

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

RENNY S.,

Petitioner,

and

WESTSIDE REGIONAL CENTER,

Respondent.

OAH No. 2012051144
(Early Intervention Services Act
Gov. Code § 95000 et seq.)

DECISION

Jennifer M. Russell, Administrative Law Judge with the Office of Administrative Hearings, heard this matter in Culver City, California on June 25, 2012.

E.S., petitioner's father, represented petitioner.¹

Erin Fox, Attorney at Law, represented Westside Regional Center (WRC).

Testimonial and documentary evidence was received, the case argued, and the matter submitted for decision on June 25, 2012. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUE

Whether petitioner's center-based therapy should be increased to three hours per day, five days per week.

FACTUAL FINDINGS

1. By letter dated May 21, 2012, WRC denied petitioner's parent's request to increase the frequency of petitioner's center-based therapy, set forth below, to three hours

¹ Initials are used to preserve confidentiality.

per day, five days per week. On June 7, 2012, petitioner's parent filed a Due Process Hearing request appealing the denial.² Thereafter, this proceeding ensued.

2. Petitioner was born on August 19, 2010 after a 32-week gestation period. His birth weight was three pounds, six ounces. After his birth, petitioner was hospitalized in a neo-natal intensive care unit for several weeks. He has a history of gastroesophageal reflux disease and central sleep apnea. He resides with his mother, father, and twin sibling.

3. It is undisputed that petitioner presents with developmental delays. On April 8, 10, and 15, 2011, petitioner was 7 months, 19 days old when Edith M. Mak administered to him the Bayley Scales of Infant and Toddler Development, Third Edition (Bayley-III), an assessment measuring the developmental functioning of infants and children, and the Infant/Toddler Sensory Profile (Sensory Profile), a judgment-based caregiver questionnaire. Mak's Occupational Therapy Developmental Evaluation Report (Exhibit 2) indicates that on the Bayley-III petitioner obtained composite scores of 90 for cognitive development indicating that he was functioning within the low end of the average range; 109 for language development indicating that he was functioning within the average range; 76 for motor development indicating that he was functioning within the borderline range; and 105 for social-emotional development indicating that he was functioning within the average range.

4. Mak further reported that petitioner "obtained a score of 104 on the General Adaptive Composite (GAC) which represents a comprehensive and global estimate of . . . [claimant's] adaptive behavior functioning and describes the degree to which . . . [petitioner's] skills generally compare to other children within the same age group; relative to children of comparable age, [petitioner] . . . currently is functioning in the Average range of functioning. [Petitioner's] . . . developmental age for the cognitive subtest is 5 months, 10 days; receptive communication is 7 months; expressive communication is 7 months; fine motor skills is (*sic*) 5 months and gross motor is 4 months, 20 days." (Exhibit 2.)

5. Mak reported the following "concerns" about petitioner:

1) [Petitioner] . . . has decreased strength in his trunk and upper and lower extremities especially right side of body, which appears to impact his age and developmentally appropriate motor skills. 2) [Petitioner] . . . attempts to engage in functional one and two-handed skills but tends to drop toys when attempting to transfer objects. His decreased strength in his upper body appears to impact the . . . dexterity, quality, efficiency and coordination, of his functional hand skills which are needed for play and self-care skills. 3) He has good head control but decreased postural control and strength which impacts functional mobility, gross motor skills, transitional movements i.e. limited rolling on his own or limited independent sitting. 4) He has limited functional endurance and tires easily. 5) He appears to have typical sensory

² No objection regarding the timeliness of petitioner's due process hearing request has been raised.

processing skills and sensory modulation skills in certain areas for his age. However, he has over-responsive behaviors to tactile processing. Most of the time, he is alert, active and happy but there are times, when he appears tired or uninterested. Reportedly, he does not sleep well. He has good attention span for his age. 6) Reportedly, he has made improvement in his social emotional and personal-social skills. He now attempts to engage in eye and social contact and initiate interaction with caregivers. (Exhibit 2.)

6. Mak recommended “a trial of in-home physical therapy (PT) to address [petitioner’s] . . . limitations in strength[,] especially [the] right side of his body, gross motor skills and functional mobility.” She indicated that petitioner “may benefit from a trial of in-home occupational therapy, two times a week, for one hour sessions for six to 12 months [to] address his limitations in strength and functional hand skills/fine motor skills[,] especially right arm/hand use” and that “[h]e would appear to benefit from a trial of in-home infant stimulation from the developmental specialist to address his play skills and history of poor eye contact and decreased interaction or play with caregivers.” (Exhibit 2.)

7. Ceasar Garcia, WRC’s Early Start Manager, testified that Mak’s Developmental Evaluation report was used to determine petitioner’s eligibility for early intervention services commonly known as “Early Start.” According to Garcia’s testimony, claimant’s eligibility for Early Start was uncertain because of his scores on the Bayley-III, but WRC gave him the benefit of the doubt after considering the clinical data along with information an intake officer gathered. An Eligibility Worksheet for Birth to 3 Years Old lists claimant’s chronological age of seven months, 19 days and indicates with an asterisk next to the domain for motor development that claimant functions at age “4 mos./5 mos.” (Exhibit 3.)

8. An August 2, 2011 Individualized Family Service Plan (IFSP) provides for petitioner’s receipt of WRC-funded in-home physical therapy at a rate of one hour per week, five hours per month and in-home occupational therapy at a rate of one hour per week, five hours per month for the period August 11, 2011 to August 31, 2012 to address his motor delays. In January 2012, after completion of another occupational therapy evaluation, the frequency of petitioner’s in-home occupational therapy was increased to two hours per week. (Exhibit 6.) Petitioner currently receives one hour of in-home physical therapy and two hours of in-home occupational therapy each week.

9. In an undated Request for Early Start Center-Based Natural Environment Funding, Shelley P. Cox, Executive Director of Step By Step, opined that petitioner would benefit from “a toddler group three hours per day three days a week.” (Exhibit 5.) A revised IFSP, dated January 12, 2012, provides for WRC-funded early intervention center-based services at a rate of three hours per day, three days per week with Step By Step for petitioner.

10. Garcia testified that petitioner’s adjusted age was 14-months old when he started receiving center-based services. Garcia testified that petitioner’s individual therapies addressed his needs; however, center-based therapy was provided to petitioner as an

exception to the generally accepted practice of limiting the amount of center-based therapies to children younger than two-years old because the needs of such young children are best addressed on an individual basis in a natural setting. Garcia testified that this was another instance of petitioner receiving the benefit of the doubt.

11. On March 17, 2012, LeeAnn Roca, M.Ed., a licensed speech-language pathologist, conducted a speech and language assessment of petitioner. Roca prepared an evaluation report in which she reported that petitioner “presents with a moderate-to-severe receptive and expressive language delay characterized by receptive language skills greater than 40% delayed and expressive language skills greater than 50% delayed. He presented with minimal attention to spoken language and minimal vocalizations and verbalizations. He also presented with weak oral musculature strength and range of motion hindering his articulation development and swallowing of liquids.” (Exhibit 10.) To address these delays, Roca recommended two hours per week of speech and language services, which petitioner currently receives.

12. In a May 2, 2012 Report petitioner’s clinical team at Step-by-Step requested that petitioner’s rate of center-based therapy be increased to five days per week for 15 hours per week. The report further recommended continuing petitioner’s speech and language, occupational and physical therapies “to help foster development in those areas.” (Exhibit 12.)

13. Licensed occupational therapist Laura Haynsworth has been providing petitioner with his two weekly hours of occupational therapy since May 2011. In an April 19, 2012 report she indicated that her administration of the Developmental Assessment of Young Children (DAY-C) to petitioner revealed that his social/emotional developmental age is the equivalent age of a 5-month old child; his cognitive developmental age was the equivalent age of a 6-month-old child; and his adaptive behavior skills were the equivalent skills of a 7-month-old child. (Exhibit 12.) Haynsworth summarized her findings and recommendations stating that, “At his point in time, [petitioner] . . . is still demonstrating developmental delays and does not appear on tract to catch up developmentally by his 2nd birthday in August. In addition to the current therapy [petitioner] . . . is receiving, he will benefit from enrolling in a center-based program to facilitate social and developmental skills. It is my recommendation that he attend a center based facility 5 days per week to help facilitate the development of social and play skills as well as reaching developmental milestones.” (Exhibit 12.)

14. Sarah Zahed has been providing petitioner with his weekly physical therapy since October 2011. Zahed recently assessed petitioner with, among other things, the Revised Gesell Developmental Schedules and prepared a June 22, 2012 Physical Therapy Developmental Evaluation Report. Zahed reports that claimant “is presenting with Gross Motor Skills at (14) Month level based on Revised Gesell Developmental Schedules. . . . [Petitioner] remains with mild hypotonicity (low muscle tone) throughout all extremities and trunk area and slight right torticollis which is improving. However, it appears that hypotonicity and torticollis is affecting his posture and balance with ambulation, at this

time.” Zahed recommended continuing petitioner’s physical and occupational therapies and “increase[ing] his Early Start services to assist . . . meeting his developmental milestones.” (Exhibit A.)

15. WRC argues, without proffering any supporting evidence, that it is not clinically advisable to increase the frequency of petitioner’s center-based therapy because of his age, and maintains that it will continue to monitor petitioner’s progress.

16. Cox, the Step By Step Executive Director, credibly testified that based on her clinical team’s work with and assessments of petitioner, he would benefit from an additional two days (three hours each day) of center-based therapy.

17. Petitioner’s parent is distraught that at almost two-years old petitioner is not speaking and is unable to ambulate up and down stairs. He expressed concern that without more frequent center-based therapy petitioner will not catch up developmentally to his peers.

LEGAL CONCLUSIONS

1. Petitioner’s appeal of WRC’s denial of an increase in his center-based therapy hours is granted. (Factual Findings 2 through 17, inclusive; Legal Conclusions 2 through 6, inclusive.)

2. Where a change in services is sought, the party seeking the change has the burden of proving that a change in services is necessary. (See Evidence Code, §§ 115 and 500.) Thus, in requesting an increase in his center-based therapy hours, petitioner bears the burden of proving by a preponderance of the evidence that the increase is necessary to meet his needs. Petitioner has established by a preponderance of the evidence that an increase in his center-based therapy hours is warranted at this time.

3. Under the California Early Intervention Services Act (Gov. Code, § 9500 et seq.), as it interacts with the federal Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1431 et seq.), an infant or toddler under three years of age is eligible for early intervention services if the child demonstrates a developmental delay in one or more of the following five areas: cognitive development; physical and motor development, including vision and hearing; communication development; social or emotional development; or adaptive development. Developmentally delayed infants and toddlers are those who are determined to have a significant difference between the expected level of development for their age and their current level of functioning. A significant difference is defined as a 33 percent delay in one developmental area before 24 months of age, or, at 24 months of age or older, either a delay of 50 percent in one developmental area or a 33 percent delay in two or more developmental areas.

4. It is undisputed that petitioner presents with developmental delays rendering him eligible for early intervention services, which he has been receiving. The design of his

early intervention services should meet his unique developmental needs and the needs of his family. (See 20 U.S.C. § 1432 (4)(C); Gov. Code, § 95020, subd. (d)(5); Cal. Code Regs., tit. 17, § 52000, subd. (b)(12).) Petitioner has made some progress in some areas of delay; however, it is established that the totality of his developmental delays is significant, and after initial therapeutic interventions it is now apparent that his current rate of center-based therapy insufficiently addresses his unique needs. In addition, petitioner's physical and occupational therapists are agreed that increasing the frequency of petitioner's center-based therapy is beneficial for his global development. WRC provided no contradictory evidence. Nothing established that petitioner's needs are not met with two additional days (three hours each day) of center-based therapy.

5. WRC's denial of an increase in petitioner's center-based therapy hours to meet his current needs on the basis of a general principle limiting the quantity of service hours for children under a certain age without regard to petitioner's unique, individual circumstances is an unacceptable basis for denying the requested increase. (See *William v. Macomber* (1990) 276 Cal.App.3d 225.)

6. Petitioner has established by a preponderance of the evidence that an increase in his center-based therapy to three hours per day, five days per week is warranted at this time to meet his needs.

ORDER

1. Petitioner Renny S.'s appeal is granted.

2. Westside Regional Center shall fund three hours per day, five days per week of center-based therapy for Renny S. until such time as changed circumstances or a new IFSP warrants otherwise.

Dated: July 15, 2012

_____/s/_____
JENNIFR M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings