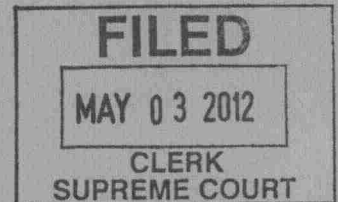


**SUPREME COURT OF KENTUCKY
CASE NO. 2011-SC-000202-DG
(2010-CA-000361-MR)
(Jefferson Circuit Court No. 09-CI-03970)**



W.B., AN ADULT CITIZEN OF
JEFFERSON COUNTY, KENTUCKY

APPELLANT

V.

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES,
DEPARTMENT FOR COMMUNITY BASED SERVICES,
AN ADMINISTRATIVE AGENCY

APPELLEES

**BRIEF FOR APPELLEE, COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES,
DEPARTMENT FOR COMMUNITY BASED SERVICES**

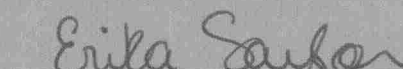
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and ten (10) true copies of the foregoing were mailed to the following, via Federal Express Mail – Next Day Delivery, on this the 2nd day of May, 2012, to the following: Kentucky Supreme Court, Clerk's Office, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601-3488; and a true and exact copy of the foregoing also was mailed first-class, postage prepaid, on this the 2nd day of May, 2012, to the following: Hon. Samuel Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Frederic J. Cowan, Judge, Jefferson Circuit Court, Division Thirteen (13), Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; and, Hon. J. Fox DeMoisey, Counsel for Appellant, 905 Baxter Avenue, Louisville, Kentucky 40204.


ERIKA SAYLOR, Attorney

STATEMENT CONCERNING ORAL ARGUMENTS

Oral argument is not requested in this action. Given that the arguments contained herein have been thoroughly briefed by both parties, oral argument is unlikely to yield any additional useful information to this honorable Court.

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COUNTERSTATEMENT OF THE CASE

The Appellee, the Commonwealth of Kentucky, Cabinet for Health and Family Services, Department for Community Based Services (hereinafter, "the Department"), does not accept the Statement of the Case presented in the Brief for Appellant and propounds its own Counterstatement of the Case.

On December 8, 2008, the Department substantiated an allegation that the Appellant had committed sexual abuse of a minor in his custody or control.¹ On January 6, 2009, the Appellant filed a Request for Appeal of Child Abuse or Neglect Investigative Finding with the Cabinet for Health and Family Services (hereinafter, "the Cabinet") pursuant to the Child Abuse Prevention and Treatment Act (hereinafter, "CAPTA"), specifically 42 United States Code §5106a, which became law in October 1998. That CAPTA appeal² was assigned to a Cabinet hearing officer who conducted a telephonic conference in the matter and rendered a Prehearing Conference Order on February 19, 2009 holding that no reference to the victim's forensic interview would be permitted in the CAPTA hearing unless the Appellant obtained access to that videotaped interview through a circuit court order for the same. That Prehearing Conference Order further noted that the Appellant had indicated during the telephonic conference that he would seek such an order from the Jefferson Circuit Court.

¹ The Appellant incorrectly notes in his Brief that the substantiation was made on September 4, 2008. Appellant's Brief, p. 2, paragraph (E). That is incorrect. September 4, 2008 was the date of the forensic interview of the victim but the Department's finding was not made until December 8, 2008, at which time both the investigative social worker (hereinafter, "FSW") and her supervisor (hereinafter, "FSOS") signed off on the investigative report, also referred to as a Continuous Quality Assessment (hereinafter, "CQA"). An investigative finding is not considered complete until the FSW's supervisor has approved the result. 922 KAR 1:330 §9(4).

² The CAPTA appeal case number is AHB DCBS 09-028. It is incorrectly noted in Appellant's Brief, at p. 2, paragraph (J), as case number AHB DCBS 90-028.

The hearing officer rendered a Second Prehearing Conference Order in the CAPTA appeal on March 18, 2009, reiterating that no reference to the victim's forensic interview would be permitted in the CAPTA hearing unless the Appellant obtained access to it through a circuit court order. That Order also noted that the Appellant had continued to assert his intention to seek such a circuit court order but that he had yet to do so.

On April 20, 2009, the Appellant filed a Complaint in the Jefferson Circuit Court demanding: 1. That the Court find KRS 13B.150(2)(c), 922 KAR 1:330§§9, 10, 922 KAR 1:480, and 922 KAR 1:470 unconstitutional; 2. That the CAPTA appellate process be enjoined and vacated; and, 3. That the Appellant recover attorney fees and any other relief to which he may be entitled. Appendix 1. The Appellant failed to request access to the videotape of the victim's forensic interview within that Complaint and has not done so to date.

On June 11, 2009, the CAPTA appeal hearing officer entered a third Prehearing Conference Order continuing the CAPTA hearing, generally, until resolution of the circuit court declaratory judgment action. That CAPTA appeal remains in abeyance pending completion of this appeal.

On January 25, 2010, the Jefferson Circuit Court, Division Thirteen (13), rendered its Opinion and Order Granting Commonwealth's Motion to Dismiss the declaratory judgment action. Appendix 2. The Appellant challenged that Opinion and Order before the Kentucky Court of Appeals which, on March 11, 2011, rendered an Opinion Affirming the circuit court decision. Appendix 3. This discretionary review follows.

ARGUMENT

By providing multiple opportunities for the accused perpetrator to participate in, cross-examine, and otherwise contest the allegations against him, the existing investigatory and adjudicatory procedure for child abuse and neglect cases affords substantial due process and fundamental fairness to those finding themselves the subject of such cases, such as this Appellant.

I. HISTORICAL AND PROCEDURAL OVERVIEW OF CHILD ABUSE AND NEGLECT INVESTIGATIONS AND CAPTA PROCEEDINGS.

When child abuse or neglect is alleged, the Cabinet undertakes an investigation³, pursuant to the provisions of the Kentucky Unified Juvenile Code (hereinafter, "KUJC"), KRS Chapters 600 through 645, and Kentucky Administrative Regulations (hereinafter, "KAR"). *See*, KRS 620.030, .040, and .050; and, 922 KAR 1:330§2. The KUJC authorizes the Cabinet to promulgate administrative regulations to implement the provisions of KRS Chapter 620 pertaining to child abuse or neglect investigations and other matters in that chapter. KRS 620.180(1). Pursuant to such statutory authority, the Cabinet has implemented administrative regulations, including 922 KAR 1:330. Pertinent to the investigation in this case, the KUJC requires that "[t]he cabinet shall participate in all investigations of reported or suspected sexual abuse of a child[.]" KRS 620.040(3), and the KAR requires that the Cabinet shall "[r]eceive and investigate any report that alleges sexual abuse of a child committed or allowed to be committed by a caretaker." 922 KAR 1:330§2(4)(c). More generally, the Kentucky Legislature has charged that the Cabinet "shall, wherever possible: ...[l]ocate and plan for all children

³ The particular unit within the Cabinet that conducts child abuse, neglect, and dependency investigations is the Department for Community Based Services. The Department was created within the Cabinet in 1998 in an effort to regionalize child protective services and it maintains offices in each county within Kentucky.

who are dependent, neglected, or abused [KRS 605.130(1)]; ...and...[p]erform such other services as may be deemed necessary for the protection of children.” KRS 605.130(4).

In performing these duties, Cabinet representatives may or may not determine to file an abuse, neglect, or dependency (hereinafter “A/N/D”) petition with a district court or, in family court jurisdictions, a family court, wherein exclusive jurisdiction for such an action lies.⁴ KRS 610.010(2)(d). “For actions under KRS 610.010(2)(d) the Kentucky Rules of Civil Procedure shall apply.” KRS 610.080(2). Unlike in criminal actions, where the standard of proof is “beyond a reasonable doubt,” in A/N/D actions, wherein child abuse or neglect is determined under the KUJC, the burden of proof is by a “preponderance of the evidence.” KRS 620.100(4). “In cases where criminal charges arising out of the same transaction or occurrence are filed against an adult alleged to be the perpetrator of child abuse or neglect, such charges shall be tried separately from the adjudicatory hearing held pursuant to this chapter.” KRS 620.120. When a Cabinet investigation of alleged child abuse or neglect is undertaken, the FSW and FSOS are guided by the “preponderance of evidence” standard in determining whether they will take legal action in the courts or only pursue administrative action pursuant to their foregoing statutory duties. KRS 620.100(3); 922 KAR 1:330§1(9)(2).

Contrary to the Appellant’s assertions, the Cabinet’s regulations pertaining to child abuse investigations afford alleged perpetrators such as the Appellant several opportunities to respond to the allegations raised against them. 922 KAR 1:330 §3(7);

⁴ Pursuant to the Cabinet’s Division of Protection and Permanency (a subdivision of the Department) Standards of Practice Manual (hereinafter, “SOP”), the FSW and FSOS shall determine whether or not to file a court petition when they substantiate an investigation, upon consultation with Cabinet legal counsel

See also, SOP 2.11, 2.12, *et seq.* After the investigation is complete, the FSW and FSOS must determine whether they will substantiate child abuse or neglect against a named or found perpetrator. 922 KAR 1:330§9; SOP 2.12. Their investigative conclusions are not considered judicial findings, 922 KAR 1:330 §9(3), nor are they necessarily the final findings of the Cabinet. Instead, when a child abuse or neglect investigation results in a *substantiated* finding (as opposed to a finding of *unsubstantiated*), accused perpetrators are given the right to challenge the initial substantiated finding through an administrative appeal, a CAPTA appeal, pursuant to the Cabinet's administrative regulations and KRS Chapter 13B, the Commonwealth's administrative procedures act. KRS 13B.005 to 13B.170; 922 KAR 1:330§10; 922 KAR 1:480§§2, 3. The applicable federal regulation is 45 Code of Federal Regulations §205.10.

In the CAPTA appeal, persons such as the Appellant are granted a hearing upon making a timely request. 922 KAR 1:330§10(1); 922 KAR 1:480§§2, 3. At the CAPTA hearing, the Appellant would be given a further opportunity to receive notice of the factual basis for the Cabinet's action, i.e., substantiation, KRS 13B.050(3)(d), to present evidence on his own behalf and to cross examine the evidence against him. KRS 13B.080(4); 922 KAR 1:480§6 (1). Pursuant to statute, the Cabinet has delegated authority to conduct this evidentiary hearing to an administrative hearing officer, KRS 13B.030(1), 922 KAR 1:480§6(1), who makes a recommended decision to the Department Commissioner, who in turn makes the final decision for the Cabinet.⁵⁶ KRS

when appropriate. SOP 2.12. The on-line SOP Manual can be accessed at the following website: <http://manuals.sp.chfs.ky.gov/Pages/index.aspx>

⁵ By long-standing practice and policy of the Cabinet, the Commissioner of the Department has served as the Cabinet's "agency head" that is responsible for entry of a final order in administrative appeals from substantiated findings of child abuse or neglect.

⁶ The Appellant incorrectly claims that "the law requires that there then be a degree of deference owed by the agency head to the hearing officer" pursuant to *Herndon v. Herndon*, 139 S.W.3d 822 (Ky. 2004).

13B.030(1). If the administrative hearing officer enters a recommended decision against the Appellant, he has a third opportunity to convince Cabinet officials not to enter a final order substantiating the child abuse allegations against him by filing exceptions for the Commissioner to consider before entering her final order for the agency. KRS 13B.110 and 13B.120. If the Commissioner nonetheless enters a final order against the Appellant, he may file a petition for judicial review of that final order in circuit court. KRS 13B.140. Therefore, it is preposterous for the Appellant to claim that there is “no formal procedure which afford[s] any due process with which to make a determination of any weight of proof[.]” Appellant’s Brief, at 2, paragraph (E). Instead, the Appellant has short-circuited that formal procedure (at least temporarily) by filing this declaratory action.

II. THE EXISTING STATUTORY AND ADMINISTRATIVE FRAMEWORK FOR CAPTA HEARINGS AND THEIR SUBSEQUENT CIRCUIT COURT APPEALS IS CONSTITUTIONAL, BOTH ON ITS FACE AND IN ITS APPLICATION.

The Appellant asserts that KRS 13B.150(2)(c), 922 KAR 1:330§§9, 10, 922 KAR 1:470, and 922 KAR 1:480 violate the constitutional doctrine of separation of powers and deny due process. Brief for Appellant, at 7-24. However, it is well established that courts should construe state statutes in a manner that would make such a statute constitutional if such a reading is reasonable in light of the statute’s language and legislative history. A statute is presumed to be constitutional and a court should exercise judicial restraint before making a determination that it is not. *Standard Oil Co. v. Commonwealth*, 119 Ky. 75, 82 S.W. 1020 (Ky. 1904); *Gibson v. Commonwealth*, 209

Rather, *Herndon*, simply reiterates that “if the agency head deviates from the recommended order, it must make separate findings of fact and conclusions of law for any deviation from the recommended order.”

1. THE EXISTING CAPTA FRAMEWORK RISKS MINIMAL INJURY TO APPELLANT'S PRIVATE REPUTATIONAL INTEREST.

The Appellant asserts that his character may be defamed as a result of Kentucky's existing CAPTA process. Brief for Appellant, at 18-20. However, the collateral damage that might flow to the Appellant's reputation from a CAPTA hearing is no greater than that affecting any civil or criminal defendant, and is arguably much less given the confidentiality of CAPTA hearings.

In the proper exercise of its public safety regulatory power, the Kentucky Legislature has invested the Cabinet with police and quasi-judicial power to determine whether the names of alleged perpetrators of child abuse or neglect, such as this Appellant, should be placed on a Central Registry for the protection of Kentucky's children pursuant to legislative intent. 922 KAR 1:470; KRS 620.180(1); *See e.g.*, KRS 17.165(5); KRS 199.896(19); KRS 199.8982(1)(a). Specifically, KRS 17.165(5) provides as follows:

No child-care provider that is required to be certified under KRS 199.8982 or that receives a public child-care subsidy administered by the cabinet or an adult who resides on the premises of the child-care provider and has direct contact with a minor shall have been convicted of a violent crime, or a sex crime, ***or have been found by the Cabinet for Health and Family Services or a court to have abused or neglected a child.***

(Emphasis supplied.) KRS 199.896(19) provides as follows:

Directors and employees of child-care centers in a position that involves supervisory or disciplinary power over a minor, or direct contact with a minor, shall submit to a criminal record check in accordance with KRS 17.165. ***The application shall be denied if the applicant has been found by the Cabinet for Health and Family Services or a court to have abused or neglected a child*** or has been convicted of a violent crime or sex crime as defined in KRS 17.165.

(Emphasis supplied.) KRS 199.8982(1)(a) provides as follows:

The cabinet shall establish a family child-care home certification program which shall be administered by the Department. A family child-care provider shall apply for certification of the provider's home if the provider is caring for four (4) to six (6) children unrelated to the provider. A family child-care provider caring for three (3) or fewer children may apply for certification of the provider's home at the discretion of the provider. ***Applicants for certification shall not have been found by the cabinet or a court to have abused or neglected a child[.]***

(Emphasis supplied.)

As argued below, KRS Chapter 13B and the attendant Cabinet administrative regulations assure a person such as this Appellant fundamental due process procedures, i.e., notice and an opportunity to be heard and to confront the evidence against him, to challenge the allegations that may result in the placement of his name on the Central Registry for the protection of the public, and to seek judicial review of the final action by the agency. Moreover, unlike with a criminal conviction, the CAPTA proceedings are confidential, 922 KAR 1:480§6(3), and the information that a person's name has been placed on the Central Registry—unlike the Sexual Offenders Registry, which is governed by KRS 17.510—is available only to a reasonably limited number of people on a need-to-know basis so that the children to whom they owe a duty of due care and protection may be better protected in various places such as state licensed childcare providers, 922 KAR 1:300§3(6)(f); 922 KAR 1:305§7(1)(c), other state licensed facilities, such as schools, hospitals, detention facilities, or wherever else a court may order that such information be made available. KRS 620.050(5); 922 KAR 1:470§3. Accordingly, the Kentucky Legislature has properly and constitutionally balanced the private interest of persons such as the Appellant with the right of the public to have their children reasonably protected by the Commonwealth.

2. THE EXISTING CAPTA FRAMEWORK IS SUFFICIENT AND NO ADDITIONAL OR ALTERNATE PROCEDURES ARE WARRANTED.

Kentucky's CAPTA regulatory scheme is replete with procedural safeguards. Appellants are provided notice of the Department's substantiated finding against them. 922 KAR 1:480§3(1)(a); KRS 13B.050(3)(d). Appellants may request a hearing, 922 KAR 1:330§10(1); 922 KAR 1:480§2, where they can present a case and cross-examine evidence against them. KRS 13B.080(4). Appellants may file pleadings, motions, and recommended orders. KRS 13B.080(2). Appellants may have an attorney or other professional represent them in the hearing. KRS 13B.080(5). Appellants will receive a recommended order, including notice of their additional appeal rights, KRS 13B.110(4); KRS 13B.110(1), and may file written exceptions to the recommended order. KRS 13B.110(4). Appellants will receive a final order from the agency, KRS 13B.120(5), and may appeal the agency decision to circuit court. 922 KAR 1:330§10(3); KRS 13B.140. The administrative and procedural protections Appellants are afforded in the existing CAPTA framework are substantial and certainly adequate to meet existent due process requirements.

a. The burden of proof is on the Department.

The Appellant argues that the burden of proof is impermissibly placed upon the Appellant to prove that the initial substantiated finding by the investigative worker and supervisor is incorrect. Brief for Appellant, at 5. However, the initial substantiated finding does not become the final act of the Cabinet unless and until the Department is able to present sufficient proof, i.e., by a preponderance of the evidence, to convince the Commissioner to make that initial finding final. KRS 13B.090(7). That may or may not

occur. The Appellant is correct that KRS 13B.090(7) requires that the burden of proof is allocated to “the party proposing the agency take action or grant a benefit[.]” In CAPTA hearings, the party, the Department, is proposing that the agency, the Cabinet, adopt its initial investigative finding as final and resultantly place the Appellant on the Central Registry of substantiated perpetrators of child abuse or neglect, thereby preventing him from obtaining employment in a state licensed child daycare center, for example. 922 KAR 1:470; *See, also, e.g.*, KRS 199.896(19). Accordingly, “the agency has the burden to show the propriety of a penalty imposed, or the removal of a benefit previously granted[.]” KRS 13B.090, and the burden of proof remains on the Department to prove that the initial substantiated finding is correct. *Id.* The Appellee, the Department, by and through counsel, has repeatedly acknowledged in the case *sub judice* that it carries the burden of proof in CAPTA hearings. Appendix 2, at 6.

b. The Appellant is not denied access to evidence against him.

The Appellant next argues that the current system deprives him of the necessary evidence that should otherwise be available to him. Brief for Appellant, at 11. He cites no authority for his allegation. What Appellant is referring to is evidence of the child victim’s forensic interview that was videotaped at a children’s advocacy center, which is unavailable to him pursuant to statute, except as authorized by court order. KRS 620.050(6). With this requirement, the Kentucky Legislature has adopted a rational legislative policy of protecting sexually abused children from harassment flowing from the forensic interview process.⁷

⁷ The Appellant correctly notes that there is no known physical evidence in this case, but that here, as in many child sexual abuse actions, key evidence will be the child victim’s own testimony. However, he incorrectly cites the KAR dealing with such child testimony in a CAPTA appeal, in his Brief for Appellant,

In the case *sub judice*, the child victim participated in a forensic interview at the Jamestown Advocacy Center. Appendix 1, at 3. The Department does not, however, possess any interview summary, videotape, or other documentation related to said interview. The Department is precluded from even referencing that forensic interview during the CAPTA hearing unless the Appellant obtains access to it via a circuit court order, thereby alleviating any potential prejudice to the Appellant from said evidence. Appendix 2, at 6. On April 20, 2009, the Appellant filed a Complaint in the Jefferson Circuit Court but failed to make any request to access the videotape or other documentation of the victim's forensic interview at the Jamestown Advocacy Center. Appendix 1. Throughout the pendency of this matter before the Jefferson Circuit Court, the Appellant at no time ever requested any such order. Appendix 2, at 6.

While such videotaped or other documentary forensic evidence from the children's advocacy center would not be introduced in this CAPTA hearing, in lieu of the Appellant's successfully obtaining it via court order pursuant to the hearing officer's existing orders, any such evidence ever introduced in this or other CAPTA hearing would nonetheless be part of the official administrative record, contrary to the Appellant's assertions otherwise (Brief for Appellant, at 10), and therefore would be available for review by any circuit or appellate court from which the Appellant sought relief. KRS 13B.090 and .150; 922 KAR 1:480§6; Appendix 2, at 6.

c. The Appellant is afforded an impartial trier of fact.

The Appellant contends that the Cabinet hearing officers assigned to CAPTA proceedings are likely to be "more concerned about retaining [their] jobs and seeking

at 6, FN 2. He appears to instead be referencing 922 KAR 1:480 §6(4) and (5), wherein the procedure for the child's en camera testimony, based upon a finding of compelling need, is outlined.

upward mobility” than in providing an impartial review of the case. Brief for Appellant, at 5. While due process does require an impartial decision maker, *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970), it also presumes the honesty and impartiality of decision makers absent a contrary showing. *Withrow v. Larkin*, 421 U.S. 35, 55, 95 S.Ct. 1456, 1468, 43 L.Ed.2d 712 (1975). This Appellant has given no factual or legal basis for his accusation of bias. The Appellant simply assumes that because the hearing officer and the FSW are both employees of the Cabinet that the decision maker is less likely to be impartial. The Appellant is entitled to his opinion of this matter but he is not entitled to a new trier of fact or additional due process protections solely on his unproven opinion.

d. Due Process does not mandate jury trials in CAPTA proceedings.

The Appellant contends that he is entitled to a jury trial to challenge the initial substantiated finding that he has abused or neglected a child and the consequent placing of his name on the Central Registry of perpetrators of child abuse or neglect. Brief for Appellant, at 18-23. No right to a jury trial in administrative proceedings is granted by the common law and there is no such absolute right in administrative actions except where it is expressly conferred by statute. *Howard v. Howard*, 333 S.W.2d 953 (Ky. App. 1960). The Appellant is unable to cite any statutory basis for a jury trial in this administrative proceeding. Furthermore, the Kentucky Court of Appeals has noted that “an appeal from an administrative decision is a matter of legislative grace and not a right[.]” *Taylor v. Duke*, 896 S.W.2d 618, 621 (Ky. App. 1995).

There is similarly no right to jury trials in any actions regarding children enumerated in Kentucky’s Juvenile Code, including A/N/D actions, termination of

parental rights (hereinafter, “TPR”) actions, and status and delinquency offenses by minors. “The Seventh Amendment to the United States Constitution does not guarantee a right to jury trial in [A/N/D and TPR] cases, because it preserves the right only in common-law actions. The same is true in Kentucky.” Appendix 3, at 13; *See also*, KRS 610.070(1); KRS 625.080(1); *Mays v. Department for Human Resources*, 656 S.W.2d 252 (Ky. App. 1983); *Dryden v. Commonwealth*, 435 S.W.2d 457 (Ky. 1968); *McKiever v. Pennsylvania* 91 S.Ct. 1976, 403 U.S. 528, 29 L.Ed.2d 647 (U.S.Pa. 1971); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed 527 (1967). Inasmuch as TPR actions require proof that the parents have abused or neglected their children, KRS 625.090; *O.B.C. v. Cabinet for Human Resources*, 705 S.W.2d 954 (Ky. App. 1986), it is difficult to see why alleged perpetrators such as Appellant would be entitled to a jury trial in an administrative proceeding to determine whether the Commonwealth’s police power should be exercised to place Appellant’s name on the Central Registry of perpetrators of child abuse or neglect as a prophylactic measure for the protection of the Commonwealth’s children.

The Appellant heavily relies upon an inference he makes from the Kentucky Supreme Court case, *Maggard v. Commonwealth of Kentucky, Board of Examiners of Psychology*, to support his claim that a jury trial is warranted in lieu of the Cabinet’s offered administrative hearing in the case *sub judice*. Brief for Appellant, at 21-22, citing, *Maggard*, 282 S.W.3d 301 (Ky. 2009) (“Indeed, there is no entitlement to a jury trial in an administrative proceedings where the right in question is created by statute.”). However, a closer review of *Maggard* reveals that the Court in that matter was considering provision of a jury trial during the circuit court review of an administrative

hearing, not *in lieu of* the administrative hearing itself. *Id.* Nonetheless, the Appellant argues that the CAPTA hearing involves his “right” to protect his reputation, his professed protected liberty interest, one not created by statute and he is therefore entitled to a jury trial. Brief for Appellant, at 22-23. Even protected liberty interests do not *mandate* jury trials. *See, e.g., Washington v. Harper*, 494 U.S.210, 233, 110 S.Ct. 1028, 1042-43, 108 L.Ed.2d 178 (1990) (procedural due process does not require a full judicial hearing to protect prisoners who possess a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs; administrative review using medical decision makers satisfies due process); *Vitek v. Jones*, 445 U.S. 480, 496, 100 S. Ct. 1254, 1265, 63 L.Ed.2d 552 (1980) (prisoners facing involuntary transfer to mental hospital for involuntary psychiatric treatment are threatened with immediate deprivation of liberty interests and are entitled to notice and hearing but “independent decision maker conducting the transfer hearing need not come from outside the prison or hospital administration”); *McKeiver v. Pennsylvania*, 403 U.S. 528, 547, 91 S.Ct. 1976, 1987, 29 L.Ed.2d 647 (1971) (“a jury is not a necessary part even of every criminal process that is fair and equitable”). Even if this Appellant did assert a protected liberty interest, the process he is afforded in the existing CAPTA framework is sufficient due process, without the necessity of adding a jury trial that would only further delay these proceedings and thereby impede the agency’s ability to protect children.

3. THE GOVERNMENT HAS A SIGNIFICANT INTEREST IN PROTECTING CHILDREN FROM PERPETRATORS OF CHILD ABUSE OR NEGLECT.

The KUJC recognizes that children have “certain fundamental rights which must be protected and preserved, including but not limited to [...] the right to be free from

physical, sexual or emotional injury or exploitation[.]” KRS 620.010. This Commonwealth has long sought to protect its youngest and weakest citizens, particularly those who have suffered abuse or neglect at the hands of a caregiver. The General Assembly has endowed the Cabinet with certain general duties toward the protection of such children, including that the agency “plan for all children who are dependent, neglected, or abused” and “perform such other services as may be deemed necessary for the protection of children.” KRS 605.130(1), (4). Administration of a Central Registry listing persons determined by the Cabinet as having abused or neglected children in their care, is one such service. The government has an undeniable, significant, interest in keeping child abusers out of the ranks of professional childcare providers, foster parents, and educators, among other fields that involve frequent contact with children.

4. THE APPELLANT’S SPECULATIVE CONCERNS ABOUT FUTURE CIVIL OR CRIMINAL LITIGATION DO NOT MERIT ADDITIONAL DUE PROCESS.

The Appellant has expressed concerns about potential criminal and civil litigation arising in the future as a result of the incidents that are the subject of his administrative appeal, with the potentiality that his 5th Amendment rights would be implicated in a CAPTA proceeding. Brief for Appellant, at 20-21. Obviously, those concerns are merely speculative. “An actual controversy for purposes of the declaratory judgment statute [KRS 418.040] requires a controversy over present rights, duties and liabilities; it does not involve a question which is merely hypothetical or an answer which is no more than an advisory opinion.” *Barrett v. Reynolds*, 817 S.W.2d 439, 441 (Ky. 1991) (citing, *Dravo v. Liberty Nat’l Bank & Trust co.*, 267 S.W.2d 95 (Ky. 1954)).

In similar matters, the Kentucky Court of Appeals has held that staying child abuse or neglect proceedings in a dependency action until final disposition was had on *actual* criminal charges arising from alleged sexual abuse of the children was not warranted absent a showing that the parents would have been deprived of their right against self-incrimination or would risk "losing" their children as a result of the dependency proceedings. *Carter v. Drumm*, 700 S.W.2d 423 (Ky. App. 1985). *Also see*, *Standard v. Buckner*, 561 S.W.2d 329 (Ky. App. 1977), and *Baltimore City Dept. of Social Services v. Bouknight*, 110 S. Ct. 900, 905-906 (1990) (recognizing that "the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws" and confirming that "the ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement").

The Appellant additionally argued that any finding against him in a CAPTA hearing could be used as the basis for a *res judicata* or collateral estoppel argument in a civil case against him. Brief for Appellant, at 21. These concerns, too, are highly speculative and unlikely. Any *res judicata* argument requires identity of issues and that both causes of action arise from the same transactional nucleus of facts. *Yeoman v. Commonwealth, Health Policy Board*, 983 S.W.2d 459, 464-465 (Ky. 1998). Any civil action brought pursuant to the statutory authority cited by this Appellant, KRS 446.070, would be focused on demonstration of actual injury and damages resulting from purported statutory violation, thereby involving issues and facts far beyond those covered under this CAPTA hearing. Brief for Appellant, at 21. Additionally, collateral estoppel

likely would not apply because the relief authorized or requested is different in a CAPTA hearing and a civil action for damages. *Supra, Yeoman*.

In situations such as those at present, alleged perpetrators of child sexual abuse, such as this Appellant, might never be called to account in criminal case or civil damages cases. If such a person is allowed to frustrate the aforesaid legislative and regulatory scheme for the protection of the Commonwealth's children due to off-hand concerns that the alleged perpetrator *might someday* be called to account in a criminal action, then invocation most definitely *would* "interfere with the effective operation of a generally applicable, civil regulatory requirement[.]" and as such must not be allowed. *Id.*

B. KRS 13B.150(2)(c) DOES NOT VIOLATE THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE.

The Appellant argues that there is a discrepancy between the statutory requirement that a substantiated finding of child abuse or neglect be supported by a preponderance of the evidence, KRS 13B.090 and 922 KAR 1:330, and the fact that Kentucky's administrative procedures act admonishes a Circuit Court undertaking judicial review of a final order by the Cabinet where such evidence has been found to "not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact[.]" KRS 13B.150(2), and to only reverse the final order if it is "without support of substantial evidence on the whole record[.]" KRS 13B.150(2)(c).

The Appellant's complaint about this statute also could be made about the "clearly erroneous" standard which applies to appellate review of trial court findings of fact. *See, CR 52.01*. Regarding the factual findings of a trial court in TPR actions, which also involve determinations of child abuse or neglect, the Kentucky Court of Appeals has stated that "[w]e will not substitute our judgment for that of the family court unless there

is no substantial evidence in the record to support such a finding.” *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986). Are we to assume, pursuant to the Appellant’s reasoning, that the Court of Appeals is thereby authorizing the trial court to grant TPR based only on “substantial evidence” rather than based on a “clear and convincing” standard of proof as KRS 625.090(1) requires? Of course not. Similarly, when this Court construes KRS 13B.150(2)(c)—as it must—from the perspective of presumed constitutionality, it becomes clear that there is no inconsistency in deferring to the Cabinet’s final decision on questions of fact and yet requiring that the record as a whole demonstrate that the Department has presented substantial evidence to meet its “preponderance of the evidence” burden of proof.

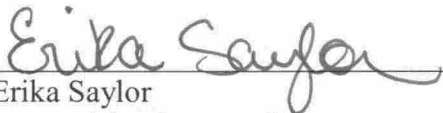
C. THE EXISTING CAPTA FRAMEWORK IS NEITHER ARBITRARY NOR CAPRICIOUS.

The Appellant’s claims are multifaceted but are essentially premised upon the theory that the Cabinet’s actions have been and will be arbitrary and capricious. Therefore, regardless of the theory challenging the administrative action, “[i]n the final analysis, all of these issues may be reduced to the ultimate question of whether the action taken by the administrative agency was arbitrary.” *American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456-57 (Ky. 1964) (involving claims that agency acted in excess of granted powers, lack of procedural due process, and lack of substantial evidence.)

A long body of case law clearly holds that the action of an administrative agency cannot be found to be arbitrary if there is any substantial evidence to support its action. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406 409 (Ky. App. 1995); *City of Lancaster v. Trumbo*, 660 S.W.2d 954 955 (Ky. App.

1983); *Taylor v. Coblin*, 461 S.W.2d 78, 80 (Ky. 1970); *Board of Education of Ashland School District v. Chatten*, 376 S.W.2d 693 697 (Ky. 1964) (*overruled on other grounds*); *Osborne v. Bullitt County Board of Education*, 415 S.W.2d 607, 612 (Ky. 1967). However, by pursuing this declaratory action, the Appellant wants to by-pass the process whereby it is determined whether or not the record indicates that substantial evidence exists to support a substantiated finding against him. This Court should deny that effort and allow the administrative due process procedures to play out.⁸

Respectfully Submitted,


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⁸ Pursuant to 922 KAR 1:470§2(1)(b)2, this Appellant's name will not appear on the Central Registry as a perpetrator of child abuse or neglect unless and until the substantiated finding against him is upheld in this CAPTA appeal. If the Appellant is found in this CAPTA appeal to have perpetrated child sexual abuse as determined in the Department's substantiation against him, his name will remain on that Central Registry permanently. *Supra*, at §2(2)(b)2.a. Therefore, it is in the Appellant's best interests to delay the CAPTA hearing, and potential upholding of the substantiated finding against him, as long as possible.