STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
COMMISSIONER OF EDUCATION

DEPARTMENT OF CHILDREN, YOUTH AND FAMILIES, *Petitioner,*	:	
vs.	:	RIDE No. 19-045A
NORTH KINGSTOWN SCHOOL DEPARTMENT and WARWICK PUBLIC SCHOOLS, *Respondents*	:	

In re D. Doe

FINAL DECISION AND ORDER

Held: Motion of state child welfare agency to reopen the evidentiary record is denied and the Commissioner's prior order denying the agency's petition for order to compel one of two respondent school districts to accept financial responsibility for a portion of the cost of educating a child placed in an out-of-state residential treatment facility that provided educational services is affirmed as the agency made neither a specific offer of proof describing the additional evidence that allegedly established the "last known Rhode Island residence" of the child's mother under R.I. Gen. Laws §16-64-1.2(c), nor made any effort to explain why the "extensive search" that led to the evidence had not been conducted prior to filing its initial petition, or at least prior to the two evidentiary hearings that had been conducted.

March 8, 2021

This is the latest chapter in what the Commissioner has characterized as a seemingly never-ending series of claims against local school districts by the Department of Children, Youth and Families ("DCYF") seeking monetary reimbursement for a portion of the cost of educating a child in DCYF's care who was placed in a residential treatment facility that provided educational services.

I. Procedural History, Jurisdiction and Standard of Review

On March 15, 2019, DCYF filed a petition requesting that the Commissioner enter an order to compel one of two Respondents – either the North Kingstown School Department ("NKSD") or the Warwick Public Schools ("WPS") – to accept responsibility and contribute financially to the education of Student D. Doe, who was in DCYF custody and who was then twenty years of age. Following evidentiary hearings on September 5, 2019 and February 25, 2020, the Commissioner denied DCYF's request. *See DCYF v. NKSD and WPS*, RIDE No. 19-045A at 3-5 (May 13, 2020).

The relevant facts are recited in the Commissioner's May 13, 2020 Decision and Order. *See* Decision at 3-5. For present purposes, suffice it to note that: (1) D. Doe had cerebral palsy, suffered from seizures, was nonverbal and wheelchair dependent, and used a G-tube for feeding; and that (2) by order of the Family Court, DCYF had placed D. Doe at Crystal Springs, a residential treatment facility that provided educational services located in Assonet, Massachusetts.

The Commissioner's May 13, 2020 Order provided as follows:

> DCYF's March 15, 2019 Petition is denied and dismissed, *without deciding at the present time whether said dismissal is with or without prejudice to a later claim by DCYF for the statutorily-mandated contribution towards the cost of Student D. Doe's education*.

See id. at 15 (emphasis added). In addition, the May 13 Order provided that "DCYF shall forthwith":

> (a) take whatever measures are necessary to ascertain the last Rhode Island residence of D. Doe's mother under R.I. Gen. Laws § 16-16-64-l.2(c), and report back its findings to the undersigned Hearing Officer as soon as practicable;
>
> (b) ensure that a group of qualified individuals at Crystal Springs and appropriate staff of DCYF confer with respect to creating a draft, interim IEP for D. Doe to be implemented until a responsible local educational agency ("LEA") is identified, a properly-constituted IEP team is put in place; and
>
> (c) provide a copy of this decision to D. Doe's educational advocate, or if unknown, to Maria Heffernan (mheffernan@ric.edu), Program Coordinator, Educational Advocate Program at the Paul V. Sherlock Center on Disabilities at Rhode Island College.

Id.

Three months later, DCYF informed the Commissioner that it had conducted an "extensive search" and had "identified additional evidence establishing that D. Doe's mother lived at 185 Pine River Drive, North Kingstown, Rhode Island shortly before D. Doe was placed at Crystal Springs."[1] DCYF then moved for leave to open the evidentiary record to submit the additional evidence. The "last known Rhode Island residence" of D. Doe's mother prior to moving from the state is relevant since it may establish the city or town responsible for contributing financially, and in cases where the Family Court fails to determine residency, the task falls to RIDE. *See* R.I. Gen. Laws §§ 16-64-1.1(c) and § 16-64-1.2(b) and (c).

NSKD strenuously objected to reopening the evidentiary record and its request to brief the issue was granted.[2]

[1] *See* DCYF's December 8, 2020 Memorandum ("DCYF's Mem.") at 2-3.
[2] As noted, DCYF's Mem. was submitted on December 8, 2020. NKSD's Response Brief ("NKSD's Mem.") was filed on February 1, 2021.

Finally, as was noted in the Commissioner's May 13, 2020 Decision: (1) the Commissioner has subject matter jurisdiction over this matter, and DCYF has standing, under, *inter alia*, R.I. Gen. Laws § 16-64-1.1; and (2) DCYF has the burden of proof by a fair preponderance of the evidence. *See id*. at 2.

II. Positions of the Parties

1. DCYF

DCYF made the following argument in support of its motion to open the evidentiary record:

(a) The plain language of the Commissioner's May 13, 2020 Decision and Order, while denying and dismissing DCYF's petition, expressly provided that the dismissal was made "without deciding . . . whether said dismissal [was] with or without prejudice to a later claim by DCYF for the statutorily-mandated contribution towards the cost of Student D. Doe's education." *See* May 13, 2020 Order at 15. Thus, it was not a final judgment on the merits, but rather an interlocutory decision and order, and thus the doctrine of *res judicata* does not apply. *See* DCYF's Mem. at 3-9;[3]

(b) Even if one were to assume, for argument's sake, that the May 13, 2020 Decision and Order was not interlocutory, *res judicata* should not be applied to bar the introduction of additional evidence since the "application of the doctrine would lead to inequitable results," by rendering it impossible to identify the LEA responsible for providing Doe with a free, appropriate, public education (a "FAPE") and thereby would "effectively permanently deny D. Doe her state and federal right to a FAPE," *see id*. at 9-11;[4]

(c) The intent of R.I. Gen. Laws § 16-64-2[5] would be defeated if introduction of the additional evidence were not admitted and D. Doe made ineligible to

[3] Citing *Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan*, 755 A.2d 799, 808 (R.I. 2000); *Foster-Glocester Reg'l Sch. Comm. v. Bd. of Review*, 854 A.2d 1008, 1014 (R.I. 2004); *Shanahan v. Moreau*, 202 A.3d 217, 229 (R.I. 2019); *Colt v. Tillinghast*, 91 A.3d 838, 843 (R.I. 2014); *Banki v. Fine*, 224 A.3d 88, 96 (R.I. 2020);

[4] Citing *Foster-Glocester Reg. Sch. Comm. v. Bd. of Review*, 854 A.2d 1008, 1014 (RI 2004); *Casco Indem. Co. v. O'Connor*, 755 A.2d 779, 782¬83 (R.I. 2000); *State v. Werner*, 865 A.2d 1049, 1055 (R.I. 2005); and *State v. Gautier*, 871 A.2d 347, 358 (R.I. 2005).

[5] R.I. Gen. Laws § 16-64-2 provides that:

> [a] child shall be eligible to receive education from the city or town in which the child's residence has been established until his or her residence has been established in another city or town and that city or town has enrolled the child within its school system, unless the commissioner of elementary and secondary education, pursuant to § 16-64-6, has ordered otherwise. Nothing contained in this section shall be construed to prohibit a city or town in its own discretion from enrolling a child within its school system before a child has established technical residency within the city or town. The commissioner of elementary and secondary education shall promulgate any rules that may be needed to implement the educational provisions of the Stewart B. McKinney Homeless Assistance Act (P.L. 105-220), 42 U.S.C. § 11431 *et seq*.

receive education aid from North Kingstown before residency was established elsewhere. *See* DCYF Mem. at 11-12;[6] and

(d) "It would be an absurd result to apply *res judicata* to preclude DCYF from introducing additional evidence to support its claim for contribution from the NKSD for a 'per-pupil special education cost,' but still designate NKSD as responsible for the provision of D. Doe's FAPE under RIGL § 16-64-1.3(b). "The Commissioner cannot say that North Kingstown is not 'responsible' for the 'per-pupil special education cost' of D. Doe because of *res judicata* but still 'responsible' for provision of D. Doe's FAPE because the sequential findings required for application of RIGL § 16-64-1.3(b) require a designation of the school district responsible for the 'per-pupil special education cost' contribution." *See id*. at 15.

2. NKSD

NKSD replied by arguing that:

(a) "DCYF wants to introduce into evidence documents that 1) could have been introduced in the previous hearing and 2) add nothing more to the information that has already been established. In the DCYF complaint filed in March 2019 it stated that D. Doe's mother lived in North Kingstown until September 20, 2018, although further documentation from the mother through an email indicate that she moved out of North Kingstown in March 2018. DCYF cannot go back and introduce evidence now that it could have introduced in the first hearing or that contradicts evidence previously entered." *See* NKSD Mem. at 4;

(b) "The Commissioner 'denied and dismissed' the petition. When the Commissioner denies and dismisses a matter, that constitutes a final order and as such DCYF is barred from re-opening the case" under the doctrine of *res judicata*. *Id*. at 5;[7]

(c) DCYF is barred from re-opening this hearing by the doctrine of administrative finality. *See id*. at 6;[8] and finally

(d) The fact that DCYF failed to file an appeal is fatal to its motion to reopen the evidentiary record. *See id*. at 6-7.

Id.

[6] Discussing *In re Residency of Student James B*., RIDE No. 0034-05 (July 26, 2005).

[7] Citing *Foster-Glocester Reg'l School Committee v Board of Review*, 854 A. 2d 1008, 1014 (R.I. 2004) and *ElGabri v Lekas*, 681 A. 2d 271, 275 (R.I. 1996).

[8] Citing *Audette v Coletti*, 539 A. 2n 520, 521-22(1988).

III. Decision

1. The Doctrines of Res Judicata, Collateral Estoppel and Administrative Finality

Little time need be spent on NKSD's argument that DCYF's motion to re-open the evidentiary record is precluded as a matter of law under the doctrines of either *res judicata* or collateral estoppel. As the Court noted in *Town of Warren v. Bristol Warren Regional School District*, 159 A.3d 1029 (2017):

> '[t]he doctrine of *res judicata* bars the relitigation of all issues that 'were tried or might have been tried' in an earlier action.' *Huntley v. State*, 63 A.3d 526, 531 (R.I. 2013) (quoting *Bossian v. Anderson*, 991 A.2d 1025, 1027 (R.I. 2010)). 'In essence, the doctrine * * * 'serves as an absolute bar to a second cause of action where there exists identity of parties, identity of issues, and finality of judgment in an earlier action.' " *Id*. (quoting *Bossian*, 991 A.2d at 1027).

Id. at 1036.

The doctrine of collateral estoppel, or issue preclusion, is related to *res judicata*, or claim preclusion, but its focus is different. *See Cranston Police Retirees Actin Committee v. City of Cranston*, 208 A.3d 557, 584 (R.I. 2019). As the Court noted in *Cranston Police*, collateral estoppel " 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' " *Id*. at 584-85 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)).

Here, the Commissioner's May 13, 2020 Decision and Order was not a final judgment as the Commissioner expressly provided that she was not "deciding at the present time whether said dismissal is with or without prejudice to a later claim by DCYF for the statutorily-mandated contribution towards the cost of Student D. Doe's education." *See id*. at 15. Thus, neither the doctrines of *res judicata* nor collateral estoppel are applicable. Nor, for that matter, does the doctrine of administrative finality bar re-opening the evidentiary record as a matter of law. That doctrine provides that:

> when an administrative agency receives an application for relief and denies it, a subsequent application for the same relief may not be granted absent a showing of a change in material circumstances during the time between the two applications. * * * This rule applies as long as the outcome sought in each application is substantially similar, * * * even if the two applications each rely on different legal theories. * * * Administrative action is not final, however, if the first decision was invalid.

Johnston Ambulatory Surgical Associates, Ltd. v. Nolan, 755 A.2d 799, 808 (R.I.2000). The doctrine of administrative finality does not automatically preclude the requested relief here because it is evident that the Commissioner did not intend that the May 13, 2020 Decision and Order be final. Rather, the obvious intent was to grant DCYF the opportunity to argue that it should be entitled to introduce additional evidence in support of its claim. In short, the May 13 Decision and Order was without prejudice to DCYF's subsequent argument that it should be entitled to open the evidentiary record.

2. Standards Governing Motions to Re-open an Evidentiary Record

The applicable *Procedures for Appeals to and Hearings Before the Commissioner of Education*, 200-RICRI-30-15-4, do not address motions to re-open the evidentiary record. However, the state's Administrative Procedures Act ("APA"), R.I. Gen. Laws § 42-35-9 through § 42-35-16, applies to hearings conducted by the Commissioner, *see Pawtucket School Committee v. Pawtucket Teachers Alliance*, 610 A.2d 1104, 1105-06 (1992), and under the APA, such a request may be granted by a reviewing court if:

> ...it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency. In such circumstances, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

R.I. Gen. Laws § 42-35-15 (e). Although this provision applies to a court reviewing an agency decision – as opposed to the exercise of discretion by an agency hearing officer – the described

factors are similar to those utilized by trial courts and are relevant here. Thus, our Supreme Court has noted that:

> [a] motion to reopen and take additional testimony differs from a motion for a new trial on the ground of newly discovered evidence, and in a nonjury case is generally sought while the trial justice has the case under advisement. *See, e. g., Caracci v. Brother Int'l Sewing Mach. Corp*., 222 F.Supp. 769, 771 (E.D.La.1963), aff'd, 341 F.2d 377 (5th Cir. 1965); *Schick Dry Shaver, Inc. v. General Shaver Corp*., 26 F.Supp. 190 (D.Conn.1938). Although there is no statutory provision of substantive law or procedural rule expressly providing for such a motion, we have permitted it, following the lead of federal courts which '(i)n an attempt to comply with the mandate of Fed.R.Civ.P. 1 to construe the rules in order 'to secure the just, speedy, and inexpensive determination of every action' * * * have resorted to a cross-breeding or 'cannibalization' of Rules 59 and 60 * * *.' *Oury v. Annotti*, 113 R.I. 506, 511-12, 324 A.2d 325, 328 (1974).

Corrente v. Town of Coventry, 116 R.I. 145, 146-47, 352 A.2d 654, 655 (1976). In addition, the First Circuit has explained that "[w]hile the court's decision turns on flexible and case-specific criteria, among the facts the district court should consider are 'whether (1) the evidence sought to be introduced is especially important and probative; (2) the moving party's explanation for failing to introduce the evidence earlier is bona fide; and (3) reopening will cause no undue prejudice to the non-moving party.' " *Davignon v. Hodgson*, 524 F.3d 91, 114 (1st Cir.2008) (quoting *Rivera–Flores v. Puerto Rico Tel. Co*., 64 F.3d 742, 746 (1st Cir.1995) (citation omitted)).[9]

Thus, at a minimum, some explanation as to why the proffered evidence was not introduced in a timely manner must be provided. Yet here, despite a clear invitation to do so, DCYF neither made a specific offer of proof describing the evidence that allegedly established that Doe's mother lived in North Kingstown, nor made any effort to explain why the "extensive search" that led to the evidence had not been conducted prior to filing the Petition in the above matter, or at least prior to the hearings that were conducted on September 5, 2019 and February

[9] *See also MacFarland v. Brier*, 1999 WL 551158 (Superior Court, July 15, 1999) (Gibney, J.) ("An application to reopen prior to entry of judgment is essentially addressed to a trial justice's sound judicial discretion").

25, 2020. Thus, DCYF has failed to meet even the most liberal standard for granting its Motion.[10]

Finally, R.I. Gen. Laws § 16-64-1.1 makes clear that children placed at a residential facility and receiving educational programming provided by that facility "shall have the cost of their education paid for *as provided for in subsection (d) and § 16-64-1.2*." *Id.* (emphasis added). Thus, it is clear that R.I. Gen. Laws § 16-64-2 (quoted at note 5, *supra*), is simply not applicable, DCYF's argument to the contrary notwithstanding.

3. DCYF's Obligation to Children in its Care

DCYF has argued in this and similar cases that whatever inadequacies may exist with respect to its ability to prove the "last known Rhode Island residence" of a child's parent under R.I. Gen. Laws §16-64-1.2(c), the Commissioner should nonetheless select the most likely LEA and render it liable for the statutorily-mandated portion of the child's educational expenses. Thus here, DCYF argues that the Commissioner's failure to select s responsible LEA regardless of the adequacy of the relevant proof, would "effectively permanently deny D. Doe her state and federal right to a FAPE." *See* DCYF Mem. at 9-11. Yet, as the Commissioner noted in the May 13 Decision, she is not at liberty to abandon either the basic evidentiary principles that apply to

[10] *See, e.g., Gando-Coello v. I.N.S.*, 888 F.2d 197, 199 (1st Cir. 1989) (Motion to reopen need not be granted unless evidence to be offered was not available and could not have been discovered or presented at the prior hearing); *Zhu v. Holder*, 622 F.3d 87, 92 (1st Cir.2010) (noting that "new evidence [in a proceeding before an federal immigration judge] must have been unavailable and undiscoverable at the former hearing"); *In the Matter of Greenberg and Leopold*, 39 S. E. C. 601, '57-'61 CCH Dec. ¶ 76,684 (1959) (In a proceeding to review disciplinary action taken by the NASD against a member firm and certain of its officers, the SEC denied a motion to reopen the record for the purpose of receiving additional evidence relating to an alleged lack of control over the firm's activities on the part of two of the officers where it found that ample opportunity had been afforded below for the presentation of evidence, and that no extenuating circumstances existed which would tend to excuse the failure to introduce the proffered evidence); 48 Am. Jur. 2d *Labor and Labor Relations* § 949 (Second Edition | November 2020 Update) ("In general, no motion for reconsideration, for rehearing, or to reopen the record will be entertained by the National Labor Relations Board or by any regional director or hearing officer with respect to any matter which could have been but was not raised pursuant to the rules.")

administrative proceedings or the proof required under R.I. Gen. Laws §§ 16-64-1.1 and 16-64-1.2. *See* May 13 Decision at 14, note 6.

Moreover, as the New Hampshire Supreme Court noted in this context, "[a]lthough requiring that such education be 'free,'" the IDEA "leaves to each State the decision where responsibility for funding that education lies." *Ashland School Dist. v. New Hampshire Div. for Children*, Youth and Families, 141 N.H. 45, 50, 681 A.2d 71, 75 (1996), citing 20 U.S.C. § 1412(2)(B) (1994). And the implementing Code of Federal Regulations (the "C.F.R.") and corresponding state *Regulations Governing the Education of Children with Disabilities* (the "Disability Regs."), make clear that "[e]ach public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.'" *See* 34 C.F.R. § 300.115(a) (2017) and Disability Regs, 200 R.I. Admin. Code 20-30-6.5.2(B). And significantly, both the federal and state regulations recognize that child welfare agencies like DCYF are, in certain situations, responsible for providing children in their care with a FAPE. As noted in the C.F.R.:

> The provisions of these regulations—
>
> (1) *Apply to all political subdivisions of the State that are involved in the education of children with disabilities*, including:
>
> (i) The State educational agency (SEA).
>
> (ii) Local educational agencies (LEAs), educational service agencies (ESAs), and public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA.
>
> (iii) *Other State agencies and schools (such as Departments of Mental Health and Welfare and State* schools for children with deafness or children with blindness).
>
> (iv) State and local juvenile and adult correctional facilities; and
>
> (2) *Are binding on each public agency in the State that provides special education and related services to children with disabilities, regardless of whether that agency is receiving funds under Part B of the Act*.

34 C.F.R. 300.2 (2018) (emphasis added); *see also* Disability Regs, 200 R.I. Admin. Code 20-30-6.3 (adopting and incorporating, with certain immaterial exceptions, 34 C.F.R. Part 300 (December 2018).[11]

Thus, in the absence of evidence sufficient to meet its burden of proof as to residency, DCYF remains responsible for doing what is necessary to ensure that D. Doe is provided with a FAPE.

IV. Order

For all the above reasons:

1. The motion to reopen the evidentiary record in the above matter by the Department of Children, Youth and Families is hereby denied; and

2. The Department's March 15, 2019 request that the Commissioner enter an order to compel either the North Kingstown School Department or Warwick Public Schools to accept responsibility and contribute financially to the education of Student D. Doe is hereby denied and dismissed.

Anthony F. Cottone, Esq.,
as Hearing Officer for the Commissioner

Angélica Infante-Green,
Commissioner of Education

March 8, 2021

[11] *See, e.g., M. S. v. Los Angeles Unified School District*, 2019 WL 334564 (C.D. Calif., January 9, 2019), aff'd., 913 F.3d 1119 (9th Cir. 2019), quoting *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990) (state child welfare agency 'had an independent obligation to "ensure that a continuum of alternative placements [was] available to meet [M.S.'s educational] needs' 34 C.F.R. § 300.115(a)—and to consider whether a residential placement was '[ ] necessary for educational purposes' and not merely 'necessary quite apart from the learning process."'); *King v. Pine Plains Cent. School Dist*., 918 F. Supp. 772 (S.D.N.Y 1996) ("While local social services departments are not explicitly mentioned among the listed agencies, that list is not exclusive, the county department of social services is clearly a political subdivision of New York State that is "involved" in providing education to disabled children and thus subject to requirements of IDEA even though local social services departments were not explicitly mentioned in regulations implementing IDEA); and *Parks v. Pavkovic*, 557 F .Supp. 1280 (N.D. Ill., 1983), affirmed in part, reversed in part 753 F.2d 1397, certiorari denied 105 S.Ct. 3529, 473 U.S. 906, 87 L.Ed.2d 653, certiorari denied 474 U.S. 918 (Illinois Department of Mental Health and Developmental Disabilities, which paid for education of hundreds of disabled children each year was bound by terms of Act and had a duty to provide a FAPE).