

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PETITIONER,

vs.

WESTSIDE REGIONAL CENTER,

Respondent.

OAH No. 2015090020

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

DECISION

This matter was heard by Carla L. Garrett, Administrative Law Judge, Office of Administrative Hearings, State of California, on September 28, 2015, in Culver City.

Petitioner was represented by his mother (Mother).¹ Lisa Basiri, Fair Hearing Coordinator, represented the Westside Regional Center (Respondent or WRC).

During the hearing, the parties presented the testimonial and documentary evidence described below. The record was closed and the matter was submitted for decision on September 28, 2015.

ISSUE

Must WRC continue to provide Petitioner respite services at 14 hours per month, or may WRC fade out and then terminate those services by October 31, 2015?

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¹ In order to protect their privacy, party and family titles are used in lieu of Petitioner's name or the names of his family members.

EVIDENCE RELIED UPON

Documentary: Petitioner's exhibits A – C; Respondent's exhibits 1 – 8.

Testimonial: Mother and Lisa Basiri.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Petitioner is a two-year, four-month-old boy who was found eligible for services from WRC's Early Start program,² due to developmental delays, including gross motor delays, stemming from Albright's Hereditary Osteodystrophy.³

2. By a letter dated July 29, 2015, WRC notified Mother that the Purchase of Service committee had determined that, based on his current needs, Petitioner no longer qualified for respite services. As such, WRC advised it would fade out those services, and terminate them on October 31, 2015.

3. Mother submitted to WRC a written appeal titled Due Process Hearing Request. This hearing was the result of the appeal.

Factual Background

4. On May 29, 2014, Petitioner's mother and father (Parents) and his service coordinator met and developed Petitioner's Individualized Family Service Plan (IFSP). The IFSP provided Petitioner with physical therapy, occupational therapy, infant stimulation, and respite services. The IFSP stated Petitioner would receive respite services 14 hours a month. The IFSP did not describe the basis or rationale underlying the 14 hours a month of respite services, and WFS introduced no documents or proffered any testimony from any percipient witnesses explaining why WRC authorized 14 hours of respite services a month.

5. On June 2, 2015, Petitioner underwent an annual developmental evaluation, which assessed areas of Petitioner's development, including areas of

² "Early Start" is another name for the California Early Intervention Services Act (Gov. Code, § 95000 et seq.), described more specifically in Legal Conclusions 1-4, below.

³ At hearing, Ms. Basiri explained that she discovered, upon her review of the file, that on February 11, 2014, WRC found Petitioner eligible for services under the Lanterman Act as well. In that regard, she produced an "Early Start Follow-Up Status 2 Diagnostic/Eligibility Sheet," purportedly demonstrating Petitioner met eligibility criteria under the area of "mental retardation."

cognitive, language, motor, social/emotional, and adaptive skills. Dr. Natalia Pokras (Doctor of Physical Therapy) from Los Angeles Intensive Pediatric Therapy, who is also contracted by WRC to provide physical therapy services for Petitioner, conducted Petitioner's annual developmental evaluation, and prepared a written report. According to the report, Dr. Pokras interviewed Parents, conducted clinical observations, and administered two standardized tests: (1) Bayley Scales of Infant and Toddler Development – III Edition (Bayley-III), which measured Petitioner's development across cognitive, language, motor, social/emotional, and adaptive domains; and (2) Developmental Assessment of Young Children – II Edition (DAYC-II).

6. The report included Dr. Pokras' conclusions, noting Petitioner was functioning at the extremely low range in the cognitive area of development, at the borderline range in the area of motor development, at the below-average range in the social-emotional area of development, and at the below-average range in the adaptive-behavioral area of development. As such, Dr. Pokras recommended in her report that Petitioner continue to receive physical, occupational, and speech therapy, and continue participating in a center-based program. The report did not address respite services, and included no conclusion or recommendation concerning respite services. Dr. Pokras did not testify at hearing.

7. On July 22, 2015, Petitioner's service coordinator, Guadalupe Andrade, completed a Family Respite Needs Assessment Summary Sheet (Summary Sheet) concerning Petitioner. Using a Family Respite Needs Assessment Guideline, Ms. Andrade was to complete the Summary Sheet in order to obtain an estimation of the amount of respite Petitioner's family could receive through regional center funding. In that regard, Ms. Andrade assigned Petitioner a value of "1" for the "age of individual," a value of "2" for "communication," and a value of "0" for "adaptive skills," "mobility," "day program attendance," "medical needs," "behavioral needs," and "family situation," for a total value of "3" points. Ms. Andrade did not testify at hearing, and, therefore, could not share her rationale for why she assigned the values listed above, or if she reviewed any reports or consulted with any of Petitioner's service providers prior to completing the Summary Sheet.

8. According to the Summary Sheet describing the amount of respite hours to assign, total values ranging from 0 to 5 points constituted "routine supervision." At hearing, Ms. Basiri explained that children under the age of three are to receive "routine supervision" from their parents, just as all parents of toddlers are required to provide. As such, individuals receiving a total value of "0" to "5" points are not entitled to respite hours.

9. On July 29, 2015, Ms. Andrade sent Parents a letter stating that, starting September 1, 2015, respite services would be reduce from 14 hours per month to 7 hours, and would be terminated on October 31, 2015.

Mother's Testimony

10. Mother consulted with Petitioner's occupational and physical therapists, and determined the Summary Sheet does not accurately Petitioner's needs. Specifically, Petitioner has "definite mobility issues," evidenced by his excessive falling and lack of coordination, yet Ms. Andrade assigned a value of "0" in the area of mobility. Mother produced a letter, dated September 25, 2015, from the same physical therapist who completed Petitioner's developmental evaluation report on June 2, 2015, Dr. Pokras. The letter stated Petitioner, due to his medical diagnosis, required "full assistance with all aspects of his life," as his safety awareness was poor and he required "constant adult supervision." Mother confirmed Petitioner's need for constant supervision because of his excessive falling and the inherent danger he faces going up and down stairs, due to his difficulty coordinating his legs.

11. Mother explained Petitioner has medical needs, yet Ms. Andrade did not list any of his medical needs, and assigned a value of "0" in that area. Specifically, Mother explained that Petitioner must wear glasses at all times in order for him to continue to develop and to keep himself safe. However, Petitioner has a tendency to break his glasses by stepping on them or biting on them, and therefore requires constant supervision to ensure he does not break his glasses. Mother also explained Petitioner suffers from severe eczema, requiring that he be washed multiple times a day and have prescribed medication applied to the affected areas.

12. Mother expressed Petitioner has behavioral needs, yet Ms. Andrade did not address them, and assigned a value of "0" in that area. Specifically, Mother explained that nearly every hour, Petitioner cries excessively, hits, bites, scratches, and screams. Dr. Pokras noted the same behavior in her September 25, 2015 letter, stating that during Petitioner's physical therapy sessions, Petitioner displayed multiple behavioral issues in the form of tantrums, throwing himself to the floor, or crying when faced with a challenging task or when his requests were denied.

13. Mother submitted a letter from Petitioner's occupational therapist, Jesica Martino, dated September 28, 2015, corroborating the testimony regarding behavioral issues. Specifically, Ms. Martino stated Petitioner had been demonstrating more frustration, evidenced by episodes of screaming, hitting, scratching, and biting. Ms. Martino did not testify at hearing.

14. Additionally, Mother submitted an email by Petitioner's lead teacher, Sevan Yagyazan, at the UCLA Intervention Program for Children with Disabilities, stating Petitioner had been crying excessively in the classroom. Mr. Yagyazan did not testify at hearing.

15. Mother explained that she and her family required respite services to care adequately for Petitioner, as Petitioner required constant care substantially beyond the range of "routine supervision" as determined by WRC. Mother argues the

care and supervision Petitioner requires far exceed that of an individual of the same age without developmental disabilities.

16. WRC, contends, however, that Petitioner is not entitled to respite services under Early Start, because respite services were not considered a required service under Early Start. Additionally, WRC asserts that Petitioner was not entitled to receive respite services under the Lanterman Act, because his level of need did not support a determination for respite services.

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 (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.

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) Where a change in the status quo is sought, the party seeking the change has the burden of proving that a change is necessary. (Evid. Code, §§ 115 and 500.) In this case, the WRC is seeking to change the status quo by its proposal to fade out and terminate respite services. Accordingly, the WRC has the burden to prove by a preponderance of the evidence that its decision to fade out and terminate such services was warranted.

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. 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 located at California Welfare and Institutions Code sections 4500 through 4846, also apply to the Early Start program.

5. Section 4512, subdivision (b), of the Lanterman Act states in part:

“Services and supports for persons with developmental disabilities” means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of . . . the consumer’s family, and shall include consideration of . . . the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, . . . special living arrangements, physical, occupational, and speech therapy, . . . education, . . . recreation, . . . community integration services, . . . daily living skills training, . . . respite, . . .”

6. Respite services are defined in California Code of Regulations, title 17, section 54302, subdivision (38). Under Welfare and Institutions Code section 4686.5, effective July 1, 2009, relating to the Lanterman Act, respite services may only be purchased when “the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.”

7. More specific to respite as an Early Start service is the amendment to Government Code section 95020, subdivision (e)(3), also effective July 1, 2009, whereby respite would be considered a “nonrequired service”⁴ that could not be purchased by the regional center. Subdivision (e)(3) reads, in pertinent part: “Notwithstanding any other provision of law or regulation to the contrary, effective July 1, 2009, with the exception of durable medical equipment, regional centers shall not purchase nonrequired services, but may refer a family to a nonrequired service that may be available to an eligible infant or toddler or his or her family.”

8. Here, WRC failed to demonstrate by a preponderance of the evidence that Petitioner’s respite services must be faded out and terminated. WRC failed to proffer competent evidence in support of its contention that Petitioner’s level of need equaled that of a child requiring “routine supervision,” and, therefore, rendered respite services unnecessary. Specifically, WRC did not proffer testimony from Ms.

⁴ Early intervention services are described in 20 U.S.C. § 1432(4), and do not include respite.

Andrade who completed the Summary Sheet and determined Petitioner required only routine supervision. Consequently, WRC was unable to establish what information, if any, upon which Ms. Andrade relied when assigning value, especially in the areas of mobility, medical needs, and behavioral needs. Additionally, the evidence showed Petitioner, through the credible testimony of Mother, that he required constant adult supervision, stemming from his significant mobility issues. Mother's testimony in this regard was supported by documentary evidence, including the letter from Dr. Pokras. Petitioner also established he had medical and behavioral needs, as Mother offered uncontroverted and credible testimony demonstrating Petitioner required constant supervision to ensure he remained safe, did not destroy his glasses, and to address his excessive crying, biting, hitting, screaming, and tantrumming. Given these factors, WRC failed to meet its burden of demonstrating the reduction and eventual termination of respite services was warranted.

9. Notwithstanding this, WRC argues that respite services is a "nonrequired service" under Early Start, and, as such, cannot be purchased by the regional center, pursuant to the law set forth in Legal Conclusion 7. However, that law became effective in 2009, yet WRC, under Early Start, began providing Petitioner with 14 hours of respite services in and subsequent to May 2014. As such, in order to change the status quo by fading out and terminating respite services, as set forth in Legal Conclusion 2, WRC must establish that the decision to fade out and terminate such services was warranted. As established in Legal Conclusion 8, WRC has failed to proffer credible, competent, or persuasive evidence to warrant the change.

10. Even if WRC was successful in showing it was not required to provide Petitioner respite services under Early Start, the evidence shows WRC must continue to provide Petitioner with respite services under the Lanterman Act, as Petitioner has firmly established he requires substantially more than "routine supervision", despite WRC's claim that Petitioner's level of need did not support a determination that he respite services.

11. In light of the foregoing, Petitioner's appeal is granted.

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ORDER

Petitioner's appeal is granted. WRC shall continue to provide Petitioner respite services at 14 hours per month, and shall not fade out and terminate those services on October 31, 2015.

DATED: September 30, 2015

CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings