



**DISABILITY
LAW
CENTER**
Utah's Protection and Advocacy Agency

**Public Comment on
Proposed Medicaid Rules**

July 16, 2007

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**UPDATED PUBLIC COMMENT ON REVISION TO PROPOSED
MEDICAID RULES REGARDING DME**

**HEALTH, HEALTH CARE FINANCING, COVERAGE AND REIMBURSEMENT POLICY
R-414-70-MEDICAL SUPPLIES, DURABLE MEDICAL EQUIPMENT, AND PROSTHETIC DEVICES
DAR FILE NO.:29535**

Submitted on July 16, 2007 to:

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FAXED AND FIRST-CLASS MAIL

Background

On February 21, 2007, the Division of Health Care Financing (DHCF) filed a proposal¹ designed to formalize existing coverage and reimbursement practice for durable medical equipment (DME). The Disability Law Center (DLC) provided comment on the proposed rules. On June 15, 2007, DHCF filed a Change in Proposed Rule (CPR). This document serves as DLC's comment to the CPR.²

Beginning with the Rehabilitation Act of 1973 and continuing through President Bush's New Freedom Initiative, the U.S. has built a strong tradition of integrating persons with disabilities into work, family, and community life. Congress has made it clear that the purpose of the Medicaid program is to "furnish medical assistance...and rehabilitation and other services to help [recipients] attain or retain capability for independence or self-care."³

The DLC is concerned that there are provisions in the rule that represent a step backward and could reverse much of the progress that has been made over the years.

About the Proposed Rule

Dr. David K. Sundwall, Executive Director for the Utah Department of Health states, "[This policy] should be continued to curb unnecessary expenditures in the Medicaid program for durable medical

¹ Notice of Proposed Rule-DAR File No. 29535, accessible online at: <http://www.rules.utah.gov/publicat/bulletin/2007/20070315/29535.htm>

² The DLC will submit a separate statement outlining in more detail its analysis of legal implications of the proposed rules and Change in Proposed Rule. It is the DLC's position that this rule violates numerous statutory provisions of the Medicaid Act and their implementing regulations.

³ 42 U.S.C. § 1396.

equipment that is not medically necessary.” While the DLC applauds the effort to manage costs and reduce fraudulent billing in Medicaid, we are concerned that the proposed rule will restrict Medicaid enrollees’ access to medically necessary DME. We believe any policy should reflect a fair and balanced definition of medical necessity. A narrow and overly restrictive definition of medical necessity is inconsistent with the basic purpose of the Medicaid Act and contravenes guidance from the Center for Medicare and Medicaid Services, the federal agency responsible for the Medicaid program.

Comments on the Change in Proposed Rules for Durable Medical Equipment

Note regarding proposed rule quotes: Underlined text indicates language added by DHCF; strikethrough text indicates language that has been deleted by DHCF. Emphasis in bold has been added by DLC.

The Rule R.414-70-6(1)

“Medically necessary durable medical equipment...are benefits for recipients residing at home...All special **adaptations and design of DME is limited to utilization in the home.**”

DLC Comment

According to a 2000 letter to state Medicaid directors from the Centers for Medicare and Medicaid Services the ... **‘homebound’ requirement is a Medicare requirement that does not apply to the Medicaid program...***The restriction of home health services to persons who are homebound to the exclusion of other persons in need of these services ignores the consensus among health care professionals that community access is not only possible but desirable for individuals with disabilities.*⁴ This restriction on access to any home health services, including durable medical equipment and supplies, violates both the comparability requirement of the Medicaid Act⁵ and the prohibition on diagnosis-based decision making.⁶

The proposed rule is in direct opposition to CMS’ intent and federal law because it restricts not just wheelchairs, but all medically necessary durable medical equipment to use in the home. Senate Bill No. 3677, the “Medicare Independent Living Act of 2006” seeks to amend title XVIII of the Social Security Act to eliminate the “in the home” restriction on Medicare coverage of mobility devices for individuals with expected long term needs. It is appropriate for DHCF to update its interpretation of previous policy to reflect the current social, legal, and technological landscape.

The Rule R.414-70-6 (5)

Wheelchairs which are suitable for use in the home are a benefit. [~~if the recipient’s condition is of such severity that without the use of a wheelchair, the recipient would be confined to bed or chair at least 19 hours or more each day without functional ambulation.~~]

DLC Comment

We commend the deletion of these criteria and believe that it is a small step forward in realizing the purpose of the Medicaid Act.

⁴ Olmstead update no. 3. July 25, 2000. Accessible online at <http://www.cms.hhs.gov/smdl/downloads/smdl072500b.pdf>

⁵ 42 U.S.C. § 1396a(a)(10)(B)

⁶ 42 C.F.R. § 440.230(c).

The Rule R.414-70-6 (5) (a)

"Medicaid will pay for **one wheelchair** for a recipient."

DLC Comment

Utah's Medicaid Provider Manual allows for a standard manual second wheelchair when the aggregate weight of the client and power wheelchair exceeds the limitations of the power lifts on transportation vehicles. Other policy and legal interpretations have also recognized additional exceptions to a limited extent. However, the proposed rules do not address this issue in any way. Further, the provision does not recognize the necessity of a backup chair when the primary chair is being serviced or when traveling in an inaccessible vehicle or visiting an inaccessible location, among other essential purposes.

The Rule R. 414-70-6 (5) (c)

"A standard wheelchair with attachments, components or accessories; a customized, manual wheelchair; or a motorized wheelchair may be provided if the recipient demonstrates medical necessity to the Department and the wheelchair is **designed for use in the home.**"

DLC Comment

Almost all wheelchairs are suitable for use inside the four walls of someone's residence. Many people require a power wheelchair which is suitable for use in the home, but that allows them to access their community as well. For example, the ability to access a local supermarket in order to buy food is a critical activity of daily living. Denying this access puts many at risk for unnecessary institutionalization.

The Rule R.414-70-6 (5) (f)

"A recipient who requires a wheelchair for employment, vocational development, or educational purposes **must seek this benefit through the appropriate funded state agency.**"

DLC Comment

A fundamental purpose of the Medicaid Act is to "furnish medical assistance...and rehabilitation and other services to help [recipients] attain or retain capability for independence or self-care."⁷ This provision also directly opposes the federal Ticket to Work and Work Incentives Act of 1999 by denying wheelchairs to individuals who could otherwise obtain meaningful employment. Additionally, Kansas Medicaid explicitly recognizes the link between mobility, education, and employment by providing coverage for a power chair if it is needed for school or work.⁸

The Rule R 414-70-7 (1)

~~"[Prosthetic Devices,] Medicaid covers prosthetic devices that include hearing aids, special orthopedic appliances, prosthetic limbs, prosthetic eyes, braces, and orthoses [are covered]. Medicaid does not cover prosthetic devices that include special shoes, cochlear implants, augmentative speech devices, and wigs or hair replacements after chemotherapy. [DME devices including wheelchairs and standers are not prosthetic devices under this rule.]"~~

⁷ 42 U.S.C. § 1396.

⁸ Exline, C.M., "The Impact of State Budget Shortfalls on Access to Assistive Technology Through State Medicaid Programs," RESNA Technical Assistance Project, February, 2004.

DLC Comment

DHCF states in its summary of the rule change: “[the rule] further removes language which states that medical necessity determines the provision of a prosthetic device because medical necessity does not govern the provision of optional services.” However, Utah Medicaid has chosen to provide prosthetics as a service in the state plan. In so doing, it must provide these services in a manner consistent with all federal requirements. Additionally, these devices should be considered durable medical equipment as well as prosthetic devices. Other states consider them as such. This rule proposes to offer hearing aids to certain individuals who demonstrate a medical necessity, yet deny medically necessary cochlear implants for others for whom hearing aids will not suffice. Likewise, augmentative communication devices offer many individuals the ability to speak. The ability to hear and speak is critical to one’s ability to attain independence and self-sufficiency. The DLC will be submitting additional legal analysis which supports our contention.

Comments About the Proposed Rules for Non-Covered Items

Overview

The DLC is concerned that a list of “Non-Covered Items” exists as part of DHCF’s coverage policy. CMS (then HCFA) attempted to provide interpretive guidance on this issue in a “Dear State Medicaid Director” letter dated September 4, 1998.⁹ This letter was in direct response to litigation which challenged a state Medicaid program’s ability to limit coverage of DME items to those found on an exclusive list.¹⁰ The letter states, “**An ME (medical equipment) policy that provides no reasonable and meaningful procedure for requesting items that do not appear on a state’s pre-approved list, is inconsistent with federal law...**” We feel that explicitly listing devices such as cochlear implants and augmentative communication devices as “non-covered” implies that these devices will not be available to an individual who demonstrates a medical necessity for the item, and is therefore inappropriate.

The Rule R.414-70-9 (1)

“Items used primarily for **hygiene**, education, exercise, convenience, cosmetic purposes, social interaction, or comfort of the recipient.”

DLC Comment

Utah defines a “medically necessary” device as something necessary to “prevent, diagnose or cure conditions in the recipient that endangers life, causes suffering or pain, causes physical deformity or malfunction, or threatens to cause a handicap”¹¹ Under the proposed rule, Medically Necessary DME that promotes hygiene becomes subject to denial¹² In many circumstances the failure to maintain appropriate hygiene can lead to serious medical complications. This exclusion prevents consideration of DME necessary to maintain proper hygiene as medically necessary in appropriate circumstances.

⁹ Available online at www.cms.hhs.gov/smdl/downloads/smd040700.pdf

¹⁰ *Desario v. Thomas*, 139 F. 3rd 80 (2nd Cir. 1998), *cert granted, judgment vacated*, *Slekis v. Thomas* 525 U.S. 1098 (1999).

¹¹ UAC. R. 414-1-2(18)(a)

¹² Examples of medically necessary devices that promote hygiene include specialized bath and shower chairs, among various other devices.

The Rule R.414-70-9(3, 4)

(3) “DME for use outside the home, including wheelchair, wheelchair attachments, accessories and modifications for use outside the home.”

(4) “[e]quipment permanently attached or mounted to a building or a vehicle such as ramps, lifts, and bathroom rails.”

DLC Comment

This would eliminate certain types of lifts and other devices that are required for the individual to have access to all critical parts of their home and to be independent within their home. The fundamental purpose of the Medicaid Act, to promote “independence or self care,” is applicable to the home as well as the community. The exclusion of certain types of lifts is fundamentally inconsistent with the Medicaid Act.

The types of lifts excluded under this subsection are frequently necessary for individuals with more severe disabilities. They may also be more frequently needed due to a manifestation of their particular medical condition. As a consequence, they are denied a form of DME, lifts, that is available in different forms (not permanently attached to a building) to others who have a less severe impairment. Again, this policy is inconsistent with the fundamental purposes of the Medicaid Act.

The Rule R.414-70-9(9)

This rule categorically excludes “lifts in furniture to aid a patient to a standing position.”

DLC Comment

This is a variation on a lift, which, in general, is a covered service under the state’s Medicaid plan. Mobility is not only needed for independence (otherwise bed-bound), but also for medical reasons (aids in prevention and/or treatment of decubitus ulcers (bed-bound or limited ability to frequently get in and out of a chair). In some situations a lift *may* meet the state’s definition of “Medically Necessary”:

“a service or supply is medically necessary when it is “(1) reasonably calculated to prevent, diagnose or cure conditions in the recipient that endangers life, causes suffering or pain, causes physical deformity or malfunction, or threatens to cause a handicap; and (2) there is no other equally effective course of treatment available or suitable for the recipient requesting the service which is more conservative or substantially less costly. (3) Medical services shall be of a quality that meets professionally recognized standards of health care, and shall be substantiated by records including evidence of such medical necessity and quality.”¹³

It may also be the most effective and least costly way to meet an individual’s need. Under such circumstances, it must be available to the individual.

¹³ *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995); *A.M.L. v. Department of Health, Division of Health Care Financing*, 863 P.2d 44 (Utah Ct. App. 1993).

The Rule (R. 414-70-9 (10))

“Specialized or non-standard tires on wheelchairs are not a benefit unless medically necessary for use in the patient’s home.”

DLC Comment

Many individuals (especially those living in rural areas) may require tires suitable for use in the home, but also capable of outside travel.

The Rule 414-70-9 (19, 20)

(19) This section of the rule categorically excludes “cochlear implants.”

(20) This section of the rule categorically excludes “augmentative speech devices.”

DLC Comment

As stated previously, when a state includes an optional service in its plan, it must do so in accordance with all other federal requirements. Please see comment on R 414-70-7 (1).

Summary of Comments About Proposed Rule Changes

The DLC and others are very concerned that the Change in Proposed Rule continues to strictly limit medically necessary equipment for use in the home. Most assistive devices are “appropriate” or “suitable” for use in the home. This is drastically different than the language proposed by DHCF (i.e. “limited to utilization in the home”; “designed for use in the home”). In fact, DHCF makes this restriction explicit by placing “DME for use outside the home” on a list of non-covered items. In so doing, it creates a *de facto* segregation and isolation of people with disabilities by denying them access to their communities. All members of our society have the right to aspire to independence and self-sufficiency. These are not activities that are limited within the four walls of someone’s home. “In the home” is a Medicare term that has been misinterpreted and expanded through the years. We understand DHCF’s responsibility to promote policies which are cost-effective. However, limiting medically necessary equipment for use inside the home is an inefficient mechanism through which to achieve this goal. The current language in this area creates the likelihood for inappropriately restrictive coverage decisions. We strongly urge DHCF to eliminate “in the home” language altogether from the proposed rule.