DUE PROCESS DECISION

I.

Procedural History

A due process hearing was held as a result of a request by the attorney for the Petitioner. The hearing request was received by the State Department of Education on November 18, 2014. (Hearing Officer Exhibit 1); (hereinafter referred to as “HO1”).

The hearing request was made pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). 20 U.S.C. §1400 et seq. The initial due process complaint involved a claim that the school system violated its obligation under child find. 20 U.S.C. §1412(a)(3)(A). The principle of child find involves the obligation of a school system to locate, identify, and evaluate a child for special education services. Id. In addition, it was asserted in the complaint that after the referral of the child for special education services the school system had not properly evaluated the child.
Lastly, a procedural issue was raised as a result of the due process complaint allegation that personnel for the local education agency who attended referral and special education eligibility meetings regarding the child did not consider the parents of the Petitioner as equal participants in the development of the child’s educational program.

On November 25, 2014, a prehearing conference was held in this matter. (HO2). At that time, counsel for the school system stated that the child had been referred by the parents for a special education evaluation. That referral was the second referral by the parents. As a consequence, the school system undertook preliminary steps to conduct an in-house evaluation of the child. The parties mutually requested an extension of the 45-day deadline for a decision in response to the due process complaint. Ala. Admin. Code 290-8-9-.08(9)(c)12(v).

As a result of the in-house evaluation of the child by the school system, an eligibility meeting was convened on [ ], 2015. At that time, the Petitioner was found eligible for special education services. The category of disability designated for the child was [ ]. The child suffers from [ ]. (Prior to the determination of eligibility for special education services, the child received §504 services. Those services were initiated at the beginning of the 2014-2015 school year).

[ ] means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment that is due to chronic or acute health problems including conditions such as [ ]. 34 CFR §300.8(c)(9)(i). The chronic or acute health problem must adversely affect the child’s educational performance. Id.
It was the assertion of the parents that the personnel at the [ ] school that Petitioner attended should have recognized the condition of [ ] (or some other disabling condition) because the child was experiencing behavioral and academic difficulties.

The school system responded that it had no reason to suspect a disability. It maintained that although Petitioner may have been diagnosed with [ ], that condition did not adversely affect the child’s educational performance. Educational performance includes academic, social/emotional, and/or communication skills. Ala. Admin. Code 290-8-9-.00(4).

Counsel for the school system also maintained that the child’s §504 plan was adequate for his needs. 20 U.S.C. §794 (Rehabilitation Act of 1973). In that regard, counsel for the local education agency produced evidence that new and additional circumstances resulted in the child being found eligible for special education services shortly after the second semester of the 2014-2015 school year began.

Counsel for the Petitioner also alleged procedural violations of the IDEA by the school system. A procedural violation of the IDEA may only entitle a parent to relief if the violation impeded the opportunity of the child to receive a free appropriate public education, caused him a deprivation of educational benefits, or significantly impeded the parent’s opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the child. 20 U.S.C. §1415(f)(3)(E)(ii)(I-III).

The due process hearing was held on February 2, 2015 and February 3, 2015. The hearing resumed on February 13, 2015. It concluded on that date. The lawyers for both parties filed post-hearing briefs and arguments. (HO4 and HO5).
At the request of the parents of the child, the hearing was closed. The witnesses were sequestered by agreement of the counsel for the parties. The presence of the Petitioner was waived. However, Petitioner appeared during the morning session of the due process hearing held on February 2, 2015.

Petitioner was represented at the hearing by his lawyer. Both of the Petitioner’s parents were present throughout the proceedings.

The Tuscaloosa County Board of Education was represented by its attorney. The special education director for the school system served as the representative for the local education agency.

II.

Statement of Issues

In order to comply with the IDEA, a school system must satisfy the statutory procedural safeguards. Hendrick Hudson Central Sch. Dist. v. Rowley 458 U.S. 176, 188-189 (1982). It must also comply with its substantive duties relating to identification, evaluation, educational placement, or the provision of a free appropriate public education to a disabled student. Id. at 206-07; 20 USC §1415(b)(6)(A).

The initial issue in dispute was procedural in nature. Petitioner’s lawyer maintained that the parents of the child were not treated as equal partners in their participation at the referral/eligibility meetings. The testimony at the due process hearing focused primarily on the alleged failure of referral team members/eligibility team members to consider medical information, data, and videos of the child reading when various meetings were conducted by the local education agency with the participation of
the boy’s parents. The attorney for the parents insisted that the school system personnel in attendance ignored the information provided by the parents as well as the information that the school system itself developed in its evaluation of the child for special education services.

The primary substantive issue was one of an alleged violation of the principle of child find. 20 U.S.C. §1412(a)(3)(A).

The second substantive issue was that once the school system referred the child for an evaluation, it ignored parental information, information developed by its personnel and medical diagnosis of the child’s condition of [ ] when it initially concluded that the child was ineligible for special education services in [ ] of 2014.

III.

Findings of Fact

Petitioner is [ ] years old. He was born in [ ]. He is the son of [ ] and [ ] He lives with his parents in [ ], Alabama.

Petitioner is a [ ] grader in the Tuscaloosa County School System. He is enrolled in an [ ] school operated by the school system. He has been at that [ ] school since [ ].

Petitioner has been diagnosed with [ ] disease by two medical doctors as well as a neuropsychologist and a psychiatrist. It appeared from the evidence that the Petitioner’s family doctor and a psychiatrist to whom the child was referred diagnosed him with that condition from observation. As a result of those diagnosis, the child was evaluated by a [
] in [ ], Alabama. That individual is [ ]. [ ] testified at the due process hearing as an expert for the Petitioner.

Following his evaluation of the child, [ ] referred Petitioner to a neurologist at the [ ]. The neurologist confirmed the diagnosis of [ ].

The psychiatrist who treats the child has prescribed several medications for the Petitioner. The medicines are for [ ] and [ ]. The child also receives an [ ]. [ ] stated that in [ ] of 2014, the child began to take medication to control his [ ] and [ ] [ ] and [ ].

On [ ], 2014, the child was evaluated by [ ]. (Petitioner’s Exhibit 1 p. 53), (hereinafter referred to as “P-____”).

[ ] testified that before beginning his evaluation, he observed the child. From his observation he believed that the child suffered from [ ]. Nevertheless, [ ] conducted additional assessments and tests to confirm that diagnosis. [ ]’s assessments also sought to determine if the child suffered from [ ] [ ]’s testing confirmed the diagnosis of [ ] but indicated that the child did not suffer from [ ].

[ ] disease or [ ] is characterized by [ ]. It is sometimes accompanied by [ ]. [ ] expressed that symptoms in the nature of [ ] are rare.

According to [ ], individuals who are diagnosed with [ ] have a high degree of learning disabilities. [ ] stated that there was a sixty to eighty percent chance of such individuals having a learning disability. Persons suffering from [ ] also suffer from [ ] disorders. In the case of Petitioner, [ ] expressed that the Petitioner had [ ]. The mother of the child confirmed signs of that disorder [ ] testified that the child was often unable to write a word or lesson on paper. [ ] explained that the [ ] of a child with [ ]/[ ] becomes
such that he/she are afraid to act for fear that their answers will be incorrect or will result in castigation.

[ ] usually begins in childhood. [ ] remarked that young children with [ ] get into trouble in school and other places for making noises. When the child tries to control the condition, it makes it worse. It increases the child’s [ ]. [ ] added, however, that children with [ ] are often skillful in disguising [ ], etc. But ultimately, continued observation of such children will reveal that something is not right.

In his testimony [ ] said that approximately a [ ] of patients with [ ] will improve over their lifetime. In another one [ ] there will be no change in their condition. In the remaining one [ ], their condition will worsen. [ ] commented that the signs and symptoms of [ ] will “travel”. By that, [ ] explained that he meant that one day the symptoms may manifest themselves as a [ ] and on another day they may manifest themselves in an entirely different manner such as [ ] or other similar involuntary body movements.

[ ] testified that he saw the Petitioner as a result of the concern of the parents’ about Petitioner’s academics. He remarked that [ ] reported that her child’s grades had “plummeted”. Although there was testimony that the child consistently did well in his academics, the grades of the child for the 2013-2014 school year that were entered into evidence revealed scores ranging from a [ ] to [ ]. Most were in the [ ]’s and [ ]’s. (P. 7 and P. 8)

Upon testing, Dr. [ ] expressed that Petitioner had very poor handwriting. [ ] described Petitioner’s handwriting as “[ ]”. 
As a result of the standardized test he administered, [ ] stated that Petitioner’s academic achievement was adequate. Nevertheless, in the opinion of [ ] Petitioner had poor math skills. [ ] testified that what he was seeing in the youngster was an “emerging [ ] disorder”.

Before the beginning of the 2013-2014 ([ ]) school year, the principal of the [ ] school that Petitioner attended met with [ ] [ ] expressed that her son had a great deal of [ ] about returning to school. According to the principal, at that meeting she told [ ] that if it were her (the principal’s) child she would take him to a doctor. ([ ] responded that that remark was made by the principal later in the school year).

[ ] testified that the [ ], [ ] sound, [ ] clearing, and other [ ] movements of her son became quite noticeable at the beginning of the second semester of Petitioner’s [ ] grade school year. That school year was the 2013-2014 school year. [ ] related that her son would move his fingers [ ], [ ] at his fingers and nails and make [ ]. [ ] said that those were the symptoms of [ ]. According to [ ], the disease can affect the patient in both his motor movements and his vocalizations. [ ] added that despite unusual movements and noises there is often a delay in the diagnosis of a person who suffers from [ ]. That delay usually occurs because of the youth of an individual. Because almost all young children engage in movement, fidgeting and similar behavior, [ ] explained that frequently the behavior of a child suffering from [ ] is ignored.

Because of the increase in Petitioner’s involuntary movements and [ ], [ ] asked her son’s [ ] grade teacher about those conditions. The [ ] grade teacher responded that she had never observed Petitioner engage in such movements at school.
[ ] was also concerned about Petitioner’s behavior. He was talking out in class, he would not listen to his teachers, and he was not following directions. [ ] testified that she expressed her concerns to the [ ] grade teacher.

In early [ ], 2014 of the second semester, the Petitioner was counseled about an [ ] book that he and another student had found in the library. Because the children were laughing and commenting on the pictures in it ([ ], etc.) the [ ] grade teacher referred the children to the principal. The principal discussed the matter with the Petitioner.

When [ ] learned of the counseling, she was upset. She stated that she did not believe that school system personnel should be counseling children on adult matters. The next day, [ ] went to the [ ] school. She met with the principal and the [ ] grade teacher. According to [ ], both individuals agreed that her son could not control himself. They said that Petitioner was having behavior issues. The child was reported to be always [ ]. Both principal and teacher indicated that they suspected that the Petitioner suffered from [ ]. The principal suggested to [ ] that the youngster needed to be medicated.

[ ] insisted that it was at that meeting that the principal told her that if it was her (the principal’s) child, she would take him to the doctor. [ ] acknowledged that the principal’s remark was made after the [ ] grade teacher left the meeting.

In their testimony, both the [ ] grade teacher and the principal denied ever making the comments attributed to them at that meeting. However, both agreed that they told [ ] that her son “talked a lot”.

On [ ], 2014, [ ] returned to the [ ] school. She complained to the [ ] grade teacher that Petitioner was making noise when reading, that he was pausing when he read almost
as if he had a stutter, and that Petitioner was unable to read sequentially. Although the [ ] grade teacher agreed that [ ] made that complaint to her, she told [ ] that she did not see any of those conditions or symptoms at school. The parent responded that she was taking the child to a doctor.

The next week, the parent took the child to the family doctor. Upon observation, the physician concluded that Petitioner suffered from [ ]. He referred Petitioner to a psychiatrist. The psychiatrist diagnosed Petitioner with [ ] “with general [ ]”. (P. 1 p. 202). [ ] related that a diagnosis of “general [ ]” may include other conditions such as [ ], [ ], and [ ].

On [ ], 2014, the parents referred the child for special education evaluation. (P.1 p. 138; P-6). [ ] discussed the referral with the special education teacher at the [ ] school that her son attended. According to [ ], the special education teacher responded that the school had never had a student with [ ].

On cross-examination the parent admitted that before [ ], 2014 she did not discuss with the [ ] grade teacher that she ([ ]) was observing Petitioner [ ] his fingers or engaging in unusual movements and vocal [ ] at their home.

Upon Petitioner receiving the diagnosis of [ ], [ ] began to investigate that condition. A [ ], 2014, a referral for special education services meeting was scheduled. The meeting was held a few days before school ended for the 2013-2014 school year. The parent compiled a packet of information regarding [ ]. She brought the packet to the meeting. In addition, she had four videos of the child reading. (P. 11). Two of the videos were made on the same date that her son saw the family’s doctor. That was the
week of [ ], 2014. (P.1 p. 9). The remaining two videos were made on separate dates after the initial videos.

The referral meeting was attended by the [ ] school special education specialist, the principal, the [ ] grade teacher, a special education teacher, a second general education teacher, Mr. and Mrs. [ ] and the sister of [ ]. The [ ] of [ ] is a teacher.

At the referral meeting, [ ] stated that she was having to force the child to go to school. She related that the [ ] of the boy was such that he did not want to attend school. The [ ] grade teacher and the principal responded that based on their observations of the child at school, he was happy.

The principal had known Petitioner since he was in preschool. The principal attended the same [ ] as the youngster and Mr. and Mrs. [ ]. At the referral meeting the principal expressed to [ ] that she (the principal) had frequently observed the child in his [ ] grade class and had never observed anything unusual in his behavior or mannerisms.

[ ] and the witnesses for the school system stated that the packet of [ ] information was examined by the members of the referral team. All agreed that due to the volume of it, it was not read or discussed in detail.

[ ] expressed that she asked the persons at the meeting to look at the videos of her child reading. According to her, most of the persons declined to look at it. However, the testimony of the principal and the [ ] school special education specialist was that they did review the video after the meeting concluded. (The [ ] grade teacher did not view it because she was retrieving work samples of the child).
A portion of the testimony of what occurred at the referral meeting was in dispute. [ ] insisted that the teachers indicated that Petitioner might have a [ ] disability. All of the school system personnel present at the meeting denied that any of them made such a comment. Instead, the [ ] grade teacher stated that her testing showed that the child had retained what he had learned throughout the 2013-2014 school year.

[ ] told the referral team that she believed that the Petitioner should receive special education services as an [ ] student ([ ]). [ ] demanded an individualized education plan (IEP) for her son. She explained that the school system’s response to her demand was that the Petitioner had not demonstrated any academic or behavior difficulties that would warrant an IEP.

The referral team and the parents discussed the possibility of additional testing of the youngster. The testing would be conducted during the summer. After the referral meeting concluded, the school system personnel actually offered to test and evaluate the child during the summer of 2014. The special education specialist remarked that she made that decision based on the video of the child reading. From the video and the child’s difficulties that were depicted in it, the special education specialist concluded that additional reading tests should be administered to the child.

The testimony at the due process hearing revealed that it was the belief of Mr. and Mrs. [ ] that the child’s medical diagnosis required an IEP. Their view was expressed at the referral meeting. In response, school personnel insisted that they made the parents aware that in addition to a medical diagnosis, the child needed an educational evaluation in order to have an IEP.
On [ ], 2014, the child was tested by a school psychologist employed by the local education agency. The psychologist stated that during her testing she saw no evidence ([ ], etc.) that would support a diagnosis of [ ]. She commented that the behavior scale regarding the child completed by the parent on [ ], 2014, indicated that the child was within normal limits of externalizing (i.e., movements, [ ], expressions of [ ], etc.). The psychologist admitted that Petitioner did resist the portions of the achievement test she administered which required him to write. Nevertheless, the achievement test, behavior scales, and class work she reviewed showed that Petitioner had learned in the [ ] grade. In her view, if the child suffered from a disabling condition, he could not have scored in the above average range that he achieved as a result of the assessments she administered.

As a result of the completion of the testing by the school system and the compilation of other evaluation materials, a special education eligibility meeting was scheduled for [ ], 2014.

[ ] testified that at the eligibility meeting the teachers and personnel for the school system who were present suggested that her son had a [ ] disability. The parents believed that Petitioner should be designated for special education services under the category of [ ]. [ ] said that school system personnel responded that the child was too smart for an IEP. According to [ ], they stated that the child’s curriculum would be changed if the child received an IEP. Mr. and Mrs. [ ] wanted an IEP for the boy but they did not want any change in his curriculum.

In response to that testimony, school system personnel maintained that the members of the eligibility team in no way indicated that the child had a disability.
According to several of the persons who attended the meeting, all of the remaining members of the team believed that the child was progressing. The youngster was meeting State Department of Education standards. Only the parents disagreed with those views. However, because members of the team employed by the school system had reviewed the video which revealed Petitioner’s difficulty reading as well as their having been made aware of the medical diagnosis of [ ], school system employees stated that they proposed a §504 plan for the child. That §504 plan was to be in place prior to the beginning of the 2014-2015 school year when Petitioner would enter the [ ] grade.¹

[ ] testified that she believed that her child should have been found eligible for special education at the [ ], 2014 eligibility meeting because a medical diagnosis should “trump” an educational diagnosis. Once again school system officials advised her that Petitioner needed an educational evaluation to qualify for special education services. [ ] acknowledged that she was aware that that was the position of the local education agency.

School system personnel added that they ruled out eligibility of Petitioner as an [ ] or [ ] individual because the child did not meet the State Department of Education criteria for those categories. (P.1 p. 48). Ala. Admin. Code 290-8-9-03(9)(b)-(c) (criteria for [ ]); Ala. Admin. Code 290-8-9-03(10)(b) (criteria for [ ]).

At the conclusion of the eligibility meeting, the parents declined to sign the eligibility form. (P. 1 p. 48). Mr. and Mrs. [ ] were upset that their son had not received

¹ §504 prohibits discrimination against individuals with disabilities including discrimination in educational activities. 20 USC §794. A student with a §504 plan may receive various accommodations to assist him/her (longer time to complete assignments, etc.)
an IEP. School system personnel responded that a §504 plan would be drafted for the child before he entered the [ ] grade for the 2014-2015 school year. The personnel for the school system testified that they concluded that the child needed a §504 plan because of his medical diagnosis of [ ] and the difficulties he had in reading as depicted by the videos made by [ ]

On [ ], 2014, a §504 meeting was held. (P.1 p. 197). In addition to §504 accommodations, a functional behavior analysis (FBA) and a behavior intervention plan were proposed. Petitioner’s [ ] grade teacher was assigned to record the data for an FBA. After that data was compiled, a behavior intervention plan was to be implemented to address any behavior difficulties that interfered with the youngster’s education.

[ ] testified that between [ ], 2014, and [ ], 2014, her son went to the school nurse or left the [ ] grade classroom and stayed in the hallway [ ] times. She was concerned that her son was losing instruction at such times. She stated that Petitioner was suffering from [ ] and [ ] as a result of being overwhelmed by the tasks proposed by his teacher. The [ ] grade teacher who was collecting the FBA data responded that the child was trying to avoid tasks. She noted no severe [ ]. As a result of her observations, her hypothesis of the cause for Petitioner’s leaving the classroom was task avoidance. (P.1 p. 217). The [ ] grade teacher agreed that Petitioner would leave the class particularly when her students were asked to write.

[ ] explained that her concern increased because her son was once again reluctant to go to school. It was difficult to arouse the child each morning to take him to school. There was no real beneficial change in his behavior. Petitioner was increasingly anxious
when he returned home each day after school. [ ] commented that when she brought that information to the attention of school system personnel, staff again responded that they were not seeing at school what [ ] was complaining about.

It was during that period the child began to take [ ] to control his [ ].

Before requesting a meeting with the [ ] grade teacher about her ([ ]’s) concerns, [ ] spoke with the child’s psychiatrist. [ ] requested a letter from the psychiatrist to the school system. On [ ], 2014, the psychiatrist wrote the school system. (P.1 p. 200). The psychiatrist asked for modifications in Petitioner’s §504 plan. The psychiatrist requested extra time for Petitioner to complete work, dividing work into smaller parts, and a quite environment for the boy. [ ] insisted that none of those modifications/accommodations were implemented by the school system.

On [ ], 2014, [ ] met with the [ ] grade teacher. According to [ ], the [ ] grade teacher agreed that she was seeing the [ ] and other behaviors that the parents had been observing since [ ] 2014. [ ] stated that the [ ] grade teacher remarked that the youngster was “lost” in her class. [ ] related that the [ ] grade teacher said that Petitioner needed an IEP. The teacher agreed that the behaviors of Petitioner that [ ] (and the teacher) had seen at the beginning of the school year were now getting worse.

The [ ] grade teacher denied that she made such statements to [ ] Instead, the [ ] grade teacher viewed the younger’s [ ] and movements as insignificant. Nevertheless, because of the parents’ concern, the [ ] grade teacher suggested that the §504 plan be revised. She told [ ] that additional accommodations could be made for the child. As a
result of that meeting, school system personnel intended to meet on [ ], 2014, to review Petitioner’s §504 plan.

Because of her dissatisfaction with her meeting with the [ ] grade teacher, the parents initiated another referral for a special education evaluation. (P.1 p. 38). [ ] submitted her second request for special education evaluation on [ ], 2014. (P. 9). The parents of Petitioner asked for a revaluation of their son to include an assessment in the areas of academics, physical, psychiatric, and motor skills. (Id.) The purpose of their requested evaluation was to provide information to develop an IEP that met the child’s educational needs.

Petitioner’s [ ] grade teacher and the special education specialist for the [ ] schools agreed that throughout this period the parents were maintaining that a medical diagnosis was all that was needed to receive special education services. Both individuals stated that they explained to the parents of Petitioner several times that additional educational evaluations that supported the need for special education services were required by the State Department of Education. The teacher and the specialist told the parents that the disabling condition must impact the child’s educational performance. Based on Petitioner’s behavior/academics that impact did not exist.

On [ ], 2014, a special education referral meeting was held (P. 4). Both Mr. and Mrs. [ ] attended. An advocate attended on their behalf. That individual had a child diagnosed with [ ]. [ ] testified that she described to the referral team members that her son was becoming increasingly angry because he was frustrated and anxious. [ ] was also concerned with Petitioner’s academics. In that regard, it appeared that the child was on
the [ ] honor roll. Yet the grades that the parents were seeing were much poorer. According to [ ], the [ ] grade teacher responded that what the youngster “could not do” was not counted against him. [ ] said that the [ ] grade teacher continued by stating that she did not count against Petitioner the work that he was afraid to do or the work that he did that was incorrect.

In her testimony, the [ ] grade teacher said that she explained to the parents that what she did was an accommodation to the child. She described that the final grades that Petitioner received were “accommodating grades”. The teacher expressed that she believed that she had enough tests that Petitioner had completed so that she could provide his parents with an accurate assessment of his performance outside of the actual grades that he achieved.

The special education specialist acknowledged that the accommodating grades were not indicated on the Petitioner’s report card. They should have been. She explained that situation to the parents. The specialist testified that she told the [ ] grade teacher that the type approach that the teacher used should be made known to the parents. [ ] responded that she was not told what the teacher was doing regarding her son’s grades until the referral meeting.

The special education specialist commented that what the [ ] grade teacher and parents were observing at that time with respect to the child’s movements and [ ] symptoms were “drastically different” from what was observed and discussed at the [ ] 2014 referral meeting or the [ ] 2014 eligibility meeting. The [ ] school counselor remarked that Petitioner’s behavior during his [ ] grade year was much different than the
previous year. Petitioner [ ] more, he made more [ ] movements, and when teachers spoke to him, he would respond by saying “[ ].” Because of these new circumstances, members of the referral team told Mr. and Mrs. [ ] that the school system was willing to conduct additional tests and evaluations of their child. Each of the members of the team testified – and [ ] agreed – that the parents did not want additional testing. [ ] explained that the rationale for her resistance was that the testing made her son extremely anxious. She believed that the school system had enough information. (P.1 p. 247). [ ] once again insisted that the medical diagnosis of her son should be enough to provide special education services to the Petitioner.

On November 18, 2014 the parents filed a request for a due process hearing. (HO1).

In regard to the “new” information considered by the [ ], 2014 referral team the school system presented evidence of a different set of circumstances regarding the condition of the Petitioner that took place between the 2013-2014 school year and the 2014-2015 school year. The school system presented a number of witnesses to support its claim that the educational situation of Petitioner had undergone a substantial change. The [ ] grade teacher testified that the only problem she had with Petitioner was that he was talking out. That behavior was similar to the other students in the [ ] grade class. There were [ ] students in her [ ] grade class. The teacher remarked that she observed no [ ], [ ], [ ], [ ], or other unusual movements with respect to Petitioner during the year that she instructed the child.
On cross-examination, the [ ] grade teacher was asked about a female student in her class. The female student suffered from [ ] and [ ]. The teacher said that that child was not doing well academically, while Petitioner was doing well. However, the teacher admitted that she never observed in the female student movements that suggested [ ].

The teacher did observe the child twirling her hair and humming. At the time that the female student was assigned to the [ ] grade teacher’s classroom, the child was being monitored for additional services by the Problem Solving Team (PST)\(^2\). The female child did not have a diagnosis of [ ] at that time. According to the [ ] grade teacher, the female child was subsequently diagnosed with [ ] while under observations and interventions by the PST team.

The [ ] grade teacher agreed that [ ] had asked her at the [ ], 2014 meeting between the two if the teacher had observed Petitioner’s [ ], [ ], and [ ]. The teacher responded that she had never observed such conditions. The parent stated that she was going to take her son to the doctor to find out what was occurring.

The [ ] grade teacher stated that the first time she learned that the Petitioner had been diagnosed with [ ] was in [ ], 2014. At that time, the Petitioner was being monitored by the PST problem solving team. It was personnel with that team that showed her the medical reports that diagnosed Petitioner with [ ].

The primary response by the local education agency to the parents’ assertion regarding the academic difficulties/behavioral problems of their son was the [ ] ([ ])

\(^2\) PST (Problem Solving Team) personnel use intervention strategies and monitoring of those strategies for an appropriate period before a child is referred for a special education evaluation. The team may also implement such strategies concurrently with the special education evaluation process. *Ala. Admin. Code* 290.8-9-.01(4).
reading assessment. The teachers and school system administrators explained that on that assessment, a student must read for one minute. The assessment is read out loud. The [ ] grade teacher described that Petitioner never revealed a problem reading to her during her administration of the [ ]. There were no pauses, sounds, coughs, or [ ] during her assessment of Petitioner. The [ ] grade teacher assessed Petitioner one on one (as with the other students) one time each week. In addition, school system personnel described that a team came to the [ ] school three times a year to assess the children for their reading. Each child was assessed individually by a team member. The school system personnel remarked that for the [ ] grade school year, Petitioner exhibited at or above benchmarks on reading for each assessment period. He exceeded the 110 word per minute score required at the end of the period, i.e. the school year. He scored a [ ]. (P. 1 p. 156). The special education specialist commented that Petitioner’s [ ] scores were “great for a [ ] grader”. She added that if the boy suffered from [ ] or pauses in reading he could not have achieved that score. The specialist explained that while the youngster’s pauses and sounds ([ ] in the videos made by [ ] were certainly of concern, in her opinion Petitioner could not have scored a [ ] if he exhibited similar conditions doing the [ ] assessment.

The [ ] school principal agreed that while Petitioner’s [ ] assessment had not demonstrated the sustained progress that the school system liked to see, the youngster’s scores were acceptable. Throughout Petitioner’s enrollment at the [ ] school the principal remarked that he scored “pretty high.”
The [ ] grade teacher denied that she observed any of the problems exhibited by Petitioner in reading that were depicted in the videos made by his mother. The principal read with Petitioner on one occasion during the boy’s [ ] grade year. She too did not observe anything unusual about Petitioner’s reading. The [ ] grade teacher stated that she never saw anything that impeded Petitioner’s learning. She admitted that on the math fact challenge assessment Petitioner did not make the top score of one hundred. That assessment is a timed assessment. Despite not having achieved a one hundred, the [ ] grade teacher said that the youngster made gains. He had a [ ] and a [ ].

On other assessments, the special education specialist responded that the fact that Petitioner was [ ] points below district average on one reading assessment should not be cause of concern because that assessment was a computer reading assessment. She admitted on cross-examination that Petitioner scored lower in [ ] 2014 than in [ ] 2014 (P.1 p.154).

The evidence in the due process hearing also included the results of two observations of Petitioner made as a part of the evaluation of the child for special education after the initial [ ] 2014 referral by [ ]. Both observations were conducted by individuals who were aware of Petitioner’s diagnosis of [ ]. The first observation was by the [ ] school counselor. It took place on [ ], 2014. On the final eligibility form it was written that although the child caused no disturbance to others, he did touch his [ ] several times. (P.1 p. 143). A second observation of the youngster by the reading coach at the [ ] school Petitioner attended noted nothing unusual. However, that observation stated that the child did not complete one task. Petitioner also talked about off-topic subjects during
the second observation. Petitioner did not follow along with a story one of his peers was reading to Petitioner. (P.1 p. 72).

Upon examination by counsel for the parents, the [ ] school counselor admitted that her observation revealed the child [ ] on his desk, [ ] with his pencil, [ ] at the [ ] of the fingers times [ ] and [ ] different parts of his face. (P.1 p. 70). All those actions occurred doing a 25 minute observation.

The school system counselor insisted that despite the movements of Petitioner during her observation, the child completed the tasks assigned to him. The movements he demonstrated did not interfere with the tasks assigned to him. He was performing in a manner similar to the rest of the students in his class.

The [ ] grade teacher and those persons to whom she reported were adamant that throughout the period of the [ ] grade the [ ] grade teacher did not observe in her classroom what the parents were observing with Petitioner at home. Although Mr. and Mrs. [ ] complained that the [ ] and [ ] interfered with Petitioner’s reading at home, that it was difficult for them to complete homework with the child because he was so anxious, and that the parents struggled to get him to come to school, the principal of the school and the [ ] grade teacher responded that none of those conditions were being observed at the school. They maintained that the child’s condition was not interfering with his learning. In support of that testimony the school system submitted documentation that at the end of the [ ] nine weeks of the child’s [ ] grade school year Petitioner was proficient in all academic areas. (P. 1 p.135).

IV.
Discussion of Issues

School districts have an explicit duty to locate, identify, and evaluate all children with disabilities from birth, whether they provide them any educational services or not. That duty is commonly referred to as “child find” or “seek and serve.” 20 U.S.C. § 1412(a)(3)(A). Students who are at least suspected of being eligible for special education and related services must be evaluated by a school system in all areas of suspected disability. Relevant federal regulations state that each public agency shall ensure a full and individual evaluation is conducted for each child being considered for special education to determine if the child is “a child with a disability.” 34 CFR § 300.301(c)(2)(i). The evaluation must also determine the educational needs of the child. 34 CFR § 300.301(c)(2)(ii). The principle of child find emphasizes that the duty of the school system applies to children who are suspected of having disabilities and are in need of special education even though they are advancing from grade to grade. 34 CFR § 300.111(c)(1); Alabama Admin. Code, 290-8-9-.1(1)(a). Child find applies to all children with disabilities “regardless of the severity of their disability.” 20 U.S.C § 1412(a)(3)(A). The child find requirement is an affirmative obligation and a parent is not required to request that a school system identify and evaluate a child. N.B. v. Hellgate [Sch. Dist.], 541 F. 3d 1202, 1209 (9th Cir. 2008); M.G. v. Cent. Reg’t. Sch. Dist., 81 F. 3d 389, 397 (3rd Cir. 1996); E.M. v. Pajaro Valley Unified Sch. Dist., 2008 WL 4615436 *1 (N.D. Ca. 2008); N.G. v. District of Columbia, 556 F. Supp. 2d 11, *16 and *25 (D. D.C. 2008); Scott v. District of Columbia, 2006 WL 1102839 *8 (D. D.C. 2006). The failure to locate and evaluate a potentially disabled child constitutes a denial of a free

A school district may be found liable in individual cases for the failure to identify children with disabilities when on notice of the child’s difficulties with learning or behavior. Compton Unified Sch. Dist. v. Addison, 598 F. 3d 1181 (9th Cir. 2010) (declining grades, poor standardized scores and total disinterest in class warranted special education evaluation of child); W.B. v. Matula, 67 F. 3d 485, 501-02 (3rd Cir. 1995)(children who are suspected of having a qualifying disability must be identified and evaluated within a reasonable time after school officials are on notice of behavior or condition that is likely to indicate a disability); G.G. v. District of Columbia, 924 F. Supp. 2d 273 (D. D.C. 2013)(child’s anxiety, social problems and increasing tendency to withdraw from instruction triggered child find duties); Regional Sch. Dist. #9 v. Mr. and Mrs. M., 2009 WL 25114064 *11 (D. Conn. 2009)(mother told school system staff that daughter would not be commencing school on time due to child’s admission to psychiatric hospital).

Some cases have held that the child find duty is triggered when the local education agency has reason to suspect a disability coupled with reasons to suspect that special education services may be needed to address that disability. New Paltz Central Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 (N.D. N.Y. 2004); Department of Educ. State of Hawaii v. Cari Rae, 158 F. Supp. 2d 1190, 1994 (D. Haw. 2001). Another view, however, seems to be that it is the suspicion of a disability that triggers child find rather than factual knowledge of a qualifying disability (i.e. one that requires special education.
services). Regional Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 2009 WL 2514064 *12 (D. Conn. 2009). The latter view appears to be based on the rationale that one cannot know if a child with a suspected (or known) disability needs special education until one evaluates the child.

Regardless, a selection of those conflicting views need not be made in this case because the local education agency was on notice as of [ ], 2014 that at least based on the views of his parents, Petitioner’s grades were falling, he was having difficulty reading fluently, and he was experiencing strange [ ] and [ ] movements. That Petitioner’s [ ] grade teacher had not noticed those conditions did not excuse her duty to report the parent’s complaint/concerns to appropriate school system personnel. Robertson Cnty Sch. Sys. v. King, 99 F 3d 1139 (6th Cir. 1996) (unpublished) (a request for special education assessment is implied when the parent informs the school that the child may have special needs); G.G. v. District of Columbia, 924 F. Supp. 2d 273 (D.D.C. 2013) (parent bringing behavior concerns about child equates to a referral for special education). See Scarsdale Uni. and Free Sch. Dist. v. RC 2013 WL 563377 *7 (S.D. N.Y 2013) (parent’s verbal and written demands for IDEA evaluation and district’s delay in response was a denial of FAPE).

A report made by the [ ] grade teacher to the principal, school counselor or chairperson of the PST about [ ]’s description of her son’s problems when considered with [ ]’s earlier reported concerns to the principal in which [ ] related the [ ] her son had about coming to school certainly would have at least caused the suspicion that a disability existed.

All of the witnesses who testified at the due process hearing agreed that the problems depicted on the videos of Petitioner reading revealed “very obvious [ ]” and other difficulties in reading. The videos depict both motor [ ] and vocal [ ]. The child demonstrated [ ], the [ ] sound and pauses that sounded somewhat like a short [ ]. These videos were made in mid-[ ] of 2014 and after - yet school system personnel insisted that Petitioner never exhibited such conditions at school. While staff reiterated that assertion at the due process hearing, the situation depicted in the video supports the conclusion that the child’s [ ] were ongoing and should have been noted by school system personnel at least by [ ] 2014. That was the date that the parent reported them to the [ ] grade teacher. When such reports occur, the local education agency “must evaluate the student within a reasonable time after school officials have notice of the behavior likely to indicate a

In this case, school personnel should have suspected a disability as of [ ], 2014 when the parent complained to Petitioner’s classroom teacher about Petitioner’s academics/condition. It should not have required a referral by the parent before the school system undertook at least an observation of the youngster by a staff member other than the [ ] grade teacher – the latter of whom had no significant training in special education or the identity of children in need of special education services.

Despite the requirements of child find, the school system personnel maintained that conditions such as that complained of by the parent must be seen over a period of time before they warrant concern. The witnesses for the local education agency insisted that it was only if the [ ] grade teacher saw the behaviors shown on the videos over and over that she should have contacted the special education department or the PST team. But witnesses for the school system agreed that if the [ ] grade teacher observed those conditions, it should have been reported to appropriate school system personnel. And while the Hearing Officer agrees with the testimony of the special education director that teachers are not required to be qualified to diagnose [ ], they should at least be cognizant of behavior that may indicate a disability.

In his testimony, [ ] addressed the situation that the Hearing Officer concludes occurred in this case. [ ] explained that many persons who observe the [ ] and other conditions of [ ] are unaware of what they are seeing. They believe the child can control his movements. That situation arises because frequently [ ] is not diagnosed earlier in a
student’s life because all of the young students lack muscle control. It is only when their contemporaries begin to gain muscle control with maturity that the students with [ ] began to stand out.

Such a situation appears to have been what took place in this case. For example, the [ ] grade teacher did not recognize another female student in her class with [ ] despite the child’s odd behaviors, including humming. Although one cannot say that that student was harmed because she was receiving interventions by the PST team, the oddness of her behavior reveals that the [ ] grade teacher was not always cognizant of conditions that might indicate a disability.

The [ ] grade teacher had [ ] students. The principal commented that that was a large classroom for the [ ] school that Petitioner attended. Several of the witnesses agreed that the young students demonstrate behaviors such as fidgeting, tapping and picking at different parts of their body. For example, the [ ] school counselor who observed the child a day after the parent’s referral for special education services said that many of Petitioner’s movements were what one would observe in a similar situation with any [ ] grade child. [ ] graders are rambunctious. Very often the young students are incapable of remaining in their seats. Frequently, they engage in distracting movements.

In this case, a misinterpretation of student behavior in a large classroom of young children was explained by [ ], the parents’ expert witness. His testimony supports the conclusion that what occurred with respect to the behaviors seen by Petitioner’s parents at home as opposed to this [ ] grade classroom was that the [ ] grade teacher was simply
unaware of the significance of what was transpiring in her class with respect to Petitioner’s [ ] and [ ] movements.

Both [ ] and the [ ] grade teacher were credible witnesses. Because they their credibility is in equipoise, the Hearing Officer must make a credibility determination should this matter be reviewed by either the state or federal court. See e.g. Sebastian M. v. King Phillip Reg’l Sch. Dist. 685 F. 3d 79, 86 (1st Cir. 2012) (proper for hearing officer to give more weight to educators “who interacted with [student] regularly); County Sch. Bd of Henrico Cnty. v. Z.P. 399 F. 3d 298, 306-07 (4th Cir. 2005) (holding that evidence by school system not of such quality that would require hearing officer to accept it over parents’ witnesses); S.T. v. Howard Cnty Pub. Sch. Sys., 2015 WL 72233 *4 (D. Md. 2015) (hearing officer may find testimony of school officials less credible than witnesses proffered by student’s parents.); N.M. v. Central Buck Sch. Dist. 2014 WL 185219 (E.D. Pa. 2014) (rejecting parents’ claims based on hearing officer finding that teacher’s version of events was more credible.); Department of Education v. Ria L., 2014 WL 7184217 (D. Hawaii 2014) (citing elements for credibility determinations). In that regard, the Hearing Officer finds the more credible evidence to be that Petitioner was indeed demonstrating the very behavior about which the parents complained. The Hearing Officer finds it difficult to accept that there was a significant increase in symptoms (and deterioration of the child’s reading ability) in a two month period in the latter part of the [ ] grade school year. There was no expert testimony presented by the local education agency that could countermand the validity of [ ]’s complaints to the [ ]
grade teacher on [ ], 2014 and what a video of Petitioner reading made a week or two thereafter revealed.

The failure of the [ ] grade teacher (and others) to observe that the Petitioner might have a disabling condition was explained by Petitioner’s expert. As [ ] stated, many persons simply choose to ignore, do not understand what they observe or attribute odd behaviors to the youthfulness of the person observed. Thus, consideration of the condition of [ ] is often ignored.

That being said, that fact alone does not mean the child find duty was violated. In this case, the Hearing Officer agrees with the special education director that a general education teacher should not be expected to make diagnosis of disabling conditions. However, regardless of whether the [ ] grade teacher observed the [ ], etc., once the parent brought those conditions - as well as her ([ ]’s) perception of academic and behavior difficulties of her child - to the attention of the [ ] grade teacher - the child find duty was triggered. The principle of child find applied even though the teacher insisted that she was not observing the conditions about which the parent expressed concern.

The Hearing Officer disagrees with the special education specialist that a referral for special education is not necessary unless the condition significantly impacts the child in either behavior or academics. If that were the law, then any complaint or referral by a parent could be ignored on the basis – as here – that school system personnel “weren’t seeing it at school.” That is not what the principle of child find compels. On [ ], 2014, when the parent reported concern about Petitioner’s [ ], [ ], behavior problems (i.e., reluctance to come to school) and reading difficulties as well as the opinion of [ ] that her
son’s academic work was declining, the [ ] grade teacher should have initiated contact with either the chairperson of the PST or the special education department about a response. That response would include some initial consideration by staff of whether the child should be referred for an evaluation for the purpose of determining if special education services were necessary.

Conversely, once the school system received the parent referral on [ ], 2014 it acted in an expeditious manner to complete the evaluation and referral process. Ala. Admin. Code 290-8-9-01(6). As the principal noted, an observation of the child took place the day after the parents’ referral letter was actually delivered to the school. A referral meeting was held shortly thereafter. It was held even though school was about to conclude for the year and despite the numerous activities that take place at the end of a school year. The school system referred the child for a special education evaluation. An eligibility meeting was held on [ ], 2014. It was held in a timely manner despite the fact it was summer vacation. Ala. Admin. Code 290-8-9-02(1)(b).

In a similar vein, there was nothing inappropriate about the evaluation of Petitioner for special education services that was conducted by the school system. As stated by the witnesses for the school system, a medical diagnosis by itself if not sufficient for the designation of special education services as an [ ] individual. Ala. Admin. Code 290-8-9-03(9)(a).

In order to obtain eligibility for special education, a child’s condition, including those listed under [ ], must “adversely affect” the educational performance of the child. Id. In that regard, the [ ] assessment by the local education agency and the achievement
tests administered by both [ ] and the school system (with which [ ] agreed) demonstrated adequate academic achievement by Petitioner. In addition, the school system demonstrated that Petitioner was achieving at or above grade level despite the fact that an intelligence quotient (I.Q.) assessment revealed a slightly [ ] average I.Q. Lastly, the behavioral scales generated at the time of the [ ] 2014 eligibility meeting supported the conclusion that the eligibility team reached the appropriate decision in denying eligibility for special education services to the child. O.W. v. Board of Educ. of Fayette Cnty, Ky. 2015 WL 197418 (E.D. Ky. 2015) (standardized test results and in-class performance revealed autistic child to be functioning at levels above peers in academics and at levels similar to peers in behavior/socialization.); Ala. Admin. Code 290-8-9-.03(9)(d)-(e). At that time the Petitioner did not meet the eligibility criteria for OHI. (P. 1 p. 48). Ala. Admin. Code 290-8-9-.03(9)(b)-(e).

Where a disability is suspected a full and individual evaluation of a child’s education needs must be conducted by a local education agency. Ala. Admin. Code, 290-8-9-.02(1)(c). The purpose of the evaluation is to determine whether the child needs special education services. Ala. Admin. Code, 290-8-9-.02(1)(d)(2.)(iii). A child must be assessed in all areas related to the specific disability including health, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. Ala. Admin. Code, 290-8-9-.02(1)(g). No single measure or assessment may be used as the sole criterion for determining whether a child has a disability or in determining an appropriate educational program for the child. Ala. Admin. Code, 290-8-9-.02(1)(h). Instead, a variety of assessment tools and strategies must be utilized to
gather relevant functional, developmental, and academic information. Ala. Admin. Code, 290-8-9-.02(1)(l).

In evaluating each child the evaluation must be sufficiently comprehensive to identify all the child’s special education and related service needs. Ala. Admin. Code, 290-8-9-.02(1)(t). In that regard, certain minimum evaluations are required by State Department of Education regulations. Ala. Admin. Code, 290-8-9-.03. Professional judgment should be used to determine if the results of any of the required evaluations are reliable sources of information or if other assessment data may prove to be a more accurate indication of a child’s level of function. Ala. Admin. Code, 290-8-9-.03.

For the category of [ ] due to an acute or chronic condition one of the criteria is that there must be standard scores (total or composite) on two out of three of the same norm referenced scales designed specifically to determine behavioral difficulties. See Ala. Admin. Code, 290-8-9-.03(9)(d)(3). The results of the scales must be at least two standard deviations above or below the mean which would indicate clinically significant behavior. Ala. Admin. Code, 290-8-9-.03(9)(d)3. The persons completing the scales may include the parent but each of the raters must have had knowledge of the child for at least six weeks. Ala. Admin. Code, 290-8-9-.03(9)(e)3.

In order for a health problem to support eligibility as an [ ] child the regulations require “a statement providing evidence that the health impairment [upon which the student intends to rely] adversely affects the educational performance of the child.” Ala. Admin. Code, 290-8-9-.03(9)(b)4.
In this case the local education agency used these required components in its initial [ ], 2014 evaluation of Petitioner. The applicable federal and state regulations require that in determining if a child is a child with a disability in need of special education services that the local education agency must draw on information from a variety of sources, including aptitude and achievement tests, parental input, teachers recommendations as well as information about the child’s physical condition, social or cultural background and adaptive behavior. 34 CFR §306(c)(1)(i); Ala. Admin. Code, 290-8-9-.04(1)(b). The local education agency must ensure that the information considered is documented and “carefully considered.” Id.; Ala. Admin.Code, 290-8-9-.04(1)(d). In the present dispute the school system complied with these and other applicable provisions regarding eligibility. The fact that Petitioner’s parents were dissatisfied with the analysis of data by the eligibility determination team does not warrant reversal of the team’s “carefully considered” determination that Petitioner did not require special education services to address his disabling condition(s).

A great deal of the complaints of the parents of the child was that in reaching its eligibility determination the local education agency never really considered the diagnosis, recommendations and assessment of outside doctors and psychological providers. But there is no requirement under the IDEA that the eligibility team reach its conclusions based on outside data. Q.W. v. Board of Educ. of Fayette Cnty, Ky. supra *6. Although the eligibility team is required to consider reports from private experts, it is not required to follow of their recommendations or agree to all of their conclusions. Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F. 3d 632, 640-41 (7th Cir. 2010) (IDEA requires that full
IEP team make eligibility decisions. A physician cannot simply prescribed special education); M.H. v. N.Y.C. Dept. of Educ., 2011 WL 609880 *12 (S.D. N.Y. 2011). And while an eligibility team is required to consider certain evaluative information from a child’s parents and teachers (or related service providers), the IDEA does not explicitly require that the eligibility team consider all potentially relevant evaluations from a child’s doctor or psychologist. M.Z. v. New York City Dept. of Educ., 2013 WL 1314992 *8 (S.D. NY 2013); T.G. v. New York City Dept. of Educ., 2013 WL 5178300*18 (S.D. N.Y. 2013). See 20 U.S.C. §1414(c)(1)(A). Instead, in making a determination of eligibility, the IDEA requires only that a school district use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent. 34 CFR §300.306(c)(1)(i).

Next, with respect to the procedural issue that the parents were denied active participation in their referral/eligibility meetings with school system staff the local education agency did not act in an appropriate manner at the first eligibility meeting held on [ ], 2014. The child’s [ ] grade teacher was not present at that meeting. (P. 1 p 48). The applicable federal regulation at 34 CFR §300.321(a)(2) requires that membership of the IEP team include “[n]ot less than one regular education teacher of the child”. See also Ala. Admin. Code 290-8-9-04(1) (eligibility team must be composed of a team of qualified professionals). In addition, the eligibility team must have classroom based observations and observations by teachers. 34 CFR 300.305(a)(1)(ii)-(iii) (presumably in the case of young children who attend only one class the regulation would require the classroom teacher to be present at the eligibility meeting to discuss with the parent his/her
observations). The absence of the [ ] grade teacher in this situation where the parents were maintaining that their child showed significant symptoms of a condition that impaired his reading and behavior was a violation of the spirit of regulations – if not their express intent. It was a procedural violation that warrants relief. 20 USC §1415 (f)(3)(E)(ii)(II)(procedural violation significantly impeded parents’ opportunity to participate in the decision making process regarding parent’s child). Although the school system presented the teacher’s behavior scale which revealed that Petitioner had no significant clinical (or even “at risk”) behavior, what the teacher says about the child makes a “big difference” in eligibility as at least one school system witness attested. The parents certainly had a right to question the [ ] grade teacher about the behavior of their son that they saw at home which behavior the teacher maintained that she did not see in her classroom. At a minimum the parents had the right to review with the [ ] grade teacher the behavior scale that she completed. See Ala. Admin. Code 290.8-9-04(2)(a) (each eligibility team member must certify in writing whether the [eligibility] report reflects his/her conclusion).

Likewise, without a specified requirement, absence at the eligibility meeting of the school counselor who conducted an observation of the child which revealed a number of the same symptoms and distracting behaviors about which the parents complained impeded the parents’ participation in the eligibility decision making process. See 34 CFR §300.321(a)(6) (IEP team may include other individuals who have knowledge or special expertise regarding the child); Ala. Admin. Code 290-8-9-04(1) (requiring qualified professionals at eligibility meeting). The school system should have made that individual
available. The principal agreed that it would be “nice” to have all of the counselor’s observations at the eligibility meeting. The counselor herself agreed that her observation of Petitioner was important to the eligibility determination. She also agreed if she had been on the eligibility team she would have desired the information contained in her observation narrative as opposed to the summary of the observation provided to Mr. and Mrs. [ ] (P. 1 p. 43-48). While the Hearing Officer does not find fault with the observation summaries contained in the eligibility documents, the counselor should have been available to review the actual observation form that she completed and allow a discussion of it by the parents and the eligibility team. M.M. v. LaFayette Sch. Dist. 767 F. 3d 842 (9th Cir. 2014) (school district violated IDEA by its failure to provide student’s parents with response to intervention [RTI] assessment data). See Ala. Admin. Code 290.8-9-.04(2) (eligibility report must include evaluation information).

A similar analysis may also apply to the reading coach who observed the child – although perhaps less so than the counselor. The reading coach observed that the child did not complete a task and talked about off topic subjects. Again, while the actual narrative of this individual’s observation provides an explanation of those conclusions her presence at the eligibility meeting would have enabled the parents to ask her about her conclusions.

Parents have a right to participate in meetings with respect to the identification, evaluation and educational program for their child. 20 USC §1415(b). The purpose behind that procedural safeguard is to “guarantee parents both an opportunity for meaningful input into all decisions affecting their child’s education and the right to seek
review of any decision they think inappropriate.” Pihl v. Massachusetts Dept. of Educ., 9 F. 3d 184, 187 (1st Cir. 1993). In that regard “[t]he IDEA imposes upon school districts a duty to conduct a meaningful meeting with appropriate parties” W.G. v. Board of Trustees of Target Rnge Sch. Dist. #23, 960 F. 2d 1479, 1483 (9th Cir. 1992). Such a meeting did not take place when Petitioner was initially considered for eligibility.

V.

Conclusion

In order to establish a violation of the child find, school system officials must have “overlooked clear signs of disability”; be “negligent in failing to order testing;” or have no “rationale justification for not deciding to evaluate.” Board of Educ. v. L.M., 478 F. 3d 307, 313 (5th Cir. 2007); A.P v. Woodstock Bd. Ed., 572 F. Supp. 2d 221, 222 (D. Conn 2008). Those standards apply to the present dispute. Staff members employed by the school system were on notice that Petitioner’s parents were complaining of deteriorating academics, difficulties with the child’s behavior including his reluctance to attend school, difficulty in reading and vocal and muscle [ ] and odd movements. Information concerning those conditions was provided to the school system by admission of the [ ] grade teacher and to a lesser extent, the principal (i.e. child’s [ ] about attending school). The [ ] grade teacher agreed that [ ] complained of those circumstances at the [ ], 2014 meeting. Thus, the [ ] grade teacher overlooked clear signs of a disability that required a response by the special education services department (or the PST team) prior to the consideration of the parents’ referral for such services on [ ], 2014.
A violation of the child find duty constitutes a denial of free appropriate public education. *James S. v. Milwaukee Pub. Sch.* 668 F 3d 481, 495 (7th Cir. 2012); *N.B. v. Hellgate Elem. Sch. Dist.* 541 F. 3d 1202 (9th Cir. 2008).

Conversely, the school system did not fail to appropriately evaluate the child. All tests, assessments, and criteria required by the State Department of Education for the designation of the disability of [ ] were conducted by the school system. *Ala. Admin. Code* 290.8-9-03(9)(b)-(e) (outlining evaluation components and criteria for designation of [ ]).

Furthermore, in academics, Petitioner was meeting standards. He was achieving in the above average range without teacher accommodations. According to witnesses, his achievement was commensurate with his age and specialized instruction was not needed at the time of his initial eligibility determination. *Doe v. Cape Elizabeth Sch. Dept.*, 2014 WL 736958 *8* (D. Mn. 2014) (IEP team reach correct decision that child did not qualify as a child with a disability where grades, standardized test scores and teacher feedback showed she was achieving adequately for her age and meeting state-approved guidelines).

The determination of whether a student is eligible for special education services is three pronged. The student (1) must have a disability; (2) the disability must adversely affect his/her educational performance (and educational performances includes the areas of social/emotional and/or communication skills); and (3) the disability must require the need for special education (specially designed instruction) and related services. *Ala. Admin. Code* 290.9-.02 and .03; *D.R. v. Antelope Valley Union High Sch. Distr.*, 746 F. Supp. 2d 1132, 1139 (C.D. Cal. 2010).
Specially designed instruction is defined by State Department of Education and federal regulations as adapting as appropriate to the needs of the eligible child the content, methodology, or delivery of instruction, to ensure access of the child to the general curriculum so that the child can meet the educational standards that apply to all children. Ala. Admin. Code 290-8-9.00(21)(a)(3); 34 CFR § 300.39(3). (The IDEA statute states that special education means specially designed instruction at no cost to the parents to meet the unique needs of a child with a disability. 20 U.S.C. §1401(29)). The definition of the term specially designed instruction under the applicable regulations may not seem to fit the areas of social/emotional skills or even possibly communication skills. Yet that was the standard that governed the eligibility team’s decision on [ ], 2014. As such, it cannot be said that the team erred in concluding that although Petitioner may have suffered from a disabling condition, his condition did not adversely impact his educational performance. Nor did his condition require specially designed instruction.

The parents should be aware that a medical diagnosis – regardless of how severe the diagnosis may indicate a condition to be – does not qualify a child for special education services. Instead the condition must adversely affect educational performance. 34 CFR 300.(c)9(ii), Ala. Admin. Code 290.8-9-.03(9)(a).

Conversely, the absence at the [ ], 2014 eligibility meeting of Petitioner’s [ ] grade teacher and the [ ] school counselor, whose observation of the child supported many of the parents’ concerns, significantly impeded the parents’ opportunity to participate in the decision making process regarding their son, M.L. Federal Way Sch. Dist., 394 F 3d 634,649 (9th Cir. 2005); Orange Unified Sch. Dist. v. C.K. 2012 WL 2478389 (C.D.
That omission by the school district was a procedural violation of the IDEA. While the Hearing Officer recognizes that the eligibility meeting occurred in the summer months, a school system must continue its referral/evaluation process regardless of the summer vacation. *Ala. Admin. Code* 290.8-9-02(1)(b).

In *Board of Educ. Hendrick Hudson Sch. Dist. v. Rowley* 458 U.S. 176 (1982) the Supreme Court stated that the “importance Congress attached to …. procedural safeguards cannot be gainsaid. Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation in every stage at the administrative process….Id.* at 205-06. In this case the absence of the [ ] grade teacher and counselor who observed the child for eligibility purposes denied Mr. and Mrs. [ ] the opportunity to participate in the decision making process of the provision of a free appropriate public education. *M.M. v. LaFayette Sch. Dist.* 767 F 3d 842 (9th Cir. 2014). *See Deal v. Hamilton Cnty Bd of Educ.*, 392 F 3d 840,847-48 (6th Cir. 2004); *W.G. v. Board of Trustees of Target Rnge Sch. Dist.* #23 supra at 1484; *Hall v. Vance Cnty Bd of Educ.* 774 F 2d 629, 634-635 (4th 1985).

**VI.**

**Specific Findings**

1. The local education agency failed to comply with its child find duties which required it to locate, identify, and evaluate all children in their jurisdiction who need special education and related services regardless of the severity of the disability. The school system should have undertaken a review of the possibility that Petitioner suffered
from a disability that impaired educational performance which includes academic, social/emotional and/or communication skills. Ala. Admin. Code, 290-8-9.01. Its review should have been initiated on April 11, 2014. Ala. Admin. Code, 290-8-9.00(4). However, because the child was referred shortly thereafter for consideration of special education services and the school system timely referred, evaluated, and determined that Petitioner was not eligible for special education, the child is not entitled to compensatory education.

Nevertheless, because of the violation of child find, the local education is directed that in future in-service training regarding special education services (and the identity of those who may need such services) that a specific discussion and/or information regarding [ ] Syndrome shall be provided to participating school system personnel. See Campbell v. Talladega Cnty Bd of Educ., 518 F. Supp. 47, 56 (N.D. Ala. 1981 (requiring training of personnel to ensure appropriate program).

While personnel with the local education agency are not required to make medical diagnosis of disabilities, the training implemented by the local education agency should include a discussion/information about the fact that [ ] Syndrome may encompass symptoms and/or signs far different than what is conveyed by media or what may be understood by those who have never encountered that condition. While the Hearing Officer is cognizant that the number of students in a class, their youth and the significant burdens placed on classroom teachers by federal and state educational departments regarding data accumulation /testing/paperwork, the teachers should be aware that – as
Dr. [ ] expressed – the signs or symptoms of [ ] Syndrome may be minimal or such as to be overlooked.

2. The local education agency committed a procedural violation of the IDEA by its failure to have the child’s second grade general education teacher and the counselor who conducted one of the observations of the child present at the [ ], 2015 eligibility meeting. M.L. v. Federal Way Sch. Dist., 394 F 3d 634, 646 (9th Cir 2005) (absence of general education teacher at IEP deprived team of important expertise), Orange Unified Sch. Dist. V. C.K. 2012 WL 2478389 (C.D. Calif. 2012) (absence of special education teacher deprived parents of meaningful participation in IEP).

3. The local education agency shall take steps to ensure that the parents of children who are seeking eligibility for special education services have an opportunity to discuss and/or question those who had immediate contact with (or gathered relevant information) about the child at referral/eligibility meetings. See M.M. v. LaFayette Sch. Dist. 767 F 3d 842 (9th Cir. 2014) (district’s failure to provide parents with RTI data denied student a free appropriate public education).

4. Once the parent initiated a referral on May 19, 2014, the school system’s evaluation of the child complied with the appropriate regulations. Ala. Admin. Code, 290-8-9.02(1)(d). The referral and evaluation for eligibility was conducted in a timely manner. Ala. Admin. Code, 290-8-9.02(1)(d).

5. The decision of the eligibility team on July 7, 2014 regarding its determination that the child was not eligible for special education services under the category of [ ] was supported by the evidence, information, and assessments in the
possession of the local education agency. While a medical diagnosis of [ ] Syndrome was presented, the medical diagnosis alone was not sufficient to justify Petitioner being identified in the area of [ ]. Ala. Admin. Code, 290-8-9.03(9)(a).

6. At the time of the first eligibility meeting, the information considered by the IEP eligibility team supported its decision that Petitioner’s impairment did not adversely affect his educational performance. Id; QW v. Board of Educ. of Fayette Cnty, Ky., 2015 WL 197418 (E.D. Ky. 2015).

7. The evaluation of the child conducted by the local education agency after the second referral for special education services on November 3, 2014 complied with the Ala. Admin. Code, 290-8-9.02(1)(a)-(v). The conduct of the referral meeting and eligibility determination was conducted in a timely and appropriate manner. Ala. Admin. Code, 290-8-9.02(1)(b).

8. While the child find duty is continuing,³ the delay to evaluate the child a second time resulting in the parents’ second referral did not violate the child find duty. Ala. Admin. Code 290.8-9-01(6)(e) (IEP team must review referral and determine in a timely manner if the child will be evaluated for special education services); Ala. Admin. Code 290.8-9-07(4) (before the child is referred for special education evaluation intervention strategies must be implemented in the general education program and monitored for a minimum of eight weeks and be determined unsuccessful).

9. The determination of eligibility of the child for special education services on January 13, 2015 was supported by the evidence. While the parents argued that the decision of the eligibility team on that date supported a determination of eligibility six months before, the evidence in this case demonstrated that there had been a significant change regarding the child that supported the need for special education services. Of particular importance was the fact that §504 accommodations did not appear to be sufficiently assisting the child in age-appropriate activities and behavioral scales completed by both parent and classroom teacher revealed the child’s behavior to be either clinically significant or “at risk”. See Ala. Admin. Code, 290-8-9.03(9)(b) and (d).

10. In all other respects the local education agency complied with the Individuals With Disabilities Education Improvement Act.

VII.

Notice of Appeal Rights

Any party dissatisfied with the decision may bring an appeal pursuant to 20 U.S.C. § 1415 (i)(2). The party dissatisfied with this decision must file a notice of intent to file a civil action with all other parties within thirty (30) calendar days of the receipt of this decision. Thereafter, a civil action must be initiated within thirty (30) days of the filing of the notice of intent to file a civil action. Ala. Admin. Code, 290-8-9-.8(9)(c)16.

DONE this the 13th day of March, 2015.