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 REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Defendants DCPS and Chavez make clear in their Opposition that, having been blocked by the Hearing Officer in their effort to expel A.J. from Chavez for behavior that is a manifestation of his disability, they will invoke any excuse they can think of to achieve the same result. As Hearing Officer Ruff found in his two HODs, Chavez and DCPS have repeatedly failed to provide A.J. the services to which he is entitled and have instead relied on punitive measures in response to his disability, including unlawful expulsion. Rather than appeal those decisions, Chavez and DCPS have instead chosen to ignore them—putting forth a host of arguments in an attempt to justify their disregard of the HODs. As explained further below, these arguments are invalid as a matter of law, and they are mere pretext for DCPS's and Chavez' true goal of *functionally* expelling A.J. for behavior that is a manifestation of his disability.

A. Defendants' cannot "grant themselves a stay" by refusing to implement the HODs and must raise arguments against the HODs in a properly filed appeal, not here.

Defendants' arguments amount to an effort to overturn the HODs in the wrong forum, as they disregard one basic fact: that the HODs can only be implemented by returning A.J. to Chavez. To the extent Defendants disagree with that result—either because they believe Ms. Smith "voluntarily withdrew" A.J. from Chavez, or that changing his location will not effectuate a change in placement—they must present those concerns, if at all, in a properly filed appeal, not through a refusal to implement the HODs.[1]

Defendants argue that they can essentially ignore Hearing Officer Ruff's orders because in ordering DCPS and Chavez to return A.J. to Chavez and to fund and provide him services there, Hearing Officer Ruff did not specify the 2013-2014 school year. *See* Opposition at 5-6. This is contrary to the plain language, context, and intent of the HODs, and has no support. Indeed, Defendants' Opposition itself largely disregards the July 3, 2013 HOD—focusing instead only on the May 31, 2013 HOD as the HOD "[a]t issue." Opposition at 5. However, in that July 3 HOD, Hearing Officer Ruff recognized that A.J. "did not return to School A by the end of SY 2012-2013," and yet he still ordered that DCPS *and Chavez* provide the compensatory education ordered in the second HOD *for SY 2013-2014*. Dkt. No. 2342-4, Ex. B at 8 ("Having a behavioral consultant visit [Chavez] for two to three hours each week during the Fall semester of SY 2013-2014 to consult with teachers, staff and the student is an appropriate course of action to make immediate impact and improvement in the student's in-

[1] To the extent Defendants argue that the Hearing Officer lacked the authority to order A.J. to return to Chavez or to order any compensatory education to occur at that school, Defendants made this same argument to the Hearing Officer at both hearings, but he plainly rejected it—specifying Chavez in both of HODs. *See* Dkt. No. 2342-4, Ex. B at 13-14 (ordering that "DCPS/[Chavez] shall within thirty (30) calendar days of this Order provide and fund the following services as compensatory education for the denials of FAPE"); Dkt. No. 2342-3, Ex. A at 9 (ordering that DCPS/[Chavez] shall within fifteen (15) school days of the issuance of this order, provide and fund an independent FBA at the OSSE approved rate").

school behavior."). As the 2012-2013 school year had already ended at the time of this order, Hearing Officer Ruff plainly intended A.J. to return to Chavez for the upcoming 2013-2014 school year.[2] "The [IDEA] was not intended to reward [semantic] games" like Defendants play here. *See Madison Metro. Sch. Dist. v. P.R. ex rel. Teresa R.*, 598 F. Supp. 2d 938, 952 (W.D. Wis. 2009).

As this District explained in *Shelton v. Maya Angelou Public Charter School*, Defendants are not "allowed to essentially grant [themselves] a stay when [they] disagree[] with an HOD." 578 F. Supp. 2d 83, 102 (D.D.C. 2008) (citing *Friendship Edison Public Charter School Chamberlain Campus v. Suggs*, 562 F. Supp. 2d 141, 143 (D.D.C. 2008) (Friedman, J.) ("Nowhere in the IDEA . . . is there a . . . right of an education provider to decline to implement a Hearing Officer Decision in a student's favor automatically, without seeking a stay of that Decision from either the Hearing Office or the Court in which further proceedings have been commenced under 20 U.S.C. § 1415(i)(2)").

B. A particular school can be a critical element of—and even equivalent to—a child's "educational placement," especially in the context of an attempt to expel the child.

Ms. Smith does not dispute that a child's "educational placement" under the IDEA may not always be the same as his particular physical school or location of services. *See, e.g., Alston v. Dist. of Columbia*, 439 F. Supp. 2d 86, 90-91 (D.D.C. 2006) (the meaning of the term "'then-current educational placement' . . . 'falls somewhere between the physical school attended by a

[2] Defendants' argument that Ms. Smith failed to exhaust administrative remedies, Opposition at 13-17, is entirely without merit. For the reasons explained above, the HODs clearly require that A.J. be returned to Chavez. As such, Ms. Smith does not seek to appeal the HODs, but seeks merely to ensure they are properly implemented. Moreover, Defendants' argument that "no issue was adjudicated in either hearing concerning A.J.'s educational placement or location of service for the 2013-2014," *id.* at 16, flatly contradicts Defendants' earlier assertion that Ms. Smith is "seeking relief through a preliminary injunction that has already been denied by a hearing officer," *id.* at 6.

child and the abstract goals of a child's IEP'") (quoting *Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook Cnty., Ill. v. Ill. State Bd. of Educ.*, 103 F.3d 545, 548 (7th Cir. 1996) (hereinafter "Cook County")); *see also Spilsbury v. Dist. of Columbia*, 307 F. Supp. 2d 22 (D.D.C. 2004) (rejecting DCPS's argument in that case that the term "current educational placement" be read "to *only* indicate which physical school building a child attends") (emphasis added).

But neither are the terms entirely divorced from each other as DCPS and Chavez now argue. *See* Opposition at 11-12. DCPS and Chavez contend that, although Chavez is identified as both the "LEA of Enrollment" and the "School / Site" in A.J.'s current IEP, *see* Dkt. No. 2342-15, Ex. M, DCPS and Chavez can unilaterally decide to change his location at any time. Likewise, DCPS argues that it can essentially ignore Hearing Officer Ruff's direction that A.J. be returned to *Chavez* and that DCPS *and Chavez* must "*provide* and fund" the ordered compensatory education to remedy their denials of FAPE to A.J. Dkt. Nos. 2342-3, Ex. A at 9 and 2342-4, Ex. B at 13-14 (emphasis added). This is not correct.

Indeed, for the IDEA's disciplinary provisions to have any effect, placement must be synonymous with location of services in the expulsion context. If the rule were any different, schools would be able to engage in intentional discrimination without any consequence, ridding themselves of students with disabilities by expelling them to other locations while claiming that such actions do not constitute a change in placement. This outcome belies the text of the IDEA, which requires that a child be "*return[ed] . . .* to the placement *from which the child was removed*" upon a finding that the behavior for which the child was punished was a manifestation of his disability. 20 U.S.C. § 1415(k)(1)(F)(iii) (emphasis added). It is also entirely inconsistent with the IDEA's goal of "prohibit[ing] schools from excluding from the classroom difficult disabled students." *Cook County,* 103 F.3d 545 at 549. The IDEA requires that discriminating

schools be held accountable by compelling those schools to serve the students with disabilities whom they unlawfully attempt to expel. *See* 20 U.S.C. § 1415(k)(1)(D)(1).

Accordingly, courts consistently find that placement and location are one and the same in the expulsion context: "[W]here expulsion is at issue, a change of school is interpreted as a change in placement. This narrow reading of placement is in keeping with [the] original purpose of the [Act]: Congress passed the act to prohibit schools from excluding from the classroom difficult disabled students." *Cook County,* 103 F.3d at 549; *see also Hale ex rel. Hale v. Poplar Bluss R-I School Dist*., 280 F.3d 831, 834 (8th Cir. 2002) ("[A]n expulsion from school or some other change in location made on account of the disabled child or his behavior has usually been deemed a change in educational placement that violates the stay-put provision if made unilaterally."). Other courts, while finding that a change of location did not constitute a change in placement under the facts of their particular cases, have distinguished cases in the expulsion context. *See, e.g.*, *Brad K. v. Bd. of Educ. of City of Chicago*, 787 F. Supp. 2d 734, 740 n.1 (N.D. Ill. 2011) (noting "that, in expulsion cases, 'educational placement' should be construed as including the physical location of the placement"); *N.D. v. Hawaii Dep't of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010) (finding that "[a]n across the board reduction of school days" did not constitute a change in placement only because it "d[id] not conflict with Congress's intent of protecting disabled children from being singled out"). It is no surprise that none of the cases cited by Defendants involve an effort to expel a child from a particular school or location of services for behavior manifesting the child's disability. *See* Opposition at 11-12.

C. DCPS must provide Ms. Smith with notice and due process before changing A.J.'s location of services, even if DCPS contends that the change in location does not constitute a change in placement.

Even assuming, *arguendo*, that A.J.'s location of services could be changed without effectuating a change in placement, such a change cannot be made without providing Ms. Smith prior notice of the new location.

Under the statute, a specified location of service is an integral part of any IEP. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(VII). A proper "IEP must contain a location where the services will be provided." *Eley v. Dist. of Columbia*, No. 11-309, 2012 WL 3656471, *7 (8/24/2012) (Facciola, J.) (citing with approval, *A.K. ex rel. J.K. v. Alexandria City School Bd.*, 484 F.3d 672, 681 (4th Cir. 2007)). Indeed, the particular location identified can determine whether an IEP is appropriate. *A.K.*, 484 F.3d at 680 ("In light of the fact that the school at which special education services are expected to be provided can determine the appropriateness of an education plan, it stands to reason that it can be a critical element for the IEP to address."); *see also Madison Metro. School Dist.*, 598 F.Supp. 2d at 949-950 [3] Moreover, a change in location can constitute a change in "educational placement," if, for example, the change "results in a dilution of the quality of a student's education or a departure from the student's least restrictive

[3] To the extent that *T.Y. v. New York City Dept. of Education*, 584 F.3d 412 (2d Cir. 2009) construes the reference to "location" in 20 U.S.C. § 1414(d)(1)(A)(i) (VII) to not necessarily refer to a child's particular school, the holding did not extend to the disciplinary provisions contained in Section 1415(k). Applying the *T.Y.* court's definition of location to those provisions would undermine their effect for the reasons explained above. Moreover, that case is directly at odds with this District's decision in *Eley*, and with *A.K.* and *Madison*, discussed above. *See Eley*, 2012 WL 3656471 at *7 ("The importance of identifying a *location, or particular school*, where the IEP is to take place was thoroughly discussed in [*A.K.*].") (emphasis added). And even if an IEP does not have to identify a particular school where a child is to receive services as part of his or her individual plan, A.J.'s current IEP—as well as the HODs—does, and cannot be unilaterally changed by DCPS. *See Petties v. Dist. of Columbia*, 238 F. Supp. 2d 88, 98 (D.D.C. 2002).

environment-compliant setting." *A.K.*, 484 F.3d at 680 (quotation and citation omitted); *see also Madison Metro. School Dist.*, 598 F.Supp. 2d at 949.

Recognizing the importance of a disabled child's location of services, Judge Friedman has held that "DCPS's intention to relocate students without giving *prior* notice to the parents and a *prior* hearing (if requested) violates the letter and the spirit of the IDEA." *Petties v. Dist. of Columbia*, 238 F. Supp. 2d 88, 97 (D.D.C. 2002). In that case, DCPS argued that its proposed change in location did not constitute a change in placement, and it therefore had no obligation to provide the parents with proper notice. *Id.* at 98. Noting that this argument was "disingenuous—indeed, Kafkaesque," Judge Friedman held that parents are entitled to notice of any proposed change in their child's location of services, as well as the right to argue that the change in location constitutes a change in placement. *Id.* The IDEA does not "allow[] DCPS to move any child from any school at any time without prior notice to the parents—even though there is an IEP, a settlement agreement or *a hearing officer determination* in place. Such a reading of the statute is nonsensical and such a result is untenable." *Id.* (emphasis added).

Chavez is the current location of services specified in A.J.'s IEP and in the HODs, and is therefore currently a component of his placement, unless and until his location of services is changed through the appropriate IEP process.[4] To date, now just 10 days before the start of the school year, A.J. has yet to receive any notice of the location at which DCPS intends to place her son. Until DCPS provides such information, Ms. Smith is unable to meaningfully "challenge

[4] Defendants argue that A.J. will not suffer irreparable injury in part because Ms. Smith has enrolled him at Options Public Charter School for the 2013-14 school year. Ms. Smith continues to seek A.J.'s return to Chavez; her proactive and responsible parenting does not alleviate Defendants from their responsibility to implement the May 31, 2013 and July 3, 2013 HODs. In the face of Defendants' inaction, Ms. Smith enrolled her child at Options on her own initiative. To have done otherwise may have subjected her to referral to the Child and Family Services Agency for educational neglect. 5 DCMR § 2103.5(a).

[the] proposed change." *Id.* Assuming DCPS in the future provides such notice of a change in location of services, Ms. Smith has the right to appeal that decision if she believes the change constitutes a "fundamental change" in A.J.'s placement, as well as the right to invoke "stay-put" while her administrative appeal is heard. *See Dist. of Columbia v. Vinyard*, 901 F. Supp. 2d 77, 85 (D.D.C. 2012) ("[A] child's 'current educational placement' should be the IEP actually functioning when the 'stay put' is invoked" or alternatively, a hearing officer's decision regarding placement, which "must be treated as an agreement between the State and the parents.") (citing *Johnson v. Dist. of Columbia*, 839 F. Supp. 2d 173, 177 (D.D.C. 2012) (internal quotation omitted); *see also Spilsbury*, 307 F. Supp. 2d at 25-26; *Petties*, 238 F. Supp. 2d at 124.[5] Tellingly, Defendants do not address the "stay-put" issue in their Opposition.

D. Ms. Smith did not "voluntarily withdraw" A.J. from Chavez such that the HODs are now nullified.

Until now, the only justification provided for Chavez's refusal to allow A.J. to return to Chavez later this month was that Ms. Smith had "voluntarily withdraw[n]" A.J. on May 17, 2013 when she enrolled A.J. at his "interim placement" for the remaining few weeks of the school year. *See* Email from Principal Irick (August 2, 2013), Dkt. No. 2342-12, Ex. J. Of course, Ms. Smith did this because Chavez had expelled A.J and refused to take him back while she pursued her due process rights, and because she was told she must "withdraw" A.J. from Chavez before he could attend the interim placement suggested by DCPS. *See* Email from Tanya Chor (May 1, 2013), Dkt. No. 2343-1, Corrected Ex. D.

[5] The fact that DCPS sent Ms. Smith an email, after this motion was filed, to schedule a meeting to "[r]eview and [r]evise the IEP, if necessary" and to "[d]iscuss [l]ocation of [s]ervices, if necessary" does not and cannot change the fact that under the HODs DCPS and Chavez must allow A.J. to attend Chavez when the school year begins in two weeks. Dkt. No, 2344-1, Ex. 2 to Opposition.

Apparently recognizing the brazen nature of that excuse, Defendants now seek to cloud the timing and basis for Ms. Smith's decision to enroll A.J. at Ron Brown, claiming that "*following* the May 31, 2013 HOD, she voluntarily enrolled A.J. at [Ron Brown] instead of Cesar Chavez" and that "[a]ccordingly, A.J. enrolled in Ron Brown and was unenrolled from Cesar Chavez." Opposition at 2 (emphasis added). This is just wrong: As explained above and recognized in the August 2 email from Chavez's principal, A.J. was already "unenrolled" from Chavez at the time of the May 31, 2013 HOD, and this was because Chavez had expelled him, he needed to receive interim services somewhere, and DCPS procedures required A.J. to "unenroll" from Chavez before he could enroll at Ron Brown. DCPS's computer system's inability to allow students to be simultaneously enrolled in two schools during the pendency of an IDEA proceeding does not trump that statute's protections. Defendants' argument ignores that A.J.'s "unenrollment" from Chavez and Ms. Smith's choice of an interim placement pending the second due process hearing were the *direct result* of Chavez's failure to provide A.J. FAPE and its unlawful resort to punishment.[6] And it ignores that the Hearing Officer: (1) knew that A.J. had not returned to Chavez at the time of the second hearing on June 19, 2013, Dkt. No. 2342-4, Ex. B, Findings of Fact ¶ 29, at 8; (2) knew that this was because only a few weeks remained in the school year and Ms. Smith sought to have in place the appropriate behavioral supports before returning him to Chavez, *id.*; and (3) still ordered (on July 3, 2013) that DCPS *and Chavez* provide the services he ordered, *id.* at 13-14.

[6] Defendants also seek to downplay the significance of Chavez's refusal to treat A.J. as a continuing student: The letter from Chavez regarding A.J.'s placement on the waitlist, quoted by Defendants, Opposition at 3, 6, mistakenly states that he would be behind only seven others on that list. In fact, A.J. is now number ***thirty-one*** on the waitlist. Email from Ms. Crider, Operations & Compliance Coordinator at Chavez (Aug. 9, 2013), attached hereto as Exhibit 1.

Defendant now also impugns Plaintiff's responsibility, claiming that her "registration attempt was late and faulty," Opposition at 17, and that therefore—despite her diligent efforts to ensure her son's IDEA rights are vindicated, and months of frustration and litigation—it is her simple failure to follow the registration procedures at issue. Again, Defendants are just wrong: Ms. Smith submitted her re-registration for A.J. on April 4, before Chavez unlawfully expelled him. *See* Submission Confirmation Email from Chavez (April 4, 2013), attached hereto as Exhibit 2. Defendants' latest arguments are yet another back-door effort by Chavez to circumvent the HODs and unlawfully "rid itself of a disabled child." *See Cook County*, 103 F.3d at 549.

Conclusion

Defendants' desire to functionally expel A.J.—and to accomplish the same result that the Hearing Officer has already deemed unlawful—is transparent. Ms. Smith therefore respectfully requests that this Court grant the Relief ordered in the May 31, 2013 and July 3, 2013 HODs and the relief requested in Ms. Smith's Motion for a Preliminary Injunction, Dkt No. 2342.

Dated: August 12, 2013

Respectfully submitted,

/s/

Emily B. Read, Bar No. 492773
Julia M. Graff, Bar No. 983511
Ira A. Burnim, Bar No. 406154
The Judge David L. Bazelon Center for Mental Health Law
1101 15th Street, NW, Suite 1212
Washington, DC 20005
(T) (202) 467-5730
(F) (202) 223-0409
emilyr@bazelon.org

juliag@bazelon.org

Shawn R. Ullman, Bar No. 490436
University Legal Services
220 I Street, NE, Suite 130
Washington, DC 20002
(T) (202) 547-0198
(F) (202) 547-2662
sullman@uls-dc.org

Laurel Pyke Malson, Bar No. 317776
Luke van Houwelingen, Bar No. 989950
Crowell & Moring L.L.P.
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(T) (202) 624-2500
(F) (202) 628-5116
lmalson@crowell.com
lvanhouwelingen@crowell.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Emily B. Read, certify that on August 12, 2013, I caused a true and correct copy of the foregoing to be filed with the Clerk of the Court using the CM/ECF system, which will send notice of the electronic filing to counsel for all parties.

/s/ Emily B. Read

Emily B. Read