State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
2699 Park Avenue, Suite 100
Huntington, WV 25704

Earl Ray Tomblin
Governor

Michael J. Lewis, M.D., Ph. D.
Cabinet Secretary

February 27, 2012

----------for ---

Dear ----------:

Attached is a copy of the Findings of Fact and Conclusions of Law on ----------'s hearing held January 13, 2012. Your hearing request was based on the Department of Health and Human Resources' decision to deny prior authorization for durable medical equipment – specifically, a speech generating device.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

Medicaid regulations for the requested durable medical equipment require a prior authorization review to determine medical necessity. This determination of medical necessity considers the basic health care needs of the individual and provides the most economical item, explicitly not covering expensive items when less costly alternatives are available (West Virginia Bureau for Medical Services Provider Manual, Chapter 506: DME/Medical Supplies, §506.5). InterQual General Durable Medical Equipment Criteria is to be used in the medical necessity determination (West Virginia Bureau for Medical Services Provider Manual, Chapter 506: DME/Medical Supplies, §506.5), and these criteria include a requirement for executive level functioning or the development thereof.

Information and testimony at the hearing revealed that the proposed device is the most economical item that would meet the basic health care needs of Ms. Scott; a clear selection process was outlined in which less expensive items were eliminated because they did not meet basic health care needs and more expensive items were eliminated based on cost. Further, Ms. Scott's executive level functioning is revealed through the testimony of speech professionals and others witnessing her ability to successfully operate the requested device.

It is the decision of the State Hearing Officer to **reverse** the action of the Department to deny prior authorization for a speech generating device.

Sincerely,

Todd Thornton
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
Amy Workman, Department Representative

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW

IN RE: **----------,**

Claimant,

v. **ACTION NO.: 11-BOR-2116**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION OF STATE HEARING OFFICER

I. INTRODUCTION:

This is a report of the State Hearing Officer resulting from a fair hearing concluded on February 27, 2012, for ----------. This hearing was held in accordance with the provisions found in the Common Chapters Manual, Chapter 700 of the West Virginia Department of Health and Human Resources. This fair hearing was convened on January 13, 2012, on a timely appeal, filed October 3, 2011.

II. PROGRAM PURPOSE:

The 1965 Amendments to the Social Security Act established, under Title XIX, a Federal-State medical assistance program commonly known as Medicaid. The Department of Health and Human Resources administers the Medicaid Program in West Virginia in accordance with Federal Regulations. The Bureau for Medical Services is responsible for the development of regulations to implement Federal and State requirements for the program. The Department of Health and Human Resources processes claims for reimbursements to providers participating in the program.

III. PARTICIPANTS:

----------, Claimant's witness
----------, Claimant's representative
----------, Claimant's witness
----------, Claimant's witness
----------, Claimant's witness
----------, Claimant's witness
Virginia Evans, Department's representative
Shirley Starkey, Department's witness
Pat Woods, Department's witness

Presiding at the Hearing was Todd Thornton, State Hearing Officer and a member of the State Board of Review.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether or not the Department was correct to deny prior authorization for durable medical equipment to the Claimant.

V. APPLICABLE POLICY:

West Virginia Bureau for Medical Services Provider Manual, Chapter 506: DME/Medical Supplies, §506.3; §506.5

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

D-1 West Virginia Bureau for Medical Services Provider Manual, Chapter 506: DME/Medical Supplies, §506.3; §506.5
D-2 InterQual 2011 Durable Medical Equipment Criteria – Augmentative and Alternative Communication Devices: General
D-3 Information received from [redacted], MD, and [redacted] Company
D-4 Denial notices dated September 19, 2011
D-5 Additional documentation submitted September 29, 2011
D-6 Denial notices dated October 3, 2011

VII. FINDINGS OF FACT:

1) Virginia Evans, representative for the Department's Bureau for Medical Services, testified that, in response to a request (Exhibit D-3) for durable medical equipment for the Claimant, denial notices were issued on or about September 19, 2011, to the Claimant, her prescribing practitioner, and the servicing provider (Exhibit D-4). This notice explains the reason for denial as lack of information, and requests additional information as follows, in pertinent part:

> Your request for speech services cannot be authorized due to the lack of information required for review.
>
> After review of the information provided for the request the consultant needs the following information:
>
> 1. Tell us more about technological systems tried, time, location, success (ages 3-9)
> 2. Tell us about communication in school, IEP plans for AAC (same skills as communication [*sic*] basic medical needs)
> 3. Explain about traning [*sic*] plan for any devices to be approved – should be systematic and more than training from P-R staff of 5-8 sessions.

2) Additional information (Exhibit D-5) was submitted on September 29, 2011, and the Department issued another set of denial notices (Exhibit D-6) on October 3, 2011 to the same three parties. This final denial notice states, in pertinent part:

> Your request for speech services cannot be authorized due to the lack of information required for review.
>
> After review of the information provided for the request, the consultant needs the following information:
>
> 1. There is no real evidence of ACC [*sic*] speech generating device systems (technology) used by this patient. All attempts as [*sic*] non-technological approaches did not work.
> 2. The provider may want to look at other systems. Some are likely to meet the goals of communicating basic needs (other manufacturers of speech generating devices)
> 3. Patient does not meet "executive functional" skill level for this SGD

3) Shirley Starkey, the Department's speech consultant, testified that she is a licensed speech language pathologist with over fifty years of experience, many of those in augmentative and alternative communication. She testified that she uses the InterQual criteria, the Bureau for Medical Services Provider Manual, and nationally accredited research as part of her review for medical necessity for requested speech generated devices, such as the device requested for the Claimant. She testified that she reviewed the documentation submitted (Exhibit D-3) as part of the Claimant's request and determined that the Claimant is eligible for alternative communication. She testified that the Claimant is almost thirteen years old and there is no indication of therapy history. She noted testing of the Claimant in the Pediatric Augmentative Communication Evaluation portion of the provider documentation packet (Exhibit D-3, page 17 of 24) with test results indicating a receptive language age-equivalent of "approximately four years." She testified that she requested additional information to get a "total picture" of the Claimant – her needs and ability to manage the technology of the requested device.

4) ---------- testified that she has been a licensed speech language pathologist since 2005 and has over three years of experience directly related to augmentative communication. [redacted] was the evaluating speech language pathologist for the Claimant in the initial evaluation as well as the addendum to the Augmentative Communication Evaluation (Exhibit D-5). In this addendum [redacted] responded to the requests in the Department's September 19, 2011 denial letter (Exhibit D-4). Regarding the request for information about technological systems tried by the Claimant, [redacted] addendum explains that because the Claimant was adopted and not in the custody of her adoptive mother until age six, information prior to that age is unavailable. After age six, the addendum details attempts at getting the Claimant to use sign language or Picture Exchange Communication System ("PECS"), and how the Claimant does not – or is not interested in – using these methods.

5) Regarding the request for information about communication in school and Individualized Education Program ("IEP") plans, [redacted] opines through her addendum that the IEP is not relevant as the requested device is for medical needs, not educational needs. Ms. Starkey testified to clarify that she did not request an IEP, but did want to know about how the Claimant communicates in school, therapy approaches in school, and if the Claimant uses a speech generating device in school. ----------, the Claimant's mother, testified that the Claimant does not have a speech generating device for use at school, and communicates in school by writing, grunting, pointing, or otherwise demonstrating her wants and needs. ----------, the Claimant's service coordinator with the Intellectual Disabilities and Developmental Disabilities Waiver Program, testified that she knows through her regular monthly visits with the Claimant that the Claimant cannot communicate on her own beyond grunting or pointing. [redacted] noted in her addendum that the Claimant did not respond to traditional speech therapy methods – started around age six in school – and that the Claimant started to use PECS and modified PECS at school around age eight or nine.

6) Regarding the request for an explanation of training plans, [redacted] addendum report stated that the Claimant and her mother will be trained in the basic operation of the device. Additionally, the Claimant's mother will be trained on specific methods of eliciting communication, setting up the environment for communication, and on how to expand the device utilization through the creation of additional "pages." The addendum also noted the availability of free online training in addition to training directed by a therapist. ----------, a speech language pathologist currently seeing the Claimant, testified that the Claimant is able to use the proposed device and is presently being trained on the use of the device, while on loan from the provider.

7) [redacted] testified that, in response to the final denial notice (Exhibit D-6), there is evidence of use and success with a speech generating device by the Claimant. In her initial evaluation report (Exhibit D-3) this is addressed as follows, in pertinent part:

> When using a SGD [redacted] demonstrated the use of all the above communication skills in addition to the following:
>
> - The ability to request an absent object
> - The ability to ask questions
> - The ability to name people or things

----------testified that her daughter "does well" with the device, and is more understandable when using it.

8) Testimony on the Claimant's behalf addressed the final denial notice comments suggesting consideration of other systems. [redacted] testified that other systems were tried by the Claimant, and that SpringBoard Lite was eliminated because the Claimant's receptive language age-equivalent test results exceeded the 36-month level of this device, and her initial report noted that "…the ECHO by Prentke Romich or the V and V-Max by Dynavox were also considered, however these devices are much more costly and have additional features that are not necessary to meet [redacted] basic communication needs." [redacted] testified that in the Claimant's present use of the requested device – on loan from the provider – she is already communicating more complex thoughts and ideas than the SpringBoard Lite would allow. She additionally noted that Dynavox does not have built-in language capability and language growth features included in the proposed device.

9) ----------, a speech language pathologist and assistant professor specializing in augmentative communication, testified that she reviewed the record of the Claimant, and that the process of determining the appropriate speech generating device for the Claimant is considered in terms of features – specifically the language the device will provide. She testified that a recommended device should accommodate the Claimant's receptive language age-equivalent level with "room to grow." This would eliminate low-tech and mid-tech devices that produce "language up to about 36 months." She additionally testified that grammar starts at approximately this level and that the Claimant would need a device that allows for grammar instead of low-tech or mid-tech devices that allow "stringing together" words but no grammar. She testified that this eliminates devices with Current Procedural Terminology ("CPT") or Healthcare Procedure Coding System ("HCPCS") codes "below" E2510 (i.e., E2500, E2502, E2504, E2506, and E2508). The proposed device was culled from devices in the E2510 category.

10) Ms. Evans testified regarding policy discussion of an IEP requirement or provision allowing the request of an IEP; however, Ms. Evans did not present or cite this policy, such policy could not be located in either the Department's provider manuals for durable medical equipment or speech and audiology services, and Ms. Starkey clarified her initial denial notice as not "requesting" an IEP and her final denial notice did not reference an IEP as part of her basis for denial.

11) Pat Woods, a witness for the Department's Bureau for Medical Services, objected to the representation of the Claimant by ----------, an employee of Prentke Romich, the provider of the proposed device. ---------- was allowed to represent the Claimant in this hearing. In his role as a representative for the Claimant, he questioned witnesses from both parties, but did not offer testimony himself.

12) Policy from the West Virginia Bureau for Medical Services Provider Manual, Chapter 506: DME/Medical Supplies, §506.3, states:

> 506.3 COVERED DURABLE MEDICAL EQUIPMENT AND MEDICAL SUPPLIES
>
> Durable Medical Equipment/medical supplies and other related services/items provided through DME are considered for reimbursement by WV Medicaid when requested by a prescribing practitioner and determined medically necessary to meet the basic health care needs of the member.
>
> A complete list of covered and non-covered DME/medical supplies and other related services/items provided through DME are seen in Attachments I and II. Attachment I describes the DME/medical supplies through current HCPCS codes, description of each code, replacement code for closed codes (as appropriate), service limits, prior authorization requirements and special coverage instructions. Dispensing of medical supplies for more than a one (1) month time frame or shipping supplies on an unsolicited or automatic basis is prohibited. Attachment II describes DME/medical supply items, without HCPCS codes, that are non-covered by WV Medicaid
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> Durable Medical Equipment/medical supply coverage is based on product category not specific item, brand or manufacturer. Medical supplies are purchased items, while equipment may be initially purchased or reimbursed on a cap-rental basis. Following the established cap-rental timeframe, DME items are determined purchased and the provider that received the last cap-rental reimbursement maintains responsibility for the item and must provide repairs and/or modification as needed.
>
> The most economical items/services will be provided. Expensive items are not covered when less costly items/services are available.

13) Policy from the West Virginia Bureau for Medical Services Provider Manual, Chapter 506: DME/Medical Supplies, §506.5, describes the prior authorization process and the utilization of the InterQual criteria (Exhibit D-2) to determine medical necessity for the requested device, as follows, in pertinent part:

> 506.5 PRIOR AUTHORIZATION
>
> For DME services and items requiring prior authorization review for medical necessity by WVMI, it is the responsibility of the prescribing practitioner to submit the appropriate clinical documentation i.e., ICD-9 code(s), all information required on the written prescription (see 506.4, 2nd paragraph, (2) for clarification) and any other relevant information. Additionally, a licensed physical therapist or licensed occupational therapist who is fiscally, administratively and contractually independent from the DME provider may also submit clinical documentation for review when requested by the prescribing practitioner. PA recertification review is required at the end of the prescription period specified or within one (1) year whichever comes first. It is strongly recommended that DME providers, in partnership with prescribing practitioners, assist in obtaining prior authorizations. Prescribing practitioners must provide clinical information and a written prescription while DME providers may submit the appropriate HCPCS code and billing information. If items and/or services provided before the PA is confirmed, the DME will not be reimbursed. PA does not guarantee payment. Refer to Attachment I for specific DME/medical supplies requiring PA and service limits for covered services.
>
> Effective, January 1, 2006, Medicaid covered services which currently require a PA will no longer require a PA if the primary insurance approves the service. The explanation of benefits (EOB) must accompany the claim. An EOB documenting the reasons for the denial of TPL for services requested must be provided to WVMI when requesting prior authorization review. If the service is not allowed or covered by the primary insurance, but is a covered service for Medicaid and the service requires a PA from WVMI, Medicaid policy will be enforced. If administrative denials are given by the primary payer, Medicaid will not reimburse for services. Please refer to Chapter 600 – Payment Methodologies for additional information.
>
> Effective March 15, 2006, InterQual General Durable Medical Equipment Criteria, will be utilized by WVMI for determining medical necessity for DME items. These items include the following:
>
> • Adaptive Strollers (E1232, E1236, E0950, E0966, E0978, E1029, E1030)
> • Aerosol Delivery Devices (E0565, E0570)
> • Augmentative and Alternative Communication Devices (E2508, E2510) – Refer to Speech/Audiology Manual for additional information

VIII. CONCLUSIONS OF LAW:

1) Policy provides that prior authorization is required for the proposed speech generating device, and that a determination of medical necessity considers both the basic health care needs of the individual and cost effectiveness. The Department issued two sets of denial notices to the Claimant, although the initial set can be thought of as a request for additional information. Upon receipt of additional information, the Department issued the final set of denial notices. Anything on the first set of notices that is not on the second set is presumed to have been resolved through the additional documentation provided on the Claimant's behalf. The final denial notice offers three reasons for denial: the absence of documented device usage, failure to identify an device that is "…likely to meet the goals of communicating basic needs," (only implying that such a device exists and is less costly – conditions required for this to be a valid basis for denial) and the lack of executive level functioning required for the device.

2) Successful device usage by the Claimant was indicated by the testimony of the Claimant's mother, her treating speech therapist ----------, and her evaluating speech therapist [redacted]. This was additionally documented in the initial evaluation report submitted to the Department. Testimony and evidence clearly showed that the Claimant has used the proposed device successfully.

3) Although the Department has only offered a hypothetical refutation that the proposed device is the least costly equipment that can meet the Claimant's basic healthcare needs by implying that some unspecified device is likely to satisfy these dual requirements more effectively, the requirements are established by policy; however, evidence and testimony clearly showed that the selection process for the Claimant's proposed device was based on sound methodology and met these requirements. Devices on one end of the product spectrum could not satisfy the Claimant's basic healthcare needs because they would be restrictive in terms of language and grammar, and were eliminated from consideration for this reason. Devices on the other end of the product spectrum were eliminated based on cost and features unnecessary for the Claimant. Multiple devices were considered from more than one vendor. There was no testimony from the Department to dispute the effectiveness of such a process in identifying the optimal device in terms of both meeting needs and minimizing cost. Testimony and evidence clearly showed that this process identified the proposed device as the optimal choice for meeting both the Claimant's basic healthcare needs and cost considerations.

4) Testimony and evidence showed that the Claimant was able to use the proposed device in the initial evaluation, in the subsequent four-week trial, and in ongoing use of a loaned device. The Department's denial rationale that the Claimant lacks the executive level functioning to operate the proposed device was not offered in the initial set of denial notices, and there was no reason offered in testimony to explain its sudden appearance in the final set of denial notices. Not only is this assertion contradicted by the testimony and evidence, it is disturbing that the Department appears to have added a reason for denial that, if deemed valid by the Department's consultant, should have been included in the initial denial notification.

5) With no valid reason for denial from the Department, no dispute that the Claimant needs alternate communication, and no dispute of a reasonable process used to identify the best device for providing the Claimant's communication needs, the Department was incorrect to deny the proposed speech generating device.

IX. DECISION:

It is the decision of the State Hearing Officer to **reverse** the Department's denial of prior authorization for durable medical equipment – specifically, a speech generating device – for the Claimant.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this _____ Day of February, 2012.

_____

Todd Thornton
State Hearing Officer