IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES JONES, *et* al., Plaintiffs, v. GOVERNMENT OF THE DISTRICT OF COLUMBIA, *et al*., Defendants.	Civil Action No. 97-2402 (PLF) *consolidated with* Civil Action No. 97-1629 (PLF) Claim of LaShawn Smith, Parent and Next Friend of A.J.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

A.J.is a bright eleven-year-old District of Columbia charter school student with disabilities. His mother, LaShawn Smith, secured two hearing officer determinations ("HODs") vindicating A.J.'s rights under the Individuals with Disabilities Education Act ("IDEA"). Neither is being timely implemented by Defendants Cesar Chavez Public Charter School ("Chavez") and the District of Columbia Public Schools ("DCPS"). Ms. Smith therefore seeks a preliminary injunction requiring Chavez and DCPS to timely implement the HODs mandating that A.J. be returned to Chavez this fall with necessary services. *See* Consent Decree at ¶ 134 (Dkt. 498).

Ms. Smith enrolled A.J. at Chavez in the fall of 2012 because she understood it was a good school at which her son could receive a quality education, in keeping with his academic capabilities.[1] But over the course of the 2012-13 school year, Chavez and DCPS failed to provide A.J. with an appropriate behavioral assessment, an adequate behavioral intervention

[1] The Hearing Officer found that A.J.'s "academic skills are within the high average range and his broad mathematic scores are superior." *See* Exhibit A, Hearing Officer Determination at 4 (May 31, 2013).

plan, or effective behavioral interventions. Rather than provide A.J. the services he needed to be successful in the general education classroom, Chavez relied on punitive measures. Chavez suspended A.J. repeatedly and ultimately expelled him unlawfully for behaviors that were a manifestation of his disability. And even after Plaintiff filed a due process complaint under the IDEA on April 18, 2013 and invoked "stay put" to keep A.J. at Chavez during the pendency of the proceeding, Chavez *again* expelled A.J. for behaviors that were a manifestation of his disability.

Two hearing officer determinations ("HODs") issued pursuant to the due process complaint Ms. Smith filed on April 18, 2013. In an "expedited" HOD dealing with A.J.'s expulsion from Chavez, the Hearing Officer:

- Reversed the April 17, 2013 Manifestation Determination Review upon which the expulsion was based and ordered DCPS and Chavez to return A.J. to Chavez within five days of the Order; and
- Ordered DCPS and Chavez to fund an independent Functional Behavior Assessment (FBA) and convene an IEP meeting upon its completion to develop a Behavior Intervention Plan (BIP).

Exhibit A, HOD at 9 (May 31, 2013). In a second HOD, the Hearing Officer found that Chavez had failed to provide A.J. with FAPE during the 2012-13 school year, and:

- Ordered DCPS and Chavez to fund 36 hours of independent tutoring for the many hours of class time A.J. had missed when Chavez suspended and expelled him for behaviors that were manifestations of his disability; and

- Ordered DCPS and Chavez to fund 36 hours of "independent counseling," to "be used by Petitioner to assist in student counseling/coaching, parental training and/or consultation with the student's school staff."

Exhibit B, HOD at 13-14 (July 3, 2013).

In an effort to evade these adverse decisions, Chavez and DCPS have refused to return A.J. to Chavez for the coming school year and claim that he must wait behind at least twenty-six other students on a waiting list. The first day of school is August 26, 2013, which leaves only 13 business days to resolve this dispute so that A.J. can begin the 2013-14 school year at Chavez, as the HODs in this case require.

Accordingly, Ms. Smith is left with no option other than to seek an order from this Court that DCPS and Chavez immediately comply with the HODs issued on May 31, 2013 and July 3, 2013 by providing him, at Chavez, the services ordered.

FACTUAL BACKGROUND

A.J. is a bright eleven-year-old with particular talents for math and art who is eligible to receive special education services under the IDEA due to his anxiety disorder, depression, attention deficit hyperactivity disorder and oppositional defiant disorder. Exhibit A, HOD at 4 (May 31, 2013). A.J. was a sixth grade student at Chavez during the 2012-13 school year until Chavez expelled him for behaviors that were later adjudicated to be manifestations of his disability. *Id.* at 7 (holding that "the student's conduct on April 11, 2013 . . . was a manifestation of his disability and the April 17, 2013 MDR is hereby reversed").

Pursuant to District of Columbia law, Chavez has chosen to "be treated as . . . a District of Columbia Public School for the purpose of part B of the [IDEA]." D.C. Code 38-1802.10(c); *see also* 20 U.S.C. 1413(a)(5); Exhibit A, HOD at 2 (May 31, 2013). This choice means, *inter*

alia, that Chavez has elected to "[h]ave [DCPS] serve as its [LEA] for purposes of the IDEA." D.C. Mun. Reg. tit. 5-E, 3019.2(a).

Ms. Smith alleged in a due process complaint filed on April 18, 2013 that Chavez and DCPS had unlawfully used discipline to address A.J.'s behaviors, culminating in the unlawful expulsion on April 11, 2013. Exhibit C, Due Process Complaint (April 18, 2013). Ms. Smith further alleged that Chavez and DCPS denied A.J. FAPE by failing to provide him with effective behavioral interventions. *Id.* at ¶ 11, 17, 21, 31-37. Ms. Smith named Chavez as a Respondent in the due process complaint, in addition to DCPS, as required by Section 302 of the District of Columbia Special Education Student Hearing Office's Due Process Hearing Standard Operating Procedures.

Ms. Smith invoked the "stay put" provision of the IDEA, 20 U.S.C. § 1415(j), which requires that a child with a disability remain in his current educational placement during a due process proceeding, including any appeal. As a result, A.J. returned to Chavez not long after the April 11, 2013 expulsion. However, on April 30, 2013 Chavez *again* expelled A.J. for fighting with a peer, this time also calling the police (all charges were dropped). Though Ms. Smith again had the right to invoke "stay put," she did not. She was understandably concerned about the emotional effect of sending her son to a school that continued to unlawfully rely on punitive measures, including law enforcement involvement, instead of providing the behavioral interventions her son needed to learn. She hoped that the Hearing Officer would ultimately order Defendants to implement the services A.J. needed so that he could return to Chavez.

Several weeks passed, during which counsel for Defendant DCPS informed Ms. Smith that Chavez "will not accept [A.J.] back." Exhibit D, Email from T. Chor to E. Read, *et al.* (May 1, 2013). On or about May 9, 2013, DCPS suggested Ron Brown Middle School as an interim

placement. Exhibit E, Email from E. Read to A. West, *et al.* (May 9, 2013). A.J. began attending Ron Brown on May 20, 2013, after further delays caused by Defendants. Ron Brown was slated to and did close at the end of the 2012-13 school year.

Following an expedited hearing on the manifestation determination and expulsion, Hearing Officer Coles Ruff ordered on May 31, 2013 that the expulsion be reversed because the behaviors that had given rise to the expulsion were manifestations of A.J.'s disability, and that "DCPS/[Chavez] shall, within five (5) school days of issuance of this Order return the student to [Chavez]." Exhibit A, HOD at 9 (May 31, 2013).

On June 6, 2013, prior to the expiration of the five school days referenced in the May 31, 2013 HOD, Ms. Smith notified DCPS and Chavez through counsel that she was reluctant to return A.J. to Chavez until the school implemented the necessary services to address his disability. *See* Exhibit F, Letter from E. Read to Principal Yvonne Waller (June 6, 2013). Plaintiff further stated that because only three weeks remained in the school year at that point, and Chavez had not implemented the necessary services to address A.J.'s disability since his expulsion, she believed it best that A.J. finish the 2012-13 school year at Ron Brown. *Id.* The letter explained that A.J. would return to Chavez for the 2013-14 school year, by which time Ms. Smith believed Chavez would be able to have needed services in place. *Id.* Neither DCPS nor Chavez responded to the June 6, 2013 letter.

On June 19, 2013, the Hearing Officer held a second hearing regarding DCPS' and Chavez' failures to provide A.J. the behavioral services he needed to receive FAPE in the general education classroom, A.J.'s least restrictive environment. Exhibit B, HOD at 5 (July 3, 2013). Consistent with Ms. Smith's complaint that neither Chavez nor DCPS had provided the behavioral interventions A.J. needed and to which he was entitled, on July 3, 2013, the Hearing

Officer ordered that "DCPS/Chavez shall within thirty (30) calendar days of the issuance of this Order provide and fund the following services as compensatory education for denials of FAPE: 36 hours of independent tutoring and 36 hours of independent counseling at the DCPS/OSSE prescribed rates." *Id.* at 13-14. The Hearing Officer specified that the independent counseling was to "be used by Petitioner to assist in student counseling/coaching, parental training and/or consultation with the student's school staff," as recommended by Ms. Smith's behavioral health expert, who testified at both due process hearings. *Id.* at 13.

After the first HOD was issued, Ms. Smith's counsel was in e-mail communication with the DCPS Compliance Case Manager assigned to her son. On June 25, 2013, Ms. Smith's counsel indicated that A.J. would need services in place "when he returns to Chavez in the fall" and that Ms. Smith "plan[s] to complete the FBA at Cesar Chavez when [A.J.] returns in the fall." Exhibit G, Emails from A. Allen-King to S. Ullman, *et al.* (June 26-August 2, 2013). The Case Manager never questioned that A.J. would return to Chavez in the fall. In July, counsel requested that Ms. Smith have the opportunity to meet with Chavez' new Principal and Special Education Coordinator to discuss implementation, and also requested an Individualized Education Program (IEP) meeting at Chavez prior to the first day of school to revise A.J.'s IEP and plan for implementation. Exhibit H, Emails from G. Jackson, F. Irick to E. Read, *et al.* (July 17-24, 2013). Chavez proceeded to schedule the meeting, never questioning that A.J. would return to Chavez in the fall. On August 1, 2013, however, Ms. Smith's counsel received an email from counsel for Defendant DCPS, stating that Aric could not return to Chavez for the 2013-14 school year. Exhibit I, Email from E. Read to T. Chor, *et al.* (August 2, 2013). Chavez took the same position at a meeting with Plaintiff and her counsel on August 5, 2013. Exhibit J,

Email from E. Read to F. Irick, *et al.* (August 6, 2013). Defendant DCPS has not issued prior written notice of a proposal to change A.J.'s placement.

Defendant DCPS has agreed to fund 20 hours of independent "interim services" to be used while the parties await the completion of the FBA the Hearing Officer ordered, *see* Exhibit K, 2011 and 2013 *Jones* ADR Agreements at ¶ I(1)(c) and ¶¶ 17-18 (requiring interim services), but not at Chavez or to support Aric's return to Chavez. *See* Exhibit G, Emails (June 26-August 2, 2013); Exhibit L, Interim Service Plan (August 2, 2013).[2]

ARGUMENT

Plaintiff LaShawn Smith is entitled to a preliminary injunction on behalf of her son, A.J., who is a member of the *Jones* subclass. Ms. Smith has exhausted her administrative remedies, and she is likely to succeed on the merits of her claims. Without a preliminary injunction, her son A.J. will suffer irreparable harm. Conversely, harm to DCPS and Chavez will not follow from the issuance of a preliminary injunction. Lastly, granting a preliminary injunction to order compliance with the decisions of a Hearing Officer will serve the public interest in enforcing the IDEA.

1. A.J. is a member of the *Jones* subclass.

A.J. is a member of the *Jones* subclass, certified as: "[a]ll children, now and in the future, who are entitled to have DCPS provide them with a free appropriate public education [FAPE] and who have been denied same because DCPS . . . has failed to fully and timely implement the determinations of the hearing officers . . . ." *Blackman v. District of Columbia*, No. 97-1629, Order at 2-3 (D.D.C. May 14, 1998). A.J. plainly meets this description: he is a District of

[2] The 2013 *Jones* ADR Agreement's requirement that interim services "be individualized and based on the parent's complaint and the student's record." Exhibit K, 2013 *Jones* ADR Agreement at ¶ 17.

Columbia student with a disability entitled to have DCPS provide him with FAPE, and he will be denied FAPE if DCPS does not timely implement the HODs directing Chavez to provide him necessary services.

2. Ms. Smith has exhausted administrative remedies.

Ms. Smith has exhausted administrative remedies by pursuing and obtaining two HODs. *See* Exhibit C, Due Process Complaint (April 18, 2013); Exhibit A, HOD (May 31, 2013); Exhibit B, HOD (July 3, 2013). Moreover, the need for immediate relief is especially urgent in this case because the first day of school is August 26, 2013, which leaves only 13 business days to resolve this dispute in time for A.J. to begin classes.

3. Ms. Smith is entitled to injunctive relief to enforce the HODs.

Ms. Smith is entitled to a preliminary injunction because (1) she is likely to prevail on the merits of her claim; (2) her son A.J. will suffer irreparable harm without a grant of immediate relief; (3) an injunction will not substantially harm the other interested parties; and (4) an injunction will serve the public interest. *See Wash. Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (citing *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Ms. Smith does not have to prevail on each of these factors; rather, "the factors must be viewed as a continuum, with more of one factor compensating for less of another." *Blackman v. Dist. of Columbia*, 277 F. Supp. 2d 71, 77-78 (D.D.C. 2003) (citing *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D. C. Cir. 1995)).

a. Ms. Smith is likely to prevail on the merits of her claim.

Ms. Smith has already prevailed on the allegations of DCPS' and Chavez' IDEA violations in her April 18, 2013 due process complaint. Without an order from this Court, DCPS

and Chavez will deny her the relief obtained in the HODs. *See* Consent Decree at ¶ 134 (Dkt. 498).

The May 31, 2013 expedited HOD in this case ordered that "DCPS/Chavez shall, within five (5) school days of issuance of this Order return [A.J.] to . . . Cesar Chavez PCS Parkside Middle School." It further ordered "DCPS/Chavez shall within fifteen (15) school days of the issuance of this Order provide and fund an independent FBA . . . and within fifteen (15) school days of its receipt of the independent FBA convene an IEP meeting to develop an updated BIP for the student." Exhibit A, HOD at 9 (May 31, 2013). On the fourth school day after the issuance of the Order, Ms. Smith notified Chavez and DCPS of her grave concerns about returning A.J. to Chavez without services in place to address his disability, and of her intention to return him to Chavez for the 2013-14 school year pursuant to the HOD. *See* Exhibit F, Letter from E. Read to Principal Yvonne Waller (June 6, 2013).

The July 3, 2013 HOD resolving Ms. Smith's due process complaint ordered that "DCPS/Chavez shall within thirty (30) calendar days of the issuance of this Order provide and fund the following services as compensatory education for the denials of FAPE to [A.J.]: 36 hours of independent tutoring and 36 hours of independent counseling." Exhibit B, HOD at 13-14 (July 3, 2013). The thirtieth calendar day expired on August 2, 2013, by which time DCPS and Chavez had already made clear their intention to refuse to return A.J. to Chavez for the 2013-14 school year.

b. A.J. will suffer irreparable harm without immediate relief.

For Defendants to assert at the eleventh hour that A.J. cannot attend Chavez, denying him relief ordered in two HODs and thus FAPE, will cause him irreparable harm. This Court has

recognized that DCPS' failure to provide FAPE results in immediate, devastating, and irreparable harm to children, observing that:

> the District consistently has failed to recognize the serious physical, emotional and educational difficulties that individual Plaintiffs face as a result of Defendants' failure to comply with the IDEA. . . . While a few months in the life of an adult may be insignificant, at the rate at which a child develops and changes, especially one at the onset of biological adolescence with or without special needs like those of our Plaintiff, a few months can make a world of difference in the life of that child.

Blackman v. D.C., 185 F.R.D. 4, 7 (D.D.C. 1999) (quoting Foster v. District of Columbia, Civil Action No. 82–0095, Mem. Op. and Order at 4 (D.D.C. February 22, 1982)). This Court has also recognized that improper changes in school assignment can constitute irreparable harm. *Petties v. Dist. of Columbia*, 238 F. Supp. 2d 88, 98-99 (D.D.C. 2002) (holding that DCPS' proposed plan to relocate 151 special education students to different schools without providing notice and other rights constituted irreparable harm). Moreover, DCPS may not change a student's placement without the parent's agreement or a determination in an administrative due process hearing that the change in placement is appropriate and permissible under the IDEA, *id.* at 97, neither of which has occurred here.

c. An injunction will not substantially harm DCPS or Chavez.

An injunction will not harm Defendants. Indeed, Plaintiff requests only what the Hearing Officer has already ordered.

Any inconvenience to Defendants because of the imminence of the new school year is of their own making. Defendants have known since at least June 6, 2013 – when counsel for Ms. Smith notified them of her concerns about returning A.J. to Chavez without the necessary services in place – that A.J. would be returning to Chavez for the 2013-14 school year. Chavez sent Ms. Smith an enrollment form for the 2013-2014 school year for a returning student, and

notified her that she had until July 31, 2013 to submit the paperwork (which she did). It was Defendants who did not notify Plaintiff until August 1 of their intent to block A.J.'s return to Chavez.

And any argument by Defendants that financial constraints are at issue will be unavailing. This Court has already made clear that "it cannot accept [DCPS'] implicit claim that financial hardship justifies the risk to the [special education] class members that DCPS seeks to impose, a risk that directly results from DCPS's own failure to follow the law." *Petties,* 238 F.Supp.2d at 99.

d. An injunction will serve the public interest.

An injunction will serve the public interest. It will reinforce the importance of timely compliance with the IDEA. It will also reinforce that charter schools must comply with the IDEA.[3] "The public interest lies in the proper enforcement of the orders of the Court and the IDEA and in securing the due process rights of special education students and their parents provided by statute." *Petties,* 238 F.Supp.2d at 99.

[3] *See, e.g.*, Testimony of Tameria Lewis, Transcript of Hearing before the Honorable Paul L. Friedman, *Blackman v. District of Columbia*, Docket No. CV -97-1629 (Feb. 2, 2009) at 97 ("We have a great many Charter Schools . . . that . . . if a student reaches a certain level of need, . . . they will simply say we can't provide those services." . . . [I]n practice what has been happening over the years is [that] Charter Schools . . . [have held the] view that if a case was difficult, a child's situation was difficult, . . . of course the normal classroom can't serve that child, [so] we'll send them to a private placement."); Emma Brown, "D.C. Charter Schools Expel Students at Far Higher Rates than Traditional Public Schools," THE WASHINGTON POST (Jan. 5, 2013) (reporting that "D.C. charter schools expelled 676 students in the past three years, while the city's traditional public schools expelled 24"), *available at* www.washingtonpost.com /local/education/dc-charter-schools-expel-students-at-far-higher-rates-than-traditional-public-schools/2013/01/05/e155e4bc-44a9-11e2-8061-253bccfc7532_story.html (last visited Aug. 5, 2013). Chavez has publicly acknowledged that it intentionally excludes certain students with disabilities. *See* Public Charter School Board, Cesar Chavez Public Charter School 2012-13 Preliminary Charter Renewal Report (Jan. 16, 2013) at 26, note 63, *available at* www.dcpcsb .org/data/images/chavez%20preliminary%20 charter%20renewal%20 report.pdf (last visited Aug. 5, 2013). Indeed, in January 2008, only three students had IEPs at Chavez' Parkside Middle School, the campus to which A.J. seeks return. *Id*. at 25.

4. The Court should order that A.J. attend Chavez during the pendency of this preliminary injunction proceeding.

Ms. Smith further requests that this Court direct that A.J. attend Chavez during the pendency of this preliminary injunction proceeding. The IDEA's stay put provision requires that a child with a disability remain in his current educational placement during a "judicial proceeding regarding a due process complaint." 34 C.F.R. § 300.518(a); *see also Laster v. District of Columbia*, 439 F. Supp. 2d 93, 98-99 (D.D.C. 2006) ("courts have consistently interpreted the stay put provision to be an automatic injunction").

A.J.'s current IEP, dated April 25, 2013 lists Chavez as his current educational placement. *See* Exhibit M, Individualized Education Program at 1 (April 25, 2013) (listing "Cesar Chavez PCS" as the "LEA of enrollment" and "Cesar Chavez PCS – Parkside Campus" as the "School/Site"). Because a "judicial proceeding regarding a due process complaint" is pending, *see* 34 C.F.R. § 300.518(a), and Ms. Smith has not "otherwise agree[d]" to a different educational placement, *see* 20 U.S.C. § 1415 (j), this Court should direct that A.J. attend Chavez during the pendency of this proceeding.

5. Relief requested.

Plaintiff respectfully requests that the Court grant – prior to August 20, 2013 – the following relief:

a. An order that A.J. be allowed to attend Cesar Chavez Public Charter Schools' Parkside Middle School during the upcoming school year;

b. An order that Defendants fund (1) an independent Functional Behavior Assessment to be completed at Chavez, Exhibit A, HOD at 9 (May 31, 2013); (2) 36 hours of independent tutoring; and (3) 36 hours of "independent counseling," to "be used

by Petitioner to assist in student counseling/coaching, parental training and/or consultation with the student's school staff;"

c. An order that Chavez hold an IEP meeting prior to the first day of school, to discuss, *inter alia*, how the 20 hours of interim services authorized by DCPS will be used, in compliance with the *Jones* ADR agreements;

d. Reasonable costs and attorneys fees; and

e. Such other or different relief as may be appropriate.

Moreover, Plaintiff respectfully requests that, pursuant to the IDEA's stay put provision, the Court direct that A.J. attend Chavez until the Court has finally resolved the issues raised by Plaintiff's request for a preliminary injunction.

CONCLUSION

For the foregoing reasons, Ms. Smith is entitled to a preliminary injunction requiring DCPS and Chavez to return A.J. to Cesar Chavez Public Charter Schools' Parkside Middle School with the services awarded in place.

Respectfully submitted,

/s/

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