

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of  Michael E. K  by Burlington Area School District Board of Education	Order Regarding Motion for Reconsideration  Appeal No.: 00/01 EX 23
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On January 18, 2002, the school board filed a motion requesting the state superintendent to reconsider her January 15, 2002 decision reversing the expulsion. (Michael K. v. Burlington Area School District Board of Education, Decision and Order No. 449). The basis for the request was:

- 1) The student was not disabled, therefore, not entitled to §504 protection.
- 2) Even if he was disabled under §504, because his conduct involved the use of illegal drugs (use of marijuana), he is not entitled to §504 protection.
- 3) The order for expulsion was mailed separately to the parents and the student.

When considering a motion for reconsideration, the state superintendent applies the procedures for a petition for rehearing contained in Wis. Stats. §227.49. In other words, the aggrieved party must allege either 1) a material error of law; 2) a material error of fact; or 3) the discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

Allegation number 1 alleges that the superintendent's decision was based upon either a material error of fact or upon new evidence. The superintendent's decision was based upon the record submitted by the school board. As described in the decision and order, there was a reference to a §504 plan in place for the student based on a disability due to ADHD. There was also a reference in the notice of expulsion hearing to "change of placement". The district did not respond to this at the expulsion hearing and the board did not address it in the response to the expulsion appeal. Therefore, the superintendent found that there probably was a §504 plan in place. The superintendent's order, however, allowed the board to address this at a future hearing and if the student was not disabled, the board could reaffirm its expulsion order. Now the board asserts that the student is not disabled. This is not a material error of fact. This is new evidence. The petition for reconsideration does not address why this information was not included in the expulsion hearing record or the response to the appeal. Therefore, the motion to reconsider this finding is denied.

Allegation number 3 also alleges that the superintendent's decision was based upon either a material error of fact or upon new evidence. There was no evidence provided in the hearing record that the expulsion order was mailed separately to the pupil and his parents. In the school board's brief, it states that the order was mailed separately. When a board neglects to mail the expulsion order to the pupil or parents, the superintendent may order the board to send a copy to the pupil or parents. See *Adam C. v. Evansville Community School District Board of Education*, Decision and Order 340 (November 26, 1997). The board included an affidavit of the person who mailed separate copies to the parent and pupil with the motion for reconsideration. Therefore, the issue is moot. The board is not required to mail a second copy of the order to the pupil.

As to allegation number 2, the board alleges a material error of law. The board alleges the superintendent's decision did not take into account 29 USC §705 (20)(C)(iv), which states that an LEA may take disciplinary action pertaining to the use of illegal drugs or alcohol against any student who is an individual with a disability and who is currently engaging in the illegal use of drugs or alcohol to the same extent that such disciplinary action is taken against students who are not disabled. §705(20)(C)(iv) also states that due process procedures in 34 CFR 104.36 do not apply. Thus, federal law does not require the board to conduct a manifestation hearing if the §504 disabled pupil is being disciplined for his use of illegal drugs.<sup>1</sup> Because the superintendent's decision was based on a material error of law, the school board's motion for reconsideration is granted as it pertains to the issue of whether the pupil's drug use excludes him from §504 protection in this instance. If the pupil wishes to respond to this issue (the substantive issue, not the decision to grant reconsideration), the arguments shall be received by January 29, 2002. If the board wishes to file a reply it must be received by February 5, 2002. The parties should mail and fax the arguments to opposing counsel and to legal counsel for the state superintendent, Sheri Berkani (608-266-3392).

The board has also requested that the Decision and Order dated January 15, 2002 be stayed pending a decision upon reconsideration. The stay is granted. The board is likely to prevail given the clear federal statutes. In addition, the board's expulsion order allows the pupil to enroll in the technical college at the beginning of second semester, which has either already started or is just beginning. Therefore, it is possible for the pupil to receive an education while this issue is pending.

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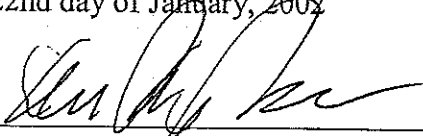
<sup>1</sup> There may be an exception in the law if the pupil was receiving drug abuse treatment during the time of the misconduct. There is no evidence in this record to suggest that he was receiving drug treatment when he engaged in the misconduct.

ORDER

The motion for reconsideration is granted as it relates to the applicability of federal law, 29 USC §705 (20)(C)(iv). The motion is denied as it relates to the issue of whether the pupil is disabled. The motion is denied as moot as it relates to the issue of mailing separate notices to the pupil and his parent.

The January 15, 2002 order of the state superintendent is stayed, pending reconsideration. The pupil's response to the applicability of 29 USC §705 (20)(C)(iv) must be received by January 29, 2002. The board's reply must be received by February 5, 2002. The state superintendent will issue a final order and decision on or before February 11, 2002.

Dated this 22nd day of January, 2002



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Anthony S. Evers, Ph.D.  
Deputy State Superintendent of Public Instruction