KENTUCKY DEPARTMENT OF EDUCATION
AGENCY CASE NO 1819-13

[redacted] **PETITIONER**

V **DECISION AND FINAL ORDER**

LIVINGSTON COUNTY SCHOOLS **RESPONDENT**

This case involves the same issue addressed in a complaint proceeding, agency case 18-C-14, filed with KDE by Petitioner. The parties agree that there is no dispute regarding the facts and the case may be decided without an evidentiary hearing. The sole issue is whether the student was denied FAPE when the school's attorney attended a "resolution session" ordered in another case, 1819-05, where the parent appeared without counsel.

By previous order, it was clarified that the case *sub judice*, 1819-13, is not an "appeal" of the complaint investigation decision, but is an original due process proceeding claiming denial of FAPE and that the matter will be considered de novo as if no complaint had been filed. By previous order, a briefing schedule was set and the hearing officer has received briefs from Petitioner and Respondent. Respondent's brief includes a motion to dismiss grounded in res judicata and collateral estoppel.

FINDINGS OF FACT

1. **The school was the petitioner in 1819-05.** This is undisputed.
2. **The hearing officer in case 1819-05 entered an order that required a 'resolution session" on October 30, 2018**. This is undisputed.
3. **The school's attorney attended the resolution session and the parent did not attend with an attorney.** This is undisputed.

4. **The school withdrew its due process request on October 31, 2018.** This is undisputed.

CONCLUSIONS OF LAW

I. NEITHER CLAIMS NOR ISSUES ARE PRECLUDED BY THE DECISION IN THE COMPLAINT PROCEEDING

Respondent's response included a motion to dismiss based upon res judicata and collateral estoppel. Respondent quotes *City of Louisville v. Louisville Professional Firefighters Association, Local Union No. 345*, 813 SW2d 804, 806 (Ky. 1991) holding that "[u]nder the principle of res judicata or claim preclusion, a judgment on the merits in a prior suit involving the same parties or their privies bars a subsequent action based upon the same cause of action." Respondent also cites *Napier v. Jones,* 925 SW2d 193, 195 (Ky. App. 1996) in support of the argument that collateral estoppel bars the parent's attempt to reargue an issue that has previously been settled. Collateral estoppel also is referred to as issue preclusion.

Yeoman v. Com., Health Policy Bd., 983 S.W.2d 459, 464-465 (Ky. 1998) summarizes the law on res judicata and its two subparts, claim preclusion and issue preclusion:

> The rule of res judicata is an affirmative defense which operates to bar repetitious suits involving the same cause of action. The doctrine of res judicata is formed by two subparts: 1) claim preclusion and 2) issue preclusion. Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action.[citations omitted]. Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be identical.

The parties agree that the issue in the complaint proceeding and this proceeding are identical. However, the argument of res judicata, whether claim preclusion or issue preclusion, must fail

because the complaint proceeding did not constitute litigation. *OSEP Letter to Reilly* dated 11/3/14 states that

> [l]ike due process hearings, State complaints can address disputes between parents and school districts regarding the provision of FAPE. Unlike due process hearings, **State complaints are investigative in nature, rather than adversarial, and do not include the same procedural rights accorded to parties in an impartial due process hearing**. Therefore, the Department believes that it is not consistent with the IDEA regulation for an SEA to treat a State complaint like a due process complaint and assign the burden of proof to either party. Under 34 CFR §300.152, once a State complaint is properly filed, it is solely the SEA's duty to investigate the complaint, gather evidence, and make a determination as to whether a public agency violated the IDEA. It is not the burden of the complainant – or any other party – to produce sufficient evidence to persuade the SEA to make a determination one way or another. Rather, the SEA must independently review and weigh the evidence, generally by reviewing student and school records, data and other relevant information, and come to a determination supported by relevant facts.

(emphasis added). As authority cited by Respondent, *City of Louisville v. Louisville Professional Firefighters Association, Local Union No. 345*, 813 SW2d 804, 806 (Ky. 1991) state, one of the requirements of issue preclusion is that the party precluded "must have had a full and fair opportunity to litigate the issue in the prior proceeding." While regulations allow the parent and school the option of submitting evidence to KDE in a complaint proceeding, rights guaranteed under a due process hearing include

> the right to be accompanied and advised by counsel; to present evidence and confront, cross-examine, and compel the attendance of witnesses; to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing; to obtain a written or electronic verbatim record of the hearing; and to obtain written findings of fact and decisions.

§ 1415(h); 34 CFR § 300.508(a). In addition, Parents may appeal an adverse decision by a local educational agency in a due process hearing to the state educational agency ("SEA") for an impartial review. § 1415(g). If they lose before the SEA, then they may file a civil action in state or federal court. § 1415(i)(1)(A) & (2)(A). While Kentucky provides for a review by the agency

itself of the decision in a complaint investigation, no statute or regulation gives a party aggrieved by KDE's decision the right to challenge it in judicial proceedings.

This issue has been addressed in other jurisdictions. Lucht v. Molalla River School District, 57 F. Supp. 2d 1060, 1065 (D. Oregon 1999) held that res judicata does not apply, relying on policy statements by the Oregon Department of Education ("ODE") in its Memorandum No. 34–1997–98 dated September 5, 1997, and by the United States Department of Education in its letter dated July 28, 1995, to the Illinois State Board of Education interpreting 34 CFR §§ 300.506–515 and 300.660–662:

> According to those policy statements, a party aggrieved by a SEA decision following a complaint investigation under a state's CRP is permitted to pursue a due process hearing on the same issues, with that hearing decision prevailing over a conflicting SEA decision. In addition to these policy statements, the District's position also is supported by the case law. Although the Ninth Circuit has not addressed this issue, other circuits have implied that a due process hearing may be held after a CRP on the same issues.

The reason this is so is that a parent cannot have access to judicial review of denial of FAPE without first litigating it in a due process proceeding. In *Fry v. Napoleon Community Schools et al.*, 137 S. Ct. 743, 754 (2017) an appeal of a Sixth Circuit case, the United States Supreme Court made clear a parent must exhaust administrative remedies with an IDEA due process hearing officer before proceeding to court:

> § 1415(l)'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education. If a lawsuit charges such a denial, the plaintiff cannot escape § 1415(l) merely by bringing her suit under a statute other than the IDEA—as when, for example, the plaintiffs in Smith claimed that a school's failure to provide a FAPE also violated the Rehabilitation Act. Rather, that plaintiff must first submit her case to an IDEA hearing officer, experienced in addressing exactly the issues she raises.

Lucht, at p. 365, states:

> If a due process hearing is ordinarily required to exhaust administrative remedies arising from an adverse CRP prior to filing a court action under the IDEA, then ipso facto, a

> complainant has the right to a due process hearing after unsuccessfully pursuing the CRP option. Therefore, a CRP is a process that may precede, but does not foreclose, a due process hearing

II. ATTENDANCE BY SCHOOL'S ATTORNEY AT 'RESOLUTION SESSION' DID NOT CONSTITUTE FAILURE TO PROVIDE FAPE

The purpose of resolution sessions is to give the school a chance to resolve a parent's complaint without the time and expense a hearing:

> The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, **so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint**.

§300.510(a}(2), emphasis added. Resolution sessions are required by regulation only if the *parent* is the petitioner. §300.510(a}(1). In 1819-05, the school was the petitioner. However, the hearing officer's order provided for a resolution session to be held. The school claims that a deadline for a 'resolution session' was included in the order at the request of the parties to give the parties a chance to try to work things out before gearing up for a hearing.

The parent is correct that the regulation on resolution sessions specifies in paragraph (a) that the school participate without counsel if the parent is without counsel. Assuming for argument's sake that the hearing officer intended, and had the power to order, a resolution session under the same formalities and restrictions regarding attorneys as would apply if the parent had been the petitioner, the parent's remedy for the school's failure to conduct a proper resolution session is set forth in the regulation itself:

> If the LEA fails to hold the resolution meeting specified in paragraph (a) of this section within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.

§300.510(a}(1). The school's failure to correctly conduct a resolution session, if it occurred, would be a procedural event within due process litigation triggering the parent's right to speed up the deadline for a final decision from the hearing officer. It would not be a denial of FAPE. Regardless, the outcome of the resolution session in question was that the school dismissed its due process request. The parent could not have had a more favorable outcome, and it was an outcome more favorable than the remedy provided in the regulation itself.

FINAL ORDER

The hearing officer finds for Respondent on all issues.

NOTICE

A party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to members of the Exceptional Children Appeals Board as assigned by the Kentucky Department of Education at Office of Legal Services, 300 Sower Blvd., 5th floor, Frankfort KY 40601.The appeal shall be perfected by sending, by certified mail, to the Kentucky Department of Education, a request for appeal within thirty (30) calendar days of date of the hearing officer's decision.

February 21, 2019.

/s/ Mike Wilson
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MIKE WILSON, HEARING OFFICER

CERTIFICATION:

The original of the foregoing was mailed to Hon. Todd Allen, KDE, 300 Sower Blvd., Frankfort KY 40601, and copies to [redacted], and to Teresa T. Combs, Mazanec, Raskin & Ryder, 230 Lexington Green Circle, Suite 605, Lexington KY 40503, on February 21, 2019.

/s/ Mike Wilson

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MIKE WILSON, HEARING OFFICER