

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

REQUEST: February 11, 2014  
PRIOR APPROVAL #: 11073963077  
CASE #:  
AGENCY: Onondaga  
FH # 6630954H

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In the Matter of the Appeal of

A.F.

DECISION AFTER  
FAIR HEARING

from a determination by the Office of Health Insurance Programs  
of the New York State Department of Health  
(hereinafter referred to as the Agency or OHIP)

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### **JURISDICTION**

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on April 22, 2014, in Onondaga County, before John Bush, Administrative Law Judge. The following persons appeared at the hearing:

#### For the Appellant

A.F., Appellant; Marge Gustas, Staff Paralegal, Fair Hearing Representative; Jennifer Butera, Physical Therapist, Witness; Tama Margolas, Occupational Therapist, Witness; E. F., Mother, Witness; Father, F.F., Witness

#### For the Office of Health Insurance Programs

Appeared by Documents

### **ISSUE**

Was the Agency's determination to deny the Appellant's equipment provider's prior approval request for a Permobil IC300 power wheelchair with power tilt, power seat elevation, a MicroPilot micro touch mini joystick, attendant control, and other accessories correct?

**FINDINGS OF FACT**

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant, born on September 21, 2011, is in receipt of a Medical Assistance authorization. The Appellant has been diagnosed with Spinal Muscular Atrophy Type 2. She resides with her parents. The Appellant has primary Health Insurance coverage through MVP Health Care.
2. On November 7, 2013, the Appellant's equipment provider, Monroe Wheelchair, requested prior approval for the following items for the Appellant: a Permobil K300 power wheelchair with power tilt; a MicroPilot micro touch mini joystick; an expandable controller with harness; power seat elevation; attendant control, an ICS alternative switchbox; an Omni Control Module; and microlite switches and accessories.
3. On November 27, 2013, the Agency sent letters to the Appellant's evaluating physical therapist, to the equipment provider, and to the Appellant's physician requesting additional information necessary for a complete medical review.
4. On January 27, 2014, the Agency received a response to its request letter that was signed by the Appellant's evaluating Physical Therapist, Jennifer Butera, and by the Appellant's Occupational Therapist, Tamar Margolis.
5. By notice dated January 29, 2014, the Agency determined to deny the Appellant's provider's prior approval request for all requested items on the grounds that the items are not medically necessary for the Appellant. Specifically, the Agency denied the request for a Permobil K300 power wheelchair with power tilt, power elevating seat, electronics and accessories because the submitted documentation does not establish that the Appellant would be safe and independent with a power wheelchair. The Agency denied the request for an attendant controller because that type of controller is not medically necessary if the user is independent. The Agency denied the request for a seat elevator on the grounds that the submitted documentation does not establish that use of this function would make the Appellant independent with transfers or with activities of daily living. The Agency denied the request for an ICS alternative switchbox because no documentation was submitted regarding its function on the power wheelchair. The Agency indicated that consideration would be given to a new request for an appropriately configured power wheelchair when the submitted documentation establishes that Appellant independent navigating a power wheelchair in all of her customary environments.
6. On February 11, 2014, the Appellant requested this fair hearing.

**APPLICABLE LAW**

Section 365-a of the Social Services Law provides in part:

2. "Medical Assistance" shall mean payment of part or all of the cost of medically necessary medical, dental and remedial care, services and supplies, as authorized by this title or the regulations..., which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with such person's capacity for normal activity, or threaten some significant handicap and which are furnished an eligible person in accordance with this title and the regulations...

Section 364.2 of the Social Services Law provides in part, as follows:

The Department of Health shall be responsible for . . .

- (b) establishing and maintaining standards for all non-institutional health care and services rendered pursuant to this title, . . .

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Pursuant to regulations at 18 NYCRR 513.0, where prior approval of medical, dental and remedial care, services or supplies is required under the MA program, such prior approval will be granted when the medical, dental and remedial care, services or supplies are shown to be medically necessary to prevent, diagnose, correct or cure a condition of the recipient which: (1) causes acute suffering; (2) endangers life; (3) results in illness or infirmity; (4) interferes with the capacity for normal activity; or (5) threatens to cause a significant handicap. Pursuant to 18 NYCRR 513.6, the determination to grant, modify or deny a request initially must be made by qualified Department of Health professional staff exercising professional judgment based upon objective criteria and the written guidelines of the Department of Health and regulations, and commonly accepted medical practice.

Section I of the New York State Medicaid Program Information for All Providers General Policy defines prior approval as the process of evaluating the aspects of a plan of care which may be for a single service or an ongoing series of services in order to determine the medical necessity and appropriateness of the care requested.

Section IV of the New York State Medicaid Program Durable Medical Equipment Manual Policy Guidelines and Regulations at 18NYCRR 505.5(a)(1) define "Durable Medical Equipment" as:

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devices and equipment, other than prosthetic or orthotic appliances, which have been ordered by a qualified practitioner in the treatment of a specific medical condition and which have all of the following characteristics:

- Can withstand repeated use for a protracted period of time;
- Are primarily and customarily used for medical purposes;
- Are generally not useful to a person in the absence of an illness or injury;  
and
- Are usually not fitted, designed or fashioned for a particular individual's use

Where equipment is intended for use by only one patient, it may be either custom made, or customized.

Section IV of the Durable Medical Equipment Manual Policy Guidelines defines custom made as any durable medical equipment fabricated solely for a particular Medicaid patient from raw materials which cannot be readily changed to conform to another patient. These materials are used to create the item from patient measurements or patterns. Custom-made requires that the Medicaid patient be measured for the custom-made item so that it can be fabricated from these measurements

Section IV of the Durable Medical Equipment Manual Policy Guidelines defines custom- fitted as a componentry made on or added to an already existing model or device that is assembled, adjusted or modified to fit the body.

Section 4.4 of the New York State Medicaid Program Durable Medical Equipment Manual Procedure Codes provides that:

Wheeled mobility equipment is covered if the patient's medical conditions and mobility limitations are such that without the use of the DME, the patient's ability to perform mobility related activities of daily living (MRADL) in the home and community is significantly impaired and the patient is not ambulatory or functionally ambulatory. MRADLs include dining, personal hygiene tasks and activities specified in a medical treatment plan completed in customary locations in the home and community.

The New York State Medicaid Program Wheeled Mobility Equipment Guidelines provide detailed clinical and coverage criteria for both manual and power wheelchairs.

The United States Code at 42 U.S.C. §§ 1396a(a)10(A), 1396d(a)(4)(B) requires that each state Medicaid plan provide Early and Periodic Screening, Diagnostic and Treatment services (hereinafter EPSDT): "early and periodic screening, diagnostic, and treatment services (as defined in subsection (r) of this section) for individuals who are eligible under the plan and are under the age of twenty-one," Subsection (r) further defines EPSDT services as, among other things, "[s]uch other necessary health care, diagnostic services, treatment, and other measures described in [§ 1396d(a)] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." 42 U.S.C. § 1396d(r)(5). 42 CFR 441Subpart B implements sections 1902(a)(43) and 1905(a)(4)(B) of the Social Security Act, by prescribing State plan requirements for providing early and periodic screening and diagnosis of eligible Medicaid recipients under age 21 to ascertain physical and mental defects, and providing treatment to correct or ameliorate defects and chronic conditions found. 42 CFR 441.57 provides that under the EPSDT program, the agency may provide for any other medical or remedial care specified in part 440 of this subchapter, even if the agency does not otherwise provide for these services to other recipients or provides for them in a lesser amount, duration or scope.

## **DISCUSSION**

The Appellant, currently age 2 years and 9 months, is in receipt of a Medical Assistance authorization, which coverage is secondary to her primary health insurance coverage through MVP Health Care. The Appellant has been diagnosed with Spinal Muscular Atrophy Type 2.

The hearing record establishes that on November 7, 2013, the Appellant's equipment provider, Monroe Wheelchair, requested prior approval for a Permobil K300 power wheelchair with power tilt, a MicroPilot micro touch mini joystick, an expandable controller with harness, power seat elevation, and the other accessories listed above. The Agency requested additional information, which was provided on January 27, 2014 by the Appellant's evaluating Physical and Occupational Therapists.

The record further shows that after reviewing the additional information, the Agency, by Notice dated January 29, 2014, determined to deny the prior approval request on the grounds that none of the requested items are medically necessary for the Appellant. Specifically, the Agency denied the request for a Permobil K300 power wheelchair with power tilt, power elevating seat, electronics and accessories because the submitted documentation does not establish the Appellant would be safe and independent with a power wheelchair. The Agency denied the request for the additional requested items for the reasons listed above.

In his fair hearing summary, Agency Representative Jonathan P. Curtin, M D , wrote that the Appellant's Physical Therapist (PT) reported that the Appellant is able to navigate a power wheelchair in all directions, turn around and stop when needed. He contended that the PT did not report that the Appellant could do this independently. He maintained that there "were multiple inconsistencies in the documentation to suggest that the [Appellant] is not independent with the power wheelchair as Medicaid guidelines require."

The AR further noted that the Appellant is "cognitively intact." He acknowledged that any child of the Appellant's age would require supervision and would not be completely independent or left alone. He maintained, however, that the Appellant should be able to independently control the power wheelchair in all of her customary environments without physical assistance. The AR wrote that the requested attendant control is for the caregiver to control the wheelchair. He added that the requested alternative ICS switchbox with push buttons mounted on the back canes appears to be for the caregiver to control the wheelchair's seating systems. He noted that when the Agency asked the PT to explain what the ICS switchbox was for, she just stated that the component was recommended by the vendor. The AR maintained that if the Appellant is an independent user, the attendant controller and the ICS switchbox would not be necessary. He wrote that the PT reported that these controls are needed for when the Appellant falls asleep, is fatigued, or to allow the caregivers to provide supervision in case of an emergency. The AR maintained that if only supervision is needed for the Appellant to drive the power wheelchair, then this could be accomplished by verbally telling her to stop or to turn the wheelchair. He added that if the Appellant cannot follow such verbal commands, then using a power wheelchair at this time may not be a safe plan of care.

The AR went on to write that the PT reported that the Appellant has 3/5 strength throughout her upper extremities. He explained that this means that the Appellant has full range of motion against gravity and would have good strength with gravity eliminated. He contended that the Appellant should therefore be able to use a standard joy stick with the objective measures given. The AR noted that the discrepancy is that the type of joystick and switches requested suggest that the Appellant has very limited movement. He wrote that the requested specialty joystick and switches are activated with an extremely light touch. He indicated that such joysticks are requested for individuals with extreme weakness and very little movement. The AR contended that the requested MicroPilot joystick requires virtually no joystick throw and can be adjusted to between 10-50 grams of force. He added that it can also be controlled with the chin, finger, or thumb. He pointed out that the therapist is requesting a hand tray so that the Appellant could rest her hand on it and control the joystick with a finger. The AR noted that the micro light switches are being requested because the Appellant cannot depress regular switches to control the power wheelchair and tilt. He maintained that it is unclear why the Appellant cannot utilize standard switches or toggles with 3/5 strength. He

contended that this also suggests that the Appellant is more involved physically than what was described by the PT and indicates that her independence with this power wheelchair is uncertain.

The AR further wrote that the PT pointed out that a typical toddler is supervised and as he/she learns to walk, she falls, bumps into things, and gets back up again. He noted that while this may be true with normal development, a 500+ pound wheelchair is being requested for an individual with significant physical impairments. He maintained that if this wheelchair is not driven correctly or safely, it could cause the Appellant or another person serious injury. The AR added that this is one of the multiple reasons a power wheelchair user must be independent as required by Medicaid guidelines.

The AR also wrote that the requested power seat elevation is typically utilized to assist an individual with independent transfers. He contended that power seat elevation will not assist the Appellant in performing an independent transfer as she is dependent for transfers, having minimal trunk and head control. He noted that it also appears that the Appellant has significant upper extremity weakness based on the specialty controls needed for the power wheelchair. He added that it does not appear that the Appellant would have the strength to perform activities such as washing her hands or brushing her teeth. The AR contended that there are alternate ways to perform such activities from a seated position. He wrote that if the Appellant requires assistance with most ADL's, driving the power wheelchair, and requires constant supervision due to age, it is unclear why a caregiver could not assist the Appellant with washing her hands and brushing her teeth. He maintained that the PT did not address any medically necessary ADLs the Appellant would be able to perform independently by accessing countertops and tables. The AR added that while activities such as being able to sit at different table heights or being able to interact with peers on their level may be desired, they are not medical necessities. He indicated that it is unclear how the Appellant would be on the same level as her peers since she would be taller than most 2 or 3 year olds while seated in the power wheelchair. He wrote that the power seat elevation was therefore denied as not medically necessary.

The AR maintained that a video of the Appellant utilizing the power wheelchair was requested. He wrote that although not required, given the Appellant's age, diagnosis and physical impairments, it would have been useful in this case. He added that due to inconsistencies in the documentation, a video may have assisted in establishing medical necessity for the power wheelchair and some of the requested components. The AR conceded that a child as young as the Appellant is capable of learning to safely drive a power wheelchair. He contended, however, that the submitted documentation did not establish that the Appellant has the physical ability to be independent and safe with the power wheelchair at this time.

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The AR further wrote that "Although it had no bearing on [the Agency's] determination, the [Appellant's] primary insurance denied the power wheelchair as well."

The AR submitted several documents into the hearing record in support of the Agency's determination. He wrote that the requested power wheelchair and components do not appear to be the most medically appropriate or cost effective mobility option at this time. He indicated that consideration would be given to a new request for an appropriately configured power wheelchair when the documentation establishes that Appellant is safe and independent navigating a power wheelchair in all of her customary environments.

In her opening statement, the Appellant's Representative explained that the Appellant has been diagnosed with Spinal Muscular Atrophy (SMA) Type 2. She noted that SMA is a neurological condition under the umbrella of muscular dystrophy. She stated that it is important to note that the Appellant has no cognitive disabilities. The Representative maintained that the evidence will show that the requested power wheelchair and other items are medically necessary and cost effective under both the federal Early and Periodic Screening, Diagnosis and Treatment (EPSDT) guidelines and under 18 NYCRR Section 513. She explained that the evidence will deal with the Appellant's medical need due to her diagnosis of SMA, and also her medical need related to her physical abilities and her development.

The Appellant's Representative testified that the Appellant will also present evidence to show that the Agency is discriminating against the Appellant under Section 504 of the Rehab Act. She maintained that the Agency's criteria that power wheelchair users must be independent is narrower than the federal EPSDT mandates and is not supported by any other state or federal law. She noted that in this area, they will be discussing the topic of age-appropriate independence. The Representative added that "independence" is always going to be age appropriate.

Tamar Margolis testified that she has been a licensed Occupational Therapist for 19 years. She states that she works with children up to five years of age. She notes that this Appellant has SMA Type II, which is a neuro-muscular disorder. The witness explained that this condition causes a child to have very significantly decreased strength and, more importantly, endurance. She indicated that it affects all of the muscles in the body, including those related to respiration and digestion.

Ms. Margolis further testified that she meets with the Appellant twice a week for occupational therapy. She stated that the purpose of these sessions is to ensure that the Appellant is meeting her developmental milestones in the area of her fine motor control, which is how she utilizes her arms and her hands. The witness explained that she also works on the Appellant's sensory processing skills, which is how she is aware

of herself and her environment, and how she tolerates movement. She noted that they also work on the Appellant's activities of daily living (ADLs) including eating, washing hands, and other things appropriate for a two and a half year old child. She maintained that testing has shown that the Appellant does not have any cognitive limitations. Ms. Margolis testified that she has been treating the Appellant for over a year and it is evident that the Appellant is very bright, and is smarter than most of her peers.

Ms. Margolis then testified that SMA causes the muscles in the Appellant's legs to be significantly weak and she therefore cannot use her legs for standing or walking. She stated that the muscles in the Appellant's arms and hands are also very weak and she has limited use of her hands. She maintained that the Appellant is able to stabilize her arms on a table in front of her and use her hands well with the support of the table. The witness then explained the meaning of "3/5 strength" in the Appellant's arms. She stated that this measurement means that the Appellant has full range of motion in her arms, but that she can only take a small amount of resistance. She noted that moving through the range means moving through gravity, which creates some resistance by itself. The witness contended that the Appellant can lift a toothbrush, a fork, or a small drinking glass that is not full. She stated that the Appellant has weak trunk muscles which do not allow her to sit up straight against gravity or to control her head. She explained that these weak trunk muscles also make it more difficult for the Appellant to take full breaths against gravity, which causes her to fatigue with respiration more easily than a child with full trunk muscles.

Ms. Margolis went on to testify that the Appellant's medical condition is not progressive and is static in the sense that her strength will remain the same. She noted, however, that the Appellant's strength will not grow as her body grows. She maintained that the requested power wheelchair and tilt will provide the Appellant with the support that she needs to sit up straight and to hold her head up. The witness stated that the requested wheelchair and accessories will also provide the Appellant with the mobility she needs to navigate in her environment while supporting herself in a sitting position so that she can access that environment. She maintained that the requested seat elevator will allow the Appellant to access "up and down" which will let her reach different table heights so that she can rest her arms on the table and use them for whatever activities she is doing. The witness noted that the requested seat elevator will also let The Appellant come up to a sink to wash her hands or to rise up to a kitchen table to eat. Ms. Margolis then testified that the requested attendant controller will allow the Appellant's parents to provide supervision. She noted that the Appellant requires the supervision that any other child her age would require when moving. She stated that the attendant controller will also help the Appellant when she is fatigued and her endurance is low. The witness explained that the Appellant's endurance fluctuates, and that she can become quickly fatigued if she engages in an activity that is taxing on her muscular system. She contended that this would require the Appellant's parents to maneuver the power wheelchair for a short period of time or for a longer period of time,

so that the Appellant can rest. She added that the Appellant's parents would have to maneuver the power wheelchair all day if the Appellant is not feeling well or if she had a difficult night.

Ms. Margolis then testified that a developmental milestone is a developmental activity that is identified as being the next activity to achieve. She stated that such milestones are in a hierarchy and are sequential. She noted that these are activities that can be identified as a child goes through all areas of development. The witness explained that such milestones include fine motor milestones, cognitive milestones, and language milestones. She stated that milestones are completely in tandem with each other. She indicated that a child without any inhibiting disabilities will typically reach full development between the ages of 18 and 20. The witness contended that it is common for authority figures to intervene before a child reaches full development. She noted that learning and making mistakes are aspects of healthy development.

Ms. Margolis maintained that all of the developmental milestones are affected by the Appellant's SMA. She stated that by her age, the Appellant should be walking and running. She noted that the Appellant is unable to sit up or to hold her head up for a length of time. The witness added that the Appellant is also unable to push herself up so that she can crawl or maneuver on the floor. She explained that due to her condition, the Appellant cannot use eating utensils or to pick up small items without support at the elbow or with her arms resting on a table. She noted that, for very short periods of time, the Appellant can hold a spoon and a fork to feed herself, and she can hold a small cup that is not very full. The witness indicated that the Appellant can hold a toothbrush if her arm is stabilized on a table in front of her. She stated that the Appellant is very good at problem solving and is very sociable. She noted that when the Appellant comes to the center for therapy, she interacts with the other children as much as she can. The witness maintained that without a power wheelchair, the Appellant needs to be brought over to a child who she wants to interact with, or she has to wait for that child to come over to her.

Ms. Margolis then testified that the Appellant's language skills are also impacted by her SMA. She noted that the Appellant's parents are currently her primary caregivers and are able to read her cues very well. She added that the Appellant therefore does not feel a need to talk. The witness maintained that once the Appellant is able to navigate away from her parents and is not dependent upon them completely, she will understand the value of using spoken language. She contended that all of the Appellant's developmental skills are dependent on her developing gross motor skills using functional independent ambulation with the requested power wheelchair. She stated that with the requested power wheelchair and accessories, the Appellant will be able to be in an upright position with support, and she will be able to move the joystick so that she can go to anyplace that she wants. The witness noted that the Appellant will be able to raise her seat up and down so that she will be able to

access tables to participate in activities and support her arms on the table in front of her. She added that the Appellant will also be able to lower her seat in order to interact in her environment and any peers she may come in contact with.

The witness further testified that the "throw" in a joystick is the amount of movement required to work the joystick. She noted that a sensitive joystick requires very little movement. She explained that she chose a sensitive joystick because the Appellant would be able to use it with her finger and because it does not require the endurance needed to push a typical joystick. The witness stated that the Appellant may be able to push a regular joystick one or two times, but then she would fatigue and not be able to continue due to the effort required. She also noted that if the Appellant is using her hands to do any ADLs, then using a regular joystick after that would be very difficult or impossible for her, due to fatigue. The witness explained that the purpose of the requested attendant control is for the Appellant's parents to be able to override or to maneuver the Appellant's power wheelchair, and to elevate the seat up and down. She contended that the requested attendant control and ICS switchbox would aid the Appellant's development because her parents could use them as an instructional tool to override her decisions and to teach her the appropriate use of the power wheelchair. The witness maintained that the requested seat elevator will help with the Appellant's development by allowing her to raise herself up and down to complete her own ADLs such as eating and brushing her teeth. She noted that the seat elevator will allow the Appellant to bring herself up to the table height so that she can rest her arms on it so that she can do those activities. She added that the seat elevator will also aid in the Appellant's social and emotional development by allowing her to lower herself to her peer level so that she can interact with them socially.

Jennifer Butera then testified that she has been a Licensed Physical Therapist for 16 years. She noted that she is also a certified Pediatric Specialist in Physical Therapy. She stated that she works primarily with children up to five years of age. The witness added that she is a supervisor for her employer, where she has worked for 14 years. She explained that she has been seeing the Appellant for about 18 months and provides physical therapy to her twice a week. She added that the purpose of this therapy is to help the Appellant to maintain range of motion, particularly in her legs, which have a tendency to tighten and to get contractures. The witness stated that another purpose of the therapy is to help the Appellant to maximize her gross motor skills, her height control in her sitting, and to try to get some movement in her body. She then explained what a contracture is. She noted that she has seen the Appellant interact at her facility and maintained that she is very bright and has an interest in everything that is going on around her. The witness stated that the Appellant does not forget what they have worked on in the past and holds onto everything that they have done.

Ms. Butera further testified that she has seen the Appellant in the power wheelchair that they are requesting. She stated that she saw that the Appellant was able to independently navigate obstacles, to go forward and backwards, to stop upon command. She maintained that the Appellant understood how to maneuver the power wheelchair very quickly. The witness acknowledged that she anticipates some age appropriate learning with the power wheelchair, such as learning how much to turn to navigate around a kitchen island. She stated that there would be such a body awareness learning curve for any person. She added that a person learns by making mistakes and corrections. The witness noted that the Appellant will need to learn how much space she needs to maneuver the power wheelchair. She maintained that the Appellant "absolutely" has the capacity to independently learn how to do these things. She stated that she saw the Appellant maneuver the power wheelchair independently and to stop and turn properly without external cues.

Ms. Butera maintained that mobility is the key to all development. She stated that if a person cannot access his or her environment, they will not be able to continue to progress with cognitive skills and social/emotional skills. She noted that the person also won't be able to work on higher level problem solving or to independently engage in social activities. The witness contended that mobility is the key to achieving all developmental milestones. She stated that due to the Appellant's medical condition, she will never have the strength to propel a manual wheelchair. She explained that the requested seat elevator allows the Appellant to do what her shoulder girdles can't sustain. The witness contended that it is too fatiguing for the Appellant to lift her arms over her head repeatedly. She noted that if the Appellant needed to brush her teeth or to wash her hands, the seat elevator will allow her to use her bicep, her elbow, and her wrist, where she is stronger. She added that the Appellant will not have to maintain that endurance.

Ms. Butera then testified that she believes that the requested attendant control is necessary along with the ICS switch because the Appellant fatigues. She stated that as the Appellant has to learn her fatigue limits through the learning curve. She noted that the Appellant will not realize how fatigued she is until she's done and she may require assistance. The witness added that it is a learning curve for the Appellant to find out how much endurance she has.

Ms. Butera contended that she did consider and look at a number of less costly power wheelchairs for the Appellant. She explained that she selected the Permobil K300 because it could be configured to fit the Appellant's petite body size and to meet her need to tilt back when fatigued. She stated that the selected wheelchair also provided support for the Appellant's arms and had the Microlite joystick which will allow her to maintain endurance by only having to use her finger. The witness noted that this joystick will prevent the Appellant from getting fatigued while driving so that she could use her arms for other daily living skills and activities. She maintained that the selected

power wheelchair has front wheel drive, which makes it easier to maneuver. She stated that this wheelchair has a suspension which allows it to go over different surfaces and will allow the Appellant to drive around her large grass backyard, which is uneven. The witness maintained that a good suspension is important for the Appellant, due to her weak trunk control, so that she does not get knocked off balance. She contended that most of the power wheelchairs they looked at either were more expensive or could not be configured to fit the Appellant's body to give her the support that she needs. She noted that the other wheelchairs did not have the appropriate front wheel drive to allow her to maneuver.

The witness went on to testify that the Appellant is in the optimal learning time. She maintained that the Appellant is able to learn quickly and to adapt to being mobile in a different way. She stated that if the Appellant has the requested power wheelchair, she will be able to continue to develop. The witness contended that without being able to access her environment, the Appellant will not gain skills (cognitive, social/emotional, problem solving) needed to become independent. She stated that if they wait to obtain a power wheelchair for the Appellant, she will not gain developmental skills that she needs along the way, and it will interfere with her overall development.

The Appellant's Representative then submitted four studies into the hearing record regarding the use of power wheelchairs by children under five years of age. She pointed out that the first article dealt with children with the Appellant's medical condition. It was published in the Journal of Child Neurology on July 6, 2012, and was entitled "Independent Mobility After Early Introduction of a Power Wheelchair in Spinal Muscular Atrophy." The Representative maintained that these studies all support the testimony of the Agency's expert witnesses.

The Appellant's mother testified that her household consists of herself, her spouse, and the Appellant. She stated that the Appellant was diagnosed with SMA when she was nine months old. She noted that the Appellant's Pediatrician suggested that they obtain a power wheelchair for her. The witness indicated that she discussed a power wheelchair with both Ms. Margolis and Ms. Butera. She explained that the Permobil company has allowed them to borrow a power wheelchair similar to the one they are requesting. She stated that they have borrowed this power wheelchair for a week or two at a time since the Appellant was fifteen months old. The Appellant's mother maintained that by using the loaned power wheelchair, the Appellant has been able to access her toys, to brush her teeth, and to gain access to kitchen drawers to pull out utensils and Tupperware to play with. She noted that the Appellant has also been able to use the loaner power wheelchair to go out into their backyard to play with their dogs and to go where she wants to go. The witness stated that she or her spouse is right next to the Appellant the entire time to provide supervision. She added that the Appellant is still independently operating the power wheelchair. She maintained that after they get the loaner wheelchair back, after being gone for a month or two, the

Appellant quickly recalls what she learned using the wheelchair. The Appellant's mother explained that when the Appellant occasionally bumps into something, she has learned to back herself up and to go in a different direction. She contended that the Appellant has never run over her or anyone else while using the power wheelchair. She stated that whenever the Appellant sees the loaner wheelchair in the house, she wants to use it. She maintained that the Appellant wants to be able to move and to be independent, and to go get her things herself. The witness maintained that the Appellant "lights up" when she gets into the wheelchair because it makes her a child.

The Appellant's mother further testified that when the Appellant is not in the power wheelchair, she is very limited in what she can do. She maintained that the Appellant cannot roll or "combat crawl." She added that the Appellant can only lay there and she has to be handed everything. The witness explained that the Appellant primarily lays on her back because she cannot pick her head up when she lays on her stomach.

Ms. Butera interjected that it is very inappropriate for a child of the Appellant's age to just lay on the floor and to not interact with her environment.

The Appellant's mother maintained that the loaner power wheelchair was able to move through their house without problems. She stated that she realizes that it is a very expensive piece of equipment and her family has an obligation to take care of it.

In her closing statement, the Appellant's Representative reiterated that the Agency is discriminating against the Appellant under Section 504 of the Rehab Act. She referred to Paragraph "D" on page #3 of the Agency's Fair Hearing Summary. She maintained that the Agency is saying that the Appellant does not have the right to a normal development because she has a physical impairment. The Representative also maintained that the Agency's contention that power wheelchair users must be independent is narrower than the mandates listed in the federal Early and Periodic Screening Diagnosis and Treatment (EPSDT) guidelines and is not supported by other state or federal law.

The Representative submitted the EPSDT Manual into the hearing record. She also submitted additional documentation, including a Fair Hearing Decision, dated May 29, 2012, under FH# 5874022H.

It must first be noted that the hearing record does establish that the Appellant is eligible for Early and Periodic Screening Diagnosis and Treatment (EPSDT) services under the provisions of the United States Code at 42 U.S.C. §§ 1396a(a)10(A) and 1396d(a)(4)(B). Such services are, under the above cited federal law, a mandatory part of all state Medicaid plans. They require, among other things, that children who suffer from "defects and physical and mental illnesses and conditions discovered by the

screening services" shall be provided with "necessary health care, diagnostic services, treatment, and other measures described in [§ 1396d(a)] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." (42 U.S.C. § 1396d(r)(5)).

Since the Appellant is a minor child in receipt of Medical Assistance benefits, she is eligible for EPSDT services. The Appellant's diagnosis, Spinal Muscular Atrophy Type 2 SMA, is a diagnosis likely to be uncovered and/or specified through the screening components of EPSDT. The hearing record partially described above also establishes that the requested Permobil K300 power wheelchair with power tilt, MicroPilot micro touch mini joystick, expandable controller with harness, power seat elevation, and the other requested accessories listed above are necessary to correct or ameliorate the Appellant's physical illness or condition. The hearing evidence shows that the requested items would serve to help correct and ameliorate some symptoms of the Appellant's illness which interfere with her capacity for certain normal activities. Under the Early Periodic Screening and Diagnostic Testing requirements set forth at 42 CFR Part 441, Subpart B, children under 21 are entitled to treatment and other measures to correct or ameliorate defects and conditions discovered through medical screening, regardless of whether the service is otherwise included in the New York Medicaid State Plan.

In his fair hearing summary, the Agency Representative conceded that a child as young as the Appellant is capable of leaning to safely drive a power wheelchair. The weight of hearing evidence partially described above establishes that the Appellant has no cognitive disabilities and is able to safely use the requested Permobil K300 power wheelchair with power tilt and power elevation. The testimony of the Appellant's Occupational Therapist, Ms. Margolis, and her Physical Therapist, Ms. Butera, was detailed and persuasive. Due to the training and extensive relevant experience of these witnesses, and the large amount of time they have been treating the Appellant, their testimony is entitled to be given considerable weight in this proceeding. The testimony of the Appellant's mother was also detailed and persuasive. The testimony of the Appellant's witnesses was also uncontradicted by the Agency.

Pursuant to the foregoing provisions of Section 513 of the Department Regulations, "where prior approval of medical, dental and remedial care, services or supplies is required under the MA program, such prior approval will be granted when the medical, dental and remedial care, services or supplies are shown to be medically necessary to prevent, diagnose, correct or cure a condition of the recipient which: (1) causes acute suffering; (2) endangers life; (3) results in illness or infirmity; (4) interferes with the capacity for normal activity; or (5) threatens to cause a significant handicap." The hearing record establishes that the requested Permobil K300 power wheelchair with power tilt, power seat elevation, and listed accessories is the most medically

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appropriate and cost effective mobility option for the Appellant. Based upon the weight of all of the available evidence in the hearing record partially described above, the Agency's determination cannot be sustained, and the Agency will be directed to approve the prior approval request it received on behalf of the Appellant on November 7, 2013.

DECISION AND ORDER

The determination of the Agency to deny the Appellant's equipment provider's prior approval request is not correct and is reversed.

The Agency is directed to approve the Appellant's equipment provider's prior approval requested for a Permobil K300 power wheelchair with power tilt, a MicroPilot micro touch mini joystick, an expandable controller with harness, power seat elevation, attendant control, an ICS alternative switchbox, and other requested items listed in the prior approval request received on behalf of the Appellant by the Agency on November 7, 2013.

Should the Agency need additional information from the Appellant's Representative or witnesses in order to comply with the above directives, it is directed to notify the Appellant's Representative and/or witnesses promptly in writing as to what documentation is needed. If such information is requested, the Appellant's representative and/or witnesses must provide it to the Agency promptly to facilitate such compliance.

As required by 18 NYCRR. 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York  
07/21/2014

NEW YORK STATE  
DEPARTMENT OF HEALTH

By

James W. Ryan III  
Commissioner's Designee