APPENDIX D.

Case Law Summary: Due Process and Data Repositories of Child Maltreatment Perpetrators

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APPENDIX D. CASE LAW SUMMARY: DUE PROCESS AND DATA REPOSITORIES OF CHILD MALTREATMENT PERPETRATORS

INTRODUCTION

The 5th and 14th Amendments of the U.S. Constitution prohibit governments from depriving individuals of their liberty or property interests. These Amendments assure fairness and promise that, before depriving an individual of liberty or property, the government must follow fair procedures. When a person is denied or deprived of one of these interests, that person is said to have been denied due process. There have been numerous court cases in which individuals have challenged procedures used by States to maintain and disseminate information in data repositories as violating their due process rights.

In recent years there have been many successful Federal and State court challenges to different aspects of child abuse data repositories on due process grounds. There have also been several State and federal court that have dismissed data repository challenges, finding that individuals failed to meet the strict requirements of the "stigma plus" due process test. This test requires individuals to prove an actual injury from being placed on the data repository beyond damage to their reputations. A handful of the most recent challenges to data repositories, however, have taken a less stringent approach to the "stigma plus" test, focusing more on whether the processes afforded alleged perpetrators were constitutionally adequate. It is not clear whether these more recent cases signify a shift in due process jurisprudence relating to state data repositories. These cases have imposed stricter requirements on State repositories with respect to notice, burdens of proof, and the right to a timely hearing

METHODOLOGY

Online legal search engines were the primary tool used to identify due process challenges to State data repositories. Databases that house all Federal court cases, including cases from the district courts, appellate courts and the U.S. Supreme Court, were searched. Data ranges were not set so that any Federal court opinion that addressed due process and repositories could be identified. Numerous key search terms were used, in a variety of combinations to maximize search efforts. Terms that were used include due process, child, abuse, neglect, registry, perpetrator, name, and index. Similar search terms were used to identify relevant State cases. State case searches were limited to the last 10 years and an "all State" database was used to search cases. This database includes State lower courts, appellate courts, and State supreme courts. Cases that are currently being litigated were also identified via news articles and regularly checking online legal search engines to ensure that any new case-related filings were identified.

KEY DUE PROCESS ISSUES ADDRESSED BY THE COURTS

This section provides an analysis of the key due process issues and how State and Federal courts have addressed them in the last 10 to15 years.

Constitutionally Protected Rights

To sustain a due process claim, an individual must show that a State or governmental entity or actor deprived them of a "constitutionally protected liberty or property interest…" (*Dupuy v. Samuels*, 397 F.3d 493, 503 (7th Cir. 2005) (internal citations omitted)). The test for determining whether placement on a data repository violates due process is well settled in the case law. If the challenge relates to the processes used by the government to place one's name on the repository, the court will inquire: (1) whether a liberty or property interest has been interfered with and then (2) whether the procedures afforded to the individual were constitutionally adequate. A fundamental property interest exists only if the complaining individual had a legitimate *entitlement* to the thing he lost. For example, if he loses a job because he was placed on the repository, then he has been deprived of a property interest, but only if he had a contractual entitlement to that job. If he was an at-will employee, then he had no legal entitlement to the job, and thus was not deprived of a constitutionally protected property interest.

In analyzing whether an individual has a fundamental liberty interest at stake, courts uniformly apply the "*"stigma plus"*" test. Here, the affected person must show that his or her reputation was injured (or stigmatized), as well as some real injury from either being placed on the repository or losing something to which he or she was legally entitled. To prove this kind of injury, the affected person usually must show that he or she lost or cannot obtain a job in a child-related field. (*See, e.g., Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994); *Dupuy v. Samuels*, 397 F.3d 493 (7th Cir. 2005)).

In a handful of cases, individuals have also argued that designation on the State data repository implicated their substantive due process *right to privacy* or *right of familial relations*, but many courts have rejected those arguments. (*See, e.g., Behrens v. Regier*, 422 F.3d 1255 (11th Cir. 2005) (court rejected argument that individual's substantive due process right was violated because there is no fundamental right to adopt); *see also Miller v. California*, 355 F.3d 1172 (9th Cir. 2004)).

Burden of Proof

What constitutes an adequate standard of proof at the substantiation phase (i.e., what amount of evidence is required to substantiate a report) has been addressed by numerous Federal and State courts. Many cases have held that due process requires at least a preponderance of the evidence standard (more evidence supporting substantiation than not supporting it) be used before an individual's name can be placed on a State data repository. (*See, e.g., Valmonte v. Bane*, 18 F.3d 992 (2nd Cir. 1994); *Jamison v. Missouri, Dept. of Soc. Serv.*, 218 S.W.3d 399 (Mo. 2007); In *the Matter of W.B.M.*, 2010 WL 702752 (N.C. App. 2010); *see also Petition of Preisendorfer*, 719 A.2d 590 (N.H. 1998)). In instances in which a lower standard (e.g., merely having some "credible" evidence of abuse or neglect) has been upheld, some courts have limited their decisions or directed the child welfare agency to apply the standard a certain way. For example, the New York Court of Appeals found that, although the preponderance standard had to be used

before disseminating repository information to potential employers, the lower "credible evidence" standard was sufficient if the information was shared only with health care and law enforcement agencies. (*Lee T.T. v. Dowling*, 664 N.E.2d 1243 (N.Y. 1996)). The 7th Circuit upheld the "credible evidence" standard as long as the child welfare agency looked at *all* evidence, not just evidence that tends to inculpate the individual. (*Dupuy v. Samuels*, 397 F.3d 493 (7th Cir. 2005)). Other courts have upheld lower standards of proof at substantiation, but have done so by relying on the totality of due process protections afforded the individual. For example, an Illinois court upheld a lower standard at substantiation and the first appeal, as long as the second review was done under a preponderance standard and there were no delays in the appeals process. (*Lyon v. Dept. of Children & Fam.*, 807 N.E.2d 423 (Ill. 2004)).

Although most cases address standards of proof at substantiation, a few have addressed the issue later in the appellate process. For example, the Second Circuit has held that using the "some credible evidence standard" at substantiation and first review carries an "unacceptably high risk of error," which violates due process (*Valmonte v. Bane*, 18 F.3d 992, 1004 (2nd Cir. 1994)). In contrast, the Illinois Supreme Court upheld the same standard at substantiation and the first appeal because the second appeal uses a preponderance standard. The court acknowledged, however, that, if there were delays in the appeals process, these standards of proof in the early stages would violate the alleged perpetrators' due process rights. (*Lyon v. Dept. of Children & Fam.*, 807 N.E.2d 423 (Ill. 2004); *cf. Doyle v. Camelot Care Centers, Inc.*, 305 F.3d 603 (7th Cir. 2002)).

Right to Notice

Some courts have held that the State does not need to notify an alleged perpetrator of the investigation until *after* his name was placed on the repository, even if placement on the repository could affect his employment prospects. (*See, e.g., Kindler v. Manheimer*, 2007 WL 61889 (Cal. App. Jan. 10, 2007) (involving a school teacher)). However, the courts in *Jamison* and *W.B.M.* disagreed, holding that agencies must provide alleged perpetrators with specific notice of the allegations against them before their names are placed on the repository. *Jamison v. Missouri, Dept. of Soc. Serv.*, 218 S.W.3d 399 (Mo. 2007); In *the Matter of W.B.M.*, 2010 WL 702752 (N.C. App. 2010). In *Jamison* the alleged perpetrators were nurses whose employment could be affected by placement on the repository and thus the right to specific notice in that jurisdiction may be limited to individuals employed in certain professions. In *W.B.M.*, however, there is no discussion of the alleged perpetrator's profession or possible loss of employment and, thus, it seems that all individuals may have a right to predeprivation notice in that jurisdiction unless an emergency or other compelling reason prevents it.

Right to a Hearing before Name is Placed on Data Repository

Some cases have held that individuals did not have a due process right to a hearing *before* their name was placed on the repository (*see, e.g., Red Willow v. Ellenbecker*, Civ. 94-5088 (D. S. Dak. 1995)). However, other courts have disagreed, holding that a preplacement hearing must be held unless doing so involved excessive cost or would be unduly burdensome on the State (*see, e.g., Lee T.T. v. Dowling*, 664 N.E.2d 1243 (N.Y. 1996)). *Jamison* and *W.B.M.* are similar to the latter ruling. In both, the courts held that the plaintiffs had a right to a hearing before their names were placed on the repository and based this reasoning in large part on significant delays in scheduling post-placement hearings. The right to a pre-placement hearing in *Jamison*, however,

may be limited to individuals whose employment is affected by placement on the repository, while this is was not the case in *W.B.M*.

Who can Challenge Inclusion on a Data Repository

Courts require different levels of actual or potential harm to an individual when considering their right to challenge inclusion on a repository. In several of the cases discussed above, the affected individuals worked with children and, therefore, their current and future employment opportunities were affected (*Jamison v. Missouri, Dept. of Soc. Serv.*, *Angrisani v. City of New York*). For cases in which employability in a child care field is at issue, the court's decision may be influenced by whether or not the State *requires* potential employers to check the repository and justify a decision to employ someone listed. (*Dupuy v. Samuels*, 397 F.3d 493 (7th Cir. 2005)). At least one case found that there was no due process violation and no right to a hearing because there was no real injury when a health care worker was included on the repository, despite her assertion that she would have to self-report it to her credentialing agency (the court noted that, although her name was listed on the repository, the State was not allowed to inform potential employers of that fact without giving her a hearing) (*L.C. v. Texas Dept. of Family and Protective Services*, No. 03-07-00055-CV, 2009 WL 3806158 (Tex.App.-Austin Nov. 13, 2009)).

Some cases have taken a broader view of what type of harm warrants due process protections in these cases. In one case discussed above, a father's listing on the repository was found to violate due process although the court did not discuss whether he worked with children or had an interest in being a foster or adoptive parent (*In the Matter of W.B.M.).* In others, courts considered foster parents' lost chance to adopt a specific child in their care, and individuals' inability to volunteer at a child care organization, in their decisions that the challenge process afforded was inadequate (*Lee T.T. v. Dowling*, *Humphries v. County of Los Angeles*) (Note, however that the Seventh Circuit has said that no property interest exists in remaining or becoming a foster parent (*Dupuy v. Samuels)* and the Eleventh Circuit has said there is no right to adopt unless granted by State law *((Behrens v. Regier*, 422 F.3d 1255 (11th Cir. 2005)).

Right to Appeal Decision Placing Name on Data Repository

Two relatively recent cases address whether there is a right to appeal a decision to place a name on the repository. In *Humphries*, a Federal court found the California repository system to be unconstitutional because it did not provide alleged perpetrators a method to challenge their placement on the repository or to have their names removed from it. *Humphries v. County of Los Angeles*, 554 F.3d 1170 (9th Cir. 2009), *cert. granted*, --- S. Ct. ----, 2010 WL 596529 (Feb. 22, 2010) (certiorari granted on an issue unrelated to due process ruling). The court held that the State must create some process that affords individuals a right to challenge the State's decision at some type of hearing, without outlining exactly what this hearing or process should entail.
In *Finch*, New York had an appeals process, but it was effectively unavailable to alleged perpetrators because of extreme delays in scheduling hearings. In its preliminary settlement agreement, the State agreed to grant affected individuals (approximately 25,000) appeals hearings, which had previously been denied to them. *Finch v. New York State Office of Children & Family Services*, No. 04 Civ. 1668(SAS), 2008 WL 5330616 (S.D.N.Y. Dec. 18, 2008).

SUMMARY

It is not clear how the holdings in the cases discussed above might be used and/or interpreted by other Federal and State courts as the standards of due process required are not consistent among the courts:

- The Second Federal Circuit and Supreme Courts of Missouri and New Hampshire have required a "preponderance" standard of proof be used before a name is placed on a State data repository. In contrast, the Seventh Federal Circuit and the Illinois Supreme Court have upheld lower standards, as long as other conditions are met.

- While the Missouri Supreme Court and North Carolina Court of Appeals required that individuals be notified *before* placement on the repository, a California Court of Appeals did not.

- The Missouri and New York Supreme Courts and a North Carolina Court of Appeals have required hearings *before* individuals are placed on the repository in certain circumstances, but a Federal District Court in South Dakota did not, even if it affects the individual's employment.

- The Ninth Federal Circuit and a Federal District Court in New York (via a settlement agreement) have both struck down data repository schemes that had either nonexistent or significantly delayed appellate processes.

It also remains to be seen whether or how these issues may be addressed with the institution of a national data repository of a State or county child protective services agency's abuse or neglect findings. Changes in States' due process procedures may require changes in both legislation and practice.

PERTINENT CASE SUMMARIES

This section provides a summary of pertinent cases. The cases are summarized by case name in alphabetical order. At the end of the appendix, a list of all the cases identified by State is provided. (See table B.1., Cases Involving Data Repositories of Child Maltreatment Perpetrators.)

Behrens v. Regier, 422 F.3d 1255 (11th Cir. 2005): The plaintiff accidentally injured his child and, although cleared of criminal liability, was placed on the Florida repository. Plaintiff, who had adopted one child, argued that his name on the repository prevented him from adopting again. The court rejected the argument that his substantive right to familial relations was violated because individuals do not have a fundamental right to adopt. The court also rejected his procedural due process argument relating to reputational harm. The court reasoned that even though he was stigmatized, he could not meet the "plus" prong of the test because he had no right under Florida law to adopt.

Doyle v. Camelot Care Centers, Inc., 305 F.3d 603 (7th Cir. 2002): The court rejected the plaintiffs' procedural due process arguments that they did not receive proper notice of their names being placed on the Illinois repository. One individual did not receive any formal notice and the other received notice late and the documentation contained little elaboration of the charges. The court reasoned that, although formal notice would have been ideal, the fact that both plaintiffs were handed redacted case files detailing some of the evidence against them in advance of their initial hearings constituted adequate notice under the due process clause. The court also addressed issues relating to the standard of proof. Plaintiffs challenged the "credible evidence" standard used to put someone on the repository. Although the court did not make a definitive ruling on the constitutionality of the standard, it said that the low evidentiary standard coupled with the initial determination to place someone on the repository, coming from an *ex parte* determination, seems prone to produce mistaken findings against innocent individuals, which could lead to erroneous deprivations. The court held that, if all of the facts the plaintiff alleged proved to be true at trial, the low evidentiary standard, coupled with a belated postdeprivation hearing (one plaintiff waited 8 months for a hearing, the other 11 months), would violate plaintiff's due process rights.

Dupuy v. Samuels, 397 F.3d 493 (7th Cir. 2005): The plaintiffs, Illinois child care workers, alleged that their opportunity to respond to abuse/neglect allegations before the agency indicated and disclosed a report was insufficient because it was not an evidentiary hearing. During the predeprivation conference offered they were given the name of the child, the place of the alleged incident, an explanation of the data repository, and the length of time their information will remain on the repository. The court held that the conference was adequate because it provides the accused an adequate opportunity to avoid an unjust determination and because the person presiding over the conference was not involved in the original investigation. The right to such a conference did not apply to people who were not currently child care workers but were hoping to enter the profession; the court held that this violated these child care workers' right to procedural due process because there needed to be an immediate resolution of issues preventing them from working in their chosen profession. Plaintiffs also alleged that the State was violating their procedural due process rights because appeals of placements on the repository could take up to three years to schedule. The district court mandated (and the 7th Circuit upheld) that the State implement a 35-day expedited appeals process for child care workers. Finally, plaintiffs challenged the State's use of the "credible evidence" standard when placing names on the repository. The district court held (and the 7th Circuit affirmed) that the standard was sufficient as long as investigators took into account both inculpatory and exculpatory evidence when making a decision.

Finch v. New York State Office of Children & Family Services, No. 04 Civ. 1668(SAS), Not Reported in F.Supp.2d, 2008 WL 5330616 (S.D.N.Y. Dec. 18, 2008): Child care workers challenged the New York repository system's delays in scheduling administrative hearings as unconstitutional. The court remanded the case for a trial, but suggested that the State complete hearings within 6 months from the date of request, with decisions issued 30 days from the conclusion of the hearing. In February 2010, the parties agreed to a settlement that has, to date, been preliminarily approved by the court. The settlement agreement says that the State shall give notice to the child care workers that they are on the repository and provide them with an opportunity to receive an administrative hearing to challenge their placement if they are currently

waiting for the processing of a check of the repository by an employer or planning to apply for a job in the child care field within 45 days. This administrative review was required to be given "as promptly as possible."

Humphries v. County of Los Angeles, 554 F.3d 1170 (9th Cir. 2009), *cert. granted*, --S. Ct. ---, 2010 WL 596529 (Feb. 22, 2010) (certiorari granted by the U.S. Supreme Court on an issue unrelated to due process ruling): A couple that was erroneously placed on the California repository and could not get their names expunged from the list brought a due process challenge. California did not have an expungement procedure; the only option was to convince the investigator who recommended placement on the repository to change his mind. The court held that California had to allow people placed on the repository an opportunity to challenge their inclusion at some sort of hearing. The court reasoned that, without this remedy, the risk of erroneous placement on the repository was impermissibly high

Hunt v. Indiana Family & Social Services Administration, Not Reported in F.Supp.2d. 2007 WL 2349626 (S.D. Ind. Aug. 1, 2007): Plaintiff lost her license to run a child care facility when placed on the Indiana repository. The court held that the plaintiff's State licenses entitled her to operate her day care business and therefore amounted to a property interest. The court, however, found that this interest was not violated because the State allowed her to keep her facility open during the course of the investigation. Applying this same logic, the court struck down her liberty interest claim, finding that, even though her reputation was harmed, she could not prove the "plus" prong of the test because the damage to her reputation did not make it impossible to keep her business open even if the harm did lead to fewer clients.

In the Matter of W.B.M., 690 S.E.2d 41 (N.C. Ct. App. 2010) (*W.B.M.*): Plaintiff was placed on the repository after allegedly sexually abusing his child. Plaintiff challenged the placement through the available channels at the time, which included a review by the director of the agency, then by the district attorney, and then by a trial court. His request for expunction was denied at each juncture. On appeal, the plaintiff argued that the lack of a preplacement hearing violated his due process rights and the higher court agreed, holding that the repository was unconstitutional. The court reasoned that the entire appeals process could take up to 169 days or more. It said that a predeprivation hearing would not be unduly burdensome to the State nor was the act of placing the individual's name on the repository an action that needed to be taken immediately. The court also struck down the substantial evidence standard used to place the plaintiff's name on the repository. The court held that, at the predeprivation hearing, a preponderance of the evidence standard was required because the lower standard compromised the individual's right to be heard in a meaningful manner and it did not allow the fact finder to weigh the evidence properly.

Jamison v. Missouri, Department of Social Services, 218 S.W.3d 399 (Mo. 2007): Registered nurses at a day care center challenged their placement on the Missouri repository. Their names were left on the repository during their appeal process where potential employers had access to the information. The Missouri Supreme Court found that the nurses had a liberty interest at stake under the "stigma plus" test. The court noted that the nurses were, in effect, barred from future employment in their chosen profession because all State child care providers were required to use the repository to screen employees, and there were serious ramifications (like losing funding or licensing) if an employer hired or continued to employ someone who was on the repository.

The court then struck down parts of the repository scheme, holding that (1) the agency's failure to provide the nurses specific notice of the allegations against them before their names were placed on the repository and reviewed by the investigator or agency director violated their due process rights; (2) the nurses must be afforded some predeprivation notice and opportunity to be heard because of the current system's long delays before an administrative hearing is scheduled and the high risk of erroneous deprivation, using the low standard of review; (3) the "probable cause" standard at the administrative hearing was too low. It reasoned that such a low standard gave rise to a high risk of erroneous fact finding, and that it placed the brunt of the risk of that error on the individual instead of the agency. The administrative hearing had to have at least a preponderance of the evidence standard to be constitutional; and (4) the administrative hearing procedures that allowed hearsay, testimony not under oath and prohibited cross-examination were sufficient because the nurses were provided notice and an opportunity to present their side of the story through witnesses and could request judicial review of the administrative decision.

Kindler v. Manheimer, Not Reported in Cal.Rptr.3d. 2007 WL 61889 (Cal. App. Jan. 10, 2007): The court found that notice to a suspected perpetrator is not required until *after* the child welfare agency reaches its conclusion to include the person's name on the repository.

Lee T.T. v. Dowling, 664 N.E.2d 1243 (N.Y. 1996): The court held that due process required that a report of child abuse must be substantiated by a "fair preponderance of the evidence" before being released "as a screening device for future employment." The court also held that, during the investigative process, the information may be retained on the strength of some credible evidence supporting it and released to health care and law enforcement agencies under certain terms and conditions. When the investigation is at an early stage, and the deprivation is a temporary one pending an adversarial hearing, it is not improper for the State to rely on a report that contains some credible evidence**.**

Lyon v. Dept. of Children & Fam., 807 N.E.2d 423 (Ill. 2004): A teacher argued that his placement on the Illinois repository violated his due process rights because the credible evidence standard used at the first review was too low and there was too much of a delay in proceedings. The court agreed in part, finding that the delay and the low standard of proof at the first review were not by themselves enough to rise to the level of a due process violation. However, when combined, they deprive the teacher of his due process rights. The court reasoned that, if the "some credible evidence" standard continues to be used at an initial appeal, the secondary administrative appeal, which uses a preponderance standard, cannot be delayed and must occur within the strict timeframes set in State law.

Miller v. California, 355 F.3d 1172 (9th Cir. 2004): The court rejected a grandparent custodian's challenge to having his name on the California repository. The court struck down his substantive due process argument because grandparents do not have a constitutionally protected liberty interest in making decisions about children in their care. The court also rejected his harm to reputation argument, finding that, because he retained custody of the children, he suffered no change in legal status as a result of being on the repository.

Petition of Preisendorfer, 719 A.2d 590 (N.H. 1998): The plaintiff, a special education aide, challenged the "probable cause" standard used to place his name on the New Hampshire data

repository. The court held that use of the standard for individuals whose employment was at stake was too low and violated due process. The court reasoned that the risk of erroneous error was too great to the individual and the additional burden on the government, by using a higher preponderance standard, was minimal.

Red Willow v. Ellenbecker, Civ. 94-5088 (S. Dak. 1995): Plaintiffs challenged their placement on the South Dakota repository, arguing that the appeals procedures provided in statute violated their procedural due process rights. Under the South Dakota law, individuals were informed that their names were on the repository after the fact. Upon notice they could request an informal review, an administrative hearing, and a judicial review. The court held that additional procedural protections were not constitutionally required, citing cases that held that predeprivation procedures are unduly cumbersome and duplicative of post-deprivation processes.

Smith ex rel. Smith v. Siegelman, 322 F.3d 1290 (11th Cir. 2003): A minor challenged his placement on the Alabama repository. The court never reached his arguments that the hearing provided was insufficient (he was not allowed to call or cross-examine witnesses) because he failed the "stigma plus" test. The court found that, although he may have been stigmatized, he suffered no tangible loss as a result. The court reasoned that any damage done to his future job prospects stemmed from a reputational injury only, which is insufficient to satisfy the "plus" prong.

Valmonte v. Bane, 18 F.3d 992 (2d Cir. 1994): The plaintiffs challenged the constitutionality of using a "credible evidence" standard to place an individual's name on the New York repository. Although the repository scheme allowed the individual to immediately appeal the decision, the burden of proof remained the same. It was not until after an individual was fired from a job or denied employment that the appellate reviewer would use a "preponderance" standard. The court held that using such a low standard of proof created too high a risk of erroneous deprivation of individuals' constitutional rights, noting that approximately 75 percent of cases appealed were later expunged from the repository.

Table D.1. Cases Involving Data Repositories of Child Maltreatment Perpetrators

CASE NAME	STATE	COURT LEVEL	YEAR	PUBLISHED	HOLDING
Vancleave v. Arkansas Dept. of Health and Human Services	AR	State Court of Appeals	2007	Published	Administrative appeals process to remove name from repository was not an impermissible relitigation of criminal child abuse case, where individual was found not guilty.
C.C.B. v. Arkansas Dept. of Health and Human Services	AR	Supreme Court of Arkansas	2007	Published	Individual's argument that administrative law judge was biased simply because he worked for the agency bringing the case was rejected.
Burt v. Orange County	CA	State Court of Appeal	2004	Published	California statute implicitly includes a right to challenge being placed on the repository.
Miller v. California	CA	Ninth Federal Circuit	2004	Published	Grandparent custodian's placement on the repository did not negate his substantive due process right because he does not have a constitutionally protected liberty interest in making decisions about children in his care.
Kindler v. Manheimer	CA	Court of Appeal, First District, Division 3, California	2007	Not Officially Published	Notice to a suspected perpetrator is not required until after the agency places his name on the repository.
Humphries v. County of Los Angeles	CA	Ninth Federal Circuit	2009	Published	Repository violated due process by failing to afford persons listed a fair opportunity to challenge allegations against them.
Doe v. State Dept of Children & Families	CT	State Superior Court	2004	Not Published	Prohibiting children from testifying at substantiation hearings does not violate individuals' right to confront or cross-examine witnesses.
Kimberly L. v. Hamilton	CT	State Superior Court	2008	Not Published	A several-week delay in completing the child abuse investigation did not violate individual's due process rights.
Hogan v. Department of Children and Families	CT	Supreme Court of Connecticut	2009	Published	Rejected argument that repository scheme was so vague that it was unclear what conduct would result in designation on the repository.

CASE NAME	STATE	COURT LEVEL	YEAR	PUBLISHED	HOLDING
State of Georgia et al. v. Jackson	GA	Supreme Court of Georgia	1998	Published	Struck down repository scheme as unconstitutional because it precluded perpetrators from compelling a child's testimony during administrative proceedings.
Smith ex rel. Smith v. Siegelman	FL	Eleventh Federal Circuit	2003	Published	Minor's due process rights were not violated when only possible future job pro0spects may have been hindered by placement on the repository
Doyle v. Camelot Care Centers, Inc.	IL	Seventh Federal Circuit	2002	Published	Formal notice was not necessary to child care workers whose names were on the repository and credible evidence standard was prone to error.
Boyd v. Owen	IL	Seventh Federal Circuit En Banc	2007	Published	"Credible evidence" standard was facially constitutional, but it violates an individual's due process rights when the agency only reviews inculpatory evidence.
Hunt v. Indiana Family & Social Services Administration	IN	Federal District Court	2007	Not Reported	Placement of child care facility owner's name on the repository did not infringe on her due process rights because she was able to keep her business open.
Howard v. Malac	MA	Federal District Court	2003	Published	Failure to notify individual of placement on the repository, by itself, does not constitute a due process violation when there is no cognizable property or liberty interest at stake.
Pease v. Burns	MA	Federal District Court	2010	Published	Although a several-year delay in hearing violated due process, the case was dismissed because none of the named defendants were responsible.
Hodge v. Jones	MD	Fourth Federal Circuit	1994	Published	Maintaining "unsubstantiated" reports in the data repository did not violate due process when only agency representatives could access the information.
Owens v. P.G. County Dept. of Social Services	MD	State Court of Special Appeals	2008	Published	Rejected argument that name should be removed from repository because agency investigation took longer than

CASE NAME	STATE	COURT LEVEL	YEAR	PUBLISHED	HOLDING
					allowed by statute.
Jamison v. Missouri, Department of Social Services	MO	Missouri Supreme Court En Banc	2007	Published	Parts of repository scheme violated due process, relating to notice, standard of proof, and right to a hearing.
In the Matter of W.B.M	NC	State Court of Appeals	2010	Published	Preponderance standard required at hearing before name is placed on repository.
Petition of Preisendorfer	NH	Supreme Court of New Hampshire	1998	Published	Preponderance of the evidence standard must apply in a hearing on whether to list individual on repository, when the individual's job is at stake.
Neason v. Clark Co.	NV	Federal District Court	2005	Published	Rejected argument that placement on out-of-State repository resulted in inability to get a job when there was no evidence that repository information was relied upon in making job decisions and individual did not lose a job she already had.
Valmonte v. Bane	NY	Second Federal Circuit	1994	Published	Use of the "credible evidence" standard carried too high a risk of error when placing individuals' names on the repository.
Glasford v. N.Y. State Dept. of Soc. Serv.	NY	Federal District Court	1992	Published	Family court determination of abuse creates a nonrebuttable presumption that individual committed the alleged abuse in the context of the administrative hearing challenging designation on the repository.
Tafuto v. New York State Office for Children and Family Services	NY	Federal District Court	2009	Slip Copy	Disclosure of investigation to daycare provider's clients and licensing authority before an appeals hearing did not violate due process when the information was not shared with a potential employer.
Maude v. N.Y. State Office of Children and Family Services	NY	State Supreme Court Appellate Division, New York	2010	Slip Opinion	Expungement hearings do not need to be presided over by administrative law judges.
C.E. v. Dept of Public Welfare	PA	State Commonwealth Court	2007	Published	Individual must be given a fair opportunity to confront or cross-examine child witness at hearing to challenge placement on repository.

CASE NAME	STATE	COURT LEVEL	YEAR	PUBLISHED	HOLDING
F.V.C. v. Department of Public Welfare	PA	State Commonwealth Court	2010	Published	Under State law, mother could appeal expungement of grandfather's name from repository even though she was not the subject of the abuse report.
Red Willow v. Ellenbecker	SD	Federal District Court	1995	Unpublished	Upheld practice of informing individuals of repository designation after placement on repository, finding that predeprivation procedures are unduly cumbersome and duplicative of postdeprivation processes.
Dubray v. Dept. of Social Services	SD	Supreme Court of South Dakota	2004	Published	Individual was denied a meaningful opportunity to review agency's initial decision when agency's case was entirely based on three documents that were inadmissible hearsay.
Vigil v. Division of Child and Family Services	UT	State Court of Appeals	2005	Published	Failure to notify an individual of specific allegations that the agency would raise at an administrative hearing violated due process.

APPENDIX E.

State Comparison of Select Due Process Requirements

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APPENDIX E: STATE COMPARISON OF SELECT DUE PROCESS REQUIREMENTS

This table provides a summary of State survey responses relating to critical Due Process of Law issues, often addressed in court cases challenging the operation of State data repositories. Answers in each field reflect survey responses from States, cross-tabulated with each other, as well as staff-performed statutory and case law research. "Yes" and "no" responses reflect State answers to the survey or answers found through staff-performed case law or statutory research. "Does not specify" answers reflect that statutory research was conducted and statutory language addressing the question was not identified. State policy, regulations or rules were not reviewed. "Missing" answers mean that the State did not participate in the survey and staff did not conduct research to answer the questions.

Requires Preponderance of the Evidence Standard for Substantiation
Thirty-three States reported that they use a "preponderance of the evidence" standard or higher to substantiate a maltreatment finding. Nineteen States reported that they use some lower standard, such as "credible evidence" or "reasonable cause." Some courts, such as the Second Federal Circuit and the Supreme Courts of Missouri and Hew Hampshire, have required that the "preponderance" standard be used *before* any name is placed on a State data repository. However, other courts in the Seventh Federal Circuit and Illinois have upheld lower standards, as long as other conditions are met.

Notice of Designation on Data Repository
Thirty-one States reported that they notify individuals that they will be designated (placed) on the State data repository. Sixteen States reported that they did not provide such notification, and four States indicated that they notified individuals only under certain circumstances. Several State Supreme Courts have held that to satisfy due process, States must provide alleged perpetrators with specific notice of the allegations *before* their names are placed on a State data repository. However, one case, an unpublished State court opinion in California, has held otherwise.

Right to Challenge Designation on Data Repository
Twenty-eight States offer at least one level of review for alleged perpetrators to challenge designation on a State data repository. Only one State indicated that they do not. However, 17 States did not respond to this question. Federal courts in the Ninth Circuit and the Federal District of New York have struck down State data repositories as unconstitutional that had nonexistent or significantly delayed review processes.

Placement on State Data Repository during Appeal of Designation
Nineteen States reported that they placed individuals' names on the State data repository while there was an appeal pending of their designation. Ten States reported that they did not add a name to the repository while an appeal was pending. Twenty States did not specify whether they did or did not delay placement on the repository while an appeal was pending. Several State court cases have required hearings *before* individuals are placed on State data repositories in certain circumstances (e.g., when their employment is at stake).

Appendix E: State Comparison of Select Due Process Requirements

STATE	REQUIRES PREPONDERANCE OF THE EVIDENCE STANDARD FOR SUBSTANTIATION	NOTICE OF DESIGNATION ON DATA REPOSITORY	RIGHT TO CHALLENGE DESIGNATION ON DATA REPOSITORY	PLACEMENT ON STATE DATA REPOSITORY DURING APPEAL OF DESIGNATION
	Is the state required by case law, statute or policy to use a preponderance of the evidence standard or higher when making the substantiation decision?	Is the state required by case law, statute or policy to notify individuals that they will be designated a perpetrator on the state data repository?	Is a first level of review provided for a person to challenge being designated a child maltreatment perpetrator in the data repository?	Does case law, statute or written policy allow an individual to be added to the state data repository while the first level of review of designation on the state data repository is being conducted?
Alabama	Yes	Yes	Yes	No
Alaska	No	No	Missing	Does not specify
Arizona	No	Yes	Once found to have committed abuse or neglect by a preponderance of the evidence or probable cause standard of evidence, perpetrator is automatically placed on the Central Registry.	No
Arkansas	Yes	Yes	Yes	Missing
California	Yes	Yes	According to Humphries v. County of Los Angeles *(*9th Federal Circuit, 2009), California's repository violated due process by failing to afford persons listed a fair opportunity to challenge allegations against them.	Does not specify. According to *Kindler v. Manheimer* (unpublished opinion, State Court of Appeals, 2007), notice to a suspected perpetrator is not required until after the agency places his name on the repository.
Colorado	Yes	Yes	Yes	Yes
Connecticut	No	Yes	Yes	Yes
Delaware	Yes	Yes	Yes	Does not specify
District of Columbia	No	Yes	Missing	Does not specify
Florida	Yes	No	There is no statewide policy, process or procedure for a person to challenge the finding that he/she is a perpetrator of child abuse and neglect. There may be local protocols whereby if a person challenges a finding, there is a review of written documentation by an individual at the agency at a higher level than a caseworker or supervisor. There is no formal appeal process for any	Does not specify

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			administrative/agency finding. However, the department is in the process of establishing a formal due process appeals procedure.	
Georgia	Yes	No	No data repository	Missing
Hawaii	No	No	Missing	Does not specify
Idaho	No	No	Missing	Does not specify
Illinois	No	Yes	Yes	Yes
Indiana	Yes	Yes	Yes	Yes
Iowa	Yes	No	Missing	Does not specify
Kansas	Yes	Yes	Yes	No
Kentucky	Yes	No	Missing	Does not specify
Louisiana	Yes	Yes	Yes	Yes
Maine	No	Yes	Yes	Yes
Maryland	Yes	Yes	Yes	No
Massachusetts	No	No	Massachusetts did not participate in the legal survey. Pease v. Burns *(Federal District Court, 2010)*) provides some evidence that the State provides individuals an opportunity to challenge their designation. The case found that a several year delay in scheduling an appeal hearing violated due process.	Does not specify
Michigan	Yes	Yes	Yes	Yes
Minnesota	Yes	No	Yes	Yes
Mississippi	No	No	Missing	Does not specify
Missouri	Yes	Yes	Yes	Yes. However, the State reported that the person could not be designated pending the appeal of the maltreatment determination.

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Montana	Yes	No	Missing	Does not specify
Nebraska	No	Yes	Yes	Yes
Nevada	No	Yes	Yes	Does not specify
New Hampshire	Yes	Yes	Yes	No
New Jersey	Yes	Yes	Yes	Does not specify. However, the State reported that an individual could be designated on the repository when there is a substantiated finding.
New Mexico	No	Yes	No	Does not specify. However, the State reported that a maltreatment finding is sufficient to document the case in their FACTS system.
New York	No	Yes	Yes	Yes
North Carolina	Yes	Only those individuals determined to be responsible for abuse and serious neglect as defined in statute as the result of a CPS Investigative Assessment.	Yes	No
North Dakota	Yes	Yes	Yes	Yes
Ohio	Yes	No	Determined by each agency's policy	Does not specify
Oklahoma	No	No	Yes	Yes
Oregon	No	Yes	Yes	Yes
Pennsylvania	Yes	No	Pennsylvania did not participate in the legal survey. *C.E. v. Dept of Public Welfare (*State Commonwealth Court, 2007) provides some evidence that the State provides individuals an opportunity to challenge their designation. The case found that individuals must be given a fair opportunity to cross-examine witnesses at hearings to challenge placement on the repository.	Does not specify
Puerto Rico	Yes	Yes	Yes	Yes

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Rhode Island	Yes	Missing	Missing	Missing. However, the State reported that an individual could not be designated on the repository pending an appeal of the maltreatment determination.
South Carolina	Yes	Childcare, foster care, residential group care and institutional cases require notice. All others are entered on the Central Registry only after a court order.	Yes	Yes
South Dakota	Yes	Yes	When the designation is based on the investigation by the Division of Child Protection Services, the individual can request a review. When the designation is based on a court finding, the individual does not have the right to a review.	No
Tennessee	No	Yes	Yes	Yes. However, the State reported that an individual could not be designated on the repository pending an appeal of the maltreatment determination.
Texas	Yes	For CPS cased no notice is required. For child care licensing, notice is required by policy.	Yes	Yes
Utah	No	If the Division makes a supported finding that a person committed a severe type of abuse or neglect, it must notify the individual that his name has been listed in the licensing information system.	Missing	Yes

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Vermont	No	Yes	Missing	No
Virginia	Yes	Yes	Yes	No
Washington	Yes	Yes	Missing	Does not specify
West Virginia	Yes	No	Missing	Does not specify
Wisconsin	Yes	No	Missing	Does not specify
Wyoming	No	Yes	Yes	No