Looking to Medicaid to Fund Cutting Edge and Specialty Equipment

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I. Medicaid is a joint federal/state program

A. Purpose of Medicaid

1. 42 USC 1396-1

2. Enable states to furnish rehabilitation and other services to help families with dependent children and aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, attain or retain capability for independence or self-care.

B. States need not participate in Medicaid but if they do, they must comply with federal Medicaid law and regulations.

C. Mandatory and optional services: 42 USC 1396a(a)(10)(A)

1. A participating state must provide mandatory services, including but not limited to:

a. Inpatient hospital services

b. Outpatient hospital services

c. Other laboratory and X-ray services

d. Nursing facility services

e. Physician services

f. Home health services (including medical equipment)

2. A state may provide optional services, including but not limited to:

a. Private duty nursing

b. Clinic services

c. Dental services

d. Physical therapy, occupational therapy, and speech, hearing and language services

e. Hospice services

f. Personal care services

g. Prosthetics, orthotics

II. Determining whether a particular item is coverable under the Medicaid program

A. Preliminary questions:

1. Is the person eligible for Medicaid?

2. Does the particular item meet the criteria for a mandatory service category or for any optional service categories included in that particular state's Medicaid plan?

3. Is the item medically necessary for the individual?

B. Home health services

1. Service category that includes medical equipment and supplies: 42 USC 1396d(a)(7), 42 CFR 440.70(b)(3).

2. A state Medicaid plan must provide home health services for "categorically needy" individuals (those who meet financial eligibility criteria for Medicaid). 42 CFR 440.210, 42 CFR 440.70.

3. Must be provided to any "medically needy" individual (states may extend coverage to "medically needy" individuals who do not meet financial eligibility criteria) entitled to skilled nursing facility services. 42 CFR 440.220(a)(3).

C. Other service categories may include AT: e.g., 42 CFR 440.110 (physical therapy, occupational therapy, and services for individuals with speech, hearing, and language disorders includes any necessary supplies and equipment).

D. Currently, there is no federal definition of "medical equipment."

1. In the absence of a federal definition, most states have developed their own definitions of equipment, usually referred to as durable medical equipment or "DME."

2. Some states are using the Medicare definition (42 CFR 414.202)

a. Can withstand repeated use.

b. Is primarily and customarily used to serve a medical purpose.

c. Generally is not useful to an individual in the absence of an illness or injury.

d. Is appropriate for use in the home (regulation was amended to add a requirement that all items classified as DME after Jan. 1, 2012, have an expected life of at least 3 years).

3. Federal definition has been proposed, awaiting promulgation of final rule.

E. 42 CFR 440.230(d): States may place limits on services based on such criteria as:

1. utilization control procedures (prior approval or prior authorization)

2. medical necessity

a. see *Moore ex rel Moore v. Reese*, 637 F.3d 1220 (11th Cir (Ga) 2011) (state need not fund desirable but medically unnecessary services)

b. See *Lankford v. Sherman*, 451 F.3d 496 (8th Cir (Mo) 2006) (state may not exclude non-experimental, medically necessary service within a covered service category)

c. Federal Medicaid act does not define medical necessity and therefore, the individual states have defined it.

F. Early and Periodic Screening, Diagnosis and Treatment program (EPSDT)

1. A mandatory service category for all Medicaid recipients under the age of 21. 42 USC 1396a(a)(10)(A), 42 USC 1396d(a)(4)(B), 42 USC 1396d(r)

2. Mandates periodic screening such as wellness visits, immunizations, etc.

3. Mandates treatment to "correct or ameliorate" defects or conditions identified by the screen

4. All optional service categories become mandatory service categories for recipients under 21

5. A more thorough discussion of EPSDT can be found at http://www.nls.org/Disability/NationalAssistiveTechnologyProject/ATAdvocateNewsletters/ATAdvocateWinter2008.

III. Getting funding for cutting edge or special equipment

A. **Standing wheelchair**: fully functioning wheelchair that allows an individual to stand at the touch of a button (some models allow user to drive wheelchair in standing position)

1. Probably meets the definition of DME in most if not all states

2. Does it meet the criteria for any other service categories, such as physical or occupational therapy services?

3. May meet various medical needs

    a. Studies are available on the medical benefits of sustained weight bearing through supported standing.

        (1) The co-authors have written an extensive *amicus curiae* brief on the medical benefits of standing wheelchairs, filed in the *Koenning* case below.

        (2) Contact the authors for a copy of that brief or copies of the studies referenced I the brief.

    b. RESNA Position on the Application of Wheelchair Standing Devices: http://www.resna.org/dotAsset/18255.pdf.

4. Can individual use the less costly separate stander?

    a. How often can person get into separate stander in various environments (school, home, work)?

    b. What risks are involved in repeated transfers?

    c. Are there other medical needs that will be met by standing wheelchair that will not be met by separate stander?

        (1) ability to urinate independently

        (2) ability to change classes in standing position

        (3) ability to reach cupboards, etc., without need to transfer

        (4) additional positive impact on bone density as a result of driving it in standing position (due to vibrations)

5. Court decisions

    a. *Johnson v Minnesota Dept. of Human Services*, 565 NW2d 453 (Minn.App.,1997)

    b. *Sorrentino v Novello*, 295 AD2d 592 (NY 2002)

c. *Correa v. NC Dept of HHS*, No. 09-CVS-18112 (NC 2010), available from the National Assistive Technology Advocacy Project.

d. *Koenning v. Janek*, 897 F. Supp. 2d 528 (S.D. Texas, 2012), vacated on other grounds, 2013 WL 4430365 (5th Cir. 2013)

6. As this is written, the National Assistive Technology Advocacy Project has copies of at least nine administrative hearing decisions from New York and two from Minnesota (provided upon request).

7. A short discussion of standing wheelchairs, *Did You Know - State Medicaid Agencies Can Fund Standing Wheelchairs*, can be found at http://www.nls.org/Disability/NationalAssistiveTechnologyProject/DidYouKnow/Medicaid/StandingWheelchairs.

B. **Adaptive tricycle**

1. Probably meets the definition of DME in most if not all states.

2. Probably meets the criteria for OT or PT services (often used in physical therapy in schools).

3. Meets various medical needs, including

   a. Improvement in cardiovascular, respiratory health

   b. Improvement in balance, coordination, and mobility

   c. Improvement in bone density, joints

   d. Age appropriate activity

4. Can Medicaid deny it because it is exercise equipment?

   a. Medicaid cannot categorically exclude equipment that otherwise meets the definition of DME even though it also can be categorized as "exercise equipment."

   b. See State Medicaid Director letter, dated September 4, 1998 http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD090498.pdf. (Often referred to as "DeSario Letter.")

(1) States can use list of approved equipment for administrative convenience, but must have procedures to allow beneficiaries to seek items that are not on the list.

(2) States should update their list of equipment "periodically to reflect available technology."

c. Citing this State Medicaid Director letter, the Supreme Court in *Slekis v Thomas*, 525 U.S. 1098 (1999), vacated a judgment of the Second Circuit that approved pre-approved lists of DME, as long as the state provided access to sufficient DME to meet the needs of the Medicaid population as a whole. The letter rejected the Medicaid population as a whole argument.

d. On May 21, 2013, CMS issued a letter to the Texas Medicaid agency, reaffirming the guidance provided in the September 4, 1998 letter, stating, "items of DME meeting the State's definition of such coverage is to be provided to individuals (of any age) meeting the State's medical necessity criteria."

5. As this is written, the National Assistive Technology Advocacy Project has at least five administrative hearing decisions that found adaptive tricycles to be DME and medically necessary.

6. Practice tip: One hearing decision found adaptive tricycles to be DME but not medically necessary in that case because the evidence failed to document that the trike would be used on a regular and consistent basis throughout the year (including winter). That objection can be overcome by developing a reasonable and plausible plan of use during inclement weather.

7. Are there other funding sources that should be paying for it (like a Medicaid waiver)?

8. A short discussion of Medicaid funding of adaptive tricycles, *Did You Know - State Medicaid Agencies Can Fund Adaptive Tricycles*, can be found at http://www.nls.org/Disability/NationalAssistiveTechnologyProject/DidYouKnow/Medicaid/AdaptiveTricycles.

C. **Functional electrical stimulation leg cycles** (electrodes attached to muscles stimulate the muscle to move)

1. Probably meets the definition of DME in most states

2. Also meets the criteria under physical therapy (includes any necessary supplies and equipment, 42 CFR 440.110), See *Matter of Anonymous*, Docket No 108675 (Minn 2009).

3. It is not experimental.

    a. It has been cleared for marketing by the FDA.

    b. It is used for therapy in reputable hospitals and clinics.

4. Benefits of electrical stimulation of muscle are well documented. (Copies of studies documenting the medical benefits are available from National AT Advocacy Project available upon request.) Benefits include:

    a. Improved cardiovascular function;

    b. Improved blood flow;

    c. Improved bone density;

    d. Decreased spasticity;

    e. Improved glucose tolerance and insulin sensitivity for the prevention of Type II Diabetes;

    f. Increased muscle mass.

5. FES cycles are fairly expensive. Are there less costly alternatives or combination of alternative therapies that would meet recipient's needs?

6. Is it safe for home use?

D. **Exercise equipment**

1. Does the item meet the definition of DME?

    a. If so, Medicaid cannot categorically exclude (see above)

    b. If not, does it meet the criteria for OT or PT services or any

other service category covered by the state Medicaid plan?

2. Does it meet a medical need? Aerobic exercise provides medical benefits:

   a. Strengthens the muscles involved in respiration

   b. Strengthens, enlarges the heart muscle

   c. Reduces blood pressure

   d. Improves circulation

   e. Raises number of red blood cells, facilitates transportation of oxygen

   f. Reduces the risk of heart disease and cardiovascular problems

   g. Stimulates bone growth (high impact aerobic exercise), reduces risk of osteoporosis

   h. Increases blood flow through muscles

3. Is physical therapy a type of therapeutic exercise?

4. Is there a difference between a treadmill for person without a disability and one for a person with a disability?

5. Medicaid may try to use the Medicare exclusion of exercise equipment as an excuse to also exclude, but the two programs have different purposes, criteria, and mandates.

6. Winning administrative hearing decisions involving exercise equipment are available.

   a. The Reck Motomed is a type of cycling device that can be used from a chair or wheelchair. Movement can be passive, motor-assisted, or active resistive with use of individual's own muscles.

   b. Uppertone Exercise Unit allows individuals with spinal cord injury at or below C4-C5 to do upper body exercises necessary for rehabilitation and maintenance, without any assistance.

c. Flex Leg Therapy Machine is another cycling machine that can be used passively or actively.

E. **Environmental control unit (ECU)**

1. Probably meets the definition of DME in most if not all states.

   a. Allows individuals with disabilities to access a variety of products in the home or other environment;

   b. ECUs can be controlled by voice, touch screen, head movements, or switch.

   c. They can be mounted on wheelchairs, beds, desks, etc.

2. How is it medically necessary? See *Matter of F.P.*, FH # 4790256Q, "the evidence shows that the environmental control unit is a feature for the Appellant's independence and safety...the environmental control unit allows him to adjust heat, light, telephone or a computer through his chin. In the event of an emergency or the unavailability of an aide, this feature would permit the Appellant to use a phone for assistance." (at page 8)

3. Are there other funding sources that should/could be paying for it?

F. **Ceiling track lifts**

1. Medicaid agency may classify ceiling track lifts as a home modification.

2. If it is a home modification, can it also be DME if it meets the definition of DME?

   a. Medicare covers ceiling track lifts. While Medicare and Medicaid are different programs, Medicare criteria is generally more *restrictive* than Medicaid's.

   b. If Medicare covers an item as DME a compelling argument can be made that Medicaid should cover as well.

3. In the letter issued by CMS on May 21, 2013, directed to the Texas Medicaid agency, CMS specifically stated that medically necessary ceiling track lifts are reimburseable if they meet the State's

definition of DME.

4. Are there less costly "equally effective" alternatives such as hydraulic or power lifts?

G. **Ramps**

1. Permanent vs portable: does it matter? Is a permanent ramp a home modification rather than a device or product?

2. Is the ramp useful in the absence of an illness or injury? Can you argue that it is not useful to a person without a disability even though that same person may *use* the ramp. (The person can easily use the stairs).

3. In *Matter of N*, FH # 3204959R (NY 1999), the administrative hearing decision directed the Medicaid agency to provide appellant portable ramps once he showed that he had no wheelchair accessible exit from his apartment building.

4. Two court settlements in NY resulted in the provision of portable ramps to Medicaid recipients who needed them to enter and exit their residences.

H. **iPads as speech generating devices**

1. The iPad has a number of apps that help individuals communicate.
   a. Proloquo2Go provides "natural sounding text-to-speech voices (CURRENTLY AMERICAN, BRITISH and INDIAN ENGLISH ONLY), high resolution up-to-date symbols, powerful automatic conjugations, a default vocabulary of over 7000 items, advanced word prediction, full expandability and extreme ease of use." See http://itunes.apple.com/us/app/proloquo2go/id308368164?mt=8

   b. For a list of other communication apps, see http://www.friendshipcircle.org/blog/2011/02/07/7-assistive-communication-apps-in-the-ipad-app-store/

2. May not meet the definition of DME because of mainstream use (i.e., for non medical purposes).

3. However, may meet the definition of speech language services and any necessary equipment

a. Should it matter that it is not “dedicated” device?
b. Does that make it more prone to a virus and should that matter?

4. May be the least costly alternative when compared to dedicated devices (in fact, the cost is so minimal compared to the cost for dedicated speech generating devices that a few Medicaid programs are nonetheless paying for them).

5. Are there other possible funding sources such as Vocational Rehabilitation or Special Education?

IV. Medicaid Home and Community Based Services (HCBS) Waivers

A. Allows states to waive certain federal requirements

1. Statewideness (may apply in certain geographic areas rather than across the state).

2. Comparability (may provide services not available under the state Medicaid plan)

3. Income and resources

B. Waivers were intended to provide additional services to individuals so that they can live in the community rather than in an institution (hospital, nursing facility, or intermediate care facility for the mentally retarded).

C. If waiver provides AT, it is often intended to provide AT *not* covered under the state Medicaid program

1. i.e., AT that either does not meet the definition of DME or is not “medically necessary” as defined under Medicaid (*Matter of S.J.*, FH # 5926475M (NY 2011).

2. Waiver may require that Medicaid deny funding first. (Caution: while the waiver may require that Medicaid deny first, the Medicaid agency should not be insisting the individual seek funding from the waiver first. This has happened in at least one state.)

D. Waivers may also fund home and vehicle modifications.

E. Copies of Waiver applications, organized by state, can be found at: www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Waivers.html?filterBy=1915(c)#waivers

F. For more information regarding waivers, see our Fall 2007 issue of the *AT Advocate* newsletter available at http://www.nls.org/Disability/NationalAssistiveTechnologyProject/ATAdvocateNewsletters/ATAdvocateFall2007.

V. The Appellant has important rights regarding Medicaid funding:

A. The right to ask for a medical service (i.e., right to submit a prior authorization request for a particular device). 42 USC 1396a(a)(8).

B. The right to a timely and adequate notice:

1. Agency must issue a written notice whenever it takes any action affecting a recipient's claim for services. 42 CFR 431.206(c)

2. The notice must contain:

a. a statement of what action the agency intends to take;

b. the reasons for the intended action;

c. the specific regulations that support the action;

d. an explanation of the individual's right to request a hearing. 42 CFR 431.210

e. For a discussion of notice requirements, see http://www.nls.org/Disability/NationalAssistiveTechnologyProject/DidYouKnow/Medicaid/MedicaidNoticeRequirements.

C. The right to challenge an adverse agency determination (denial or modification of a prior authorization request or failure to respond to the request) at an administrative hearing. 42 USC 1396a(a)(3). Medicaid agencies are required to:

1. Publicize their hearing procedures and inform every applicant and recipient in writing of their right to request a hearing, the method by which to request a hearing, and their right to represent themselves or be represented by counsel or other spokesperson. 42 CFR 431.206(a), (b);

2. Provide this information when the individual applies for Medicaid and when the agency takes an action that would affect the recipient's claim for services. 42 CFR 431.206(c)

3. Allow the recipient a reasonable time, not to exceed 90 days, to request the hearing. 42 CFR 431.221(d);

4. Conduct the hearing at a reasonable time, place, and date. 42 CFR 431.240(a)(1);

5. Provide impartial officials or other persons to conduct the hearing who were not involved in the original determination. 42 CFR 431.240(a)(3);

6. Give the recipient, prior to and during the hearing, an opportunity to examine the case file as well as all documents and records the agency intends to use at the hearing. 42 CFR 431.242(a).

7. The recipient has the right to

    a. present witnesses,

    b. confront and cross-examine adverse witnesses,

    c. establish all pertinent facts,

    d. and present an argument without undue influence. 42 CFR 431.242(b)-(e)

8. The decision must be based entirely on the evidence submitted at the hearing. 42 CFR 431.244(a).

9. The decision must be in writing and must summarize the facts and identify the regulations supporting the decision. 42 CFR 431.244(d)

10. The agency must take final administrative action ordinarily within 90 days from the date of the hearing request. 42 CFR 431.244(f)(1).

11. The hearing must comport with the due process requirements set forth in *Goldberg v. Kelly*, 397 US 254 (1970). 42 CFR 431.205(d) See http://www.nls.org/Disability/NationalAssistiveTechnologyProject/DidYouKnow/Medicaid/MedicaidFairHearingRights.