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OPINION NO. 2011-02

CHILD ABUSE AND NEGLECT;  
CHILDREN; WELFARE: A finding by the  
court in the child protection case that the  
child was in need of protection at the time  
of removal will provide the agency with  
sufficient credible evidence to support a  
substantiated finding of child abuse or  
neglect but the child welfare agency must  
make its own finding to enter such a  
report in the Central Registry.

Diane Comeaux, Administrator  
Division of Child and Family Services  
4126 Technology Way  
Carson City, NV 89706

Dear Ms. Comeaux:

You requested an opinion from the Office of the Attorney General regarding the effect on the child welfare agency's<sup>1</sup> decision to substantiate a report of child abuse or neglect of a court order related to either criminal allegations of abuse or neglect of a child or a petition that a child is in need of protection.

QUESTION ONE

Is a child welfare agency required to change its substantiation of a report of child abuse or neglect to match a court's determination on the same allegations of abuse or neglect in either a criminal matter or in a proceeding for a child in need of protection under Chapter 432B of the Nevada Revised Statutes?

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<sup>1</sup> Child welfare agency refers to the agency which provides child welfare services as defined in NRS 432B.030.

### RELATED QUESTION

When a child welfare agency makes a substantiated finding of child abuse or neglect, does the person found responsible for the child abuse or neglect have the right to bring in evidence of a court order rendered in either a criminal matter or in any NRS 432B proceeding for any appeal brought under NAC 432B.170?

### ANALYSIS

Allegations of child abuse and neglect can trigger three separate legal proceedings: (1) the child welfare agency may substantiate the report of abuse or neglect of the child and enter the substantiated report to the Collection of Information Concerning the Abuse or Neglect of a Child (hereinafter the "Central Registry") as provided in NRS 432.100; (2) a petition may be filed alleging that the child is in need of protection under NRS 432B.510; and (3) the prosecution and conviction may be pursued of any person for violation of NRS 200.508 or other crimes related to the abuse or neglect of a child. These proceedings are independent determinations and each contains its own protection of due process in an appeal process.

In order to address your question about how the NRS 432B and criminal proceedings impact the substantiation by a child welfare agency, we first review the statutory and any regulatory requirements for these three types of proceedings. Then we must consider whether a court judgment in the criminal or child in need of protection proceedings creates a legal binding effect on the child welfare agency.

#### A. Substantiation of Abuse or Neglect by a Child Welfare Agency.

Upon receipt of a report of possible abuse or neglect, the child welfare agency must determine if the report indicates circumstances that mandate an investigation. NRS 432B.260; NAC 432B.140. If the child welfare agency conducts an investigation, the agency must determine whether there is reasonable cause to believe that a child is abused or neglected or threatened with abuse or neglect; the nature and extent of injuries, abuse or neglect; and finally, who is responsible for the abuse and neglect. NRS 432B.300; NAC 432B.150. A report of child abuse or neglect may be substantiated if the child welfare agency finds credible evidence that the abuse or neglect occurred. NAC 432B.170.

NAC 432B.170 states the following:

1. After the investigation of a report of the abuse or neglect of a child, an agency which provides child welfare services shall determine its case findings based on whether

there is reasonable cause to believe a child is abused or neglected, or threatened with abuse or neglect, and whether there is credible evidence of alleged abuse or neglect of the child. The agency shall make one of the following findings:

- (a) The allegation of abuse or neglect is substantiated; or
- (b) The allegation of abuse or neglect is unsubstantiated.

2. The agency which provides child welfare services shall enter the findings of the investigation in the central registry established pursuant to NRS 432.100.

3. When a finding of confirmed abuse or neglect of a child by the person responsible for the welfare of the child has been made, the agency which provides child welfare services shall:

- (a) Provide written notification to the person concerning his right to appeal the finding; and
- (b) Provide information on the appeals process.

4. A request for an appeal must be made in writing to the agency within 15 days after the date on which the written notification is sent.

5. A hearing that is held pursuant to this section must be conducted in accordance with chapter 233B of NRS.

6. A communication or request relating to information contained in the central registry established pursuant to NRS 432.100 must be retained in the manner set forth in chapter 239 of NAC.

7. As used in this section:

(a) "Substantiated" means that a report made pursuant to NRS 432B.220 was investigated and that credible evidence of the abuse or neglect exists.

(b) "Unsubstantiated" means that a report made pursuant to NRS 432B.220 was investigated and that no credible evidence of the abuse or neglect exists. The term includes efforts made by an agency which provides child welfare services to prove or disprove an allegation of abuse or neglect that the agency is unable to prove because it was unable to locate the child or the person responsible for the welfare of the child.

The substantiated or unsubstantiated finding of child abuse or neglect is an internal administrative decision by the child welfare agency that must be made for purposes of maintaining information regarding child abuse and neglect reports in the Central Registry. NRS 432B.310. The Central Registry is maintained by the Division of Child and Family Services (Division) and provides statistical information on reports of abuse and neglect. NRS 432.100. In addition, the Division provides information about substantiated reports to some employers who conduct background checks for employment purposes. See NRS 432A.170 (Bureau of Services for Child Care of the Division required to request information from the Central Registry concerning every applicant, licensee or employee of an applicant or licensee of a child care facility).

Therefore, the agency must notify the person found responsible for the abuse or neglect in its findings if the agency substantiates the report. The person then has fifteen days to appeal the substantiated finding by the agency. NAC 432B.170(4). A hearing is conducted in accordance with Chapter 233B. NAC 432B.170(5). The administrative hearing officer determines whether the agency decision is based on substantial evidence. NRS 233B.121(8). The decision of the hearing officer can be appealed to the district court through a petition for judicial review. NRS 233B.130. An aggrieved party can then file an appeal of the final district court decision with the Nevada Supreme Court. NRS 233B.150. Through this process, a court may review the determination by the child welfare agency and issue an order which directs the child welfare agency to reverse the finding of a substantiation of child abuse or neglect.

B. NRS 432B Proceedings for a Child in Need of Protection.

At the same time the agency is determining whether to substantiate a report to enter in the Central Registry, the agency may also be making an important decision regarding the child's safety. Once the agency has determined whether there is reasonable cause to believe that a child is abused or neglected, the agency must take additional steps to protect the child, which may include removal of the child from the parent or guardian, and recommendation that the District Attorney file a petition pursuant to NRS 432B.490. NRS 432B.340; NRS 432B.380; NRS 432B.390. NRS 432B.330 specifies that a child is in need of protection under the following conditions:

1. A child is in need of protection if:
  - (a) The child has been abandoned by a person responsible for the welfare of the child;
  - (b) The child has been subjected to abuse or neglect by a person responsible for the welfare of the child;

(c) The child is in the care of a person responsible for the welfare of the child and another child has died as a result of abuse or neglect by that person;

(d) The child has been placed for care or adoption in violation of law; or

(e) The child has been delivered to a provider of emergency services pursuant to NRS 432B.630.

2. A child may be in need of protection if the person responsible for the welfare of the child:

(a) Is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity;

(b) Fails, although the person is financially able to do so or has been offered financial or other means to do so, to provide for the following needs of the child:

(1) Food, clothing or shelter necessary for the child's health or safety;

(2) Education as required by law; or

(3) Adequate medical care; or

(c) Has been responsible for the abuse or neglect of a child who has resided with that person.

3. A child may be in need of protection if the death of a parent of the child is or may be the result of an act by the other parent that constitutes domestic violence pursuant to NRS 33.018.

4. A child may be in need of protection if the child is identified as being affected by prenatal illegal substance abuse or as having withdrawal symptoms resulting from prenatal drug exposure.

If a petition is filed alleging a child is in need of protection, a court will determine whether grounds exist under NRS 432B.330, which may include whether a child was abused or neglected. NRS 432B.330(1)(6). Further, NRS 432B.530(5) states in relevant part:

*5. If the court finds by a preponderance of the evidence that the child was in need of protection at the time of the removal of the child from the home, it shall record its findings of fact and may proceed immediately or at another hearing held within 15 working days, to make a proper disposition of the case. If the court finds that the allegations in the petition have not been established, it shall dismiss*

*the petition and, if the child is in protective custody, order the immediate release of the child.*

NRS 432B.530(5) (emphasis added). The court that hears the child protection matter determines whether there is a preponderance of the evidence that the child was in need of protection at the time of removal, but does not make a direct finding regarding the agency substantiation of abuse and neglect.

C. Criminal Proceedings.

A criminal investigation can occur simultaneously with a child welfare investigation or the child welfare agency may make a referral to the district attorney for criminal prosecution. NRS 432B.380. If a person is charged with the violation of NRS 200.508 or other crimes related to abuse or neglect of a child, a judge or jury may either convict or find the parent or other responsible person not guilty of child abuse or neglect. The judge or jury in a criminal case makes a finding of guilt using the beyond-a-reasonable-doubt standard. *Jackson v. Virginia*, 443 U.S. 307, 317–18 (1979) (“[In re] *Winship* (397 U.S. 358, 90 S.Ct. 1068 (1970) [ ] established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, . . .”); *Mitchell v. State*, 124 Nev. \_\_\_, 192 P.3d 721, 727 (Adv. Op. 70, Sept. 18, 2008). Again, the judge or jury does not make a finding regarding whether the agency should substantiate a report of child abuse or neglect. This is not the purpose of the criminal hearing nor is the same standard used for the criminal case and the agency decision.

D. Impact of NRS 432B or criminal proceedings on an agency substantiation.

The child welfare agency has a strong interest in having accurate information in the Central Registry. The findings from the child protection or criminal case will be relevant to the administrative hearing officer decision in determining whether there is substantial evidence to support a finding of child abuse or neglect. If the findings of the court in the child protection or criminal proceedings, including factual and legal findings, are identical to the substantiated finding, the agency may be precluded from making a decision contrary to the prior court's decision. See *Kahn v. Morse & Mowbray*, 121 Nev. 464, 474, 117 P.3d 227, 234–235 (2005) (footnote omitted) (holding that when an issue of fact or law is litigated in a prior proceeding a party may be precluded from litigating the issues previously addressed by the prior court). The legal doctrine of issue preclusion may apply in administrative hearings. *State, University and Community College System v. Sutton*, 120 Nev. 972, 983, 103 P.3d 8, 16 (2004) (footnote omitted). The issues in an agency substantiation of child abuse or neglect are not always identical to the child protection or criminal court findings but a prior court's findings will at minimum either lend support to or refute the findings of a

child welfare agency if the allegations in either the criminal matter or the 432B proceedings are similar.

For example, if a court finds that a child's injuries were caused by a medical condition, the child welfare agency may be legally precluded at the administrative hearing from claiming that the child's injuries not caused by a medical condition. On the other hand, if a jury finds a parent guilty of child abuse upon evidence beyond a reasonable doubt, the agency would appear to have sufficient evidence to meet the lower credible evidence standard to substantiate the report and the agency could argue issue preclusion to prevent the parent from arguing otherwise. As a result, it would be unlikely that the person responsible for the child abuse would appeal the agency finding.

The agency should make its decision regarding whether to substantiate a report of abuse or neglect based on all the available evidence including evidence that is revealed after the agency has concluded its investigation. The criminal and civil hearings may provide evidence which support a substantiated finding. However, if evidence is revealed during a criminal or child protection court hearing which disproves that the child was abused, the agency may choose to reverse a substantiated finding of child abuse or neglect for purpose of the Central Registry.

The agency is not prohibited by regulation or statute from waiting to make a final finding regarding the report of child abuse or neglect until the conclusion of the related criminal or child protection cases. The agency can also enter its finding and agree to stay the administrative appeal hearing until the conclusion of the criminal or civil matter. Finally, if the agency denies a request to consider additional information which was not available at the time of the initial administrative hearing, the agency can provide a limited hearing to ensure that the information contained in the Central Registry is accurate.

#### CONCLUSION TO QUESTION ONE AND RELATED QUESTION

The child welfare agency is not required to change its substantiated findings entered in the Central Registry unless the substantiation is reversed through the Chapter 233B administrative hearing process. The child welfare agency should make its decision on whether or not to substantiate a report of abuse or neglect by considering all available evidence including findings made by a court in a related criminal or child protection matter. As a result, the agency should make its decision to substantiate a report or to conduct the administrative appeal hearing after the completion of all criminal or civil hearings regarding the abuse or neglect when possible. If information from a criminal or NRS 432B proceeding is not available at the initial administrative hearing and the child welfare agency does not agree to change

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the substantiated finding, the agency should proceed with a limited hearing so that a hearing officer can ultimately determine whether the findings of such a court are relevant to a substantiation of child abuse and neglect by a child welfare agency.

#### QUESTION TWO

Does a court order finding that the allegations in a petition for a child in need of protection at the time of removal pursuant to NRS 432B.530 are true mean that the allegations of abuse or neglect are substantiated?

#### ANALYSIS

As already explained above, the decision to substantiate a report of abuse or neglect is solely an agency determination made pursuant to NAC 432B.170. The court in the child protection hearing makes a decision regarding whether the child should have been removed from his parent or guardian's care. NRS 432B.530. The child welfare agency can use the court's findings in the child protection case to support their case during any appeal of a substantiated finding of a report of child abuse or neglect.

#### CONCLUSION TO QUESTION TWO

A finding by the court in the child protection case that the child was in need of protection at the time of removal will provide the agency with sufficient credible evidence to support a substantiated finding of child abuse or neglect but the child welfare agency must make its own finding to enter such a report in the Central Registry.

Sincerely,

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