



Office of Children and Family Services

Andrew M. Cuomo
Governor

52 WASHINGTON STREET
RENSSELAER, NY 12144

Sheila J. Poole
Acting Commissioner

Local Commissioners Memorandum

| | |
|---------------------------------|--|
| Transmittal: | 16-OCFS-LCM-05 |
| To: | Local District Commissioners |
| Issuing Division/Office: | Division of Child Welfare and Community Services |
| Date: | April 12, 2016 |
| Subject: | Phillips v. Orange County – Considerations for Child Protective Services Investigations |
| Contact Person(s): | Charles Carson, Division of Legal Affairs (Charles.carson@ocfs.ny.gov) |
| Attachments: | None |

I. Purpose

The purpose of this Local Commissioners Memorandum (LCM) is to discuss an oral order issued by the United States District Court for the Southern District of New York on August 19, 2015 pertaining to Phillips et al. v. County of Orange, et al. (“Phillips”). The order granted a motion by the plaintiffs for summary judgment and held that, in this case, the county engaged in an unconstitutional seizure of a child when the child was questioned in a public school as part of a child protective services (“CPS”) investigation.¹

This LCM clarifies the position of the Office of Children and Family Services (OCFS) that this **order pertains only to Orange County and should not change other local social services districts’ (districts) procedures or protocols.**

¹ The discussion in this LCM of the facts of the case is based on information that is contained in the August 19 order and an earlier published decision in the case found at 894 F.Supp2d 345, and which is thus public. Nothing in the LCM should be construed as stating or implying that the facts as discussed herein reflect any confidential information in any records that may be applicable to the case.

II. Background

A. Parties

Plaintiffs are the parents of a child who was five years old at the time of the CPS investigation at issue in the case. The defendants were Orange County; the Board of Education of the Goshen Central School District; and the Village of Goshen. The order dismissed the claims against the Village of Goshen.

B. Investigation

CPS initiated an investigation after a report of suspected child abuse was made to the Statewide Central Register of Child Abuse and Maltreatment ("SCR") in November of 2009. The report alleged that the plaintiff parents ("parents") had abused their five year old child. The report to the SCR was made by a source who did not have direct knowledge of the information on which the allegations were based.

Orange County assigned the report to the county's multidisciplinary team ("MDT") for investigation. The MDT included an Orange County CPS caseworker and a police officer, who were assigned to investigate the report. The CPS caseworker and police officer contacted the source of the report to confirm the information in the report.

Interview of the Child At School

The investigators then went to the child's school to interview the child. In interviewing the child, the MDT followed standard protocol for investigations of alleged child abuse by parents and did not seek or obtain parental consent, or notify the parents in advance of the interview.

The MDT continued their investigation and made contact with the person who provided the information to the source of the original report. The information provided by that person was inconsistent with the information in the report.

Home Visit

The investigators subsequently interviewed the parents at the Orange County Department of Social Services. The parents denied any form of abuse. A CPS caseworker then conducted a home visit, advising the parents that a home visit was required. (Section 424(6) of the Social Services Law and the CPS regulations at 18 NYCRR 432.2(b)(3)(iii) require a home visit as part of a CPS investigation. However, nothing in law compels a parent to agree to a home visit in the absence of a court order.) The parents later claimed that they would not have consented to the home visit had they known that refusing to consent was an option.

After completing the home visit, Orange County CPS unfounded the report.

C. Initiation of Litigation

The parents subsequently initiated litigation, claiming among other things that the interview of their child at school without their consent was a violation of the Constitutional protection against unreasonable search and seizure under the Fourth Amendment, and that the home visit constituted an unlawful search under the Fourth Amendment. The parties ultimately moved for summary judgment and the plaintiffs prevailed on that motion in an oral determination read into the record on August 19,

2015. The court did not issue a written decision and there is no published opinion regarding that determination. The “decision” exists only as a transcript of what the judge said. Orange County subsequently settled the case with the parents.

III. Program Implications

Phillips Should Not Impact Interview Procedures Outside of Orange County

A. The order in Phillips Has Minimal Precedential Value

Although the transcript of the Phillips order has been widely circulated, there is no written decision in this case. Accordingly, there is little firm basis from which to draw conclusions about the precedential value of this oral determination. It is well settled that both New York State and federal courts may consider an unreported decision if the court deems the unreported decision relevant to a matter before the court. Whether an oral ruling of this nature even rises to the level of an unreported decision is questionable. While it is possible that the ruling in Phillips could be considered by a State or federal court faced with a similar situation, the oral determination in Phillips is not binding in any jurisdiction.

B. Phillips Does Not Affect the Permissibility of Interviewing a Child At School Without Parental Permission

The oral determination in Phillips focuses primarily on the issue of whether the interview at the school by the representatives of the MDT (the CPS caseworker and the police officer), without the consent of the parents, or a court order or warrant, constituted an unreasonable seizure of the child under the Fourth Amendment. The court’s oral determination concludes that it did constitute a seizure.

However, the primary precedent for this decision is from the Seventh Circuit, which is not binding on New York State in the Second Circuit. Second Circuit precedent has not resolved this issue. The Second Circuit cases relied on by the court are each distinguishable factually from the Phillips case because they involved finding “seizure” in much more intrusive steps than existed in this case, such as CPS removing the child from the school or taking custody of the child. In this case, the alleged “seizure” involved a school official bringing the child to an office in the school where the child was questioned by the MDT members. The Phillips oral determination goes well beyond established case law, as no Second Circuit decision has previously found that merely questioning a child without his or her parents’ approval, when his or her parents are accused of abuse, constitutes a “seizure”.

The oral determination also went well beyond established case law in asserting that a report of child abuse fails to provide requisite “probable cause” to interview an allegedly abused child. In fact, case law does not support the notion that probable cause is necessary to question an alleged victim of abuse or maltreatment.

C. Phillips Settlement

Orange County entered into a settlement with the Phillips plaintiffs. This settlement has been kept confidential by the parties to the lawsuit. The contents of the settlement have no precedential value for non-parties to the settlement. Thus, regardless of what Orange County did or did not agree to do in settlement of this suit, its agreement does not control or inform the legal standards applicable to any other counties.

D. Counties' Legal Obligations to Investigate Abuse and Maltreatment

The position of OCFS remains that children who are alleged to have been abused or maltreated can be interviewed at school without parental permission in appropriate circumstances. The first duty of the child protective service in conducting a CPS investigation is to see to the safety of the child. (See, Section 424(6)(a) of the Social Services Law and the regulations at 18 NYCRR 432.2(b)(3)). Especially in a situation where a parent is alleged to have abused or maltreated a child, it is often necessary to interview the child outside the presence of the parent who has allegedly abused or maltreated the child. The Child Protective Services Program Manual (Chapter IV, Section D.3.h) and the OCFS/SED Model Policy on Educational Neglect provide guidance on interviewing children at school. (The guidance on this issue in the Model Policy is not restricted to reports involving educational neglect.)

This guidance provides that the circumstances which may, but do not necessarily, prompt a decision to interview a child at school include, but are not limited to, allegations of:

- Bruises inflicted by parents;
- Unusual punishments;
- Unattended illness;
- The child is fearful of returning home; or
- Sexual abuse

This guidance remains in effect and continues to embody the position of OCFS on the issue of interviewing children at school. Since neither the State nor any county other than Orange is a party to the Phillips settlement, this guidance also remains an accurate interpretation of the legal standard applicable statewide.

A settlement is a private agreement that binds only the signatories to that settlement. In this case, the Phillips settlement is binding **only** on Orange County and has no direct applicability elsewhere in the State.

IV. OCFS Guidance For Counties Considering a Response to Phillips

First, OCFS reminds counties that the oral determination in Phillips is not binding on any court. Second, OCFS reminds counties that the private settlement in Phillips is not binding on any county other than Orange. Third, OCFS reminds counties that the private settlement in Phillips is confidential at this time so any speculation on the contents is unfounded in confirmed documentation. Lastly, please note that OCFS does not require that any social services district change any interview practices whatsoever.

If counties wish to react in any way to the Phillips decision, OCFS offers the following guidance: a CPS worker or MDT member could interview a child in a public school without the consent of a parent if the CPS worker or MDT member has either (1) probable cause or (2) good reason to believe that child abuse or maltreatment occurred.

A. “Probable Cause” Means “Reason to Believe Child Abuse or Maltreatment Occurred”

“Probable cause” is a concept generally applicable only in criminal cases. In the present context, the court in Phillips equates it to having a reasonable basis to believe that facts exist warranting the action at issue. The court also uses the term “good reason to believe that child abuse or maltreatment occurred”, which is essentially the same

standard; it means there is a reasonable basis to believe that the child was the victim of some form of child abuse or maltreatment.

This leads to the question of what constitutes a reasonable basis to believe that questioning the child without parental permission is necessary, or what constitutes good reason to believe that child abuse or maltreatment occurred. Based on the oral determination in Phillips, the court did not view the report to the SCR as meeting this standard. Accordingly, the fact that the SCR took a report would not itself meet the standard suggested by the oral determination in Phillips. Determining whether the child may be interviewed at school without parental permission will involve an evaluation of different factors that may be applicable. Some of these factors would be:

- Whether a parent is the subject of the report. The primary reason to interview a child at school is to have the opportunity to interview the child outside the presence of the parents where a parent is a subject of the report. If the subject of the report is not a parent, there may be less need to interview the child outside the direct influence of the parent.
- The apparent reliability of the source of the report and/or the information in the report. The fact pattern that underlay the Phillips case involved a source without direct knowledge of the alleged abuse or maltreatment. Although not stated in the transcript or court's oral determination, it appears that the court was troubled by the nature of the underlying report, particularly when the investigation ultimately revealed discrepancies between the information in the report and what the person who gave information to the source of the report told CPS. Accordingly, if the report is from (a) a source who does not have direct knowledge of the alleged abuse or maltreatment, (b) an anonymous source, or (c) a source who on the face of the report may have a motivation to fabricate or exaggerate information, additional consideration should be given to the reliability of the information in the report in determining whether interviewing the child at school without parental permission is appropriate.
- In the same vein, whether the source of the report is a mandated reporter. Mandated reporters are under a legal obligation to make reports to the SCR when a child or parent, guardian, custodian or other person legally responsible for the child comes before the mandated reporter in the mandated reporter's official or professional capacity and provides reasonable cause to suspect that a child has been abused or maltreated. Many mandated reporters have received some level of training in their legal responsibilities, and by the nature of their positions are more often in a position to observe signs of possible abuse and maltreatment than are members of the general public. The indication rates for reports from mandated reporters are historically higher than the indication rates for reports from non-mandated reporters. Accordingly, a report from a mandated reporter could be considered more reliable than a report from a non-mandated reporter.
- Other factors may also be relevant depending on the circumstances of the report. The view of OCFS is that if there is a question of the safety of a child, and interviewing a child at school without parental permission is deemed necessary to protect the safety of a child, CPS should conduct the interview at school without parental permission. A question about the safety of the child would

constitute reasonable cause to believe that there may have been child abuse or maltreatment.

B. Consent to Home Visit

The other aspect of the Phillips order with potential CPS ramifications is the court's finding that there was an issue of fact as to whether the parents consented to the home visit. The order implies, although does not find, that if the parents were told they were required to consent to a home visit, and the parents did not actually consent to the visit, this could be an unreasonable search of the home under the Fourth Amendment prohibition against unreasonable search. The exact consequence of this is unclear, as in this instance the home visit disclosed no information of note. It suggests that if the home visit yielded useful information, that information could not be used for purposes of criminal prosecution, based on the information being the result of an unconsented search without a warrant. It is unclear what the implications would be for CPS purposes.

Based on the recitation of facts of the case in the order, CPS did not tell the parents that they were required to permit a home visit. CPS advised the parents that CPS was required to conduct a home visit, which is what the statute and regulations require. The court order does not conclude that there is an affirmative duty to advise parents that they may refuse to consent to a home visit.

The guidance OCFS suggests be taken from this is that, if a parent asks CPS whether they are required to permit a home visit, CPS should advise the parents that they are not required to permit the home visit. They can advise the parents that CPS is required by law to attempt to conduct a home visit, and they can explain to the parents the purpose of the home visit. If a parent refuses to permit a home visit, CPS should consult with their counsel to determine whether it is necessary to seek an access order pursuant to Section 424(6-a) of the Social Services Law. (See [07-OCFS-ADM-07, Obtaining Court Orders When Denied Access in CPS Investigations](#))

/s/ Laura M. Velez

Issued By:

Name: Laura M. Velez

Title: Deputy Commissioner

Division/Office: Child Welfare and Community Services