Jakki Hillis
Acting Assistant Director,
Division of Children, Youth and Families
for the Arizona Department of Economic Security
1789 West Jefferson Street
Phoenix, AZ 85007
Telephone: (602) 542-3598
Facsimile: (602) 542-3330
E-mail: JHillis@azdes.gov

IN THE ARIZONA SUPREME COURT

In the Matter of PETITION TO AMEND RULE 41 OF THE RULES OF PROCEDURE FOR THE JUVENILE COURT	R-08-0029 Arizona Department of Economic Security's Comment Modifying Petition

The Arizona Department of Economic Security (ADES or the Department) recommends modifying the proposed amendment to Rule 41, Arizona Rules of Procedure for the Juvenile Court, to ensure that children are advised of and encouraged to participate in hearings when and how appropriate. The Department's proposed modification also clarifies the effect on mandatory judicial determinations of the inability of the Department to transport children to court hearings should the Department be unable to do so. The Department's

proposed modification is attached hereto as Appendix A. [1]

I. Introduction.

The proposed amendment to Rule 41, Arizona Rules of Procedure for the Juvenile Court, would require the attendance of dependent children at every substantive court hearing unless excused by the court for good cause. (Petition at 2.) The rationale for the amendment is to give children a voice in the proceedings. (Petition at 1-2.)

The Department supports the goal of the amendment, but opposes requiring children's attendance at every hearing.[2] The Department proposes language to instead ensure that the child is advised in a developmentally appropriate manner of his or her ability to participate and is given a meaningful opportunity to do so. Moreover, the Department's amendment reflects that meaningful and developmentally appropriate communication between a child and his or her

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1. Petitioner's Exhibit A, outlining the proposed amendment to Rule 41, does not reflect the amendments made to that rule on an emergency basis by this Court's order in R-08-0020. The Department's Appendix A rewrites Petitioner's new subsection A and reflects the remainder of Rule 41 in its current form.

2. The Department notes that children age twelve and older are already entitled to notice of dependency review hearings and their right to participate in them under A.R.S. § 8-847(B)(5).

attorney may be achieved by the attorney's contact with the child or others with information about the child's care and well-being.[3]

Further, the Department proposes adding language at the end of the proposed new subsection A as follows:

> The Arizona Department of Economic Security is not required to transport the child to the hearings. The inability of the Department to transport a child to a court hearing pursuant to this rule shall not result in penalties or sanctions or negatively impact the mandatory judicial determinations set forth in Rule 47.1, A.R.S. § 8-829, and Title IV-E of the Social Security Act.

(*See* Appendix A.)

II. Providing Transportation for Children to Court Hearings Is Not a Reunification Service. Consequently, the Department Should Not Be Penalized or Sanctioned for Its Inability to Provide Transportation to Court Hearings, Nor Should It Be Reflected in the Court's "Reasonable Efforts" Findings.

In 1997, Congress enacted the Adoption and Safe Families Act (ASFA) to amend Title IV-B and -E of the Social Security Act. Pub.L. No. 105-89, 111 Stat. 2115 (1997); 42 U.S.C. §§ 673b, 678, and 679b. The Act provides federal reimbursement funds for foster-care placements and family-preservation services for states that meet its requirements for prompt permanency and reasonable efforts

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3. Reference to a child's attorney also includes a child's appointed guardian ad litem.

to prevent removal and to provide reunification services. *Id*. To qualify for funding under ASFA, the Department must make reasonable efforts to preserve and reunify families or, when family reunification is not the case plan goal, take necessary steps to finalize the permanent placement of the child. 42 U.S.C. § 671(a)(15)(A)-(C); A.R.S. § 8-829(A)(5); Ariz. R.P. Juv. Ct. 47.1. The juvenile court must make findings regarding the reasonableness of the Department's reunification efforts within twelve months of the child's removal from home and once every twelve months thereafter. *Id*.

When it enacted ASFA, Congress elected not to define "reasonable efforts" because "[t]o do so would be a direct contradiction of the intent of the law" that such determinations be made on a case-by-case basis. Proposed Rules, 63 F.R. 50058, 50073, 63 Fed. Reg. 181 (Sept. 18, 1998). To make a reasonable-efforts determination, however, a court may consider whether the service plan was customized to the needs of the family and whether the agency "provide[d] services to ameliorate factors present . . . that would inhibit a parent's ability to maintain the child safely at home." *Id*. The court may also consider whether "limitations exist with respect to service availability" and, if so, the efforts taken to overcome such obstacles. *Id*.

Congress did, however, identify family preservation and support services that *may* be provided to support a reasonable-efforts finding, including preventive services such as intensive family preservation programs; services designed to reunify children with parents or place them in other permanent living arrangements, as appropriate; respite care; parenting-skills instruction regarding child development, budgeting, coping with stress, health, and nutrition; case management services such as transportation, housing assistance, utility payments, and access to health care; and community-based services such as structured activities to strengthen parent-child relationships, transportation, and information and referral services to afford families access to other community services. 42 U.S.C. § 629(a)(1) and (2); 45 C.F.R. § 1357.10(c).

Arizona's courts have likewise recognized the Department's duty to provide parents "with the time and opportunity to participate in programs designed to help [him or] her become an effective parent," *Maricopa County Juvenile Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994), while recognizing that it need not provide the parent with every conceivable service, ensure that the parent participates in services, or provide futile rehabilitative measures, *id*.; *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 187, 971 P.2d 1046, 1048 (App. 1999).

Facilitating children's attendance at hearings, while important, is not among those services identified by Congress and Arizona's Legislature as necessary to reunify families or otherwise secure permanent placements for children. Under current budgetary conditions, the Department has had to resolve a budget shortfall of over $150 million. To address this crisis, the Department recently made numerous painful cuts to the amount and types of services it can provide to Arizona's families in need.[4] The proposed amendment, as originally drafted, could have the unintended consequence of requiring the Department to transport every child in the child welfare system to every court hearing.[5] To require the Department to provide transportation to court hearings for children in its care would divert scarce resources that could be better used to provide services to strengthen and repair families. It would thwart the goals of ASFA and Arizona's permanency statutes to require the Department to provide transportation to hearings, when doing so would eliminate the ability to provide transportation to or supervision for visits, for example. Further, without the Department's proposed

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4. For details regarding the Department's budget cuts, please see https://egov.azdes.gov/cmsinternet/default.aspx?id=3460&menu=12. (Accessed 2/18/09.)

5. There are over 11,500 children in the Department's care, and attorneys representing the Department attend approximately 55,000 hearings per year.

language, courts may unjustifiably equate the Department's inability to provide transportation for children to court with a failure to make reasonable efforts. In so finding, the court will needlessly imperil the Department's federal funding through ASFA. The loss of federal funding will dramatically impact the availability of reunification services to all families and would stymie the Department's efforts to provide even the most basic services.

The Department agrees that the participation of children improves outcomes and benefits the affected children and the child-welfare system overall, but providing transportation to the court hearings is not a reunification service as contemplated under ASFA or Arizona law. For this reason the Department urges adoption of its language clarifying that the inability of the Department to provide transportation should not negatively impact ADES's federal funding through the required "reasonable efforts" findings.

III. The Proposed Rule Change as Written Conflicts with the Department's Duty Under A.R.S. § 8-527 to Ensure Children's Attendance at School.

In June 2008, the governor signed into law House Bill 2633 requiring that the Department "make every reasonable effort to not remove a child who is placed in out-of-home care from school during regular school hours for appointments, visitations or activities not related to school." Laws 2008, 2nd Sess., ch. 268, §§ 1-

2 (codified at A.R.S. § 8-527). The Legislature found that "it is preferable for a child to remain in school during regular school hours" and that "unnecessary disruptions to the child's school schedule do not promote the child's best interests and constitute an inefficient use of monies appropriated to schools." *Id*.

The Department's modification of the amendment would eliminate a conflict with the duty imposed by the legislature to avoid interfering with the schooling of children in the Department's care by allowing the children to participate in hearings by means that minimize the need for them to miss out on school or other activities.

IV. Conclusion.

The Department agrees with Petitioner that children's participation in court hearings would provide them a voice that they otherwise may not have. The Department proposes additional language for the amendment to Rule 41, however, to change the focus of the rule from requiring children's attendance at hearings to ensuring that they are advised of their right to participate and that they are given flexible means for exercising that right. Further, the Department's proposed modification would clarify that the Department's inability to transport a child to a hearing should not result in penalties or sanctions, or reflect on its reasonable reunification efforts and consequent federal funding. Consequently, the

Department requests that if this Court amend Rule 41, Arizona Rules of Procedure for the Juvenile Court, it adopt the amendment proposed by the Department.

DATED this _____ day of April, 2009.

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Jakki Hillis
Acting Assistant Director,
Division of Children, Youth and Families
for The Arizona Department of
Economic Security

Original and six (6) copies of the foregoing and appendix and a CD filed this __ day of , 2009, with:

Supreme Court of Arizona
1501 West Washington
Phoenix, Arizona 85007

A copy of this comment and appendix has been mailed this _____ day of , 2009, to:

Hon. Robert Brutinel
Chair, Committee on Juvenile Courts
c/o Legal Services Office
1501 W. Washington, Suite 414
Phoenix, AZ 85007-3231
Petitioner

By _____

HDM# 399910

APPENDIX A

Rule 41. Attendance at hearings.

A. A child who is the subject of a dependency proceeding shall be advised by his or her counsel in a developmentally appropriate manner that he or she may participate in every dependency hearing. Counsel for the child shall avow to the court that he or she advised the child and the child's placement of the ability to participate and shall encourage the child to attend and participate in court hearings where appropriate or to communicate with the court at every substantive dependency hearing to ensure that the child has a voice in the proceedings. The court shall encourage and accommodate the child's appearance in writing, telephonically, or in person. At any hearing, the court may inquire whether counsel for the child has had meaningful communication with or regarding the child. The inability of the Department to transport a child to a court hearing pursuant to this rule shall not result in penalties or sanctions or negatively impact the mandatory judicial determinations set forth in Rule 47.1, A.R.S. § 8-829, and Title IV-E of the Social Security Act.

B. ~~A.~~ Except as otherwise provided pursuant to statute or court rule, court proceedings relating to dependent children, permanent guardianships and termination of parental rights are open to the public.

C. ~~B.~~ The court may limit the presence of a participant to the time of the participant's testimony if:

1. It is in the best interest of the child; or
2. It is necessary to protect the privacy interests of the parties and will not be detrimental to the child.

D. ~~C.~~ The court may impose reasonable restrictions as may be required by the physical limitations of the facility or to maintain order and decorum.

E. ~~D.~~ At the first hearing in any dependency, permanent guardianship, or termination of parental rights proceeding, the court shall ask the parties if there are any reasons the proceeding should be closed. For good cause shown, the court may order any proceeding to be closed to the public. In considering whether to close the proceeding to the public, the court shall consider:

1. Whether doing so is in the child's best interests.
2. Whether an open proceeding would endanger the child's physical or emotional well-being or the safety of any other person.
3. The privacy rights of the child, the child's siblings, parents, guardians and caregivers and any other person whose privacy rights the court determines need protection.
4. Whether all parties have agreed to allow the proceeding to be open.
5. If the child is at least twelve years of age and a party to the proceeding, the child's wishes.

F. ~~E.~~ At the beginning of a hearing that is open to the public, the court shall admonish all attendees that they are prohibited by order of the court from disclosing outside the hearing personally identifiable information about the child, the child's siblings, parents, guardians, or caregivers and any others mentioned in the hearing. A person who remains in the courtroom after the admonition submits to the jurisdiction of the court and shall abide by the orders of the court prohibiting disclosure of that information. Failure to abide by the orders shall be deemed contempt of court. The court shall explain contempt of court to all attendees, including observers, and the possible consequences of violating an order of the court. For the purposes of this subsection, "personally identifiable information" includes name, address, date of birth, social security number, tribal enrollment number, telephone or telefacsimile number, driver license number, places of employment, school identification or military identification number or any other distinguishing characteristic that tends to identify a particular person.

G. ~~F.~~ The court may close an open proceeding at any time for good cause shown and after considering the factors prescribed in Section D.

H. ~~G.~~ If a proceeding has been closed by the court, any person may subsequently request that the court reopen a proceeding or a specific hearing to the public. In ruling on this request, the court shall reconsider the factors prescribed in Section D.

I. ~~H.~~ **Notice.**

(A) If the Arizona Department of Economic Security (the Department) is the petitioner, it shall notify the foster parents, pre-adoptive parents, relative caregivers

or relative who has been identified as a possible placement for a child in foster care under the responsibility of the State of the date, time, and location of all proceedings to be held with respect to the child. Foster parents, pre-adoptive parents, or relative caregivers of a child in foster care under the responsibility of the State shall have a continuing duty to provide the Department with a current and correct mailing address, including addresses identified as protected by court order.

(B) If the petitioning party is not the Department, the court shall ensure that foster parents, pre-adoptive parents, or relative caregivers are notified of all proceedings to be held with respect to the child.

(C) The foster parents, pre-adoptive parents, or relative caregivers shall be afforded the right to be heard in any proceeding to be held with respect to the child. This right shall not be construed to require that any foster parents, pre-adoptive parents, or relative caregivers be made a party to such proceeding solely on the basis of such notice and a right to be heard.

(D) Nothing in this rule shall be construed to limit the periodic review hearing notice requirements of ARS § 8-847(B).