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.

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER

Pursuant to Federal Rule of Civil Procedure 65, Plaintiff LaShawn Smith, parent and next friend of A.J., respectfully submits this Memorandum of Points and Authorities in support of her Motion for a Temporary Restraining Order requiring the District of Columbia Public Schools (DCPS) and Cesar Chavez Public Charter Schools ("Chavez") to implement during the pendency of Plaintiff's Motion for a Preliminary Injunction in this case two hearing officer determinations ("HODs") issued on May 31 and July 3, 2013, in response to a due process complaint filed pursuant to the Individuals with Disabilities Education Act ("IDEA").

I. FACTS

a. Ms. Smith Secured Two HODs Regarding A.J.'s Special Education.

A.J. is a bright seventh grader with disabilities who attended Chavez for sixth grade during school year 2012-13. Chavez, as a so-called DCPS charter school, 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).[1] A.J. is eligible for special education services under the IDEA and received some special education services at Chavez.

During the 2012-2013 school year, however, Chavez repeatedly suspended and then expelled A.J. for behaviors that were a manifestation of his disability, instead of providing the behavioral services he needs in the general education classroom, his least restrictive environment. Ms. Smith filed a due process complaint on April 18, 2013, asserting both that the suspensions and ultimate expulsion were unlawful under the IDEA and that Chavez had denied A.J. the free appropriate public education ("FAPE") required by the IDEA. Exhibit D, Due Process Complaint (April 18, 2013). Ms. Smith named both DCPS and Chavez as respondents and served both entities. *Id.* Ms. Smith also invoked the "stay put" provision of the IDEA, 20 U.S.C. § 1415(j), to secure A.J.'s return to Chavez while the due process complaint was pending. *Id.*

While the due process complaint was pending, Chavez again expelled A.J., without due process, and again for behavior that was a manifestation of his disability. Though Ms. Smith again had the right to invoke the IDEA's stay put provision, she did not. She was 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

[1] In November 2007, the Department of Education issued a letter to DCPS, instructing it that, "If a charter school elects to be a public school of DCPS, the LEA (DCPS) is responsible for ensuring the requirements of Part B of the IDEA are met, unless DC law assigns that responsibility to some other entity." Letter from Alexa Posny, Director, Office of Special Education Programs, U.S. Department of Education, to Mary Lee Phelps, Acting Director of Special Education, District of Columbia Public Schools (Nov. 28, 2006) (Dkt. 1914). Defendants in *Blackman/Jones* subsequently conceded that they have the responsibility and the authority to implement HODs involving charter school students. *See* Statement of Defendant District of Columbia Accepting Legal Responsibility for Ensuring Timely Hearings and Timely Implementation of HODs and SAs for Charter School Students (Dec. 14, 2007) (Dkt. 2036).

interventions he needed to learn. Exhibit E, Emails between T. Chor and E. Read (May 1, 2013). She hoped that the Hearing Officer would ultimately order Defendants to implement the services A.J. needed so that he could return to Chavez. Ms. Smith chose to have A.J. moved for the last weeks of the 2012-13 school year to an interim setting at a traditional public school, Ron Brown Middle School, which has since closed.

The Hearing Officer issued two HODs in Ms. Smith's favor: a May 31, 2013 HOD finding the earlier expulsion unlawful and returning A.J. to Chavez, and a July 3, 2013 HOD finding that Chavez had denied A.J. FAPE and ordering that DCPS and Chavez provide and fund compensatory education. Exhibit A, HOD (May 31, 2013); Exhibit B, HOD (July 3, 2013). The two HODs are, on their face, directed to both DCPS and Chavez. The May 31, 2013 HOD orders 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). And consistent with Ms. Smith's complaint that neither Chavez nor DCPS had provided the behavioral services A.J. needed and to which he was entitled, the July 3, 2013, HOD orders 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." Exhibit B, HOD at 13-14 (July 3, 2013). The Hearing Officer specified that the "independent counseling" awarded was to "be used by [Ms. Smith] 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.

On June 6, 2013, prior to the expiration of the five school days referenced in the May 31,

2013 HOD and with only two weeks remaining in the 2012-13 school year, 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 Chavez had not implemented those services, she believed it best that A.J. finish the 2012-13 school year at Ron Brown, and stated that she would return A.J. to Chavez for the 2013-14 school year, *id.*, by which time she believed Chavez would be able to have the needed services in place. Neither DCPS nor Chavez ever responded to the June 6, 2013 letter.

After the first HOD was issued, Ms. Smith's counsel was in email communication with the DCPS Compliance Case Manager assigned to her son. On June 25, 2013, for example, 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 between S. Ullman and A. Allen-King, *et al.* (June 25-August 2, 2013). The Case Manager and other staff never questioned that A.J. would return to Chavez in the fall. *See, e.g., id.* at July 25, 2013 email from A. Allen-King to S. Ullman. 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 discuss interim behavioral services prior to the completion of the independent evaluation ordered by the May 31, 2013 HOD. Exhibit H, Emails between G. Jackson, *et al.* and E. Read, *et al.* (July 17-31, 2013). Chavez proceeded to schedule the meeting, never questioning that A.J. would return to Chavez in the fall. *See id.*

On August 1, 2013, however, Ms. Smith's counsel received an email from DCPS counsel stating that A.J. could not return to Chavez for the 2013-14 school year. Exhibit I, Emails between E. Read and T. Chor, *et al.* (August 1, 2013).[2] Chavez subsequently communicated to Ms. Smith and her counsel that it would not comply with the May 31, 2013 HOD, Exhibit A, and instead would only allow A.J. to return if he completed an application as a new student and waited on a waitlist behind thirty other students.

On August 7, 2013, Ms. Smith filed a Motion for a Preliminary Injunction pursuant to ¶134 of the 2006 Consent Decree in this case (Dkt. 498) and Fed.R.Civ.P. 65, requesting that this Court order DCPS and Chavez to comply with the HODs, including by returning A.J. to Chavez by August 26, the first day of school. *See* Motion for Preliminary Injunction (August 7, 2013) (Dkt. 2342). Ms. Smith also invoked her rights under the stay put provision of IDEA.[3]

b. The Hearing Before the Special Master.

At an August 12, 2013 preliminary injunction hearing before the Special Master, Defendants argued that Ms. Smith "voluntarily unenrolled" A.J. from Chavez on May 17, 2013

[2] DCPS counsel represented Chavez throughout the due process proceedings, at times instructing counsel for Plaintiff not to communicate directly with Chavez about the matter. Exhibit N, Various Emails between T. Chor and E. Read. After the second due process hearing, at which DCPS counsel suggested she did *not* represent Chavez, counsel for Plaintiff requested that Chavez identify its counsel; it identified DCPS counsel as its lawyer.

[3] 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 J, 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), Plaintiff asserts that A.J. should attend Chavez during the pendency of this proceeding.

when she enrolled him at his interim placement, and also that Ms. Smith had "waived" her right to enforce the HODs by not returning A.J. to Chavez for the last two weeks of the 2012-13 school year.[4] Defendants also asserted that DCPS does not have the authority to ensure implementation of the HODs because Chavez is a public charter school (despite the facts that 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), and that Defendants in *Blackman/Jones* have conceded that they have the responsibility and the authority to implement HODs involving charter school students. *See* Statement of Defendant District of Columbia Accepting Legal Responsibility for Ensuring Timely Hearings and Timely Implementation of HODs and SAs for Charter School Students (Dec. 14, 2007) (Dkt. 2036)).

On August 13, 2013, one day after the preliminary injunction hearing, the Special Master issued a "Preliminary Action To Comply With Hearing Officer Determination," Exhibit C, Preliminary Action (August 13, 2013), stating that "student A.J. shall return to the Cesar Chavez public charter school beginning on August 26, 2013, until and through such a date when the Court affirms this action or directs the Defendant to take a different action." *Id.* It "FURTHER

[4] As DCPS admitted at the hearing, DCPS never sent Ms. Smith a "provision waiver" form or obtained her agreement to such a waiver, as required by ¶ I(5) of the 2011 *Blackman/Jones* ADR Agreement. Ms. Smith would have refused to provide such a waiver if it had been requested, as it would have been directly at odds with the relief Ms. Smith has been seeking for months, *i.e.* full implementation—at Chavez—of the behavioral services necessary to provide FAPE to A.J. as required by the IDEA. Moreover, waiver of a civil rights claim must be "voluntary, deliberate, and informed," which this was certainly not, given that Ms. Smith was not even aware that DCPS believed her June 6, 2013 letter to constitute a waiver until after she had filed her Motion for a Preliminary Injunction. *W.B. v. Matula,* 67 F.3d 484, 497-98 (3d Cir. 1995) (collecting cases and quoting *Salmeron v. United States,* 724 F.2d 1357, 1361 (9th Cir.1983)); *see also Johnson v. Veneman,* 569 F.Supp.2d 148, 155 (D.D.C. 2008) (waiver of Title VII rights must be knowing and voluntary, "which means that it is "executed freely, without deception or coercion with a full understanding of [what] rights [are being waived].") (internal citations omitted).

ORDERED, that Cesar Chavez public charter school shall implement the services ordered in the attached May 31, 2013 and July 3, 2013 Hearing Officer Determinations," and that "DCPS shall exercise its responsibilities under 20 U.S.C 1400 et seq. and D.C.M.R. Title 5-E § 3019 et seq. to assure that such services are delivered to A.J." *Id.*

The next day, August 14, 2013, counsel for Ms. Smith repeated an earlier request for an IEP meeting with Chavez staff and prior to the first day of school, to discuss implementation of the behavioral services A.J. needs and was awarded in the two HODs. Exhibit K, Emails between T. Chor and E. Read, *et al.* The request was refused. *Id.* Instead, DCPS insisted on having an IEP meeting without Chavez staff. *Id.* The meeting was canceled when a family emergency prevented Ms. Smith from attending. *Id.* Later the same day, DCPS issued a notice to Ms. Smith announcing DCPS' intention to change A.J.'s school location to Kramer Middle School, not Chavez, for the coming school year. Exhibit L, Email from R. Perry to S. Ullman (August 14, 2013).

Counsel for Ms. Smith then requested confirmation that A.J. would be allowed to return to Chavez as required by the IDEA's stay put provision and confirmed in the Special Master's Preliminary Action. *See* Exhibit M, Emails between E. Read and R. Utiger, *et al.* Having received no response, on August 15, counsel gave notice by email and telephone that it would seek a TRO from this Court unless DCPS confirmed that A.J. would be allowed to return to Chavez for the first day of school; counsel for DCPS responded that they believed they had fully effectuated the Special Master's directive by simply conveying it to Chavez. *Id.*

There are now just five business days before the first day of school. DCPS and Chavez have made clear that A.J. will not be allowed to return to Chavez despite stay put, the Special Master's directive, and the HODs upon which it is based. Ms. Smith seeks a temporary

restraining order, enforceable by contempt, to enforce her right to allow A.J. to "stay put" at Chavez pending the results of her Motion for Preliminary Injunction to enforce the two HODs she already secured.

II. ARGUMENT

a. Ms. Smith is entitled to a temporary restraining order to enforce the IDEA's "stay put" provision pending the results of her Motion for Preliminary Injunction.

Ms. Smith is entitled to a temporary restraining order 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)). "The same standard applies to both temporary restraining orders and to preliminary injunctions." *Hall v. Johnson,* 599 F.Supp.2d 1, 3 n. 2 (D.D.C. 2009). 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)).

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

Ms. Smith is likely to prevail – indeed, has already prevailed – on the merits of her underlying IDEA claims; and is likely to prevail on her Motion for a Preliminary Injunction.

Ms. Smith established at the two due process hearings that DCPS and Chavez violated A.J.'s rights under IDEA. *See* Exhibit A, HOD (May 31, 2013); Exhibit B, HOD (July 3, 2013).

Thereafter, the Hearing Officer and the Special Master directed that A.J. be returned to Chavez and that the compensatory education awarded be implemented at Chavez. *See id.*; *see also* Exhibit C, Preliminary Action (August 13, 2013). Nevertheless, DCPS and Chavez have made clear they will continue to bar A.J.'s return to Chavez pursuant to the HODs.

Ms. Smith has provided ample evidence in the preliminary injunction proceeding that she did not voluntarily "unenroll" A.J. from Chavez; instead she enrolled him at an interim alternative educational placement, as is allowed by the IDEA, because Chavez had expelled A.J. for a second time, referred him to law enforcement, and continued to fail to provide needed behavioral services. Further, Ms. Smith has provided ample evidence that she did not waive her right to return A.J. to Chavez with behavioral services, as ordered in the May 31, and July 3, 2013 HODs; instead she notified Defendants in writing that A.J. would finish the 2012-13 school year in the interim alternative educational placement and return to Chavez for the 2013-14 school year.

Issuance of a TRO, enforceable by contempt, is required to protect A.J.'s IDEA rights, both to stay put at Chavez pending the results of the Preliminary Injunction and to secure the relief ordered by the Hearing Officer.

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

School starts on August 26 and time is running out if A.J. is to begin the school year at Chavez with the behavioral services the IDEA and the HODs require.

This Court has recognized that a 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). Indeed, requiring Ms. Smith to enroll A.J. at another school pending the results of the Motion for Preliminary Injunction not only violates the stay put provision of the IDEA, but will likely result in A.J. having to switch schools yet again in the middle of the year, which at the very least will disrupt his education and delay the implementation of the compensatory behavioral services awarded – and could result in further denials of FAPE.

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, neither of which has occurred here. *Petties*, 238 F. Supp. 2d at 91 ("As the IDEA and the earlier opinions of the Court make plain, once there is an IEP in place, a hearing officer determination, or a placement pursuant to a settlement agreement, there can be no change in placement without providing a student and his or her parents with the full panoply of due process rights established by Congress, including (unless the matter is otherwise consensually resolved) an administrative due process hearing.").

d. A temporary restraining order will not substantially harm DCPS or Chavez.

A temporary restraining order will not harm DCPS or Chavez. Indeed, Ms. Smith requests only what the Hearing Officer has already ordered and the IDEA requires.

e. A temporary restraining order will serve the public interest.

A temporary restraining order will serve the public interest by reinforcing timely compliance by DCPS and Chavez with the IDEA. It will also reinforce that DCPS has an obligation to implement HODs at a charter school, like Chavez, that 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).

III. CONCLUSION

Based on the foregoing, Ms. Smith respectfully requests that the Court issue a temporary restraining order by Tuesday, August 20, 2013, requiring DCPS and Chavez, pending the resolution of Ms. Smith's Motion for a Preliminary Injunction, to:

a. Return A.J. to Chavez by the start of the school year on August 26, 2013, consistent with the stay put provisions of the IDEA; and

b. Implement the services ordered in the May 31 and July 3, 2013 Hearing Officer Determinations, *see* Exhibit A, HOD (May 31, 2013) and Exhibit B, HOD (July 3, 2013).

Dated: August 19, 2013

Respectfully submitted,

/s/

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