

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF KANSAS**

IN THE MATTER OF THE SPECIAL
EDUCATION DUE PROCESS
HEARING FOR

Hearing Officer File No.: 21 DP 294-001
OAH Case No: 22ED0004 SPED

A.M. BY AND THROUGH S.M.

AND U.S.D. NO. 294,
OBERLIN/DECATUR
COMMUNITY SCHOOLS

REVIEW DECISION
Pursuant to K.S.A. 72-3418

The above-captioned case was referred for review decision to this administrative law judge/review officer (ALJ) by the Kansas State Department of Education as authorized by both K.S.A. 72-3418 and K.S.A. 75-37,121(d). Following six days of hearing, the special education due process hearing officer (Hearing Officer) issued a ruling in this case on October 12, 2021. The appellant, U.S.D. No. 294 (Appellant) is represented by counsel, Ashley Rohleider-Webb, Kansas Association of School Boards. The Respondent, A.M. by and through S.M., (Respondent) is represented by counsel Liz Rueben and Ben Cohen, Disability Rights Center of Kansas.

Finding of Facts

1. The administrative hearing was conducted by the Hearing Officer on July 21, 22, and 23, 2021 and August 2, 3, and 4, 2021.
2. On October 12, 2021, the Hearing Officer issued a 35-page order finding:
 - a. Appellant failed to implement A.M.'s individualized education program (IEP) to the extent that she was denied a free and appropriate public education (FAPE).
 - b. The Kansas School for the Deaf (KSD) is the least restrictive environment for A.M.
 - c. A.M. demonstrated by a preponderance of the evidence that the Appellant is not equipped to meet A.M.'s needs. Specifically:
 - i. A.M. has failed to make academic progress as evidenced by her testing scores.
 - ii. Appellant has failed to engage the services of a qualified interpreter.

111. Appellant refused to consider the child's and the family's preferred mode of communication (ASL).
 - 1v. Appellant failed to take into full consideration A.M.'s social, emotional, and cultural needs.
 - v. Appellant has disregarded the severity of A.M.'s hearing loss.
3. As a remedy for the denial of FAPE, the Hearing Officer ordered the Appellant to immediately begin the process of transferring A.M. to the care of the KSD. The Hearing Officer ordered Appellant to be responsible for any direct or indirect costs related to A.M.'s placement at KSD, including the reasonable costs of transportation to and from KSD and her home.
4. The Hearing Officer also ordered, "The [Appellant] shall pay [A.M.'s] accrued attorney fees and costs."
5. On November 9, 2021, the Kansas Department of Education stamped as received the [Appellant's] Notice of Appeal of the Due Process Hearing Decision pursuant to K.S.A.72-3418(b)(1).¹ The appeal, being filed within 30 calendar days of the decision, is timely filed.
6. The record has not been provided to this ALJ.

Conclusions of Law

1. Appellant's appeal is solely focused on the legal issue of the award of attorney fees by the Hearing Officer.² Appellant's Notice of Appeal asked this ALJ to find that the special education due process hearing officer is without authority to order attorney fees, pursuant to K.S.A. 72-3430(b)(12). The Hearing Officer³ is part of a system of procedural safeguards and parental involvement enacted by the Kansas law known as The Special Education for Exceptional Children Act.⁴ When Parents disagree with any aspect of their child's special education program, they may file for a due process hearing--a formal evidentiary proceeding conducted by a state hearing officer. K.S.A. 72-3430(b)(12) provides that the parents of exceptional children shall have the right to recover attorney fees, *as provided in the federal law*, if they are the prevailing parties in a due process hearing or court action; however, *only a court shall have the authority to award attorney fees*, and such fees may be reduced or denied in accordance with federal law.

2. We must look whether the federal law provides for the right to recover attorney fees in a due process hearing. The Hearing Officer is also part of a system of procedural safeguards and parental involvement enacted by Congress with the passage of the federal law--Individuals with

¹ The Certificate of Service on the Notice shows it was mailed to the parties on November 10, 2021.

² Although Appellants "disagree[s] with the other findings made by the due process hearing officer," the Appellants are proceeding with an IEP to place A.M. at the KSD and making transportation arrangements as ordered. *See* Districts' Notice of Appeal of Due Process Hearing Decision, November 10, 2021.

³ K.S.A. 72-3416(e).

⁴ K.S.A. 72-3403, *et seq.*

Disabilities Education Act (IDEA).⁵ "Although there is an occasional due process hearing decision on attorney's fees, the IDEA does not give special education hearing officers authority to award fees."⁶ Because the federal law does not provide for the *hearing officer* to award attorney fees, this ALJ concludes the state law does not authorize a hearing officer to award attorney fees, either.⁷

3. Additionally, Kansas law does not make the Hearing Officer a court.⁸ Thus, because the hearing officer is not a court, this ALJ concludes the hearing officer may not award attorney fees.⁹

4. K.S.A. 72-3418 (b)(l) provides:

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). A review officer appointed by the state board shall conduct an impartial review of the decision. The review officer shall render a decision not later than 20 calendar days after the notice of appeal is filed. The review officer shall:

- (A) Examine the record of the hearing;
- (B) determine whether the procedures at the hearing were in accordance with the requirements of due process;
- (C) afford the parties an opportunity for oral or written argument, or both, at the discretion of the review officer;
- (D) seek additional evidence if necessary;
- (E) render an independent decision on any such appeal not later than five days after completion of the review; and
- (F) send the decision on any such appeal to the parties and to the state board.

5. KS.A. 72-3418(b)(l)(A) provides that the review officer *shall* examine the record of the hearing. However, this ALJ finds and concludes that such examination would needlessly increase the time necessary to resolve the narrow question presented in the Appellants' Notice of Appeal since the question is a question of law, not fact. A review of the record will not add any understanding to the narrow question of law.

6. KS.A. 72-3418(b)(l)(B) requires this ALJ to "determine whether the procedures at the hearing were in accordance with the requirements of due process." Since the Appellant does not complain about the hearing procedures, and the Respondent has obtained the relief requested, this ALJ finds and concludes the hearing procedures were in accord with the requirements of due process.

7. The record is sufficient regarding the circumstances surrounding the award of attorney fees.

⁵See 20 U.S.C. § 1415(i)(3). See also, Professor Lynn M. Daggett, Special Education Attorney's Fees: Of *Buckhannon*, the IDEA Reauthorization Bills, and the IDEA as Civil Rights Statute, 8 U.C. Davis J. Juv. L. & Pol'y I (2004).

⁶ Id.

⁷ K.S.A. 72-3430(b)(12).

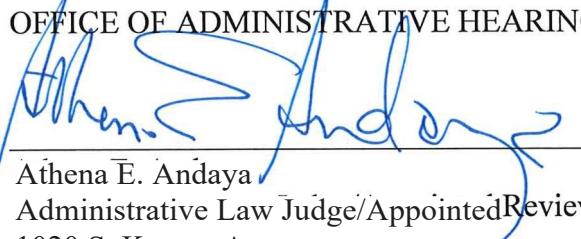
⁸ "The judicial power of this state shall be vested exclusively in one court of justice, which shall be divided into one supreme court, district courts, *and such other courts as are provided by law*; and all courts of record shall have a seal. The supreme court shall have general administrative authority over all courts in this state." Kan. Const. art. III, § 1. See generally, K.S.A. 75-3403, *et seq.* and specifically K.S.A. 72-3416(e).

⁹ K.S.A. 72-3430(b)(12).

Therefore, it is the decision of this review officer that there is no need to hear additional oral arguments or receive additional written arguments,¹⁰ or to receive additional evidence.¹¹

8. This ALJ as Review Officer finds that decision of the Hearing Officer to award attorney fees is without legal authority. Only attorney fees and costs ordered *by a court and as provided by federal law* are authorized and enforceable. The award for attorney fees and associated cost of the legal representation ordered by the Hearing Officer are stricken from the October 12, 2021 Order. All other findings, conclusions, and remedies remain in force and are affirmed.

OFFICE OF ADMINISTRATIVE HEARINGS


Athena E. Andaya
Administrative Law Judge/Appointed Review Officer
1020 S. Kansas Ave.
Topeka, KS 66612
Telephone: 785-296-2433

Notice of Appeal Rights

Pursuant to K.S.A. 72-3418, this decision is subject to review in accordance with the Kansas Judicial Review Act 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.

¹⁰ K.S.A. 72-3418(b)(l)(C).

¹¹ K.S.A. 72-3418(b)(l)(D).

Certificate of Service

On November 29, 2021, I certify that a true and accurate copy of this document was placed in the United States mail, postage certified mail, return receipt requested, postage prepaid, addressed to:

Ashley Rohleder-Webb
Kansas Association of School Boards
1420 SW Arrowhead Road
Topeka, Kansas 66604
Attorney for Appellant

Elizabeth Hueben
Ben Cohen
Disability Rights Center
214 SW 6th Avenue, Suite 100
Topeka, Kansas 66603
Attorneys for Respondents

With a courtesy copy by email to:

R. Scott Gordon, General Counsel
Kansas State Department of Education
900 SW Jackson, Ste. 102
Topeka, KS 66612
ogc@ksde.org

Larry Rute
Associates in Dispute Resolution, LLC
212 S.W. 8th Ave., Suite 207
Topeka, Kansas 66603
lany@adrmediate.com


Paula N. Hamilton
Office of Administrative Hearings
1020 S. Kansas Avenue
Topeka, KS 66612
Telephone: 785-296-2433