

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of

RICHARD N.,

Petitioner,

v.

REGIONAL CENTER
OF ORANGE COUNTY,

Respondent.

OAH No. L 2008010612

[California Early Intervention Services Act,
Government Code section 95000 et seq.]

DECISION

Daniel Juárez, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on March 13, and April 30, 2008, in Santa Ana, California.

Carmen Carley, Parent Advocate, represented Richard N. (Petitioner).¹ Petitioner was not present, but Petitioner's mother and father were present on both days of hearing.

Mary Kavli, Regional Center of Orange County's designee, represented the Regional Center of Orange County (Respondent).

The parties submitted the matter for decision on April 30, 2008.

FACTUAL FINDINGS

1. The questions in this matter are: 1) should Respondent fund 40 hours per week of applied behavior analysis therapy (ABA) for Petitioner? and 2) should Respondent reimburse Petitioner for the cost of his independent psychological evaluation?

2. Petitioner contends Respondent should fund 40 hours per week of ABA therapy, as recommended in the independent psychological evaluation he obtained because, in accordance with that evaluation, his autism-related needs call for such an intensive therapeutic program. Petitioner also contends Respondent should pay the cost of his independent evaluation, by reason of equity.

¹ Petitioner's surname was reduced to its first initial to maintain Petitioner's confidentiality.

3. Respondent contends that it need not fund ABA at the level Petitioner requests because, according to other assessments of Petitioner’s needs, Petitioner has properly progressed with, initially 10, and now with 15 hours per week of ABA therapy. Respondent asserts that 15 hours per week is the appropriate level of ABA therapy for Petitioner’s needs. Regarding the claim for reimbursement, Respondent contends the assessments it authorized were adequate to evaluate Petitioner’s needs, Respondent did not require further evaluation data, and thus, should not be required to reimburse Petitioner.

4. Petitioner requested an administrative hearing timely, based upon Respondent’s denial of Petitioner’s request for 40 hours per week of ABA therapy.

5. Petitioner, a two-year-old boy, has autism. On or about December 6, 2007, when Petitioner was approximately 24 months old, Petitioner became eligible for services, from Respondent, pursuant to the California Early Intervention Services Act. The parties do not dispute Petitioner’s diagnosis or eligibility for early intervention services.

6. When Petitioner originally applied to Respondent for eligibility, as part of its overall evaluative process, Respondent contracted with an agency called Cornerstone Therapies (Cornerstone) in Huntington Beach, California. On November 19, 2007, Cornerstone assessed Petitioner to “determine eligibility for services from Regional Center.” The Cornerstone evaluators administered the following tests: the Preschool Language Scale 4, the Rossetti Infant-Toddler Language Scale, the Peabody Developmental Motor Scale II, the Developmental Assessment of Young Children, and the Infant/Toddler Sensory Profile. As part of its evaluation, Cornerstone staff also interviewed Petitioner’s parents and made clinical observations of Petitioner.

7. Petitioner’s pertinent test results from the Cornerstone evaluation are set forth in Table A.

Table A Cornerstone Evaluation Results

Area of Assessment	Age Equivalency	Percentage of Delay
Gross Motor	9-15 months old	38-65 percent delay
Cognitive	12-15 months old	50 percent delay
Speech/Language	approx. 3-6 months old	greater than 75 percent delay
Expressive Language	approx. 3-6 months old	greater than 75 percent delay
Social Emotional	4 months old	83 percent delay
Fine Motor	12-14 months old	42-50 percent delay
Adaptive/Daily Living	12 months old	50 percent delay

8. In describing Petitioner’s behavior during the evaluation, Cornerstone staff reported, among other things, that Petitioner transitioned to a smaller room easily, separated immediately from his parents, but refused to attempt many of the standardized tasks that were part of the testing.

9. Cornerstone set out 29 specific developmental goals for Petitioner, in response to the deficits uncovered by the evaluation, and recommended as follows: “it is recommended that [Petitioner] participate in a global multidisciplinary individualized program with a behavioral component for 15 hours per week It is recommended that [Petitioner’s] need for further intervention be evaluated in 3 months.”

10. The Cornerstone evaluation was signed by four individuals: a pediatric occupational therapist, a pediatric physical therapist, a speech and language pathologist, and the Co-Director of Cornerstone who is also a pediatric physical therapist (though this fourth person, the Co-Director, was not present during the evaluation). None of the Cornerstone evaluators testified at hearing.

11. On a date undetermined by the evidence, Respondent initially informed Petitioner’s parents that it intended to authorize 10 hours per week of ABA therapy. The evidence did not explain the disparity between Respondent’s authorization of 10 hours per week and Cornerstone’s initial recommendation of 15 hours per week. Petitioner’s individualized family service plan (IFSP), dated December 21, 2007, incorporates Cornerstone’s developmental findings (including those discussed in Factual Findings 7-9) and its recommendation for ABA therapy.

12. After receiving the Cornerstone evaluation, on December 21, 2007, and as a result of their own research regarding autism therapies, Petitioner’s parents informed Respondent that they considered 10 hours per week to be inadequate to meet Petitioner’s developmental needs, and asked for an independent evaluation, at Respondent’s expense, to determine the number of ABA therapy hours Petitioner needed. Petitioner’s parents informed Respondent that they believed Petitioner required 35 to 40 hours per week to meet his autism-related needs. On that same day, Respondent sent Nicole Ward, a board certified behavior analyst (BCBA), an expert in applied behavior analysis, to observe Petitioner in his home. Ward had limited interaction with Petitioner, as she explained that her purpose was to observe Petitioner and answer questions Petitioner’s parents might have regarding ABA therapy, but not render an opinion as to the appropriateness of the quantity of recommended therapy hours.

13. On December 21, 2007, Respondent denied Petitioner’s request for an independent assessment, stating that Respondent was “not in need of further assessments in order to provide services to [Petitioner].” Respondent also asserted that there was no recommendation or justification to increase Petitioner’s ABA therapy to 35 hours per week. In its denial letter to the parents, Respondent wrote, “[a]fter observing [Petitioner], Nicole Ward, our Board Certified Behavior Analyst was in agreement with Cornerstone’s initial recommendation for ABA hours and parent training which she informed you [*sic*] at the time of the observation.”

14. Petitioner secured his own evaluation, engaging Robin L. Morris, PsyD., a licensed clinical psychologist, to evaluate him. Dr. Morris (sometimes hereafter, “Morris”) received her doctorate in 1997 from the California School of Professional Psychology. Her doctoral project topic was entitled, “A Case Study of Autistic Children Using Physical Play as an Adjunct to Treatment.” She received a master’s degree in clinical psychology from Pepperdine University in 1992. Morris has had a private clinical practice since 2001, providing, among

other things, therapy to high-risk infants and children. In 1995, as a research associate at the UCLA Neuropsychiatric Institute, Morris collected data regarding in-patient treatment for children with developmental disabilities, including autism. Morris is a member of the American Psychological Association and the Autism Society of Los Angeles.

15. Dr. Morris evaluated Petitioner on December 24, 2007, and administered the following tests: the Mullen Scales of Early Development, the Autism Diagnostic Interview-Revised, the Child Development Inventory, and the Vineland Adaptive Behavior Scales. The results of the tests Dr. Morris administered are set forth in Tables B, C, D, and E.

Table B Mullen Scales of Early Development

Area Assessed	Age Equivalency	Assessment
Gross Motor	16 months old	very low
Visual Reception	19 months old	below average
Fine Motor	16 months old	very low
Receptive Language	7 months old	very low
Expressive Language	5 months old	very low

Table C Autism Diagnostic Interview-Revised

Area Assessed	Petitioner's Score	Cut-Off Score²
Social Interaction	24	10
Communication	14	7
Repetitive Behaviors	5	3
Abnormality of Development	6	1

Table D Child Development Inventory

Area Assessed	Age Equivalency	Assessment
Social Development	less than 12 months old	significant delay
Self-Help	less than 12 months old	significant delay
Gross Motor	less than 12 months old	significant delay
Fine Motor	one year, five months old	significant delay
Expressive Language	less than 12 months old	significant delay
Language Comprehension	less than 12 months old	significant delay
Letters	2 years, 1 month old	significant delay
Numbers	1 year, six months old	significant delay
General Developmental Score	1 year old	significant delay

² According to Dr. Morris, scores near or above the cut-off score “suggest significant problems in a particular behavior domain.”

Table E Vineland Adaptive Behavior Scales

Area Assessed	Petitioner's Score	Assessment
Communication	40	low
Daily Living Skills	67	low
Socialization	68	low
Motor Skills	82	below average

16. In her written report, Dr. Morris described Petitioner as follows: Petitioner “has no ability to communicate with others. He is void of using words and gestures to express himself and get his needs met. He shows limited awareness of gestures and his behavior is not affected by social cueing such as smiles and praise. He does not follow one-step commands and shows poor eye contact when spoken to. [Ppetitioner’s] play skills are far below what would be expected for a child his age. He is unable to play with a variety of toys for a few minutes and will line items up instead of playing with them as intended. He does not play with peers and will not approach children his age playing parallel to them. He does not engage in outside activities without assistance. In regards to self help skills, [Ppetitioner] is unable to chew his food resulting in him swallowing bites whole and choking. He cannot use utensils or brush his teeth. He cannot dress or undress himself and has no bowel and bladder control.” The Respondent did not contest Dr. Morris’ description of Petitioner, nor did it contest Dr. Morris’ test results.

17. Dr. Morris made the following recommendations, among others: “A 40-hour a week program is highly recommended to derive educational benefit and to improve [Ppetitioner’s] functioning across domains. An intensive program also allows time for [Ppetitioner] to develop attending skills, compliance, communication and basic imitation skills. It is recommended ABA therapy be provided by individuals who have earned at least a Bachelors Degree and have weekly supervision from a Master level supervisor. It is recommended data be taken on a daily basis and shared with parents.” Morris also recommended that “[o]ne-hour monthly consultations should be provided to the family as a time to discuss current goals and to help teach parents to generalize the goals discussed. [Ppetitioner’s] ABA supervisor should be present at all meetings.” Dr. Morris went on to clarify that the services she recommends should “be provided 12 months out of the year, with no breaks exceeding 2 weeks to ensure skills can be generalized and to minimize the chance of regression occurring.”

18. At hearing, Dr. Morris explained that she recommends a 40-hour per week program because Petitioner’s autism is severe and has caused severe developmental delays, as uncovered by her evaluation. Morris pointed to the fact that Petitioner is unable to communicate his most basic needs (for food and help, for example), in ways that other toddlers his age can. Dr. Morris opined that an intensive program, as she recommends, of 40 hours per week, would help Petitioner learn ways to communicate and improve other significantly delayed abilities. Where Petitioner is exhibiting behavioral challenges, like separation anxiety (regarding his mother), Morris explained that such challenges need not be an impediment to implementing a 40-hour per week program. Instead, a program should incorporate those challenges into the therapy plan. Morris opined that 10 hours per week, as offered by Respondent, is inadequate to meet Petitioner’s many needs and would produce nominal progress, leaving Petitioner severely developmentally delayed. In describing how a 40-hour per week program should be

implemented, Morris explained that Petitioner's ABA provider should begin at 25 hours per week and gradually increase those hours, by five hours per week, over three months.

19. In January 2008, Petitioner began receiving services from Autism Interventions and Resources, Inc. (AIR) of Laguna Hills, California. AIR is vendored with Respondent to provide services to Petitioner. Respondent initially authorized AIR to provide Petitioner 10 hours per week of ABA therapy.

20. Petitioner's gross and fine motor skills, general knowledge, self-help, speech and language, and social/emotional development, showed nominal progress when contrasting a January 11, 2008 progress report (from AIR), with AIR's February 21, 2008 progress report. AIR's February 21, 2008 report described Petitioner's behavior as non-compliant 1.6 times per hour, eloping 1.3 times per hour, tantrums 0.33 times per hour, physical automatic³ 1 time per hour, dangerous behavior 0 times per hour⁴, and separation anxiety 2.3 times per hour. AIR wrote, Petitioner "continues to require intensive direct 1:1 intervention services in order to increase skill level in areas of development including cognition, speech and language, self-help, and fine motor." AIR concluded, "the current recommendation for direct 1:1 intervention services includes 15 hours per week of 1:1 ABA."

21. Respondent has agreed with AIR's recommendation for 15 hours per week, and has now authorized AIR to provide Petitioner with 15 hours per week of ABA therapy. This is Petitioner's current quantity of therapy hours.

22. AIR's director opined that 15 hours per week is appropriate, and 40 hours per week is not because Petitioner would not tolerate such a high intensity program. AIR's director believes Petitioner currently has a low tolerance for ABA, low compliance abilities, low attention skills, and is too attached to his mother. Due to these characteristics, at this time, the AIR director believes that 40 hours per week is simply too much for Petitioner to handle and such an intensive program would limit his progress. AIR's director does not provide Petitioner direct services. The director believes Petitioner is reasonably progressing and suggested that AIR may, in the near future, request an increase in Petitioner's ABA hours, by seven additional hours (for a total of 22 hours per week). However, AIR's opinion at hearing was that 15 hours per week was appropriate for Petitioner's needs because Petitioner requires a gradual increase in hours, based on his observed tolerance and compliance problems. When asked if an intensive program of 35 to 40 hours per week would ever be appropriate for Petitioner, the AIR director believed it would be in the future, but not now.

23. Respondent proffered the opinions of Nicole Ward, Respondent's Autism Program Coordinator and the BCBA discussed in Factual Findings 12 and 13. Ward did not evaluate Petitioner. After observing Petitioner on December 21, 2007 and reviewing the evaluations of Cornerstone and Dr. Morris, as well as AIR's progress reports, Ward opined that

³ The evidence did not define "physical automatic."

⁴ After listing no dangerous behaviors as noted, the AIR report then described Petitioner's various observed acts as "dangerous behaviors."

15 hour per week of ABA therapy is appropriate for Petitioner's needs. Ward based her opinion on the Cornerstone evaluation and the AIR progress reports. According to Ward, Morris' evaluation did not present sufficient data to justify the provision of 35 or 40 hours of ABA therapy, specifically, no goals or objectives on which to base the requested increase in hours. In contrast, Ward found the Cornerstone evaluation provided 29 specific goals that supported the provision of 15 hours per week of therapy. Ward gave more weight to the Cornerstone evaluation and AIR's opinions, than to Morris' evaluation, because, in her opinion, the Cornerstone program and AIR have significant experience in treating children with autism, they both have good reputations in the autism community, and have successfully provided such evaluation and treatment services to children like Petitioner for many years. However, on cross-examination, Ward conceded that the professional backgrounds of the four signees to the Cornerstone evaluation (see Factual Finding 10) were not the kinds of backgrounds associated with professionals who would commonly provide recommendations for ABA therapy.

24. Petitioner's parents believe that Petitioner needs the type of intensive program recommended by Dr. Morris. Petitioner's parents see Petitioner as severely delayed in all areas of development. They are concerned that without intensive ABA therapy at a young age, Petitioner will remain delayed by severe autism and be unable to develop like other children his age.

LEGAL CONCLUSIONS

1. Cause exists to grant Petitioner's appeal in part and deny the appeal in part, as set forth in Factual Findings 1-24, and Legal Conclusions 2-11.

The Law

2. Government Code section 95004 states in pertinent part:

(a) Direct services for eligible infants and toddlers and their families shall be provided pursuant to the existing regional center system under the Lanterman Developmental Disabilities Services Act

(b)(1) In providing services under this title, regional centers shall comply with the Lanterman Developmental Disabilities Services Act

3. California Code of Regulations, title 17, section 52100, states in pertinent part:

The IFSP shall address the infant's or toddler's developmental needs and the needs of the family related to meeting the developmental needs of the infant or toddler.

4. California Code of Regulations, title 17, section 52109, states in pertinent part:

(a) Regional centers shall provide, arrange, or purchase early intervention services, as required by the infant's or toddler's IFSP

Discussion

5. Respondent is mandated to implement those services set forth in Petitioner's IFSP that meet his individually tailored needs. (Gov. Code, § 95004; Cal. Code Regs., tit. 17, §§ 52100 & 52109, subd. (a).) The parties do not disagree Petitioner needs ABA therapy. The question is whether Petitioner's needs are met by 15 or 40 hours per week of ABA therapy. The evidence established that Petitioner's needs require 40 hours per week of ABA therapy, as recommended by Dr. Morris.

6. Morris persuasively testified that Petitioner requires intensive therapy services in response to his significant delays. Morris' testing elicited low scores, similar in severity to those found by Cornerstone. Cornerstone opined that 15 hours per week was appropriate, even though Cornerstone found that Petitioner had greater than 50 percent delays in most functional areas. Saliiently, no one from Cornerstone testified to explain the therapeutic basis for that opinion, given Petitioner's significantly low scores. Ward, Respondent's BCBA, criticized Morris' evaluation for Morris' failure to develop developmental goals justifying the intensive 40-hour per week program. However, here, the legal analysis requires one to assess whether Petitioner's disability-related needs are met by 15 or 40 hours per week of ABA therapy. (Gov. Code, § 95004; Cal. Code Regs., tit. 17, §§ 52100 & 52109, subd. (a).) The absence of goals in Morris' evaluation does not discredit or lessen the value of her recommendations, if Petitioner's needs, as derived from the evidence, show that he requires intensive therapy at the recommended quantity. In this case, Morris credibly testified that Petitioner has significant delays that require a more intensive program. As a licensed clinical psychologist, who evaluated Petitioner, testified at hearing, and whose background includes an understanding of therapy and the treatment of persons with developmental disabilities, including autism, Morris' recommendations merited significant weight.

7. In contrast, such weight could not be accorded to the Cornerstone evaluation, with no direct testimony from Cornerstone staff, and no evidence to explain how the professional backgrounds of the four signees could competently recommend ABA therapy, an issue conceded by Respondent's own BCBA. (See Factual Finding 23.)

8. The director of AIR, who opined similarly to Cornerstone and Respondent that 15 hours per week was appropriate for Petitioner, could also not be accorded significant weight. The director did not directly provide Petitioner with ABA services, she did not evaluate Petitioner, and she did not establish that she had direct knowledge of Petitioner's therapeutic needs. Though the director of a program providing ABA services to regional center clients, her professional background, as established by the evidence, was insufficient to outweigh the professional opinions of Dr. Morris, regarding ABA therapy and Petitioner's needs. Furthermore, the director's opinion, that Petitioner's tolerance and compliance abilities were not conducive to an intensive therapy program, was not supported by the evidence, other than the director's testimony. With no evidence establishing her direct knowledge of Petitioner's behaviors, the director's testimony was insufficient to establish her assertions. Overall, the evidence did not support the AIR director's opinion that 15 hours per week of therapy was appropriate.

9. Nicole Ward, Respondent's BCBA opined that 15 hours per week was appropriate, but she relied on the Cornerstone evaluation and the data from AIR. Since the evidence from Cornerstone and AIR was insufficient to establish Respondent's case, Ward's opinion was commensurately unpersuasive.

10. Petitioner met his burden of proof, and proved, by a preponderance of the evidence, that his needs require 40 hours per week of ABA therapy, as contemplated (and set forth in Factual Findings 17 & 18) by Dr. Morris.

11. Neither Petitioner nor Dr. Morris provided evidence establishing the cost of Dr. Morris' psychological evaluation. With no evidence establishing the costs sought, ordering reimbursement for the evaluation is inappropriate. Consequently, Petitioner cannot prevail on his request for reimbursement.

ORDER

Petitioner's appeal is granted in part and denied in part.

1. Respondent shall fund 40 hours per week of applied behavior analysis therapy for Petitioner, as recommended by Dr. Robin L. Morris. The parties shall convene an individual program plan meeting within 20 days of the date of this Decision, wherein Petitioner's planning team shall develop a plan and schedule to implement applied behavior analysis therapy, at a rate of 40 hours per week.

2. Petitioner's request for reimbursement of the independent psychological evaluation performed by Dr. Robin L. Morris is denied.

Dated: May 14, 2008

DANIEL JUAREZ
Administrative Law Judge
Office of Administrative Hearings