THE WILSON COUNTY SCHOOL SYSTEM,	)	**Chancery Court No. 91-2675-II**
Plaintiffs/Appellants,	)	
VS.	)	
CREAD CLIFTON and wife, TAMELA CLIFTON as next of kin for their minor son, WILLIAM (KYLE) CLIFTON	)	**Appeal No. 01A01-9604-CH-00152**
Defendants/Appellees.	)	

FILED

November 13, 1996

Cecil W. Crowson
Appellate Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

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HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
SAMUEL L. LEWIS, JUDGE

CONCURS IN RESULT
WILLLIAM C. KOCH, JR., JUDGE

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O P I N I O N

This is a suit for judicial review of an administrative decision of the Tennessee Department of Education requiring the Wilson County School System to pay for private instruction of a handicapped child. However, the Department of Education was not named as a defendant and has taken no part in the proceedings.

The Administrative Procedures Act, does not expressly require that the agency which rendered the decision be made a party to an action for judicial review. However, T.C.A. § 4-5-322(b) (2) requires that copies of the petition for review be served upon the agency. This implies that the agency should be notified and given an opportunity to defend its action before the Courts. So far as this record shows, this did not occur. Upon remand, this omission should be supplied.

The statutory background of the dispute includes 20 U.S.C. § 1400 "Education of the Handicapped Act" and T.C.A. Title 49, Chapter 10, entitled "Special Education."

A perusal of said statutes discloses a scheme of federal grants to states and state grants to local school systems to finance and encourage adequate special education for handicapped

persons, particularly children. T.C.A. § 49-10-601(c) authorizes the State Department of Education to conduct hearings on complaints of failure of local systems to adequately provide for the disabled.

Such a hearing was conducted by an administrative judge who on June 17, 1991, entered an eighteen page order which states:

> In November and December, 1989, and January, 1990, K's mother communicated with respondent school district personnel. Educational services, however, were not rendered during this period. In January, 1990, K's mother contacted the institution of private placement for evaluation of K. An evaluation was completed and recommendations made. As with any conscientious parent, K's mother was anxious to address K's needs and requested a multi disciplinary team (M-Team) meeting to prepare an individual Educational Program (IEP) for K.
>
> The first M-Team was convened February 8, 1990. K's parents did not agree that the February 8, 1990, IEP was appropriate and declined to acquiesce to have same implemented. Subsequently, Two additional M-Team meetings occurred March 15 and May 14, 1990, ending in similar discord. Therefore, the issues addressed at this hearing were:
>
> 1. Whether the school district could provide a free appropriate public education in the least restrictive environment when the components of the child's IEP were inferior to the child's needs as assessed by an outside institution; and
>
> 2. whether placement in private institution is the least restrictive environment when the child educated among a marginal number of children who do not have handicaps and must make a significant trip to attend the institution that offers the same services available within the school district; and
>
> 3. whether school district should reimburse parents for independent psychological evaluation when parents disagreed with school district's evaluation but did not make their request for a new evaluation known or make results of same available to school district for use in development of an individualized education program; and
>
> 4. whether the school district must reimburse parents for tuition costs in private institution

> when parents refused to concur with inappropriate individualized educational program that failed procedurally and did not plan, locate, design, equip and guarantee child necessary accommodations to address needs of same.

Following the preceding text, the order undertakes to state findings of fact and conclusions of law as follows:

> The holistic impression from the testimony of parties, witnesses, and the record was that the school district was always ready, willing and able to respond to the child's needs based on the "then available" data. It was disturbing, however, that the school district was continually in the position of borrowing outside information and activities to define their "then available" data. That is to say, the school district did not convince this writer that they had planned, located, designed, constructed, equipped and maintained the necessary facilities to meet the academic and physical needs of this child, adapted, Tennessee Code Annotated, Section 49-10-103.
>
> School district's response appears to be that they cannot expend the funds for the aforementioned without the placement of the child. The parents refuse to remove the child, from an otherwise appropriate placement, until the school district proves it can deliver the appropriate support services to guarantee a free appropriate public education. These diametric positions define the predicament.
>
> Because there was no proof that the school district had: consulted engineers or architects to design a classroom conducive to educate a hearing, speech and language impaired child; nor budgeted funds to meet the needs of the child; together with absence of proof of its ability to "first" design and coordinate professionals to accommodate the child's hearing, speech and language impairments; and hesitation to commit representations to the child's IEP, the Court finds petitioners argument based on the inquiry of Neveldine, 16 E.H.L.R. 739 (1990) to be well taken. In these respects, the school district's proof was found lacking. These were factors in determing appropriateness.
>
> The private placement is found to have been educationally beneficial and appropriate. Incidental to the findings above, this Court finds no bad faith on behalf of either party.
>
> The proposition that deference should be given to the local education agency in the placement decision is well taken. But since all components were not included in the IEP (e.g. transcript 75), this officer is not prepared to agree that the

school district complied procedurally.

> Otherwise, this officer finds that the proof amply demonstrates that the school district, when properly engaged by placement, has the wherewithal to provide a free appropriate public education in the least restrictive environment.

For the reasons detailed hereafter, this Court deems the foregoing findings of fact and conclusions of law to be inadequate compliance with T.C.A. § 4-5-314 which reads in pertinent part as follows:

> The "Final Order", initial order or decision under § 50-7-304 shall include conclusions of law, the policy reasons therefor, and findings of fact for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. The final order, initial order or decision must also include a Statement of the available procedures and time limits for seeking reconsideration or other administrative relief and the time limits for seeking judicial review of the final order. An initial order or decision shall include a statement of any circumstances under which the initial order or decision may, without further notice, become a final order.
>
> Findings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. The agency member's experience, technical competence and specialized knowledge may be utilized in the evaluation of evidence.

The order of the Administrative Judge concludes as follows:

> IT IS HEREBY ORDERED, that the school system shall make available a Individual Education Program containing the components to include, but necessarily be limited to, those outlined in this Order, in the school district's proposed May IEP, in the school district's correspondence to parents and in the school district's representations to parents. The child shall be enrolled in this program. Parents shall immediately notify the system, in writing, of their intent to enroll the child with the school district. On receipt of the parent's notification, the school district shall have forty-five (45) days in which to complete the arrangements for implementation of this program.
>
> Within ninety (90) days of implementation of the said program the parties shall convene a multidisciplinary team consisting of:

(1) the parents, and provided by the school; (2) a teacher from the school district knowledgeable of the instructional needs for the child; (3) a representative, from the institution of private placement knowledgeable of the instructional needs for the child; (4) the principal, Director of Special Education, or someone assigned to assure that the program can be carried out as planned; (5) if necessary, an assessment specialist to explain evaluations; and (6) any other parties deemed necessary to complete the objectives. All members of this team will cooperate in determining an "appropriate" (emphasis added) IEP for the child.

IT IS FURTHER ORDERED that the Individual Education Program must reflect effective participation by multidisciplinary team members in the planning process and include a complete and accurate program. On completion of the integrated agreement, deference is to be given to the school district's opinion of "appropriateness."

THEREFORE, because present placement is considered the issue of paramount concern, the school system is declared to be the prevailing party in this case.

IT IS FURTHER ORDERED, upon placement, the school district is to reimburse the expenses of tuition and transportation for the specially designed instruction, received from the Institution of Private Placement, for the period beginning 23 March 1989 and continuing to the date of this Order.

IT IS FURTHER ORDERED, the school district shall provide the necessary related services, including but not limited to, modification of the facilities to create an acoustically treated environment. Said changes are to the considered significant factors in providing the child a free "appropriate" public education in the "least restrictive environment."

IT IS FURTHER ORDERED, the school district shall provide qualified professionals to "appropriately" address the hearing, speech, and language impairments of the child.

IT IS FURTHER ORDERED, the parents are to be solely responsible for: (A) the independent psychological examination; and (B) any costs incurred prior to 23 March 1989.

The first issue, quoted above, appears to state a conclusion that the plans of instruction offered by the system were inferior to the child's needs as assessed by an outside institution. T.C.A. § 4-5-314 requires that such a conclusion be supported by specific findings as to the deficiencies in the local plans as established by the outside diagnosis. Facts should be found and

law stated to support the apparent conclusion that the System had a duty to conform its diagnosis and plan to that of the outside institution. This Court holds that the conclusion reached by the administrative judge required fact finding as to whether the diagnosis and plans of the outside institution were brought to the attention of the school system with opportunity for improvement.

The second issue was supposedly decided in favor of the parents, for they were awarded reimbursement of expenses of attending the private institution. The findings of fact should include the details of the private instruction and of that proposed by the defendant with specific reference to the differences in effect upon the child with citation to factual and expert testimony supporting the finding. Findings should also detail with citations the facts and law supporting the time period for which reimbursement was ordered.

The third issue, was apparently decided favorably to the defendant; and, if challenged by the parents, the conclusion should be adequately supported by findings of fact with citation to factual and expert testimony in the record.

The fourth issue contains an apparent conclusion as to procedural failures by the defendant. Such a conclusion requires detailed findings as to the required procedures and failure of the defendant with appropriate citation to laws, regulations, factual and expert testimony supporting said conclusion, together was properly supported findings that said omitted or defective procedures were called to the attention of the defendant with opportunity to comply.

The findings should explain why the parents are required to enroll the child before claiming <u>future</u> benefits, but the defendant is penalized for failure to provide expensive preparation without enrollment in the <u>past</u>. In addition, the final order should contain an elucidation of the source of funds to provide compliance with the order, especially payment of reimbursement to the parents, that is, whether said reimbursement is to be paid out of funds

granted to the defendant by the State or out of the general fund of the County. If the latter, the order should cite statutory authority of the administrative judge to render an enforceable judgment against a county.

For the foregoing reasons, the Trial Court was not in position to adequately review the order of the administrative judge, and this Court is at the same disadvantage.

Pursuant to T.C.A. § 27-3-128, the cause is remanded to the Trial Court with directions to enter an order requiring the administrative agency to supplement its final order in conformity with this opinion and to re-certify the record and supplemented final order to the Trial Court. Upon review of the supplemental final order, the Trial Court will enter its judgment thereon and re-certify the record to this Court for further consideration.

Costs of this appeal will be paid by the defendants.

VACATED AND REMANDED.

_____
HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

_____
SAMUEL L. LEWIS, JUDGE

_____
CONCURS IN RESULT
WILLIAM C. KOCH, JR., JUDGE