

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

MAX K.,

Claimant,

vs.

NORTH LOS ANGELES COUNTY
REGIONAL CENTER,

Service Agency.

OAH Case No. 2013060255

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on September 25, 2013, in Van Nuys. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Max K. (Claimant), who was not present, was represented by his mother.¹

The North Los Angeles County Regional Center (Service Agency) was represented by Stella Dorian, Fair Hearing Representative.

ISSUE

Shall the Service Agency provide funding for Claimant to receive Dialectical Behavior Therapy?

EVIDENCE RELIED ON

In making this Decision, the ALJ relied upon exhibits 1-21 submitted by the Service Agency, exhibit A submitted by Claimant, and the testimony of Consumer Services Supervisor Ann Moore, Service Agency Consulting Psychiatrist Dr. Sarla Karan, and Claimant's mother.

FACTUAL FINDINGS

Parties and Jurisdiction

¹ Initials and family titles are used to protect the privacy of Claimant and his family.

1. Claimant is a 22-year-old male eligible to receive services from the Service Agency due to a diagnosis of a condition similar to that of an individual with mental retardation (also known as the fifth category).

2. On a date not established, but in connection with Claimant's transition from an out-of-home residential placement in a specialized crisis facility to an independent living environment in February 2013, Claimant's mother requested the Service Agency provide funding for Claimant to continue receiving Dialectical Behavior Therapy (DBT) in his new residential placement. DBT is described as a modified form of cognitive behavior therapy used for the treatment of chronically suicidal or self-injurious individuals with borderline personality disorders. An emphasis is placed on developing mindfulness, through yoga and other relaxation techniques. The goal is to identify problem thoughts, embrace them, and develop ways to not allow them from becoming problematic. Focus is also placed on developing coping skills.

3. By a Notice of Proposed Action dated May 22, 2013, Claimant's mother was advised that the Service Agency had denied the service request, primarily because Service Agency staff believed DBT was not an assessed need at that time, and would not be an appropriate service in Claimant's new living arrangement.

4. On June 3, 2013, a Fair Hearing Request on Claimant's behalf was submitted to the Service Agency, which appealed the Service Agency's denial of DBT funding.

5. On or before June 28, 2013, the parties participated in an Informal Conference to discuss the Service Agency's service denial. No resolution was reached.

6. Claimant's parents are his limited conservators and, in that capacity, Claimant's mother has legal authority to act as Claimant's representative in this matter.

7. The hearing of this matter was initially scheduled for July 26, 2013. The hearing was continued to the instant date at the request of the Service Agency, which request was not opposed by Claimant. In connection with that continuance, Claimant's mother executed a written waiver of the time limit prescribed by law for holding the hearing and for the ALJ to issue a decision.

Claimant's Background Information

8. Claimant was diagnosed with Moyamoya Disease, a rare condition in which narrowing blood vessels causes brain injury and developmental disorder. This condition has impaired his intellect, leading to his fifth category condition diagnosis.

9. Claimant has also been diagnosed with dementia secondary to that medical condition, Tourette Syndrome, ADHD, aspects of schizophrenia, and a personality disorder. When Claimant had a brain operation at the age of 14, many of his mental health disorders became more pronounced.

10. Due to the above, Claimant became aggressive and destructive at times.

11. For one year, Claimant resided at the Heritage School in Utah, which was funded by the California Department of Mental Health. He returned home in December 2008. In February 2009, Claimant was placed in an out-of-home residential facility, but that lasted just a few days until Claimant became involved in an altercation with another resident. Claimant again returned home, but shortly after he had a serious physical altercation with his mother. From February through May 2009, Claimant was in a psychiatric hospital as a result of that episode. Claimant's mother obtained a restraining order against him and he is now no longer able to reside at home. After being released from the psychiatric hospital, Claimant was placed at a residential facility known as the Goleta Home, where he stayed for approximately five months, i.e., May through October 2009.

12. In October 2009, Claimant was placed at Aacres Crisis Home (Aacres), a residential facility for patients who have severe behaviors, caused either by mental illness, developmental disorders or both. DBT is interwoven into the fabric of Aacres' residential treatment program. DBT is used in individual psychotherapy sessions with residents, as well as part of group skills training, such as yoga and relaxation. In Claimant's individual program plan (IPP) and documents related to the development of his IPP, DBT was not discussed as an individual service funded by the Service Agency, but rather as part of the program and curriculum used by Aacres. Claimant received DBT during his entire three-year stay at Aacres. Claimant did well at Aacres and his behavior stabilized.

13. Although Service Agency staff wanted to transition Claimant to a less restrictive environment in December 2011, Claimant's mother persuaded them to wait until Claimant graduated from high school one year later. After Claimant graduated from high school in December 2012, Service Agency staff again approached Claimant's mother about transitioning him to a less restrictive environment. Although Claimant's mother articulated the family's strong preference that Claimant continue to receive DBT wherever he lived, it appears from the record that ultimately Claimant's parents did not object to their son being moved to another facility without the assurance that he would continue to receive DBT. However, Claimant's mother was advised by her son's service coordinator that the Service Agency would consider a written recommendation from Aacres' staff that DBT be provided to Claimant on an out-patient basis.

14. In February 2013, Claimant was transitioned to an independent living environment operated by the Pathpoint Community Independent Living Program (Pathpoint). Claimant shares a two bedroom apartment with three other male residents. He receives independent living programming there. Overall, Claimant's placement at Pathpoint has been successful and he continues to reside there.

15. Claimant takes classes at a local junior college through the Nexus program.

16. Claimant also continues to receive psychotherapy through the Asian Pacific Counseling and Treatment Center (APCTC). His therapist visits him twice per week at Pathpoint. Claimant also continues to visit his APCTC psychiatrist, Dr. James Oh, every six weeks. Dr. Oh has seen Claimant since 2009, and he is well-liked by the family.

Findings on the Evidence Presented by Claimant

17. Claimant's mother testified that DBT was a "godsend" for her son. She believes it was instrumental in stabilizing Claimant's behavior, primarily because it helped her son develop better coping skills, which has reduced violent behaviors. Although she agrees that Claimant is doing well at Pathpoint, she also described a few situations in which she saw him growing anxious when things were not going his way. She fears that without the structure and tools provided by DBT, Claimant may begin to regress and fall back into a pattern of aggressive or violent behaviors, which in turn may lead to another hospitalization. She believes if that were to happen, Claimant's progress will be lost.

18. Claimant's mother would prefer DBT to be provided to her son by Aacres on an out-patient basis. Aacres provides such a service. Although Aacres is vendored by the Service Agency as a residential facility, it was not established whether Aacres is also vendored to provide out-patient DBT. Aacres does not accept insurance, so Claimant's family cannot use their insurance for funding. Claimant's mother found only one other DBT provider, which is located in West Los Angeles. The family cannot afford that provider's charges for the service; also, that provider's location is far from Pathpoint, which would make transportation difficult.

19. In March 2013, after Claimant had already transitioned to Pathpoint, Claimant's therapists at Aacres provided the Service Agency with a written recommendation for Claimant to receive DBT on an out-patient basis. Although they noted Claimant's significant progress, they also noted that in January 2013 he displayed a few negative behaviors, such as cursing, refusing certain responsibilities, and fixation on food. They fear those behaviors present "the legitimate possibility of [Claimant] losing his placement at Pathpoint." The therapists added that Claimant had mentioned to them experiencing "trouble" managing the new responsibilities of adulthood and that he felt under "pressure" at times. (Ex. 13.)

20. In June 2013, Claimant's psychiatrist at APCTC, Dr. Oh, also wrote a recommendation for Claimant to continue with the DBT. Dr. Oh believes Claimant's continued success at Pathpoint relies on his ability to modulate his behaviors, which DBT is best served to do. Dr. Oh believes there is a significant risk of a relapse if DBT is not provided. Dr. Oh concludes that it is "my professional opinion that [Claimant] needs ongoing DBT-based treatment for his impulse and aggressive behaviors . . . for at least another year." (Ex. 17.)

Findings on the Evidence Presented by the Service Agency

21. The documentation from Aacres submitted into evidence demonstrates Claimant made significant progress with his problem behaviors and was ready to transition to a less restrictive environment. The last quarterly report issued for Claimant, done in early March 2013, was positive and indicated that Claimant met most of his goals. When Service

Agency staff asked Aacres to provide more details than described in its March 2013 recommendation for continued DBT, Aacres did not respond.

22. The Service Agency's most recent quarterly IPP review for Claimant, written in June 2013, does not indicate that there are any major problems to address.

23. A report from Pathpoint generated in June 2013 indicates that Claimant is doing well in his new environment. An e-mail dated July 18, 2013, from Pathpoint's Juan Godinez to Service Agency staff, indicates that Claimant is doing well there and has not exhibited any concerning behaviors.

24. Claimant continues to receive counseling from APCTC staff and visit Dr. Oh. No major problems have been reported to the Service Agency from APCTC. In fact, records from APCTC indicate that Claimant was "doing quite well" at Pathpoint in February and March 2013. A note from May 2013 indicates that although his anxiety was up (attributed to changes associated with college and his new residence), Claimant's mother had not noticed an increase in psychotic symptoms. It was also noted that Claimant may whine more to his mother, but he had not engaged in any angry episodes. The last note is dated July 2, 2013, and references the instant fair hearing. Claimant's compliance is described as "good," and he is described as "mostly redirectable" and "not distracted." Dr. Oh also notes that "it is apparent that his [Claimant's] psychosis is still quite active, so continuing the anti-psychotic medication is warranted. On the positive side, he has made significant progress in dealing well with his psychotic symptoms."

25. Service Agency Consulting Psychiatrist Sarla Karan testified as follows:

A. Based on her description of DBT and the types of situations where it is used effectively, it was established that DBT has been an appropriate therapy for Claimant, based on his prior violence, self-injurious behaviors, as well as his psychotic episodes and personality disorders.

B. Dr. Karan opined that DBT is time-limited, i.e., it is only intended to be used for 6-12 months. Her opinion is not persuasive, because she presented no research that supports such an opinion; in addition, none of the literature submitted by Claimant indicates DBT is time-limited, and it is clear from the recommendations of Aacres staff and Dr. Oh that they do not agree with such a theory. Moreover, DBT was effective for Claimant well after one year.

C. Dr. Karan also opined that DBT is no longer warranted or necessary for Claimant, because his condition has stabilized and he is doing very well under the circumstances. Although Dr. Karan has not examined or evaluated Claimant, her review of the records described above demonstrate to her that Claimant has functioned very well for the past seven months without DBT and has remained in good condition. Although Claimant has had a couple of flare-ups in that time, he has been able to redirect himself and calm down. Dr. Karan describes Claimant as high-functioning, and opined that the therapy he receives from APCTC currently is sufficient to address his behaviors.

DISCUSSION

Jurisdiction and Burden of Proof

The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.²) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established. (Factual Findings 1-7.)

The standard of proof in this case is the preponderance of the evidence. (Evid. Code, § 115.)

A regional center seeking to terminate or reduce ongoing funding provided to a consumer has the burden to demonstrate its decision is correct, because the party asserting a claim or making changes generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) On the other hand, when one seeks government benefits or services not before provided, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).)

In this case, the issue of who has the burden of proof is muddled.

DBT was provided to Claimant for three years while he resided at Aacres. It is no longer being provided. No evidence was submitted indicating that the Service Agency gave Claimant's parents a notice of proposed action advising them that DBT would no longer be provided and that they could thereby appeal such a decision. In that sense, Claimant can plausibly argue the Service Agency now carries the burden of proof.

But the better argument belongs to the Service Agency. DBT was provided to Claimant only as an interwoven part of his overall crisis residential placement. As indicated by documents from Aacres and those related to Claimant's IPP, DBT was not funded or provided to him as a discrete service. After three years, Claimant's residential needs changed, i.e., he was ready to transition from the heavily structured crisis placement to an independent living environment. It was not established that Claimant's parents refused to consent to that transition, whether or not DBT would be provided at the new residential facility. Since Pathpoint focuses on independent living skills, it is no surprise that DBT is not part of that program.

The best way to view this chain of events is that the Service Agency and Claimant's parents agreed to transition Claimant from one type of residential facility to another. The

² All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

bundle of services provided at one facility was replaced by the bundle of services provided by the other. A notice of proposed action in connection with that transition was not warranted, since Claimant's parents did not object to him being moved to a new facility.

Stated another way, Claimant's parents are now requesting funding for DBT to be provided to Claimant, on an out-patient basis, in conjunction with his residing at an independent living facility. The Service Agency has not before provided that kind of funding.

Under these unique circumstances, Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to that funding.

Funding for Out-Patient DBT to Claimant

The Lanterman Act requires the parties to develop goals, as well as the services and supports necessary to achieve those goals, in the process of creating an IPP. A client's IPP "shall be reviewed and modified by the planning team . . . as necessary, in response to the person's achievement or changing needs, . . ." (§ 4646.5, subd. (b).) The planning process relative to an IPP shall include, among other things, "[g]athering information and conducting assessments to determine the . . . concerns or problems of the person with developmental disabilities." (§ 4646.5, subd. (a).) The Lanterman Act directs service agencies to accomplish agreed-upon IPP goals in a cost-effective manner. (§§ 4646, subd. (a), and 4648, subd. (a)(11).) It is therefore axiomatic that services and supports cannot be blindly provided, indifferent to the results, and indefinite in time. It is similarly self-evident that a regional center cannot meet its mandate of delivering cost-effective services when expending funds on an IPP goal that has been met.

With regard to the issue presented in this case, Claimant's IPP was focused on his residential placement, as opposed to his psychiatric management and psychotherapy. When he could no longer live at home, Claimant was first placed in an out-of-home facility. When that did not work, he was moved to the Aacres Crisis Home. As part of the services provided to Claimant at Aacres, he received DBT for approximately three years. DBT has not been mentioned in Claimant's IPP documents as a stand alone service, but only as an interwoven part of the crisis residential placement. Claimant's psychiatric management and therapy needs are addressed in his IPP documents by funding for the services provided by APCTC, which continue without modification. The effectiveness of the overall service provided by Aacres was demonstrated by the fact that Claimant was able to successfully transition to a less restrictive environment, Pathpoint. By all accounts, Claimant has done well there. Thus, when Claimant's residential placement needs changed, his needs for DBT changed as well.

Claimant has failed to meet his burden of proving by a preponderance of the evidence that he continues to need DBT provided on an out-patient basis while he resides at Pathpoint. Though Aacres and Dr. Oh recommend that service, neither has persuasively explained how that service is necessary, warranted or vital to Claimant's ability to enjoy the independent living services at Pathpoint. Conversely, the anecdotal evidence from both Pathpoint and APCTC indicate that, seven months after his transition from Aacres to Pathpoint, Claimant is doing well, and has been able to cope with issues that have surfaced from time to time. The

opinions of Aacres' therapists and Dr. Oh have also been blunted by the Service Agency's consultant. Dr. Karan opines that Claimant's ability to access what he previously learned from DBT, in conjunction with the continuing services he receives from APCTC, is sufficient to properly meet his needs. Providing funding for DBT under these circumstances would not be cost-effective.

As the above cited excerpts from the Lanterman Act indicate, Claimant's needs should be reviewed and analyzed as they change over time. Should it become apparent to his parents that Claimant's behavior is regressing to the point of jeopardizing his placement at Pathpoint, they should immediately exercise their right pursuant to section 4646.5, subdivision (b), to convene a meeting with Service Agency staff for purposes of discussing a revision to Claimant's IPP to add DBT on an out-patient basis provided by Aacres.

LEGAL CONCLUSION

Pursuant to sections 4646, 4646.5 and 4648, Claimant failed to establish cause to order the Service Agency to provide funding for him to receive DBT on an out-patient basis while residing at Pathpoint. (Factual Findings 1-25, Discussion.)

ORDER

Claimant Max K.'s appeal is denied. The North Los Angeles County Regional Center is not required to provide the funding for Dialectical Behavior Therapy requested by Claimant.

DATED: October 3, 2013



ERIC SAWYER,
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.