

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

I.P.,

Petitioner,

vs.

WESTSIDE REGIONAL CENTER,

Respondent.

OAH No. 2014041089

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

DECISION ON PETITIONER'S
APPEAL

This matter was heard by David Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 14, 2014, in Culver City.

Petitioner was represented by C.P., her mother.¹ Erin Fox, Attorney at Law and 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 May 14, 2014.

ISSUE

Petitioner presently attends the Brite Kids center based program four days per week, three hours per day. Petitioner requests an increase to five days per week, three hours per day.

EVIDENCE RELIED UPON

Documentary: Respondent's exhibits A-H; Petitioner's exhibits 1-4.

Testimonial: Cesar Garcia, WRC; C.P. (Petitioner's mother).

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

FACTUAL FINDINGS

Parties and Jurisdiction

1. Petitioner is a two-year, nine-month-old (33 months) girl who was found eligible for services from WRC's Early Start program² due to developmental delays in cognition and communication.

2. By a letter dated November 7, 2013 (Ex. A), WRC notified Petitioner's mother that her request for WRC to provide funding for Petitioner to attend a center based program five days per week was denied.

3. Petitioner's mother submitted to WRC a written appeal titled Due Process Hearing Request (Ex. H). This hearing was the result of the appeal.

Facts Related to Petitioner's Service Request

4. Petitioner became eligible for services from WRC in October 2012. It was not established precisely when she began attending the center based program at Brite Kids, however a progress report dated June 26, 2013, commented on her last six months there. (Ex. E.) In summary, she was evaluated using the Hawaii Early Learning Profile (HELP) Strands in six domains of development, and the subparts thereof, noted below. Petitioner's chronological age at that time was 23 months. A "normal range" of development in these domains is "plus/minus" three months, according to the testimony of Cesar Garcia, WRC's Early Start Program Manager.

a. Cognitive Development (Learning/Play/Problem Solving):
Regulatory/Sensory Organization: 15-17 months; Development of Symbolic Play: 15-17 months; Gestural Imitation: 14-16 months; Object Permanence: Age Appropriate; Means-Ends: Age Appropriate; Cause and Effect: 12-15 months; Spatial Relationships: 15-18 months; Pictures: 12-14 months; Matching and Sorting: 15-17 months; Size: 18 months; Associative: 17 months.

b. Communication Development:

A. Receptive (The Ability to Understand What is Being Expressed):
Understanding the Meaning of Words: 14-16 months; Body Parts: 19-20 months;
Understanding and Following Directions: 15-17 months.

² "Early Start" is another name for the California Early Intervention Services Act (Gov. Code, § 95000 et seq.), described more specifically in Legal Conclusions 1-5, below.

B. Expressive (The Ability to Communicate Thoughts and Feelings): Expressive Vocabulary: 13-15 months; Gesturally: 10-12 months; Verbally: 12-15 months; Learning Grammar and Sentence Structure: 14-18 months (Scattered); Development of Sounds and Intelligibility: 12 months; Communicating Through Rhythm: 18-20 months.

c. Gross Motor (Large Muscle Movement): Standing: 15-17 months; Walking/Running: 18-20 months; Jumping: 20 months; Climbing: 17 months; Stairs: 18 months; Throwing/Catching: 17 months.

d. Fine Motor (Small Muscle Movement): Grasp/Prehension: 16-21 months (Scattered); Development of Voluntary Release: 16-18 months; Bilateral and Midline Skills: 15 months; Pre-Writing: 14-16 months; Block Construction: 16 months; Form board: Age Appropriate; Pages: 18-20 months; Pegboard: 16-18 months; Stringing Beads: 18 months.

e. Social-Emotional Development (How the Child Relates to Others): Attachment/Separation/Autonomy: Age Appropriate; Development of Self: 15-17 months; Expression of Emotions and Feelings: 20 months; Learning Rules and Expectations: 20-22 months; Social Interactions and Play: 15-17 months.

f. Adaptive Development (Self-Help, Sleeping, Eating, etc.): Oral-Motor Development: Age Appropriate; Dressing: 18-20 months; Independent Feeding: 15 months; Grooming and Hygiene: 18 months; Toileting: 14-16 months; Household Independence: 18-21 months.

The report notes particular gains and other skills that had not yet been mastered. As noted, although Petitioner had met many of the stepped goals in her program, she was still behind having age-appropriate development in the majority of subparts measured. The report requested that Petitioner be “reauthorized” for 45 hours per month for the next six months to address the listed goals and outcomes.

5. Services to be provided to Petitioner were discussed at meetings to develop her Individualized Family Services Plan (IFSP) on September 20 and 27, 2013. (Ex. C-2.) The IFSP charts Petitioner’s developmental status as follows (Petitioner was 23 months of age at that time): cognitive development, 15-18 months; communication development, 14-17 months; social or emotional development, 15-17 months; adaptive/self help development, 18-20 months; and physical development-gross motor, 15-20 months, fine motor, 16-20 months. It was agreed that WRC would fund: (1) for Petitioner to attend a center based program three days per week, three hours per day, for a total of 45 hours per month, through January 31, 2014; (2) for a one-time developmental evaluation; and (3) for a psychological evaluation as Petitioner was approaching her third birthday as part of a transition from Early Start services, which end at age three. The IFSP also noted that Petitioner was receiving occupational therapy, speech therapy and physical therapy (each one hour and one

time per week), all paid under her health insurance, and that the Los Angeles Unified School District was providing a deaf and hard of hearing specialist, 2 times per month, one hour each visit.

6. An evaluation of Petitioner was performed on December 20, 2013 and January 31, 2014, and a report was prepared February 4, 2014, by Jason Dorian, M.A. and Pantea Sharifi-Hannauer, M.D., at the Pediatric Minds neurology center. By use of the Autism Diagnostic Observation Schedule (ADOS-2) and portions of the Mullen Scales of Early Learning, AGS Edition, a diagnosis was made of autism using the criteria of the DSM-V. (DSM-V is the Diagnostic and Statistical Manual, Fifth edition; a scholarly text used to assist in diagnosing psychological and developmental disorders.) Service recommendations included: intensive individual speech therapy at least two hours per week; occupational therapy one hour per week; physical therapy one hour per week; in home ABA services at least 25 hours per week; referral for genetics testing; and a note the Petitioner “would also benefit from an intensive day treatment program like the UCLA Partial Hospital Program or ECTC.” (Ex. 1.) It is difficult to evaluate this last recommendation, as there is no reference to the number of hours for such a program and no evidence was submitted about the UCLA Partial Hospital Program or ECTC so as to make any comparisons or conclusions.

7. Brite Kids issued a progress report dated January 23, 2014. (Ex. F.) Again, progress was based on the HELP Strands, observations and parent report, with the following information included. Petitioner’s chronological age was 29 months.

a. Cognitive Development (Learning/Play/Problem Solving):

Development of Symbolic Play: 18-20 months; Gestural imitation: Age Appropriate; Pictures: 24-27 months; Matching and Sorting: 20-22 months; Size: 20-22 months; Associative: 20-21 months.

b. Communication Development:

A. Receptive (The Ability to Understand What is Being Expressed):

Understanding the Meaning of Words: 20-22 months; Body Parts: 24-26 months; Understanding and Following Directions: 18-20 months.

B. Expressive (The Ability to Communicate Thoughts and Feelings):

Expressive Vocabulary: 20-24 months; Verbally: 20 months; Learning Grammar and Sentence Structure: 20-21 months (Scattered); Development of Sounds and Intelligibility: 18 months; Communicating Through Rhythm: 20-22 months.

c. Gross Motor (Large Muscle Movement): Standing: 20-22 months;

Walking/Running: 24 months; Jumping: 24 months; Throwing/Catching: 22-23 months.

d. Fine Motor (Small Muscle Movement): Grasp/Prehension: 20-22 months (Scattered); Bilateral and Midline Skills: Age Appropriate; Pre-Writing: 18-20 months; Block Construction: 18-20 months; Stringing Beads: 25-27 months.

e. Social-Emotional Development (How the Child Relates to Others): Development of Self: 24 months; Expression of Emotions and Feelings: 22 months; Learning Rules and Expectations: 24 months; Social Interactions and Play: 23-24 months.

f. Adaptive Development (Self-Help, Sleeping, Eating, etc.): Dressing: 25 months; Independent Feeding: 20-22 months; Toileting: 15-18 months.

The report notes particular gains and other skills that had not yet been mastered. As noted, although Petitioner had met many of the stepped goals in her program, she was still behind having age-appropriate development in the majority of subparts measured. The report stated: “It is strongly recommended that [Petitioner] be authorized to attend the Brite Kids’ Center-Based Infant Development Program . . . five days a week for 3 hours daily.” In part the recommendation was based on Petitioner’s progress, and recently diagnosed significant hearing loss in both ears requiring hearing aids, which may have negatively affected her progress. It was hoped the increase would help to better prepare her for preschool.

8. Another IFSP meeting occurred on February 28, 2014, called a periodic review and transition, as Petitioner would have her third birthday in six months. WRC routinely schedules these meetings to discuss the end of Early Start services, possible eligibility for Lanterman Act³ services after the third birthday, and services available from the school district. Mother stated that, by this time, she had asked for an increase in the center based program to five days per week and had informed her service coordinator that she wanted a due process hearing when WRC denied that request. The IFSP does not note this request, nor could any record be found of the request for due process hearing. The services and developmental status listed in the February 2014 IFSP (Ex. C-1) are the same as in the IFSP from September 2013, including that the center based program would continue at three hours per day, three days per week.

9. Other assessments were submitted in evidence but were not directly relevant to the issue of Petitioner’s center based program, and don’t merit significant further comment. Generally speaking, there is little in these assessments (Exs. G, 2, 3 and 4) to help determine whether Petitioner should attend the center based program either four or five days per week.

³ “Lanterman Act” is a reference to the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4400 et seq.

10. Psychologist Carol Kelly, Ed.D., performed a psychological evaluation of Petitioner on May 1, 2014 (observation at Brite Kids) and May 7, 2014 (observation and testing at WRC), and provided a draft report. (Ex. D.) The primary purpose of Dr. Kelly's evaluation was to gather information for use by WRC in determining whether Petitioner was eligible for services after her third birthday. Dr. Kelly reviewed, among other things, the Brite Kids progress report from January 2014; the Pediatric Minds report from February 2014; an occupational therapy assessment; and a developmental assessment. Based on her record review, testing results, and interviews with Petitioner's teacher and mother, Dr. Kelly opined that Petitioner does not have characteristics of autism. Dr. Kelly's report contains comments about Petitioner's progress, skills and deficits, but does not contain other information that addresses the issue of the amount of time Petitioner should spend at the Brite Kids program.

11. WRC recently determined to increase the funding for Petitioner to attend Brite Kids to four days per week. Mother stated she was informed of that decision last Thursday (May 8, 2014), and Petitioner began attending four days per week on Monday (May 12, 2014). Mr. Garcia stated that the Brite Kids program, at three days per week, was meeting Petitioner's needs. The increase to four days per week was justified by Petitioner's recently discovered need for hearing aids, the possibility that her hearing loss took a toll on her development, and an attempt to give her a "push" before she transitioned to school services at age three.

12. With respect to the two progress reports from Brite Kids, Mr. Garcia stated that most of the listed goals had been met. Usually when child is making good progress, it is no reason to increase services, and here it would also have been appropriate to not increase the services. He was also concerned that the HELP Strands used by Brite Kids to assess progress is not standardized and has some limitations. Further, Mr. Garcia expressed concerns that a young child such as Petitioner can be over-programmed and not provide better performance with increased services, particularly considering additional time constraints such as travel to and from therapies. He stated that, for example, a child with 40 hours per week of therapies and services would be like an adult having a full time job, but with less ability to accommodate such a schedule. An increase in services will not necessarily lead to meeting more goals and gaining more skills. Ultimately, needs and services must be assessed on an individual basis.

13. Petitioner's mother added that the problems with Petitioner's hearing were addressed by inserting pressure equalization (PE) tubes in December 2012. However, the doctor did not realize the tubes were clogged and ineffective. Petitioner's progress generally and at Brite Kids was negatively affected. The PE tubes were reinserted in December 2013 and Petitioner was then able to benefit from the use of hearing aids. Mother reports that Petitioner does "wonderfully" at Brite Kids. She has been there about one and one-half years, is used to the structure, and enjoys the children-directed nature of the floor time therapy. Petitioner does not

perform as well at her other therapies, in part because they are adult-led. She sometimes has tantrums and “melt-downs.” However, she looks forward to going to these therapies, all of which are at Kids in Motion, which is about a 20-30 minute drive from home.

14. WRC contends that the added fifth day is not clinically indicated and that it must also consider the family as being responsible to provide the types of services that would usually be provided by a family for a minor child without disabilities.

LEGAL CONCLUSIONS

1. 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. Each act is accompanied by pertinent regulations. Thus, both federal and state laws apply to this case. Under these laws, Petitioner presented a hearing request, and therefore jurisdiction for this case was established. (Factual Findings 1-3.)

2. When a person seeks to establish that she is entitled to government benefits or services, the burden of proof is on her. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]; see also, 34 C.F.R. § 303.425(b) (1999).) Petitioner’s mother therefore bears the burden of proof in this case, since she is requesting relief which WRC has not agreed to provide, i.e. funding for an added day at Petitioner’s center based program. (Factual Findings 2, 3, 4, 5, 7 and 8.)

3. The California Legislature has found that early intervention services represent an investment of resources, “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).) Importantly, the Legislature has recognized that time is of the essence and that “[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.*)

4. 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 cognition and communication skills and the expected level for someone of her age. As it relates to Petitioner, the statute defines “significant difference” as a “33-percent delay in one developmental area before 24 months of age.”

5. 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 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 Brite Kids center based program, such as personal care, day care, physical, occupational, and speech therapy, training, education, recreation, child care, behavior training and behavior modification programs, and social skills training. 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. In this case, there is no dispute that the center based program is necessary to meet Petitioner’s developmental needs. (Factual Findings 4, 5, 7, 8, 11, 12 and 13.)

6. The issue is how much attendance at the center based program is necessary to meet Petitioner’s needs. As applied to these circumstances, the Early Start program has a very specific goal—when a child has a developmental delay in skill areas, to provide the services necessary to address those deficits. The regional center is not required to provide the best service available. It is sufficient if the services address the identified developmental needs.

7. WRC’s contention of family responsibility is based on Code section 4646.4, subdivision (a)(4), which requires regional centers to consider a family’s responsibility to provide similar services for their minor child, with or without disabilities. This contention fails. As noted below, WRC is required to provide five days per week of the center based program to meet Petitioner’s needs.

8. In this case, it was established that Petitioner was in need of a center based program at the level of five days per week to address needs that were not otherwise being met by WRC under the Early Start program. WRC’s contention that Petitioner was progressing at such a rate as not to require the additional day is not supported by the evidence. To be sure, Petitioner has performed well at Brite Kids and her progress includes reaching many interim goals set in the six domains addressed in the progress reports. However, that progress, in terms of age-equivalent performance, shows that Petitioner is still performing below age-appropriate levels in many areas. More specifically, as of the June 2013 progress report (Ex. E), the six domains discussed in the report have 46 subparts listed. Petitioner’s performance is measured as age-appropriate in five subparts, and as having approximately a 33-percent delay in 21 other subparts.⁴ As noted in footnote 4, this is a very rough measure, but uses the concept of a 33-percent delay described above as being the

⁴ This is based on rough figures. Petitioner was age 23 months; a 33-percent delay is performance at the level of 15.4 months. In the 21 subparts counted here,

“significant difference” between her level of functioning and the expected level for someone of her age that is used to determine eligibility for Early Start services as applied to Petitioner. Although this comparison is not required for continuing services once eligibility is established, it is a fair basis under the facts of this case on which to determine whether the services are meeting Petitioner’s needs and whether or not an added day is clinically indicated.

9. In the January 2014 progress report (Ex. F), the six domains have 29 subparts listed. Petitioner’s performance is measured as age-appropriate in two subparts, and as having approximately a 33-percent delay in five other subparts.⁵

10. Even prior to the Brite Kids January 2014 progress report, there was evidence that, despite receiving the center based program and making progress, Petitioner still experienced significant developmental delays. In the September 2013 IFSP, when Petitioner was age 23 months, several areas noted in her developmental status were in the range of a 33-percent delay. It appears that Petitioner has received services, has benefited from those services, but has still lagged behind normal development levels. As stated in the language of the eligibility statute, Petitioner continued “to have a significant difference between the expected level of development for [her] age and [her] current level of functioning.” (Govt. Code § 95014, subd. (a).)

11. WRC contends that the HELP Strands used in these progress reports are not standardized, inferring that they are, therefore, unreliable in some way. This contention is not convincing. Brite Kids is vendored by WRC and provides the progress reports as part of its requirement to report to WRC on the services it provides and Petitioner’s performance. There was no evidence that these progress reports have not been accepted by WRC for those purposes. If acceptable for those purposes, the progress reports are acceptable in the hearing as the basis on which to gauge Petitioner’s performance. WRC’s contention that Petitioner’s needs are met by attending the Brite Kids program either three or four days per week is not supported by the analysis of Petitioner’s performance, as noted above. Admittedly, these are very rough measures. However, Petitioner is meeting age-appropriate levels in relatively few of the subparts reported, and continues to show a measureable delay in a greater number of subparts.

Petitioner’s performance level was either below 15 months or in a range that included 15 months.

⁵ For this computation, Petitioner’s age was 29 months. A 33-percent delay is performance at the level of 19.4 months. In the five subparts counted here, Petitioner’s performance level was either below 19 months or in a range that included 19 months.

12. This conclusion is supported further by the delays noted in Petitioner's developmental status in the September 2013 IFSP. According to the developmental status chart, Petitioner is more than marginally behind the performance or skill level expected for her age in each subject area listed. Despite the progress she has made at Brite Kids, there is sufficient clinical evidence to establish that her needs are not being met at the level of three days per week that existed until early May 2014. In the absence of evidence that four days will be enough, it is appropriate to order funding for Petitioner to attend five days per week until her third birthday in two months.

12. WRC raised the concern that Claimant might be over-programmed, and that there would be little if any benefit to an added day at Brite Kids. However, this was not established by the evidence. She presently attends Brite Kids three hours per day (four days per week), has occupational, physical and speech therapies for a total of three hours each week, and two hours per month of support from a deaf and hard of hearing specialist. The position of WRC that three days per week is all that is clinically necessary is not convincing. The position of WRC that it did not need to add a fourth day is equally unconvincing.

ORDER

Petitioner's appeal of WRC's decision to deny funding for a fifth day each week for Petitioner to attend a center based program is granted. WRC shall provide funding for five days per week, three hours per day, of a center based program.

DATED: May 19, 2014.

_____/s/_____
DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings