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JAN 29 2010

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

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DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-07952

PETITIONER,

Vs.

AGENCY FOR HEALTH
CARE ADMINISTRATION
CIRCUIT: 01 Escambia
UNIT: AHCA

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on January 6, 2010, at 10:45 a.m., in Pensacola, Florida.

The petitioner was present. He was represented by his father,

Testifying on behalf of the petitioner was his mother, and

, speech and language pathologist, Center for Pediatric Rehabilitation.

The Department was represented by Amber Vaughn, program administrator, Agency for Health Care Administration (AHCA). Testifying on behalf of the Agency by telephone was Carolie Hardiman, speech and language pathologist, AHCA and Jody Winter, physical therapy consultant, durable Medicaid Equipment (DME), AHCA. Observing the proceeding was Marshall Wallace, senior human services program specialist, AHCA.

ISSUE

At issue is the Agency's October 19, 2009 denial of an Augmentative and Alternative Communication (AAC) speech device, specifically the E2510 Dynavox PalmTop3 speech generating device, based on the contention that the requested item does not meet the definition of medical necessity.

FINDINGS OF FACT

1. The petitioner (DOB [REDACTED]) is 20 years old. The petitioner lives with his parents and receives state plan Medicaid services as a recipient of Supplemental Security Income (SSI).
2. The petitioner suffers from developmental delay and autistic characteristics that has been observed since he was two years old. His condition causes him to be incapable of verbally communicating with his caregivers.
3. His treating physician, Dr. [REDACTED] provided a letter dated December 18, 2009 stating, "I believe it is medically necessary for [REDACTED] to have the AAC device in order to communicate with his caregivers. The AAC device would allow [REDACTED] to tell his caregivers when he is hurting or what he needs may be."
4. The petitioner's parents have tried several alternate methods to communicate with their son. He is currently attending school and a life skills program through the United Cerebral Palsy. He was provided with speech therapy through the school system but there were no records presented to show his

progress, whether or not AAC systems were utilized, or the results of any tests. The school system determined the petitioner had reached a plateau. The petitioner currently uses a communication book and alphabet board to effectively supplement his verbalizations. He uses the book to make requests and answer questions. His vocalizations are very soft spoken and appear to be "yes" or "no" one word responses to questions. Verbalizations initiated by the petitioner are less than 25% intelligible to unfamiliar listeners and less than 50% intelligible to his parents. There is no physiological reason for the petitioner's low volume.

5. The petitioner's parents heard about the use of an AAC device that would allow the petitioner to communicate with them with computer generated voice output. He has been assessed by a speech-language pathologist. The petitioner's speech-language pathologist believes there is a significant discrepancy between his comprehension of language and his ability to express himself. He benefits from visual cues in the form of pictures and text to help formulate statements. His anxiety and communication impairment inhibit his verbal initiation and response for communication.
6. In support of the testimony, the petitioner submitted video graphic evidence and a compact disc (CD) showing the petitioner using the Palm speech device (Petitioner's Exhibit 1). The CD showed the petitioner pushing computer buttons with visual cues in response to pictures depicting an

accident, a heart attack, and personal information. The pre-programmed computer would communicate appropriate responses using oral output. However, there was no indication that he was able or inclined to initiate communication. His responses were appropriate but were made in response to questions put to him by the speech pathologist.

7. The speech and language evaluation conducted by his speech therapist on April 10, 2009 indicated articulation skills were not formally evaluated due to difficulty with speech elicitation and concerns regarding language. Verbalizations elicited during the evaluation were judged to be approximately 70% intelligible to an unknown listener in a known context. Intelligibility was compromised by low volume. The Receptive One-Word Picture Vocabulary Test was administered to measure the petitioner's receptive vocabulary at the single-word level. He obtained an age equivalency of 11 years, 11 months on the assessment. He was able to point to pictures using an isolated point to indicate his response. The Expressive One-Word Picture Vocabulary Test administered to measure the petitioner's expressive vocabulary at the single-word level revealed his age equivalency of 6 years, 2 months. Based on the performance, the speech therapist determined there was a significant discrepancy between his receptive and expressive vocabulary skills. The assessment diagnosis was expressive language impairment and social communication impairment. The speech pathologist recommends speech

and language therapy one to two times weekly to develop and implement strategies to enhance communication skills using a total communication approach that incorporates verbalizations, picture symbols, and voice output communication aids. The speech and language therapist and treating physician submitted a physician prescription for the AAC device along with a school concurrence form and speech-therapist assessment for prior authorization of a Dynavox Palmtop device.

8. On June 5, 2009 a request for an E2510 AAC device (Dynavox Palmtop) was received by Medicaid Services. The information presented was reviewed and on July 15, 2009 additional information was requested. The information needed was a Concurrence by School form as he attends an extended school program, information regarding vision, information relative to current AAC systems used by the petitioner and limitations presented, an explanation why the petitioner cannot increase volume in order to be better understood and an explanation why it is necessary to have an AAC device when recipient's articulation is considered to be 70% intelligible to an unknown listener in a known context. He was to provide evidence of an Interdisciplinary Team involved in the evaluation.
9. The speech-pathologist submitted additional information dated July 21, 2009. A school concurrence dated September 29, 2009 and additional information

was received by the Medicaid Services on October 6, 2009. The Agency review of the information indicated:

"...Recipient does not initiate verbal and/or any other form of communication in any environment but is able to produce speech at a 70% intelligibility level for an unknown listener in known context. He is able to use a communication book to make choices when provided regarding desired wants and needs, but data does not support that he carries a picture communication book to initiate communication or engage in a conversational exchange. Reportedly he did not use any form of AAC or a picture communication book while attending school. Data indicates that speech therapy has been billed through Medicaid since April 2009 and that the present treatment is recipient's first exposure to incorporating AAC into a total communication approach. Considering the recipient has a means of communication, he is able to produce voice and say words but does not use the present communication options available to him to a functional level, the medical necessity for a device is not considered to be appropriate nor medically necessary to meet the communication level and/or needs of this individual at this time..."

Based on the follow up request from the initial review of July 15, 2009 a determination was made to deny the request for a Dynavox speech device on October 19, 2009.

10. The respondent defined Augmentative and Alternative Communication (AAC)

systems according to the DME Handbook as follows:

"AAC devices are designed to allow individuals to communicate. As defined by the American Speech-Language Hearing Association (ASHA), an AAC device attempts to compensate for the impairment and disability patterns of individuals with severe, expressive communication disorders, i.e., individuals with severe speech-language and writing impairments.

Dedicated AAC systems are designed specifically for a disabled population and must be prior authorized.

Non-dedicated systems are commercially available devices such as laptop computers with special software and are not reimbursable by Medicaid."

In addition, the complete definition of an AAC system and Aid according to ASHA is

"An integrated group of components, including the symbols, aids, strategies and techniques used by individuals to enhance communication: As this definition states communication encompasses more than just spoken words it includes gestures, eye gaze, touch, body postures/movements, sign language, photographs, printed words, objects, pictoideographs, and Braille.

AID Refers to a "physical object or device used to transmit or receive messages (e.g. communication book, board, chart, mechanical or electronic device, computer)". (ASHA, 1991, p.10).

11. The respondent explained the term medical necessity as defined in the DME and Medical Supply Services coverage and Limitations Handbook (2-9). Medicaid reimburses for services that do not duplicate another provider's service and are determined to be medically necessary as outlined in 59G-1.010, Florida Administrative Code. In addition, the respondent explained that the services must be reflective of the level of service that can be safely furnished and for which there is no equally effective and more conservative or less costly treatment available statewide.
12. Based on the documentation submitted, the respondent determined the requested item did not meet the definition of medically necessity in that it is not the most conservative or less costly treatment to meet communication needs. His current means of communication are effective when he chooses

to use them. Further, the Medicaid billing codes indicated that an AAC Initial Evaluation provided by a Speech Language Pathologist was performed on April 10, 2009, evidenced by code 92597. Speech Therapy evaluation/re-evaluation has not been billed under code 92506 and code 92507 Speech Therapy has been billed beginning April 17, 2009 continuing at least through November 2009.

13. The respondent believes the AAC device was recommended for the petitioner prior to any speech therapy being provided.

CONCLUSIONS OF LAW

By agreement between the Agency for Health Care Administration and the Department of Families and Children, the Agency for Health Care Administration has conveyed jurisdiction to the Office of Appeal Hearings to conduct this hearing pursuant to Chapter 120.80 F.S.

Fla. Admin. R 65-2.060, states in part:

(1) The burden of proof, except where otherwise required by statutes, is on the party asserting the affirmative of an issue. The burden is upon the Department when the Department takes action which would reduce or terminate the benefits or payments being received by the recipient. The burden is upon the petitioner if an application for benefits or payments is denied. The party having the burden shall establish his/her position, by a preponderance of evidence, to the satisfaction of the hearing officer.

Because the petitioner made a request for a device under Medicaid which was denied, the petitioner has the burden of proof.

Florida Statute 409.913 addresses **Oversight of the integrity of the Medicaid program**, with (1)(d) describing "medical necessity or medically necessary" standards and saying in relevant part that: "...For purposes of determining Medicaid reimbursement, the agency is the final arbiter of medical necessity.

The Florida Administrative Code Rule 59G-1.010 addresses relevant definitions within the Medicaid Program, which apply to this Medicaid decision on the requested equipment and services at issue. Although the term medically necessary may be used in a variety of context, at issue is whether or not medical necessity as defined in Medicaid rules was demonstrated for a Dynavox PalmTop 3 speech device. Subsection (166) of the Florida Administrative Code Rule defines "medically necessary" care, goods or services, as follows:

...means that the medical or allied care, goods, or services furnished or ordered must:

(a) Meet the following conditions:

1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;
2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;
3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;
4. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available; statewide; and
5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

(c) **The fact that a provider has prescribed, recommended, or approved medical or allied care, goods, or services does not, in itself, make such care, goods or services medically necessary or a medical necessity or a covered service** (emphasis added).

Under appropriate statute and administrative guidelines, AHCA is charged with determining whether medical necessity has been adequately established and AHCA must assess whether the Medicaid reimbursement criteria have been met

Fla. Admin. Code Rule section 59G-4.070 states in part:

(1) This rule applies to all durable medical equipment and supply providers enrolled in the Medicaid program.

(2) All durable medical equipment and supply providers enrolled in the Medicaid program must comply with the Florida Medicaid Durable Medical Equipment and Supply Services Coverage and Limitations Handbook, July 2008, incorporated by reference, and the Florida Medicaid Provider Reimbursement Handbook, HCFA 1500, which is incorporated by reference in Rule 59G-4.001, F.A.C. Both handbooks are available from the Medicaid fiscal agent...

Durable Medical Equipment/ Medical Supply Services Coverage And Limitations Handbook, July 2008, sets forth the description of AAC systems (page 2-36) and documentation requirements for authorization (page 2-37):

For Medicaid to reimburse for an AAC device, the recipient must meet the following criteria:

- Demonstrate a severe, expressive communication disorder; and
- Have the physical, cognitive, and language abilities necessary to use the specific type of AAC device requested, as documented in an evaluation that was performed and dated by a licensed speech-language pathologist, within the past six (6) months.

Interdisciplinary (ID) Team and
Evaluation of Recipients
Under 21 Years of Age and
Enrolled in Public School

For recipients under 21 years of age and enrolled in public school, an interdisciplinary team (ID team) must evaluate the recipient, recommend an AAC device, and write an individualized action plan or plan of care. The ID team must consist of at least two members of different professional disciplines and must include a speech-language pathologist who will lead the team. The speech-language pathologist may request the assistance of

an occupational therapist or a physical therapist. It is expected that most cases will require the need for an occupational therapist to be a part of the ID team. The recipient who will use the AAC device should be encouraged to participate on the ID team, as well as the recipient's caregivers, teachers, social workers, case managers, and any other members deemed necessary.

It is the responsibility of the team leader to provide the team members and other appropriate individuals with the necessary documentation to review and make a determination of concurrence. Documentation must include an evaluation and individual action or plan of care.

The evidence demonstrates that the petitioner would benefit from an AAC speech device and that the petitioner needs to have assistance in communication. What is at issue is whether or not the requested AAC equipment, Dynavox PalmTop 3, meets all of the Medicaid definitions for medical necessity, State Plan limitations and the limitations as set forth in the handbook for durable medical equipment. The petitioner is currently using an alphabet board and communication book to communicate his needs. His articulation is considered to be 70% intelligible to an unknown listener in a known context using the less expensive alternative to communicate. Findings show that the petitioner's treating physician and his speech-language therapist requested consideration be offered to the petitioner based on the belief that the PalmTop3 speech generating device would allow voice output that is necessary to effectively handle emergency situations. The use of a communication book to supplement his verbalization is restricted by the physical limitation of a communication book and limits his vocabulary for communicating his medical needs and feelings. The respondent does not believe that this treatment is medically necessary as the petitioner has not demonstrated that he initiates communication with the more conservative generally

accepted standard treatment options and there is no evidence showing that he will initiate communication with the more expensive alternative suggested. The evidence submitted shows that the petitioner is able to effectively communicate using the assistance devices currently in place.

According to the above rule, medically necessary services must be effective, but must reflect the more conservative or least costly level of services, per paragraph 4. Per paragraph 5, the services must be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider. The use of a more expensive communication device, PalmTop 3, is a more costly alternative to the current effective use of the alphabet board and communication book. Further, the requested PalmTop 3 assistive communication device must not be furnished in a manner primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

Based on the evidence and testimony provided and a review of the controlling authorities, the undersigned authority concludes the respondent acted correctly to deny coverage for the requested durable medical equipment under state plan Medicaid.

DECISION

The appeal is denied and the Agency action affirmed.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the agency. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, FL

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32308-5403. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The agency has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

DONE and ORDERED this 29th day of January, 2010,

in Tallahassee, Florida.



Linda Garton
Hearing Officer
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Copies Furnished To