

H.G.'s RIGHT TO A FREE, APPROPRIATE PUBLIC EDUCATION, WHICH INCLUDES IDENTIFICATION, REFERRAL, EVALUATION, CLASSIFICATION, IEP DEVELOPMENT, AND APPROPRIATE PLACEMENT, IS IN NO WAY DIMINISHED BY HIS PRIOR ATTENDANCE AT A PRIVATE SCHOOL.

There is no dispute but that H.G. and his parents are domiciled in Jersey City, New Jersey, or that H.G., being born on March 13, 1989, is a person who has a constitutional right to a thorough and efficient education. *Abbott v. Burke*, 119 N.J. 287 (1990). For children who are disabled, local Boards of Education are obligated to provide a free, appropriate public education as that standard is set under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. (N.J.A.C. 6A:14-1.1 (b)). Indeed, even students who are attending non-public schools must be located, identified, and evaluated. N.J.A.C. 6A:14-1.2 (b) 3 states: "(b) Each district board of education shall have policies, procedures, and programs in effect to ensure the following: ... 3. All students with disabilities, who are in need of special education and related services, including students with disabilities attending nonpublic schools, regardless of the severity of their disabilities, are located, identified and evaluated according to N.J.A.C. 6A:14-3.3;"

A local school district is also specifically obligated to locate, refer and identify potentially disabled students. N.J.A.C. 6A:14-3.3 (a) states as follows:

"(a) Each district board of education shall develop written procedures for students age three through 21, including students attending nonpublic schools, who reside within the local school district to:

1. Locate students who may be disabled; and
2. Refer students who may be experiencing physical, sensory, emotional, communication, cognitive or social difficulties. The procedures shall include referral for:

- i. Interventions in the general education program according to N.J.A.C. 6:26;
- ii. Evaluation to determine eligibility for special education and related services; and/or
- iii. Other educational action, as appropriate."

Therefore, the local school district's obligation to locate, refer and identify is existent even for children who are not then attending public schools. H.G. certainly fell within this category when W.P. attempted to enroll him on June 17, 1998. This legislative intent is specifically set forth in *N.J.S.A. 18A:46-19.1*, wherein it is stated that: "The legislative intent is to require local communities to identify and provide remedial services for handicapped children in both public **and non-public schools**." (Emphasis added). *Section 19.3* of Chapter 46 of the New Jersey Statutes states that: "The provision of facilities and programs pursuant to Chapter 46 of Title 18A of the New Jersey Statutes shall apply only to children enrolled in the public schools in the state except as specifically provided by law." In other words, the full panoply of special education is guaranteed to all children who are enrolled in public schools, but that their entitlement to special education is specifically limited as provided by law. In order to determine what services are available to children in non-public schools, one must look at *N.J.S.A. 18A:46-19.5*: "Services for children **enrolled** in non-public schools shall be provided only upon the consent of the parent or guardian and shall be provided in a location determined by the local Board pursuant to rules and regulations of the State Board, except that no such services shall be provided in a church or sectarian school." (Emphasis added).¹

¹ A 1993 U.S. Supreme Court decision now permits disabled pupils who are attending non-public school to receive services in sectarian facilities, see *Florence County Sch. Dist. Four v. Carter by Carter*, 114 S.Ct. 361 (U.S. 1993).

The New Jersey Board of Education has promulgated rules and regulations regarding the provision of programs and services to be provided disabled children under *N.J.S.A. 18A:46 (a)-1 et seq.*, and *18A:46-19.1 et seq.* It should be noted that these rules and regulations apply to students who are non-public school students. Subchapter 6 of the New Jersey Administrative Code, specifically *N.J.A.C. 6A:14-6.2*, is captioned "Requirements for Services in Non-Public Schools". *6.1* is entitled "Participation of Students with Disabilities Enrolled in Non-Public Schools by Their Parents". That section obligates each district of residence to provide a genuine opportunity for the equitable participation of students with disabilities who are enrolled in non-public schools to spend an amount of money equal to a proportionate amount of federal funds available under *Part B* of IDEA, and to ensure that those procedural safeguards are available to non-public school students with disabilities as specified by federal law. The following section of the Code, *N.J.A.C. 6A:14-6.2*, is captioned "Provision of Programs and Services Provided Under N.J.S.A. 18A:46 (a)-1 et seq. and 18A:46-19.1 et seq." Subsection C of this section states: "Identification, evaluation, determination of eligibility, development of Individualized Education Programs and provision of speech and language services, home instruction and supplementary instruction shall be provided according to this chapter."

Thus, here in New Jersey we have developed a plan wherein children who are enrolled and attending non-public schools can receive certain enumerated special education services including identification, evaluation, determination of eligibility, and development of Individualized Education Programs. **The re are instances, however, where parents have determined that continuation in a private school is no longer warranted, and attempt to enroll their child in the public school of residence. This is what happened in the case at bar. The question to be determined by this Court is whether under the circumstances of this case the Jersey City Board of Education had an obligation to enroll H.G. and to refer him to the Child Study Team for**

evaluation A remarkably similar factual circumstance was presented in the case of *A.S. v. Teaneck Board of Education*, OAL Docket No. EDS 8123-94, Agency Ref. No. 95-6288, 95 N.J.A.R. 2d (EDS) 45, decided October 27, 1994.

A.S. v. TEANECK BOARD OF EDUCATION

The A.S. case involved a youngster who was living with his parents in Teaneck, New Jersey. A.S. was enrolled in the Yevneh Academy in 1992, which was a private sectarian school. During that year, the child was evaluated by a neurologist who found neurological deficits. The parents removed A.S. from Yevneh and met with the Director of Special Services for Teaneck, Ms. Markowitz. The Director understood that A.S. was still enrolled in Yevneh and thus special services was the responsibility of the Paramus School District, the town wherein Yevneh was located.² As a result, the Teaneck School District did not enroll A.S. and did not take any other action with regard to referral to its Child Study Team. A.S.'s parents then unilaterally enrolled their child at the Community School. **In September of 1993** A.S.'s parents again requested that their son be evaluated, and the Child Study Team found that A.S. was suffering from a neurological impairment and suggested continued placement at the Community School. **In April of 1994**, A.S.'s father requested that he be reimbursed for the Community School tuition for the year and two months prior to the development of the IEP. This was denied by the Board, and as a result a request for due process was filed by A.S.

In discussing the issue of reimbursement, the ALJ noted the Board's argument as follows:

"The Board, relying upon N.J.A.C. 6:28-6.1 (b), takes the position that: Until A.S. was enrolled in some school within the Teaneck Board of Education's purview, Teaneck had no legal ability or obligation to undertake classification of the

² It should be noted that (a) the Cornerstone School is physically located in Jersey City, New Jersey, whereas the Yevneh School is located in Paramus, New Jersey, a municipality that was not the district of residence; and (b) the Director in the A.S. school district understood that A.S. was still enrolled in Yevneh, but in the case at bar there is no question but that Jersey City knew that H.G. was no longer enrolled at the Cornerstone School.

student. Ms. Markowitz did not and could not have scheduled an evaluation under the circumstances of this case."

The ALJ further stated that under the Board's interpretation: "It is the school district where the non-public school is located that has the exclusive responsibility of evaluating children who may be educationally disabled, precluding the local school district from exercising those responsibilities enumerated in N.J.A.C. 6:28-3.2, including identifying potentially educationally disabled children to the Child Study Team." The ALJ did **not** concur in that interpretation. The Court held:

"Assuming that N.J.A.C. 6:28-6.1 (b) imposes any responsibility on a school district where a child attends a private school, but does not live, to initiate the classification of a child who may be educationally disabled, there is no indication such responsibility is exclusive and not to be shared by, at least an equally logical district, that of the child's residence ... For a child such as A.S., the requirements on the school district are mandatory: Each District Board of Education shall adopt written procedures for identifying those pupils ages 3 through 21 who reside within the local school district who may be educationally disabled and who are not receiving special education and/or related services as required by this chapter. N.J.A.C. 6:28-3.2 (a)."

The Court in A.S. also found that the information provided to the district "clearly signaled that A.S. may have been educationally disabled." The ALJ then went on to state:

"According to the parents, at the time of the meeting with Markowitz, A.S. was no longer enrolled in Yevneh. Certainly Markowitz knew that A.S. would not remain at Yevneh and, at least, by the time she left the school district on June 30, 1992, he was no longer a pupil at Yevneh.

The Board correctly indicates that educational services shall be provided pursuant to the IEP which did not exist until November 1993 when the Board undertook payment of tuition and transportation expenses. The absence of the IEP, however, was a result of the Board

not acquitting its responsibilities to evaluate A.S. when it came to its attention that A.S. was potentially educationally disabled ... Under the circumstances of this matter, the parents of A.S. are entitled to reimbursement for those tuition and transportation expenses for the period A.S. was attending Community School from September 1992 through October 1993."
(Emphasis added).

The facts of the case at bar are even more compelling given that the Cornerstone School is located in the district of residence, i.e., Jersey City, New Jersey. The Jersey City Board of Education under any circumstances would be the school district responsible to undertake referral and evaluation of potentially disabled students, and the Jersey City Child Study Team had a prior awareness of the special education needs of H.G.³

The district's argument is essentially that as of June 17, 1998, any request for a Child Study Team referral had to be accomplished pursuant to Chapters 192-193 (*N.J.A.C. 6A:14-6.2*). The fact that H.G. was neither enrolled at Cornerstone at that time nor was going to return to Cornerstone was apparently unimportant. The Jersey City Board of Education also takes the position that enrollments are not permitted on or after June 17, and must occur on the first day of school in September, which in this case was September 10, 1998. The fact that *34 C.F.R. 300.342 (a)* requires that at the beginning "of each school year, each public agency shall have in effect an IEP for every child with a disability who is receiving special education from that agency", is overcome simply by denying enrollment and therefore denying services until September of each year when, ostensibly, a referral and subsequent IEP would be developed. However, as correctly noted in the *A.S.* case, *Super*: "The absence of the IEP, however, was a result of the

³ Consistent with EXHIBIT D of the petition for due process, Richard DiPatri, State District Superintendent, in the second paragraph, correctly notes that H.G. was scheduled for speech services during the 1995-96 school year, which "were available pursuant to the law which authorizes and funds certain services to students in non-public schools, Chapters 192-193." This, coupled with the information and reports obtained from June Cohen as well as from parental input, makes it crystal clear that H.G. was in fact educationally disabled and in need of special education and related services.

Board not acquitting its responsibilities to evaluate A.S. when it came to its attention that A.S. was potentially educationally disabled."