

RENDERED: OCTOBER 15, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-000573-ME

C.F.C., A CHILD UNDER EIGHTEEN

APPELLANT

v. APPEAL FROM ALLEN CIRCUIT COURT  
HONORABLE G. SIDNOR BRODERSON, JUDGE  
ACTION NO. 07-J-00146

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

WINE, JUDGE: C.F.C., a minor, appeals from an order of the Allen Family Court finding her to be a juvenile status offender and a habitual truant. On appeal, C.F.C. maintains that the Director of Pupil Personnel in Allen County failed to comply with the requirements of Kentucky Revised Statute(s) (“KRS”) 159.140, and thus, that the order adjudicating her as a juvenile status offender must be vacated. For the reasons stated herein, we agree.

Official notice was reportedly sent to C.F.C's parent or guardian on November 17, 2009, notifying same of C.F.C.'s unexcused absences in violation of KRS 159.150.

On December 2, 2009, the Allen County Director of Pupil Personnel swore out a complaint against fourteen-year-old C.F.C. alleging habitual truancy. The complaint and notice were accompanied by a "student profile attendance report," a grade report, and a "pre-complaint--truancy diversion program" form (which was essentially blank except for the signature lines). The court designated worker's preliminary inquiry/informal processing form stated that C.F.C "failed to appear" for an inquiry on January 5, 2010, and that diversion was unsuccessful.

The complaint was filed in the Allen Family Court on March 2, 2010. Summonses to the child's mother, father, and guardian were issued; however, the summonses to her parents were returned to the court unserved. The proof of service on each stated, "Unable to locate." The guardian was served and appeared in court on March 3, 2010, for C.F.C.'s arraignment. The Department of Public Advocacy ("DPA") was appointed as counsel for C.F.C. and requested an adjudication hearing.

At the adjudication hearing, on March 9, 2010, Jim Young ("Young"), the Allen County Director of Pupil Personnel, was called by the Commonwealth to testify. He testified that C.F.C. had seven unexcused absences and one unexcused tardy at the time he swore out the truancy complaint on December 2, 2009. When asked by the court whether he had taken any actions before filing the complaint,

Young stated that he had sent a “final notice” to the parent or guardian on November 17, 2009. On cross-examination, when asked what had been done to acquaint the school with C.F.C.’s home conditions, Young stated only that he had sent a letter to the parents inviting participation in the “Truancy Diversion Program” and that he had mailed a final notice on November 17, 2009. However, Young admitted that he did not know whether C.F.C. had participated in the truancy diversion program prior to December 2, 2009. Young testified that he had no documentation concerning whether he spoke with CFC’s parent(s) or guardian or attempted to learn the causes of C.F.C.’s irregular attendance. The Commonwealth then closed its case.

Although the Commonwealth did not request a continuance by motion, the court, *sua sponte*, after inquiring of Young whether he had any documentation available in his office, continued the hearing until the next week.

On March 16, 2010, a different prosecutor for the Commonwealth appeared and inquired of the court why the case had been continued. Upon the Commonwealth’s being informed that the case had been continued after the court inquired about documentation, Young was again called to testify.

Young testified that C.F.C. had seven unexcused absences and one unexcused tardy at the time the complaint was filed on December 2, 2009. Young further testified that a “pre-complaint” form, which he stated was issued on September 18, 2009, would have informed C.F.C.’s parents that a meeting was to be held concerning participation in the “Truancy Diversion Program” on

September 29, 2009. Young had no documentation that the letter was actually mailed out, other than a list kept in his office concerning to which students the letter was to be sent. Young testified that he had no documentation of whether C.F.C. attended the September 29, 2009, meeting.

Further, although Young testified that C.F.C. did eventually participate in the Truancy Diversion Program, he had no documentation concerning whether C.F.C. participated in the program before the complaint was sworn on December 2, 2009. Rather, he “felt like” C.F.C. attended before that time. Nonetheless, Young admitted that he didn’t know for certain. Young also acknowledged that he was aware C.F.C.’s parents had stated that the child had medical issues and was seeing a doctor for stress-related problems.

On cross-examination, Young acknowledged that he had no documentation concerning any attempts to become acquainted with the C.F.C.’s home conditions, the causes of her irregular attendance, or any intervention strategies that were implemented to deal with her attendance issues. In fact, Young stated that he “didn’t think it was his responsibility” to acquaint the school with the causes of C.F.C.’s irregular attendance and that the school could “draw their own conclusions.”

On re-direct, the Commonwealth introduced several documents through Mr. Young as “Exhibit 1.” Such documents included: (1) the “pre-complaint form”; (2) the “September 18 letter”; (3) an email concerning C.F.C.’s

contact with a counseling agency, “Lifeskills”; and (4) a list of students with unexcused absences in the school district (which included C.F.C.’s name).

On re-cross, defense counsel elicited from Young that “Exhibit 1” reveals that C.F.C. did not return to Lifeskills to reopen her case until after December 2, 2009 (after the complaint was sworn).<sup>1</sup> Defense counsel moved to dismiss the complaint for lack of subject-matter jurisdiction. Defense counsel further argued that there was a complete absence of documentation to show that the mandates of KRS 159.140 were followed. Counsel also pointed out that, even though there was testimony that C.F.C. eventually participated in the Truancy Diversion Program, there was no evidence that she participated in the program before the complaint was sworn on December 2, 2009.

Relying on Young’s testimony and the documents entered in Commonwealth’s “Exhibit 1,” the trial court found that the Allen County School District met all of its obligations under KRS 159.140. The court then entered a juvenile status offender order adjudicating C.F.C. to be a juvenile status offender and a habitual truant. C.F.C. now appeals.

On appeal, C.F.C. avers that the Allen County School System failed to comply with the mandates of KRS 159.140. Specifically, she alleges that the Director of Pupil Personnel did not even attempt to visit her home prior to filing the complaint and that he failed to produce any evidence documenting such

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<sup>1</sup> The e-mail refers to “reopening” her case, which was originally opened in June of 2009. The record is not clear on this matter, but it appears that C.F.C. must have had some previous involvement with Lifeskills. Nonetheless, this is not pertinent herein as the complaint only covers the period from August 2009 to December 2009.

compliance. She further alleges that the Director did not attempt to ascertain the reasons for her truancy and did not seek elimination of those causes before filing the instant action. C.F.C. further avers that Allen County and the Director of Pupil Personnel have a practice of disregarding the mandates of KRS 159.140 when filing complaints for habitual truancy.

KRS 159.140 states, in pertinent part, that

(1) The director of pupil personnel, or an assistant appointed under KRS 159.080, shall:

.....

(c) ***Acquaint the school with the home conditions of a habitual truant*** as described in KRS 159.150(3), and the home with the work and advantages of the school;

(d) ***Ascertain the causes of irregular attendance and truancy, through documented contact*** with the custodian of the student, and seek elimination of these causes;

.....

(f) Attempt to visit the homes of students who are reported to be in need of books, clothing, or parental care;

.....

(3) In any action brought to enforce compulsory attendance laws, ***the director of pupil personnel or an assistant shall document the home conditions of the student and the intervention strategies attempted.***

(Emphasis added.) This Court has previously interpreted this statute, in conjunction with KRS 630.060(2), to require compliance with its mandates before

a complaint may be received by the courts. *T.D. v. Commonwealth*, 165 S.W.3d 480 (Ky. App. 2005). KRS 630.060(2) states that:

No complaint shall be received by the court designated worker alleging habitual truancy unless an adequate assessment of the child has been performed pursuant to KRS 159.140(1)(c), (d), and (f), unless it can be shown that the assessment could not be performed due to the child's failure to participate.

Upon a reading of both KRS 630.060(2) and KRS 159.140, this Court previously held that the legislature intended to make the requirements of KRS 159.140 “a matter of subject matter jurisdiction.” *T.D. v. Commonwealth*, at 482. Indeed, we noted that although the director of pupil personnel's duties as expressed in KRS 159.140 “are stated in broad language, the legislature's later enactment of KRS 630.060 shows its intent to require the Director to perform those goals *in a particular case* before bringing a child before the court as a habitual truant.” *Id.*

In *T.D. v. Commonwealth*, we found that although the Director of Pupil Personnel's duties may be burdensome under such an interpretation, it was the intention of the legislature to establish rigorous prerequisites before a Director may resort to the court for intervention into a juvenile truancy matter. *Id.* We acknowledged the reality, however, that there would inevitably be instances where home visits are impossible and where it may be impossible to ascertain the causes of the truancy if such efforts are frustrated by a lack of cooperation by the student and parent(s) or guardian(s). *Id.* We determined that, in those situations, the duty would fall upon the court designated worker to determine whether an “adequate

assessment” had been performed under the language of the statute. *Id.*

Additionally, we found that the legislature has provided that where the difficulty in complying with the statute is due to a child’s failure to participate, the assessment may be abandoned upon such a showing. *Id.* at 482-483.

In the present case, we conclude from the evidence that the requirements of KRS 630.060(2) were not met prior to submission of the complaint to the court designated worker. The Commonwealth has even conceded in this case that the documentation of the Director of Pupil Personnel’s actions to satisfy the statutes’ mandates was “woefully insufficient.” However, the Commonwealth argues that the Truancy Diversion Program was implemented to satisfy the requirements of KRS 159.140. We disagree. Rather, the existence of the program cannot act as a substitute for the statutorily mandated documentation of compliance with KRS 159.140 and KRS 630.060. As we previously held in *T.D. v. Commonwealth*, lack of documentation of compliance with these statutes deprives the court of subject-matter jurisdiction. The legislature has made quite clear that the Director of Pupil Personnel’s efforts to ascertain the causes of truancy and visit the home of the child must be supported by documentation. Accordingly, we find that the complaint should have been dismissed by the Allen Family Court for lack of jurisdiction. *T.D. v. Commonwealth, supra.*

Moreover, there appears to be an ancillary issue broached (although not raised by the parties) in this case through the Commonwealth’s argument that the Truancy Diversion Program may take the place of the Director of Pupil



Personnel's responsibilities under KRS 159.140 and KRS 630.060(2). Namely, separation of powers problems may arise with any attempts to delegate the Director of Pupil Personnel's duties to the Truancy Diversion Program, which is a program run by the Judicial Branch.<sup>2</sup> Kentucky Constitution § 27 (Ky. Const.); Ky. Const. § 28; Ky. Const. § 69. As we stated in *T.D. v. Commonwealth*, the legislature intended that certain requirements must be met before the Director of Pupil Personnel may involve the courts in juvenile matters involving truancy. *Id.* at 482. KRS 159.140 and KRS 630.060(2) make quite clear that the duties imposed therein fall upon the director himself (or his assistant). Any attempt to shift these duties away from the director to a judicial agency may well violate the separation of powers clauses of our Constitution.

For the foregoing reasons, the order of the Allen Family Court finding C.F.C. to be a juvenile status offender and a habitual truant is hereby vacated. This matter is remanded to the Allen Family Court for the purpose of entering an Order dismissing the complaint alleging habitual truancy.

ALL CONCUR.

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<sup>2</sup> The Truancy Diversion Program is facilitated by the Court Designated Worker Program, which was created by the General Assembly in 1986 and is under the direction of the Department of Juvenile Services of the Administrative Office of the Courts. The Administrative Office of the Courts is an operational arm of the Kentucky Court of Justice.

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