Did You Know?

When AT Does Not Meet Medicaid's DME Criteria

Using Coverage Categories Other Than Durable Medical Equipment to Fund Assistive Technology (AT)

Medicaid programs most often fund AT through the durable medical equipment (DME) coverage category. Although there is currently no federal DME definition (42 CFR 440.70(b)(3) covers "medical supplies, equipment, [and] appliances" under the mandatory home health services category), most state Medicaid programs use something like the following four-part test for DME:

- can withstand repeated use;
- is primarily and customarily used for medical purposes;
- is generally not useful to a person in the absence of illness or injury; and
- is suitable for use in the home.

DME definitions will vary from state to state, but nearly all will use the second and third parts of this test. (Note that a proposed DME regulation, published by the Centers for Medicare and Medicaid Services on July 12, 2011 and not yet published as final, includes the second and third parts of this test. See 76 FR 41032-01.) When the Medicaid agency says an item is not DME because it is not "primarily and customarily" used for medical purposes, or "generally not useful" to a person in the absence of illness or injury, the best strategy may be to show why the item does meet parts two and three above. For example, when seeking funding for a therapeutic tricycle, try to show that this tricycle is designed for children with disabilities and not useful to able-bodied children. See *State Medicaid Agencies Can Fund Adaptive Tricycles*, available at http://www.nls.org/Disability/NationalAssistiveTechnologyProject/DidYouKnow/Medicaid/AdaptiveTricycles.

Often, the challenge is to obtain funding for an item that is not specifically designed for a person with a disability – an item typically used by the general population. For example, a growing number of speech pathologists are looking to tablet computers – the iPad in particular – as the preferred speech generating device (SGD) for individuals who need an SGD for functional communication. The problem is that many state Medicaid programs will not fund a iPad as DME because it is useful to the general population for any number of personal computing functions. This is the case even though the cost of the iPad/tablet is a fraction of the cost of the typical dedicated SGD that would meet the DME definition. The remainder of this publication will focus on the use of several "optional" Medicaid coverage categories to fund everyday items that, as used, are to serve a disability-related purpose.

Readers need to keep in mind that states have the option to include or not include one or more optional service categories in its state Medicaid plan for serving adults age 21 or older. Thus you need to check whether your state covers the categories discussed below. However, all Medicaid-eligible children, under age 21, are considered a part of the Early and Periodic Diagnostic, Screening and Treatment (EPSDT) program. As such, federal law

Our Staff:
James R. Sheldon (jsheldon@nls.org)
Marge Gustas (mgustas@nls.org)
Diana M. Straube (dstraube@nls.org)

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mandates that they are eligible for all the optional service categories even those not a part of the state Medicaid plan for adults. See 42 USC 1396d(r); *Medicaid, AT and Kids: How Medicaid's EPSDT Program Expands the Availability of AT for Children Under 21 in All States*, http://www.nls.org/files/AT%20Advocate%20Newsletters/Advocatewinter08.pdf.

Physical therapy, occupational therapy, and services for individuals with speech, hearing, and language disorders, 42 CFR 440.110. As related to speech and language this category includes "diagnostic … or corrective services provided by or under the direction of a speech pathologist … [and] includes any necessary supplies and equipment." For all children and for all adults covered by this optional service in your state, iPads used as SGDs should be available where medically necessary.

Those parts of this regulation defining physical therapy and occupational therapy also include the "includes any necessary supplies and equipment" language. Going back to the therapeutic tricycle example, your Medicaid agency may be adamant that the item does not meet the DME definition despite your proof of how they are different from the usual tricycle you can buy at the local Kmart. In that case, you can turn to the above regulation if you have a physical therapist willing to explain that the tricycle is prescribed as part of a plan of physical therapy to promote the health of a child who might otherwise not get exercise.

Preventative services, 42 CFR 440.130(c), are services provided by a physician or licensed practitioner to "prevent disability [and its] progression," prolong life, and promote physical and mental health. An air conditioner is an example of an everyday item that is often needed by an individual with multiple sclerosis to avoid the predicable exacerbations of the disease during extremely hot weather. Since avoiding extremes of heat is often a way to promote physical health and prevent the progression of disability for the MS patient, the air conditioner should fit under the preventative services category. Similarly, an air cleaner or air filter should fit this coverage category when prescribed to prevent exacerbations for a person diagnosed with asthma or some other respiratory illness. A home whirlpool unit might also meet this coverage category when used to prevent skin breakdown (i.e., decubitus) as the predicable consequence of spending all day in a wheelchair.

Rehabilitative services, 42 CFR 440.130(d), are services that include any medical or remedial services "for maximum reduction of physical or mental disability and restoration of a recipient to his best possible functional level." If the individual already has skin breakdown and a home whirlpool is prescribed to treat it and prevent it from getting worse, the treatment would meet this coverage category if a doctor or other health professional justifies it as medically necessary.

Prosthetic devices, 42 CFR 440.120, includes corrective or supportive devices prescribed by a physician or other licensed practitioner to artificially replace a missing portion of the body, or prevent or correct physical deformity or malfunction. The most common use of this funding category is to pay for an artificial leg, arm, or hand. Medicaid agencies have also used this category to fund a speech generating device. See *Fred C. v. Texas Health and Human Services Commission*, 988 F. Supp. 1032, *affirmed per curium*, 167 F.3d 537 (5th Cir. 1998 (reviewing only whether SGDs are DME). If your state will not fund an iPad/other tablet as an SGD under its DME category and does not cover the optional speech pathology category for its adult population, but does cover prosthetic devices for adults, this can be

the way to pay for the SGD. Again, do not forget that Medicaid-eligible children under 21 will always be covered by all optional coverage categories under the EPSDT provisions.

Much of the content presented here comes from a newsletter that addresses Medicaid denials of AT more broadly. See *Confronting the Most Common Reasons Why Medicaid Agencies Say No to Durable Medicaid Equipment Requests: Advocacy Strategies for Turning a No into a Yes*, available at http://www.nls.org/files/AT%20Advocate%20Newsletters/Advocatespring08.pdf.

Advocates and attorneys are encouraged to share their successes with using coverage categories other than DME to fund AT. Those who are reading this post as a list serve posting are encouraged to use "reply all" to share comments or questions that they want to reach all participants on the list serve. Use "reply" to communicate only with the person who did the posting.

Posted by: James R. Sheldon, 716-847-0650 ext 262, jsheldon@nls.org