

BEFORE THE SPECIAL EDUCATION REVIEW OFFICER

IN THE MATTER OF }
THE DUE PROCESS APPEAL FOR }
NOT NAMED }
AND }
UNIFIED SCHOOL DISTRICT NO. }
233, JOHNSON COUNTY, STATE OF }
KANSAS }

Case No. Appeal 18DP233-001

ORDER OF THE REVIEW OFFICER

NOW, comes the matter before the review officer on a motion to dismiss filed by the U.S.D. #233 [hereinafter "District"]. Said motion was received on December 29, 2017. The prose parent was provided until January 2, 2018, to provide a written response to the motion. Response was submitted by parent by e-mail dated December 31, 2016. The matter is now ready for decision on the motion.

Introduction

This is an appeal from a decision by Lloyd Swartz, Hearing Officer, rendered on November 14, 2017. The district moves for the dismissal of Petitioner's Appeal for the reason that the Notice of Appeal was not filed timely in accordance with the requirements of Kansas law.

Procedure

The Hearing Officer, Lloyd Swartz, submitted his decision on November 14, 2017. Parent filed a notice of appeal of special education due process hearing #18DP233-001 with the commissioner of education on December 18, 2017. The review officer was appointed by letter of appointment by the Kansas State Department of Education on December 20, 2017, and a copy of the parent's notice of appeal and the hearing officer's order was provided as part of that appointment. The original case record was received by the review officer from the hearing officer on December 27, 2018. A scheduling order setting a District timeline to respond to the notice of appeal and a decision to be rendered in the review was issued electronically on December 27, 2017. A request to extend the district's timeline to respond and the review officer's decision was submitted by the District electronically on December 27, 2017. The Parent responded to the request to extend the District's timeline to respond to the appeal notice electronically by e-mail dated December 27, 2017. The review officer by order dated December 27, 2017, granted an extension of time to January 5, 2018, for district to respond to

the appeal notice and subsequently to January 16, 2018, for the review officer to render a decision in the matter. The Parent requested reconsideration of the review officer's order to extend the timeline electronically by e-mail dated December 27, 2017 at 9:54 p.m. and subsequently withdrew that request electronically by e-mail dated December 29, 2017 at 1:06 p.m. The review officer requested by e-mail dated December 28, 2017 at 11:04 a.m. and was unable to find a mutually agreed upon time for a status conference of the parties for December 29, 2017, and a status report was instead issued by e-mail to the parties on December 29, 2017, at 12:44 p.m. The District filed a motion to dismiss petitioner's appeal electronically on December 29, 2017, 1:23 p.m. and the review officer issued an order electronically on December 29, 2017, at 4:18 p.m. granting the withdrawal of the Parent request to reconsider the timeline for District to respond to the appeal notice and setting a deadline of January 2, 2018 at 5:00 p.m. for parent to respond to the District's motion to dismiss. Addressing multiple additional Parent requests submitted by e-mails dated between December 27 and 30, 2017, including a request to extend the timeline for Parent to respond to the District's motion to dismiss, the review officer issued an order electronically on January 1, 2018, at 1:00 p.m. denying all said parent requests and establishing an updated scheduling order for the remaining matters before the officer. Parent submitted a response to the motion to dismiss on December 31, 2017, in advance of the January 2, 2018, 5:00 p.m. deadline specified in the scheduling order dated December 29, 2017.

Is Parent's appeal barred by the failure to timely file the appeal notice?

Analysis and Findings

In relevant part, K.S.A. 72-974 provides:

(a) Written notice of the result of any hearing provided for under this act shall be given to the agency providing for the hearing and shall be sent by certified mail to the parent, or attorney of the child within 24 hours after the result is determined. Such decision, after deletion of any personally identifiable information contained therein, shall be transmitted to the state board which shall make the decision available to the state advisory council for special education and to the public upon request.

(b) (1) Any party to a due process hearing provided for under this act may appeal the decision to the state board by filing a written notice of appeal with the commissioner of education not later than 30 calendar days after the date of the postmark on the written notice specified in subsection (a).

The hearing record shows and the review officer finds that Hearing Officer, Lloyd Swartz, served his decision in the special education due process hearing case 18DP233-001 by registered mail postmarked November 14, 2017. The record further shows that and the review officer finds that Parent filed a notice of appeal of special education due process hearing #18DP233-001 with the Kansas State Department of Education on December 18, 2017. The postmark date of the written notice of decision in the due process hearing and the filing date of the written

notice of appeal are not contested. Applying the timely filing requirements of K.S.A. 72-974(b) to the date of postmark on the written notice of the hearing decision establishes December 14, 2017, as the filing deadline for the written notice of appeal. Therefore, the review officer finds that the parent's notice of appeal was not timely.

The review officer must also address Parents' response to the District's motion to dismiss. Parent moved for an extension of the timeline to file the written notice of appeal to be granted by the review officer and that the motion to dismiss be denied. In argument, Parent cites, without full citation, "Rule 4(a)(S) and 4(a)(S)(C)," which review officer has determined to be referencing Federal Rules of Appellate Procedure and a bankruptcy proceeding, O'Brien v. Harnett, Adv. No. 11-5010 (Bankr. W.D. Tex. 1/19/12). Review officer finds that such rules and case govern procedure for the United States courts of appeals and are not applicable to this matter. However, K.S.A. 72-97S(c) states, "Any person conducting a hearing or review under this act, at the request of either party, may grant specific extensions of time beyond the limitations specified in this act." Therefore, the review officer will consider the Parent's arguments for an extension of time to file a written notice of appeal to determine if good cause for an extension exists.

First, the parent argues that the parent's inundation of other investigations and legal action as well as the Thanksgiving holiday created a distraction and should warrant an extension of the timeline. The review officer does not find distractions to be good cause for an extension of the 30 day timeline to file the written notice of appeal.

Next, the parent stated general confusion over the date of the decision in the due process hearing since the mailed copy of the decision distracted and has stated that it was not until the district's filing of the motion to dismiss that the Parent realized the deadline had been missed. However, the parent actually received the hearing officer's decision by e-mail on November 14, 2017 and failed to claim the certified written copy of the decision for 3 weeks and with 3 separate notices from the United States Postal Service. The Parent does not provide any particular reason for her confusion that the deadline was December 18 and not December 14. The review officer finds this argument does not merit good cause for an extension of the timeline for the written notice of appeal.

Parent also argues that the review officer should grant this extension because the district was granted an extension of time for responding to the written notice of appeal due to a holiday and she should get same treatment. The two extensions are not comparable in duration of the original timeline or cause for the extension. Further, the district requested more time prior to the deadline passing, a prospective request of an internal procedural timeline established by the review officer.

Finally, Parent argues that the discovery of e-mails on December 27, 2018, which would have offered the parent additional arguments to contest the original due process hearing and

impacted that decision date and timeline, thereby impacting the deadline to file the written notice of appeal, are cause to extend the 30 day timeline for filing the written notice of appeal. The review officer finds this argument tenuous and does not warrant a good cause extension of the timeline for the written notice of appeal.

Having considered the parent's response to the district's motion to dismiss and request for an extension of the timeline for filing a written notice of appeal with the commissioner of education, the review does not find good cause to extend the timeline to file the written notice of appeal in this case and the Parent's motion for such is denied.

Summary

For the foregoing reasons, the review officer finds that the parent's appeal did not meet the filing timeline specified in K.S.A. 72-974(b) and that the parent is not entitled to an appeal of special education due process hearing case 18DP233-001.

The above-captioned and numbered case is dismissed.

IT IS SO ORDERED.

DATE

Elena Lincoln, Review Officer

RIGHT TO APPEAL

Pursuant to K.S.A. 72-974, this decision is subject to review in accordance with the act for judicial review and civil enforcement of agency actions or to an action in federal court as allowed by the federal law. Consistent with state court actions, any action in federal court shall be filed within 30 days after service of the review officer's decision.

CERTIFICATE OF SERVICE

I, Elena Lincoln, do hereby certify that I have provided a true and correct copy of the above and foregoing Review Officer's Final Order upon the following parties:

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by mailing the same by registered U.S. mail, postage prepaid and by e-mailing a copy to the parties, this 2nd day of January, 2018.

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Elena Lincoln, Review Officer