



STATE OF OREGON
Legislative Counsel Committee

April 13, 2010

To: Annette Tesch
Rules Coordinator
Department of Human Services—Children, Adults and Families Division
Human Services Building
500 Summer Street NE E-48
Salem OR 97301-1066

From: BeaLisa Sydlik, Deputy Legislative Counsel

Subject: Written Findings of Negative Determination (ARR 1201)
OAR 413-015-0420 TEMPORARY
(Effective Date: February 12, 2010, through August 11, 2010)

Enclosed is a copy of our written findings for ARR 1201, reflecting this office's review of rules of the Department of Human Services—Children, Adults and Families Division relating to "Child Abuse Investigations—Initial Contact." The administrative rule responsibilities of the Legislative Counsel are described in ORS 183.710 to 183.725.

The written findings include a determination that OAR 413-015-0420 raises constitutional concerns.

This negative determination will be considered by the following interim committee of the Legislative Assembly:

House Interim Committee on Human Services

You will be contacted by the administrator of the interim committee as soon as a date has been set for the meeting at which the interim committee will consider this negative determination. The administrator will also inform you whether the presence of a representative from your agency will be required at the meeting.

In the meantime, we request a written response to the written findings of negative determination on or before **May 15, 2010**. Please send the written response to our office. We will provide a copy of the response to the interim committee identified above.

Please contact our office with questions or concerns.

Encl.



STATE OF OREGON
Legislative Counsel Committee

ARR Number: 1201

April 13, 2010

Administrative Rule Review

WRITTEN FINDINGS OF NEGATIVE DETERMINATION
(Pursuant to ORS 183.720 (3))

State Agency: Department of Human Services—Children, Adults and Families Division

Rules: OAR 413-015-0420

The above temporary rule was filed with the Secretary of State on February 12, 2010, to become effective February 12, 2010, through August 11, 2010.

Pursuant to ORS 183.720 (3), we have made the following determination:

The rule raises constitutional issues, for the reasons set forth below.

1. The portions of the rule set forth below violate or, as implemented by the Child Protective Services (CPS) worker, could violate the Fourth Amendment to the United States Constitution pursuant to the holding in Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009):
 - a. OAR 413-015-0420 (1)(b)(A) provides that a CPS worker “must notify parents of the intent to interview a child, unless notification could compromise the child’s safety.” (Emphasis added.) The phrase “or a criminal investigation” is struck through in the amendment to the rule purportedly to bring the rule within the holding of the recent federal court opinion in Greene.
 - b. OAR 413-015-0420 (1)(b)(B) requires the CPS worker to contact the child “at home, school, day care, or any other place where the worker believes the child may be found.”
 - c. OAR 413-015-0420 (1)(b)(C)(ii) instructs the CPS worker that the worker “must wait until the parent is present in the home to complete a child interview in the home if the referral does not indicate severe harm or threat of severe harm to the child or if there is not reasonable cause to believe the child’s health or safety is endangered by the conditions of the dwelling or that the child is inadequately supervised.”

- d. OAR 413-015-0420 (1)(b)(D) requires a CPS worker to request law enforcement agency assistance if denied access to the child or the child's residence, whether or not the child is safe.
- e. OAR 413-015-0420 (1)(b)(E) requires a CPS worker to "notify the parents or caregivers the same day a child is interviewed."
- f. OAR 413-015-0420 (1)(b)(G) instructs the CPS worker that the worker "must attempt to interview children outside the presence of their parents or caregivers" if the parent or caregiver is the alleged perpetrator or if the presence of the parent or caregiver might impede the interview.

Discussion: These portions of the rule do not set forth any requirement for obtaining a warrant, a court order or parental consent for that part of an investigation that would entail interviewing the child under nonexigent circumstances. The requirement to notify the parents, if possible, is insufficient. The Greene court held that more than parental notification would be required if the investigation involved questioning a child at home or at school under nonexigent circumstances. The Greene court's review found that Oregon's statutory scheme for investigation of child abuse evidenced a "broader entanglement of law enforcement and social services officials" and "makes no effort to distinguish between criminal investigations of child abuse and civil investigations to protect the victims of abuse." Greene at 1028, 1029. As such, the Greene court held that "the general law of search warrants applie[s] to child abuse investigations." Id. at 1030, quoting Calabretta v. Floyd, 189 F.3d 808, 814 (9th Cir. 1999). Under the Greene ruling, a warrant, court order, exigent circumstances or parental consent to the CPS worker's investigation is required in order to comply with the constitutional protections of the Fourth Amendment to the United States Constitution.

- 2. The portions of the rule set forth below, as implemented by the CPS worker, could violate the Fourteenth Amendment to the United States Constitution pursuant to the holding in Greene:
 - a. OAR 413-015-0420 (1)(b)(I) provides that, in the context of the interview conducted by the CPS worker, the worker "must observe the child's injuries or signs of neglect. The CPS worker may need to remove a child's clothing to make adequate observations." The CPS worker is also required to "[s]eek parental consent and assistance, when possible and appropriate."
 - b. OAR 413-015-0420 (1)(b)(J) provides that "[t]he CPS worker may observe injuries to a child's anal or genital region if the child is not school aged and if the injury can be observed without the CPS worker touching the child's anal or genital region."

Discussion: These portions of the rule do not require the CPS worker to permit the child's parent to be present, or nearby, during the examination by the CPS worker if the examination could be considered to be "emotionally traumatic." Greene at 1037. Instead, the rule merely requires the CPS worker to seek parental consent and assistance "when possible and appropriate." The implication is that the CPS worker need not permit the parent to be in attendance

or nearby if observation or examination of the child's injuries or signs of neglect could be emotionally traumatic. The Greene court found that "the visual inspection and photographing of the children's genitals . . . could certainly be emotionally traumatic" and held that the children's parent could not be excluded from the location of the examination "absent parental consent, some legitimate basis for exclusion, or an emergency requiring immediate medical attention." Greene at 1037. The rule does not address these constitutionally required limitations and, as implemented, could violate the Fourteenth Amendment to the United States Constitution.