

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

C. C.,

Petitioner,

vs.

WESTSIDE REGIONAL CENTER,

Respondent.

OAH No. 2013070615

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

DECISION

This matter was heard by David Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California, on July 29, 2013, in Culver City.

Petitioner C. C. was represented by his mother and father. (Initials and titles are used to protect the privacy of Petitioner and his family.) 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 July 29, 2013.

ISSUES

1. Is Petitioner eligible for Early Start services from Respondent?
2. Does Petitioner need speech therapy? (WRC agrees that Petitioner needs speech therapy.)
3. Is Petitioner's need for speech therapy urgent?
4. Does Petitioner need occupational therapy?

5. Is Petitioner's need for occupational therapy urgent?

EVIDENCE RELIED UPON

Documents: Petitioner's exhibits 11, 12 and 13; Respondent's exhibits 1-10.

Testimony: Cristina Azantian, WRC staff Occupational Therapist; Stephanie Hunter, teacher and literacy coach; Petitioner's mother and father.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Petitioner is a two-year five-month-old boy who seeks to be found eligible for services under the Early Start program,¹ due to speech and language developmental delays and a need for occupational therapy.

2. By a letter dated June 13, 2013 (Ex. 7), WRC notified Petitioner's parents of its determination that Petitioner was not eligible for Early Start services. Petitioner's mother and father submitted a written appeal. This hearing was the result of the appeal.

Facts Related to Petitioner's Service Request

3. Petitioner was referred to WRC for evaluation of his eligibility for the Early Start program due to concerns about his delayed speech and language development. There were two referrals and two decisions by WRC that Petitioner did not meet the eligibility requirements. Some of the testing from the first referral is relevant to a discussion of Petitioner's overall presentation.

4A. The first referral occurred on November 27, 2012, and the following three assessments were prepared.

4B. A Psychosocial Assessment on December 20, 2012, by Andrea Danneker, the Intake Coordinator. (Ex. 3.) Of significance, Petitioner was referred by his pediatrician, Dr. Brenda Bass, due to concerns about expressive language delays. Parents reported that Petitioner spoke about ten words and a few phrases.

¹ "Early Start" is another name for the California Early Intervention Services Act (Gov. Code, § 95000 et seq.), described more specifically in Legal Conclusions 1-3, below.

4C. A Physical Therapy Developmental Evaluation was performed on December 11, 2012. (Ex. 4.) Two standardized assessment tests were given that provide results on the basis of age-equivalency. When these tests were given, Petitioner was 21 and one-half years old. On the Bayley Scales of Infant Development III (Bayley III), Petitioner obtained the following scores:

Cognitive	21 months
Language-Receptive Communication	20 months
Language-Expressive Communication	17 months
Fine Motor	22 months
Gross Motor	24 months

On the Developmental Assessment of Young Children (DAYC), Petitioner obtained the following scores:

Adaptive	19 months
Social Emotional	19 months

The results of both tests were rated as average. The therapist recommended a speech therapy evaluation.

4D. A Speech and Language Evaluation was performed on December 12, 2012, by Deborah Fleiger, a speech and language pathologist. (Ex. 5.) Again, Petitioner was 21 and one-half years old; the evaluation incorrectly states he is “1 year 8 months (20 months).” Petitioner was evaluated by observation and administration of the Preschool Language Scale 5 (PLS-5), from which the following scores were obtained:

Auditory Comprehension	2 years, 6 months (30 months)
Expressive Communication	1 year, 8 months (20 months)

Ms. Fleiger also examined Petitioner’s social/pragmatic behavior, and concluded it was age-appropriate. She also determined his articulation / phonological skills appeared to be developing normally but should be monitored as his speech output progressed.

5. The results of the assessments were reviewed by members of the WRC interdisciplinary team on December 20, 2012 and January 8, 2013. (Ex. 1.) Applying the legal criteria for eligibility, discussed in more detail in the Legal Conclusions below, it was decided that Petitioner was not eligible for services. A letter explaining the eligibility criteria and the WRC decision was sent to the parents on January 18, 2013. (Ex. 2.)

6A. The second referral was in June 2013. Two new assessments were performed.

6B. A Developmental Assessment was performed on June 3, 2013, by Nate Hochgesang, a registered Occupational Therapist, who observed Petitioner, interviewed his parents, and administered the Bayley III and the DAYC. (Ex. 8.) Petitioner was 27 months old at that time. Petitioner obtained the following scores:

Cognitive	25 months
Language-Receptive Communication	24 months
Language-Expressive Communication	21 months
Fine Motor	25 months
Gross Motor	31 months

On the DAYC, Petitioner obtained the following scores:

Adaptive	24 months
Social Emotional	24 months

Mr. Hochgesang made the following comments of note. Petitioner was extremely active during the evaluation. Based on parent reports, Petitioner “may be under-responsive to proprioceptive input and/or vestibular input” and engages in sensory seeking activities to provide such input. Occupational therapy can address these sensory processing needs. He recommends a speech and language evaluation.

6C. Deborah Fleiger provided a speech and language evaluation on June 4, 2013. (Ex. 9.) Petitioner was age 27 months. Petitioner was evaluated by observation and administration of the PLS-5, from which the following scores were obtained:

Auditory Comprehension	2 years, 9 months (33 months)
Expressive Communication	1 year, 8 months (20 months)

Ms. Fleiger also examined Petitioner’s social/pragmatic behavior, and commented there were concerning behaviors that were not present six months prior. She noted decreased attention span, that Petitioner does not bring toys to peers or his parents to initiate play, and that he may throw a toy when frustrated. She noted there was no progress in Expressive Communication from the tests she gave six months prior and characterized this result as a significant delay. Petitioner uses jargon and gestures and frequently pulls caregivers to desired objects. She recommends speech therapy. Ms. Fleiger again determined his articulation / phonological skills appeared to be developing normally but should be monitored as his speech output progressed.

7. The results of the assessments were reviewed by members of the WRC interdisciplinary team on June 13 and 14, 2013. (Ex. 6.) Applying the legal criteria for eligibility, discussed in more detail in the Legal Conclusions below, it was decided that Petitioner was not eligible for services. A letter explaining the eligibility criteria and the WRC decision was sent to the parents on June 13, 2013. (Ex. 7.)

8. Cristina Azantian, WRC staff Occupational Therapist, explained the various tests and evaluations. She was on the team reviewing Petitioner's eligibility both times and discussed the process. In summary, different criteria applied each time, based on Petitioner's age. The first time, Petitioner was under 24 months of age, and the team looked to see if he had one area of development that was 33 percent or more below the average. His lowest scores were Adaptive and Social Emotional, both at 19 months on the DAYC, and Expressive Communication at the level of 20 months on the PLS-5. Petitioner was age 21 and one half months at the time, and none of these amounted to a delay of 33 percent or more. The second time, Petitioner was over 24 months old, and the team looked to see if he had one area of development that was 50 percent or more below the average, or two areas of development that were 33 percent or more below average. Petitioner was age 27 months at the time. His lowest scores were Expressive Communication at the level of 20 months on the PLS-5, a delay of about 25 percent, and Adaptive and Social Emotional, both at 24 months on the DAYC, a delay of about 11 percent.²

9. Petitioner's parents submitted a letter from Dr. Bass, his pediatrician, indicating that Petitioner's speech has been delayed and that his mother reported he used three words at age 23 months. (Ex. 10.)

10. Petitioner's parents submitted a letter from Erica Stepehnsen, the teacher at a program Petitioner attends called Outside the Box. Ms. Stepehnsen is also a physical therapist. Petitioner and his mother attend once per week for an hour, in a group of ten children with their parents. (Ex. 11.) Ms. Stepehnsen has observed Petitioner seeking "a lot of vestibular / proprioceptive stimulation" by increased activity in class, and his difficulty forming words and needing prompts, and confirms that mother has brought many concerns to her attention.

11A. Petitioner's parents presented the testimony of Stephanie Hunter, a relative who has worked for the Los Angeles Unified School District for 19 years, is a certificated elementary school teacher, and has worked as a literacy coach and mentor teacher. Ms. Hunter has some experience with preschool programs as well as children with special educational needs. Ms. Hunter sees Petitioner about every three months, at family events and to babysit, and is familiar with many of his behaviors and interactions. She has knowledge of teaching goals and standards for preschool teachers and their students and how the abilities of students can affect their performance in preschool.

11B. Petitioner's parents and Ms. Hunter expect Petitioner to begin preschool when he turns three years old in late February 2014. Ms. Hunter offered her opinion that the types of delays she has seen in Petitioner are more profound than

² Ms. Azantian did not provide testimony of estimated delays of 25 percent and 11 percent. These percentages were computed by the ALJ based on the test scores and Petitioner's age.

those revealed by the test results noted above. She described Petitioner as being in the 15 to 16 month range in social and adaptive abilities and expressive language, in the 18 or 19 month range in receptive language and fine motor skills, and agrees with the test results that his cognitive ability is in the 25 month range and his gross motor ability in the 31 month range.

11C. Based on her knowledge of Petitioner's abilities and the standards expected in preschool, Ms. Hunter expresses skepticism that Petitioner could perform at an acceptable level in preschool. She prepared written materials comparing some of Petitioner's skills to the standards for preschool programs. (Ex. 12.)

12. Petitioner's parents both testified to some of the behaviors they have observed and the concerns they have. Petitioner's weaknesses in expressive communication are shown when for example, he cannot reciprocate when other children call his name or want to engage in play that includes using many words. They have witnessed his frustration when he cannot express himself. They believe that his high level of activity, such as running continuously even when he is tired, indicates a need for occupational therapy to address his need to seek sensory input.

LEGAL CONCLUSIONS AND DISCUSSION

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 (CEISA) (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. In conformity with these laws, Petitioner presented a hearing request, and therefore jurisdiction for this case was established. (Factual Findings 1 and 2.)

2. When a person seeks to establish that he is entitled to government benefits or services, the burden of proof is on him. (*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 parents therefore bear the burden of proof in this case, since they are requesting eligibility for services, which WRC has denied. (Factual Findings 1- 8.)

3. Pursuant to Government Code section 95014, subdivision (a)(1), as well as California Code of Regulations, title 17 (Regulation), section 52022, subdivision (a), an infant or toddler under the age of three is eligible for services under the Early Start program if he or she has a developmental delay in one or more of the following areas: cognitive development; physical and motor development, including vision and hearing; communication development; social or emotional development; or adaptive development. Under Government Code section 95014, subdivision (a)(1), the developmental delay must represent a "significant difference

between the expected level of development for their age and their current level of functioning,” and such “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.” Therefore, as Petitioner is older than 24 months, to be eligible there must be either a delay of 50 percent in one developmental area or a 33-percent delay in two or more developmental areas

4. Regulation section 52082, subdivision (e), further clarifies that when the infant’s eligibility for services is evaluated by standardized, normed or criterion referenced instruments, a significant delay “shall be established when an infant’s or toddler’s age equivalent score falls one third below age expectation.”

5. An infant may also be found eligible for Early Start services if he or she has an “established risk,” as defined in 20 U.S.C. § 1432(1), Government Code section 95014, subdivision (a)(2), and Regulation section 52022, subdivision (b). There was no claim or evidence that Petitioner was eligible under the criteria for having an established risk.

6. In this case, it was not established by sufficient evidence that Petitioner has a significant delay, as defined by statute, in any of the five areas of development. Examining the branch of eligibility requiring two areas of development with at least a 33-percent delay, none of the Petitioner’s areas of development score that low. (Factual Findings 6 - 8.)

7. The other branch of eligibility requires one area of development with at least a 50 percent delay. Again, none of the Petitioner’s areas of development score that low. (Factual Findings 6 - 8.)

8. As Petitioner has not submitted sufficient evidence to establish eligibility for Early Start services, it is not necessary to examine whether he needs speech therapy or occupational therapy and if so, whether those needs are urgent. Once the lack of eligibility has been established, the Administrative Law Judge has no authority to make any other determinations about the requested services.

9. In reaching the conclusion that Petitioner is not eligible for services, the testimony and evidence presented by Petitioner’s parents and Ms. Hunter have not been ignored. While it is true that Petitioner’s DAYC scores stayed the same, age equivalent 20 months, between the two sets of tests, the most recent score represents a 25 percent delay, not enough for eligibility either by itself or in conjunction with other test scores. And, despite Ms. Hunter’s experience and qualifications, her estimates of Petitioner’s age-equivalent abilities are not based upon any standardized tests or other age-appropriate methods. The types of assessments and evaluations required to be performed by the regional centers are described in Government Code section 95016 as “timely, comprehensive, multidisciplinary evaluation of his or her

needs and level of functioning in order to determine eligibility.” These assessments and evaluations are more specifically described in Regulation 52084, subdivision (c), to include “(2) Developmental observations by qualified personnel and the parent; (3) Other procedures used by qualified personnel to determine the presence of a developmental delay, established risk condition, or high risk for a developmental disability; and (4) Standardized tests or instruments.” Petitioner’s parents are right to be concerned about the nature of their son’s abilities and their effect on his hoped-for success in preschool. However, his present delays are not so extreme as to qualify for Early Start services, his ability levels seven months from now when he is ready for preschool are unknown at this time, and whether or not he can function in preschool is not the basis upon which eligibility for Early Start services is determined.

ORDER

Petitioner is not eligible for services from the Westside Regional Center under the California Early Intervention Services Act. Petitioner’s appeal is denied.

DATED: July 31, 2013.



DAVID ROSENMAN
Administrative Law Judge
Office of Administrative Hearings