

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LUCAS E.-C.,

Petitioner,

vs.

WESTSIDE REGIONAL CENTER,

Respondent.

OAH No. 2012110835

California Early Intervention Services

Act

(Gov. Code, § 95000 et seq.)

DECISION DENYING PETITIONER'S

APPEAL

DECISION

This matter was heard by Humberto Flores, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on December 13, 2012, in Culver City, California.

Petitioner, Lucas E.-C., was represented by his mother, Stacy E.¹

Erin Fox, Fair Hearing Consultant, represented Respondent Westside Regional Center (Respondent or WRC).

Oral and documentary evidence was received, the record was closed, and the matter was submitted on December 14, 2012.

¹ Petitioner and his mother are identified by first name and last initial to protect their privacy.

ISSUE

Is Petitioner eligible to receive services under the Early Start program?²

EVIDENCE RELIED UPON

Documentary. Respondent's exhibits A-F and H; Petitioner's exhibits 1-8.

Testimonial. Cristina Azantian, OTR/L, occupational therapy consultant and member of WRC's early intervention services eligibility determination team; and Petitioner's mother, Stacy E.

FACTUAL FINDINGS

1. Petitioner is a 22-month-old boy, born on February 19, 2011. Petitioner was referred to WRC by his physical therapist, Natalia Nokas.

2. On September 17, 2009, WRC's early intervention services eligibility determination team met to discuss Petitioner's case. The team consisted of Cristina Azantian and two other consultants to WRC. The team referred Petitioner for a psychosocial assessment and a physical therapy consultation, in order to allow the team to determine Petitioner's eligibility for the Early Start program.

3. Petitioner's psychosocial assessment was performed by Andrea Danneker, M.A., Early Start Intake Coordinator for WRC, on October 26, 2012. (Exh. A.) At that time, Petitioner had a chronological age of 20 months. Ms. Danneker observed Petitioner to be very active and able to climb adult furniture. He made good eye contact, smiled socially and was very chatty. He was also able to string two words together. During the assessment, Petitioner was able to walk (toe walks) and run in all directions, kick a ball

² "Early Start" is another name for the California Early Intervention Services Act (Gov. Code, § 95000 et seq.), described more specifically in Legal Conclusions 1-6, below.

and jump with both feet leaving the ground. Petitioner's mother informed Ms. Danneker that Petitioner has a history of toe walking. Mother was informed by Petitioner's occupational therapist that the toe walking was related to Petitioner's muscle tone and referred Petitioner to a physical therapist. Regarding Petitioner's cognitive development, Ms. Danneker noted that Petitioner was interested in his environment and explored his surroundings with curiosity, corrected a bottle that was given to him in an upside-down position, and was able to attend to a short story.

Petitioner's physical therapy consultation was performed by Debbie Bohn, MPT, for WRC on October 22, 2012. (Exh. B.) Her report reflects that Petitioner was assessed with the Bayley Scales of Infant and Toddler Development—3rd Edition (Bayley Scales), and The Developmental Assessment of Young Children (DAYC). Petitioner's scores on the Bayley Scales were in the average range in all areas tested, which included cognitive, language, fine and gross motor skills, adaptive skills and social and emotional domains. Ms. Bohn's report summarized the outcomes as follows: Petitioner's cognitive skills were at 21 months, and his language skills were at 20 months for receptive skills and 23 months for his expressive language. Petitioner's fine motor skills were at the 21 month level and his gross motor skills were at the 19 month level. Regarding the DAYC test instrument, Ms. Bohn noted that Petitioner's range of motion was within normal limits for all four extremities, though his muscle tone was slightly hypotonic.

4. Deborah Flieger, a speech and language pathologist, evaluated Petitioner on October 23, 2012. Ms. Flieger observed Petitioner during the evaluation and obtained information from his mother. In addition Ms. Flieger utilized the Preschool Language Scale 5 (PLS-5) to assess expressive and receptive language skills; the Auditory Comprehension Subscale to assess Petitioner's understanding of vocabulary, concepts and interpretation of meaning based on word order and subtle word differences; and the Expressive Communication Subscale, which evaluates social

communication skills and Petitioner's ability to apply word and sentence rules and express complex ideas. Ms. Flieger concluded that Petitioner "presents with above age level receptive and expressive language skills. His receptive and expressive language skills are at the 30-month level. He demonstrates age appropriate articulation /phonological skills. Social and pragmatic skills appear to be developing normally."

5. On November 6, 2012, WRC determined Petitioner to be ineligible for Early Start services. The determination was based on Petitioner's psychosocial assessment (see Factual Finding 3), Petitioner's physical therapy consultation (see Factual Finding 4), and Petitioner's speech and language evaluation. The psychosocial assessment did not indicate any area of significant developmental delay. The eligibility team concluded that Petitioner did not have a developmental delay in any of the above areas.

6. Christina Azantian, an occupational therapist, testified that, based on her personal observations of Petitioner during a 40 minute visit, and according the results of the above mentioned assessments and evaluations, Petitioner does not have a 33 percent delay in at least one of the following areas: cognitive, speech and language, fine motor skills, gross motor skills, or adaptive skills. Ms. Azantian further testified that Petitioner's toe walking is not necessarily caused by a developmental delay and that Petitioner demonstrated that he can walk very well with orthotics. In any event his toe walking should resolve with time.

7. On November 29, 2012, Robert M. Kay, M.D., Professor of Orthopedic Surgery at University of Southern California, saw Petitioner as part of a consultation regarding Petitioner's toe walking. Dr. Kay noted that Petitioner had mild low muscle tone and flexible flat feet, and demonstrated intermittent toe walking. Dr. Kay also noted that Petitioner had a full range of motion in the upper and lower extremities.

Based on his examination, Dr. Kay opined that Petitioner's toe walking is a condition that generally improves with time (Exhibit 3).

8. On February 9, 2011, Debra Shiroma, OTD, a pediatric occupational therapist, evaluated Petitioner. In her report, Ms. Shiroma noted that "[Ppetitioner] walked on his toes 90 percent of the time without foot orthotics. With his shoes on with Patti Bob foot orthotics, [Ppetitioner] was seen to walk on his toes significantly less." Regarding petitioner's gross motor skills, Ms. Shiroma noted that much of the concern relates to Petitioner's lack of safety awareness. In addition, Petitioner demonstrated decreased muscle tone, balance and toe walking. . . .[A]fter ruling out any orthopedic and neurological concerns, . . . his toe walking was reassessed and may possibly be related to a need for proprioceptive input." In a letter dated October 23, 2012, Ms. Shiroma noted that after seeing Petitioner in July 2012, she determined that '[Ppetitioner's] toe walking did not appear to be related to sensory input, and that [Ppetitioner] had been discharged from occupational therapy." (Exhibit 7)

9. In a letter dated October 9, 2012, Natalia Pokras, DPT, a Doctor of Physical Therapy, stated "when a standardized test Bayley SITD-III was administered to establish a baseline for [Ppetitioner's] performance in the gross motor area, he received a scaled score of 8, which indicates that [Ppetitioner] is functioning two third standard deviations below the average in the gross motor area. Most of the items missed were related to balance and coordination." Petitioner did not present a report from Dr. Pokras which might have provided more detail regarding the testing and scores.

10. Petitioner's mother testified that her major concerns are Petitioner's body awareness, balance, low muscle tone and weakness, toe walking and his lack of protective reaction. She is concerned that Petitioner will get hurt if these issues are not addressed with physical therapy.

LEGAL CONCLUSIONS

1. Jurisdiction for this case is governed by the federal law set forth in the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1431 et seq.), and the California Early Intervention Services Act (CEISA) (Gov. Code, § 95000 et seq.), which supplements the IDEA and which is commonly referred to as the “Early Start Program.” Each act is accompanied by pertinent regulations. Thus, both federal and state law applies to this case. Petitioner properly and timely presented, in conformity with these laws, a due process hearing request, and therefore jurisdiction for this case was established. (Factual Findings 1-6.)

2. 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).)

3. The California Legislature has found that 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 has recognized 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. 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 and Welf. & Inst. Code, § 4620.) Early Start services are provided in accordance with an Individualized Family Service Plan (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).)

5. The CEISA sets forth criteria for eligibility for early intervention services. The CEISA provides that an infant or toddler two years of age or younger is eligible if the child demonstrates a developmental delay in, among other things, gross motor skills. "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. . . . A significant difference is defined as a 33-percent delay in one developmental area before 24 months of age" (Gov. Code, §95014, subd. (a)(1).)

6. A person seeking to establish eligibility for services has the burden of proof in an administrative hearing under the IDEA. (See, e.g., *Schaffer v. Weast* (2005) 546 U.S. 49, 51; see also, 34 C.F.R. § 303.425(b).) In this case, Petitioner's parent has the burden of proof.

7. Petitioner and/or his mother have not met their burden of establishing that Petitioner is eligible to receive services in the Early Start Program. (Factual Findings 1-11.) The conclusions of WRC's early intervention services eligibility determination team were persuasive in light of all the evidence. Petitioner does not meet the eligibility criteria for the Early Start Program.

ORDER

Petitioner is not eligible to receive services under the California Early Intervention Services Act.

DATED: December 20, 2012

A handwritten signature in black ink that reads "Humberto Flores". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

HUMBERTO FLORES

Administrative Law Judge

Office of Administrative Hearings