BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: L.L., Petitioner, v. WESTSIDE REGIONAL CENTER, Respondent.	OAH Case No. 2012060975 California Early Intervention Services Act, Government Code section 95000 et seq.]

DECISION

Daniel Juárez, Administrative Law Judge, Office of Administrative Hearings, heard this matter on July 16, 2012, in Culver City, California.

L.L. (Petitioner) was represented by his mother.[1]

Erin Fox, Esq., represented the Westside Regional Center (Respondent).

The parties submitted the matter for decision on July 16, 2012.

STATEMENT OF THE CASE

Petitioner seeks eligibility for the Early Start Program, as a person with developmental delays. The Early Start Program is intended for children ages birth to three with developmental delays, as defined in statute and regulation.

[1] Initials are used to identify Petitioner and family title is used to identify Petitioner's representative to preserve Petitioner's privacy.

Respondent contends Petitioner does not meet the eligibility requirements in the applicable statute and regulation.

FACTUAL FINDINGS

1. Petitioner is a 28-month-old boy. He was born with ankyloglossia (tongue tie). His condition was corrected by surgery at three months of age. Currently, Petitioner has ligamental tissue strands that interfere with his ability to fully move his upper lip. He has one large midline heart-shaped band and at least two others on either side of the midline on his upper lip above the gum line impinging on his ability to control and mold his lips.

2. On May 23, 2012, Petitioner filed an application for inclusion in the Early Start Program (Early Start).[2]

3. Respondent denied Petitioner eligibility for Early Start on June 12, 2012, for failing to meet the eligibility criteria. Instead, Respondent referred Petitioner to the Westside Family Prevention Resources and Referral Services Center to assist Petitioner in accessing community resources and obtaining parent-to-parent support.

4. In Petitioner's application, Petitioner's mother described Petitioner's physical condition. She explained that he is "unable to eat, [he] drools, and has enlarged tonsils making it difficult to swallow. His speech is behind . . . ." Petitioner's mother described Petitioner's needs as follows: "I need assistance in teaching him to eat and currently only able to eat mush, introducing harder, crunchier foods, tongue extention

[2] The ALJ, on his own motion, redacted Petitioner's social security number and health insurance policy number, each on the first page of Petitioner's application (Exhibit 2) and the third page of the psychosocial assessment (Exhibit 4) to preserve Petitioner's privacy.

[*sic*] to overcome his medical set backs [*sic*] so he is able to speak better. He also needs assistance in breathing through nose so he can sleep better."

5. At hearing, Petitioner's mother asserted that Petitioner's physician diagnosed him with orofacial myofunctional disorder (OMD). OMD is a condition wherein one's tongue thrusts forward, out of the mouth, while speaking and swallowing.

6. Petitioner's mother completed a questionnaire provided by Respondent, dated June 9, 2012. Petitioner was 27 months old at the time his mother completed the questionnaire. Petitioner's mother answered questions regarding Petitioner's developmental milestones and current needs. She explained that Petitioner does not speak much, "does not call out friend[s'] names like other toddlers and when prompted or asked still nothing although he knows their names." She noted that Petitioner understands only "simple commands like Mommy, Daddy, cracker, cars" and mostly babbles. Petitioner's mother clarified that Petitioner's tongue-related problems continue. She wrote, "therapists have advised it[']s still too tight[,] not enough taken off, with therapy may be corrected." She described her concern about Petitioner's behavior as, "just lack of speech." In describing her worries about Petitioner, Petitioner's mother wrote, "Lack of interest to eat. Anything most children like to eat (PBJ, macaroni & cheese) he doesn't like. [E]ats just mush like a 9[-]month baby. The lack of speech is going to set him behind socially."

7. Respondent conducted a psychosocial assessment on June 9, 2012. Petitioner's mother attended and participated. The psychosocial assessment report of the same date notes that Petitioner follows directions well. He cannot yet identify body parts. He is able to vocalize approximately 10 words. Petitioner makes eye contact and responds to his name. He is affectionate and not aggressive. He likes to be around other children and demonstrates no repetitive behaviors. He plays well with his toys. He appears to be a happy toddler. He can use a fork. He does not eat toasted bread or

chicken nuggets. He does not appear to chew. Petitioner's food must be cut into small pieces, otherwise he will gag. Petitioner does not take any medication. The psychosocial assessment notes that Petitioner can sometimes put on his jacket or shirt by himself; however, Petitioner's mother disputed this finding, stating emphatically at hearing that she must fully dress and undress Petitioner at all times. Other than this one disputed fact, Petitioner's mother did not dispute the psychosocial assessment's description of Petitioner's abilities.

8(a). Fredlyn Berger and Cheryl Hubert (Berger and Hubert), both occupational therapists, performed a developmental assessment on Petitioner on May 31, 2012. Petitioner was 27 months old at the time. Berger and Hubert administered the Developmental Pre-Feeding Checklist (Pre-Feeding Checklist), the Bayley Scales of Infant and Toddler Development-III (Bayley), the Developmental Assessment of Young Children (DAYC), and the Short Sensory Profile; they additionally made clinical observations and interviewed Petitioner's mother. Berger and Hubert wrote a report of their findings and recommendations.

8(b). On the Pre-Feeding Checklist, Petitioner scored an age equivalency of 12-15 months in food types, liquid types, and liquid management/coordination of sucking, swallow, breathing; an age equivalency of 8-15 months in oral motor skills, and 12-21 months in solid food management. With regard to Petitioner's oral motor skills, Berger and Hubert opined that Petitioner's difficulty is "due to ligamental tissue strands that are interfering with his ability to fully move his upper lip." They wrote, "Possibly, at least part of his difficulty with speech development could be attributed to these sensory issues, facial tone differences and oral-motor structural anomalies. They are definitely interfering with his biting, chewing and oral tongue management of higher textured foods challenging his feeding progression."

8(c). On the Bayley, Petitioner scored an age equivalency of 24 months in cognitive development, 27 months in fine motor skills, and 27 months in gross motor skills. According to Respondent's assertions at hearing, Berger and Hubert did not consider Petitioner's oral motor skills in assessing his fine and gross motor skills, only his eye-hand coordination. This assertion is supported by the fact that they made no mention of Petitioner's oral motor skills in their discussion of his Bayley motor scores. Berger and Hubert did not assess Petitioner in language because they opined he was becoming fatigued, anxious, and uncooperative during the testing.

8(d). On the DAYC, Petitioner scored an age equivalency of 21 months in adaptive skills, and 27 months in social-emotional skills. With regard to his adaptive skills, Berger and Hubert noted that Petitioner is not yet toilet trained. Berger and Hubert found that Petitioner has some ability to dress himself. They wrote, "He can remove his socks. He can put on simple clothing like shoes."

8(e). Berger and Hubert summarized that Petitioner "demonstrated age appropriate scores on the motor performance section and mildly delayed performance on the cognitive section of the Bayley . . . based on the age equivalent scores." They opined that his "cognitive scores may have been negatively impacted by language delays and anxiety concerning the novel testing environment." They noted that Petitioner's social-emotional skills are at age level, but his adaptive skills are delayed, based on not being able to eat an entire meal with a utensil and not showing awareness of his toileting needs. Berger and Hubert opined that Petitioner "would benefit greatly from O.T. services to address these delays which are affecting progress in development and mastery of daily routines."

9(a). Separate from Berger and Hubert's report, Berger wrote a letter, dated July 13, 2012, wherein she opined that Petitioner's feeding skills show a severe delay and are impacting his safety. According to Berger, Petitioner's delayed feeding skills are leading

to decreased overall tone and weakness and sensory deficits. There is no discussion within Berger's letter, nor was there any evidence at hearing that Petitioner has hypotonia. Berger opined that Petitioner requires an "oral manual digital massage technique performed by a trained Occupational Therapist, called oral myofascial release with excellent outcomes." Berger opined that "[w]ithout this type of Occupational Therapy intervention, [Petitioner] will most likely never fully eat a normal diet and may suffer the effects of nutritional and growth difficulties as he grows bigger and requires more to develop fully in all areas of functioning in life." Berger emphasized that feeding, as the primary activity of daily living and self-care, requires heightened analysis.

9(b). Berger recommended an ongoing occupational therapy program two to three times per week in a direct treatment model for six months, with Petitioner's mother as the primary caregiver being trained to follow through daily with a recommended home program. Berger opined that such a therapy model could be an in-home or clinic-based model.

10. Barbara L. Vasser, Speech Language Pathologist, assessed Petitioner's speech and language skills on June 6, 2012. Petitioner was 27 months old at the time. Vasser found Petitioner to have a 25-month age equivalency in receptive language skills (in the average range), and a 15-month age equivalency in expressive language skills. In her report of the same date as the assessment, Vasser described Petitioner as having "moderate to severe expressive language delays as well as severe articulation delays." Vasser opined, "Speech therapy is recommended to address his moderate to severe expressive language delays and severe oral motor and articulation delays."

11. Respondent considered all of the evidence in Factual Findings 4-10, and ultimately concluded that Petitioner's delays are insufficient to meet the eligibility requirements for Early Start. Respondent argued that the ability to feed oneself is not a developmental domain in the eligibility analysis, but only one facet of the adaptive skills

domain. Respondent further argued that difficulties with feeding, similar to difficulties with sleep, are not in themselves developmental delays and that Petitioner's feeding difficulties and expressive language delays result from his medical issues not from the type of developmental issues that Early Start seeks to address.

12. There was no evidence Petitioner's weight is subaverage or that he experiences failure to thrive.

13. Petitioner's mother disputes Petitioner's adaptive skills score because she must do everything for him all of the time. She must wash his hands for him; he does not sleep through the night; he cannot drink from a cup. According to Petitioner's mother, Petitioner has an inadequate diet that will eventually lead to social and behavioral problems and delays if left untreated. Petitioner's mother questioned how Berger and Hubert arrived at the scores on the DAYC and Bayley, but neither party proffered either Berger or Hubert as witnesses. Petitioner's mother described Petitioner's oral motor skills as severely delayed, explaining that he cannot form words correctly, chooses instead not to talk, and extrapolates that this impedes and will continue to impede his social development. Further, she argued that his oral motor skills should be considered as part of the eligibility analysis, not solely a function of his feeding abilities. Petitioner's mother argued that Petitioner's test scores are sufficient to qualify him for Early Start services.

14. Petitioner's health insurance can cover approximately two months of therapy, as recommended by Berger and Hubert. Petitioner's mother seeks Early Start services to fund therapy after the health insurance coverage ends.

LEGAL CONCLUSIONS

1. Petitioner bore the burden of proof by a preponderance of the evidence. (Evid. Code, §§ 115, 500.)

2. Government Code section 95014 states in pertinent part:

(a) The term "eligible infant or toddler" for the purposes of this title means infants and toddlers from birth through two years of age, for whom a need for early intervention services . . . is documented . . . and who meet one of the following criteria:

1. Infants and toddlers with a developmental delay in one or more of the following five areas: cognitive development; physical and motor development, including vision and hearing; communication development; social or emotional development; or adaptive development. Developmentally delayed infants and toddlers are those who are determined to have a significant difference between the expected level of development for their age and their current level of functioning. This determination shall be made by qualified personnel who are recognized by, or part of, a multidisciplinary team, including the parents. A significant difference is defined as . . . 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.

3. California Code of Regulations, title 17, section 52022, states in part:

(a). Developmental Delay

A developmental delay exists if there is a significant difference pursuant to 52082 between the infant's or toddler's current level of functioning and the expected level of development for his or her age in one or more of the following developmental areas:

(1) Cognitive;

(2) Physical: including fine and gross motor, vision, and hearing;

(3) Communication;

(4) Social or emotional;

(5) Adaptive.

4. Given the uncontradicted testimony of Petitioner's mother describing Petitioner's limited oral motor skills, and considering Petitioner's 8-to-15-month age equivalency in oral motor skills, as determined by Berger and Hubert, it is appropriate to assess Petitioner's oral motor skills to be at approximately 11 months of age. Nothing in the applicable law and regulation limits the analysis of an applicant's motor development to eye-hand coordination. The Legislature defined the applicable developmental area as "motor development" without further definition. (Gov. Code, § 95014, subd. (a)(1).) It is reasonable to conclude that oral motor skills are a part of a person's motor development. As Petitioner was assessed to have the oral motor skills of an 11-month-old at the age of 27 months, he has a greater than 50 percent delay in motor development.

5. Vasser assessed Petitioner's expressive language skills to be at an age equivalency of 15 months when Petitioner was 27 months old. This constitutes a greater than 33 percent delay in communication development.

6. Petitioner does not evidence a 33 percent delay in a second developmental area. With a greater than 50 percent delay in motor development, however, Petitioner meets the Early Start eligibility criteria. (Gov. Code, § 95014, subd. (a)(1).)

7. Cause exists to grant Petitioner's appeal, pursuant to Government Code section 95014, as set forth in Factual Findings 1-14, and Legal Conclusions 1-6.

ORDER

Petitioner's appeal is granted.

Dated: July 23, 2012

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DANIEL JUAREZ

Administrative Law Judge

Office of Administrative Hearings