

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 March 17, 2015, in Culver City.

Petitioner was represented by J.K., his mother (petitioner's parent).<sup>1</sup> 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 March 17, 2015.

**ISSUE**

The parties stipulated to the following issue:

Petitioner requests a center-based program three times a week, three hours per day, in addition to his individual Early Start<sup>2</sup> services in the areas of speech and language, occupational therapy and physical therapy.

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

## EVIDENCE RELIED UPON

*Documentary:* Respondent's exhibits 1-5; Petitioner's exhibits A-C.

*Testimonial:* J.K. (petitioner's mother); Erin Fox (WRC)

## FACTUAL FINDINGS

### *Procedural Matters*

1. Petitioner objected to WRC's expert witness Tom Kelly, Ph.D. and moved to exclude his testimony on the ground that WRC failed to provide notice of his appearance at least five days before the hearing pursuant to California Code of Regulations, tit. 17 (Regulations), § 52174, subdivision (d)(3). Good cause did not exist to grant WRC's request to continue this matter so that it could comply with its notice obligations, as Early Start matters must be heard and a Decision issued within 30 days from the date petitioner filed his request, under Regulations, § 52174, subdivision (c)(5), and petitioner would have been prejudiced by any further delay. Additionally, petitioner's representative, his mother, had limited availability and was prepared to go forward. Petitioner's motion to exclude Dr. Kelly's testimony was granted.

### *Parties and Jurisdiction*

2. Petitioner is a 25-month-old boy who was found eligible for services from WRC's Early Start program due to developmental delays in communication and adaptive self-help and developmental physical delays. At the time he was made eligible, petitioner had a significant difference in the area of his expressive communication development as compared to the expected communication development for someone of his age.

3. By letter dated February 9, 2015 (Exhibit 1), WRC notified petitioner of its denial of his request for WRC to fund a center based program, three times per week, three hours per day. A center-based program is an early intervention group-based therapeutic program directed by personnel who are specialists in developmental delays. WRC's decision was made by the Purchase of Service Team, which was comprised of developmental psychologists, the early start program manager, and the WRC lead psychologist and intake manager, Tom Kelly, Ph.D.

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<sup>2</sup> "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.

4. WRC denied petitioner's funding request on its finding that his current developmental needs were addressed through individual services in the areas of occupational therapy (OT), one 60- minute session per week, physical therapy (PT) one 60- minute session per a week, and speech therapy, three 60- minute sessions per week. These services were being funded by petitioner's health insurance and by WRC. Relying upon its developmental evaluation of petitioner, the WRC concluded, "a typical preschool, mommy and me, or a gym class were more appropriate at this time." (Exhibit 1.)

5. Petitioner's mother timely submitted a written appeal titled Due Process Hearing Request (Exhibit 2) to WRC which established the issues for this hearing.

*Facts Related to Petitioner's Service Request*

6. In June 2014, when petitioner was 15 months old, his pediatrician referred him for a speech and language assessment to determine his need for speech-language therapy intervention. A qualified speech and language therapist with Therapy-West, a therapeutic clinic, administered the assessment. Based upon the assessor's clinical observations, informal interviews with parent, informal oral peripheral exam, observation of communicative intent and behavior, and administration of a standardized assessment, the Preschool Language Scale, Fifth Edition (PLS-5), the assessor found delayed expressive language skills and limited oral motor awareness.

7. The PLS-5 confirmed a marked difference between petitioner's auditory comprehension and his expressive ability. On the receptive language auditory comprehension subtest of the PLS-5, petitioner scored in the low average range of his same-aged peers, obtaining a standard score of 92, or the 30th percentile. Petitioner could not participate in self-directed play, or follow routines or directions. On the expressive language auditory comprehension subtest petitioner was significantly below average to same-aged peers, obtaining a standard score of 53, or a percentile rank of one percent. He could not imitate facial expressions and movements, combine sounds, or take multiple turns. His main form of communication was nonverbal, i.e., crying and gesturing.

8. During the summer of 2014, petitioner's pediatrician referred him to WRC due to deficits in his communication and gross motor development.

9. In July 2014, the WRC funded a speech and language assessment by two qualified speech and language pathologists retained by Speech Language and Educational Associates. The WRC-funded assessment repeated the PLS-5, administered a month before. Petitioner scored higher than the month before on the auditory comprehension scale with a standard score of 116, placing him in the above

average range or a percentile rank of 86 percentile of his same-aged peers, as opposed to the low average range. Petitioner's expressive skills were also slightly higher than the previous administration, with a standard score of 77, or a percentile rank of 6. In this administration of the PLS-5 the assessor acknowledged that the scores could have been affected by the reliance on parent's report to obtain some of the information. Despite the differences in the scores from the first and second administration of the test, the WRC-funded assessment confirmed petitioner's significant deficit in expressive communication.

10. The WRC funded assessors also administered another standard assessment, the Rosetti-Infant Toddler Language Scale (Rosetti) which confirmed petitioner's significant expressive communication deficit with his expression equivalent to a three to four month- old child. The Rosetti measured petitioner's skill level across several domains: interaction/attachment, pragmatics, gesture, play, language comprehension, and language expression. Petitioner scored in the below average range on all measures, including language comprehension. His scores in the areas of pragmatics, play and language expression were at least six months below his age and functional level. The assessors attributed scoring differences between the PLS-5 and Rosetti, in the area of language development, to the PLS-5's placement of the same skills in a higher age range. Despite the scoring differences between the assessments, severe deficits in expressive communication were identified in each assessment and confirmed in observations.

11. Petitioner became eligible for services from WRC on August 15 2014, when he was about 18 months old. Based upon the speech and language assessments, and gross, fine motor and sensory processing developmental, WRC approved funding for the speech and language, OT and PT services. The OT, PT and speech services were primarily funded through petitioner's private insurance, with WRC paying the unfunded portion, referred to as the co-pay.

12. Therapy West, a WRC vendor, provided petitioner's individual clinic based OT, PT and speech therapy services. Petitioner began services with Therapy West in June 2014, before being made eligible for the WRC's Early Start program.

13. On February 2, 2015, Nathan Hochgesang, a registered and licensed occupational therapist (OTR/L) with Every Child Achieves, prepared a developmental assessment report for the WRC in anticipation of the Individual Family Service Plan (IFSP) meeting. (Exhibit A.) Mr. Hochgesang relied upon his interview with parent, clinical observations and the results of two standardized assessments to determine petitioner's deficits and made service recommendations. Mr. Hochgesang administered the cognitive, language and motor subtests of the Bayley Scales of Infant and Toddler Development, Third Edition (Bayley Scales), and the social-emotional and adaptive-behavior subtests of the Developmental Assessment of Young Children, Second Edition (DAYC-2).

14. Mr. Hochgesang's administration of the Bayley confirmed petitioner's primary deficit in the area of expressive speech. In the area of receptive language, petitioner obtained a scaled score of 12, or an age equivalency of 26 months, consistent with his age. In the area of expressive language, petitioner obtained a scaled score of 5, or an age equivalency of 16 months, a score well below his age.

15. Mr. Hochgesang provided a more detailed analysis of petitioner's other deficits which also impacted his progress. In the area of physical development and sensory processing, Mr. Hochgesang confirmed petitioner's doctor's diagnosis of low muscle tone. Consistent with parent's report of petitioner's balance challenges, Mr. Hochgesang observed petitioner fall several times, acknowledged through parent's report his biting others could have been out of frustration with his communication challenges, but concluded that his biting and falling was also possibly due to his sensory processing and proprioceptive deficits. From the Bayley Scales Mr. Hochgesang confirmed petitioner's difficulty with fine motor bi-lateral coordination activities and gross motor balancing deficits which were further confirmed through observations during the assessment. Petitioner obtained a standard score of 11 on the fine motor subtest, or an age equivalency of 26 months, and a standard score of 10, on the gross motor subtest, or an age equivalency of 23 months, scores roughly equivalent to petitioner's chronological age.

16. Mr. Hochgesang's assessment further addressed petitioner's social emotional deficits and adaptive behavior, which he characterized as "delayed." In the DAYC-2, petitioner obtained a standard score of 95 percent on the social emotional subtest and a standard score on the adaptive behavior subtest, both equivalent to 20-months in age. Petitioner demonstrated many strengths, but demonstrated delays in playing with small groups of peers, a disinterest in comforting others in distress, an inability to sing familiar songs with adults, say "please" or "thank you," or ask for help. In the areas of adaptive behavior, which referred to self-care skills like feeding, dressing and toileting, petitioner could feed himself finger-foods and cooperate with dressing and undressing, but could not pull off his socks or put on loose clothing independently.

17. Petitioner's cognitive ability was not at issue in this matter.

18. Based on his parent interview, observation and administration of standardized assessments, Mr. Hochgesang recommended WRC "consider a center-based program to facilitate social skills, peer interaction, self-help skills and expressive language development." He also recommended petitioner's individual speech and language, PT and OT services continue, with an additional focus on bilateral coordination activities to facilitate left hand use.

19. Prior to the IFSP parents, in consultation with Therapy West, requested center-based therapeutic group services which the WRC denied (see Factual Finding 3).

20. After WRC denied petitioner's request for a center-based group therapeutic program, Therapy West prepared a progress report dated February 2015 written jointly by petitioner's OTR/L and speech and language therapists, who had worked with petitioner since June 2014. (Exhibit B.) In the area of OT, petitioner's progress was "steady" but significant delays persisted. OT sessions focused on fine motor control and coordination, upper body and hand strength, motor planning and play skills. Petitioner demonstrated "significant difficulty processing sensory input" meaning receiving and using information from the environment or feedback from his body, integrating it and using it. His sensory processing deficit impacted his ability to organize and self-regulate his behavior so that he could be independent from his caregiver, transition between activities, interact with peers, and utilize foundational fine and gross motor skills. Petitioner made "slow, but steady progress" in the area of speech and language. However, he continued to present significant delays with expressive language functional communication skills which "impact[ed] his ability to verbally communicate wants and needs as well as interact with peers."

21. Based upon his continuing delays, Therapy West "highly recommended" a center-based therapeutic group program to address challenges with sensory processing and to interact with similar aged peers "within the support of a therapeutic environment." Therapy West recommended that a structured group program, by facilitating petitioner's engagement with same-aged peers, would increase his ability to have positive social interactions and, through peer modeling, advance his speech and language and fine and gross motor development. (Exhibit B.)

22. At hearing, petitioner's parent described Therapy West's center-based therapeutic program as four day a week, four hour daily small group program, Therapy West's service providers recommended petitioner attend a center-based group therapeutic program three times a week, for three hours a session. Petitioner received his speech, OT and PT services at Therapy West, a WRC vendor, and the schedule for his individual therapies would be coordinated with the center-based therapeutic group program. At time of hearing, petitioner's mother had not observed any other program.

23. On February 18, 2015, petitioner's mother and father met with WRC's early start personnel met with petitioner's mother and father, the WRC coordinator, Blanca Rojas, and Mr. Hochgesang, for petitioner's annual IFSP meeting. Petitioner's parent reported her concerns. In the area of communication, she reported petitioner still had no speech, could use some sign language, but could not be left alone because he could not communicate his needs and wants. In the area of adaptive and physical delays, petitioner's parent reported his delays in overall motor skills, with weak muscle tone. He fell frequently, could not hang from monkey bars, and drooled. Individual services in the areas of speech and language, OT and PT were continued. The IFSP included several narrow outcomes which did not address all his stated deficiencies in the assessments, and were difficult to measure. Outcome one

addressed petitioner's communication deficit by requiring him to label objects in his environment. Outcomes two and three addressed petitioner's physical developmental delays by requiring him to grab objects with both hands interchangeably, and walk up stairs alternating his feet while holding onto the railing independently. Outcomes four and five were purely administrative and addressed petitioner's transition from Early Start to the local school. Individual speech, OT and PT services in Factual Finding 4 were continued. Petitioner's parents signed the IFSP to continue receiving the individual services.

24. On March 13, 2015, in response to an email communication from petitioner's mother, Therapy West's OTR/L provided further and convincing support for the WRC's funding of a center-based group therapeutic service program. (Exhibit C.) Although she confirmed petitioner's age-appropriate cognitive and fine motor skills, she considered the center-based program was necessary to address his significant sensory processing and motor planning deficits. As examples of sensory processing deficits, she reported his difficulty self-regulating when there is lots of noise, his difficulty with language, compounded by his oral motor apraxia which thwarts his motor planning and language output, and his drooling during strenuous activities, a typical signpost of "neurological overflow." She emphasized that children with oral motor apraxia demonstrate greater language output with sensory integration techniques. Without the application of sensory integration techniques, which only a trained therapist can provide, petitioner will not be able to apply new skills. As a result of his sensory processing deficits he required therapeutic interventions including sensory strategies and interventions from a trained therapist.

25. The WRC's basis for rejecting center-based group services was not persuasive. On March 13, 2015, petitioner's mother was present when the WRC's clinical team observed petitioner for the first time. Among those observing petitioner on behalf of the WRC, were a speech and language therapist, Erin Fox, and Dr. Kelly. What was characterized as a one-hour observation by Erin Fox, who testified as a percipient witness and as an expert on WRC's practices in funding services, but not as an expert or service provider, was only about 15 minutes, because it took a while for petitioner to interact with the speech and language therapist. The specifics of the WRC clinical team's observations were unknown, but their rejection of petitioner's request based upon one observation was given less weight than the observations and recommendations of Therapy West's service providers who worked with and observed petitioner for eight months, and the testimony of petitioner's mother, discussed in more detail below.

26. At hearing, the WRC provided an additional rationale for its rejection of a center-based group therapeutic program than provided in Factual Finding 4. Erin Fox reported that the WRC as a practice does not fund center-based therapeutic group programs unless the early start participant evidences cognitive deficiencies, which petitioner did not. To Ms. Fox's knowledge, this policy was not written. WRC's practice to limit Early Start center-based group programs was not given weight as it

was not included in WRC's rejection notice and it was unwritten. However, to the extent that it provided a hidden rationale for rejecting petitioner's request it was considered as a possible source of WRC's rejection of Mr. Hochgesang and Therapy West's service recommendations.

27. At hearing, petitioner's mother supplemented the assessment reports and recommendations with her observations of petitioner and conversations with his Therapy West service providers. Petitioner's mother was candid, sincere and credible, and based upon her direct observations, and her own efforts to provide supports for petitioner from generic community activities, her testimony was persuasive.

28. Petitioner progressed with individual therapy but his progress leveled off and he requires further support that only a center-based therapeutic service program could provide. Petitioner's mother was proactive. Petitioner's mother implemented all the strategies recommended by his WRC therapists. When petitioner's mother went to work, petitioner was left in the care of his grandmother, a highly skilled caregiver, who had operated a child day care for two decades, and who also implemented his therapists' strategies. Petitioner's mother participated with him in typical toddler community activities. He attends a gym program, visits the library once a week for story time, and attends a mommy and me play group at the family's synagogue once a week for two hours. For eight months petitioner's mother attempted participation in a weekly group program open to all children which did not require parents to be present, only to be advised that petitioner could not function independently, and that an adult caregiver's presence was required to regulate his behavior as a condition of participation. Petitioner knew some basic sign language from his individual speech and language therapy, but his teachers in the typical small group program did not understand the signs and could not communicate by using them. As a result basic skills taught by his one-on-one therapists to communicate and regulate his behavior were not used or were impeded. Petitioner continued to have a hard time separating from his mother, and was a danger to other children as he often bit and grabbed them in his attempt to communicate or obtain sensory information.

## 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).) The petitioner in this case bears that burden because he seeks funding for a center-based group therapeutic program, three days a week, three hours a day, which was not part of the IFSP and which WRC had not agreed to provide. (Factual Findings 3-5.)

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 2-5.)

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 his 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 Finding 2. 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 in the area of speech and language, OT and PT, in Factual Findings 4, to address his identified developmental delays in Factual Finding 2, 6-11.

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 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

services that would likely be components of the center based program described in Factual Finding 2, as it is operated by trained therapists in developmental delays such as petitioner is in the areas of speech, adaptive and physical delays based on Factual Finding 3, 18 and 21. Therefore, the provision of a center based program is required when that service is designed to meet the developmental needs of a child under Early Start.

7. Petitioner met his burden of proof that the center-based program was required as part of his Early Start services. WRC's noticed reasons for denying the program in Factual Findings 3-4 were not substantiated by the evidence and did not diminish the weight of petitioner's evidence. Petitioner's eligibility was based upon his severe discrepancy between his expressive speech and the expressive speech typical for his age group based on Factual Findings 6-10. Once eligible all his identified developmental delays were addressed in Factual Findings 2, and 11-12. For over eight months petitioner received individual services in the area of speech, OT and PT and his progress improved, but he continued to have a significant difference between the expected level of development and his level of functioning in the area of expressive language which was further compromised by his other delays based on Factual Findings 11-16. According to two reports by competent and well-qualified experts, an assessment performed on behalf of WRC for the February 2015 IFSP meeting, and another from WRC's vendor, Therapy West, center-based services were recommended to address petitioner's needs because his improvements from the delivery model of individual services were not enough to address his needs based on Factual Findings 14-21. WRC's one observation in Factual Finding 25 did not advance its position. In particular, petitioner's expressive language delays along with other deficits required facilitation with peers which could only be provided in a center-based program as referenced in Factual Finding 16. A center-based program addressed his significant delays in processing sensory input and apraxia in Factual Findings 20-21 and 24, which impeded his ability to produce speech, interact and be independent from his caregivers. Parent's report at the IFSP in Factual Finding 23 and at hearing in Factual Findings 27-28, confirmed the recommendations of petitioner's assessors and service providers that despite improvements from individual services, petitioner still had no speech, could not be left alone because he could not communicate with peers or any adult facilitator of group activities who was not trained to work with developmentally delayed children like petitioner. The center-based program was also consistent with the IFSP outcomes in Factual Finding 23 which referenced petitioner's transition to a school-based program, which by its very nature, is a group-based program. Otherwise, the assessment prepared for the IFSP and considered by the IFSP team in granting services was given more weight than the stated IFSP outcomes. The outcomes did not address the range of reported and uncontroverted deficits in the assessments and progress on the outcomes could not be measured.

8. WRC's contention in Factual Finding 4 that petitioner's additional needs could be satisfied by generic services available to all families of children,

typical or developmentally delayed, was not substantiated. 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).) Petitioner's family participated to the extent possible in the generic community activities in Factual Finding 28, but petitioner could not access these activities independently. The WRC's recommendation of a typical preschool, mommy and me or a gym class in Factual Finding 4 was not supported by the extent of his developmental delays demonstrated throughout the Factual Findings.

9. WRC's new contention at hearing in Factual Finding 26 that it does not as a practice fund center-based programs for children, like petitioner, who do not have cognitive disabilities, was disregarded because it was not included in its notice to petitioner in Factual Finding 4. A regional center is required to state the reasons for its denial of a request for a service in its first notification of that denial, under Welfare and Institutions Code sections 4701, subdivisions (b) and (d), and 4710, subdivision (b). Further, Ms. Fox could not substantiate this presumed purchase of service policy of the Purchase of Service Team in Factual Finding 3 with a written statement of policy approved by DDS. (Welf. & Inst. Code, §§ 4434 and 4646.4.)

10. In sum, based upon Legal Conclusions 1-9, and Factual Findings 2-28, petitioner met his burden of proving he required a center-based program at the level of three days per week, three hours a day, to address needs that were not otherwise being met by WRC in his Early Start program.

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ORDER

Petitioner's appeal is granted. WRC shall provide funding of a center-based program, three days per week, three hours per day, at Therapy West or at another mutually agreed-to center-based therapy program.

DATED: March 26, 2015

/s/

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EILEEN COHN  
Administrative Law Judge  
Office of Administrative Hearings