This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

ODR No. 28389-23-24

CLOSED HEARING

Child's Name
A.A.

Date of Birth:
[redacted]

Parent
[redacted]
Pro Se

Local Education Agency
Montgomery County Intermediate Unit
2 West Lafayette Street
Norristown, PA 19401

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Hearing Officer
Brian Jason Ford, JD, CHO

Date of Decision
12/01/2023

Introduction

This special education due process hearing concerns a young child with disabilities (the Student). The Student receives early intervention services from the Montgomery County Intermediate Unit (the IU). For purposes of this hearing, the IU is the Student's Local Educational Agency (LEA).

In the summer of 2023, the Student transitioned from a birth-to-three program to the IU's early intervention program. As part of that transition, the IU proposed an evaluation of the Student as part of its obligation to develop an Individualized Family Service Plan (IFSP). For purposes of this hearing, an IFSP is akin to an Individualized Education Plan (IEP), and those terms are used interchangeably throughout.

The Student's parent (the Parent) withheld consent for the IU's proposed evaluation. Without the Parent's consent, the IU could not evaluate the Student or develop an IFSP (a temporary plan has been in place since the Student's transition). The parties ultimately reached an impasse, and the IU requested this hearing to conduct the proposed reevaluation without the Parent's consent.

As discussed below, I find that the IU's proposed evaluation lacks specificity, and that the Parent's concerns are not without merit. However, under the legal standards that I must apply, I find that the proposed evaluation is both appropriate and necessary. Consequently, I must hold that the IU may conducted the proposed reevaluation without the Parent's consent.

Issue

A single issue is presented for adjudication: may the IU conducted its proposed evaluation without the Parent's consent?

Findings

I reviewed the record in its entirety. I make findings of fact only as necessary to resolve the issues before me. I find as follows:

1. The record, as a whole, establishes that the Parent and Student are members of a minority race and a minority cultural group. Both the record and the procedural history of this due process hearing establish that the Parent has experienced people from outside of her race and cultural group making incorrect assumptions about her and about the Student. *Passim*.

2. There is no dispute that the Student received IDEA [Early Intervention] services prior to the 2023-24 school year.

3. There is no dispute that the Student is a "child with a disability" as defined by the IDEA and became eligible for Early Intervention [redacted] services just prior to the start of the 2023-24 school year.

4. There is no dispute that the IU is the Student's Local Educational Agency (LEA) as defined by the IDEA for Early Intervention services.

5. Prior to the Student's transition to 3-to-5 services, the IU was aware that the Student has significant communication, cognitive, and physical needs. *See, e.g.* IU-4 at 1.

6. Prior to the Student's transition to 3-to-5 services, the IU was aware that the Student potentially had hearing needs and offered hearing screenings for the Student. The Parent accepted none of those offers. *See, e.g.* NT 113.

7. As part of the Student's transition to 3-to-5 services, the IU received a copy of the Student's birth-to-3 IFSP, which details the services that the Student received in the birth-to-3 program.[1] IU-1.

8. On June 27, 2023, the parties met at a transition meeting. During that meeting, the IU proposed an evaluation to confirm the Student's continuing eligibility for 3-to-5 services and to determine what services the Student required. The Parent did not accept the IU's proposal during the meeting. *See* IU-1.

9. On June 28, 2023, the IU issued a Permission to Evaluate (PTE), proposing an evaluation substantively similar to the evaluation that it proposed during the meeting the day before. IU-4. The Parent did not return the PTE.

10. On July 17, 2023, the IU reissued the PTE. The Parent did not return the reissued PTE. IU-4.

11. On August 1, 2023, the IU reissued the PTE again. The Parent returned the PTE the same day, rejecting the IU's proposed evaluation.[2] IU-4.

[1] The Student's birth-to-three program was run by a different agency within the same county that the IU.
[2] The reasons for the Parent's rejection are discussed below.

12. The PTE proposed an evaluation consisting of the following (IU-4 at 1):[3]

    a. Input from Parent, Teacher and related service providers (if applicable),
    b. Review of Records,
    c. Observation during testing,
    d. Cognitive assessment,
    e. Personal-social assessment,
    f. Speech and Language Evaluation,
    g. Occupational Therapy Evaluation,
    h. Physical Therapy Evaluation,
    i. Functional Behavior Assessment,
    j. Psychological Evaluation (observation in school if applicable or testing session, observational rating scales of emotional, social, and behavioral development),
    k. Functional Vision Assessment, and
    l. Mobility Evaluation

13. The PTE includes no information about what specific tests the IU plans to administer.

14. In addition to the PTE, the IU also offered to screen the Student for hearing needs. NT 113, 203.

15. On August 4, 2023, the IU filed a due process complaint initiating these proceedings.

16. Sometime after September 8, 2023, the Parent shared the results of a hearing screening with the IU. The screening was conducted by a third-party medical facility. *See* NT 181.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d

[3] What follows is a reformatted but otherwise direct quotation from the PTE. While the document speaks for itself, the language that the IU used is important in this case.

Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference.

Applicable Laws

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the IU is the party seeking relief and must prove entitlement to the relief that it demands by a preponderance of evidence.

Free Appropriate Public Education (FAPE)

The Student's right to a FAPE is not an issue directly in this hearing. However, a basic understanding of the IDEA's FAPE standard is necessary to examine the question presented.

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. § 1412. Local education agencies meet the obligation of providing a FAPE to eligible students through developing and implementing Individualized Education Plans (IEPs). IEPs must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

The United States Supreme Court first examined the FAPE standard in *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982). In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

For many years thereafter, the Third Circuit interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). Under this standard, LEAs satisfy their obligations to provide a FAPE through IEPs that are "reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations and quotations omitted).

This Third Circuit's interpretation of *Rowley* was functionally confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Supreme Court's first consideration of the substantive FAPE standard since *Rowley.* In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimis*" benefit standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017).

Under *Endrew F.*, appropriate progress must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id*. Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress. Rather, hearing officers must consider the totality of a child's circumstances to determine whether the LEA offered the child a FAPE.

Evaluation Criteria

The IDEA establishes requirements for evaluations. Substantively, those are the same for initial evaluations and revaluations. 20 U.S.C. § 1414(a)(2)(A).

Evaluations must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining" whether the child is a child with a disability and, if so, what must be provided through the child's IEP for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child" and must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors". 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the IU is obligated to ensure that assessments and other evaluation materials are (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments. 20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess "all areas of suspected disability". 20 U.S.C. § 1414(b)(3)(B).

Parental Consent

The IDEA has rules for obtaining parental consent before conducting evaluations and reevaluations. 20 U.S.C. § 1414(c)(3). The IDEA requires LEAs to "obtain informed consent from the parent … before conducting the evaluation." 20 U.S.C. § 1414(a)(1)(D)(i)(I).

The IDEA also has rules about what options are open to LEAs when parents withhold consent for evaluations. When a parent withholds consent, the LEA may request a due process hearing to "pursue" the evaluation. 20 U.S.C. § 1414(a)(1)(D)(ii)(I).

Neither the IDEA nor its implementing regulations say what an LEA must prove when pursuing an evaluation through a due process hearing after a parent withholds consent. *See, e.g.* 34 C.F.R. § 300.300(a)(3). To my

knowledge, this question has not been resolved conclusively by courts in Pennsylvania or the Third Circuit. In an absence of precedent, I have held in prior hearings that LEAs must prove that 1) an evaluation or reevaluation is necessary to ensure the provision of a FAPE to the Student, and 2) the evaluation or reevaluation that the LEA has proposed is appropriate. *See* ODR No. 13612-12-13, ODR No. 19053-16-17.

One of the few cases on point comes from the Court of Appeals for the Fifth Circuit and reaches the same conclusion. In *Shelby S. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450, 454 (5th Cir. 2006), *cert. denied,* 549 U.S. 1111 (2007), the Fifth Circuit held that if an LEA "articulates reasonable grounds for its necessity to conduct [the desired evaluation], a lack of parental consent will not bar it from doing so." In this context, "necessity" is the key word. At its most fundamental level, the IDEA guarantees a FAPE to qualifying children. To provide a FAPE, an LEA must determine what is educationally appropriate for the student. It is impossible to determine what special education is appropriate for a student in the absence of an evaluation or reevaluation that complies with 20 U.S.C. § 1414. An appropriate evaluation or reevaluation, therefore, forms the foundation for the IDEA's most fundamental substantive right. If an LEA can prove at a due process hearing that a proposed evaluation is both appropriate and necessary, the LEA can conduct the proposed evaluation without parental consent.

Discussion

Above, I find that the IU must prove two factors to proceed with the proposed evaluation without the Parent's consent. First, the IU must prove that an evaluation is necessary for the provision of a FAPE to the Student. Second, the IU must prove that the proposed evaluation is appropriate.

The necessity factor is not an issue in this case. On that point, the parties agree with each other. The Parent has clearly stated her belief that the Student must be evaluated. That belief is captured in the Parent's pleadings, pre-hearing communications, a pre-hearing conference, the hearing itself, and the Parent's written closing statement. The IU need not prove that an evaluation is necessary because both parties agree that an evaluation is necessary.

The parties sharply disagree with each other regarding the second factor: The IU argues that the proposed evaluation is appropriate. The Parent argues the opposite. While the burden of proof rests on the IU, considering the Parent's arguments first will place the dispute in context.

The Parent argues that the proposed evaluation is inappropriate for two reasons. First, the Parent argues that the proposed reevaluation is insufficient because it will not assess all areas of the Student's suspected disability. Second, Parent argues that the proposed reevaluation is racially and culturally discriminatory.

Regarding the alleged insufficiency, the Parent presents both general and specific arguments. Generally, the Parent argues that the PTE is cookie-cutter and not individualized for the Student. I agree. The section of the PTE describing the proposed evaluation is unedited boilerplate. My task, however, is to determine if the substance of the IU's proposal is appropriate for the Student. I cannot conclude that the IU's use of a template violates the Student's rights *per se*.

More specifically, the Parent argues that the IU's failure to individually tailor the reevaluation to the Student resulted in the IU not proposing a comprehensive functional hearing evaluation. The Parent argues that a hearing screening is not a hearing evaluation, that a hearing screening was already completed, and that the results of the hearing screening establish the need for a full hearing evaluation.[4] For these reasons, the Parent argues that a full hearing evaluation is necessary to obtain information about the Student's needs.

While the Parent's argument concerning the need for a hearing evaluation is the most fully formed, the Parent also argues that the proposed reevaluation would not capture complete information concerning the Student's health, vision, social and emotional state, intellectual ability, academic achievement, communications needs, and motor skills. The Parent argues that the absence of specific assessments in the PTE for these domains show that the proposed reevaluation is not individualized for the Student. The Parent also argues that evaluations in these domains are necessary to obtain a complete picture of the Student, as required by 20 U.S.C. § 1414(b)(3)(B).

The Parent's second argument is that that the assessments proposed by the IU have impermissible racial and cultural biases. The Parent is quite correct that the IDEA requires the IU to select and administer assessments "so as not to be discriminatory on a racial or cultural basis." 20 U.S.C. § 1414(b)(3)(A)(i). The Parent claims that the proposed reevaluation does not account for the family's race and culture, and that the IU has been nonresponsive to the Parent's requests that the IU address this issue.

[4] The IU agrees that a hearing screening is not a hearing evaluation. The IU argues that it need not include a hearing screening in the PTE because it is not a hearing evaluation. I agree with both parties on this point.

The Parent's arguments place the dispute in context. However, the burden of proof is on the IU. The Parent need not prove that the proposed reevaluation would fail to assess all areas of the Student's suspected disability or that the proposed reevaluation is racially or culturally discriminatory. Rather, the IU must prove that the reevaluation is appropriate.

To determine whether the proposed evaluation is appropriate, I compare the IU's proposal to the IDEA's mandates. As an initial consideration, I find that the proposed evaluation includes multiple assessment tools and strategies, including information provided by the Parent, that are designed to gather information to make an eligibility determination (eligibility is not in doubt) and to enable the IEP team to determine what special education the Student's needs in order to receive a FAPE. The IU's proposal complies with 20 U.S.C. § 1414(b)(2)(A).

Similarly, the proposed reevaluation does not use any single measure or assessment as the sole criterion for determining whether the Student is a child with a disability or determining an appropriate educational program for the Student. Setting the Parent's concerns about lacking specificity and racial and cultural bias aside for the moment, there is no dispute that the assessments are technically sound for gaining information about the Student's cognition, behaviors, and development. For example, there is no dispute that an Occupational Therapy Evaluation is one of several evaluations in the PTE and that it is a technically sound method for gaining information about the Student's Occupational Therapy needs. The IU's proposal complies with 20 U.S.C. § 1414(b)(2)(B)-(C).

Further, most of the factors at 20 U.S.C. § 1414(b)(3)(A) are not in dispute. Continuing to set aside the Parent's concerns about racial and cultural bias, there is no dispute that the proposed assessments will be used for valid and reliable purposes, administered by trained and knowledgably personnel, or administered in accordance with the publisher's instructions. The IU's proposal complies with 20 U.S.C. § 1414(b)(3)(A)(iii), (iv), and (v). Similarly, there is some testimony in the record of this case that the Student is multilingual, but there is no evidence that language barriers would invalidate any of the IU's proposed reevaluation. The IU's proposal complies with 20 U.S.C. § 1414(b)(3)(A)(ii).

One of the factors at 20 U.S.C. § 1414(b)(3)(A) is in dispute. Noted above, the Parent raised concerns that the proposed reevaluation is discriminatory on a racial and cultural basis in violation of § 1414(b)(3)(A)(i). It is the IU's obligation to prove otherwise.

The IDEA's specific wording is important to the analysis. The IDEA requires the IU to use materials that "are **selected and administered** so as not to be discriminatory on a racial or cultural basis." § 1414(b)(3)(A)(i) *bold added*. The absence of evidence of racial or cultural bias is insufficient because the IDEA places an affirmative obligation on the IU to *select* and *administer* materials in a nondiscriminatory way. This, in conjunction with the IU's burden in this case, illustrates what the IU must prove. To meet its burden, the IU must establish that it took affirmative steps to *select* assessments so as not to be discriminatory on a racial or cultural basis.[5]

Both parties presented evidence concerning the racial and cultural biases – or lack thereof – that are part of the IU's proposed reevaluation. For its part, the IU presented evidence that it provides services to children who speak a broad range of languages, employs bilingual evaluators and service providers, and has access to translation and interpretation services. *See, e.g.* NT 239. The Student's native language, however, is not the issue. Rather, the issue concerns Student's race and culture. To address culture specifically, the IU presented evidence that it actively solicits information about every child's culture as part of its standard practice and has a history of successfully evaluating children from a broad range of cultures. *See, e.g.* NT 240-241.

The Parent presented evidence, through her testimony, that some assessments are prone to racial and cultural biases – but that she has not shared the names of those assessments with the IU. *See, e.g.* NT 168. Rather, the Parent has asked the IU to provide the names of the assessments that the IU intends to use, and the IU's failure to respond to those inquires has made it impossible for the Parent to determine if those assessments are racially or culturally problematic. *See, e.g.* NT 167. As noted above, the Parent correctly describes the PTE as cookie-cutter. It is impossible to know from the PTE itself what specific assessments the IU will use. That lack of information, in combination with cultural problems that the Parent has seen in prior evaluations and cultural insensitivities that the Parent has perceived from the IU in the past (*see, e.g.* NT 170) form the basis of the Parent's concerns.

The Parent's concerns about racial and cultural bias are supported by the record of this case. The Parent has legitimate reasons to fear that racial or cultural insensitivities in the proposed reevaluation may yield inaccurate or

[5] It is possible to use nondiscriminatory evaluations in a discriminatory way. This is why the IDEA speaks both to selection and administration of assessments. The administration element, however, is not applicable because the evaluation has yet to be conducted. Nondiscriminatory administration is a factor that may be used to determine if a completed evaluation was appropriate.

incomplete information about the Student. At the same time, the Parent's inability to provide more robust evidence of racial or cultural bias is attributable in large part to the IU's refusal to share information about the specific assessments it will use. For example, there are many "cognitive assessments" that the IU could use to complete the evaluation. It is impossible for the Parent to challenge every cognitive assessment that the IU might use.

On the whole, however, the IU's evidence outweighs the Parent's evidence under the standards that I must apply. The IU's argument is undercut to a degree by its focus on the Student's native language and its history of not receiving citations from Pennsylvania and federal education agencies – as opposed to the specific actions it took in this case. Nevertheless, the record of this case establishes that the proposed evaluation includes parental input. The IU explained that it will solicit information specifically regarding the Student's race and culture, and how those factors impact upon the Student's needs. By collecting and carefully considering that information, the IU will be able to select more specific assessments and will be able to appropriately use those assessments to evaluate the Student.

The Parent's example of potential cultural bias helps illustrate this point. During the hearing, the Parent explained that an evaluation calling for a child to name the color of dirt may yield different results depending on the child's culture. *See* NT 168-169. By actively soliciting information about the Student's culture, the IU will be able to choose assessments that either minimize or account for that sort of variability and – more importantly – will be able to appropriately interpret and use test results. Standardized, normative assessments commonly used in educational evaluations are helpful only when interpreted by trained professionals. With information about the Student's culture, those professionals will be able to give appropriate weight and context to the raw data that such tests produce. Through that analysis, those professionals will be able to use the raw data to craft actionable recommendations for the Student's IEP team.

I note that the facts of this case are unique. In many other circumstances, the lack of specificity in the PTE could be problematic to the point of invalidating the document. The PTE provides scant information about what assessments the IU selected, and the IDEA calls for me to assess the IU's selection process. The absence of information about what assessments the IU will use is a problem, but that problem is corrected in the order below. And, under the standards that I must apply, the PTE provides sufficient information about the IU's selection process to enable the IU to satisfy its burden in this hearing.

While not part of the analysis directly, I must also note that the IDEA protects the Parent and the Student if the IU does anything other than what it has promised. If the IU chooses racially or culturally biased assessments or uses assessments in a racially or culturally biased way, the IDEA provides several avenues for correction and relief. *See, e.g.* 34 C.F.R. § 300.502(b)(1).

Additionally, the sequencing of events going forward will minimize the potential risks. Below, I will order the IU to collect parental input first. Then, after considering the Parent's input concerning the Student's race and culture, the IU will make specific determinations about what tests it will administer and share that information with the Parent. While the Parent will not have "veto power" over any specific assessment, the Parent will be able to express cautions or concerns to the IU. The IU would be wise to carefully listen to whatever concerns the Parent may have at that point. *See (again), e.g.* 34 C.F.R. § 300.502(b)(1).

In sum, the Parent's concerns about racial and cultural bias in the IU's proposed evaluation are not without merit. But, under the applicable standards, I must find that the IU has met its burden regarding § 1414(b)(3)(A)(i). Preponderant evidence establishes that the IU will gather relevant information about the Student's race and culture, and will use that information both to select specific assessments and uses those assessments in a nondiscriminatory way.

Finally, with one exception, the proposed evaluation assesses "all areas of suspected disability". 20 U.S.C. § 1414(b)(3)(B). Under IDEA regulations, the evaluation must assess the Student "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]" 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). The PTE as written notes the Student's communication, cognition, and physical needs, and proposes comprehensive testing all the domains specified in the regulations except for hearing.

The Parent makes a specific argument concerning the absence of a hearing assessment in the PTE. The Parent claims that the Student has already received a hearing screening, and the results of that screening suggest that a full functional hearing assessment is needed. The IU argues that it did not receive the hearing screening until after it filed the complaint initiating this due process hearing, and that it cannot complete a functional hearing assessment in the absence of medical documentation indicating hearing loss or a hearing-related educational need.

I reject the IU's argument that it could not offer a hearing assessment because it did not have medical documentation of a hearing need. The absence of medical documentation does not bar the IU from offering a hearing assessment if a hearing assessment was needed for educational purposes. The IDEA and its regulations create an affirmative duty for the IU to offer a hearing assessment – a full assessment for which consent is required – if the Student's hearing is an area of suspected disability. Hearing is explicitly referenced at 34 C.F.R. § 300.304(c)(4), and the IU cannot avoid its educational responsibilities for lack of medical documentation.

While the absence of medical documentation is not a defense by itself, I must assess the appropriateness of the proposed evaluation at the time it was proposed. At that time, the record of this case does not establish a basis for the IU to know that anything more than a hearing screening was needed. I agree with the IU that it need not include a hearing screening in the PTE, and that its offers of hearing screenings are well-documented elsewhere. Consequently, I find that the proposed evaluation was sufficiently comprehensive to evaluate all areas of suspected disability at the time it was offered, in compliance with 20 U.S.C. § 1414(b)(3)(B).

I will not, however, permit the IU to ignore information that it learned after this hearing was requested. The IU is currently in possession of a hearing screening completed by third party medical personnel. The IU also has a request from the Parent for a comprehensive functional hearing assessment. The IU must consider the third-party hearing screening and the Parent's request, and then either offer a functional hearing assessment or reject the Parent's request in writing. The absence of medical documentation cannot be part of the IU's analysis.

Summary and Conclusions

The IU may evaluate the Student without the Parent's consent if 1) an evaluation is necessary to ensure the provision of a FAPE to the Student, and 2) the proposed evaluation is appropriate. The parties agree that an evaluation is necessary but disagree as to whether the proposed evaluation is appropriate.

As discussed above, I find that the PTE was appropriate at the time it was offered. The record of this case establishes that the Parent's concerns about racial and cultural bias in the proposed evaluation are not baseless. However, the IU satisfied its burden through a preponderance of evidence that the proposed evaluation complies with IDEA regulations. Nevertheless, the record establishes that extra precautions are warranted, and the order below is intended to provide additional protection.

I also find that the PTE was designed to assess all areas of suspected disability at the time it was issued. Since that time, the Parent has provided additional documentation of the Student's hearing needs and has requested a comprehensive functional hearing assessment. The IU must determine if such an assessment is needed and, if so, must offer one. If not, the IU must reject the Parent's request in writing.

ORDER

And now, December 1, 2023, it is hereby **ORDERED** as follows:

1. The IU may proceed with the evaluation proposed in the Permission to Evaluate dated June 28, 2023, as follows:

    a. Within 10 days of this order, the IU shall solicit information from the Parent concerning the Parent and Student's race and culture, and how those factors may impact upon the Student's educational needs and/or the IU's evaluation of the Student's educational needs.

    b. Within 10 days of receiving a response from the Parent, or within 20 days of this order, whichever is sooner, the IU shall inform the Parent of the specific instruments that it will use as part of the evaluation.

    c. Upon receipt of a response from the Parent, or on the 20th day after this order, whichever is sooner, the statutory timeline for completing the evaluation will commence.

2. Within 10 days of this order, the IU shall either propose a comprehensive functional hearing assessment of the Student, or shall reject the Parent's request for a comprehensive functional hearing assessment in writing.

/s/ Brian Jason Ford
Hearing Officer