

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Petitioner,

vs.

WESTSIDE REGIONAL CENTER,

Respondent.

OAH No. 2015030023

California Early Intervention Services
Act (Gov. Code, § 95000 et seq.)

DECISION

This matter was heard by Eileen Cohn, Administrative Law Judge, Office of Administrative Hearings, State of California, on July 1, 2015 in Culver City.

Petitioner was represented by his mother (petitioner's parent).¹ Erin Fox, Fair Hearing Consultant, represented the Westside Regional Center (respondent or WRC).

The parties presented the testimonial and documentary evidence described below and gave closing arguments. The record was closed and the matter was submitted for decision on July 1, 2015.

ISSUE

The parties stipulated to the following issue:

Petitioner requests the continuation of weekly, one-hour, physical therapy services as part of her Early Start² services.

¹ Petitioner's name and the names of his family members are omitted to protect their privacy.

² "Early Start" and the "Early Start Program" are common names for the California Early Intervention Services Act, Government Code section 95000 et seq., described more specifically in Legal Conclusions 2-5, below.

EVIDENCE RELIED UPON

Documentary: Respondent's exhibits 1-12.

Testimonial: Petitioner's mother; Erin Fox

FACTUAL FINDINGS

Parties and Jurisdiction

1. Petitioner is a 31-month-old girl who was found eligible for services from WRC's Early Start program due to global developmental delays including physical delays. The WRC was offered two one-hour sessions of physical therapy (PT) weekly beginning in April 2013 to address her gross motor skills deficits. Prior to the hearing, the petitioner agreed to a reduction of PT services to one hour a week (Exhibit 10).

2. By letter dated February 24, 2015 (Exhibit 1), WRC notified petitioner of its decision to discharge her from PT services on March 31, 2015. WRC's decision was based on petitioner's developmental evaluation dated January 14, 2015, where the assessor concluded that her gross motor functioning was adequate.

3. Petitioner's mother timely submitted a written appeal titled Due Process Hearing Request (Exhibit 1) to WRC which established the issues for this hearing.

Facts Related to Petitioner's Service Request

4. PT services addressed petitioner's gross motor skills. Gross motor skills involve the large muscles of the body needed to successfully engage body movements in such activities as crawling, sitting, walking, and running. At the time petitioner was made eligible and had her first Individualized Family Service Plan (IFSP) meeting at five months-old on April 19, 2013, petitioner had a significant difference in the area of her gross motor skills development as compared to the expected gross motor skills development for someone of her age. WRC relied upon its developmental evaluation report dated March 29, 2013, to determine petitioner's deficits and services. The WRC found from standardized testing, observations and petitioner's mother, petitioner's gross motor skills were extremely low, equivalent to a two-month, 20 day-old toddler.

5. At her initial April 19, 2013 IFSP petitioner was also offered nine hours monthly or, on average, two one-hour sessions weekly of infant stimulation services (infant stimulation). Infant stimulation is administered by a specialist trained in early childhood development. It addresses global development skills in the child's natural environment, including the home and community. Infant stimulation services were provided to petitioner and petitioner's mother, the caregiver, for the purpose of improving petitioner's identified deficits, including her motor skills deficits.

6. Infant stimulation was provided by WRC vendor Optima Family Services (Optima). Petitioner's mother found Optima's services competent, reliable and productive, and valued the time Optima devoted to petitioner. Petitioner's mother did not have the same experience with the PT provider who, according to her, had not consistently provided the required PT services until the last month of service, March 2015.

7. Petitioner's gross motor skill development was carefully monitored by the IFSP team and petitioner's mother. At her first annual IFSP team meeting on November 26, 2013, when petitioner was one year old, IFSP team recommended two, one-hour weekly sessions of in-home individual PT to work on IFSP team outcome (goal) number three which required petitioner to walk down three steps with the support of a rail or finger. At the time of her annual IFSP, petitioner was five months behind her same-aged peers in gross motor development, and could not navigate her environment from a crawling or walking position due to decreased upper extremity strength, balance and coordination.

8. Additional gross motor goals were developed with the assistance of the physical therapist. Goals included: crawling within petitioner's play environment on level and uneven terrain, independently; pulling to stand at a couch or rail, independently, three of three trials; walking by cruising with two hands at least 10 feet in each direction, independently; rising from floor to standing position, and momentarily standing, supervised; walking at least five feet between objects, two of three trials, with minimal assistance; creeping up two stair-steps, two of three trials, with minimal assistance; and creeping up two stair-steps, two of three trials, with minimal assistance. An additional goal was developed requiring petitioner's mother to perform a home exercise program with petitioner and use adequate play techniques for gross motor development.

9. On May 8, 2014, petitioner's physical therapist prepared a progress report on her goals. Petitioner met all the goals developed for her by the physical therapist, but the goal set for petitioner's mother was still "emerging." (Exhibit 7.) The physical therapist reported significant gains in petitioner's overall gross motor skill development from her initial IFSP. Petitioner was able to "creep" to ascend and descent two standard stair steps within the home with supervision and demonstrated "emerging" ability to step up and down a standard step with minimal assistance. Petitioner could not yet jump, could only hurl a small ball without purpose, and required assistance to direct the ball to a target. (*Ibid.*) The physical therapist recommended continued in-home PT to improve gross motor skills in the area of trunk control, strength and balance and to achieve new gross motor goals within a six month period. Continued PT was also recommended for "continued caregiver training" with petitioner's mother so that she could facilitate gross motor activities.

10. Based upon the PT's recommendations, on May 29, 2014, when petitioner was one and one-half years-old, the IFSP team held a periodic review to assess her progress. The IFSP agreed to continue two one-hour sessions of PT weekly.

11. For the next six months, PT focused on the following goals: walking up

and down the two standard stair-steps holding a wall or rail, independently; standing on one foot momentarily without holding anything, supervised; kicking a medium sized ball with either foot, independently; run within her play environment without loss of balance, climb onto and off an adult chair, with minimal assistance; jump and clear both feet, two of three trials, with minimal assistance; and ride a tricycle within the play environment at least ten feet, with minimal assistance to pedal and for direction. There was no evidence as to whether the goal of riding a tricycle was implemented or achieved.

12. On November 26, 2014, when petitioner was two years old, Optima prepared a quarterly report and assessment of petitioner's global development, including gross motor development. Optima concluded that petitioner's gross motor skills were within the 20-22 month range, only two months behind her age. PT services were continued at the same frequency.

13. Optima reviewed petitioner's progress on goal three from the initial IFSP and other gross motor skills addressed by the PT's additional goals. Relying on an observation assessment tool and input from petitioner's mother Optima found that petitioner made progress with her gross motor skills in the following ways: meeting her goal of throwing a ball forward underhand in a sitting position; walking down stairs holding onto a rail; climbing forward on an adult chair, then turning around and sitting in place; jumping in place with both feet with legs close together; and squatting. Petitioner could not walk into a large ball while trying to kick it. Optima did not use the same standardized assessments used by the PT, but used an accepted observation tool, and based upon its provision of infant stimulation, was in the home regularly and was familiar with petitioner.

14. In its November 26, 2014 report, Optima recommended incorporating gross motor skill development into petitioner's play routine. Optima recommended two gross motor goals to be met within three months: kicking a large ball by walking into it; and throwing a ball from a standing position toward a target. The goals were designed to be implemented by petitioner with her infant stimulation specialist and family through games and praise.

15. On December 16, 2014, the annual IFSP meeting was held. The IFSP team developed one gross motor goal for petitioner to run with good balance and smooth turns, and walk up and down stairs. The IFSP team continued twice weekly, one-hour PT services, and also added behavior intervention services, 27 hours per month; speech therapy, one hour, once a week; occupational therapy, one hour, once a week; and the infant development program, one hour, twice weekly for upwards of nine hours a month.

16. On January 14, 2015, when petitioner was close to 26 months-old, a qualified WRC vendor, Los Angeles Intensive Pediatric Therapy (Pediatric Therapy), prepared an annual development evaluation report which identified petitioner's developmental status. From standardized assessments, parent interview, and clinical observations, Pediatric Therapy concluded petitioner functioned in the average range of gross motor skills. Petitioner jumped off the floor, ascended and descended stairs without hand support utilizing

a step-to-gait pattern and kicked a ball. She was able to walk backwards, balance on one foot with hand support, walk sideways without assistance. She could jump from the floor, but not the step. Her muscle strength and tone were normal. On one standardized assessment, the Bayley Scales of Infant and Toddler Development, Third Edition (Bayley-III), she performed in the average range of motor skill development, or 23 months, when compared with her same-aged peers.

17. Based on its evaluation of petitioner, Pediatric Therapy made several recommendations for services, including occupational therapy for fine motor skill development. Instead of physical therapy, it “strongly recommended taking [petitioner] to the park on a daily basis to insure development of her gross motor skills.” (Exhibit 11.)

18. On March 2, 2015, as a result of Pediatric Therapy’s evaluation, WRC prepared an addendum to the December 16, 2014 IFSP, modifying petitioner’s PT services. The IFSP addendum, signed by petitioner’s mother, reduced the PT services to one hour, once a week for the month of March 2015. As part of the IFSP, PT services were terminated on March 31, 2015. Mother agreed to the reduction in PT services to one hour weekly, but appealed the termination of services.

19. On April 15, 2014, when petitioner was 29 months old, Optima prepared a quarterly report. Relying on an observation tool and petitioner’s mother’s report, Optima found petitioner’s gross motor skills to be within the average range. Petitioner met her gross motor goals; she was observed to pick up toys from the floor without falling, walking with one hand held up stairs, and throwing the ball overhand within three feet of target.

20. Optima recommended gross motor goals for three months ending July 15, 2015: walking backward and jumping from a bottom step. Optima provided detailed instructions of how to implement its recommended goals through game playing, modeling and imitation. Instead of relying on a physical therapist, petitioner’s gross motor goals would be implemented by her infant stimulation specialist who would also train petitioner’s mother. The goals were considered guidelines and could be changed at the discretion of the infant stimulation specialist with the consent of the family.

21. At hearing, petitioner’s mother provided candid and heartfelt testimony about her observations of what she considered petitioner’s gross motor deficits. Petitioner’s mother described petitioner’s persistent difficulties with walking down the steps unassisted, running “like a horse” with a hopping gait as opposed to a foot-by-foot gait, and difficulties at the park with climbing up steps to the slide. All these deficits were observed at one time or another. Petitioner’s mother read into the record her written appeal, which she said was dictated by petitioner’s physical therapist who would not write a letter on petitioner’s behalf.

She doesn’t have balance, she falls a lot while walking. She walks wide. She walks with turning her toes and feet in. She walks tippy-toes. She cannot run correctly. She runs like a horse. She jumps while running. She cannot sit criss-cross. She sits like “w.” She needs help.

(Exhibit 1.)

22. Petitioner's mother insisted she personally worked with petitioner as recommended by taking petitioner to the park, but petitioner's deficits persisted and required the skilled intervention of a physical therapist. Petitioner's mother conceded she was not in the best position to know how her daughter's deficits measured against same-aged peers. For example, petitioner's mother complained that petitioner could not navigate the steps of the public play yard slide area; but she did not know whether the steps' were too steep for petitioner's same-aged group.

23. Petitioner's mother was not aware that Optima was supposed to address petitioner's gross motor deficit and train petitioner's mother in game and role playing as part of its infant stimulation program. Petitioner's mother did not recall reviewing the goals and detailed recommendations of Optima's latest quarterly report. (Exhibit 11.) Petitioner's mother's goal was to intensify services for petitioner to prepare her for preschool. As petitioner's mother, she wanted to maximize petitioner's progress, and did not judge petitioner's progress in the same manner as Optima did, or fully appreciate what she should expect from petitioner given her age. Petitioner's mother's intentions were sincere and well-meaning, and in fact, petitioner was not 100 percent equivalent to her same-aged peers as petitioner's mother noted in Factual Finding 21. However, the weight of the evidence from the above-describe evaluations and Optima's most recent report favored WRC's determination that petitioner's gross motor skills were close to her same-aged peers and remaining deficits could be adequately addressed by the infant stimulation specialist.

LEGAL CONCLUSIONS

1. A party seeking a modification of an existing service or support bears the burden of proving by a preponderance of evidence that a change is warranted. (Evid. Code, § 500; see *Schaffer v. Weast* (2005) 546 U.S. 49, 51; 34 C.F.R. § 303.425(b).) WRC, the respondent bears that burden because it terminated PT services which were part of the most recent IFSP. (Factual Findings 1-3.)

2. Jurisdiction for this case is governed by the Individuals with Disabilities Education Act (IDEA), which is federal law (20 U.S.C. § 1431 et seq.), and the California Early Intervention Services Act (Gov. Code, § 95000 et seq.), which is state law that supplements the IDEA, commonly referred to as the "Early Start Program." Each act is accompanied by pertinent regulations which guide the implementation of the program. Thus, both federal and state laws apply to this case. Petitioner properly and timely presented a due process hearing request under these laws, and jurisdiction for this case was established. (Factual Findings 1-3.)

3. Eligibility for Early Start services is governed by Government Code section 95014. Eligibility was established under subdivision (a)(1) because petitioner was found to have a "significant difference" between her level of functioning in the areas of expressive

language communication development and the expected level of development for someone of his age based on Factual Findings 1 and 4. As it relates to petitioner, the statute defines “significant difference” as a “33-percent delay in one developmental area before 24 months of age.” (*Ibid.*)

4. The California Legislature found early intervention services represent an investment, “in that these services reduce the ultimate costs to our society, by minimizing the need for special education and related services in later school years and by minimizing the likelihood of institutionalization.” (Gov. Code, § 95001, subd. (a)(2).) The Legislature recognized “[t]he earlier intervention is started, the greater is the ultimate cost-effectiveness and the higher is the educational attainment and quality of life achieved by children with disabilities.” (*Ibid.*)

5. The Department of Developmental Services (DDS) is the state agency charged with implementing the Early Start Program. DDS delivers Early Start services through regional centers. (Gov. Code, § 95004; Welf. & Inst. Code, § 4620.) Early Start services are provided in accordance with an IFSP, which must address the infant’s or toddler’s developmental needs. (Cal. Code Regs., tit. 17, §§ 52100, 52106.) A regional center service coordinator shall continuously seek the appropriate services necessary to enhance the development of each infant or toddler being served for the duration of the infant’s or toddler’s eligibility. (Cal. Code Regs., tit. 17, § 52121, subd. (a)(6).) Petitioner received a range of individual services including PT, and PT addressed her motor skills delays, as set forth in Factual Findings 4-20.

6. Early intervention services are defined as those services “designed to meet the developmental needs of each eligible infant or toddler and the needs of the family related to the infant or toddler’s development.” (20 U.S.C. § 1432(4)(A); Cal. Code Regs., tit. 17, § 52000, subd. (b)(12).) Pursuant to Government Code section 95004, subdivision (a), the provisions of the Lanterman Developmental Disabilities Services Act found in Welfare and Institutions Code sections 4500 through 4846 also apply to the Early Start program. Welfare and Institutions Code section 4512, subdivision (b), specifically defines “services and supports” for persons covered by the Lanterman Act to include physical therapy services.

7. Respondent met its burden of proof that PT was no longer required to address petitioner’s motor skill deficits as part of her Early Start services. WRC’s noticed reason for denying the program in Factual Finding 2 was substantiated by the evidence (Factual Findings 4-20). Petitioner’s mother, although sincere, did not provide sufficient justification for PT services in addition to the offered infant stimulation services (Factual Findings 21-23.) Petitioner’s mother liked Optima and considered the infant stimulation specialist extremely competent and reliable. (Factual Finding 6.) Mother had been frustrated with PT services in the past, so it made sense to incorporate motor skills game playing and role playing into the more consistently reliable and competent infant stimulation services provided to petitioner. Notably, petitioner’s mother was unaware that gross motor goals had been made part of the infant stimulation specialist’s responsibilities. (Factual Finding 23.)

8. Welfare and Institutions Code section 4646.4, subdivision (a)(4), requires regional centers to consider a family's responsibility to provide similar services for their minor child, with or without disabilities. Further, the California Legislature has decreed that "[t]o the maximum extent possible, infants and toddlers with disabilities and their families be provided services in the most natural environment, and include the use of natural supports and existing community resources." (Gov. Code, § 95001, subd. (b)(6); see also 20 U.S.C. § 1432(4)(G).) Natural environments are settings that are natural or typical for same-aged infants or toddlers without a disability and may include the home or community settings. (34 C.F.R. § 303.26.) Settings, other than natural environments are appropriate, as determined by the parent and the IFSP team, only when early intervention services cannot be achieved satisfactorily in the natural environment. (34 C.F.R. § 303.126, subd. (b).) WRC's recommendation of incorporating motor skills development into petitioner's infant stimulation services is consistent with the legislative intent to assimilate infant and toddlers into their natural environment. Optima's gross motor goals relied on games and role playing and were designed to be implemented by an infant stimulation specialist working directly with petitioner, but also with petitioner's mother in petitioner's natural environment (Factual Findings 14, 17 and 20).

9. Petitioner benefited from the services provided, such that she no longer fell significantly behind her peers with respect to her gross motor skills. In sum, based upon Legal Conclusions 1-8, and Factual Findings 1-23, respondent met its burden of proving petitioner no longer required PT to address needs that were not otherwise being met by WRC in her Early Start program.

ORDER

Petitioner's appeal is denied. WRC is not required to provide further physical therapy services.

DATED: July 13, 2015.

/s/
EILEEN COHN
Administrative Law Judge
Office of Administrative Hearings