

## Kentucky Newspapers Seek More Transparency, Accountability in Child Fatalities

February 3, 2012 [Jon Fleischaker](#) and [Jeremy Rogers](#)

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In recent years, Kentucky has ranked among the states with the highest rates of child abuse deaths. Also in recent years, Kentucky has been among the states with the least transparency in its state child protection services. Although Kentucky has a very strong state freedom of information law, the Open Records Act, for years the state agency in charge of child protection services has essentially exempted itself from the law and has operated within a culture of complete secrecy. We have represented The Courier-Journal in a fight to change that in a series of lawsuits pitting the Cabinet for Health and Family Services (Kentucky's largest state agency) against Kentucky's two largest newspapers, the Louisville Courier-Journal and the Lexington Herald-Leader.

### Legal Background

In Kentucky, the Cabinet for Health and Family Services is the state agency responsible for child protection services. When a report of suspected child abuse or neglect is made, the Cabinet and its social workers are required to investigate and intervene.

The Commonwealth receives federal funding for child protection services via the federal Child Abuse Prevention and Treatment Act ("CAPTA"). In 1996, Congress amended CAPTA in order to increase transparency and public scrutiny over state child protection agencies in cases where the agency has been involved with the child, but despite that involvement, child abuse and neglect results in a fatality or near fatality. (Under the law, a "near fatality" is defined as an injury placing the child in critical condition.) Under the amended version of CAPTA, to be eligible for funding, a state is required to give assurances that it has in place, and that it actually enforces, a state law that includes "provisions which allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality." 42 U.S.C. § 5106a(b)(2)(A)(x).

To maintain Kentucky's eligibility for CAPTA funding, in 1998 Kentucky's General Assembly passed a statute providing that "[i]nformation may be publicly disclosed by the cabinet in a case where child abuse or neglect has resulted in a child fatality or near fatality." KRS 620.050(12)(a). However, that turned out to be a change of law only on paper because the Cabinet instituted its own contrary policy. The Cabinet maintained that it would never under any circumstances publicly disclose any information about any case where child abuse or neglect resulted in a fatality or near fatality. According to the Cabinet, this was to protect the "privacy" of those involved.

As this culture of complete secrecy pervaded Kentucky's child protection services, the rates of child abuse fatalities and near fatalities rose.

## The First Lawsuit

In 2009 and 2010, some transparency began to emerge. Unfortunately, it took the tragic death of Kayden Branham to make it happen. In 2009, 20-month-old Kayden was living in Wayne County, Kentucky with his 14-year-old mother, both of whom had been placed under the Cabinet's supervision. Although the Cabinet had intervened in Kayden's situation and had placed the child and his 14-year-old mother in the home of a relative, the Cabinet failed to ascertain that the two had actually moved in with Kayden's 19-year-old father in a trailer that was being used as a meth lab. Kayden died after drinking a toxic drain-cleaning chemical used in the production of meth. The father was charged with murder and drug offenses in connection with Kayden's death and the mother was reportedly charged in juvenile court.

Consistent with its policy of absolute secrecy, the Cabinet refused to provide any information relating to Kayden's death to the newspapers. The newspapers filed suit against the Cabinet under the state's Open Records Act.

In prior decisions, Kentucky's Attorney General (who can issue binding administrative decisions under the Open Records Act) had held that the Cabinet was not prohibited from publicly disclosing information about child abuse or neglect deaths because the state law provides that "[i]nformation may be publicly disclosed by the cabinet in a case where child abuse or neglect has resulted in a child fatality or near fatality." The Attorney General reasoned that the use of the word "may" gave the Cabinet "reasonable discretion" to release or not release information.

In court, the newspapers asserted that, when the state law changed to allow for release of these records, the Open Records Act mandated the release of the records when a request was made. The Cabinet continued to say it had the discretion to withhold these records and also asserted a variety of other legal theories to support its non-disclosure of the requested records, including the confidentiality provisions of the Health Insurance Portability and Accountability Act ("HIPAA"), the Open Records Act's personal privacy exception (KRS 61.878(1)(a)), and other state statutes that generally provide for the confidentiality of the Cabinet's child abuse investigation records.

Franklin Circuit Court Judge Phillip J. Shepherd issued an Opinion and Order on May 3, 2010, rejecting each of the Cabinet's arguments. Judge Shepherd held that, because the state law specifically allows the Cabinet to publicly disclose information in cases of child abuse and neglect fatalities, such information is not exempt from disclosure under the Open Records Act. In turn, because the Open Records Act is mandatory – not discretionary – the Cabinet is required to disclose the records. He observed that "the Cabinet has ignored the explicit authorization for public disclosure of these records set forth in KRS 620.050(12)(a)."

When the ruling became final in December 2010, the Cabinet did not appeal the ruling, and the court compelled it to provide records relating to Kayden's death and the Cabinet's involvement with the

family.

## **The Second Lawsuit**

Shortly after the court's decision in the first lawsuit became final, The Courier-Journal and Herald-Leader made requests to the Cabinet under the Open Records Act for multiple records relating to child fatalities and near fatalities in 2009 and 2010. The Cabinet delayed responding to the requests, and during the delay promulgated an "emergency regulation" which significantly limited the amount of information that it would provide from a child fatality or near fatality case. According to the Cabinet, the emergency justifying the regulation was the potential loss of federal CAPTA funds. However, there was no communication from the federal government to suggest that Kentucky's CAPTA funds were in any jeopardy.

When the Cabinet finally responded to the records requests, it refused to provide any of the records and, instead, attempted to invoke the exact same exceptions to disclosure that Judge Shepherd rejected in the final and binding decision in the first lawsuit.

The Courier-Journal and Herald-Leader filed suit, again in Judge Shepherd's court, seeking to hold the Cabinet to the prior ruling and seeking to strike down the emergency regulation. The Cabinet attempted to remove the lawsuit to federal court, claiming that the lawsuit presented a federal question because of the involvement of CAPTA. After several months, the federal court remanded the case to state court, holding that there was no federal question presented.

On November 3, 2011, Judge Shepherd granted summary judgment to the newspapers, holding that the Cabinet was bound by the prior decision in the case involving Kayden Branham. The court also struck down the emergency regulation, which by that time had automatically expired due to the Cabinet's failure to present the regulation through the legislative process. In his decision, Judge Shepherd wrote, "[a]fter reviewing the briefs filed in this case, the Court must conclude that the Cabinet is so immersed in the culture of secrecy regarding these issues that it is institutionally incapable of recognizing and implementing the clear requirement of the law that the general rule of confidentiality is subject to a specific exception in cases that have resulted in child fatality or near fatality."

On December 1, 2011, the court entered a judgment compelling the Cabinet to provide the records. However, since that time, the Cabinet has continued to fight with the newspapers over what information may be redacted from the records. Despite the court's decisions, the Cabinet has insisted on redacting a wide variety of information from the records, including the identities of witnesses who report suspected abuse or neglect, witnesses who were interviewed by social workers, medical information, information about past allegations of abuse or neglect, and even the identities of some of the fatality or near fatality victims and their family members, including those who may have been an active party to the abuse or neglect which led to the fatality or near fatality. The parties continue to litigate this dispute, and it is possible that the Cabinet will pursue an appeal.

## The Third Lawsuit: the Amy Dye case

At the age of four, Amy Dye was adopted by relatives in Todd County, Kentucky in 2006. Beginning in 2007, the Cabinet received multiple reports of suspected abuse and neglect concerning Amy from teachers and administrators at Amy's elementary school. The allegations primarily focused on Amy being physically and sexually assaulted by her two adopted brothers who were eight and ten years older than Amy. The family denied the allegations, and the Cabinet took no action. In February 2011, nine-year-old Amy died after one of her brothers beat her in the head with a jack handle.

The local newspaper, the Todd County Standard, made an open records request to the Cabinet for any records relating to Amy Dye. At first, the Cabinet failed to respond to the Standard's open records request, but when the Standard appealed to the Attorney General, the Cabinet claimed that it had no records concerning Amy. When the Attorney General inquired further, the Cabinet insisted that it was not required to offer an explanation for the *nonexistence* of records. The Attorney General issued a decision that the Cabinet violated the Open Records Act by failing to establish the nonexistence of the requested records. However, the Cabinet declined to appeal or to provide any of the records, apparently still maintaining that it had no records.

The Standard filed suit in Franklin Circuit Court to enforce the Attorney General's decision. Once the case landed in Judge Shepherd's courtroom, the Cabinet finally admitted that it had records relating to Amy. However, the Cabinet claimed that all of its records were exempt from disclosure because Amy's death was not the result of child abuse or neglect insofar as she was killed by a sibling and not by a parent or guardian. In a November 7, 2011 ruling, Judge Shepherd soundly rejected the argument, observing that "[t]his case presents a tragic example of the potentially deadly consequences of a child welfare system that has completely insulated itself from meaningful public scrutiny." He wrote that "the Cabinet's records document an alarming history of misfeasance, at best, or malfeasance, at worst, on the part of the Cabinet in addressing allegations of abuse and neglect toward [Amy]." Contrary to the Cabinet's determination, Judge Shepherd ruled that Amy's death was the result of child neglect by her adoptive parent, even though the fatal blow was administered by her brother.

Judge Shepherd released the Cabinet's files on Amy Dye. The records show that on February 16, 2011 -- the day after the Standard's open records request -- Cabinet employees made the deliberate decision not to label the investigation of Amy's death a "fatality investigation" so that it could try to evade the Standard's open records request. This highlights another continuing problem with transparency in the Cabinet. In order to provide oversight and accountability of the Cabinet, information is public in cases where fatality or near fatality results from child abuse or neglect. Yet, the Cabinet has unilaterally narrowed the definition of "abuse or neglect" and says it is the sole arbiter of whether a death was the result of abuse or neglect. The Cabinet has also continued to use the "privacy" argument, not to protect these children, but to protect itself and the adults in the system.

The litigation, especially the public disclosure of the facts involved in the deaths of Kayden Branham and Amy Dye, has resulted in a serious effort by the Kentucky General Assembly to revise and strengthen the laws to allow for more transparency and public accountability of the actions, or inactions, of the Cabinet. The fight for transparency continues both in the courts and in the legislature, but it seems that there may be substantial, favorable changes in the public's right to know and understand what happened to allow these children to die or be seriously harmed. It is more than coincidence that Kentucky's high child abuse death rates correlate to the Cabinet's high rate of secrecy. Disturbing cases like Kayden Branham's and Amy Dye's demonstrate the critical need for more public accountability within the Cabinet. Hopefully, increasing transparency will decrease child abuse deaths.