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CONSTITUTIONAL LIMITS ON THE RIGHT OF GOVERNMENT INVESTIGATORS TO INTERVIEW AND EXAMINE ALLEGED VICTIMS OF CHILD ABUSE OR NEGLECT

Teri Dobbins Baxter*

ABSTRACT

Investigating allegations of child abuse or neglect presents unique challenges, particularly if parents or guardians are the alleged perpetrators. Those accused of harming the children are in a position to prevent the victims from getting access to the help they need to escape their abuser(s). The courts have not clearly defined the federal constitutional boundaries of searches and seizures in this context. The Supreme Court, in particular, has not weighed in on the constitutionality of warrantless searches and seizures in connection with abuse and neglect investigations. This lack of Supreme Court guidance has led to unpredictable and sometimes conflicting opinions from state and lower federal courts, particularly with respect to Fourth Amendment requirements in this context. This Article will examine whether court orders allowing searches and seizures in child abuse or neglect cases can be issued based on a standard lower than probable cause and still pass muster under the Fourth Amendment. Additionally, it discusses the special needs exception to the Fourth Amendment's warrant requirement and weighs arguments in favor of and in opposition to applying the special needs exception to child abuse and neglect investigations. Finally, the Article discusses whether searches without a warrant or other court order may be conducted in response to allegations of child abuse or neglect if the special needs exception does not apply.

INTRODUCTION

Government workers are tasked with investigating allegations of abuse or neglect of children. It is clear that the Fourth Amendment applies to most investigative options involving direct contact with the alleged victim.¹ Interviews are searches,² and

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¹ See Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 469–73 (2005).

² See, e.g., *Doe v. Heck*, 327 F.3d 492, 509–10 (7th Cir. 2003) (finding that an investigation on school premises that consisted of interviewing students “easily” met the definition of a Fourth Amendment search “because the defendants went to the school for the specific

taking children into custody—even temporarily for the purpose of interviewing them—involves a seizure.³ What is unclear is under what circumstances these searches or seizures violate the Fourth Amendment. There are cases that discuss rather extensively the right to remove children from their parents' custody without a warrant (requiring exigent or emergency circumstances and, in some cases, evidence that there was no time to get a court order).⁴ However, this Article focuses on the right to search or seize evidence. In other words, to what extent can social workers investigate child abuse allegations without consent or a warrant supported by probable cause?

Investigating allegations of child abuse or neglect presents unique challenges, particularly if parents or guardians are the alleged perpetrators. Those accused of harming the children are in the perfect position to prevent the alleged victims from getting access to the help they need to escape their abuser(s). In cases in which the reports of abuse or neglect are insufficient to meet the standard of probable cause necessary to issue a warrant, there may not be a meaningful investigation.⁵ Without the ability to interview or examine the children (both of which constitute searches under the Fourth Amendment to the United States Constitution),⁶ the government may be unable to assess whether the allegations of abuse or neglect can be substantiated, much less meet the burden of proof necessary to remove children from an abusive or neglectful environment. This can be particularly troubling in cases in which there is little or no opportunity to gather evidence because the children have limited contact with persons other than the alleged abusers. For example, children who live in a geographically isolated or culturally insular community may have limited contact with people who are willing and able to observe and report signs of abuse. If abuse is suspected, the information gathered may be insufficient to establish

purpose of gathering information, an activity that most certainly constitutes a search under the Fourth Amendment”).

³ “A person has been ‘seized’ within the meaning of the Fourth Amendment if, in view of all of the circumstances surrounding the incident, a reasonable person would not have believed that he was free to leave.” *Heck*, 327 F.3d at 510; *see also* *Greene v. Camreta*, 588 F.3d 1011, 1022 (9th Cir. 2009), *vacated as moot*, *Greene v. Camreta*, 661 F.3d 1201, 1201 (9th Cir. 2011) (holding that an interview of a child at her school was a seizure for Fourth Amendment purposes); *Tenenbaum v. Williams*, 193 F.3d 581, 602 (2d Cir. 1999) (affirming a district court holding that taking a child from her school to the hospital for examination was a Fourth Amendment seizure).

⁴ *See, e.g., Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1242 (10th Cir. 2003) (finding that there is no special need that invalidates the warrant requirement unless there are exigent circumstances); *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000) (stating a child may be removed without “judicial authorization” if there is “reasonable cause to believe that the child is in imminent danger”).

⁵ *See* *Coleman*, *supra* note 1, at 526.

⁶ *Heck*, 327 F.3d at 509; *Darryl H. v. Coler*, 801 F.2d 893, 899–900 (7th Cir. 1986) (holding that a physical examination of a child’s body implicates the Fourth Amendment).

the probable cause necessary to obtain a search warrant. Even if the child regularly interacts with teachers, administrators, child care providers, or others who may be inclined or required to report suspected abuse, there may not be sufficient evidence to justify issuance of a warrant to search or seize the child. In other words, without evidence of abuse, the authorities may be unable to obtain evidence to prove abuse.

On the other hand, giving investigators an unrestricted right to seize and examine or interview children would be an unnecessary and unwise erosion of Fourth Amendment rights, especially when those searches and seizures take place at the alleged victim's home. Moreover, research has shown that investigations, particularly those that are unnecessarily intrusive or that separate children from their caregivers, can be traumatic and psychologically harmful to the children as well as damaging to the family as a whole.⁷

While child abuse investigations are typically subject to detailed state regulations,⁸ the courts have not clearly defined the federal constitutional boundaries of searches and seizures in this context.⁹ The Supreme Court, in particular, has not weighed in on the constitutionality of warrantless searches and seizures in connection with abuse and neglect investigations.¹⁰ This lack of Supreme Court guidance has led to unpredictable and sometimes conflicting opinions from state and lower federal courts, particularly with respect to Fourth Amendment requirements in this context.¹¹ Despite the lack of agreement on every issue, a general consensus seems to have developed on some questions, such as strip searches in the home without parental consent.¹² Other issues have divided the courts and resulted in uncertainty for those conducting the investigations and for families that are the targets of such investigations.

In addition to clarifying the boundaries of the Fourth Amendment and its requirements in the context of child abuse investigations, there is a pressing need for guidance for investigators as well as state legislatures in this area. In some cases, investigators have acted pursuant to statutes that purport to give them authority to question children under circumstances that were later held to be unconstitutional.¹³

⁷ See, e.g., Coleman, *supra* note 1, at 415, 418–19, 421.

⁸ U.S. Dep't of Health & Human Servs., *State Laws on Child Abuse and Neglect*, CHILD WELFARE INFORMATION GATEWAY, http://www.childwelfare.gov/systemwide/laws_policies/state/can/ (last visited Oct. 14, 2012) [hereinafter U.S. Dep't of Health & Human Servs., *State Laws*].

⁹ See Coleman, *supra* note 1, at 469–76.

¹⁰ See *id.* at 416.

¹¹ See *id.*

¹² Strip searches of the child in the home without parental consent have been found to violate the Fourth Amendment. See *Roe v. Texas Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 407–08 (5th Cir. 2002); *Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999).

¹³ See, e.g., *Doe v. Heck*, 327 F.3d 492, 515–16 (7th Cir. 2003) (holding that the Wisconsin statute under which investigators acted was unconstitutional).

Now that several circuits have agreed on the broad contours of the Fourth Amendment and the necessity of obtaining a warrant or equivalent court order in the absence of consent or exigent circumstances,¹⁴ there is an even greater need to explore what actions are allowed if such a warrant cannot be obtained, as well as what types of searches should be authorized in the warrant or order.

This Article will begin with a general overview of the procedures for investigating allegations of abuse and neglect in Illinois and Texas. These procedures will serve as examples of the processes used across the country and will provide context for the Fourth Amendment issues and arguments discussed in the cases and later sections of the Article. Part II will discuss the Fourth Amendment warrant requirement in the context of abuse and neglect investigations.

In Part III, this Article will examine whether court orders allowing searches and seizures in child abuse or neglect cases can be issued based on a standard lower than probable cause and still pass muster under the Fourth Amendment. Part IV will discuss the special needs exception to the Fourth Amendment's warrant requirement and weigh arguments in favor of and in opposition to applying the special needs exception to child abuse and neglect investigations. Part V will discuss whether warrantless searches may be conducted in response to allegations of child abuse or neglect if the special needs exception does not apply. Additionally, Part V explores what actions are reasonable while interviewing or examining children in the context of a warrantless search.

I. CHILD ABUSE AND NEGLECT INVESTIGATIONS

Procedures for conducting child abuse and neglect investigations are established by state law.¹⁵ The procedures vary from state to state, although there tend to be many similarities.¹⁶ The procedures for Illinois and Texas will be examined below in order to establish a general understanding of the types of procedures that are typically

¹⁴ See *Gates v. Texas Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 420 (5th Cir. 2008) (requiring consent, exigent circumstances, or a "special need" for a warrantless entry into the home); *Doe*, 327 F.3d at 511–13 (holding that probable cause, a warrant, or exigent circumstances is necessary to conduct a search or seizure of a child on private property); *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1010 (7th Cir. 2000) (holding that seizing a child from home requires probable cause or exigent circumstances); *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000) (finding that removal of a child requires exigent circumstances, a court order, or consent); *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1093–94 (3d Cir. 1989) (holding that a strip search of a child in the home requires a warrant, consent, or exigent circumstances).

¹⁵ U.S. Dep't of Health & Human Servs., *State Laws*, *supra* note 8.

¹⁶ See Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection*, 11 TEX. J. WOMEN & L. 1, 13–14 (2001).

employed across the nation and to provide context for some of the cases and issues that are discussed in later sections of the Article.¹⁷

A. Illinois

1. Report to State Central Register

In Illinois, all reports of child abuse or neglect should be made to the State Central Register (SCR).¹⁸ Reports can be made twenty-four hours a day, seven days a week to the telephone hotline or local Department of Child and Family Services (DCFS) offices.¹⁹ Reports are screened by call floor workers who complete a State Automated Child Welfare Information System (SACWIS) intake form.²⁰ The call worker must also elicit additional information, including: the reasons why the reporter has reasonable cause to believe that abuse or neglect has occurred and the source of the reporter's information; any knowledge regarding the risk of harm to the child; any knowledge of potential danger to DCFS investigators; any knowledge of the mental and physical condition of the alleged perpetrator; any knowledge about the child, family, or perpetrator's ability to communicate with the Investigation Specialist (i.e., language barriers or hearing impairment); "identity and location of possible witnesses to, or persons with knowledge of, the alleged abuse or neglect"; and directions to any relevant addresses.²¹

¹⁷ The discussion of the Illinois and Texas procedures is intended to provide an overview and not a comprehensive or exhaustive explanation of the statutes or procedures in effect in either jurisdiction.

¹⁸ ILL. DEP'T OF CHILD & FAMILY SERVS., REPORTS OF CHILD ABUSE AND NEGLECT PROCEDURES, § 300.20(a) (Dec. 13, 2010) [hereinafter ILL. DEP'T OF CHILD & FAMILY SERVS., PROCEDURES], available at http://www.state.il.us/dcf/policy/pr_policy_procedure.shtml.

¹⁹ *Id.* The hotline number is 1-800-25A-BUSE. *Id.* Reports to the hotline go directly to the SCR. *Id.* If someone calls a local office to make a child abuse or neglect report, that person will be encouraged to call the hotline to make the report. *Id.* Individuals who go to local offices to report child abuse or neglect will be directed to and assisted with making a report to the hotline. *Id.*

²⁰ *Id.* § 300.30(a)(1) (Nov. 20, 2009). Once the form is completed, [i]ncidents of suspected child abuse or neglect reported to the Department are classified as physical abuse, sexual abuse, neglect or a combination of the preceding three and recorded in the State Central Register's Statewide Automated Child Welfare Information System (SACWIS). The SACWIS enables the Department to identify and locate prior reports of child abuse or neglect; monitor the current status of reports of child abuse or neglect being provided services under the Child Abuse and Neglect Reporting Act; and regularly evaluate the effectiveness of existing laws and programs through statistical analysis and other information.

Id. at app. B § (a) (May 20, 2002).

²¹ *Id.* § 300.30(a)(1) (Nov. 20, 2009).

Not every call or allegation of neglect or abuse will qualify as a report of child abuse or neglect. In order for a child abuse or neglect report to be taken, specified criteria must be met, including a requirement that the reporter “have reasonable cause to believe that a child has been abused or neglected; and [that] [t]he alleged victim must be less than 18 years of age; and [t]he alleged victim must either have been harmed or must be in substantial risk of harm.”²² If the child abuse or neglect report criteria are met and the allegations fit the definition of child abuse or neglect in the Abused and Neglected Child Reporting Act (ANCRA), an initial investigation will be conducted.²³ The rules do not specifically address anonymous reports.²⁴ Presumably, reports from an anonymous source will be taken and investigated in the same manner as other reports, although it may be more difficult to assess the credibility of anonymous sources.²⁵

Child abuse or neglect reports are then placed in one of ten categories, including: emergency, normal, child five years of age or less, child currently alone or

²² *Id.* § 300.30(a)(2) (emphasis omitted). The complete list of criteria is as follows:

- The reporter must have *reasonable cause to believe* that a child has been abused or neglected; and
- The alleged victim must be less than 18 years of age; and
- The alleged victim must either have been harmed or must be in substantial risk of harm; and
- There must be a specific abusive or neglectful incident which falls within the description of an allegation which caused the harm to the child, or a set of circumstances that lead a reasonable person to believe that a child is at risk of harm; and
- If the allegations presented were true, the situation would constitute abuse or neglect as defined in Abused and Neglected Child Reporting Act (ANCRA) and as interpreted in the allegations definitions contained in Procedures 300, Appendix B.
- For abuse, the alleged perpetrator must be the child’s parent, immediate family member, any individual who resides in the same home as the child, any person who is responsible for the child’s welfare at the time of the incident, or the paramour of the child’s parent, or any person who came to know the child through an official capacity or position of trust. Alleged perpetrators of abuse must be over ten years of age.
- For neglect, the alleged perpetrator must be the child’s parent or any other person that is over the age of ten years who was responsible for the child at the time of the alleged neglect.

Id.

²³ *Id.*

²⁴ In fact, the only time anonymous reports are mentioned is in Appendix B to the Procedures, addressing allegations of inadequate supervision. In that section, it states in the case of an anonymous report, “an interview must be conducted with an individual (collateral) who has (or would likely have) knowledge of the family situation and/or reported incident.” *Id.* at app. B § (c)(2)(J) (May 20, 2002).

²⁵ *See id.* at app. B § (b)(1) (May 20, 2002).

unsupervised, immediate medical attention needed, child dead, facility report, child at hospital with perpetrator present, child held by police or a physician, other action needed.²⁶ Each category has an associated required response.²⁷ Reports that are placed in the normal response category require a response within twenty-four hours.²⁸ An emergency response is required if a child is in “immediate danger of physical harm” or “[i]t is likely that the family of [an] alleged child victim will flee with the child.”²⁹ In those circumstances, SCR must “call the local police and . . . the Investigation Specialist [must] respond immediately” by initiating an investigation “without delay at any hour of the day or night.”³⁰

2. Initial Investigation

DCFS staff members that have been designated as Investigation Specialists conduct the investigations of child abuse or neglect reports.³¹ “The purpose of the initial investigation is to determine whether a report of alleged child abuse or neglect is a good faith indication of potential abuse or neglect and, therefore, warrants a formal investigation.”³² Investigation Specialists must complete a list of activities during the initial investigation, including: review of the intake and any prior indicated or unfounded investigations on file; development of “an investigative plan with the Investigative Supervisor and law enforcement, if appropriate”; “in-person contact with the alleged victim or victims”; interviews with the alleged victim or victims, reporters, and other persons with information; and verification of the identity of “alleged perpetrators, adult household members, and frequent adult visitors to the home.”³³

²⁶ *Id.* § 300.30(h) (Nov. 20, 2009).

²⁷ *Id.*

²⁸ *Id.* § 300.30(h)(2)(A).

²⁹ *Id.* § 300.30(h)(1).

³⁰ *Id.* (emphasis omitted).

³¹ *Id.* § 300.50.

³² *Id.* § 300.50(a).

³³ *Id.* The complete list of mandatory investigative activities is as follows:

- Review the intake, and prior indicated and unfounded investigations on file.
- Review the contact and evidence requirements for current allegations.
- Develop an investigative plan with Investigation Supervisor and law enforcement, if appropriate, to ensure required contacts are completed and evidence is gathered.
- Initiate the report within the 24-hour mandate in accordance with subsection 300.50(c) by in-person contacts or good faith attempts.
- In-person contact with the alleged victim or victims.
- In-person examination of the child victim or victims’ environment.

The investigation must be initiated by either “in-person contact with the alleged child victim or victims within [twenty-four] hours of the receipt of the report, or by a good faith attempt to contact the alleged child victim or victims.”³⁴ The interview of the victim must be conducted in accordance with specific procedures developed for different types of harm.³⁵ In accordance with procedure:

The interviews shall be conducted out of the presence of the child’s caretaker and the alleged perpetrator if at all possible. . . . Another person whom the child trusts but who is not the alleged perpetrator or another alleged child victim . . . may be present during the interview if it will make the child more comfortable.³⁶

Investigation Specialists are to contact the parents or caretakers in person on the same day that the alleged child victims are interviewed.³⁷ If contact is not possible

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- Interview the alleged child victims or victims, reporters, other persons with information, and other identified persons to obtain information pertaining to the alleged incident of abuse or neglect.
 - Observe the alleged victim or victims in accordance with the requirements of subsection 300.50(c)(9).
 - Verify identification of alleged perpetrators, adult household members, and frequent adult visitors to the home through Social Security Numbers and photographic identifications (e.g., driver’s license, employee identification).
 - Complete data checks and SOUNDEX on members of the household.
 - Complete LEADS [Law Enforcement Agencies Data Systems] check in accordance with Administrative Procedure #6.
 - Complete required minimal investigative activities for the alleged allegation that are identified in Procedures 300, Appendix B.
 - Document all investigative activities within 24-hours after they are completed.

Id. (emphasis omitted).

³⁴ *Id.* § 300.50(c) (emphasis omitted).

³⁵ *Id.* Different reporting and investigation procedures are set out for death; head injuries; internal injuries; burns; poisons or noxious substances; wounds; bone fractures; substantial risk of physical injury or environment injurious to health and welfare; cuts, bruises, abrasions, and oral injuries; human bites; sprains or dislocations; tying or close confinement; substance misuse; torture; mental and emotional impairment; sexually transmitted diseases; sexual penetration; sexual exploitation; sexual molestation; substantial risk of sexual injury; inadequate supervision; abandonment or desertion; inadequate food; inadequate shelter; inadequate clothing; medical neglect; failure to thrive (non-organic); environmental neglect; and malnutrition (non-organic). *Id.* at app. B § (e) (May 20, 2002).

³⁶ *Id.* § 300.50(c)(8) (Nov. 20, 2009).

³⁷ *Id.* § 300.50(c)(10).

at that time, the “contact must be attempted no later than [twenty-four] hours after the Investigation Specialist observes and assesses the safety of the children.”³⁸

3. Observation of the Child

In addition to interviewing the child, it may be necessary for the Investigation Specialist to examine the child to verify or refute allegations of injury.³⁹ If the report alleges external marks or injuries as a result of neglect or abuse and, based on the information obtained from the investigation or other credible sources, there is “reasonable cause to believe that an observation will reveal marks [or] injuries supporting the allegation,”⁴⁰ the investigator should attempt to view those marks or injuries only in the presence of “a parent[,] guardian or other professional person, preferably of the same sex as the child.”⁴¹ If the investigator discovers information indicating that the child has external marks or injuries on other parts of the child’s body, those marks or injuries should also be observed.⁴² If the marks or injuries are on a part of the body that normally would be covered by a bikini bathing suit and the child is age six or above, then the observing investigator must be of the same sex as the child.⁴³ If the child to be observed is verbal, the investigator should explain the purpose of the observation in words that the child can understand.⁴⁴

If the child’s clothes must be “adjusted or removed” in order for the investigator to observe the alleged marks or injuries, the investigator should “make a good faith effort” to get the parent or guardian’s consent to the observation.⁴⁵ If the parent or guardian is not present at the place where the observation is to take place, the investigator must attempt to notify the parent or guardian of the necessity of observing the child for external marks or injuries.⁴⁶ The investigator must call any emergency numbers left by the parent or guardian and must consult local telephone books and directory assistance if the parent or guardian has not left any emergency numbers or cannot be reached at those numbers.⁴⁷

³⁸ *Id.* If the children are judged to be safe and the alleged perpetrators are not the parents or caretakers, “the Investigation Specialist shall contact the alleged perpetrators within [seven] calendar days” of the initial report. *Id.* (emphasis omitted). Contact can be delayed at the request of law enforcement. *Id.*

³⁹ *Id.* § 300.50(c)(8).

⁴⁰ *Id.* § 300.50(c)(9)(A)(ii). “A report by a mandated reporter shall be deemed to be ‘reasonable cause’ under this paragraph.” *Id.* § 300.50(c)(9)(A)(iii).

⁴¹ *Id.* § 300.50(c)(9)(A).

⁴² *Id.* § 300.50(c)(9)(A)(iii).

⁴³ *Id.* § 300.50(c)(9)(A).

⁴⁴ *Id.*

⁴⁵ *Id.* § 300.50(c)(9)(A)(iii). Those efforts may include (but are not limited to) a request for the parent or guardian’s assistance with moving or removing the child’s clothes. *Id.* Compliance with the request is apparently deemed to be consent to the observation. *See id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

If the parent or guardian is located but refuses to cooperate with the investigator or allow observation of the child, the investigator must notify the parent that the investigator has a “responsibility” to observe the child.⁴⁸ The investigator must then offer the following options:

1. The parent [or] guardian may take the child to a physician or hospital emergency room for a physical examination within a reasonable time. The Investigation Specialist will secure a written report from the examining physician; or
2. The parent [or] guardian may give consent to allow the Investigation Specialist and another professional (e.g., a school nurse, school teacher, policeman, etc.) to observe the child.⁴⁹

If the parent or guardian still refuses to cooperate or allow the observation of external marks or injuries and “the Investigation Specialist determines that the child is in imminent risk of harm if left in the custody of the parent [or] guardian, the Investigation Specialist shall take the child into protective custody and proceed to have the child examined by a physician.”⁵⁰ If there is no imminent harm, the child may not be observed or taken into custody.⁵¹ If internal injuries are alleged, the child must be taken to a physician for examination.⁵² “An Investigation Specialist shall never attempt to examine an alleged child victim for internal injuries or attempt to move a child with internal injuries.”⁵³

Allegations of sexual abuse are handled differently.⁵⁴ “Investigation Specialists will not physically examine any child alleged to have been sexually abused. Investigators must follow local office procedures to arrange for the child’s medical examination and treatment.”⁵⁵ If advocacy center resources are not available at a particular

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* § 300.50(c)(9)(B). The Investigation Specialist shall attempt to get the parent or guardian’s cooperation and consent to taking the child for examination and treatment by a physician. *Id.* If the parent cannot be contacted or refuses to take the child for examination *and* the child is in imminent risk of harm, the child shall be taken into protective custody, and the Investigation Specialist shall have the child taken to a hospital emergency room for examination. *Id.*

⁵³ *Id.* (emphasis omitted).

⁵⁴ *Id.* § 300.50(c)(9)(C) (“Child advocacy centers are available to a number of Department field offices to provide a coordinated multidisciplinary approach to the identification, treatment, and legal aspects of sexual abuse allegations in accordance with the Children’s Advocacy Center Act.”).

⁵⁵ *Id.* (emphasis omitted).

field office, “the Investigation Specialist must notify law enforcement and the State’s Attorney to coordinate a multidisciplinary investigation.”⁵⁶

The initial investigation should be completed within fourteen days.⁵⁷ If, at the end of the initial investigation, it is determined that the alleged victim is not less than eighteen years of age, the alleged victim was not harmed and is not in substantial risk of harm, the allegations do not fit the statutory definition of neglect or abuse, or there is no “eligible perpetrator” as defined by statute, then the report is determined to be “not a good faith indication of abuse or neglect, [and] the investigation shall be discontinued.”⁵⁸ Those reports are categorized as “unfounded.”⁵⁹ If the initial investigation reveals that reasonable cause exists to believe that child abuse or neglect occurred, then the report is “indicated” and a formal investigation must be conducted.⁶⁰ A report is “unqualified” if the investigation determines that there is “not an alleged victim and/or eligible perpetrator of potential abuse or neglect.”⁶¹

4. Referrals to Law Enforcement

Law enforcement may become involved in a child abuse or neglect investigation in many ways. “The Investigation Specialist shall notify the appropriate law enforcement agency and the State’s Attorney of the receipt of reports of Death, Physical Abuse and Sexual Abuse Harms This notification shall take place at the commencement of the initial investigation.”⁶² The rules list several reasons for prompt notification, including notifying law enforcement of a possible criminal act, requesting assistance in protecting the child and the Investigation Specialist, and requesting assistance in preserving evidence and conducting the investigation.⁶³

In some circumstances, law enforcement may take the lead in an investigation. If law enforcement is investigating the incident that is the basis of the child abuse or neglect report received by DCFS, that investigation may preempt the DCFS investigation.⁶⁴ “[T]he Investigation Specialist may [choose to] delegate the initiation of the investigation to . . . law enforcement”⁶⁵ For example, a report may be delegated if “[t]he law enforcement agency is already involved in the situation, an officer had in-person contact with the alleged child victim no longer than one hour prior to” or within twenty-four hours “after the date and time the CA/N report,

⁵⁶ *Id.*

⁵⁷ *Id.* § 300.50(k) (July 8, 2010).

⁵⁸ *Id.* § 300.50(l).

⁵⁹ *Id.*

⁶⁰ *Id.* § 300.50(k).

⁶¹ *Id.* § 300.50(m).

⁶² *Id.* § 300.50(e)(1) (Aug. 27, 2010).

⁶³ *Id.*

⁶⁴ *Id.* § 300.50(c)(1) (Nov. 20, 2009).

⁶⁵ *Id.* § 300.50(c)(2).

and the officer can attest to the current condition and safety of the alleged child victim.”⁶⁶ Neither preemption nor delegation relieves the Investigation Specialist of the “responsibility for assuring the safety of the alleged child victim, interviewing the alleged child victim during the course of the investigation, and meeting all investigative and documentation requirements.”⁶⁷ Finally, DCFS may conduct investigations in cooperation with or parallel to a law enforcement investigation.⁶⁸

B. Texas

The Child Protective Services Division (CPS) of the Texas Department of Family and Protective Services (DFPS) is responsible for investigating reports of abuse or neglect of children.⁶⁹ Reports can be made to the DFPS Statewide Intake (SWI) hotline twenty-four hours a day, seven days a week.⁷⁰ Nonemergency situations can also be reported on the DFPS website.⁷¹ While online reports may be made at any time, it takes up to twenty-four hours for those reports to be processed.⁷² Moreover, reporters must create an account and login (or login as a guest) to access the reporting website.⁷³ Anonymous reports can be made via the hotline.⁷⁴

SWI intake workers gather as much information from the reporter as possible to determine whether the report meets the criteria for CPS investigation and assessment.⁷⁵ If the case is referred to CPS, it is assigned an initial level of priority based on the perceived current risk to the child.⁷⁶ If the report indicates that a child faces an immediate risk of serious harm or death, the report is designated Priority 1 (P1).⁷⁷ If a report is

⁶⁶ *Id.*

⁶⁷ *Id.* (emphasis omitted).

⁶⁸ *Id.* § 300.50(c)(3)–(4) (Jan. 5, 2011).

⁶⁹ *About Texas Child Protective Services (CPS)*, TEX. DEPT. OF FAMILY AND PROTECTIVE SERVS., http://www.dfps.state.tx.us/Child_Protection/About_Child_Protective_Services/ (last visited Oct. 14, 2012).

⁷⁰ *Child Protective Services Handbook*, TEX. DEPT. OF FAMILY AND PROTECTIVE SERVS. § 2000, <http://www.dfps.state.tx.us/handbooks/CPS/Menu/MenuCPS2000.asp> (last visited Oct. 14, 2012) [hereinafter *CPS Handbook*].

⁷¹ *Report Abuse, Neglect, or Exploitation*, TEX. DEPT. OF FAMILY AND PROTECTIVE SERVS., http://www.dfps.state.tx.us/Contact_Us/report_abuse.asp (last visited Oct. 14, 2012).

⁷² *Id.*

⁷³ *Texas Abuse, Neglect, and Exploitation Reporting System*, TEX. DEPT. OF FAMILY AND PROTECTIVE SERVS., <http://www.txabusehotline.org/Login/Default.aspx> (last visited Oct. 14, 2012).

⁷⁴ *Id.*

⁷⁵ *CPS Handbook*, *supra* note 70, § 2110.

⁷⁶ *Id.* A CPS supervisor, SWI supervisor, or CPS investigation screener reviews the report and approves or changes the intake worker’s decision. *Id.* The supervision or screener must document reasons for changing the intake worker’s decision. *Id.*

⁷⁷ *Id.* § 2142. A report will also qualify as P1 if the report alleges abuse or neglect within twelve months after a prior investigation was closed as “Unable to Complete,” or if the report

accepted for investigation but does not qualify as P1, then it is assigned as Priority 2 (P2).⁷⁸ The final category is Priority None (PN) which applies to reports in which:

[t]here does not appear to be a reasonable likelihood that a child will be abused or neglected in the foreseeable future; . . . [t]he allegations are too vague or general to determine whether a child has been, or is likely to be, abused or neglected; [or] [t]he report does not give enough information to locate the child's family or household.⁷⁹

1. Initial Investigation

The purpose of investigating reports of abuse is to protect children.⁸⁰ In most cases, the CPS worker will conduct a "thorough investigation[],"⁸¹ which requires the following actions by the worker:

- Check the abuse and neglect backgrounds of every member of the family and home, unless an exception to this requirement is met;
- Interview and examine each alleged victim;
- Interview and examine other children in the home who may have been abused or neglected but were not named as alleged victims in the intake report;
- Interview each of the alleged victim's parents who are living in the home. If both parents (or the only parent) in the home

alleges the death of a child due to abuse or neglect (regardless of whether there are surviving children in the house). *Id.*

The handbook lists (among others) the following examples of P1 reports: "a child has sustained a serious physical injury from the alleged abuse or neglect"; "a child is alleged to be sexually abused and in immediate danger of further abuse"; "a preschool child is left alone"; "a child is abandoned or totally without parental supervision, family resources, personal resources, or community support[;] [n]o responsible adult is close by to offer limited supervision, and the child is in immediate danger of serious physical harm"; "a child is in immediate danger of death or serious physical harm because the child lacks basic physical necessities or medical attention as a result of alleged neglect"; or, "a child's caretaker behaves in a bizarre, psychotic, or extremely intoxicated or drugged manner and abuse or neglect is alleged." *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* § 2210 (citing TEX. FAM. CODE ANN. § 261.301(d) (West 2011)).

⁸¹ *Id.* § 2224. Alternative investigation types include: "abbreviated investigations, which begin as thorough investigations but are truncated when circumstances indicate that a thorough investigation is unnecessary; unable to complete investigations, in which the family cannot be located . . . or refuse[s] to cooperate with the investigation; and preliminary investigations, which must be administratively closed because CPS lacks jurisdiction." *Id.*

are alleged perpetrators, then the worker must also interview a collateral with relevant information or a principal who is not an alleged victim or perpetrator;

- Interview each alleged perpetrator, unless an exception to this requirement is met;
- Visit the home, unless the worker can confirm or rule out the abuse or neglect without the visit; and
- Check the criminal background of each alleged perpetrator, unless an alleged perpetrator is a child who is also alleged to be a victim.⁸²

These actions should be completed within thirty days of the date of the intake.⁸³

If an anonymous report of child abuse or neglect is made to DFPS, “the department shall conduct a preliminary investigation to determine whether there is any evidence to corroborate the report.”⁸⁴ The preliminary investigation may include a visit to the child’s home, an interview of the child, parents, and anyone else with relevant knowledge, and an examination of the child.⁸⁵ “Unless the department determines that there is some evidence to corroborate the report of abuse, the department may not conduct the thorough investigation required by this chapter or take any action against the person accused of abuse.”⁸⁶

The interview of the alleged victim may take place “at any reasonable time and place, including the child’s home or school.”⁸⁷ In order to interview the child at home, the worker must obtain the parent’s consent.⁸⁸ If the CPS worker seeks to interview the child at school and the parent is present, then the parent must consent to the interview.⁸⁹ If the parent is not present but has already refused to give DFPS consent to interview the child, then CPS workers may not interview the child at school.⁹⁰ If the parent is not present at the school and has not already refused consent, the worker may

⁸² *Id.* § 2224.1.

⁸³ *Id.* § 2270. All investigation activities should be documented and submitted for supervisor approval within forty-five days after the date of the intake, and the investigation should be approved and closed within sixty days after the date of the intake. *Id.*

⁸⁴ TEX. FAM. CODE ANN. § 261.304(a) (West 2011).

⁸⁵ *Id.* § 261.304(b).

⁸⁶ *Id.* § 261.304(c).

⁸⁷ *CPS Handbook*, *supra* note 70, § 2241.

⁸⁸ *Id.* § 2241.1. Consent must be voluntary and not due to coercion or duress. *Id.* § 2245.14 “The standard is whether a reasonable person in the circumstances would believe he or she is free to refuse consent.” *Id.* Consent to interview the child does not give the worker the right to search the entire home unless exigent circumstances exist. *Id.* § 2245.17. “A caseworker can search closets and other areas of the home that the parents have not given consent to search only when: exigent circumstances are present; and the search is necessary to avoid immediate danger to the child.” *Id.*

⁸⁹ *Id.* § 2241.1.

⁹⁰ *Id.*

interview the child.⁹¹ If the parent refuses to grant consent to the interview at home or school, the worker must seek a court order, which will be granted “for good cause shown.”⁹² If exigent circumstances exist, the worker can remove the child from the home or school without a court order.⁹³

The interview must be an in-person, face-to-face interview and should normally be conducted in private without any third parties present.⁹⁴ A third party may be present if his or her presence will improve the quality of the interview or make the child feel more comfortable, but not if his or her presence will compromise the integrity of the investigation.⁹⁵ All interviews must be audio- or videotaped.⁹⁶ “The worker follows protocol to keep the number of interviews with a child to a minimum, while also being thorough, and exercises professional judgment and expertise in determining the nature, extent, and number of interviews and examinations.”⁹⁷

The worker may also need to examine the alleged victim and any other children in the home for signs of abuse or neglect.⁹⁸ All observations from the examinations must be documented by photographs.⁹⁹ If the parent is present, the parent must consent to the examination.¹⁰⁰ If the parent refuses to give consent, then the worker can seek a court order.¹⁰¹ When the examination involves areas “under the child’s clothing,” workers are advised to take precautions and be sensitive to the age and gender of the child.¹⁰²

⁹¹ *Id.*

⁹² TEX. FAM. CODE ANN. § 261.303(b) (West 2011) (“If admission to the home, school, or any place where the child may be cannot be obtained, then *for good cause shown* the court having family law jurisdiction shall order the parent, the person responsible for the care of the children, or the person in charge of any place where the child may be to allow entrance for the interview, examination, and investigation.” (emphasis added)).

⁹³ *CPS Handbook*, *supra* note 70, § 2241.1; *see also id.* §2245.2 (“Exigent circumstances to enter a home exist only when the worker and supervisor determine that: CPS has evidence that a child is in immediate danger; and CPS’s purpose for entering the home is to prevent immediate danger and protect the child. If the child would be safe during a delay to gather more information or obtain a court order, then exigent circumstances are not present.”).

⁹⁴ *Id.* § 2241.2.

⁹⁵ *Id.*

⁹⁶ TEX. FAM. CODE ANN. § 261.302(e) (West 2011); *CPS Handbook*, *supra* note 70, § 2241.2.

⁹⁷ *CPS Handbook*, *supra* note 70, § 2241.2.

⁹⁸ *Id.* § 2250.

⁹⁹ *Id.* § 2251.1.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* The precautions further advise:

The younger the child, the more likely it is to be necessary to visually inspect the child, particularly if he or she is non-verbal. . . . The examination must be done by a worker of the same gender as the child, whenever possible. If this is not possible, at a minimum, the caseworker must have another adult (such as another caseworker, a school nurse, a teacher, a parent, and so on) present throughout the examination.

Id.

“Caseworkers must *never* conduct sexual abuse examinations themselves”¹⁰³ Such examinations may only be conducted by medical professionals and with the consent of a parent.¹⁰⁴ If a parent refuses to give consent, the examination can only be conducted if a court order is obtained.¹⁰⁵

At the end of the investigation the worker must assign a disposition to each allegation included on the intake.¹⁰⁶ The two primary dispositions are: “reason to believe” and “ruled out.”¹⁰⁷ If, based on a preponderance of evidence, CPS concludes that abuse or neglect has occurred, then CPS finds “reason to believe.”¹⁰⁸ If, based on the available information, CPS determines that it is reasonable to conclude that the abuse or neglect has not occurred, then CPS rules out abuse.¹⁰⁹ “‘Available information,’ in the context of the ‘ruled out’ disposition, is the evidence that the worker gathered through the required and supplemental actions he or she took to conduct a thorough or an abbreviated investigation.”¹¹⁰

If there are multiple allegations, then an overall disposition is assigned based upon the separate dispositions for each allegation.¹¹¹

¹⁰³ *Id.* § 2251.2.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 2271.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* There are other dispositions as well. *Id.* The disposition is “Unable to Complete” if “Before staff could draw a conclusion, the persons involved in the allegation moved and could not be located, or the family refused to cooperate with the investigation.” *Id.* “Unable to Determine” is assigned when Staff conclude that “there is not a preponderance of the evidence that abuse or neglect occurred; it is not reasonable to conclude that abuse or neglect has not occurred; and the family did not move and become unable to locate before the worker could draw a conclusion about the allegation.” *Id.* A disposition of “Preliminary Investigation[]” or “Administrative Closure” is assigned when “[i]nformation received after a case was assigned for investigation reveals that continued CPS intervention is unwarranted as outlined in Item 2224.4, Preliminary Investigations (Administrative Closure).” *Id.* Finally, a case may be “Merged in Error” because

[t]wo cases with open investigations can be merged in error. When the case is subsequently split, the IMPACT system will not allow the worker to delete the allegations added from the “merged from” case to the “merged to” case. Therefore, the worker must review the Allegation window of the formerly “merged to” investigation and give the disposition of “merged in error” to allegations that should no longer be a part of the investigation.

Id.

¹¹¹ *Id.* The overall dispositions are assigned as follows:

- Reason to believe: If any allegation disposition is “reason to believe,” the overall case disposition is “reason to believe.”
- Unable to determine: If any allegation disposition is “unable to determine” and no allegation disposition is “reason to believe,” the overall case disposition is “unable to determine.”

2. Cooperation with Law Enforcement

The Texas Family Code requires law enforcement to refer all reports of child abuse or neglect to DFPS and likewise requires DFPS to refer all reports of child abuse or neglect to law enforcement.¹¹² The role of CPS is civil, and CPS policies are intended to clarify the role of CPS and its responsibility for protecting children.¹¹³ CPS staff “must not act as law enforcement agents . . . by gathering evidence or talking to parents, children, or collaterals for the sole purpose of criminal investigation.”¹¹⁴ CPS staff will provide law enforcement with information collected during the civil investigation, testify at criminal hearings, and otherwise cooperate with law enforcement.¹¹⁵ Of particular importance is the requirement that DFPS conduct a joint investigation with law enforcement whenever the intake “alleges that a child has been or may be the victim of conduct that constitutes a criminal offense that poses an immediate risk of physical or sexual abuse of a child that could result in the death of or serious harm to the child.”¹¹⁶

II. WARRANT ISSUED UPON PROBABLE CAUSE

The Fourth Amendment warrant requirement is intended to ensure that a neutral party has reviewed the evidence and concluded that the sanctity of the home or the privacy rights of the individual are not intruded upon arbitrarily.¹¹⁷ The warrant requirement—or at least the requirement that searches or seizures be conducted based on probable cause¹¹⁸—should not be dispensed with lightly, even when

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- Unable to Complete: If any allegation disposition is “unable to complete” and no allegation disposition is “reason to believe” or “unable to determine,” the overall investigation disposition is “unable to complete.”
 - Ruled out: If all allegation dispositions are “ruled out,” the overall case disposition is “ruled out.”
 - Administrative closure: If all allegation dispositions are “administrative closure,” the overall disposition is “administrative closure.”

Id. § 2271.1.

¹¹² TEX. FAM. CODE ANN. § 261.105 (West 2011) (“All reports received by a local or state law enforcement agency that allege abuse or neglect by a person responsible for a child’s care, custody, or welfare shall be referred immediately to the department or the designated agency. The department or designated agency shall immediately notify the appropriate state or local law enforcement agency of any report it receives, other than a report from a law enforcement agency, that concerns the suspected abuse or neglect of a child or death of a child from abuse or neglect.”).

¹¹³ *CPS Handbook*, *supra* note 70, § 2510.

¹¹⁴ *Id.* (emphasis omitted).

¹¹⁵ *Id.*

¹¹⁶ TEX. FAM. CODE ANN. § 261.301(f) (West 2011).

¹¹⁷ *See Katz v. United States*, 389 U.S. 347, 356–57 (1967).

¹¹⁸ *See, e.g., id.* at 357.

government officials are trying to protect vulnerable children. Consequently, as a matter of policy, if the allegations or evidence already obtained by the would-be searchers establish probable cause that a crime has been or is about to be committed, a warrant or equivalent court order should be obtained (absent exigent circumstances or consent).¹¹⁹ The Supreme Court has held,

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a “substantial basis for . . . conclud[ing]” that probable cause existed.¹²⁰

A warrant may not be issued solely based on conclusory statements in an affidavit.¹²¹ “Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.”¹²² Several courts have held that a court order is equivalent to a warrant for Fourth Amendment purposes in child abuse and neglect investigations.¹²³

If the allegations and evidence are not sufficient to establish probable cause, then the following questions must be answered: (1) Should something less than probable cause be sufficient for a warrant to be issued in child abuse or neglect investigations? (2) Does the special needs exception to the warrant requirement apply? (3) Is a warrantless search permissible in the absence of the special needs exception, probable cause, or exigent circumstances?

¹¹⁹ See *Illinois v. Gates*, 462 U.S. 213 (1983).

¹²⁰ *Id.* at 238–39 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960), *overruled on other grounds by* *United States v. Salvucci*, 448 U.S. 83 (1980)).

¹²¹ *Id.* at 239.

¹²² *Id.*

¹²³ See, e.g., *Tenenbaum v. Williams*, 193 F.3d 581, 602 (2d Cir. 1999) (“In the context of a seizure of a child by the State during an abuse investigation, as the district court recognized, a court order is the equivalent of a warrant.”). It is interesting to note that state laws may authorize issuance of a court order based upon something other than probable cause. For example, in Texas, a family law court may order the parent or guardian to allow entry into the home and allow an interview of the child based upon a showing of “good cause.” *Roe v. Texas Dep’t of Protective & Regulatory Servs.*, 299 F.3d 395, 407 n.15 (5th Cir. 2002) (quoting TEX. FAM. CODE ANN. § 261.303 (West Supp. 2002)). But see *Greene v. Camreta*, 588 F.3d 1011, 1030 n.19 (9th Cir. 2009), *vacated as moot*, *Greene v. Camreta*, 661 F.3d 1201 (9th Cir. 2011) (citing Oregon statutes which allow caseworkers to obtain a court order for an in-school interview by submitting an affidavit stating facts that constitute probable cause that a child has been abused); *Tenenbaum v. Williams*, 862 F. Supp. 962, 975 & n.9 (E.D.N.Y. 1994) (stating that reasonable cause in family court proceedings is equivalent to probable cause in criminal proceedings).

III. COURT ORDER BASED ON LESS THAN PROBABLE CAUSE

In very limited circumstances, the Supreme Court has authorized searches based on something less than probable cause.¹²⁴ In *Safford Unified School District No. 1 v. Redding*,¹²⁵ the Court referenced its holding in *New Jersey v. T.L.O.*¹²⁶ that a lesser standard should apply to searches of students in a public school setting:

In *T.L.O.*, we recognized that the school setting “requires some modification of the level of suspicion of illicit activity needed to justify a search,” and held that for searches by school officials “a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause.” We have thus applied a standard of reasonable suspicion to determine the legality of a school administrator’s search of a student, and have held that a school search “will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”¹²⁷

While this language appears to authorize searches based on reasonable suspicion under some circumstances, the *T.L.O.* case has been regarded as the first recognition of the “special needs” exception to the Fourth Amendment warrant requirement.¹²⁸ To the extent that courts have already rejected application of the “special needs” exception,¹²⁹ this case or its successors cannot be relied upon as sanctioning searches based on reasonable suspicion instead of probable cause.¹³⁰

However, rejecting the special needs exception does not bar courts from recognizing that while child abuse and neglect investigations do not fit easily within the rationale underlying that exception, the need to protect children provides a justification for recognizing a different exception to the warrant requirement. The standard

¹²⁴ See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009).

¹²⁵ 129 S. Ct. 2633 (2009).

¹²⁶ 469 U.S. 325 (1985).

¹²⁷ *Redding*, 129 S. Ct. at 2639. (citation omitted) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

¹²⁸ See *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring) (“Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”).

¹²⁹ See, e.g., *Greene v. Camreta*, 588 F.3d 1011, 1026–27 (9th Cir. 2009) (holding “special needs” inapplicable because the purpose of child abuse investigations is to gather evidence); *Tenenbaum v. Williams*, 193 F.3d 581, 605–06 (2d Cir. 1999).

¹³⁰ See *Coleman*, *supra* note 1, at 474–75.

applied in abuse and neglect cases need not be identical to the special needs standard and could be tailored to fit the circumstances raised by abuse and neglect cases.

The need for a less rigorous standard for investigative child abuse searches exists because there may be no means by which social workers can evaluate abuse allegations without conducting a search of the home or an interview of the children. This is particularly true if the parents or guardians are the alleged perpetrators and if the children are isolated from other members of society. For instance, a young child may not attend school or preschool and may have little or no contact with adults other than the potentially abusive parent(s). Consequently, there may be little or no opportunity to investigate abuse or neglect allegations without the cooperation of the parents (which is unlikely if the allegations are true) or the ability to search the home or interview the child. Obtaining a warrant may likewise be impossible. A report of abuse may not provide sufficient information to qualify as probable cause to support a search warrant. Absent some other authority to investigate the allegations, no investigation may take place.

Parents have understandably objected to a lower standard, arguing that the government's right to interfere in their decisions as parents must be limited.¹³¹ While this viewpoint is valid, it does not address the need to protect children from parents who are harming, or allowing others to harm, their children. A standard that balances privacy interests with the need to protect those unable to protect themselves is necessary to protect rights without unnecessarily sacrificing the safety of children.

This balance can be struck by requiring investigators to obtain a court order to interview children, but requiring only reasonable belief instead of probable cause for the issuance of the order. Because a government worker would still need to present facts to a judge—a neutral party—in order to obtain the order, workers are protected and will not bear the burden of relying on their own judgment in difficult cases. More important, it protects the parents and children that are the targets of investigation. While perhaps more burdensome than warrantless searches, this middle ground approach recognizes the sanctity of the home and parent-child relationship, while still providing a mechanism for protecting children who are alleged victims of abuse and neglect.

¹³¹ One group that is particularly well-organized in their opposition is the Home School Legal Defense Association (HSLDA). Many parents who home school their children do so because of a distrust of the public school system, and some may harbor suspicions about the government in general. They are particularly opposed to social worker investigations because they believe that government officials will treat them less favorably than other families because of the government's perceived negative opinion of home-schooling families. See Summer A. Duke, Comment, *Standard Bearers of the Fourth Amendment: The Curious Involvement of Home School Advocates in Constitutional Challenges to Child Abuse Investigations*, 73 UMKCL. REV. 137, 140–42 (2004); see also Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 127–28 (2008) (discussing HSLDA legal challenges).

This approach is also consistent with current practice in many states.¹³² As discussed above, Texas requires workers to obtain a court order if the parent refuses to allow the child to be interviewed or examined.¹³³ The court will issue an order on “good cause shown.”¹³⁴ The statute could be amended to lower the standard to “reasonable belief” for all court orders in abuse and neglect situations, or a separate statute could be drafted to address situations in which the worker has a “reasonable belief” but does not have evidence that rises to the level of probable cause.¹³⁵ If only the lower standard can be met, the court could issue an order authorizing a more limited search and seizure. Rather than give the worker broad authority to conduct an interview or inspection, the order could limit the place, duration, and scope of the interview or observation of the child.¹³⁶

IV. SPECIAL NEEDS EXCEPTION TO THE WARRANT REQUIREMENT

The Fourth Amendment protects against unreasonable government intrusion.¹³⁷ There is a great deal of uncertainty regarding whether the search of a home or the seizure and interview of a child in the course of a child abuse or neglect investigation violates the Fourth Amendment if the search or seizure is conducted without a warrant supported by probable cause.¹³⁸ Some states have regulations authorizing warrantless searches or seizures in specified circumstances,¹³⁹ but state law cannot authorize conduct that violates the United States Constitution.¹⁴⁰

¹³² See, e.g., TEX. FAM. CODE ANN. § 261.303(b) (West 2011).

¹³³ *Id.*; see discussion *supra* Part I.B.

¹³⁴ TEX. FAM. CODE ANN. § 261.303(b).

¹³⁵ It should be noted that some courts have already held that “reasonable cause” in family court proceedings is equivalent to probable cause in criminal proceedings. *Tenenbaum v. Williams*, 862 F. Supp. 962, 975 & n.9 (E.D.N.Y. 1994). To the extent that the court treats “reasonable cause” as requiring the same level of proof required to meet the probable cause standard, this author’s proposal represents a change. If the court recognizes that reasonable cause is a lower standard, this author simply agrees with that court’s assertion.

¹³⁶ The statute merely states:

If admission to the home, school, or any place where the child may be cannot be obtained, then for good cause shown the court having family law jurisdiction shall order the parent, the person responsible for the care of the children, or the person in charge of any place where the child may be to allow entrance for the interview, examination, and investigation.

TEX. FAM. CODE ANN. § 261.303(b) (West 2011). The statute does not place any limitations or restrictions on the workers once the order has been obtained. *Id.*

¹³⁷ See generally *Katz v. United States*, 389 U.S. 347 (1967) (holding that warrantless eavesdropping of a telephone both was an unreasonable search and seizure prohibited by the Fourth Amendment).

¹³⁸ See *supra* text accompanying notes 129–30.

¹³⁹ See, e.g., TEX. FAM. CODE ANN. § 261.303(b).

¹⁴⁰ See, e.g., *Chandler v. Miller*, 520 U.S. 305 (1997) (holding unconstitutional a Georgia law requiring candidates for state office to submit to a drug test as a violation of the Fourth Amendment).

Many state courts and federal district and appellate courts have addressed this issue but have not reached uniform conclusions.¹⁴¹ A few have held that the special needs exception to the warrant requirement applies in child abuse investigations.¹⁴² Others reject the exception because of law enforcement involvement in such investigations.¹⁴³ Confusion persists because the United States Supreme Court has not weighed in on the issue.¹⁴⁴

The Supreme Court recognized the special needs exception to the warrant requirement in *New Jersey v. T.L.O.*¹⁴⁵ In that case the Court upheld a warrantless search of a student's purse by public school officials.¹⁴⁶ While students retain a reasonable expectation of privacy while at school, the Court recognized that requiring a warrant before searching students suspected of possessing contraband or otherwise violating rules designed to promote order or protect student safety would pose an undue burden on the schools.¹⁴⁷

We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.¹⁴⁸

The test for Fourth Amendment compliance was "reasonableness, under all the circumstances, of the search."¹⁴⁹ In order to be reasonable, the search must be justified at its inception and must be conducted in a manner that is "reasonably related in scope to the circumstances which justified the interference in the first place[.]"¹⁵⁰

¹⁴¹ See *supra* note 123; see also Coleman, *supra* note 1, at 470–71 n.170.

¹⁴² See, e.g., Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986).

¹⁴³ See, e.g., Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009); Roe v. Texas Dep't of Protective & Regulatory Servs., 299 F.3d 395, 406 (5th Cir. 2002).

¹⁴⁴ See Coleman, *supra* note 1, at 416.

¹⁴⁵ *New Jersey v. T.L.O.*, 469 U.S. 325, 340–41 (1985).

¹⁴⁶ *Id.* at 340. "Just as we have in other cases dispensed with the warrant requirement when 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search' we hold today that school officials need not obtain a warrant before searching a student who is under their authority." *Id.* at 340 (citation omitted) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967)).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 341 (footnote omitted).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1967)); see also *Roe v. Texas Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 404 (5th Cir. 2002) (citing *O'Connor v. Ortega*, 480 U.S. 709, 725–26 (1987)).

The exception to the warrant requirement will not apply if the policy justifying the search is impermissibly intertwined with the goals of regular law enforcement.¹⁵¹ In *Ferguson v. City of Charleston*,¹⁵² the staff of a public hospital collaborated with the police to draft and enforce a policy that routinely collected urine samples of pregnant women suspected of drug abuse.¹⁵³ The policy was intended to deter drug abuse and to encourage the pregnant women to enter substance abuse treatment if necessary.¹⁵⁴ In order to facilitate and encourage the women to pursue counseling or avoid drugs, positive drug test results were shared with the police and the women were threatened with prosecution.¹⁵⁵ Women who failed more than one drug test or who failed to complete the substance abuse program were arrested and prosecuted.¹⁵⁶ Several women filed suit alleging that the policy violated their Fourth Amendment rights.¹⁵⁷ Specifically, they alleged that the tests were conducted without consent and without a warrant and thus constituted a violation of their right to be free from unreasonable government searches.¹⁵⁸

The Supreme Court noted that the hospital staff members were government actors and that the urine tests constituted searches within the meaning of the Fourth Amendment.¹⁵⁹ The hospital argued that no warrant was necessary because the searches fit within the special needs exception to the warrant requirement.¹⁶⁰ The Court disagreed, noting that in each of the previous cases in which the special needs exception was invoked, the “special need” that was advanced was “*divorced* from the State’s general interest in law enforcement.”¹⁶¹

[T]he central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment. This fact distinguishes this case from circumstances in which physicians or psychologists, in the course of ordinary medical procedures aimed at helping the patient herself, come across information that under rules of law or ethics is subject to reporting requirements, which no one has challenged here.¹⁶²

¹⁵¹ *Ferguson v. City of Charleston*, 532 U.S. 67, 83–84 (2001).

¹⁵² 532 U.S. 67 (2001).

¹⁵³ *Id.* at 71.

¹⁵⁴ *Id.* at 70–72.

¹⁵⁵ *Id.* at 72.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 73.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 76.

¹⁶⁰ *Id.* at 73.

¹⁶¹ *Id.* at 79 (emphasis added).

¹⁶² *Id.* at 80–81.

Given the use of law enforcement to enforce the policy and the “extensive involvement of law enforcement officials at every stage of the policy,”¹⁶³ the case was outside of the special needs exception to the Fourth Amendment warrant requirement.¹⁶⁴ Although drug abuse was acknowledged to be a grave problem, “[t]he Fourth Amendment’s general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to such a policy.”¹⁶⁵

Some courts have held that child abuse or neglect investigations trigger the special needs exception to the Fourth Amendment warrant requirement.¹⁶⁶ However, the majority of circuits addressing the issue have cited *Ferguson* as justification for rejecting the special needs exception.¹⁶⁷ Specifically, they note that law enforcement is often intimately involved in abuse and neglect investigations as a matter of policy and practice.¹⁶⁸

A. Search and Seizure of a Child from a Home

In *Gates v. Texas Department of Protective & Regulatory Services*,¹⁶⁹ the plaintiffs brought suit against the Texas Department of Protective and Regulatory Services (TDPRS) and other government entities, alleging violations of their constitutional rights.¹⁷⁰ The claims were based on actions taken in response to a call from a school official to the state abuse and neglect hotline.¹⁷¹ In the call, the school official described various forms of punishment that one of the plaintiffs used to discipline his son Travis, who was a student at the school.¹⁷² Travis suffered from severe psychological disorders, including an eating disorder that caused him to steal and consume large amounts of food.¹⁷³ The plaintiff and the school had conflicting views on how

¹⁶³ *Id.* at 84.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 86. “While respondents are correct that drug abuse both was and is a serious problem, ‘the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.’” *Id.* (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 42–43 (2000)). *See also* *Chandler v. Miller*, 520 U.S. 305 (1997) (drug testing for candidates for state offices); *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989) (drug testing for railroad employees).

¹⁶⁶ *See* *Darryl H. v. Coler*, 801 F.2d 893, 902–03 (7th Cir. 1986) (holding that reasonableness, not probable cause, is the test for whether a visual search of a child without parental consent violates the Fourth Amendment).

¹⁶⁷ *See* *Coleman*, *supra* note 1, at 470–71 n.170 (listing various examples from across the country).

¹⁶⁸ *See, e.g.,* *Roe v. Texas Dep’t of Regulatory & Protective Servs.*, 299 F.3d 395, 407 (5th Cir. 2002).

¹⁶⁹ 537 F.3d 404 (5th Cir. 2008).

¹⁷⁰ *Id.* at 412.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

best to manage Travis's behavior, and the report to the hotline indicated that at least some school officials believed that the plaintiff's disciplinary techniques crossed the line to abuse.¹⁷⁴

In response to the hotline call, TDPRS initiated an investigation.¹⁷⁵ During the course of the investigation, Travis was interviewed at his school then moved to the Child Advocacy Center (CAC) for a videotaped interview.¹⁷⁶ Based in large part on the information gained during the interviews of Travis and three of his brothers, TDPRS workers, accompanied by deputies from the sheriff's department, went to the plaintiff's home to interview more of Travis's twelve siblings.¹⁷⁷ When they arrived at the home, the housekeeper allowed the TDPRS workers into the home and they began to interview the other children.¹⁷⁸ The plaintiff arrived home shortly after and, according to his testimony, demanded that the TDPRS workers leave.¹⁷⁹ They did not leave and ultimately removed all of the children from the home and placed them in foster homes.¹⁸⁰ A Suit Affecting the Parent-Child Relationship was filed three days later.¹⁸¹ A hearing was conducted later that day, and the court ordered the return of the children to their parents.¹⁸² The case against the plaintiffs was dismissed seven months later.¹⁸³ Over the next three years, TDPRS investigated two other reports of suspected abuse involving the plaintiffs' children.¹⁸⁴ No charges were brought as a result of those investigations.¹⁸⁵

The plaintiffs filed suit against TDPRS alleging, among other claims, that their Fourth Amendment rights were violated when the TDPRS employees entered their home without a warrant.¹⁸⁶ The Fifth Circuit began its analysis by noting that the Fourth Amendment applies to civil investigations conducted by social workers and generally prohibits government entry into a home without a warrant supported by

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 413.

¹⁷⁶ *Id.* The Child Advocacy Center was established for the purpose of coordinating child abuse investigations among TDPRS, law enforcement, and the district attorney's office. *Id.* By conducting interviews in a central location, children were spared the trauma of multiple interviews by various government entities. *Id.*

¹⁷⁷ *Id.* at 413–14.

¹⁷⁸ *Id.* at 414. The TDPRS representatives claimed that the housekeeper consented to their entrance into the home. *Id.* The housekeeper denied that she gave consent. *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 414–15.

¹⁸¹ *Id.* at 415. These events, including the removal of the children, took place on a Friday afternoon. The suit was filed, and the hearing was held on the next business day, which was Monday. *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 416.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 419.

probable cause, consent, or exigent circumstances.¹⁸⁷ It further acknowledged that the Supreme Court has recognized a few circumstances in which “special needs” beyond the general interest in law enforcement justify a warrantless search.¹⁸⁸ The defendants alleged that the housekeeper consented to their entry and that the special needs exception applied to their search of the home as part of a child abuse investigation.¹⁸⁹

The court determined that there was a question of fact as to whether the housekeeper consented to the TDPRS employees’ entry into the house,¹⁹⁰ and it held that there were no exigent circumstances justifying a warrantless entry.¹⁹¹ The court then considered whether the special needs exception to the warrant requirement applied. It ultimately concluded that the exception did not apply and that the plaintiffs had alleged a constitutional violation.¹⁹² “Key to the special needs doctrine . . . is that the need must be divorced from the purpose of law enforcement.”¹⁹³

Texas law requires TDPRS to notify law enforcement of all child abuse reports and to conduct joint investigations if the report of abuse alleges that the child is at risk of immediate physical or sexual abuse.¹⁹⁴ In the case under consideration, the court noted that the entry into the plaintiffs’ home to investigate the allegation of child abuse “was closely tied with law enforcement.”¹⁹⁵ Consequently, “because the need to enter the Gateses’ home was not divorced from the state’s general interest in law enforcement, there was no special need that justified the entry.”¹⁹⁶ Some other circuits addressing the issue have reached the same conclusion.¹⁹⁷ Others have left

¹⁸⁷ *Id.* at 419–20 (citing *Roe v. Texas Dep’t of Protective & Regulatory Servs.*, 299 F.3d 395, 401 (5th Cir. 2002)).

¹⁸⁸ *Id.* at 420.

¹⁸⁹ *Id.* at 419.

¹⁹⁰ *Id.* at 421.

¹⁹¹ *Id.* at 422–23.

¹⁹² *Id.* at 424.

¹⁹³ *Id.* at 423.

¹⁹⁴ *Id.* The court cited its holding in *Roe* that “the special needs doctrine did not permit a social worker to visually search a child’s body cavities as part of an abuse investigation without a warrant or exigent circumstances. In reaching that conclusion, we noted that Texas law requires TDPRS to notify law enforcement of all child abuse reports.” *Id.* (citation omitted); *see also* discussion *supra* Part I.B.

¹⁹⁵ *Gates*, 537 F.3d at 424.

¹⁹⁶ *Id.*

¹⁹⁷ *See Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1242 (10th Cir. 2003) (“We find no special need that renders the warrant requirement impracticable when social workers *enter a home* to remove a child, absent exigent circumstances.”); *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000) (“Officials may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.”); *see also Siliven v. Indiana Dep’t of Child Servs.*, 635 F.3d 921, 926 (7th Cir. 2011) (citing *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1010 (7th Cir. 2000)) (holding

open the possibility that the special needs exception could apply in some child abuse investigations.¹⁹⁸ The Second Circuit falls into the latter category, stating: “There may be circumstances in which the law of warrant and probable cause established in the criminal setting does not work effectively in the child removal or child examination context.”¹⁹⁹

The court’s conclusion in *Gates*—that the state’s interest in preventing child abuse goes “beyond” law enforcement but is not “divorced” from it was paramount in its decision not to apply the special needs exception.²⁰⁰ According to the Fifth Circuit, because both of the interests are present, the standard probable cause test must be met instead of the lower standard of reasonableness that is used when the special needs doctrine applies.²⁰¹ However, the interest in law enforcement exists precisely because child abuse is directed at society’s most vulnerable citizens.²⁰² Ironically, this interest in punishing child abusers makes it more difficult to prevent child abuse. While this may be appropriate from a Fourth Amendment perspective, it leaves vulnerable children with less protection. This is especially true in cases in which there is some evidence of abuse but insufficient evidence to support issuance of a warrant.

It is not clear that the Supreme Court truly requires the state’s interest to be completely separate from law enforcement. In *Ferguson*, for example, law enforcement was “extensive[ly]” involved in the development, implementation, and enforcement of the policy.²⁰³ It does not follow that any tangential law enforcement involvement automatically prevents a policy or interest from coming within the special needs exception to the Fourth Amendment warrant requirement. Indeed, the Court distinguished the policy at issue in that case from circumstances in which health care professionals incidentally come across evidence of illegal activity in the course of their treatment of a patient.²⁰⁴ In those cases, the health care workers may be required to report their findings to law enforcement officials.²⁰⁵ However, that does not make the

that a seizure of a child from his home is reasonable for Fourth Amendment purposes if it is pursuant to a court order, supported by probable cause, or if exigent circumstances exist).

¹⁹⁸ *Tenenbaum v. Williams*, 193 F.3d 581, 604 (2d Cir. 1999) (stating that the court would “refrain from deciding categorically,” that the special needs exception could never apply to a case in which a child was removed from his or her home during the course of a child abuse investigation).

¹⁹⁹ *Id.* at 604. The Seventh Circuit has not expressly rejected application of the special needs exception in child abuse investigations, but dicta in *Doe v. Heck* indicates that it would do so if the case were presented to the court. 327 F.3d 492, 517 n.20 (7th Cir. 2003).

²⁰⁰ *Gates*, 537 F.3d at 423–24.

²⁰¹ *Id.* at 423.

²⁰² *See, e.g., Wyman v. James*, 400 U.S. 309, 318 (1971) (noting, albeit in dicta, that the search of a home was not unreasonable because “[t]here is no more worthy object of the public’s concern” than a child).

²⁰³ *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001).

²⁰⁴ *Id.* at 80–81.

²⁰⁵ *Id.* at 81.

treatment subject to the Fourth Amendment warrant requirement.²⁰⁶ Consequently, despite use of the term “divorce,” the Court itself did not require a complete separation from any possible law enforcement involvement.²⁰⁷

If the “primary purpose” standard is applied instead, then the special needs exception could be applied in child abuse or neglect investigations.

The special needs doctrine is reserved for exceptional circumstances to justify a search designed to serve non-law enforcement ends. Whether the special needs doctrine applies depends upon the purpose of the law or policy in issue. If the *primary purpose* is ordinary law enforcement, the special needs doctrine does not apply and the search cannot be upheld under the doctrine. However, once a non-ordinary law enforcement purpose is identified, the court conducts a reasonableness test balancing the individual’s privacy interests against the government’s special need.²⁰⁸

The primary purpose of child abuse investigations is ensuring the health and well-being of children.²⁰⁹ Prosecution of parents or caregivers is not automatic nor is it the focus of such investigations. The investigations and consequent searches are intended to determine whether the allegations or suspicions of abuse or neglect are well-founded.²¹⁰ If so, the focus then becomes protecting the children from further abuse or neglect and providing a safe environment for the children, either in foster care, with relatives, or in the home with support services provided by the state.²¹¹

State laws regulating child abuse investigations may overlap significantly with law enforcement regulations.²¹² This entanglement is intended to reduce the need for duplicate investigative work or to minimize trauma to victims.²¹³ For example, in

²⁰⁶ See *id.* at 84.

²⁰⁷ See *id.* at 78–82.

²⁰⁸ *United States v. Sczubelek*, 255 F. Supp. 2d 315, 320 (D. Del. 2003) (emphasis added) (citation omitted).

²⁰⁹ See ILL. DEP’T OF CHILD & FAMILY SERVS., PROCEDURES, *supra* note 18, § 300.10 (Dec. 13, 2010) (“Child Protective Services (CPS) is a specialized component of the broader public welfare system of services to children and families. The purpose of these procedures is to define the intervention process when a report or referral is received from the community expressing concerns that a child is or may be maltreated and the Department’s response to those concerns. Community concerns received by the Department will be evaluated to identify families in need of protective services consistent with laws and policies pertaining to child maltreatment and the risk of maltreatment.”).

²¹⁰ See, e.g., *id.* § 300.50(a) (Nov. 20, 2009).

²¹¹ See, e.g., *id.* § 300.90(a)–(b).

²¹² See discussion *supra* Part I.A.4.

²¹³ See, e.g., *Gates v. Texas Dep’t of Protective & Regulatory Servs.*, 537 F.3d 404, 413 (5th Cir. 2008).

some states, victims are interviewed by social service investigators and police officers jointly or in a central location to avoid requiring the victim to undergo multiple interviews or relate traumatic events multiple times.²¹⁴ The regulations also allow evidence collected by social service workers to be used at trial against the abuser.²¹⁵ However, statutes can be revised to reduce entanglement, particularly at the initial stages of an investigation, if doing so will allow the special needs exception to apply. If a report of abuse or neglect is received but there is insufficient evidence to support issuance of a warrant, state law may be revised to allow for a limited, warrantless search or seizure of the child.

Law enforcement would only participate at this stage if it was deemed necessary for the protection of the alleged victim or the investigator. Even then, they would not participate in the interview and, if possible, would not be present for any actual discussion. Instead, once the child's and investigator's safety are assured, the law enforcement officers could leave, remain outside of the home, or move to another room. This would ensure that they are not involved in the search and seizure although, if necessary, they would be available if the situation turned violent. To the extent that social workers fear for their safety, it should be made clear to officers that their presence is solely for the purpose of protecting the social worker.²¹⁶ If law enforcement officers are present under those circumstances, and even if they assist in the searches, their presence is intended to protect the investigator and, if necessary, the children; thus criminal prosecution is not the primary purpose of their involvement. They are not there for the purpose of gathering evidence to be used against the parents, although that may be an incidental result. To view the primary purpose as law enforcement is to assume that the focus is on punishing the parent rather than protecting a child.

This clarification and limitation of the law enforcement role would minimize any concern that the primary purpose of the investigation is law enforcement. Information gathered may still be turned over to police, but only if such information is evidence of a crime. In this respect, such searches are analogous to the results of medical tests being turned over to police if the results are relevant to a criminal investigation.²¹⁷ The purpose of the tests is diagnosing and treating illness. The fact that the information may be used in a criminal investigation does not negate or overshadow that purpose.²¹⁸

²¹⁴ *See id.*

²¹⁵ *See id.*

²¹⁶ If, after arriving at the interview or investigation site, it becomes apparent that children are in danger, the officer's role may expand to include protection of the child (by removal of the child, if exigent circumstances exist). *See, e.g.,* ILL. DEP'T OF CHILD & FAMILY SERVS., PROCEDURES, *supra* note 18, § 300.80(f) (Nov. 20, 2009).

²¹⁷ *See* Ferguson v. City of Charleston, 532 U.S. 67, 80–81 (2001).

²¹⁸ *See id.*

B. Search and Seizure on Private Property Other than the Home

The Seventh Circuit has rejected the special needs exception in the context of searches at private schools.²¹⁹ In *Doe v. Heck*,²²⁰ social workers were notified that corporal punishment was being used as a form of discipline at a private Christian school.²²¹ Child Welfare caseworkers interviewed a former student whose guardian filed the complaint, and she identified another student, eleven-year-old John Doe, Jr., who she believed had also been spanked.²²² Caseworkers then went to the school and demanded that the school allow them to interview John about the alleged corporal punishment and other family matters.²²³ The principal objected to the interviews without a court order or parental consent, but the police allowed the caseworkers to remove John from his classroom and interview him over the principal's objection.²²⁴ The caseworkers, relying on a Wisconsin statute, their training by the Bureau of Child Welfare, the advice of the local district attorney's office, and the advice of the attorney for the Bureau, informed the school principal that they did not need a warrant or parental consent to interview the school's students as part of their investigation.²²⁵ According to the statute:

[t]he agency may contact, observe, or interview the child at any location without permission from the child's parent, guardian or legal custodian if necessary to determine if the child is in need of protection or services, except that the person making the investigation may enter a child's dwelling only with permission from the child's parent, guardian or legal custodian or after obtaining a court order.²²⁶

The Bureau of Child Welfare sought to interview other students on a different occasion, but the principal refused to allow the caseworkers access.²²⁷ Having

²¹⁹ *Doe v. Heck*, 327 F.3d 492, 517 & n.20 (7th Cir. 2003).

²²⁰ 327 F.3d 492 (7th Cir. 2003).

²²¹ *Id.* at 499. In this case, the initial report of child abuse was made by the great-grandmother of a former student. The great-grandmother, who was one of the child's guardians, reported that her great-granddaughter had been spanked by the private school's principal twice and that after the second spanking the child had bruises on her back. *Id.* at 500. She and her husband disagreed with the school's corporal punishment policy and withdrew the child from the school. *Id.* In her interview with the Child Welfare Bureau, the great-grandmother also expressed concern for the other children at the school who were being spanked. *Id.* She had also reported the spankings to the police who informed her that nothing could be done since she had not taken any pictures of the bruises on the child. *Id.* at 501.

²²² *Id.*

²²³ *Id.* at 502–04.

²²⁴ *Id.* at 502–03.

²²⁵ *Id.* at 503.

²²⁶ *Id.* at 502 (quoting WIS. STAT. § 48.981(3)(c)(b)(1) (2010)).

²²⁷ *Id.* at 506.

unsuccessfully attempted to interview John's siblings and parents or to obtain sufficient corroborating information, the Bureau eventually ended its investigation.²²⁸ John's parents and the school filed suit against three caseworkers, alleging various constitutional violations.²²⁹

The Seventh Circuit found that the investigation on the private school's premises was undoubtedly a search for Fourth Amendment purposes.²³⁰ Moreover, the court held that John was "seized" when the caseworkers removed him from his classroom and placed him in another room to be interviewed.²³¹ Thus, the only issue was whether the search and seizure were reasonable in the absence of a warrant or parental consent.²³²

The court noted that the Supreme Court has distinguished between searches and seizures on public property and those on private property, and has held that warrantless searches are presumptively unreasonable when carried out on private property unless they fall within a recognized exception.²³³ "Moreover, the principle that a warrantless search or seizure conducted on private property is unreasonable applies . . . so long as the claimant had a reasonable expectation of privacy in the premises on which the search or seizure occurred."²³⁴ The Seventh Circuit concluded that the Does had a reasonable expectation of privacy on the private school premises.²³⁵ Consequently, the search and seizure were unreasonable unless some recognized exception applied.²³⁶

The defendant caseworkers relied on two Seventh Circuit cases, *Darryl H. v. Coler*²³⁷ and *Landstrom v. Illinois*,²³⁸ in which the court held that warrantless strip searches of students on school premises did not violate the Fourth Amendment.²³⁹ However, as the court in *Doe v. Heck* pointed out, those searches occurred on public school property with the consent of public school administrators.²⁴⁰

²²⁸ *Id.* at 508.

²²⁹ *Id.* In addition to their Fourth Amendment claims, the plaintiffs alleged violations of their Fourteenth Amendment rights. *Id.*

²³⁰ *Id.* at 510.

²³¹ *Id.* "[W]e conclude that John Jr. was 'seized' with[in] the meaning of the Fourth Amendment because no reasonable child would have believed that he was free to leave the nursery." *Id.*

²³² *Id.*

²³³ *Id.* at 511 (citation omitted).

²³⁴ *Id.*

²³⁵ *Id.* at 512.

²³⁶ *Id.* at 512–13.

²³⁷ 801 F.2d 893 (7th Cir. 1986).

²³⁸ 892 F.2d 670 (7th Cir. 1990).

²³⁹ *Heck*, 327 F.3d at 513–14 (citing *Landstrom v. Illinois Dep't of Children & Family Servs.*, 892 F.2d 670 (7th Cir. 1990); *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986)).

²⁴⁰ *Id.* at 514.

Citing *Brokaw v. Mercer County*,²⁴¹ the Seventh Circuit held that the seizure of a child on private property is unreasonable unless the government obtains a court order supported by probable cause or if exigent circumstances exist.²⁴² “[I]t is *Brokaw*, not *Darryl H.* and *Landstrom*, that controls our decision in this case.”²⁴³ Since the court had already concluded that the record “clearly shows that the defendants’ search of the school and seizure of the child were not done pursuant to a court order, probable cause, or exigent circumstances,”²⁴⁴ the search and seizure violated the Fourth Amendment.²⁴⁵ The court went on to hold that the statute upon which the case-workers relied was unconstitutional to the extent that it authorized “government officials to conduct an investigation of child abuse on private property without a warrant or probable cause, consent, or exigent circumstances.”²⁴⁶

The Seventh Circuit was careful to note that because the defendants did not contend that the special needs exception applied to the case, the court was not deciding whether the exception could apply.²⁴⁷ It concluded:

Nevertheless, given that the exigent circumstances exception already gives the State the ability to take immediate action to ensure the physical safety of a child suspected of abuse who is located on private property, there is no apparent justification for carving out a “special needs” exception for child abuse investigations in this context.²⁴⁸

Thus, although they did not do so expressly in *Doe v. Heck*, the Seventh Circuit has strongly signaled that they are likely to reject the special needs exception in child abuse and neglect investigations conducted on private property if the issue is presented for decision.

C. Search and Seizure in Public Schools

While the Fourth Amendment applies to children in public (as opposed to private) schools,²⁴⁹ the scope of protection is less than that which is enjoyed in the home.²⁵⁰ Nevertheless, in the context of child abuse and neglect investigations, some courts have held that a warrant, probable cause, or parental consent are required

²⁴¹ 235 F.3d 1000 (7th Cir. 2000).

²⁴² *Heck*, 327 F.3d at 514.

²⁴³ *Id.*

²⁴⁴ *Id.* at 513.

²⁴⁵ *Id.* at 515.

²⁴⁶ *Id.* at 515–16.

²⁴⁷ *Id.* at 513.

²⁴⁸ *Id.* at 517 n.20.

²⁴⁹ See *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985).

²⁵⁰ See *id.* at 341.

before a child can be searched or seized on public school property.²⁵¹ Others, such as the Seventh Circuit, have applied a more lenient rule.²⁵²

In *Greene v. Camreta*,²⁵³ the plaintiff had been arrested and charged with sexually abusing F.S., who was the child of family friends.²⁵⁴ The parents of the alleged victim claimed that the plaintiff's wife had expressed concern regarding the plaintiff's interactions with their own daughters.²⁵⁵ In response to this information, social services workers went to the plaintiff's older daughter's school and requested to speak to her.²⁵⁶ The social worker was accompanied by a law enforcement officer.²⁵⁷ School administrators pulled the daughter out of class, led her to an empty room, and left her with the social worker and the police officer.²⁵⁸ The social worker asked questions while the officer stood by, armed but silent.²⁵⁹ The social worker claimed that the daughter made statements indicating that she had been sexually abused by her father.²⁶⁰ She later claimed that she made the incriminating statements only after being pressured to do so by the social worker.²⁶¹ The children were temporarily removed from their parents' custody, and the plaintiff went to trial for abusing F.S. and his own daughter.²⁶² The jury was unable to reach a verdict, and the plaintiff accepted a plea bargain with respect to the charges regarding F.S.²⁶³ The charges regarding the alleged abuse of his daughter were dismissed.²⁶⁴

The plaintiff filed suit against the social worker, alleging that the seizure of his daughter in the school violated her Fourth Amendment rights.²⁶⁵ The defendant social worker relied on the Court's holding in *T.L.O.*, which held that the traditional

²⁵¹ See *Greene v. Camreta*, 588 F.3d 1011, 1030 (9th Cir. 2009) (holding that the general law of search warrants applies), *vacated as moot*, *Greene v. Camreta* 661 F.3d 1201, 1201 (9th Cir. 2011).

²⁵² See *Darryl H. v. Coler*, 801 F.2d 893, 900–01 (7th Cir. 1986) (recognizing the special needs exception).

²⁵³ 588 F.3d 1011 (9th Cir. 2009). The Supreme Court subsequently held that the Fourth Amendment issue in *Greene v. Camreta* was moot. *Camreta v. Greene*, 131 S. Ct. 2020, 2026–27 (2011). On remand, the Ninth Circuit vacated the part of its opinion dealing with the Fourth Amendment. *Greene v. Camreta*, 661 F.3d 1201 (9th Cir. 2011). This Article assumes that but for the mootness issue, the Ninth Circuit's original holding would be good law. See *Camreta*, 588 F.3d 1011.

²⁵⁴ *Camreta*, 588 F.3d at 1016.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 1017.

²⁵⁸ *Id.*

²⁵⁹ *Id.* The child stated that she was not scared by the officer and that she trusted him. *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 1019–20.

²⁶³ *Id.* at 1020.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 1020, 1022.

warrant requirement does not apply in the school setting.²⁶⁶ The Ninth Circuit rejected that argument, noting that the circumstances of *T.L.O.* were very different from the circumstances in *Camreta*.²⁶⁷ In the Ninth Circuit's view, the "special need" recognized by the Court in *T.L.O.* was the need for efficient and effective discipline.²⁶⁸ No such need compelled the interview (seizure) of the child in *Camreta*.²⁶⁹ Moreover, the Ninth Circuit noted that in *T.L.O.*, the Supreme Court explicitly refrained from expressing an opinion about searches conducted by, on behalf of, or in conjunction with law enforcement personnel.²⁷⁰

The court then analyzed whether the special needs exception should apply in the context of child abuse investigations at school.²⁷¹ Ultimately it held that the law enforcement purpose and involvement in the seizure were too pervasive to allow the court to apply the special needs exception.²⁷² The Ninth Circuit stated that "the Court hasn't relaxed traditional Fourth Amendment protections when the main purpose of an ostensibly administrative search was to gather evidence for use in subsequent criminal proceedings, or when law enforcement personnel were substantially involved in the design and implementation of the administrative program."²⁷³

In *Camreta*, the law enforcement officer was present during the interview of the plaintiff's daughter.²⁷⁴ Moreover, the plaintiff had already been arrested and charged with sexual abuse of F.S., and the investigation in connection with that case was ongoing.²⁷⁵ Thus, the interview was intended not only to determine whether the plaintiff's daughters had been or were in danger of being abused, but also to gather evidence that could be used to show that plaintiff had abused F.S.²⁷⁶ Finally, the Oregon statutory scheme revealed a "broader entanglement of law enforcement and social services officials in the state's investigation of child abuse."²⁷⁷

Having decided that the special needs exception did not apply, the Ninth Circuit applied the traditional Fourth Amendment standard and concluded that the seizure, which occurred without a warrant or equivalent court order, without exigent circumstances, and without parental consent, was unconstitutional.²⁷⁸ The Ninth Circuit

²⁶⁶ *Id.* at 1023.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1024.

²⁶⁹ *Id.* at 1025.

²⁷⁰ *Id.* at 1024.

²⁷¹ *Id.* at 1025.

²⁷² *Id.* at 1027–28.

²⁷³ *Id.* at 1027.

²⁷⁴ *Id.*

²⁷⁵ *Id.* "Once the police have initiated a criminal investigation into alleged abuse in the home, responsible officials must provide procedural protections appropriate to the criminal context." *Id.* at 1030.

²⁷⁶ *Id.* at 1027.

²⁷⁷ *Id.* at 1028.

²⁷⁸ *Id.* at 1030.

noted that it was *not* deciding whether the special needs doctrine could apply in the absence of a direct law enforcement purpose and without law enforcement involvement.²⁷⁹

In *Tenenbaum v. Williams*,²⁸⁰ a kindergarten teacher reported that her student, Sarah, might have been sexually abused.²⁸¹ The report was based on statements that Sarah made to the teacher indicating that her father had hurt her and based on the fact that the child pointed to the groin area of a doll when asked where he hurt her.²⁸² Social workers removed Sarah from her public school classroom and took her to a hospital for examination by a pediatrician and gynecologist to determine whether there was evidence of sexual abuse.²⁸³ No evidence of abuse was found, and Sarah was returned to her parents.²⁸⁴ No further action was taken against the Tenenbaums, and the claims were designated “unfounded.”²⁸⁵

The Tenenbaums brought suit against the social worker, supervisor, and others involved in the investigation.²⁸⁶ Among the claims was the allegation that by removing Sarah from school and taking her to the hospital for examination, the social workers violated Sarah’s Fourth Amendment rights.²⁸⁷ The Second Circuit agreed that the actions constituted a “seizure” for Fourth Amendment purposes.²⁸⁸ It was undisputed that no warrant or equivalent court order was obtained before the seizure, therefore the question before the court was whether “the ordinary probable-cause standard applicable to, among others, law enforcement officials making warrantless arrests also apply to caseworkers seizing children without prior court authorization.”²⁸⁹

²⁷⁹ *Id.* at 1027 n.12.

²⁸⁰ 193 F.3d 581 (2d Cir. 1999).

²⁸¹ *Id.* at 588.

²⁸² *Id.*

²⁸³ *Id.* at 591. Before taking this step, the social workers visited the Tenenbaums at their home and interviewed the parents. *Id.* at 589. They also examined Sarah’s and her brother’s partially unclothed bodies for evidence of abuse; none was found. *Id.* The children were left with their parents that evening. *Id.* at 589–90. Four days later, the supervisor decided to have Sarah removed from school and examined for evidence of sexual abuse at the hospital. *Id.* at 590. During the intervening days, the social worker had met with Sarah’s teacher, who confirmed the information contained in the initial report made to social services. *Id.* at 590. The supervisor’s decision was also based on the fact that he believed the Tenenbaums ignored the command to call his office, which he believed showed that they were not taking the sexual abuse allegations seriously. *Id.* The Tenenbaums claimed they were never instructed to call his office. *Id.* Moreover, it was undisputed that when the social workers visited their home, they asked only about Sarah’s developmental delays and her habit of falling asleep in class. *Id.* at 589. At the supervisor’s insistence, the Tenenbaums were not told of the sexual abuse allegations. *Id.*

²⁸⁴ *Id.* at 591.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 581–82.

²⁸⁷ *Id.* at 601.

²⁸⁸ *Id.* at 602.

²⁸⁹ *Id.* at 603.

The court considered whether the special needs exception should apply, thereby relieving the caseworkers of the need to establish probable cause or obtain a warrant.²⁹⁰ After noting the split among the circuits on this issue, the Second Circuit declined to answer the question definitively but refused to apply the special needs exception in the *Tenenbaum* case.²⁹¹ The court noted that “[t]here may be circumstances in which the law of warrant and probable cause established in the criminal setting does not work effectively in the child removal or child examination context. This is not such a case.”²⁹² Thus, the Second Circuit left open the possibility that the special needs exception could justify warrantless searches or seizures in the child abuse investigation context, although it did not elaborate on the facts that would support such a holding.

The Seventh Circuit has refused to require a warrant or probable cause before a child can be searched on public school grounds.²⁹³ In *Darryl H. v. Coler*, the plaintiffs sought injunctive and monetary relief for alleged constitutional violations.²⁹⁴ Specifically, they sought to enjoin enforcement of the Illinois Department of Children and Family Services (DCFS) policy that allowed caseworkers to conduct warrantless “physical examination[s] of [a] child’s body for evidence of abuse.”²⁹⁵ The Illinois policy at issue was articulated in a handbook and policy memorandum.²⁹⁶

According to the Illinois handbook, five criteria (“hot-line criteria”) must be met in order for DCFS to investigate an allegation of abuse or neglect.²⁹⁷ If the hot-line criteria are met, the caseworker must conduct an investigation, which may include an examination of the child to verify allegations of abuse.²⁹⁸ If a physical examination is to be conducted, the caseworker has the option of: requiring the caretaker to take the child to a physician for examination; taking the child to a physician for examination; disrobing the child and conducting a cursory physical examination while the caretaker is present; or permitting the school nurse to examine the child.²⁹⁹

²⁹⁰ *Id.* at 603–04.

²⁹¹ *Id.* at 604.

²⁹² *Id.* at 604 (footnote omitted).

²⁹³ *Darryl H. v. Coler*, 801 F.2d 893, 902 (7th Cir. 1986).

²⁹⁴ *Id.* at 897.

²⁹⁵ *Id.* at 894. Note that the Illinois handbook guidelines discussed in Part I of this Article are a revised version of the procedures discussed in *Darryl H.* See *supra* Part I.A.

²⁹⁶ *Darryl H.*, 801 F.2d at 895.

²⁹⁷ *Id.* Those five criteria are:

- (1) a child less than eighteen years old is involved;
- (2) the child was either harmed or in danger of harm;
- (3) a specific incident of abuse is identified;
- (4) a parent, caretaker, sibling or babysitter is the alleged perpetrator of neglect; or
- (5) a parent, caretaker, adult family member, adult individual residing in the child’s home, parent’s paramour, sibling or babysitter is the alleged perpetrator of abuse.

Id.

²⁹⁸ *Id.* at 895–96.

²⁹⁹ *Id.* at 896. In cases of alleged sexual abuse, a physician must conduct the examination. *Id.* If the child is over the age of thirteen, the caseworker conducting a physical examination

In the case of one of the plaintiffs, DCFS caseworkers received an anonymous report that B.D. had been beaten by his father.³⁰⁰ The caseworker went to B.D.'s school and conducted an examination of B.D., during which the boy was required to remove his pants so that the caseworker could examine his back and buttocks.³⁰¹ The other plaintiff's case involved a call by a child's mother to DCFS seeking family counseling.³⁰² During the call, the mother disclosed that her husband had kicked and shoved her son, A.O., who was her husband's stepson.³⁰³ A caseworker later went to A.O.'s school and examined A.O. for evidence of abuse.³⁰⁴ During that examination, A.O. was required to remove his shirt and pants.³⁰⁵ In neither case did the caseworker have a warrant or parental consent to conduct the examinations.³⁰⁶

The plaintiffs claimed that both examinations violated the Fourth Amendment, and they sought to enjoin DCFS from searching children without parental consent or probable cause.³⁰⁷ The district court denied the motion for a preliminary injunction based, in part, on its finding that while the examinations were searches that implicated the Fourth Amendment, the searches were reasonable and, therefore, constitutional.³⁰⁸ The Seventh Circuit agreed that the examinations were Fourth Amendment searches and agreed with the district court with respect to the reasonableness of the searches.³⁰⁹ The court stated, "On this record, we believe that the district judge was correct in holding that the searches in question here could be conducted without meeting the strictures of probable cause or the warrant requirement."³¹⁰ However, the court was not willing to go so far as to hold that any search conducted in accordance with DCFS policy would be reasonable.³¹¹ The court stated, "[W]e are somewhat less convinced, at least on this record, that a nude body search may be constitutionally conducted in every instance in which the hot-line criteria are met."³¹²

The Court noted that the searches at issue took place in school but did not discuss the constitutional implications of that location.³¹³ Although the court did not

must be of the same sex as the child. *Id.* If the child is severely ill, the child must be seen immediately by a physician. *Id.*

³⁰⁰ *Id.* at 897.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *See id.* It is unclear whether a "caretaker" was present during the examinations as required by the policy, but this issue was not raised in the opinion. *Darryl H.*, 801 F.2d 893.

³⁰⁷ *Id.* at 897.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 901.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* Note that DCFS policy now requires parental consent or a court order to conduct a strip search of a child over the parent's objection. *See supra* Part I.A.

³¹³ *See Darryl H.*, 801 F.2d at 896–97.

discuss the diminished expectations of privacy in school (compared with the home); it did note that other plaintiffs that were a part of the district court case alleged that home searches violated the Fourth Amendment.³¹⁴ However, none of those plaintiffs were a part of the instant appeal.³¹⁵ Thus, the court made it clear that it was not deciding whether a home search consistent with DCFS policy was constitutional.³¹⁶ Because the location of the search was not discussed in depth as part of the Fourth Amendment analysis,³¹⁷ it is unclear to what extent the fact that the searches took place in school influenced the court's decision.

While the Seventh Circuit did not expressly address the special needs exception,³¹⁸ it did address concerns about whether the constitutionally required standards for criminal investigations should apply to these searches.³¹⁹ The court stated:

[W]hile the visual inspection of the child's body *may* eventually result in a criminal proceeding against a child abuser, that contingency is certainly of secondary importance to the DCFS at the time the search is conducted. Of prime importance is the safety of the child, and the stabilization of the home environment. Under these circumstances, we cannot say that the Constitution requires that a visual inspection of the body of a child who may have been the victim of child abuse can only be undertaken when the standards of probable cause or a warrant are met.³²⁰

D. Strip Searches

After concluding that a warrant was not necessary to conduct a strip search of a child in *Darryl H. v. Coler*, the Seventh Circuit acknowledged that this conclusion did not resolve the question.³²¹ Specifically, the court had to determine whether the DCFS policies in the handbook ensured that searches conducted in accordance with those policies would always be reasonable.³²² The relevant inquiry was whether the

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *See id.* at 902–04 (discussing the “reasonableness” requirement).

³¹⁸ *T.L.O.* had been decided only a year earlier, and the term “special needs” had not yet been widely used, nor had the exception been developed beyond the facts of that case. *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

³¹⁹ *Darryl H.*, 801 F.2d at 902.

³²⁰ *Id.*

³²¹ *Id.* at 902.

³²² *Id.* at 903–04. “[W]e must now assess whether this record supports the conclusion of the district judge that, criteria contained in the *Handbook* ensure that, under all circumstances, the searches conducted by the DCFS are reasonable.” *Id.* at 903.

search was justified at its inception and whether “the conduct of the search [was] ‘reasonably related in scope to the circumstances which justified the interference in the first place.’”³²³

The court was most concerned about whether searches authorized by the handbook would always be justified at their inception.³²⁴ The court noted that the handbook did not require caseworkers to seek other sources of information in order to verify abuse allegations, even when they had the time and the opportunity to do so.³²⁵ The court commented that it did not “understand why the caseworker cannot be instructed to make, as time and circumstances permit, at least some effort to verify reports which are received from minors, anonymous callers, or sources whose reliability might be reasonably suspect.”³²⁶ Additionally, the court was concerned that the handbook made no attempt to distinguish between searches of the very young and searches of older children.³²⁷ These concerns led the court to conclude that at that preliminary stage of litigation, “the *Handbook*, as it now exists, ensures that the searches will always be reasonable.”³²⁸ In other words, while the handbook criteria would lead to reasonable searches in some cases, there might be circumstances in which such searches would be unreasonable and in violation of the Fourth Amendment.

Warrantless strip searches were categorically rejected by the Fifth Circuit in *Roe v. Texas Department of Protective and Regulatory Services*.³²⁹ In June 1999, the Texas Children’s Protective Services (CPS) Statewide Intake Unit received a call concerning Jackie, a young child who was alleged to have been acting in a manner that indicated that she might have been sexually abused.³³⁰ The case was assigned to social worker Strickland, who eventually contacted Mrs. Roe, Jackie’s mother.³³¹ Strickland informed Mrs. Roe that she had received a referral regarding Jackie, although she would not discuss the details and insisted that they talk in person.³³² They agreed that Strickland would visit Mrs. Roe’s house the next morning.³³³

³²³ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968)).

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.* at 904. Because the plaintiffs could potentially establish that the handbook criteria were not reasonable under all circumstances, the court concluded that there was some likelihood that the plaintiffs could succeed on the merits of their Fourth Amendment claim. *Id.*

³²⁹ 299 F.3d 395 (5th Cir. 2002).

³³⁰ *Id.* at 398. While attending day camp, Jackie was alleged to have been seen touching the “private parts” of another six-year-old girl, kissing the girl on the lips, and dancing in a sexually suggestive manner. *Id.*

³³¹ *Id.*

³³² *Id.* at 398–99.

³³³ *Id.* at 399.

When Strickland arrived at the home the next morning, she explained the call that the Intake Unit had received and the purpose of her visit.³³⁴ When Mrs. Roe asked whether she should contact an attorney, Strickland assured her that it was not necessary.³³⁵ After some discussion, Strickland told Mrs. Roe that she (Strickland) needed to take some pictures of Jackie, although she did not specify what type of pictures.³³⁶ Mrs. Roe was not given the option of refusing to allow the pictures or examination.³³⁷ Strickland, who had no training in taking pictures of children's genitalia, asked Mrs. Roe to remove Jackie's upper clothing.³³⁸ Mrs. Roe complied, and Strickland checked her for marks and bruises but found none.³³⁹ Strickland then asked Mrs. Roe to remove Jackie's underwear.³⁴⁰ Mrs. Roe questioned the necessity of such action, but Strickland assured her that it was more stressful for Mrs. Roe than for Jackie.³⁴¹ Strickland then took pictures of Jackie's internal and external vaginal and anal areas.³⁴²

After taking the pictures, Strickland interviewed Jackie for fifteen to twenty minutes, had a brief discussion with Mrs. Roe, and then left.³⁴³ CPS ultimately "ruled out" abuse and closed the case.³⁴⁴ The incident caused Jackie to have frequent nightmares and anxiety, for which she received counseling.³⁴⁵ Mrs. Roe and Jackie's father, Mr. Doe, sued Strickland and the Texas Department of Protective and Regulatory Services (TDPRS) on Jackie's behalf,³⁴⁶ claiming that the search of Jackie without a court order violated her Fourth Amendment rights.³⁴⁷

The Fifth Circuit noted that it had not previously addressed whether the special needs exception applied to a social worker's visual search of a child's body cavities, and it acknowledged that while the Supreme Court has not addressed the issue, there was a split among the other circuits that had confronted it.³⁴⁸ The court then examined the cases in which the Supreme Court had applied the special needs exception

³³⁴ *Id.* Mrs. Roe claimed that Strickland entered the home without permission or an invitation; Strickland claimed that she was invited to enter. *Id.* The Fifth Circuit held that Mrs. Roe consented to the entry. *Id.* at 402.

³³⁵ *Id.* at 399.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.* "Strickland took pictures of Jackie's vagina and buttocks in a closed position, and then instructed Mrs. Roe to spread Jackie's labia and buttocks, so that she could take pictures of the genital and anal areas." *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* Mrs. Roe also experienced symptoms of depression following the incident. *Id.*

³⁴⁶ *Id.* at 398.

³⁴⁷ *Id.* at 400.

³⁴⁸ *Id.* at 403.

and attempted to determine whether strip searches in child abuse investigations fit within that category of cases.³⁴⁹

The court first recognized that strip searches implicate fundamental Fourth Amendment rights.³⁵⁰ “The Court has *never* upheld a ‘special needs’ search where the person’s expectation of privacy was as strong as is Jackie’s interest in bodily privacy.”³⁵¹ The fact that the search occurred in her home only strengthened the privacy interest.³⁵² The entanglement of law enforcement also tipped the scales in Jackie’s favor.³⁵³ Citing *Ferguson*, the Fifth Circuit concluded that the Supreme Court would not recognize the special needs exception in a case in which the “special need” is not “divorced” from a general law enforcement purpose.³⁵⁴ The court concluded:

Strickland ultimately fails to identify a “special need” separate from the purposes of general law enforcement. Identifying the goal of protecting a child’s welfare and removing him from an abusive home is easy; disentangling that goal from general law enforcement purposes is difficult. . . . Texas law describes social workers’ investigations as a tool both for gathering evidence for criminal convictions and for protecting the welfare of the child. *Ferguson* teaches that we must apply the traditional Fourth Amendment analysis where a child protective services search is so intimately intertwined with law enforcement.³⁵⁵

Consequently, the Fifth Circuit held that to justify a strip search of a child, a social worker must obtain a warrant or a court order supported by probable cause, receive parental consent, or identify exigent circumstances to justify a strip search of a child.³⁵⁶

V. WARRANTLESS BUT REASONABLE SEARCHES (NOT SPECIAL NEEDS)

In theory, even if the special needs exception is not applied, a warrantless search may be conducted without running afoul of the Fourth Amendment.³⁵⁷ Just as the

³⁴⁹ *See id.* at 404.

³⁵⁰ *Id.*

³⁵¹ *Id.* at 406.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 406–07.

³⁵⁶ *Id.* at 407–08.

³⁵⁷ *See, e.g., Terry v. Ohio*, 392 U.S. 1, 27 (1968) (holding that a police officer may conduct a limited, warrantless search and seizure of suspects when he has “reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable

Supreme Court adopted an alternative to the warrant standard in *T.L.O.* (that later became known as the special needs exception), the Court could simply adopt a warrantless standard that applies to child abuse and neglect cases. The decision to adopt the alternative standard, rather than simply apply the special needs exception, could reflect the unique conflict created by the role of law enforcement in abuse and neglect cases and the compelling interest of the state in protecting children. The advantage to this approach is that the Court could spell out the circumstances in which a warrantless search would be justified and outline the permissible scope of such a search. Above all, the search would still need to comply with the reasonableness requirement of the Fourth Amendment.³⁵⁸ Thus, social workers would still need to establish that the warrantless search or seizure was reasonable.

If the Court does not provide guidance with respect to what circumstances would justify a warrantless search or seizure and define the scope of such a search or seizure, regulations or case law could be developed to guide investigators regarding reasonable and unreasonable investigative conduct. Even absent specific guidelines, investigators can use judgment informed by the reality that warrantless searches and seizures must be used only as a last resort, when justified by the circumstances, and limited in such a way as to make it reasonable in all respects.³⁵⁹

A. Last Resort

If the investigator can conduct portions of an investigation without entering the home or interviewing the child, those steps should be taken first. For example, if the child attends school, the social worker can and should interview teachers or other school personnel who have had the opportunity to observe the child. Other sources of information such as preschool or day care workers, church members, neighbors, or friends may be able to provide sufficient information to either close the investigation or support the issuance of a warrant. Parents can also be interviewed to explain or respond to the allegations. Absent a warrant, none of these sources can be compelled to cooperate with the investigations, but if they choose to cooperate, searching the child may not be necessary.

B. Justified by the Circumstances

If there is still not enough evidence to obtain a warrant, the investigator must evaluate the evidence that is available and determine whether it is sufficient and credible enough to justify further action. For example, the source of the allegations may have questionable credibility, but the allegations may be specific, detailed and

cause to arrest the individual for a crime”); *see also, e.g.*, *Michigan v. Long*, 463 U.S. 1032 (1983) (extending the protective search doctrine to the interior of automobiles).

³⁵⁸ *Roe*, 299 F.3d at 404.

³⁵⁹ *Id.*

easily corroborated or disproved by a cursory examination of the child. If so, a warrantless search or seizure may be appropriate. Specifically, if the only avenue available to investigate the allegations is to interview the child, then such an interview may be reasonable even without parental consent, and even if the interview takes place in the home.³⁶⁰

C. Reasonable in All Respects

In order to comply with the Fourth Amendment, the interview must be reasonable in all respects, including the time, place, duration, and scope.³⁶¹ The interview should normally take place during the day, in a place where the child is comfortable, and should be limited to questions relevant to the allegations that triggered the investigation. Likewise, any visual inspection should be conducted only if the report of abuse alleged physical injury, and should be limited to the area alleged to have been injured. For example, if the report claims that the child has bruises on his arm, the child could be required to roll up his sleeves so that the social worker can examine his arms. The social worker could not, however, require the child to lift his pant legs or his shirt for examination of the legs or torso.³⁶²

The interview should be as brief as possible, and the parent or guardian may be allowed to be present during the interview. In short, the interview should be treated as a fact-finding mission aimed at minimizing the intrusion on the child's privacy interests and the adverse impact on the child's emotional well-being. It should not be an interrogation aimed at getting to the truth at all costs. While not all injuries will be visible and a child might be less forthcoming in the presence of the parent, serious abuse may be apparent, and the interview may provide enough information to allow the caseworker to get a warrant to conduct more intrusive searches or seizures. It may also uncover other sources of information that might provide information to corroborate either the abuse allegations or the parents' denial. Likewise, the worker may be able to determine that a child has not been abused or neglected, and the case may be closed. Undoubtedly, there will be times when a limited search or seizure yields no useful information. However, there is no perfect solution when

³⁶⁰ See ILL. DEP'T OF CHILD & FAMILY SERVS., PROCEDURES, *supra* note 18, § 300.70(b) (Nov. 20, 2009).

³⁶¹ See, e.g., *CPS Handbook*, *supra* note 70, § 2241.

³⁶² The exception would be the child's genital regions. If sexual abuse is alleged, the social worker should be allowed to inspect the child's genitals only pursuant to a warrant or probable cause. Such searches should be conducted only by specially trained medical professionals in the presence of a parent or guardian, so long as the parent or guardian does not interfere with the examination. If the child is able to understand the nature of the allegations and the need for the examination, the child's consent should be sought, and the child should be able to identify a trusted adult (other than an alleged perpetrator) who can accompany the child during the examination. This might also be an appropriate situation for requiring a court order based on reasonable suspicion. See discussion *supra* Part III.

there are no other sources of information available, and limited searches are likely to uncover the most severe abuse or obvious neglect while still respecting the Fourth Amendment's protections.

On the other hand, a more intrusive search—such as a strip search or search of a child's genitals—will usually be unreasonable.³⁶³ Moreover, a search of a home based solely on anonymous, vague allegations of abuse or neglect may not be reasonable.³⁶⁴ While hidden scars or evidence of sexual abuse will not be uncovered in these situations, more intrusive examinations would likely be unreasonable under the circumstances. Moreover, obvious signs of abuse or neglect could be detected and serve as the basis for a warrant for a more thorough (and intrusive) investigation.

It must also be noted that state actors should be held accountable for the way in which interviews or searches are conducted. A reasonable search can be conducted in an unreasonable manner.³⁶⁵ A search that might be reasonable during daylight hours might be unreasonable in the middle of the night. An interview conducted in a hostile tone with several persons unknown to the child may be unreasonable even though the same interview, conducted in a gentler tone and with fewer persons present, may be reasonable.

Another possibility, if an abuse allegation is made and the parents will not consent to an interview with the child, is to require the parents to get a signed physician's statement verifying that the child does not bear any signs of neglect or abuse. The parents can choose the physician (subject to some restrictions—i.e., not one of the parents or an immediate relative), and no government official need be present at the examination. The physician need not submit any findings, test results, or information beyond a statement that there are no signs of neglect or abuse. The cost of the examination may be paid by the state (perhaps subject to reimbursement if evidence of neglect or abuse is discovered).

This is still a search, and it does infringe on an expectation of privacy, but it is a limited intrusion that may meet the requirement of "reasonableness" in circumstances in which there is no other way for social workers to investigate abuse allegations. The conclusions of the physician need not be considered dispositive, but they may provide sufficient evidence of abuse or refute allegations of abuse in some cases. In any event, it would provide more information and, at least potentially, dispense with the need for a search of the home or for an interview with the child.

The parents or guardians also could be required to submit to an interview with the social services representative, either at the home or some other location. This could qualify as a search and seizure, if participation is mandatory (i.e., they are not

³⁶³ See, e.g., *Roe*, 299 F.3d at 409 (holding that a strip search raises Fourth Amendment concerns).

³⁶⁴ See *Darryl H. v. Coler*, 801 F.2d 893, 903 (7th Cir. 1986).

³⁶⁵ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (holding that searches must always be "reasonable" but that what is reasonable depends upon the context of each case).

free to leave),³⁶⁶ although it is less likely to be considered a seizure if they are allowed to leave, even if leaving triggers some other consequence.³⁶⁷ Abuse and neglect investigators would be allowed to question parents or guardians to allow them to provide evidence or explanations to refute abuse allegations. Denials alone would not necessarily result in closing the case, but the interviews could provide other information or evidence that could be used to further the investigation or even support issuance of a warrant.

CONCLUSION

The inevitable conflict between protecting children from abuse or neglect and protecting the privacy rights of the parents who might be guilty of inflicting that abuse or neglect creates a situation in which there are no easy answers. However, this Article advocates an approach that relieves child abuse and neglect investigators of the burden of establishing probable cause before interviewing or examining alleged victims, while limiting the scope of the investigation or requiring that a court order be issued based on reasonable suspicion. These alternatives strike a balance necessary to accommodate the interests of all concerned without sacrificing the safety and well-being of vulnerable children.

³⁶⁶ See, e.g., *Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003) (“A person has been ‘seized’ within the meaning of the Fourth Amendment if, in view of all the circumstances surrounding the incident, a reasonable person would not have believed that he was free to leave.”).

³⁶⁷ See *CPS Handbook*, *supra* note 70, § 2241.1.