BELLSOUTH

BellSouth Telecommunications, Inc.
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guy.hicks@bellsouth.com

Guy M. Hicks
General Counsel

615 214-6301
Fax 615 214-7406

November 3, 2000

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *All Telephone Companies Tariff Filings Regarding Reclassification Of Pay Telephone Service As Required By Federal Communications Commission (FCC) Docket 96-128*
Docket No. 97-00409

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Response to Motion for Prejudgment Interest. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

Guy M. Hicks with permission ch

GMH:ch
Enclosure

234968

POSTED 11-3-00

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: ***Tariff Filings by Local Exchange Companies to Comply With FCC Order 96-439 Concerning The Reclassification of Pay Telephones***

Docket No. 97-00409

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO MOTION FOR PREJUDGMENT INTEREST

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Response to the Motion for Prejudgment Interest filed with the Tennessee Regulatory Authority ("TRA") on October 26, 2000, by the Tennessee Payphone Owners Association ("TPOA"). The request for prejudgment interest should be denied because the TRA does not have the statutory authority to award such relief, nor would it be appropriate in any event under the holdings of the cases cited by TPOA.

TPOA seeks an award of prejudgment interest, at the annual rate of 10%, on the refund BellSouth may be ordered to pay if the TRA determines that BellSouth's access line rates to TPOA members should be reduced retroactive to April, 1997. To this date, neither BellSouth nor TPOA knows what rate the TRA will order, and consequently they do not know the amount of the refund, if any, that may be required. Since April, 1997, BellSouth has been charging TPOA tariffed rates pending the outcome of a contested case. In March, 1998, however, TPOA submitted an "Agreed Motion for Continuance," which included a provision that BellSouth would make

refunds retroactive to April, 1997, if required; it did not include any provision that the refunds be subject to the payment of interest. Moreover, the Agreed Motion expressly stated that the parties would not be prejudiced by the continuance. In the meantime, the TRA granted TPOA's request to continue this docket pending the completion of two other dockets, and the matter remained inactive for over two years. In March 2000, TPOA requested the TRA to reconvene this and, without objection by BellSouth, the matter has proceeded expeditiously to final hearing. In fact, the final hearing in this docket occurred before the completion of the two dockets TPOA has earlier said should be concluded before the present one.

TPOA bases its motion for prejudgment interest primarily on Tenn. Code Ann. § 47-14-123 and the cases of *Mint v. Allstate Insurance Company*, 970 S.W.2d 920 (Tenn. 1998), and *Scholz v. S.B. International, Inc.*, 2000 Tenn. App. LEXIS 588 (Tenn. Ct. App. 2000) (attached hereto as Exhibit A). An examination of the statute and cases reveals, however, that an award of prejudgment interest would not be proper in this matter. First, Tenn. Code Ann. § 47-14-123 does not authorize the TRA to award prejudgment interest, such power being expressly granted only to "courts or juries." *See* Tenn. Code Ann. § 47-14-123. Moreover, the fact that the TRA is not authorized to award damages of any kind precludes the ancillary award of prejudgment interest, which is "an element of, or in the nature of, damages." Id. Further, even if the TRA were authorized to award prejudgment interest, such an award would not be appropriate here because: the sums being sought by the moving party are not easily ascertained; the TPOA is itself responsible for the delay in the adjudication of these

proceedings; and it would be inequitable to award prejudgment interest based on the facts now before the TRA. Finally, TPOA suggests three dates from which prejudgment interest should be calculated, but none of them are supported by any rationale that would be sensible or equitable under the circumstances. Accordingly, the request of TPOA for prejudgment interest should be denied.

II. DISCUSSION

A. The TRA has no statutory authority to award prejudgment interest.

1. Prejudgment interest may only be awarded by courts or juries.

TPOA bases its request for prejudgment interest on the provisions of Tenn. Code Ann. § 47-14-123. This statute reads in part:

> Prejudgment interest, i.e., interest as an element of, or in the nature of, damages, as permitted by the statutory and common laws of the state as of April 1, 1979, may be awarded *by courts or juries* in accordance with the principles of equity . . . .

Tenn. Code Ann. § 47-14-123 (emphasis added). While the statute specifically grants authority to "courts or juries" to award prejudgment interest, administrative agencies and other quasi-judicial bodies are conspicuously not mentioned. In other contexts, the Tennessee General Assembly has shown an appreciation of differences between courts and administrative agencies, as is evidenced by the language of other statutes. *See, e.g.,* Tenn. Code Ann. §§ 24-1-208 and 40-6-307 (specifically listing courts, juries, and agencies). The legislature thus has demonstrated that when it intends to include an regulatory agency within the terms of a statute, it will do so specifically.

Accordingly, Tenn. Code Ann. § 47-14-123 was not intended to grant regulatory agencies the power to award prejudgment interest.

A customary canon of statutory construction, *expressio unius est exclusio alterius*, supports this conclusion. The "expression of one thing is the exclusion of another." Thus, the exclusion of regulatory agencies such as the TRA from the statutory authorization of prejudgment interest establishes that they were not intended to possess such authority. *See Madison Loan & Thrift Co. v. Neff*, 648 S.W.2d 655, 657 ("any action which is not authorized by the statutes is a nullity"); *cf. Western Kansas Express, Inc. v. Jayhawk Truck Line, Inc.*, 720 P.2d 1132, 1135-36 (Kan. Ct. App. 1986) (holding that a statute referencing "costs of suit" and attorneys fees to be "fixed by the court" did not vest power in an administrative agency to award damages).

2. The TRA has no authority to award damages, including prejudgment interest as an "element of damages."

Not only does Tenn. Code Ann. § 47-14-123 fail to grant specific authority to the TRA to award prejudgment interest, it also makes clear that such an award is "an element of, or in the nature of, damages," which the TRA has no other authority to award. The actions of the TRA in this matter are governed by the provisions of Title 65 of the Tennessee Code Annotated. As an administrative agency, the TRA has only the powers conferred upon it by statute, "and any action which is not authorized by the statutes is a nullity." *Madison Loan & Thrift Co. v. Neff*, 648 S.W.2d 655, 657 (Tenn. Ct. App. 1982); *General Portland v. Chattanooga-Hamilton County Air Pollution*

Control Board, 560 S.W.2d at 910, 913 (Tenn. Ct. App. 1976). Although statutes from which agencies derive their authority often "should be construed liberally because they are remedial, the authority they vest in an administrative agency must have its source in the language of the statutes themselves." *Wayne County v. Solid Waste Disposal Control Bd.,* 756 S.W.2d 274, 282 (Tenn. App. 1988). Applying these principles to the former Public Service Commission, the Court of Appeals has noted that "the powers of the Commission must be found in the statutes. If they are not there, they are non-existent." *Deaderick Paging v. Public Service Com'n,* 867 S.W.2d 729 (Tenn. App. 1993).

In the *Wayne County* case, for example, an agency found that a landfill had contaminated a family's well, causing the family to haul water from a nearby school for all their cooking, drinking, and bathing. *See* 756 S.W.2d at 278. The agency ordered the operator of the landfill to: (1) close the landfill in a satisfactory manner; and (2) to provide the family with a permanent, uncontaminated supply of water. In support of the second aspect of its order, the agency claimed that it had the authority "to fashion remedies for essentially private wrongs even though the Act does not give it explicit authority to do so" because such authority, according to the agency "is implicit in its authority to abate public nuisances and to issue orders of correction ▯." *Id.* at 283.

While acknowledging the appeal of the agency's argument in light of the facts before it, the Court of Appeals held that the agency had no authority to order the

operator of the landfill to provide the family with an uncontaminated supply of water. The Court explained that

> notwithstanding the logic and appeal of the [agency's] position, it provides an insufficient basis for this Court to engraft remedies onto the Act that were not put there by the General Assembly. It is not our role to determine whether a party's suggested interpretation of a statute is reasonable or good public policy or whether it is consistent with the General Assembly's purpose. We must limit our consideration to whether the power exercised by the [agency] is authorized by the express words of the statute or by necessary implication therefrom.

Id. at 283. The Court concluded that the family could pursue relief "in courts where the full range of legal and equitable remedies will be available to them . . . ." *Id.* at 284.

Just as the agency in the *Wayne County* case had no statutory authority to grant the relief set out in its order, the Authority has no statutory power to award damages in a matter such as this. This conclusion is apparent from the Court of Appeals' decision in *General Portland v. Chattanooga-Hamilton County Air Pollution Control Board*, 560 S.W.2d 910 (Tenn. Ct. App. 1976). In that case, an agency found that a company had failed to meet an air pollution emission standard. In an attempt to discourage the company's poor performance in the future, the agency ordered the company to post a $10,000 bond, which the company would forfeit in the event of a future failure to meet the standard. The company subsequently failed to meet the standard, and the agency sued for forfeiture of the bond.

In considering the agency's claim that it had the statutory authority to effectively fine the company $10,000 for a violation of the emission standard, the Court stated that

> an administrative agency such as this board has no inherent or common law powers. Being a creature of statute, it can exercise only those powers conferred expressly or impliedly upon it by statute. In this absence of statutory authority, administrative agencies may not enforce their own determinations. Administrative determinations are enforceable only by the method and manner conferred by statute and by no other means. The exercise of any authority outside the provisions of the statute is of no consequence.

Id., 560 S.W.2d at 914. In light of these principles, the Court held that the agency had no statutory authority to either require the company to post the bond or to seek forfeiture of the bond:

> A reading of the [Tennessee Air Quality Act] clearly shows the only enforcements for violations applicable to this case are: a fine, an action to abate a nuisance, or an action for an injunction. These methods being the only ones allowed by the Act, all others must be considered as being illegal. By no stretch of the imagination can these provisions of the Act be logically construed to authorize the exacting of bond as was done in this case or the forfeiture of the bond.

Id. at 913. Similarly, the Authority has no statutory power to order BellSouth to pay damages, or prejudgment interest as "an element of, or in the nature of, damages," in this proceeding.

B. **In any event, prejudgment interest should not be awarded under applicable case law.**

Even if the TRA had the statutory authority to award prejudgment interest (which it does not), it would nonetheless be inappropriate to do so in this matter. The Tennessee Supreme Court has established several factors to be considered in determining whether to award prejudgment interest in a given situation. *Myint*, 970 S.W.2d at 927. As explained below, applying three factors to the facts of this docket reveals that an award of prejudgment interest is not warranted.

1. The amount of the underlying damages award is uncertain.

One of the factors used to guide a court's discretion on the award of prejudgment interest is whether the amount of the underlying obligation in question is certain. *Id.*; *Scholz*, 2000 Tenn. App. LEXIS 588, at *10. While the uncertainty of the amount of an obligation does not automatically result in the denial of prejudgment interest, it is certainly an important factor to be considered. *See Myint*, 970 S.W.2d at 927-928. Appellate courts following the *Myint* decision have realized this and have "recognized that a trial court does not abuse its discretion in denying a claim for prejudgment interest where the defendant reasonably disputes either the amount of the obligation or the existence of the obligation itself." *Wilson Co. Sch. Sys. v. Clifton*, 2000 Tenn. App. LEXIS 172, at *44 (Tenn. Ct. App. 2000) (citing *Alexander v. Inman*, 974 S.W.2d 689, 698 (Tenn. 1998); *Brandt v. BIB Enters., Ltd.*, 986 S.W.2d 586, 595 (Tenn. Ct. App. 1998); *Newton v. Cox*, 954 S.W.2d 746, 748-49 (Tenn. Ct. App. 1997)) (attached hereto as Exhibit B).

The test for determining certainty of damages depends upon whether a court can ascertain the amount of damages by computation. *Myint*, 970 S.W.2d at 928. The *Myint* court found that the damages at issue were ascertainable because, even though the parties disagreed over which computation was to be used, both parties were able to offer accepted methods of valuation. *Id.* at 929. To the contrary, this matter before the TRA presents issues of whether BellSouth should provide any refunds at all and the amount of any refunds it may be required to provide. These issues are in controversy, and the amount of any refund that may be owed is therefore neither certain, nor easily determined. Controversy and uncertainty as to the amount of damages in a case weighs heavily against an award of prejudgment interest. *See Alexander v. Inman*, 974 S.W.2d 689, 698 (Tenn. 1998) (finding that, due to the uncertainty of the disposition of the case, an award of prejudgment interest would be a windfall, not an equitable compensation); *Brandt v. BIB Enters., Ltd.*, 986 S.W.2d 586, 595 (Tenn. Ct. App. 1998) (holding that denial of prejudgment interest was proper where there was "considerable controversy" over the amount due). Because the TPOA's damages – if any – are not ascertainable, an award of prejudgment interest in this matter would be improper.

2. The TPOA is itself responsible for any delay in these proceedings.

As the TPOA correctly noted in its Memorandum of Law, the Tennessee Court of Appeals has identified the following situations in which prejudgment interest may be inappropriate: (1) when the party seeking prejudgment interest has been inexcusably dilatory in pursuing its claim; (2) when the party seeking prejudgment

interest has unreasonably delayed the proceedings after filing suit initially; (3) when the party seeking prejudgment interest has already been compensated for the lost time value of its money. *Scholz*, 2000 Tenn. App. LEXIS 588, at *12 (citations omitted). The *Scholz* court emphasized the importance of a delay by the party seeking prejudgment interest, listing lack of any unreasonable delay as one factor supporting the decision to award prejudgment interest to Plaintiff Scholz. *Id.* at *13.

In the matter now before the TRA, quite unlike *Scholz*, the party moving for an award of prejudgment interest, the TPOA, has in fact been the cause of any delay in the adjudication of this matter. The docket was commenced by the TRA on April 1, 1997. However, after the TRA established a rate subject to a contested case, the "TPOA did suggest that the proceedings be stayed pending the TRA's determination of other, related dockets" on March 4, 1998. *See* TPOA's Memorandum of Law in Support of Motion for Prejudgment Interest. TPOA, then, voluntarily suspended this action until March 21, 2000, when the TPOA once again resumed its interest in proceeding with this matter. The TPOA has offered no evidence to show that it could not have proceeded earlier with this matter in a timely manner. The two year delay does not, in other words, have any reasonable explanation beyond the TPOA's contention that it needed to await the outcome of two other dockets. That justification for delay does not pan out, however, because TPOA insisted on reactivating this docket in March of 2000 despite the fact that those other two dockets still had not concluded. Because the TPOA unreasonably delayed these proceedings for two years, prejudgment interest is inappropriate in this matter.

3. An award of prejudgment interest in this matter would violate principles of equity.

As TPOA has noted, the principles of equity comprise a primary guide in determining whether a party is entitled to an award of prejudgment interest. *See* Tenn. Code Ann. § 47-14-123; *Myint*, 970 S.W.2d at 927. Simply stated, equity requires a court to "decide whether the award of prejudgment interest is fair, given the particular circumstances of the case." *Myint*, 970 S.W.2d at 927. Under the circumstances of this case, even if the TRA had the authority to grant prejudgment interest, it would be inequitable to award TPOA prejudgment interest in this matter.

One factor the courts have considered in making a determination of the equities is whether the party seeking prejudgment interest has already been compensated for the lost time value of its money. *See Scholz*, 2000 Tenn. App. 588, at *12 (citing *Braswell v. City of El Dorado*, 187 F.3d 954, 957 (8th Cir. 1999) and *Perlman v. Zell*, 185 F.3d 850, 857 (7th Cir. 1999)). In this matter, the parties have already agreed for TPOA to be compensated equitably. The TPOA cooled its interest in proceeding with this action when, on March 4, 1998, it filed its "Agreed Motion for Continuance," noting therein:

> The case was originally scheduled to be heard in 1997, but was postponed, by unanimous consent until May.
>
> Furthermore, the parties agreed to the postponement because, in accordance with directions from the FCC, whatever rates were fixed by the TRA in this proceeding would be retroactive to April, 1997. Therefore, no party is prejudiced by delay.

Nothing in that agreement provided for interest to be paid in the event refunds had to

be made. The agreement presumably was satisfactory with the TPOA at the time. Now, two years later the TPOA seeks to improve upon its agreement by adding interest on top of the agreed true-up mechanism.

Principles of equity caution against a court or other legal body redrawing as agreement so as to allow a party to improve upon the benefit obtained in a fair bargain. *See Jones v. Jones*, 1990 Tenn. App. LEXIS 490 (Tenn. Ct. App. 1990) (stating that it would be inequitable to deny a party the benefit of the bargain for which it contracted) (attached hereto as Exhibit C). BellSouth believed and continues to believe that the adjustment to which it agreed in March, 1998, were fair and reasonably compensated TPOA's members without the addition of any prejudgment interest. Likewise, TPOA accepted this agreement without any provision for prejudgment interest. TPOA contends that "[n]either the FCC nor the TRA addressed the issue of prejudgment interest, perhaps because no one expected these proceedings to take so long." TPOA's Memorandum of Law in Support of Motion for Prejudgment Interest. BellSouth respectfully disagrees. Prejudgment interest could have been addressed at the time of the initial agreement had the TPOA so requested; it did not. If BellSouth had contemplated that the TPOA would seek prejudgment interest on some unascertainable refund amount over two years later, it might have bargained for a different agreement. Equity, which governs the award of prejudgment interest, simply should not allow a party to improve its consensual standing over two years after reaching an initial agreement.

C. <u>The dates proposed by TPOA for beginning the calculation of</u>

prejudgment interest are neither rational nor equitable, and demonstrate why TPOA's request should be denied.

TPOA requests the TRA to award prejudgment interest from one of the following dates: (1) the date the FCC ordered local exchange carriers to fix cost-based rates for payphone access lines; (2) the date the TRA reconvened this proceeding in the spring of 2000; or (3) the date of oral arguments in this matter. TPOA suggests no convincing rationale for any of those dates.

According to *Myint*, the purpose of prejudgment interest is to fully compensate a plaintiff for loss of the use of funds to which the plaintiff "was legally entitled." *Myint* at 927. TPOA was not legally entitled to refunds based on lower access line rates on any of the dates it proposes as the starting date for calculating prejudgment interest. It cannot be entitled to any such refunds before the TRA sets new rates, which has yet to occur even now.

It would certainly be inequitable to use the first proposed date, April 15, 1997, and charge BellSouth with prejudgment interest during the ensuing years that this docket was inactive at TPOA's request. This would be especially inequitable because BellSouth agreed to a true up and the payment of refunds to TPOA members, if necessary, once rates are determined in this proceeding. This inequity is compounded as there was no way for BellSouth to charge less than the tariffed rate in effect throughout this proceeding, which continued in effect due to the agreement of TPOA.

The second date is obviously arbitrary, and is relevant to no particular event of significance in determining whether to grant the equitable relief of prejudgment

interest. Again, TPOA was not entitled to payment of a refund of any specific amount of money at that point, because the TRA had not determined what rates to set and TPOA's agreement to accept a subsequent true up of whatever rates resulted from this proceeding remained in effect.

Finally, the date of oral argument on the merits of the different payphone access line rates proposed by the parties has even less significance. The TRA at that date still had not decided the rates BellSouth could charge and from which any refunds would be calculated.

TPOA's proposals for when the payment of prejudgment interest should begin underscores the inherent inequity of its request for any such relief. Accordingly, the request should be denied.

III. CONCLUSION

For these reasons BellSouth Telecommunications, Inc. respectfully submits that the Tennessee Regulatory Authority should deny the Tennessee Payphone Owners Association's Motion for Prejudgment Interest.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

Guy M. Hicks (ek with permission)
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301

R. Douglas Lackey
A. Langley Kitchings
675 W. Peachtree Street, Suite 4300
Atlanta, Georgia 30375

EXHIBIT
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A

1 of 1 DOCUMENT

DAVID A. SCHOLZ v. S.B. INTERNATIONAL, INC.

No. M1997-00215-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE

2000 Tenn. App. LEXIS 588

August 31, 2000, Filed

PRIOR HISTORY:
[*1] Appeal from the Chancery Court for Davidson County. Ellen Hobbs Lyle, Chancellor. No. 96-1785-III.

DISPOSITION:
Judgment of the Chancery Court Vacated in Part and Remanded.

COUNSEL:
W. Gary Blackburn and William J. Shreffler, Nashville, Tennessee, for the appellant, David A. Scholz.

Clark H. Tidwell and Jordan S. Keller, Nashville, Tennessee, for the appellee, S.B. International, Inc.

JUDGES:
WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which HENRY F. TODD, P.J., M.S., and BEN [*2] H. CANTRELL, J., joined.

OPINIONBY:
WILLIAM C. KOCH, JR.

OPINION:

David A. Scholz became S. B. International, Inc.'s ("SBI") vice president and chief financial officer on January 1, 1996. n1 His three-year employment contract contained a severance provision entitling him to continuation of his salary for twelve months and an amount equal to his average performance bonus if the company fired him during the term of the contract. The contact also provided that Mr. Scholz would not be entitled to these severance benefits if SBI terminated him for cause.

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n1 We have no transcript or statement of the evidence in this case. The appeal is here on the technical record alone. While ordinarily we do not consider statements of fact alleged in pleadings as the facts of the case, *see State v. Bennett, 798 S.W.2d 783, 789 (Tenn. Crim. App. 1990)*, we have no alternative other than to rely on the allegations in Mr. Scholz's compaint that are admitted in SDI's answer to provide the factual framework for this appeal.

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Mr. [*3] Scholz's tenure at SBI turned out to be brief. The company fired him on May 19, 1996, and informed him that it did not intend to pay him the severance benefits contained in his employment contract. On June 12,1996, Mr. Scholz filed suit in the Chancery Court for Davidson County, alleging that SBI did not have cause to fire him and seeking payment of $ 115,523.33 in severance benefits n2 and prejudgment interest. SBI denied the allegations in the complaint and asserted the affirmative defense of novation. In May 1997, a jury found that the parties had not entered into a new employment agreement and that Mr. Scholz had not voluntarily quit his job. In light of SBI's stipulation that the severance provision, if applicable, would entitle Mr. Scholz to $ 111,623.33, n3 the trial court entered a judgment for Mr. Scholz in the amount of $ 111,623.33 but reserved the issue of prejudgment interest.

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n2 This amount included twelve months of salary at his current rate of compensation, his performance bonus, and paid vacation time.

n3 This amount is, to the penny, the amount that Mr. Scholz sued for minus the value of his vacation pay. These damages were clearly calculable to a specific sum.

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[*4]

Following the trial, Mr. Scholz promptly requested the trial court to award him over $ 11,000 in prejudgment interest and an additional $ 1,091.80 in discretionary costs. On June 26, 1997, the trial court entered an order denying both requests. The trial court justified its refusal to award Mr. Scholz prejudgment interest on the ground that SBI had "presented a reasonable defense." Likewise, the trial court justified its decision not to award discretionary costs by stating that these costs should be awarded only when "the conduct of the defendant has somehow contributed to creation of the costs" and by concluding that SBI had not contributed to the creation of the costs. Mr. Scholz then perfected this appeal.

I.

MR. SCHOLZ'S CLAIM FOR PREJUDGMENT INTEREST

Tennessee's courts have always had the power to award prejudgment interest as an element of damages. Their authority derived from the common law, *Cole v. Sands, 1 Tenn. (1 Overt.) 106 (1805)*, but during the earliest days of statehood, the General Assembly began enacting statutes defining the circumstances in which a prevailing party would be entitled to recover prejudgment interest. n4 These statutes [*5] did not completely displace the courts' common-law power to award pre- judgment interest, and in 1979, the General Assembly codified this authority. n5 Thus, Tenn. Code Ann. § 47-14-123 (1995) now provides, in part:

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n4 *E.g.*, Act of Feb. 20, 1836, ch. 50, 1835-36 Tenn. Pub. Acts 157.

n5 Act of April 24, 1979, ch. 203 § 22, 1979 Tenn. Pub. Acts 349, 360.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Prejudgment interest, i.e., interest as an element of, or in the nature of, damages, as permitted by the statutory and common law of the state as of April 1, 1979, may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum.

The common-law power to award prejudgment interest has consistently been viewed as an equitable matter entrusted to the judge's discretion. Accordingly, Tenn. Code Ann. § 47-14-123 has been construed to preserve the discretionary character of these decisions. *Spencer v. A-1 Crane Serv., Inc., 880 S.W.2d 938, 944 (Tenn. 1994)*; [*6] *Brandt v. BIB Enters., Ltd., 986 S.W.2d 586, 595 (Tenn. Ct. App. 1998)*; *Wilder v. Tennessee Farmers Mut. Ins. Co., 912 S.W.2d 722, 727 (Tenn. Ct. App. 1995)*. Many of the earlier opinions dealing with prejudgment interest leave a distinct impression of subtle judicial antipathy toward awarding prejudgment interest unless it was statutorily mandated. However, the Tennessee Supreme Court's decision in *Myint v. Allstate Ins. Co., 970 S.W.2d 920 (Tenn. 1998)* heralds a departure from this approach and requires a re-examination of the factual and legal bases used by the courts to determine whether prejudgment interest should be awarded.

Nearly everyone has become familiar with interest because they have paid it. Few, however, have bothered to understand what interest represents. Over one hundred and fifty years ago, John Stuart Mill noted that the possession of capital (money) enabled persons to gain in two ways - either by spending the capital to obtain desired goods or services or by using the capital to produce more capital over time. He also noted that persons having capital could be persuaded to forego both kinds of gain only by offering [*7] them compensation. That compensation became known as interest. n6 2 John Stuart Mill, *Principles of Political Economy* 405-06 (Sir W. J. Ashley, ed., 7th ed., Longmans, Green & Co. 1920) (1871). This understanding of interest was echoed by Learned Hand when he observed that "in modern financial communities a dollar today is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value" and that "the present use of my money is itself a thing of value and, if I get no compensation for its loss, my remedy does not altogether right my wrong." *Procter & Gamble Distrib. Co. v. Sherman, 2 F.2d 165, 166 (S.D.N.Y. 1924)*.

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n6 In medieval Latin, the noun "interesse" came to mean a compensatory payment for a loss. W. Lewis Hyde, *The Gift: Imagination and the Erotic Life of Property* 123 (1983). This meaning was taken up when European political philosophers began talking about paying the owner of wealth for the "loss" when the owner agreed to forego other opportunities to use the wealth in order to let another use his or her money.

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[*8]

Parties who have been wrongfully deprived of money have been damaged in two ways. First, they have been damaged because they have not received the money to which they are entitled. Second, they have been damaged because they have been deprived of the use of that money from the time they should have received it until the date of judgment. Awards of pre-judgment interest are intended to address the second type of damage. They are based on the recognition that a party is damaged by being forced to forego the use of its money over time. *General Motors Corp. v. Devex Corp., 461 U.S. 648, 655-56, 103 S. Ct. 2058,*

2062-63, 76 L. Ed. 2d 211 (1983); Mitchell v. Mitchell, 876 S.W.2d 830, 832 (Tenn. 1994). Thus, our courts have repeatedly recognized that prejudgment interest is awarded, not to punish the wrong-doer, but to compensate the wronged party for the loss of the use of the money it should have received earlier. *Myint v. Allstate Ins. Co., 970 S.W.2d at 927; Mitchell v. Mitchell, 876 S.W.2d at 832; Southwest Progressive Enters. v. Shri-Hari Hospitality, LLC., 1999 Tenn. App. LEXIS 603, No. 01 A01-9810-CH-00542, 1999 WL 675136,* [*9] at *2-3 (Tenn. Ct. App. Sept. 1, 1999) (No Tenn. R. App. P. 11 application filed); *see also Gore, Inc. v. Glickman, 137 F.3d 863, 868 (5th Cir. 1998); Partington v. Broyhill Furniture Indus., Inc., 999 F.2d 269, 274 (7th Cir. 1993); Marlen C. Robb & Son Boatyard & Marina, Inc. v. The Vessel Bristol, 893 F. Supp. 526, 540 (E.D.N.C. 1994); Childs v. Copper Valley Elec. Ass'n, 860 P.2d 1184, 1191 (Alaska 1993); Hughes v. Burlington N. R.R. Co., 545 N.W.2d 318, 321 (Iowa 1996); Conway v. Electro Switch Corp., 402 Mass. 385, 523 N.E.2d 255, 258 (Mass. 1988).*

Having set out the economic justification for awarding prejudgment interest, we turn now to Mr. Scholz's argument that the trial court erred by failing to award him prejudgment interest after the jury determined that he was entitled to the severance benefits that he contracted for. Both sides have reminded us that these decisions are discretionary. Therefore, we must defer considerably to the trial court's decision. *Myint v. Allstate Ins. Co., 970 S.W.2d at 927.* However, appellate deference is not synonymous with [*10] rubber stamping a trial court's decision. Discretionary decisions remain subject to appellate scrutiny, albeit less strict. Our review is confined to determining whether the trial court has based its decision on applicable legal principles and whether the decision is consistent with the evidence. *Myint v. Allstate Ins. Co., 970 S.W.2d at 927; Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999).*

Tennessee's courts have tended to decline to award prejudgment interest if the amount of the underlying obligation is uncertain or if the existence of the underlying obligation is disputed on reasonable grounds. The Tennessee Supreme Court used *Myint v. Allstate Ins. Co.* to articulate a different, more flexible, standard for considering prejudgment interest claims. Addressing the two most common reasons for denying prejudgment interest, the Court first held that "uncertainty of either the existence or amount of an obligation does not mandate a denial of prejudgment interest." *Myint v. Allstate Ins. Co., 970 S.W.2d at 928.* Second, the Court overruled all previous cases suggesting that prejudgment interest should not [*11] be awarded if the claim is reasonably disputed. *Myint v. Allstate Ins. Co., 970 S.W.2d at 928 n.7.* In place of these rigid tests, the Court articulated the following standard:

> Simply stated, the court must decide whether the award of pre- judgment interest is fair, given the particular circumstances of the case. In reaching an equitable decision, a court must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize the defendant for wrongdoing.
>
> *Myint v. Allstate Ins. Co., 970 S.W.2d at 927.*

As we construe the *Myint* decision, the Tennessee Supreme Court has shifted the balance to favor awarding prejudgment interest whenever doing so will more fully compensate plaintiffs for the loss of use of their funds. Fairness will, in almost all cases, require that a successful plaintiff be fully compensated by the defendant for all losses caused by the defendant, including the loss of use

of money the plaintiff should have received. *Levien v. Sinclair Oil Corp.*, 314 *A.2d 216, 221 (Del. Ch. 1973); King v. State Roads Comm'n, 298 Md. 80, 467 A.2d 1032, 1035 (Md. 1983);* [*12] *Erin Rancho Motels v. United States Fidelity & Guar. Co., 218 Neb. 9, 352 N.W.2d 561, 566 (Neb. 1984)* (Shanahan, J., concurring and dissenting in part). That is not to say that trial courts must grant prejudgment interest in absolutely every case. Prejudgment interest may at times be inappropriate such as (1) when the party seeking prejudgment interest has been so inexcusably dilatory in pursuing a claim that consideration of a claim based on loss of use of the money would have little weight, *R.E.M. v. R.C.M., 804 S.W.2d 813, 814 (Mo. Ct. App. 1991);* (2) when the party seeking prejudgment interest has unreasonably delayed the proceedings after suit was filed, *Batchelder v. Tweedie, 294 A.2d 443, 444 (Me. 1972);* or (3) when the party seeking prejudgment interest has already been otherwise compensated for the lost time value of its money. *Braswell v. City of El Dorado, 187 F.3d 954, 957 (8th Cir. 1999); Perlman v. Zell, 185 F.3d 850, 857 (7th Cir. 1999).*

The trial court declined to award Mr. Scholz prejudgment interest because SBI had "presented a reasonable defense." We have already pointed out that [*13] the Tennessee Supreme Court has devalued this consideration as a reason for denying prejudgment interest. Accordingly, we must review the record to determine whether other equitable grounds exist that support the trial court's decision. We find none. To the contrary, the only conclusion that can fairly be drawn from this record is that it would be inequitable not to award Mr. Scholz prejudgment interest. We base this conclusion on six considerations. First, the amount of the disputed severance pay Mr. Scholz was claiming was easily ascertained, and in fact, known and stipulated to by the parties. Second, Mr. Scholz did not delay unreasonably in filing suit to recover his severance benefits. Third, the record contains no indication that Mr. Scholz inappropriately delayed the proceedings once suit was filed. Fourth, the jury determined that Mr. Scholz was entitled to his contracted for severance benefits. Fifth, SBI, not Mr. Scholz, had full use of the money during the litigation. Sixth, Mr. Scholz has not otherwise been compensated for the loss of use of these funds from May 1996 through June 1997. Accordingly, we vacate the portion of the judgment denying Mr. Scholz's claim for prejudgment [*14] interest and remand the case with directions to calculate and award Mr. Scholz the prejudgment interest to which he is entitled.

II.

MR. SCHOLZ'S CLAIM FOR DISCRETIONARY COSTS

Mr. Scholz filed a timely and properly supported motion seeking $ 1,091.80 in discretionary costs under Tenn. R. Civ. P. 54.04(2). The trial court declined to award him discretionary costs based on its belief that "such costs should be awarded only when the conduct of the Defendant has somehow contributed to the creation of those costs." Mr. Scholz now takes issue with that decision.

Tenn. R. Civ. P. 54.04(2) empowers the trial courts to award the prevailing party certain litigation expenses. These expenses include "reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions or trials, and guardian ad litem fees." Decisions to award these costs are discretionary, *Sanders v. Gray, 989 S.W.2d 343, 345 (Tenn. Ct. App. 1998),* and thus, we employ a deferential standard when reviewing decisions either to award or to deny discretionary costs.

A party is not automatically entitled to discretionary costs under [*15] Tenn. R. Civ. P. 54.04(2) simply because it prevailed. *Benson v. Tennessee Valley Elec. Coop., 868 S.W.2d 630, 644 (Tenn. Ct. App. 1993).* However, courts

generally award discretionary costs if they are reasonable and if the prevailing party has filed a timely, properly supported motion. *Turner v. Turner, 1997 Tenn. App. LEXIS 219, No. 01 A01-9506-CV-00255, 1997 WL 136448,* at *17 (Tenn. Ct. App. Mar. 27, 1997) (No Tenn. R. App. P. application filed); *Dent v. Holt, 1994 Tenn. App. LEXIS 465, No. 01 A01-9302-CV-00072, 1994 WL 440916,* at *3 (Tenn. Ct. App. Aug. 17, 1994) (No Tenn. R. App. P. 11 application filed). Accordingly, we have affirmed Tenn. R. Civ. P. 54.04(2) awards for court reporter expenses on numerous occasions. *E.g., Placencia v. Placencia, 3 S.W.3d 497, 503-04 (Tenn. Ct. App. 1999); Reed v. Wally Conard Constr., Inc., 1999 Tenn. App. LEXIS 681, No. 03 A01-9807-CH-00210, 1999 WL 817528,* at *7 (Tenn. Ct. App. Oct. 13, 1999) (No Tenn. R. App. P. 11 application filed); *Harmon v. Shell, 1994 Tenn. App. LEXIS 229, No. 01 A01-9211-CH-00451, 1994 WL 148663,* at * (Tenn. Ct. App. Apr. 27, 1994) (No Tenn. R. App. P. 11 application filed); *Davidson v. Davidson Corp., 1993 Tenn. App. LEXIS 514, No. 01 A01-9301-CH-00017, 1993 WL 295024,* [*16] at *5-6 (Tenn. Ct. App. Aug. 4, 1993), *perm. app. denied* (Tenn. Feb. 7, 1994).

We confess to our inability to understand precisely what the trial court was getting at when it concluded that SBI did not contribute to the creation of the court reporter's expenses in this case. In one sense, SBI was solely responsible for both parties incurring this expense because it was SBI's refusal to pay Mr. Scholz's contracted for separation benefits that forced Mr. Scholz to commence this litigation in the first place. If SBI had honored its contract with Mr. Scholz, neither party would have incurred these court reporter's expenses. If we shift our focus to the litigation itself, it is still apparent that SBI was responsible, at least in part, for these expenses. In litigation, as in ballroom dancing, it takes two to tango. Both parties took depositions as part of the pretrial discovery, and $ 754.30 of the requested expenses represents the court reporter's expenses for those depositions. There is no indication in this record that SBI did not agree to taking these depositions or that it took any steps to avoid incurring the court reporter's expenses at trial.

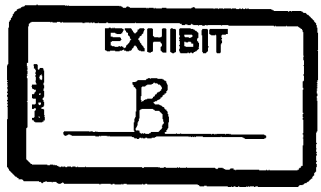
We pointed out in Section I of [*17] this opinion that trial courts have viewed awarding prejudgment interest as a punitive measure, despite the repeated admonitions that the purpose of prejudgment interest is to make an injured plaintiff whole. The same can be said for discretionary costs under Tenn. R. Civ. P. 54.04(2). Awards of discretionary costs are not intended to punish the defendant either for its conduct that caused the litigation or for its conduct during the litigation. Rather, they represent another step toward making an injured plaintiff whole. There are, of course, circumstances in which a plaintiff would not be entitled to discretionary costs even if it prevails. Litigants who adopt unreasonable litigation strategies or who unilaterally run up extravagant litigation expenses should not be permitted to pass these sorts of costs on to their adversaries.

We respectfully disagree with the trial court's reasoning that Mr. Scholz is not entitled to discretionary costs under Tenn. R. Civ. P. 54.04(2) because SBI did not "contribute" to these expenses. As far as we can tell from this record, SBI contributed to the court reporter's expenses in precisely the same way that any other litigant in routine civil litigation [*18] would. In addition, Mr. Scholz did not engage in the sort of conduct that would warrant depriving him of these costs. He also filed a timely and properly supported motion demonstrating that the court reporter expenses he was seeking to recover were necessary and reasonable. Accordingly, on remand, we direct the trial court to award Mr. Scholz his discretionary costs.

III.

The portions of the judgment denying Mr. Scholz's request for prejudgment interest and his motion for discretionary costs under Tenn. R. Civ. P. 54.04(2) are vacated, and the case is remanded to the trial court for further proceedings consistent with this opinion. We tax the costs of this appeal to S.B. International, Inc. for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUDGE



LEXSEE 2000 tenn app. lexis 172

THE WILSON COUNTY SCHOOL SYSTEM, Plaintiff/Appellee/Cross-Appellant VS. CREAD CLIFTON and wife, TAMELA CLIFTON, as next of kin for their minor son, WILLIAM (KYLE) CLIFTON, Defendants/Appellants/Cross-Appellees.

C.A. No. M1999-00359-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE

2000 Tenn. App. LEXIS 172

March 16, 2000, Opinion Filed

PRIOR HISTORY:
[*1] From the Chancery Court of Davidson County at Nashville. Honorable Carol L. McCoy, Chancellor. Davidson County Chancery Court. No. 91-2675-II.

DISPOSITION:
AFFIRMED AND REMANDED.

COUNSEL:
J. Page Garrett, Tennessee Protection & Advocacy, Nashville, Tennessee, Attorney for Defendants/Appellants/Cross-Appellees.

Michael R. Jennings, Lebanon, Tennessee, Attorney for Plaintiff/Appellee/Cross-Appellant

JUDGES:
FARMER, J., CRAWFORD, P.J., W.S., HIGHERS, J.

OPINIONBY:
FARMER

OPINION:

Cread and Tamela Clifton, on behalf of their minor son, William Kyle Clifton, appeal the trial court's judgment denying their request for prejudgment interest on a reimbursement award and an attorney's fee award entered in their favor pursuant to the Individuals with Disabilities Education Act. The Wilson County School System also has appealed, contending that the trial court erred (1) in granting the Cliftons' claim for reimbursement, and (2) in awarding the Cliftons' attorney's fees based upon the court's ruling that the Cliftons were the prevailing party in this litigation. After carefully reviewing the record, we affirm the trial court's judgment in its entirety.

I. The Individuals with Disabilities Education Act (IDEA) [*2]

The Cliftons brought this action against the Wilson County School System pursuant to the Individuals with Disabilities Education Act (IDEA). n1 Before setting forth the factual and procedural history of this case, we find it useful to outline some of the basic purposes and requirements of the IDEA. In enacting the IDEA, Congress intended, ***inter alia***, "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." *20 U.S.C.A. § 1400*(d)(1)(A) (West 2000) To this end, the IDEA requires public school districts to develop a curriculum "tailored to the unique needs of the [disabled] child by means of an 'individualized educational program'" (IEP). ***Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss, 144 F.3d 391, 397-98 (6th Cir. 1998)*** (quoting ***Board of Educ. v. Rowley, 458 U.S. 176, 181-82, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982)).***

n1 For the current version of the IDEA, see *20 U.S.C.A. § § 1400*-1487 (West 2000).

[*3]

An IEP is "the written statement which sets out an educational program to meet the particularized needs of a child with disabilities." ***Tennessee Dep't of Mental Health & Mental Retardation v. Paul B., 88 F.3d 1466, 1471 (6th Cir. 1996).*** The IEP's "development and

implementation ... are the cornerstones of the [IDEA]." *Id.* Among other things, each IEP must set forth "the child's current abilities, a description of the services to be provided, and progress goals." ***Wise v. Ohio Dep't of Educ.***, *80 F.3d 177, 183 (6th Cir. 1996)* (citing *20 U.S.C.A. § 1401*(a)(20)). n2

> n2 The current version of the IDEA provides that an IEP must contain, ***inter alia***, the following elements:
>
> (i) a statement of the child's present levels of educational performance, ...
>
> (ii) a statement of measurable annual goals, including benchmarks or short-term objectives, ...
>
> (iii) a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child ...
>
> (iv) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class ...
>
> ...(vi) the projected date for the beginning of the services and modifications described in clause (iii), and the anticipated frequency, location, and duration of those services and modifications;
>
> ....(viii) a statement of -
>
> (I) how the child's progress toward the annual goals described in clause (ii) will be measured; and
>
> (II) how the child's parents will be regularly informed ... of ... [their child's progress].
>
> *20 U.S.C.A. § 1414*(d)(1)(A) (West 2000).

[*4]

The IDEA requires public school districts to ensure that children with disabilities are educated "to the maximum extent appropriate" with nondisabled children. ***Doe v. Board of Educ.***, *9 F.3d 455, 460 (6th Cir. 1993), cert. denied, 511 U.S. 1108, 128 L. Ed. 2d 665, 114 S. Ct. 2104 (1994); 20 U.S.C.A. § 1412*(a)(5)(A) (West 2000) In this way, Congress has stated a "very strong" preference for "mainstreaming" disabled children by placing them in regular classes where feasible. ***Doe v. Board of Educ.***, *9 F.3d at 460.* Nevertheless, this "mainstreaming" requirement is not absolute, and courts have recognized that mainstreaming is not required in every case. *Id.* Instead, the proper inquiry remains whether the proposed placement is appropriate under the IDEA. *Id.*

Under the IDEA, parents who complain about the adequacy of their child's IEP may request an impartial due process hearing to be conducted by the local educational agency. *See 20 U.S.C.A. § 1415*(f) (West 2000). If the parents are dissatisfied with the results of the due process hearing, the [*5] parents may appeal to the state educational agency, which is required to conduct an impartial review of the local educational agency's decision. *See 20 U.S.C.A. § 1415*(g) (West 2000). After exhausting the state's administrative procedures, the parents may bring a civil action in state court or federal district court. *See 20 U.S.C.A. § 1415*(i)(2) (West 2000).

If the parents ultimately pursue such a civil action, the trial court is required to use a modified ***de novo*** standard for reviewing the decision of the state educational agency. ***Peck v. Lansing Sch. Dist.***, *148 F.3d 619, 625 (6th Cir. 1998);* ***Doe v. Metropolitan Nashville Pub. Sch.***, *133 F.3d 384, 387* (6th Cir.), ***cert. denied***, *119 S. Ct. 47 (1998).* This standard requires the trial court to conduct an independent reexamination of the evidence. ***Renner v. Board of Educ.***, *185 F.3d 635, 641 (6th Cir. 1999).* In conducting its review, however, the trial court must give "due weight" to the state administrative proceedings and, specifically, to the findings and determinations [*6] of the hearing officer or the administrative law judge who heard the case. ***Peck***, *148 F.3d at 625-36;* ***Doe v. Metropolitan Nashville Pub. Sch.***, *133 F.3d at 388;* ***Gillette v. Fairland Bd. of Educ.***, *932 F.2d 551, 553 (6th Cir. 1991).* This deference to the final decisions of state authorities is required because "courts are generalists with no expertise in the educational needs of [disabled] children, and will benefit from the factfinding of a state agency with expertise in the field." ***Renner***, *185 F.3d at 641* (quoting ***Doe v. Smith***, *879 F.2d 1340, 1343 (6th Cir. 1989), cert. denied, 493 U.S. 1025 (1990)).* Due to their technical expertise, "administrative agencies are traditionally better suited to make these types of determinations." ***Babb v. Knox County Sch. Sys.***, *965 F.2d 104, 107* (6th Cir.), ***cert. denied***, *506 U.S. 941, 121 L. Ed. 2d 290, 113 S. Ct. 380 (1992).*

In construing the IDEA's requirement of a free appropriate public education, the federal courts repeatedly have emphasized that public schools are [*7] not required to maximize a disabled student's educational potential. ***Renner v. Board of Educ.***, *185 F.3d 635, 644 (6th Cir. 1999);* ***Doe v. Board of Educ.***, *9 F.3d 455, 459 (6th Cir. 1993), cert. denied, 511 U.S. 1108, 128 L. Ed. 2d 665, 114 S. Ct. 2104 (1994);* ***Cordrey v. Euckert***, *917*

F.2d 1460, 1473-74 (6th Cir. 1990), cert. denied, 499 U.S. 938, 113 L. Ed. 2d 447, 111 S. Ct. 1391 (1991); Brimmer v. Traverse City Area Pub. Sch., 872 F. Supp. 447, 454 (W.D. Mich. 1994). Public schools need only (1) comply with the IDEA's procedural requirements, and (2) develop an IEP that is "reasonably calculated to enable the child to receive educational benefits." *Renner, 185 F.3d at 644; Babb, 965 F.2d at 107; Cordrey, 917 F.2d at 1464.* In this regard, the IDEA requires only that public schools "provide children with disabilities an appropriate education, not the very best possible special education services." *Wise v. Ohio Dep't of Educ., 80 F.3d 177, 185 (6th Cir. 1996);* [*8] *accord Cordrey, 917 F.2d at 1474.* The IDEA "provides no more than a 'basic floor of opportunity.'" *Doe v. Board of Educ., 9 F.3d at 459* (quoting *Board of Educ. v. Rowley, 458 U.S. 176, 201, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982)); see also Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998)* (noting that IEP need not maximize child's potential, offer superior opportunities, or provide optimal level of services).

Nevertheless, in order to be "appropriate," the educational benefits provided by the school district must be more than *de minimis. Doe v. Board of Educ., 9 F.3d at 459.* The "basic floor of opportunity" provided by the IDEA should consist of "access to specialized instruction and related services which are individually designed" to "confer some educational benefit" upon the disabled child *Rowley, 458 U.S. at 201.* Thus, the IEP proposed by the school district should provide an opportunity for "meaningful" and not merely "trivial" advancement. *Walczak, 142 F.3d at 130;* [*9] *see also Bonnie Ann F. v. Calallen Indep. Sch. Dist., 835 F. Supp. 340, 346 (S.D. Tex. 1993)* (indicating that, although IDEA does not require school district to attempt to maximize each child's potential, educational benefit provided to child must be "meaningful"), *aff'd, 40 F.3d 386 (5th Cir. 1994), cert. denied, 514 U.S. 1084 (1995).*

If the parents unilaterally place their child in a private program pending the outcome of the administrative and judicial review process, the parents may seek retroactive reimbursement for educational expenses and related services under the IDEA. *Babb v. Knox County Sch. Sys., 965 F.2d 104, 107* (6th Cir.), *cert. denied, 506 U.S. 941, 121 L. Ed. 2d 290, 113 S. Ct 380 (1992)* (citing *School Comm. v. Massachusetts Dep't of Educ., 471 U.S. 359, 369, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985)).* In such a case, however, the parents have the burden of proving by a preponderance of the evidence that the proposed IEP was "inadequate," "inappropriate," or "improper" and, further, that the private school placement was "proper" or "appropriate." *Renner v. Board of Educ., 185 F.3d 635, 642 (6th Cir. 1999);* [*10] *Doe v. Metropolitan Nashville Pub. Sch., 133 F.3d 384, 387* (6th Cir.), *cert. denied, 119 S. Ct. 47 (1998); Wise v. Ohio Dep't of Educ., 80 F.3d 177, 184 (6th Cir. 1996); Doe v. Board of Educ., 9 F.3d 455, 458 (6th Cir. 1993), cert. denied, 511 U.S. 1108, 128 L. Ed. 2d 665, 114 S. Ct. 2104 (1994); Babb v. Knox County Sch. Sys., 965 F.2d 104, 108* (6th Cir.), *cert. denied, 506 U.S. 941, 121 L. Ed. 2d 290, 113 S. Ct. 380 (1992); Doe v. Defendant I, 898 F.2d 1186, 1191 (6th Cir. 1990).* In accordance with the foregoing authorities, the parents do not meet this burden merely by proving that the private facility provided their child with superior services. *Doe v. Board of Educ., 9 F.3d at 459.* Rather, the parents first must prove that the public school was "unable to provide [their] child with an appropriate education." *Gillette v. Fairland Bd. of Educ., 932 F.2d 551, 554 (6th Cir. 1991).*

II. Factual and Procedural History of the Cliftons' IDEA Claim [*11]

The present dispute focuses on the Wilson County School System's efforts to develop an appropriate IEP for the Cliftons' son, Kyle. Prior to his second birthday, Kyle was diagnosed as having a bilateral hearing impairment, and he was fitted for a hearing aid. As a result of his hearing impairment, Kyle's development of receptive and expressive language was delayed. For purposes of these proceedings, the parties did not dispute that Kyle had a disability and that he was entitled to special education services in accordance with the IDEA. The parties also did not dispute that Kyle became eligible to receive these services when he reached the age of four years on March 23, 1990. n3

n3 *See* Tenn. Code Ann. § 49-10-102(1) (1990).

Prior to Kyle's fourth birthday, Kyle's mother, Tamela Clifton, contacted the Wilson County School System to inquire about providing special education services for Kyle. In response to this request, the School System assembled an initial M-Team n4 meeting for Kyle in February [*12] 1990. At this meeting, School System representatives learned that Kyle also suffered from dyspraxia and that this condition might have further delayed his speech and language development. The condition had been tentatively diagnosed by the staff of the Bill Wilkerson Hearing and Speech Center in Nashville, where Kyle was a student, and the diagnosis later was confirmed by Dr. Russell Jack Love, a speech and language pathologist. Dr. Love explained that dyspraxia was a movement disorder and that, more specifically, dyspraxia of speech was an inability to plan and sequence the movements of speech. The Bill

Wilkerson Center's staff first suspected that Kyle had this condition when they observed that he did not move his mouth when he spoke.

n4 An M-Team consists of "a group of individuals, including educators and medical professionals with knowledge of a child's condition, who are required to develop an Individualized Educational Program or IEP ..., specifying the necessary special education and related services which the child needs in order to receive a free appropriate public education." ***Tennessee Dep't of Mental Health & Mental Retardation v. Paul B.***, *88 F.3d 1466, 1471 (6th Cir. 1996)* (citing 34 C.F.R. § § 300.340-350).

[*13]

The M-Team met on at least two subsequent occasions, once in March 1990 and again in May 1990. During this process, School System employees attempted to address concerns raised by the Cliftons and, at each meeting, they proposed an IEP that they hoped would assuage the Cliftons' concerns. Despite these efforts, at the conclusion of each meeting, the Cliftons rejected the proposed IEP as unacceptable, and they ultimately requested a due process hearing in accordance with the IDEA. Pending the administrative proceedings that followed, Kyle remained a student at the Bill Wilkerson Center. Consequently, in addition to challenging the School System's final IEP, the Cliftons sought reimbursement for the expense of educating Kyle at the Bill Wilkerson Center.

The final IEP proposed by the School System in May 1990 is the subject of this dispute. In this IEP, the School System offered Kyle the following special education services:

1. Placement in special education classroom taught by Beverly Mainland three days per week, six hours per day;

2. Use of FM auditory trainer n5 at school;

3. Classroom assistance of deaf educator Chris Refseth thirty minutes per week;

4. Speech [*14] and language therapy provided by Jane Ann Elrod three days per week, thirty minutes per day;

5. Audiology evaluation three times per year; and

6. Occupational therapy evaluation.

n5 The evidence indicated that an FM auditory trainer was a system worn by Kyle and his teacher that overrode other noises in the room when the teacher spoke.

In July 1990, Michael Dover, the School System's Director of Special Education Services, wrote a letter to the Cliftons in which he summarized the School System's May 1990 IEP. In addition to describing the foregoing services, Dover indicated that the School System would "also take [deaf educator Chris Refseth's] advice regarding physical changes in the classroom environment needed to enhance Kyle's ability to learn and [would] make those modifications immediately upon her recommendation." Although the Cliftons previously had voiced specific objections about certain physical characteristics of the classroom proposed for Kyle, Dover's letter did not indicate what [*15] physical changes Refseth had advised or what modifications the School System proposed to make.

At the hearing before the administrative law judge (ALJ), n6 Mrs. Clifton explained some of the reasons the Cliftons rejected the final IEP proposed by the School System for Kyle. After describing the classroom proposed for Kyle, Mrs. Clifton explained her objections to the room's acoustic conditions:

What I observed about the classroom first on initial impact, was the size of the room. It was very big. It had very large ceilings. There was no carpet, there [were] no curtains on the windows. ...

Well, the reason that there is a problem with a large room and high ceilings is because acoustically that's not correct for hearing impaired children. On parents' terms and mother's terms, Kyle does not hear as well in a large room. There is more room for noises. Carpet is always applied in hearing impaired children's rooms because it just keeps the sound - just makes it louder for them. It makes the [teacher's] voice - it makes - it just sort of closes in the room, and so it really helped them talk. There was also an air conditioning unit that was going on and off during this time [*16] because Kyle has - or heating unit - I'm not sure which. Because Kyle has normal hearing in the low frequency, normal to a mild loss, he's very sensitive to a low frequency sound. So everytime that furnace came on, Kyle said, I hear it, I hear it. And I have talked to Wilson County about this matter. They said while Kyle was in the classroom they would just turn the furnace off so he wouldn't have that problem.

Mrs. Clifton also complained that the classroom's visually stimulating appearance and the teacher's instructional methods were designed for special education children and not hearing-impaired children. In addition to expressing concern over the teacher's lack of experience with hearing-impaired children, Mrs. Clifton explained:

But the other thing is because it was very visually stimulating. When you work with hearing impaired children, you do not try to visually stimulate them. They don't need to have - for the most part, and for Kyle, the individual we're talking about, he doesn't have emotional or lack of environmental needs, that he [doesn't] see things, so he doesn't need to be visually stimulated. How they [the Bill Wilkerson Center's staff] work with him [*17] mostly is to develop his auditory skills. They put their hands over their mouth when they talk to him to make sure he's listening, and not so he can look at all these things.

..... And I had some problems with the way the class was taught because it was visually stimulating, and because it was designed for these children and not for a hearing impaired child, the language - the part of language was only a minor part of their class. They'd had A-B-C time, they had language time, they had math time, they had this time, and they had that time, so language was only a small part, whereas, with a hearing impaired child, they need to just have all the speech and language that they can possibly have.

The Cliftons' objections were supported by several educators who testified on the Cliftons' behalf. Mary Ann Schaffer, the director of the Bill Wilkerson Center's early intervention program, had a master's degree in speech and language pathology. Schaffer described observations that she made of the proposed classroom during a May 1990 visit:

The classroom was very large and very noisy. There was an air conditioning unit that ran continuously during the time that I was in the [*18] classroom, and every once in a while it would kind of kick in and become even louder. And the classroom was not carpeted, the room echoed, there were very high open ceilings, there were a lot of windows without drapes, and it was a very stimulating classroom.

Schaffer explained why these physical characteristics presented problems for a hearing-impaired child like Kyle:

One of the necessities for educating a hearing impaired child is that we look at their deficit, which is that they have difficulty hearing, and if you put them in an environment where it makes it almost impossible for them to hear, you're not going to get a lot of input into the child. So one of the first things that we look for in serving a hearing impaired child is that they be in an acoustically comfortable environment. And there are a lot of things that can be done to a classroom, like using drapes, carpeting, corkboard, things like that, that will absorb the sound.

In addition to the foregoing concerns, Schaffer opined that the proposed classroom setting was inappropriate for Kyle for another reason. The teacher of the comprehensive development classroom, Beverly Mainland, was a special education [*19] teacher, but she was not trained to work with hearing-impaired children.

n6 The September 1990 due process hearing did not result in a decision because the ALJ presiding over the hearing subsequently recused himself. The Commissioner of the Tennessee Department of Education assigned the case to another ALJ, who conducted a hearing on the merits in April 1991.

Similar concerns were expressed by Tracy Jo Duncan Burkhardt, the regional coordinator for the Tennessee Infant Parent Program. Burkhardt, who had a master's degree in deaf education, testified that the comprehensive development classroom in which the School System proposed to place Kyle "was an exceptional classroom as far as [she] was concerned in terms of what it offered for comprehensive developmental delays." Burkhardt did not believe, however, that the classroom was appropriate for a hearing-impaired child. Burkhardt pointed out that the classroom teacher's expertise was in special education. Burkhardt also explained that the classroom's language [*20] curriculum, which was designed for special education children rather than for hearing-impaired children, was not appropriate for Kyle:

I felt like the language approach that they were using should be completely redirected in terms of Kyle, that they needed to use a different type of approach, and I recommended some approaches in terms of a language curriculum that would be more appropriate for a hearing impaired child.

The Cliftons also called Beverly Mainland, the teacher of the comprehensive development classroom, as a witness. Mainland testified that she had a bachelor's degree in

elementary education, with a concentration in special education. During her ten-year teaching career, Mainland had taught several hearing-impaired children, but she was not certified in deaf education or speech and language pathology. Mainland had no experience teaching dyspraxic children, and any familiarity that she had with dyspraxia was developed through her contact with the Cliftons. Mainland was not familiar with any particular instructional methods or approaches that should be used when teaching dyspraxic children. Mainland provided the following physical description of her classroom: [*21]

The ceilings are high, the walls - my room is basically the same as it was [in May 1990]. We had added - I have a carpet in the toy corner. I have a central air unit, but that can be cut off and on at our discretion. We have a lot of things on the wall, colorful things and stimulating things.

In defending its May 1990 IEP, the School System presented the testimony of, ***inter alia***, Lynn Sewell, an educational specialist who worked for the School System's special education department, and Chris Refseth (now Chris Lewis), the School System's deaf education teacher. Lynn Sewell testified that, by the time the second M-Team meeting took place in March 1990, the School System was aware of the classroom's acoustical problems and the need to make modifications:

There was a lot of discussion at this M-Team and prior to this M-Team, observations of the classroom, so we had been informed of the acoustics and how that might affect Kyle. And at this M-Team, one of the responsibilities that we had was also to address that concern. Our recommendation was ultimately that one time a week our person that's in charge of deaf education, Chris Refseth, that she meet with - she [*22] meet with the teacher, with the speech and language therapist and observe Kyle. But one of her responsibilities and one of the goals that was written at the M-Team was for Chris to tell us what we needed to do to acoustically treat the room, because it does have very high ceilings, and the air conditioner made more noise, and this room is - this room also, we had been told that it was visually very distracting, and we understood that, because this room is very highly decorated. So at this M-Team we were aware of the need to acoustically attend to the room, and Chris had experience and had some training in those areas, so she was the person that we recommended advise us.

Although Sewell's testimony demonstrated that the School System was aware of specific problems with the classroom's acoustics and appearance as early as March 1990, neither the School System's March 1990 IEP nor its May 1990 IEP proposed specific modifications to the classroom. Sewell testified that such modifications were included as a "goal" on both the March 1990 IEP and the May 1990 IEP, but she acknowledged that the School System provided no specifics as to how these problems would be remedied. Sewell first [*23] defended this failure to provide specifics on the fact that, at the March 1990 M-Team meeting, Chris Refseth had not yet visited Beverly Mainland's classroom. Sewell later defended the School System's failure to make specific proposals on the fact that the School System had "not yet had permission to serve Kyle, so there [had] been no implementation of any of the goals written, so there would have been no changes." When Chris Refseth testified, she indicated that she was qualified and willing to make recommendations to the School System concerning any necessary classroom modifications. The School System presented no testimony, however, as to any specific modifications that Refseth had recommended or that the School System had agreed to implement to make the classroom a more appropriate instructional setting for Kyle.

On June 17, 1991, the ALJ entered a final order that granted prospective injunctive relief in that it directed the School System to make available an IEP containing the components outlined in the ALJ's order, the School System's proposed May 1990 IEP, and the School System's correspondence and representations to the Cliftons. In this regard, the ALJ's final order directed [*24] the School System to "provide the necessary related services, including but not limited to, modification of the facilities to create an acoustically treated environment" and, further, to "provide qualified professionals to 'appropriately' address [Kyle's] hearing, speech, and language impairments."

In addition to directing the School System to develop an appropriate IEP, the ALJ's final order granted the Cliftons' claim for reimbursement for the expense of educating Kyle at the Bill Wilkerson Center from March 23, 1990, Kyle's fourth birthday, until June 17, 1991, the date of the ALJ's order. Despite the Cliftons' success on their reimbursement claim, the ALJ declared the School System to be the prevailing party in this action. The ALJ supported this ruling by reasoning that "present placement," rather than reimbursement, was "the issue of paramount concern" in this litigation.

As permitted by the IDEA, the School System sought review of the ALJ's final order by filing a petition in the trial court. The record indicates that the trial court affirmed the ALJ's decision by a judgment entered on October 2, 1992; however, the October 1992 judgment does not appear in the record. The [*25] School System then appealed the trial court's judgment to this court.

The first time this case was appealed, this court remanded it for further proceedings because the October 1992 judgment was not a final judgment. *See* Tenn. R. App. P. 3(a). In April 1994, the trial court entered a final judgment, and this case again was appealed. On the second appeal to this court, rather than deciding the case on the merits, this court vacated the trial court's judgment and remanded the case for the ALJ to supplement his final order with additional findings of fact and conclusions of law in accordance with Tennessee Code Annotated section 27-3-128 (1980). n7 ***Wilson County Sch. Sys. v. Clifton***, *1996 Tenn. App. LEXIS 733*, No. *01A01-9604-CH-00152*, *1996 WL 656109*, at *5 (Tenn. Ct. App. Nov. 13, 1996) (***no perm. app. filed***). In November 1997, the ALJ entered a revised final order that attempted to address some of the concerns expressed in this court's opinion.

n7 Section 27-3-128 authorizes the appellate court

> in all cases, where, in its opinion, complete justice cannot be had by reason of some defect in the record, want of proper parties, or oversight without culpable negligence, remand the cause to the court below for further proceedings, with proper directions to effectuate the objects of the order, and upon such terms as may be deemed right.

Tenn. Code Ann. § 27-3-128 (1980).

[*26]

Upon review of the ALJ's revised final order, the trial court ruled that the preponderance of the evidence supported the ALJ's findings that the School System's IEP was inappropriate and that the Bill Wilkerson Center placement was appropriate. Accordingly, the trial court upheld the ALJ's decision to grant the Cliftons' claim for reimbursement in the amount of $ 12,058.32. On the other hand, the trial court did not uphold the ALJ's finding that the School System was the prevailing party. The court reasoned that the Cliftons prevailed on a significant issue in this litigation when the ALJ granted their claim for reimbursement. In a subsequent order, the trial court awarded attorney's fees to the Cliftons' attorneys in the total amount of $ 18,069.25. The court denied the Cliftons' request for prejudgment interest. Both parties appealed the trial court's judgment, and this appeal is again before this court for review.

III. The Cliftons' Claim for Reimbursement Under the IDEA

After carefully reviewing the evidence presented at the administrative hearing, we agree with the trial court that the evidence supports the ALJ's findings that the School System's IEP was inappropriate [*27] and that the Bill Wilkerson Center placement was appropriate. The Cliftons' witnesses testified to numerous physical problems with the proposed classroom, including the high ceiling, the loud heating and cooling unit, the lack of carpeting, drapery, corkboard, and other sound-absorbing materials, and the plethora of visually stimulating materials. Although the School System claimed to have addressed these problems in its final IEP, notably, the School System's own witnesses acknowledged that the May 1990 IEP failed to propose any specific modifications to the classroom. n8 The only concrete suggestion made by the School System was that the teacher could turn off the heating and cooling unit while Kyle was in the classroom. The School System did not indicate how it proposed to control the classroom's climate if the heating and cooling unit was turned off during the six hours per day that Kyle was scheduled to be in the classroom.

n8 In this regard, we note that Tennessee's own special education statutes provided that

> physical aspects and specifications of schools, classrooms and other facilities for, or likely to be used by, [children with disabilities], shall be related to their special physical, educational and psychological needs. To this end, school districts, special education services associations, agencies of the state and its subdivisions, and any private persons or entities constructing, renovating or repairing facilities with or aided by public funds, which facilities are expressly intended for or are likely to be used by [children with disabilities], shall plan, locate, design, construct, equip and maintain them with due regard for the special capabilities, [disabilities] and requirements of the [children with disabilities] to be accommodated therein.

Tenn. Code Ann. § 49-10-103(f) (1990).

[*28]

In addition to attesting to the classroom's physical deficiencies, the Cliftons' witnesses testified that the classroom's curriculum and instructional methods were inappropriate for Kyle. Beverly Mainland's comprehensive development classroom offered a general curriculum for special education students. The classroom's curriculum was not designed for hearing-impaired or dyspraxic children, and it did not emphasize

the speech and language instruction needed by Kyle. Moreover, Mainland had not received formal training or certification in the areas of deaf education or speech and language pathology.

In our view, the deficiencies attested to in the present case are similar to those observed in ***T.H. v. Board of Education***, *55 F. Supp. 2d 830, 838-43* (N.D. Ill.), ***appeal dismissed***, *202 F.3d 275, 1999 U.S. App. LEXIS 32753 (7th Cir. 1999)*. In that case, T.H. was diagnosed as having autism. ***T.H.***, *55 F. Supp. 2d at 836*. At the administrative hearing, the evidence showed that T.H. had "the capacity to acquire new skills when the educational environment [was] free from distractions and when there [was] continuous intervention by an adult trained to [*29] focus [T.H.'s] attention on an appropriate exercise." *Id. at 837-38*. The school district proposed placing T.H. in a cross-categorical classroom four mornings per week for sessions lasting two and one-half hours each. *Id. at 839*.

Autism experts who testified at the hearing opined that the cross-categorical classroom was not an appropriate setting for T.H.'s training. *Id. at 839*. One expert, Dr. Luce, testified that early training for children with autism should take place in a setting where distractions were minimized. *Id.* T.H.'s mother testified that T.H. was bothered by singing and loud noises, and she was convinced "that the highly stimulating classroom setting would make it difficult for [T.H.] to learn." *Id.*

The early childhood program in which the school district proposed placing T.H. was not specifically designed to meet the needs of autistic children. *Id. at 838*. Another expert, Dr. Lorber, visited the school district's early childhood classrooms. *Id.* During his visits, Dr. Lorber observed "that the teachers could not describe or easily discuss their [*30] approach to teaching autistic children." *Id.* In fact, the school district "did not present a single early childhood teacher with significant training in the education of autistic children." *Id. at 838 n.9*.

Yet another expert, Dr. Leventhal, testified that T.H. needed "a fairly high student/teacher ratio and ... a lot of complex and coordinated intervention between language and communication people, behavioral management people as well as social skills development folks." *Id. at 839*. In Dr. Leventhal's opinion, the placement proposed by the school district lacked sufficient individual programming and structure to benefit T.H. *Id. at 840*.

In the present case, the evidence showed that Kyle needed the benefits of an acoustically-treated classroom containing minimal visual distractions. Instead, the School System proposed placing Kyle in a special education classroom that the School System's own witnesses acknowledged was not acoustically-treated, was equipped with an intermittently noisy heating and cooling unit, and was highly decorated.

Educators who testified on behalf of the Cliftons at the hearing [*31] opined that the proposed classroom setting was not appropriate for Kyle. In addition to the noise and visual distractions, these educators observed that the instructional methods employed in the classroom were designed for special education students, but not for hearing-impaired students. Whereas the comprehensive development classroom offered a multi-subject curriculum, Kyle needed a curriculum that consistently emphasized and reinforced his speech and language development.

Moreover, the classroom teacher, Beverly Mainland, had limited experience teaching hearing-impaired children, and she was not certified in deaf education or speech and language pathology. Mainland candidly admitted that she had no experience teaching dyspraxic children and that she was unfamiliar with instructional methods used to teach children with dyspraxia. In contrast, the evidence showed that none of these problems existed at the Bill Wilkerson Center and that Kyle's placement there was appropriate. n9

n9 Although the evidence supported the Cliftons' claim that the School System's May 1990 IEP was inappropriate for Kyle, we reject the Cliftons' contention that the IEP was inadequate because it lacked "any intermediate objective goal sheets for charting the child's progress." In evaluating this type of alleged procedural deficiency, courts have adopted a harmless error analysis. ***See Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss***, *144 F.3d 391, 399 (6th Cir. 1998)*; ***Doe v. Defendant I***, *898 F.2d 1186, 1190-91 (6th Cir. 1990)*; ***Moubry v. Independent Sch. Dist. 696***, *9 F. Supp. 2d 1086, 1102-04 (D. Minn. 1998)*; ***Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512***, *959 F. Supp. 1338, 1349 (D. Kan. 1997)*, ***aff'd***, *153 F.3d 727 (10th Cir. 1998)*. Here, the Cliftons' brief fails to explain how they were prejudiced by the IEP's failure to include "intermediate objective goal sheets."

[*32]

By way of comparison, we note that the IEP approved in ***Brougham v. Town of Yarmouth***, *823 F. Supp. 9 (D. Me. 1993)*, contained many of the elements that the witnesses testified were lacking in this case. In that case, the evidence showed that Travis, a thirteen-year-old deaf student, had been delayed by as much as

four or five years in his speech and language development due to his hearing impairment. ***Brougham***, *823 F. Supp. at 11.* The IEP proposed by the school system included placement in a classroom of seven children, two of whom also had hearing impairments. *Id. at 18.* The classroom teacher was a teacher of the deaf who taught speech and language to high school and middle school students. *Id. at 18 n.9.* The teacher's instructional methods emphasized language development so that Travis would receive "the intensive linguistic focus" that he required. *Id. at 17.* After considering these elements, the court concluded that the proposed IEP satisfied the IDEA's requirement of providing a free appropriate education to Travis. *Id. at 18.* n10

> n10 In its decision, the court cited a 1992 policy guidance of the United States Department of Education, which suggested that public school systems have not adequately considered "the unique communication and related needs" of many deaf children in developing IEP's for them. ***Brougham***, *823 F. Supp. at 17* (quoting ***Deaf Students Education Services Policy Guidance***, *57 Fed. Reg. 49,274 (1992)).*

[*33]

Similarly, in ***Bonnie Ann F. v. Calallen Independent School District***, *835 F. Supp. 340, 347 (S.D. Tex. 1993),* ***aff'd***, *40 F.3d 386 (5th Cir. 1994),* ***cert. denied***, *514 U.S. 1084 (1995),* a case involving a three-year-old hearing-impaired child, the court approved a placement that contained the following components. Along with five other hearing-impaired children, Bonnie attended Regional Day School for the Deaf classes at a public elementary school. ***Bonnie Ann F.***, *835 F. Supp. at 343.* The classroom teacher held certificates in speech pathology, speech and hearing therapy, and deaf education. *Id.* The major elements of Bonnie's educational program were

> language development, speech development, auditory training, preschool readiness activities, and motor development.
>
> ... [The teacher] provided Bonnie with individual auditory training and speech therapy for a short period of time during the school day. She then reinforced and integrated these lessons throughout the day. Language development training was incorporated in daily class activities.

Id. This classroom speech [*34] and language training was supplemented with the services of one of the school district's speech therapists, who provided Bonnie with individual speech and language therapy for forty-five minutes per week. *Id.* After reviewing these components, the court held that "the IEP developed for Bonnie through the IDEA's procedures was reasonably calculated to enable her to receive educational benefits." *Id. at 347.*

On appeal, the School System insists that, contrary to the ALJ's explicit findings as to the impropriety of the May 1990 IEP, the ALJ implicitly must have found the IEP to be appropriate because he ordered the School System to implement a new IEP that contained the same components. We disagree. The ALJ's final order did not merely order the School System to implement an IEP containing the same components as its May 1990 IEP. The ALJ also ordered the School System to include in its IEP the components outlined in the ALJ's final order. Specifically, the ALJ ordered the School System to "provide the necessary related services, including but not limited to, modification of the facilities to create an acoustically treated environment" and, further, to [*35] "provide qualified professionals to 'appropriately' address [Kyle's] hearing, speech, and language impairments." Inasmuch as these components related directly to the deficiencies in the May 1990 IEP identified by the Cliftons' witnesses, we conclude that the ALJ's order required the School System to provide important services that exceeded the level of services proposed by the School System. n11

> n11 At the administrative hearing, the evidence indicated that, at the beginning of the 1990-91 school year, a more appropriate classroom placement developed when the School System added a third early intervention classroom to its curriculum. This class was taught by Dorothy Swan, who had a dual endorsement from the state of Tennessee in both special education and speech and language pathology. The classroom was in a new school building, and its acoustic design was more appropriate for hearing-impaired children than the classroom proposed in the May 1990 IEP. In fact, one of the students enrolled in the class was hearing-impaired. The evidence was undisputed, however, that the School System never offered the Cliftons an IEP proposing this placement for Kyle.

[*36]

IV. The Cliftons' Request for Attorney's Fees Under the IDEA

In light of our affirmance of the trial court's judgment ordering the School System to reimburse the Cliftons the sum of $ 12,058.32 for Kyle's education at the Bill Wilkerson Center from March 1990 to June 1991, we likewise affirm the trial court's decision to award the Cliftons' attorney's fees incurred in pursuing this action. The IDEA authorizes the trial court, in its discretion, to award reasonable attorney's fees to the parents of a disabled child when they are the prevailing party in an IDEA action. *See 20 U.S.C.A. § 1415*(i)(3)(B) (West 2000). To be a "prevailing party" under the IDEA, the parents must succeed on at least one significant issue in the litigation, and they must obtain at least some relief on the merits of their claim. ***Payne v. Board of Educ., 88 F.3d 392, 397 (6th Cir. 1996); Phelan v. Bell, 8 F.3d 369, 373 (6th Cir. 1993).*** One way to demonstrate such success is by obtaining an enforceable judgment against the school district. ***Payne, 88 F.3d at 397.*** Thus, the trial court, in its discretion, [*37] may award attorney's fees to parents who prevail on a claim for reimbursement under the IDEA. ***See, e.g., M.C. v. Voluntown Bd. of Educ., 56 F. Supp. 2d 243, 260 (D. Conn. 1999); Gonzalez v. Puerto Rico Dep't of Educ., 969 F. Supp. 801, 815 (D.P.R. 1997); Doolittle v. Meridian Joint Sch. Dist. No. 2, 128 Idaho 805, 919 P.2d 334, 343 (Idaho 1996).***

In the present case, the primary issue before the ALJ and the trial court was the propriety of the IEP proposed for Kyle by the School System. In order to prevail on their claim for reimbursement, the Cliftons had the burden of proving by a preponderance of the evidence that the proposed IEP was "inadequate," "inappropriate," or "improper" and, further, that Kyle's placement at the Bill Wilkerson Center was "proper" or "appropriate." ***Renner v. Board of Educ., 185 F.3d 635, 642 (6th Cir. 1999); Doe v. Metropolitan Nashville Pub. Sch., 133 F.3d 384, 387*** (6th Cir.), ***cert. denied, 119 S. Ct. 47 (1998); Wise v. Ohio Dep't of Educ., 80 F.3d 177, 184 (6th Cir. 1996); Doe v. Board of Educ., 9 F.3d 455, 458 (6th Cir. 1993),*** [*38] ***cert. denied, 511 U.S. 1108, 128 L. Ed. 2d 665, 114 S. Ct. 2104 (1994); Babb v. Knox County Sch. Sys., 965 F.2d 104, 108*** (6th Cir.), ***cert. denied, 506 U.S. 941, 121 L. Ed. 2d 290, 113 S. Ct. 380 (1992); Doe v. Defendant I, 898 F.2d 1186, 1191 (6th Cir. 1990).*** The Cliftons met this burden and, consequently, obtained a judgment ordering the School System to reimburse them for Kyle's past educational expenses at the Bill Wilkerson Center. Under these circumstances, we agree with the trial court's ruling that the Cliftons were the prevailing party, and we hold that the trial court did not abuse its discretion in awarding the Cliftons' attorney's fees incurred in pursuing this action.

We also affirm the trial court's decision as to the amount of attorney's fees to be awarded. Like the trial court's decision to award attorney's fees, the determination of the amount of attorney's fees to be awarded is largely within the discretion of the trial court. ***Chaille v. Warren, 635 S.W.2d 700, 703 (Tenn. Ct. App. 1982); Preston Lincoln-Mercury, Inc. v. Kilgore, 525 S.W.2d 155, 158 (Tenn. Ct. App. 1974).*** [*39] In the court below, the School System raised specific objections to some of the hours claimed by the Cliftons' attorneys in their affidavits submitted in support of the Cliftons' request for attorney's fees. The trial court's final judgment awarding the Cliftons' attorney's fees indicated that the court properly considered each of these objections but that, ultimately, the court found the claimed hours to be reasonable.

On appeal, the School System again contends that the hours claimed by the Cliftons' attorney's were excessive. Our review of this issue is hampered, however, by the fact that the record on appeal contains neither a transcript of the hearing on the Cliftons' request for attorney's fees nor the affidavits submitted by the Cliftons' attorneys in support of their fee request. Pursuant to the Tennessee Rules of Appellate Procedure, the appellant bears the burden of preparing "a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(b); ***see also Johnson v. Hardin, 926 S.W.2d 236, 239 (Tenn. 1996);*** [*40] ***Nickas v. Capadalis, 954 S.W.2d 735, 742 (Tenn. Ct. App. 1997).*** In the absence of the attorney's affidavits or any other evidence on this issue, we are unable to conclude that the trial court abused its discretion in awarding the Cliftons' attorney's fees in the full amount requested.

V. The Cliftons' Request for Prejudgment Interest

Having affirmed the trial court's awards for reimbursement and attorney's fees, we now turn to the final issue raised in this appeal: whether the trial court erred in denying the Cliftons' request for prejudgment interest on both the reimbursement award and the attorney's fee award. As a general rule, a claimant's entitlement to prejudgment interest under a federal statute is a question of federal law. ***See Cottrill v. Sparrow, Johnson & Ursillo, Inc., 100 F.3d 220, 224 (1st Cir. 1996); United States ex rel. Bartec Indus., Inc. v. United Pac. Co., 976 F.2d 1274, 1279 (9th Cir. 1992), amended on other grounds, 15 F.3d 855 (9th Cir. 1994); United States ex rel. Georgia Elec. Supply Co. v. United States Fidelity & Guar. Co., 656 F.2d 993, 997 (5th Cir. 1981);*** [*41] ***United States ex rel. Balf Co. v. Casle Corp., 895 F. Supp. 420, 429 (D. Conn. 1995).*** If the federal statute is silent on the issue, however, courts may look to state law for guidance.

Cottrill, 100 F.3d at 224-25; United Pac., 976 F.2d at 1279; USF&G, 656 F.2d at 997; Casle Corp., 895 F. Supp. at 429.

Under Tennessee law, trial courts are authorized to award prejudgment interest as an element of damages "in accordance with the principles of equity." Tenn Code Ann. § 47-14-123 (1995). n12 In ***Myint v. Allstate Ins. Co.,*** *970 S.W.2d 920 (Tenn. 1998),* our supreme court explained that an award of prejudgment interest under this statute

is within the sound discretion of the trial court and the decision will not be disturbed by an appellate court unless the record reveals a manifest and palpable abuse of discretion. ... This standard of review clearly vests the trial court with considerable deference in the prejudgment interest decision. Generally stated, the abuse of discretion standard does not authorize an appellate court to merely substitute [*42] its judgment for that of the trial court. Thus, in cases where the evidence supports the trial court's decision, no abuse of discretion is found.

Myint, 970 S.W.2d at 927 (citations omitted).

In addition to clarifying the standard to be applied in prejudgment interest cases, the supreme court set forth several principles to guide trial courts in exercising their discretion to award or deny prejudgment interest:

Foremost are the principles of equity. ... Simply stated, the court must decide whether the award of prejudgment interest is fair, given the particular circumstances of the case. In reaching an equitable decision, a court must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize a defendant for wrongdoing. ...

In addition to the principles of equity, two other criteria have emerged from Tennessee common law. The first criterion provides that prejudgment interest is allowed when the amount of the obligation is certain, or can be ascertained by a proper accounting, and the amount is not disputed on reasonable grounds. [*43]

... The second provides that interest is allowed when the existence of the obligation itself is not disputed on reasonable grounds.

Id. (citations omitted).

n12 The parties have not raised, and we do not decide, the issue of when postjudgment interest began to accrue in this case. *See* Tenn. Code Ann. § 47-14-122 (1995) (providing that "interest shall be computed on every judgment from the day on which the jury or the court, sitting without a jury, returned the verdict without regard to a motion for a new trial").

In accordance with these principles, we conclude that the trial court did not abuse its discretion in denying the Cliftons' request for prejudgment interest. The Cliftons convincingly argue that they have been unfairly denied the use of a substantial sum of money throughout the nine-year history of this litigation. The Cliftons' loss of use of these funds, however, was merely one of the factors that the trial court was required to consider in deciding the Cliftons' request [*44] for prejudgment interest. Following the *Myint* decision, the appellate courts of this state have recognized that a trial court does not abuse its discretion in denying a claim for prejudgment interest where the defendant reasonably disputes either the amount of the obligation or the existence of the obligation itself. ***See, e.g., Alexander v. Inman,*** *974 S.W.2d 689, 698 (Tenn 1998);* ***Brandt v. BIB Enters., Ltd.,*** *986 S.W.2d 586, 595 (Tenn. Ct. App. 1998);* ***see also Newton v. Cox,*** *954 S.W.2d 746, 748-49 (Tenn. Ct. App. 1997).*

The record in the present case reveals that, although ultimately unsuccessful, the School System reasonably disputed the existence of its obligation to reimburse the Cliftons for Kyle's placement at the Bill Wilkerson Center and, concomitantly, its obligation to pay the Cliftons' attorney's fees. Despite this court's affirmance of the trial court's judgment ordering the School System to reimburse the Cliftons, we believe that the evidence at the administrative hearing presented a close question as to whether the School System's proposed IEP was appropriate for Kyle. This [*45] belief has been reinforced by an extensive review of IDEA case law, during which we were constantly reminded that the IDEA provides no more than a "basic floor" of educational opportunity for disabled children and that it does not require public school districts to provide the "best" possible program. ***Board of Educ. v. Rowley,*** *458 U.S. 176, 201, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982);* ***Wise v. Ohio Dep't of Educ.,*** *80 F.3d 177, 185 (6th Cir. 1996);* ***Doe v. Board of Educ.,*** *9 F.3d 455, 459 (6th Cir. 1993),* ***cert. denied,*** *511 U.S. 1108, 128 L. Ed. 2d 665, 114 S. Ct. 2104 (1994);* ***Cordrey v. Euckert,*** *917 F.2d 1460, 1473-74 (6th Cir. 1990),* ***cert. denied,*** *499 U.S. 938, 113 L. Ed. 2d 447, 111 S. Ct. 1391 (1991).* Under the circumstances of this case, we conclude that the School System reasonably disputed its obligations to the Cliftons under the IDEA, and we decline to disturb the

trial court's decision to deny the Cliftons' request for prejudgment interest. n13

n13 The record also reveals that the School System reasonably disputed the amount of attorney's fees to be awarded. In its final judgment, the trial court implicitly, if not explicitly, acknowledged the reasonableness of the School System's objections to the amount of fees requested when the court observed that the objections "focused on entries that bordered on excessive time." Despite these objections, the trial court found the fees requested "to be within the range of reasonableness," and it awarded the Cliftons' attorneys the full amount requested.

This case illustrates why, in our view, the award of prejudgment interest on attorney's fees is problematic. As in the present case, the reasonableness of the attorney's fees to be awarded often is disputed, and the amount of the award is not established with certainty until entry of the final judgment. Even in cases where the amount is not disputed, attorney's fees may be gradually incurred over an extended period of time. In the present case, for example, the Cliftons' attorney's fees were incurred over a nine-year period. In such cases, the problem arises as to when prejudgment interest would begin to accrue.

[*46]

The trial court's judgment is affirmed, and this cause is remanded for further proceedings consistent with this opinion. Costs of this appeal are taxed to the Wilson County School System, for which execution may issue if necessary.

FARMER, J.

CRAWFORD, P.J., W.S.

HIGHERS, J.

LEXSEE 1990 tenn. app. lexis 490

JOHN H. JONES, Plaintiff-Appellant v. RAYMOND L. JONES, RUBY JONES WELLS, KATIE JONES DUNCAN, and JAMES THOMAS JONES, Defendants-Appellee

CA No. 44

Court of Appeals of Tennessee

1990 Tenn. App. LEXIS 490

July 17, 1990, Filed

PRIOR HISTORY:
[*1]

From the Chancery Court, Morgan County, Hon. Frank V. Williams, III, Chancellor.

DISPOSITION:
REMANDED

COUNSEL:
JOEL E. PEARMAN, OF HARRIMAN, TENNESSEE, FOR APPELLANT.

JAMES FRANK WILSON, WITH WILSON & BROOKS, OF WARTBURG, TENNESSEE, FOR APPELLEE JAMES THOMAS JONES.

JUDGES:
Clifford E. Sanders, P.J (E.S.). Houston M. Goddard, J., William H. Inman, Sp.J., Concur.

OPINIONBY:
SANDERS

OPINION:

OPINION

The Plaintiff-Appellant, John H. Jones, and the Defendants, Raymond L. Jones, Ruby Jones Wells, Katie Jones Duncan, and Defendant-Appellee James Thomas Jones are the children and heirs at law of V. N. Jones and Sallie Jones, both of whom are now deceased. V. N. Jones died intestate in Morgan County in 1968 and Sallie Jones died intestate in 1986. In addition to the Plaintiff and Defendants, V. N. and Sallie Jones had another son, Leighton V. Jones, who predeceased V. N. Jones and left two children, Larry Laten Jones and Geraldine J. French, surviving him. As pertinent here, V. N. Jones died seized and possessed of a 2.5-acre tract of land located in the Second Civil District of Morgan County, which he acquired in 1913. This was the family home place upon which a residence had been constructed.

In August, 1969, Larry Laten Jones [*2] and Geraldine J. French, as the surviving children of Leighton Jones, filed suit in the chancery court at Wartburg against the Plaintiff and Defendants along with Sallie Jones as the surviving widow of V. N. Jones, to have an administrator of the estate of V. N. Jones appointed and to have their distributive share of the estate set aside to them. Each of the defendants in that proceeding, as pertinent here, filed an answer admitting V. N. Jones died seized and possessed of the 2.5-acre tract of land located in the Second Civil District of Morgan County. A settlement was subsequently made in that proceeding, resulting in Larry Laten Jones's and Geraldine J. French's deeding their interests in the 2.5 acres of land to the Plaintiff and Defendants in the case at bar.

In 1987 the Plaintiff filed this suit, asking that the 2.5-acre tract of land be sold for partition or partitioned in kind.

Defendant-Appellee James Thomas Jones was the only Defendant who filed an answer to the petition. In his answer he denied the property was subject to partition and, as an affirmative defense, as pertinent here, stated: "This Defendant is the youngest of the six children of V. N. and Sallie Wilson Jones, [*3] was raised on the property described in the Petition, assisted his parents in the operation of the V. N. Jones Grocery, grew up, served in the Aimed Services of the United States, returned, married and set up a separate home. Shortly

after returning and setting up his separate residence in Harriman, his parents called on him to return with his family to the family homeplace to provide for them in their old age and to help them run the V. N. Jones Grocery Store. In order to induce this Defendant to do this, each of his parents promised him if he would live with them, care for them in their old age, and assist them in running the grocery store, that he would have the property described in the PETITION in this case. Your Defendant has fully performed his obligation to his parents. No will or deed was ever executed by his parents, but in addition to making their oral agreement with Defendant, his parents told others what the agreement was and it was understood in the community in which they lived that the homeplace was to be the property of this Defendant upon the death of the last parent to die. From 1957 until his father's death in 1968, this Defendant and his family lived with his [*4] parents, cared for his father in sickness and in health until his death and ran the grocery store, then continued to reside in the homeplace and cared for his mother, Sallie Wilson Jones, until her death in 1986. This Defendant alleges he has fully performed his contract with his parents, is entitled to have his contract, whether express or implied in fact or law, upheld and is the title owner of the subject premises."

Upon the trial of the case the real issue was whether or not James's father and mother had promised him the home place in exchange for his helping and taking care of them.

In his determination of the case the court found James had proved his case by clear and convincing proof. A judgment was entered accordingly and, as pertinent here, the judgment provides: "James Thomas Jones, and his family lived in the homeplace, cared for his parents until they each passed away, worked in the store and provided the income for his parents support to the exclusion of the other parties hereto, paid the parents medical bills exclusively from the work at the store, and fully performed the oral agreement between him and his parents; that upon the death of V. N. Jones and Sallie Wilson [*5] Jones the other children of these parties took legal title to the property in trust for the benefit of James Thomas Jones; that it would be inequitable to allow such a miscarriage of ustice as to deny this Defendant the benefit of the bargain which he made decades ago and which he has fully performed; and that, in exercise of this courts inherent equity powers, a trust should be imposed on the legal title of the premises in favor of the Defendant, James Thomas Jones, it is

"THEREFORE, ORDERED, ADJUDGED, AND DECREED as follows:

"A. That Plaintiff's cause of action is dismissed with prejudice to the refiling of the same;

"B. That a trust is imposed on the legal title to the subject premises of all other parties to this suit in favor of the Defendant, James Thomas Jones;

"C. That all other parties hereto shall execute a Quit Claim deed conveying any and all right, title and interest they may have in this property to James Thomas Jones and, if the other parties should fail to do so, the Clerk & Master, upon the judgment becoming final, shall execute a Deed conveying that interest and

"D. That the costs of this cause are taxed to the Plaintiff for which execution shall issue, if necessary." [*6]

The plaintiff, John H. Jones, has appealed, presenting the following issues for review:

"1. Did the Chancellor err in determining that a trust could be established under the proof introduced in this case.

"2. Did the Chancellor err in determining that the proponents of the constructive trust proved their case by clear, cogent and convincing evidence."

While we find from a review of the evidence that is supports the conclusions of the court, we are of the opinion complete justice cannot be had by reason of a "defect in the record, want of proper parties, or oversight without culpable neglect," and the case should be remanded for further proceedings pursuant to T.C.A. § 27-3-128.

The court has granted affirmative relief against the plaintiff and each of the Defendants except James Thomas Jones without a counterclaim or other appropriate pleading having been filed seeking such relief. Also, the deed from Geraldine J. French and Larry Jones to the Plaintiff and other Defendants may create a cloud on the title to the property unless removed.

The case is remanded to the trial court for further proceedings pursuant to T.C.A. § 27-3-128. The cost of this appeal is taxed one-half to the Plaintiff [*7] and one-half to the Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2000, a copy of the foregoing document was served on the parties of record, as follows:

[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Cynthia Kinser, Esquire Consumer Advocate Division 426 5th Avenue, N., 2nd Floor Nashville, TN 37243
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight	T. G. Pappas, Esquire Bass, Berry & Sims 315 Deaderick Street, Suite 2700 Nashville, TN 37238-0002
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight	James Wright, Esquire United Telephone - Southeast 14111 Capitol Blvd. Wake Forest, NC 27587
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Richard Tettlebaum, Esquire Citizens Telecommunications 1400 16th St., NW, #500 Washington, DC 20036
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Jon Hastings, Esquire Boult, Cummings, et al. P. O. Box 198062 Nashville, TN 37219-8062
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Val Sanford, Esquire Gullett, Sanford, Robinson & Martin 230 Fourth Ave., N., 3d Fl. Nashville, TN 37219-8888
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Henry Walker, Esquire Boult, Cummings, et al. P. O. Box 198062 Nashville, TN 37219-8062

[ ] Hand
[/] Mail
[ ] Facsimile
[ ] Overnight

Guilford Thornton, Esquire
Stokes, Bartholomew, et al.
424 Church St., #2800
Nashville, TN 37219-2323

[ ] Hand
[/] Mail
[ ] Facsimile
[ ] Overnight

L. Vincent Williams, Esquire
Office of Tennessee Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243

Jay M. Hicks
w/permission cla