Conclusion

For these reasons, it is my assessment that if challenged, a court would find IDAPA 16.06.01.559.01 and .02 do not on their face run afoul of the Fourth or Fourteenth Amendments. Where a particular interview by a social worker is challenged, a court will consider the exigency of circumstances, the reasonable perceptions of the child or parent, the reasonable suspicion on which abuse allegations is based, the perceived freedom of the interviewee to not be interviewed, and other factors.

If you have other questions or concerns or would like to otherwise discuss possible amendments to the rules to help avoid constitutional challenges, please feel free to contact me.

Sincerely,



BRIAN KANE
Assistant Chief Deputy

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