DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd floor
Washington, D.C. 20002

STUDENT,[1]

Petitioner,

v

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

SHO Case No:
Erin H. Leff, Hearing Officer

HEARING OFFICER DETERMINATION and
DECISION ON MOTION FOR DIRECTED VERDICT

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STUDENT HEARING OFFICE
2011 JUN 10 PM 1:25

DECISION

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STATEMENT OF THE CASE

On March 31, 2011 Student,[2] filed an Administrative Due Process Complaint Notice ("Complaint"), HO 1,[3] requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education ("FAPE") to Student by District of Columbia

[1] Personal identifying information is provided in Appendix A, attached hereto.
[2] Student is nineteen years old and filed on her own.
[3] Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioner's Exhibits will be referred to as "P" followed by the exhibit number; and Respondent's Exhibits will be referred to as "R" followed by the exhibit number.

Public Schools ("DCPS") under the Individuals with Disabilities Education Act, as amended ("IDEA"). 20 U.S.C.A. §1415(f)(1)(A) (Supp. 2010). Respondent filed a Response to Parent's Administrative Due Process Complaint Notice (HO 5) on April 19, 2011. A resolution meeting was held on April 13, 2011. The parties were not able to reach an agreement. However, the parties agreed to extend the resolution period for an additional two weeks. HO 6; R 5. As a result, the 45 day timeline began to run on April 28, 2011, and my Hearing Officer Determination is due on June 10, 2011.

At all times relevant to these proceedings Petitioner was represented by Carolyn Houck, Esq., and Victoria Fetterman, Assistant Attorney General, represented DCPS. I held a telephone prehearing conference on April 28, 2011. HO 7. By agreement of the parties, the hearing was scheduled for May 31, 2011. On May 3, 2011 I held a second telephone prehearing conference to address the status of the case. HO 8. The hearing was held as scheduled on May 31, 2011.

Two matters were addressed prior to the start of the due process hearing on May 31st. At the second prehearing conference the parties had agreed to hold settlement discussions prior to the due process hearing date of May 31, 2011. This agreement was included in my Prehearing Conference Order Amendment of May 3, 2011. HO 8. Several days before the due process hearing Petitioner's counsel notified me these discussions had not occurred, indicating DCPS had stated there would be no settlement of this matter. I attempted to intervene, but my efforts were not successful. At the hearing I admonished Respondent's counsel on the record for DCPS failure to comply with my Prehearing Order Amendment. At the end of the hearing, following closing arguments, Respondent's counsel stated there was email showing that settlement discussions had occurred via email. I stated I would withdraw the admonishment of Respondent's counsel in this HOD should she provide the email she had identified as long as the

email demonstrated actual discussion regarding settlement had occurred. For the reasons that follow, I do hereby withdraw the admonishment.

DCPS' counsel was to provide the email documenting settlement discussions by midnight, May 31, 2011. However, DCPS counsel's office was evacuated. I allowed, under these circumstances, her to provide these documents first thing in the morning on the following day, June 1, 2011. However, on June 1, there was a power outage, and her office was closed. DCPS counsel ultimately was able to provide the referenced email later in the day on June 1, 2011.[4] Petitioner's counsel responded to the provided email indicating Petitioner's view that the email did not indicate there had been settlement discussions. The email states the DCPS representative is willing to work with Petitioner to assist her with her return to school. It also makes clear that the DCPS representative is waiting for Respondent's counsel to return to work before proceeding further[5] with discussions of settlement in order to allow her to confer with counsel.

It is evident that Respondent's counsel and Petitioner's counsel viewed the interactions represented in the email from individual perspectives that supported each individual's perception that the discussions had or had not occurred. It is obvious there was no meeting of the minds as to what compliance with the Preconference Hearing Order Amendment entailed, and, as such, I feel compelled to withdraw the admonishment of Respondent's counsel. In doing so, I recognize Petitioner's counsel's frustration, but frustration is not a basis for admonishing counsel. The email supports Respondent's counsel having communicated with Respondent regarding the need to discuss settlement. The email indicates willingness to proceed with settlement discussions bu t also identifies Respondent's representative's need to communicate further with counsel. As counsel was not in town, this need limited her efforts in the discussion prior to the due process

[4] Respondent's counsel subsequently provided a more formalized copy of the email after I reminded her to do so.
[5] Respondent's counsel was out of town and unavailable for approximately two weeks just prior to the due process hearing.

hearing. Under these circumstances I find there is no basis for admonishment of counsel for a failure to comply with the Preconference Hearing Order Amendment.[6]

I also noted on the record before the start of the due process hearing that Respondent's 5-day disclosures had been filed one day late. I stated, and Petitioner agreed, there had been no resultant harm as the disclosures were filed at 8:30 AM on May 24, 2011 rather than by 5:00 PM on May 23, 2011 as required by my Prehearing Conference Order. It is clear that Respondent's counsel was confused by the holiday that fell in the middle of the disclosure period and while she attempted to attribute the error in establishing the 5-day disclosure due date to me, both petitioner's counsel and I recalled the 5-day disclosure due date had been determined to be May 23, 2011 at the prehearing conference. Moreover my Prehearing Conference Order reflected the actual 5-day disclosure due date of May 23, 2011.[7]

Petitioner withdrew her request for compensatory education at the start of the hearing.

At the close of Petitioner's case, Respondent moved for a directed verdict. I held my decision in abeyance and stated I would include that determination in this Hearing Officer Determination. We then proceeded to closing arguments. At the close of the hearing I requested and received post-hearing briefs on whether the use of the word residence in District of Columbia Municipal Regulations ("DCMR") §§ 3000.1 & 3001(definition of Local Education Agency) made DCPS rather than the independent LEA responsible for child find.

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[6] I note counsel engaged in settlement discussions on May 31, 2011 prior to the start of the due process hearing and were unable to reach agreement.

[7] I note this late filing was one of two late filings in this matter. DCPS also filed its post hearing brief late and only after I reminded counsel it had not been filed when due. In both instances when submitting late filings, DCPS counsel did not notify petitioner's counsel nor me that the filing would be late nor attempt to verify that the late filing was acceptable to opposing counsel. I also note that Petitioner's filings and responses to orders were consistently timely.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (Supp. 2010); 34 C.F.R. § 300.511(a) (2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

ISSUE(S)

The issues are:

1) Whether DCPS denied Petitioner a free, appropriate public education ("FAPE") by failing to comply with the child find requirements of the Individuals with Disabilities Education Act ("IDEA") when Petitioner was not attending school during the 2009 -2010 school year;

2) Whether DCPS denied Petitioner a FAPE by failing evaluate her in all areas of suspected disability after her enrollment in in December 2010;

3) Whether DCPS denied Petitioner a FAPE by failing to implement her IEP after her enrollment in in December 2010. This claim includes an allegation that DCPS did not request the student's records from the student's previous LEA of enrollment,

4) Whether DCPS denied Petitioner a FAPE by failing to develop a transition plan for her after her enrollment in in December 2010; and

5) Whether DCPS denied Petitioner a FAPE by failing to provide her an appropriate placement after her enrollment in in December 2010.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are found in Appendix A.[8]

Exhibits admitted on behalf of Respondent are found in Appendix B.

Exhibits admitted on behalf of Hearing Officer are found in Appendix C.

[8] Exhibit 5 was admitted for the limited purpose of demonstrating there had been on-going discussions regarding Petitioner's enrollment in DCPS and not for establishing the fact of the specific content of the emails.

B. Testimony

Petitioner testified and presented the following witnesses:

Executive Director

DCPS did not present any witnesses.

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

1. Petitioner is years old. P 3. She was a student at the from the 2006 -2007 school year through the 2008 -2009 school year. P 2. These were her through 11th grade school years. She stopped attending after two months in the 08-09 school year because she did not have child care. Petitioner did not enroll in or attend any school during the 2009-2010 school year. Testimony of Petitioner.
2. is its own LEA. R 6. Petitioner has an IEP from dated July 30, 2009. P 3.
3. No one from DCPS contacted Petitioner during the 2009-2010 school year. Testimony of Petitioner
4. Petitioner enrolled in in November 2010. is part of DCPS. Petitioner selected this school program because it is an evening program, and she thought this would allow her to have child care for her son while she attended school.

[9] Petitioner did not introduce Exhibit 7, as it had not been received in time to provide it with the 5 day disclosure. It is listed on Petitioner's 5 day disclosure letter but was not provided at the hearing. did not testify as an expert.

When she registered she provided the registrar a copy of her IEP. The registrar indicated the IEP was not needed but took it and made a copy. Testimony of Petitioner.

5. Petitioner stopped attending in mid-January 2011 because she was only taking two classes, and she did not think she was getting the assistance she needed. Petitioner was taking a general music class and Living Online. She did not have access to a computer for the on-line class. She was in class from 4:30 PM until 8:00 PM including time for a "lunch break." These hours are the total number of hours per day available at Ballou in the evening program. Petitioner was told she could pick other classes in January. Testimony of Petitioner.
6. Each of Petitioner's classes at had one teacher. She does not know whether they had special education certification. She did not see her IEP being used by either of the teachers in her classes. While at Petitioner was not invited to an IEP meeting, No one discussed her IEP with her, and she was not asked to sign a consent for evaluation. Testimony of Petitioner.
7. No one from DCPS contacted Petitioner after she stopped attending Testimony of Petitioner
8. Petitioner enrolled in as of May 11, 2011. Testimony of Petitioner. P.4.[10] This registration occurred following a long process to allow her to register. P. 5.
9. Petitioner is motivated to attend school and obtain a high school diploma. In order to arrange child care she must have a school program assignment and to receive a school program assignment she must have child care. Petitioner has not found a child care sight

[10] The registration document provided at P 4 does not include a signature of a DCPS school official. However, this is the document provided to Petitioner by DCPS when they told her she was registered, and DCPS counsel stated at hearing that Petitioner's registration was not being contested by DCPS.

for her son and has not attempted to use her enrollment at to effect the child care enrollment process. Testimony of Petitioner.

10. is a full time, non public school for students with disabilities. It serves 48 students. The students are enrolled in one of two tracks. Students may obtain an external diploma, or they may be enrolled in a vocational transitional program. Testimony of

11. Petitioner has completed part of the application process for She was evaluated using the Comprehensive Adult Student Assessment System ("CASAS")[11]. She still has to spend two days visiting the program before it can be determined whether she will actually be accepted. Testimony of

12. Should Petitioner enroll in will provide Petitioner with assistance in obtaining childcare for her son. has begun working with an agency that provides support in this area. Testimony of

13. It is unlikely Petitioner would be able to earn a regular high school diploma due to her low skill level and her age. The external diploma also may be difficult for her to obtain. The vocational program would provide Petitioner with an alternative. Testimony of Anthony.

14. The BFTF external diploma is provided by The external diploma is not based on earning Carnegie units. Rather students create portfolios based on life skills. While the external diploma program is not as academic as a standard high school curriculum, it does require that students achieve at the C level (6th or 7th grade level) on the CASAS. Petitioner is not on the C level in math. She is on the A level which is the 3d

[11] The CASAS is an assessment of functional skills in the areas tested. Academic testing would tend to find students' achieving at a lower level than they achieve on the CASAS.

grade level. She is on the 6th grade level in reading. The CASAS assesses students' functional skills. It is likely that Petitioner would test at lower grade levels if she were assessed on a more academic basis. Testimony of

15. Petitioner contacted after being told about the program by a friend. She understands that she will have to work very hard to earn a high school diploma, and she may not be successful. However, she is willing to make the effort. Testimony of Petitioner.

MOTION FOR DIRECTED VERDICT

As noted above, at the close of Petitioner's case, Respondent moved for a directed verdict. I stated I would hold my decision on the motion in abeyance and issue my decision on the motion when issuing this Hearing Officer Determination. Therefore, before addressing the issues raised by Petitioner in her Due Process Complaint I must first determine whether there is a basis for a directed verdict.

Under the Federal Rules of Civil Procedure if a court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for a party that has been fully heard on an issue, the court may resolve the issue against the party and grant a motion for judgment as a matter of law. Fed.R.Civ.P. 50(a) (2009-2010). The federal rule standards are viewed particularly broadly in an IDEA due process hearing where the Federal Rules of Civil Procedure are not binding. "IDEA hearings are deliberately informal and intended to give [hearing officers] the flexibility they need to ensure that each side can fairly present its evidence." *Schaffer v. Weast,* 546 U.S. 49 (2005).

In the instant matter, following Petitioner's presentation of her case Respondent presented no witnesses and moved for a directed verdict, indicating Petitioner had not made her case as a matter of law. As the United States Supreme Court opined,

> the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady* v. *Southern R. Co.*, 320 U. S. 476, 479-480 (1943). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62 (1949). As the Court long ago said in *Improvement Co.* v. *Munson*, 14 Wall. 442, 448 (1872), and has several times repeated:
>
>> . . . . in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed. (Footnotes omitted.)

Anderson et al. v Liberty Lobby, Inc., et al 477 U.S. 242, 251 (1986).

A Motion for Directed Verdict should be granted if there is no genuine issue as to any material fact. In deciding whether there is a basis for a directed verdict, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Ickes v. Flanagan*, (W.D. Pa 2011) Civil Action No. 3:07-143. A genuine issue of material fact exists if "a reasonable jury could return a verdict for the nonmoving party." *Anderson* at p. 248. Further, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment,"[12] and the Respondent would be entitled to judgment as a matter of law. *Anderson* at pp. 247 -8. Material issues of fact are determined by the substantive law. As the *Anderson* Court, at p. 248, opined,

> Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. . . . while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.

[12]Similar standards are applied to motions for summary judgment and motions for directed verdict.

The issues before me fall into two time frames based on Petitioner's enrollment in DCPS. One issue involves events occurring prior to her enrollment in the DCPS in November 2010, and the remaining four issues involve events occurring after her enrollment in the DCPS. The timing of Petitioner's enrollment is pivotal to my determination regarding whether I am able to find there is evidence supporting Petitioner's child find claim, the first issue in her due process complaint. Petitioner's claim that DCPS failed to meet its child find obligation under IDEA requires I find DCPS was, in fact, responsible for child find as to Petitioner during the 2009 - 2010 school year when Petitioner was not attending school. This issue raises a question of whether DCPS had child find obligations when Student was no longer attending a separate LEA in the District of Columbia.

Petitioner references an OSSE memorandum[13] dated March 22, 2010 as a basis for finding DCPS was responsible for child find activities in relation to Petitioner when she stopped attending However, this memorandum does not support Petitioner's position. Petitioner cites footnote 16 of the Memorandum which states, "Because LEA charter schools are not neighborhood schools and do not have geographic boundaries, they are only responsible for child find activities within their LEA. Therefore, DCPS is responsible for all other child find activities for the District of Columbia." Petitioner emphasizes the last sentence regarding DCPS responsibility. In doing this she misses the point that as a Local Education Agency ("LEA") **is** responsible for child find within its LEA.

Respondent points to DCMR §§ 5-3000.1 & 5-3001.1 in arguing that is the responsible LEA and not DCPS. DCMR §5-3001.1 includes public charter schools, such as within the definition of LEA, and DCMR §5-3000.1 establishes that all LEAs within the District of Columbia must make FAPE available to eligible students. Moreover, DCMR §5-

[13] *Memorandum from OSSE, "Comprehensive Child find System,"* March 22, 2010.

3002.1(d) defines what each LEA must do to provide FAPE including activities that would be deemed child find under IDEA - activities such as identification, location and evaluation of all children with disabilities who need special education and related services. See 34 C.F.R. § 300.111.

Here Petitioner was within the LEA when she stopped attending school for the 2009-2010 school year. She was within the LEA because she had been enrolled in and attended the for the prior two school years. had identified Petitioner as a student with a disability, and had provided Petitioner an IEP. Moreover, developed an IEP for Petitioner in July 2009 for the 09/10 school year, reflecting the view that Petitioner was a special education student within the LEA. Petitioner remained a student within the until she voluntarily registered in DCPS in November 2010. It is clear that whatever child find activities should or should not have occurred in relation to Petitioner during the 2009 -2010 school year were the responsibility of and remained responsibility until Petitioner registered at in November 2010.[14] I therefore GRANT Respondent's Motion for a Directed Verdict as to the first issue in this matter:

> Whether DCPS denied Petitioner a free, appropriate public education ("FAPE") by failing to comply with the child find requirements of the Individuals with Disabilities Education Act ("IDEA") when Petitioner was not attending school during the 2009 -2010 school year.

not DCPS, was the responsible LEA when Petitioner stopped attending school in the 2009 -2010 school year until she entered in November 2010. Therefore, DCPS did not deny Petitioner a FAPE by failing to comply with the child find requirements of the IDEA when Petitioner stopped attending school in the 2009 -2010 school year.

[14] I do not address here whether either LEA was responsible for particular child find activities as to Petitioner as I must first address the threshold question as to which LEA was responsible for Petitioner after she stopped attending IDEAPCS and before she entered Ballou.

The remaining four issues in this matter involve actions taken or not taken by DCPS after Petitioner's enrollment at in November 2010. To address Respondent's motion for a directed verdict I must determine whether Petitioner has established a genuine issue of material fact under any or all of these four issues. In these remaining four matters matter, I am convinced there are issues of material fact and, therefore, will not take the discretionary action of finding for Respondent on the remaining issues as to the Motion. Petitioner has presented evidence raising issues that must be addressed to determine whether DCPS has met the requirements of IDEA and provided Petitioner a FAPE. Specifically Petitioner has raised issues regarding DCPS failure to implement an IEP Petitioner provided upon her enrollment in Petitioner's uncontroverted testimony is that no one discussed her special education needs or asked her to sign a consent for evaluation during her time at I must determine whether DCPS had an obligation to provide Petitioner services or attempt to evaluate her upon her enrollment. The issues regarding evaluation and provision of services are must be resolved in order to reach determinations about the remaining two issues regarding the development of a transition plan and the provision of an appropriate placement. Reviewing the evidence presented in the light favorable to Petitioner, I find Petitioner has presented material facts which must be addressed to determine whether DCPS had an obligation under IDEA to provide any of these activities. I therefore **DENY** Respondent's Motion for a Directed Verdict as to issues 2 -5 and will address them below in my determination on the merits.

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. I find all witness testimony presented in this matter to be credible.

Whether DCPS denied Petitioner a FAPE by failing to evaluate her in all areas of suspected disability after her enrollment in in December 2010.[15]

Petitioner attended the for the 2006 -2007 school year through the 2008 -2009 school year. These were her 9th through 11th grade school years. She stopped attending after two months in the 08-09 school year because she did not have child care. Petitioner did not attend any school during the 2009-2010 school year. Thus Petitioner was attending the for three years. She dropped out of school in the 2008-2009 school year while still an student. was, responsible, therefore, for her education. In fact, developed an IEP for Petitioner in July 2009 for the 2009-2010 school year, thereby supporting the view that Petitioner was a student in the However, Petitioner never attended school in the 2009 – 2010 school year.

Petitioner's next attempt to participate in an educational program came in November 2010 when she enrolled in an evening school program in DCPS. When Petitioner enrolled in she provided a copy of her July 2009 individualized education program ("IEP"). The registrar at copied the IEP, but stated it was not needed. This contradiction in statements and actions reflects the conflicts in Petitioner's enrollment, DCPS' response to her enrollment and the legal requirements for providing a FAPE to an eligible student.

In the circumstances described Petitioner, upon her enrollment in was a student who had a history of eligibility under IDEA who transferred from one LEA to another LEA

[15] All issues state Petitioner entered Ballou STAY in December 2010. However, Petitioner's uncontroverted testimony at hearing was that she entered Ballou STAY in November 2010. I, therefore, find her date of entry was in November 2010 and so state in my findings of fact. I use the entry date of November 2010 in my discussion herein.

within the same state, the District of Columbia.[16] Petitioner transferred to DCPS in November 2010, the middle of the 2010-2011 school year..

It is uncontested that this evaluation process was not initiated when Petitioner was enrolled in Yet IDEA and DCMR § 3002.1(d) require DCPS to have procedures in place to identify and evaluate all children with disabilities residing in the DCPS who are in need of special education and related services. When Petitioner entered and provided her IEP from received notice that Petitioner was potentially eligible for special education and related services under IDEA, and the evaluation process should have been initiated. *See* 34 C.F.R. § 300.111. To initiate this process requires obtaining consent. DCPS would then have had 60 days from the date of receipt of consent to complete the evaluation and determine whether Petitioner was eligible for special education and related services. But no one asked Petitioner to consent to an evaluation so no evaluation occurred. Petitioner eventually left in mid-January 2011. 34 C.F.R. §§ 300.301 & 300.323.

Respondent argues that Petitioner attended only for approximately 2 months and that some part of this time was vacation time – Thanksgiving and winter breaks. The implication is that this time period was not long enough for an evaluation to occur. While the limited extent of Petitioner's attendance at is not contested, the duration of her attendance is not relevant in determining whether DCPS was required to initiate the evaluation process. Obtaining Petitioner's written consent to the evaluation should have occurred when DCPS received notice of her history of special education eligibility. Petitioner's pre-existing IEP demonstrated she was potentially eligible for special education and related services at the time she entered Her leaving school after only a few weeks of attendance did not relieve DCPS of its responsibility to

[16] For purposes of the discussion, herein, the District of Columbia is treated as if it were a State. Requirements that apply to the state under the IDEA apply to the District of Columbia.

attempt to evaluate her. Both IDEA regulations and DCMR regulations require DCPS to identify, locate and evaluate all students potentially eligible for special education and related services. Yet this did not occur. Thus I find DCPS denied Petitioner a FAPE by failing to evaluate her in all areas of suspected disability after her enrollment in

Whether DCPS denied Petitioner a FAPE by failing to implement her IEP after her enrollment in in December 2010. This claim includes an allegation that DCPS did not request the student's records from the student's previous LEA of enrollment, IDEA PCS;[17]

As noted above, Petitioner entered in November 2010. This was the middle of the school year. It followed the 2009- 2010 school year in which Petitioner did not attend school in her prior LEA. As discussed above, DCPS, rather than being obligated to provide services under Petitioner's out dated July 2009 IEP,[18] was obligated to initiate an initial evaluation process. Part of this evaluation process would have included contacting Petitioner's prior LEA to obtain her school records including, among other items, existing evaluation data and teacher observations, following obtaining consent for evaluation. 34 C.F.R. §300.305. As DCPS did not initiate the evaluation process, they did not request records from her prior LEA.

I find that DCPS did not fail to provide Petitioner a FAPE by failing to implement her July 2009 IEP. DCPS was not required to do so. However, I find further that in connection with my finding that DCPS denied Petitioner a FAPE by failing to evaluate her upon her enrollment in

DCPS also was obligated to contact to obtain Petitioner's prior school records. Therefore, DCPS' failure to request records from was a failure to provide FAPE that is subsumed in the failure to evaluate Petitioner as discussed above, at pp. 14 -16.

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[17] See FN 14.

[18] If Petitioner had enrolled in DCPS in the 2009-2010 school year, it could have been argued under 34 C.F.R. §300.323(e) that DCPS was required to provide comparable services to the IEP upon her enrollment.

Whether DCPS denied Petitioner a FAPE by failing to develop a transition plan for her after her enrollment in in December 2010;[19]

Whether DCPS denied Petitioner a FAPE by failing to provide her an appropriate placement after her enrollment in in December 2010.[20]

The above two issues are grouped for determination as the law is similar as to both. Neither of these issues is ripe for resolution. Determining ripeness requires an evaluation of

> "the fitness of the issues for . . . decision and the hardship to the parties of withholding . . . consideration." Abbott Labs., 387 U.S. at 149, 87 S.Ct. 1507. In addition to evaluating "whether delayed review would cause hardship" . . . , [the hearing officer] must consider "whether judicial intervention would inappropriately interfere with further administrative action" and "whether the courts would benefit from further factual development of the issues presented." Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998). Thus the fitness of an issue for review depends on whether (1) "the issue presented is a purely legal one," (2) "consideration of that issue would benefit from a more concrete setting," and (3) "the agency's action is sufficiently final." Ciba-Geigy, 801 F.2d at 435; *see* Abbott Labs., 387 U.S. at 148, 87 S.Ct. 1507; Nevada v. Dep't of Energy, 457 F.3d 78, 85 (D.C.Cir.2006). In Bennett v. Spear, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997), the Supreme Court, in interpreting the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, held that the finality of an agency's action depends on whether it marks the "consummation of the agency's decision making process" and is not "of a merely tentative or interlocutory nature," and determines "rights or obligations" or is otherwise an action "from which legal consequences will flow" (quotation marks omitted).

Reckitt Benckiser Inc. v. EPA, 613 F. 3d 1131 (Ct. of App., DC Circuit, 2010).

As discussed above, DCPS was obligated to initiate an evaluation process once Petitioner enrolled in Ballou. This process would have determined whether Petitioner was eligible for special education and related services upon her enrollment in DCPS, and, if Petitioner was found eligible, DCPS would have been required to develop an appropriate IEP and determined an appropriate placement. None of these activities occurred.

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[19] See FN 14.
[20] See FN 14.

A transition plan is part of an IEP for special education students who are age 16 or older. 34 C.F.R. §300.320(b). A transition plan is not developed as an independent document. Where, as here, an evaluation has not taken place, the need to develop an IEP was not established and, therefore, the subsumed need to develop a transition plan for Petitioner, a student over the age of 16, was not established.

Using the *Reckitt* analysis, cited above, the issue of whether Petitioner should have a transition plan is purely legal. More concrete information regarding Petitioner's special education status is needed before the need for a transition plan can be established and determination of Petitioner's eligibility for special education services is the final agency action which must occur in order to establish whether Petitioner has a right to a transition plan from DCPS.

For similar reasons, Petitioner's need for an appropriate placement cannot be decided here. DCPS has not yet evaluated Petitioner to determine whether she is eligible for special education services. While Petitioner has provided evidence that she may be eligible for special education and related services under IDEA, an evaluation has not occurred. BFTF provided an evaluation of Petitioner's functional skills but did not, and could not, determine her eligibility for special education upon her enrollment in DCPS. The determination of eligibility is an LEA responsibility. Petitioner has presented as an appropriate placement, but the appropriateness of any placement cannot be determined unless Petitioner is found eligible for special education and related service and an IEP addressing her individual needs is developed. After the IEP is developed a placement in the least restrictive environment in which the IEP can be implemented is determined. 34 C.F.R. §300.114. Under the circumstances before me, this placement issue, like the issue regarding the transition plan, is not ripe for determination. A legal

determination regarding Student's eligibility for special education and related services based on an evaluation performed by DCPS must be made and an IEP developed to meet Petitioner's identified needs before a determination of appropriate placement can be made.

I find, therefore, that both the issue regarding the development of a transition plan and the issue regarding the provision of an appropriate placement are not ripe and must be **DISMISSED**.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

1. Respondent's Motion for Directed Verdict as to Issue 1, the claim that DCPS failed to provide Petitioner a FAPE by not complying with the child find requirements of IDEA during the 2009- 2010 school year is **GRANTED.**
2. DCPS failed to provide Petitioner a FAPE by failing evaluate her in all areas of suspected disability after her enrollment in This denial of FAPE includes DCPS failure to request Petitioner's education records from her prior LEA.
3. DCPS did NOT deny Petitioner a FAPE by failing to implement her IEP after her enrollment in
4. Issues 4 and 5 regarding the development of a transition plan and the provision of an appropriate placement are **DISMISSED** for lack of ripeness.

ORDER

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

DCPS shall provide Petitioner's counsel with the necessary forms for Petitioner to provide written consent for evaluation within 5 days of receipt of this Hearing Officer Determination. Once DCPS has received Petitioner's signed consent for evaluation, the evaluation process shall proceed on an accelerated basis. The evaluation process shall be completed, an IEP developed and a placement provided, if Petitioner is found eligible, in time to allow Petitioner to enroll in school on the first day of the 2011-2012 school year. Petitioner's counsel or advocate shall be allowed to participate in all meetings, if Petitioner so chooses, regarding or involved in the evaluation, IEP and placement process.

IT IS SO ORDERED:

June 10, 2011
Date

Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).