

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

In the Matter of:

SETH F.,

Petitioner,

vs.

HARBOR REGIONAL CENTER,

Respondent.

OAH No. L 2007040382

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

**DECISION**

This matter was heard by Mark E. Harman, Administrative Law Judge of the Office of Administrative Hearings (OAH), State of California, in Torrance, California, on July 18, and August 29 and 30, 2007.

Audrey Clurfeld, Program Manager, represented Respondent, Harbor Regional Center (Respondent or Service Agency).

Seth F. (Petitioner), who was not present, was represented by Carmen Carley, Advocate, and Petitioner's father and mother.

Petitioner seeks a determination that Respondent must: (a) reimburse Petitioner's parents the cost for a one-to-one (1:1) applied behavioral analysis (ABA) intervention program, which they have funded since February 2007; and (b) reimburse Petitioner's parents the cost of a psychological evaluation conducted in April 2007. Respondent contends that it has provided Petitioner with all appropriate services to address his assessed needs, and that it does not reimburse for services that have not been previously mutually agreed upon through the individualized family service plan (IFSP) process.

The parties presented oral and documentary evidence.<sup>1</sup> On August 30, 2007, the record was closed and the matter was submitted for decision.<sup>2</sup>

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<sup>1</sup> Both parties used letters to designate their exhibits. The exhibits will be identified herein with "SA" for the Respondent's exhibits, and "CL" for Petitioner's (e.g., CL-Y; SA-D).

## ISSUES<sup>3</sup>

1. Should Respondent be required to reimburse Petitioner's parents for the cost of ABA program services purchased by Petitioner's parents and provided to Petitioner between February and May 2007?
2. Should Respondent be required to reimburse Petitioner's parents for the cost of a psychological evaluation performed by Robin Morris, Psy.D., on April 30, 2007?

## FACTUAL FINDINGS

1. Petitioner is a three-year-old boy who lives with his parents. He was born on June 1, 2004, after 25-weeks gestation. He weighed only two pounds, four ounces, at birth. He was in an intensive care unit for the first month of his life and had to be intubated, with a mechanical ventilator, for three months. Before his discharge from the hospital, he was referred to Respondent as a child with a high risk for a developmental disability. He was deemed eligible for services under the California "Early Start" program in September 2004. (Cal. Code of Regs., tit. 17 (CCR), § 52022, subd. (c)(1).) Respondent began funding an occupational therapist to visit Petitioner in his home one time per month to monitor his developmental progress.

2. In an evaluation in April 2005, occupational therapist Laura Lauten, MA, OTR-L (Lauten), reported that Petitioner's scores on the Bayley Scales of Infant Development II were within normal limits. He did not display heightened or prolonged episodes of negative affect, he displayed positive affect by smiling and making eye contact, and there were no behavioral concerns. Lauten did not recommend any additional services.

3. In October 2005, Lauten reevaluated Petitioner when he was 16 months chronological age, and 13 months adjusted age. Petitioner's scores were again within normal limits; however, Lauten reported that Petitioner made minimal eye contact, had little social interaction, and appeared to have minimal interest in test materials. At times,

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<sup>2</sup> The hearing has been continued on three occasions at the request of the parties. First, pursuant to Respondent's unopposed motion to give the parties sufficient time to mediate the dispute (At that time, Petitioner waived the time limit prescribed by law for holding the hearing and for the administrative law judge to issue a decision in the case). Second, pursuant to Petitioner's motion, for the convenience of Petitioner's expert witness. And third, by agreement of both parties, as it was necessary to schedule an additional day for testimony in the hearing.

<sup>3</sup> These were the issues as framed by the parties at the due process hearing, and are derived from a due process and mediation hearing request filed on April 11, 2007.

he did not respond to his name. Petitioner's mother reported that he "spins the wheels on any object/toy." Petitioner displayed one to two heightened episodes of negative affect, did not "display any positive affect in relationship to the activities" or Lauten, and "appeared to lack persistence and attention to complete the tasks." In her written report, under "Summary and Recommendations," Lauten stated that Petitioner appeared to have some behavioral concerns that were interfering with social interaction and purposeful play. She recommended an infant stimulation program one time per week, and for Respondent "to determine if a psychological evaluation is beneficial at this time and/or ongoing OT." (SA-R.)

4. Carole S. Hovda, MS (Hovda), a service coordinator employed by Respondent and working with Petitioner's family, included much of Lauten's report in Petitioner's October 5, 2005 IFSP,<sup>4</sup> but she did not note that Lauten had suggested a psychological evaluation. Instead, Respondent's plan for services and supports was limited to an infant stimulation program one time per week and occupational therapy one time per month.

5. In October 2005, an early intervention specialist (specialist) from Niños del Cielo (NDC) began providing infant stimulation one time per week, funded by Respondent. In March 2006, the specialist wrote in a report to Respondent that Petitioner was using about 10 words during his sessions (Petitioner's father reported he had a vocabulary of between 30-40 words) and was able to label some items in a book. This report contains some contradictions, in particular, the statements, "This family seems very concerned with Seth and his development," followed by, "Seth's parents are really not concerned with anything." (SA-Q.) Furthermore, this report fails to mention that, when NDC began providing services to Petitioner, NDC had concerns about possible autism, or attention deficit hyperactivity disorder with a language disorder, but after working with Petitioner, the specialist had ruled out autism. The report also fails to mention that NDC had communicated this concern to Hovda. (CL-C.)

6. In an April 2006 report, Lauten stated she had observed improvement in social interaction, but Petitioner showed a delay in receptive communication and continuing behavioral concerns. The composite score for general adaptive functioning was 71, in the borderline range. Lauten's report was inconsistent with NDC's report in some details. For example, NDC's goals for Petitioner for the six-month period between

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<sup>4</sup> An IFSP is a detailed written plan for providing early intervention services to consumers, which contains a statement of the consumer's present levels of development, a statement of the consumer's or family's needs pursuant to assessment, a statement of expected developmental outcomes based on assessments, and a statement of the specific early intervention services necessary to meet the unique needs of the consumer and his family to achieve the outcomes. An IFSP is developed through a collaborative process of parents, a service coordinator, and persons who provide services to the consumer, and is required under state and federal law to be reviewed every six months or more frequently if a service change is necessary or if the parent requests a review. (CCR, § 52102 et seq.)

March and October 2006 included teaching Petitioner to identify three body parts -- nose, eyes and mouth. But Lauten stated that Petitioner “points to at least three named body parts.” Lauten recommended continuing in home infant stimulation services, and thought that a preschool program may be beneficial for Petitioner.

7. In September 2006, NDC acknowledged that Petitioner was displaying tantrum behaviors more frequently and making unintelligible sounds throughout his sessions, but NDC did not recommend a behavioral assessment; instead, it recommended that in home infant stimulation services continue, even after Petitioner had begun preschool three days per week. NDC’s services were provided until Petitioner began going to preschool five days per week in October 2006.

8. In September 2006, Petitioner started attending preschool part-time. Within weeks, his teachers reported that he required a great deal of monitoring with a 1:1 aide, and had difficulty with structured and group activities. They also identified some concerns with his limited peer interaction, poor eye contact, toe walking, hand-flapping and other unusual physical mannerisms. During a birthday party for another child, in which the children sang “Happy Birthday” and there were candles and a cake, Petitioner was terrified and inconsolable. The teachers recommended that his parents seek a referral from Respondent for a psychological evaluation for autism. Petitioner’s father called Hovda with these concerns, as well as his concern regarding Petitioner’s speech delays. Respondent referred Petitioner for psychological, and speech and language, evaluations.

9. Respondent referred Petitioner to Dana Briggeman, MS, CCC-SLP. On October 2, 2006, Briggeman used The Rossetti Infant-Toddler Language Scales, a checklist of skills based on parents’ observations, to evaluate Petitioner’s skills. She identified Petitioner as having a 33 percent delay in receptive language and a 50 percent delay in expressive language skills. This established a significant difference between Petitioner’s level of functioning and the expected level of development for his age. Upon Briggeman’s recommendation, Respondent funded speech and language therapy one time per week between October 2006 and January 2007. Therapy was increased to two sessions per week in January 2007, until the school district assumed responsibility for providing these services in mid-2007. Petitioner demonstrated progress in both receptive and expressive language over this seven-month period. When Briggeman reevaluated Petitioner’s language skills in May 2007, he continued to register below normal limits in comparison to his peers. He rarely verbalized spontaneously during preschool, he required prompts by adults to use words to communicate wants and needs (as he relied on other means such as pointing, gesturing, or using facial expressions to communicate) and, unless prompted to use expanded utterances, he used only one-word spontaneous utterances. Briggeman recommended “continued individual speech and language therapy in order to continue to improve functional language skills, follow multi-step directions, increase length of utterance, and improve speech intelligibility.” (CL-K.)

10. Respondent funded a psychological evaluation by Thompson Kelly, Ph.D., a licensed clinical psychologist, which Dr. Kelly conducted over two days in mid- to late-October 2006. Dr. Kelly performed clinical observations, both in his office and at Petitioner's school. He interviewed Petitioner's father and teacher regarding behaviors, and administered the Mullen Scales of Early Learning (Mullen) and the Vineland Adaptive Behavior Scales – Second Edition (VABS-II), with Petitioner's father as reporter. On the Mullen, Petitioner obtained an Early Learning Composite score within the borderline range of abilities (SS = 74). The Mullen scores were lowered, Dr. Kelly believed, because Petitioner had difficulties transitioning from one item to another. Although he observed Petitioner to exhibit some manifestations and characteristics of autism, such as difficulties with sustained focus and attention, preoccupation with parts of objects (wheels), and "preoccupation with putting objects into and taking them out of containers," he offered a diagnosis of PDD-NOS, a condition within the autism spectrum.

11. According to Dr. Kelly, the VABS-II revealed low average skills in the communication and socialization domains, and average abilities in the daily living and motor skills domains. Dr. Kelly concluded that Petitioner presented with "several autistic spectrum characteristics including some perseverative play routines, difficulties with transitions and sustained attention as well as with deficits in his language and socialization." (CL-E.) With the exception of some head shaking, Dr. Kelly did not observe stereotyped and repetitive motor mannerisms, which had been reported by others, such as finger clicking, hand-flapping, or repeating sounds (echolalia). While Dr. Kelly found impairments in socialization and communication, he did not find a lot of evidence of "positive signs of classic autism." Dr. Kelly recommended a variety of services that would benefit Petitioner, including a behavioral consultation "to assist the family in implementing and developing a program within the household to stress more appropriate means of communication." (SA-H.) Dr. Kelly also recommended speech and language therapy, occupational therapy, and referrals to the family resource center for Petitioner's parents to gain more information about autistic spectrum disorders. Dr. Kelly's written evaluation report was not submitted to Respondent until December 5, 2006.

12. In the meantime, Petitioner's parents sought to learn all they could about treatment for autism spectrum disorder (ASD).<sup>5</sup> They steeped themselves in the literature concerning behavioral intervention techniques, and came to believe that ABA was the best modality to address Petitioner's skill deficits and behavioral issues. ABA direct intervention services have been shown to improve cognitive and adaptive functioning in some children with autism. ABA interventions must be intensive and must be implemented for a substantial number of hours per week over a long duration to produce the desired outcome.

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<sup>5</sup> ASD refers to a pattern of behaviors involving three central features -- impairments in socialization, verbal and nonverbal communication and restricted and stereotyped actions -- that can vary widely in terms of symptom expression, degree of impairment, and developmental onset. ASD is not a formal diagnostic category like Autistic Disorder or PDD-NOS. (CL-S.)

Outcomes are better when interventions begin at the earliest possible age. The scientific evidence suggests that ABA can also benefit a person diagnosed with PDD-NOS.

13. Petitioner's parents attempted to implement some ABA techniques on their own. In the fall of 2006, they learned about FirstSteps for Kids (FirstSteps), a Respondent-contracted provider of ABA services, which was working with another child at Petitioner's preschool. The preschool teachers also had requested a shadow aide for Petitioner, as his needs required more 1:1 time than they could provide. Petitioner's parents requested ABA services from Respondent on December 12, 2006, after receiving Dr. Kelly's report. Respondent denied their request. Instead, Respondent offered to pay for classes to train Petitioner's parents in behavioral management techniques and to send an NDC specialist into the preschool to provide preschool inclusion support services. Petitioner's parents believed parent training was an inadequate means to address Petitioner's needs. They also were informed by their son's preschool teacher that NDC's specialist, who merely observed Petitioner for a few hours in January 2007, was providing little benefit for their son in the preschool.

14. Respondent also did not offer a behavioral consultation. Respondent requested that Petitioner undergo a second evaluation, to be conducted by its in-house psychologist, Dr. Ito, before it would consider funding an ABA program. Respondent's request for further assessment appears to have been motivated, in part, because Dr. Kelly had not used the Autistic Diagnostic Observation Schedule-Module One (ADOS-1), a structured behavioral measure used to elicit examples of communication, socialization and play skills. Petitioner's parents were not willing to allow Respondent to perform a second evaluation only three months after the first evaluation, because they had come to believe their son had autism, not PDD-NOS, and they believed Respondent's in-house psychologist would not be willing to confirm their belief because of institutional bias. In January 2007, they informed Hovda that they intended to have Petitioner assessed for ABA services by FirstSteps, and that they would seek reimbursement from Respondent for the cost of the ABA assessment and any subsequent services.

15. In mid-January 2007, Respondent began funding occupational therapy intervention for Petitioner for two hours per week. In evaluation reports of May 1 and 19, 2007, Nancy Wuller, OTR/L, found Petitioner generally made appropriate progress. He had reciprocal play skills in a one-on-one setting. He shared, traded, and accommodated to "new rules" within the context of the chosen game. His typical verbal responses during sessions were spontaneous, fairly age appropriate and generally suited to the play setting. Wuller stated, "However, during the past month he has seemed less spontaneous with regard to his language" and had begun displaying "echoed responses." Petitioner's sensory processing issues were significant. He withdrew and required much coaxing to attempt certain tasks, especially if they were novel or included distasteful sensory demand. He lacked motivation to perform, had difficulty following verbal instructions or demonstrations, and had difficulty with social interactions. Wuller concluded that, in contrast to typically developing peers who learn through imitation and interaction with others, Petitioner's learning opportunities were limited. (CL-K.)

16. On February 1, 2007, FirstSteps' director, Jennifer Harris, Ph.D., a licensed marriage and family counselor specializing in ASD, performed an assessment of Petitioner's functioning. She found Petitioner presented with "many strengths across all areas of development," including "relative strengths in the development of social behavior;" however, Petitioner did not demonstrate skill in the areas of symbolic play, his social skills appeared to be somewhat delayed, his language skills were delayed, and he exhibited "stereotypical behaviors that interfere with learning, appropriate play, and socialization." (CL-N.) Dr. Harris recommended that Petitioner receive 30 hours per week of 1:1 behavioral therapy due to his delays in the area of play skills, social behavior and verbal behavior. She recommended eight hours per month of supervision by a qualified ABA consultant, with an emphasis on parent training. Petitioner's parents retained FirstSteps and Petitioner began receiving between 12 or 14 hours per week of direct ABA intervention services in the preschool setting based upon his school schedule. FirstSteps' program included a behavior management plan to reduce Petitioner's maladaptive behaviors, e.g., non-compliance, self-stimulatory behavior, tantrumming, and aggression. Petitioner continued to receive speech and language therapy, and occupational therapy, funded by Respondent.

17. Petitioner's pediatrician referred him to Dr. Kenneth R. Huff, chief of pediatric neurology at Harbor-UCLA Medical Center. Dr. Huff examined Petitioner on February 21, 2007, and concluded that Petitioner had autism. He recommended a form of 1:1 ABA treatment, of 30-40 hours per week. On March 8, 2007, Petitioner's parents submitted Dr. Huff's diagnosis and recommendation to Respondent, and again requested funding, this time for 35 hours of 1:1 ABA therapy, along with eight hours per month of supervision.

18. Respondent questioned whether Dr. Huff had used any standardized testing as part of his assessment, and again proposed that Petitioner be reassessed by Respondent's psychologist or service provider. Petitioner's parents proposed, because of the discrepancy in diagnoses, that Respondent fund an "independent evaluation," to be performed by Dr. Robin Morris, Psy.D., a clinical psychologist and licensed marriage and family therapist. The parties reached an impasse, because Respondent refused to consider providing ABA services until it performed its own assessment, and would not rely on the existing assessments or agree to accept Dr. Morris's conclusions. Respondent informed Petitioner's parents of its decision, stating that "Harbor Regional Center does not reimburse for services that have not been previously mutually agreed upon through the Individual Service Plan Process." (SA-E.) On April 11, 2007, Petitioner's parents submitted a due process and mediation hearing request, stating their disagreement with Respondent's decision not to fund either ABA services or a psychological evaluation by Dr. Morris. (SA-A.)

19. At Petitioner's April 24, 2007 IFSP meeting, Respondent included in Petitioner's IFSP document most of the identified needs and goals from FirstSteps' evaluation. (CL-H.)

20. On April 30, 2007, Dr. Morris conducted an evaluation and diagnosed Petitioner with Autistic Disorder. She believed Petitioner's symptoms met all criteria under the Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision 2000) (DSM-IV-TR). Dr. Morris interviewed Petitioner's parents, his preschool teacher and two ABA therapists from FirstSteps who worked with him during his school day. She observed Petitioner at school while he was without the assistance of his 1:1 aide, and in his home. She administered various standardized tests, including the Wechsler Preschool and Primary Scale of Intelligence, 3rd Edition, on which Petitioner obtained a composite score indicating a full scale IQ of 102, in the average range of intellectual functioning. On the Bracken School Readiness Assessment, he scored in the "very advanced" range. On the Communication subtest of the Developmental Assessment of Young Children, Petitioner scored in the delayed range, receiving an age equivalent score of 20 months.

21. Dr. Morris utilized the Autism Diagnostic Interview – Revised, a semi-structured interview for caregivers of persons with ASD. It contains 93 items that highlight behaviors on the ASD range, focusing on the three domains of functioning -- language/communication, reciprocal social interactions, and restricted, repetitive, and stereotyped behaviors and interests -- that are specified in the DSM-IV-TR. Petitioner's parents completed this interview. Petitioner's parents reported, among other things, that Petitioner was not developing typically at around seven months of age when he stopped responding to their voices. They observed that he used odd phrases and engaged in echolalia. He was hard to understand and did not use gestures when making requests. He seldom pointed to things around him. He showed no reaction when his parents entered the room. He did not engage in any pretend play and showed no interest in any toys or action figures, with the exception of a teddy bear. His teddy bear, solar system books, and "Cosmic" videos made him happy. When among a group of children, he separated himself and played alone. He had no friends. He liked to spin the wheels of trucks, line up blocks and Legos, and "revolve" things around him, including toys, pots and pans, and Tupperware. He had a good memory for things that interested him, including shapes, the spelling of the planets in the solar system, and colors.

22. Dr. Morris used the VABS, with Petitioner's parents as the reporters. Petitioner's parents "endorsed all items" on the VABS. The scores that resulted for receptive language were in the low range, for expressive language in the below average range, and for social abilities in the low to below average range. These scores were lower than the scores reported by Dr. Kelly in October 2006. In her report of May 2, 2007 (SA-M), Dr. Morris recommended 35 hours per week of 1:1 ABA behavioral intervention therapy, to take place both at Petitioner's current school placement and in the home. She recommended an additional three hours per week of parent training. Dr. Morris's report was provided to Respondent.

23. At a mediation held on May 1, 2007, the parties were unable to resolve their dispute, but Petitioner's parents did agree to allow Dr. Kelly to make additional observations, which occurred on May 4, 2007. Dr. Kelly observed Petitioner in Petitioner's home using the ADOS-1. In his "Psychological Addendum," dated May 4,

2007 (CL-E), Dr. Kelly recited many of his observations, noting that Petitioner played with various items, he observed Petitioner reference items as they were pointed out to him, he was able to engage Petitioner, although Petitioner would not engage in joint play. He also did not show interest in the human figures. Dr. Kelly observed that Petitioner “appeared to be having difficulty sharing in this and other interactions,” as he would take the items away from Dr. Kelly’s reach so that he could play with them on his own. The following additional observations are made in Dr. Kelly’s report (CL-E; also SA-H):

24. Petitioner labeled some items (“truck” and “plane”) and used single words such as “Hello.” He engaged in a great deal of jargon and unintelligible sounds. His language did not appear directed towards others. While Petitioner was playing, Dr. Kelly asked Petitioner’s father to call his name. Petitioner’s father called Petitioner’s name three times and raised his voice the third time before Petitioner turned and referenced him.

25. Petitioner displayed brief joint attention when Dr. Kelly attempted to read a book to him. He appropriately labeled a “cup” in one illustration. Next, when Dr. Kelly began blowing bubbles, Petitioner “smiled broadly.” After much effort, Petitioner was able to blow bubbles on his own and appeared to enjoy this activity. When Dr. Kelly introduced the “Itsy Bitsy Spider” song, Petitioner appeared very excited and hugged Dr. Kelly while smiling and laughing and clapping his hands. Although he appeared to enjoy the song, he was unable to imitate any of the hand gestures, even though he was familiar with the routine. Similarly, he was unable to copy any of the gestures accompanying “Twinkle, Twinkle, Little Star.” (See factual finding number 30, *post.*)

26. Dr. Kelly believes Petitioner was making good eye contact during these interactions. Dr. Kelly took out several cups, plates, forks and spoons and laid them out for Petitioner. He demonstrated pretending to drink from a cup, which Petitioner imitated. Petitioner picked up a fork as if to eat with it. Examples of atypical behavior included lining up the plates in a row and stacking the cups one on top of another. When Dr. Kelly attempted to move one of the cups, Petitioner became upset and wanted to move it back.

27. Dr. Kelly then suggested that they have a “birthday party” for the “baby” indicating a doll. Dr. Kelly took out Play Doh and began putting candles into it. Petitioner began to sing “Happy D’day” and attempting to blow out the candles. Dr. Kelly suggested that they finish making the “cake” and then they could sing. Dr. Kelly “cut the cake,” placed several slices on the plates, and pretended to “feed the baby,” asking Petitioner for assistance. Petitioner attempted to “feed the baby.”

28. Petitioner engaged in some atypical play, taking the candles out of the cake and placing one of them on each of the plates in a row. He also engaged in brief sensory play by taking several plates and rubbing each one of them through his hair. Petitioner received a small snack of dry cereal. Although he appeared to enjoy the snack, he did not ask for any more cereal and was content with the little given. Petitioner at one point was

pulling the pretend telephone around on the floor with a string. The string became tangled in the toy's wheel. Petitioner brought the telephone to Dr. Kelly; rather than asking for help, he merely stated, "I have a telephone," while pointing his finger at the wheel where the string was tangled.

29. Based on these observations and formal scoring, Dr. Kelly concluded that, in the communication and reciprocal social interaction domains, Petitioner's scores "were above the cut off for determining the presence of an autistic spectrum disorder but not above the cut off for identifying a formal diagnosis of an Autistic Disorder." In particular, Dr. Kelly found that Petitioner engaged in good eye contact, had a good social gaze, was easily engaged, was able to visually reference a number of different items, could imitate the examiner, and engaged in simple symbolic play. On the other hand, he engaged in some atypical play characteristics, displayed a limited use of language, had difficulty participating in any actual interactive play, and did not initiate any play or interactions with Dr. Kelly or Petitioner's father. (SA-H.)

30. Petitioner's father was present during Dr. Kelly's observations and testing. He disagreed with various statements in Dr. Kelly's "Psychological Addendum" dated May 4, 2007. In general, he believed Dr. Kelly had misinterpreted Petitioner's behavior during the session in several ways, and had misreported the few examples of his son "playing" with toys or imitating Dr. Kelly's actions. He emphasized that very little of Petitioner's imitative play was spontaneous, but would require numerous prompts. He also believed Petitioner had protested against, rather than enjoyed, the singing of songs by Dr. Kelly, in part because these songs were not sung or performed in the manner in which Petitioner was accustomed. Petitioner's ability to participate in the pretend "birthday party" was a consequence of intensive training that specifically targeted this routine, and was provided by his parents, and later in his ABA program, following his emotional outburst at preschool in September 2006 (see factual finding number 8, *ante*). Petitioner's father disagreed with Dr. Kelly's observation that: "He was observed to play with a toy airplane that he held up in the air to pretend that it was flying." Instead, Petitioner removed the airplane from Dr. Kelly and held on to it, "as he frequently holds onto many toys and for no apparent purpose." (CL-E.)

31. At the administrative hearing, in which Dr. Kelly testified, he conceded that ABA treatment could be beneficial for Petitioner.

32. At his Individual Education Plan (IEP) meeting on June 1, 2007, Petitioner was deemed eligible for special education by the Hermosa Beach Unified School District based on Dr. Morris's diagnosis of autism. Since June 1, 2007, the school district has been providing, in addition to his preschool placement, a 1:1 ABA aide for 22 hours per week, plus six hours per week of ABA supervision services through FirstSteps, speech and language therapy for 80 minutes per week, and occupational therapy twice per week.

33. FirstSteps reported on Petitioner's progress with his ABA program on June 1, 2007, in connection with developing goals for his IEP. (CL-K.) The report found that

Petitioner had made good progress. He was imitating sounds and words, spontaneously requesting preferred people, items, and activities he could see, beginning to label items, and improving in his use of eye contact. He had a wide variety of preferred activities that functioned as reinforcers, thereby making motivation relatively simple to capture. He demonstrated a good ability to learn. Noted delays were receptive language, including his failure to respond to functional verbal instruction without visual cues. He also had a tendency to escape nonpreferred activities. FirstSteps recommended continuing to provide direct ABA services of 30 hours per week, and that his parents receive 10 hours of initial parent training. As of May 25, 2007, Petitioner's parents had paid \$5,920.74 to FirstSteps for the February assessment and subsequent treatment.

## LEGAL CONCLUSIONS

1. The California Early Intervention Services Act (Gov. Code, § 95000 et seq.), also known as "Early Start," is a federally funded program for infants and toddlers 36 months of age or younger who are at risk for developmental disabilities, and for their families. The California legislature recognized that early intervention services represented an investment of resources to reduce ultimate costs to our society of caring for older children and adult persons with developmental disabilities. The State Department of Developmental Services is the lead agency responsible for administration and coordination of the state system implementing the "Early Start" program (Gov. Code, § 95007). The existing systems of regional centers and local educational agencies are responsible for performing evaluations of each infant or toddler referred for evaluation, and for ensuring that direct services are provided to eligible infants or toddlers, as appropriate (Gov. Code, §§ 95004, subd. (a) & 95016). This must be done in accordance with state and federal law,<sup>6</sup> and corresponding state and federal regulations.<sup>7</sup>

2. A regional center must conduct a planning process that results in an IFSP. The IFSP must identify the unique strengths and needs of the infant or toddler and the family, and specify the early intervention or other services appropriate to meet those unique needs, and to achieve the expected developmental outcomes (Gov. Code, § 95016, subd. (a); CCR, § 52084). Psychological services are included among the services that may be needed to meet the developmental needs of the child (CCR, § 52000, subd. (b)(12)). A regional center must provide, purchase, or arrange for the provision of, early intervention services as required by the IFSP (CCR, §§ 52108 & 52109). Early intervention services are to begin as soon as possible (CCR, §§ 52109, subd. (b), & 52106, subd. (d)), and there are no limitations upon the allowable costs of "Early Start" services.

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<sup>6</sup> Part C of the Individuals with Disabilities Education Act (20 U.S.C. § 1431 et seq.).

<sup>7</sup> Part 303 (commencing with section 303.1) of Title 34 of the Code of Federal Regulations.

3a. Petitioner has established that ABA treatment is an appropriate and necessary means for addressing Petitioner's unique needs. The scientific literature supports the use of 1:1 ABA as the preferred modality for the treatment of children with autism. Direct, 1:1 ABA treatment must be intensive, consistent, long term, and implemented at the earliest possible age, to achieve the desired outcome. Generally, it must be performed by a trained therapist. Children with higher functioning autism respond particularly well to ABA treatment.

3b. Petitioner's parents requested ABA treatment in December 2006. Respondent had failed to consider behavioral intervention services in the IFSP planning process for a period of at least one year preceding Petitioner's parents' first request for ABA services, even though Petitioner's parents, teachers and therapists provided reports to Respondent, which contained substantial evidence of Petitioner's autistic-like behaviors (e.g., difficulty transitioning, non-compliance, tantruming, perseverative play routines, and poor eye contact), and often recommended that Respondent evaluate these behaviors that were impacting Petitioner's ability to learn or engage in social interactions. Dr. Kelly, Respondent's contracted service provider who first performed a psychological evaluation of Petitioner in October 2006, recommended a behavioral consultation, and conceded the Respondent could benefit from ABA treatment.

3c. Respondent continuously offered, instead of ABA services, to provide only parent training classes, even after Respondent was provided with an assessment in February 2007 from FirstSteps, which demonstrated the need for ABA services, and recommended an ABA program to address Petitioner's needs. At that point, Respondent continued to demand its own assessment before it would consider providing behavioral intervention services. Respondent's insistence on additional assessment before considering ABA services was not reasonable. Furthermore, although Petitioner's parents could be trained to be ABA therapists for their son over time, Respondent's offer of behavior management classes was not adequate to meet Petitioner's unique needs, and would not satisfy the mandate that appropriate services begin "at the earliest possible time." Respondent failed to "[c]ontinuously seek the appropriate services and service providers necessary to enhance the development of each infant or toddler being served for the duration of the infant's or toddler's eligibility." (CCR, § 52121, subd. (6).)

3d. In sum, Respondent failed to consider the needs and desires of Petitioner's family, or to fulfill its duty to ensure the provision of supports and services to meet Petitioner's unique needs. As a result, Petitioner's parents were required to purchase the ABA services that Petitioner needed in the months of February through May 2007, at their own cost. Therefore, it is fair and appropriate that they be reimbursed their costs in the amount of \$5,920.72.<sup>8</sup>

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<sup>8</sup> There is a substantial body of case law which supports the proposition that an administrative law judge in a due process hearing has the authority to provide the remedy of reimbursement, if and when he or she determines that such is appropriate under the facts and circumstances of a case, particularly where a state has failed to offer an

4. Petitioner’s parents have not established that they are entitled to reimbursement for the evaluation by Dr. Morris. Reimbursement is authorized where a regional center fails to perform its statutory duty (or its performance is inadequate), and the family is required to obtain the appropriate service with the use of private funds. However, there is no established right to an “independent evaluation” under the “Early Start” program or the Lanterman Act. Section 502(b)(4) of Part B of the Individuals with Disabilities Act (IDEA) specifically authorizes an independent educational evaluation to be performed at public expense in a special education case, where parents disagree with a school district’s evaluation, unless the school district initiates a due process hearing to show that its evaluation is appropriate. However, there is no similar counterpart in the statutes or regulations under Part C of IDEA, which governs the Early Start program. The Respondent requested that Petitioner undergo a second evaluation before it would consider an ABA program. Although the Respondent chose its in-house psychologist, and later a contracted service provider, to perform a second evaluation, its request was not unreasonable. Petitioner’s parents’ desire for their own specialist, one who was not a Respondent employee or provider, to perform a second evaluation was also not unreasonable. However, there is no entitlement to the specialist of one’s choice. Therefore, there is no right to reimbursement for purchasing an “independent” evaluation.

ORDER

Petitioner’s appeal of the Respondent’s determinations is granted in part.

1. Respondent shall reimburse Petitioner’s parents for their cost of providing ABA services during the months of February through May, 2007, in the amount of \$5,920.72.

2. Respondent is not required to reimburse Petitioner’s parents for the cost of the evaluation performed by Dr. Morris in April 2007.

Dated: \_\_\_\_\_

\_\_\_\_\_  
MARK E. HARMAN  
Administrative Law Judge  
Office of Administrative Hearings

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adequate service to implement a child’s entitlement and the child’s parents have provided an appropriate service. (*Burlington School Comm. v. Mass. Dep’t of Ed.* (1985) 471 U.S. 359; *Florence County School Dist. Four v. Carter* (1985) 510 U.S. 7.)