



Newsletter of the ASSISTIVE TECHNOLOGY Advocacy Project

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Our New York State Assistive Technology (AT) Advocacy Project regularly published the *IMPACT* newsletter, three or more times per year, between 1995 and 2002. During that time, our hard copy mailing list grew to more than 1,000 and many more readers accessed *IMPACT* on our website, www.nls.org/nyatmain.htm. Between 2002 and 2010, our production of the newsletter was more sporadic as we battled the dual challenges of less time to spend on it and less funding to justify printing and mailing. Our last print issue, with the lead article “Medicaid, Managed Care, and Durable Medicaid Equipment” (www.nls.org/at/Spring%202010.pdf), was published as our Spring 2010 issue.

Starting with this issue, we will begin to publish *IMPACT* again with a few changes. *IMPACT* is now an **electronic only newsletter**. Our Internet-only newsletter, posted on our website, will save money and the time that had been devoted to printing and bulk mailing. We will make it available to regular readers through email alerts with links to the latest newsletter on our website. *IMPACT* will continue to have the same front-page look it has had since 1995 but we will no longer be constrained by the eight-page format we used for most issues. Some issues will now be shorter, some longer. We will continue to view *IMPACT* as an ongoing curriculum on funding of AT and include resource links to our publications and other online resources. Finally, we will also use our new email readers list to provide you with other news related to our common goal of getting AT and specialized equipment into the hands of children and adults with disabilities.

If you would like to be added to the *IMPACT* email list, contact Lynn Urquhart at lurquhart@nls.org. Otherwise, look for the newsletter on our website at least three times per year.

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MEDICAID EQUIPMENT SERIES

Medicaid Can Fund Adaptive Tricycles

Our State AT Advocacy Project has delivered advocacy and technical assistance services for nearly 17 years. Most of our resources have always been devoted to representing individuals in hearings and other appeals when Medicaid or another funding source denies an application for funding. We cannot succeed with an appeal, however, if the application for funding is never submitted or if the denial of funding is never appealed.

Too often, prior approval requests for Medicaid funding of specialized equipment are not even submitted because somebody has concluded: “Medicaid will not fund X.” The origin of this conclusion is often unclear. It may come by word of mouth from the Medicaid agency (the State Department of Health) to the equipment vendor or health care professional. The “not covered by Medicaid” statement may originate in a written Medicaid policy (which may be illegal). Sometimes those involved in the process, including the Medicaid recipient or his/her family, may have heard information about what Medicare does not cover and are improperly assuming that means Medicaid will not cover X. We believe that misinformation about what Medicaid can or cannot fund often leads to individuals doing without. Our response to this problem is a new “Medicaid Equipment Series” and the focus of this issue is on adaptive tricycles.

For children with disabilities, exercise such as cycling can be therapeutic as well as fun. Cycling may provide a variety of health benefits unavailable through other medical interventions. For example, children with severe mobility limitations may have few, if any, other options for strengthening their cardiovascular system. In fact, cycling may be the best option for improving stamina, range of motion and coordination, and for strengthening muscles.

Adaptive tricycles are tricycles designed for persons with disabilities and are not the standard, off-the-shelf variety used by young children. They generally come equipped with modified handlebars, trunk support, pedal straps, and a variety of other accessories that make them useful only to people with disabilities. These adaptations make them much more expensive than their non-adapted counterparts. When items are expensive, adequate funding becomes crucial.

This article will discuss Medicaid as a possible funding source of adaptive tricycles. We will explain: why adaptive tricycles meet Medicaid’s definition of durable medical equipment; how the prior approval process works; the importance of the letter of medical justification; common reasons Medicaid may give for denying funding for an adaptive tricycle; and the fair hearing process for appealing a denial. Following the lead article, we provide a short summary of four successful fair hearings that resulted in an award of funding for an adaptive tricycle.

Adaptive Tricycles Meet Medicaid's Definition Of DME for both Children and Adults

New York Medicaid covers durable medical equipment (DME). An item is DME if it meets a four-part test:

- It can withstand repeated use for a protracted period of time;
- Is primarily and customarily used for a medical purpose;
- Is generally not useful in the absence of an illness or injury; and
- Is usually not fitted, designed or fashioned for a particular person's use. Where equipment is intended for one person's use, it may be custom made or customized.

It is clear that adaptive tricycles meet New York's definition of DME. They can withstand repeated use for a number of years and are specially outfitted for individuals with disabilities. They are not particularly useful in the absence of an illness or injury: there are other, less costly alternatives such as off-the-rack tricycles available for individuals without disabilities. Additionally, adaptive tricycles are usually not fitted, designed or fashioned for a particular person's use.

The Medicaid agency has argued that adaptive tricycles can be used by individuals without disabilities and therefore, they are not DME. This is not a persuasive argument. After all, a person who walks fine can still *use* a wheelchair. However, the wheelchair is not *useful* to that person because he or she can walk. Just because an individual without disabilities can *use* an adaptive tricycle does not mean that the tricycle is *useful* to that person when a bicycle or other type of cycle is available at much less cost.

The Medicaid Prior Approval Process

The process for getting Medicaid funding for an adaptive tricycle starts with a prior approval request. The tricycle must be prescribed by a physician, physician's assistant, or nurse practitioner. The prior approval request is submitted to the Medicaid agency, the State Department of Health (DOH), by an equipment supplier and must be accompanied by a letter of medical justification. The letter can be, and often is, written by the recipient's physical or occupational therapist. It should also be signed by the recipient's doctor or the doctor may submit his or her own letter supporting the medical



necessity for the tricycle. Medicaid law requires that the DOH issue a written decision within 21 days after they receive the prior approval request, unless more information is needed by DOH before it makes a decision (see *Medicaid Agency May Request Additional Information*, p.6, below).

The Letter of Medical Justification

The letter of medical justification is a very important document. Often, the primary reason why an equipment request was denied is because there was not a comprehensive letter of justification. However, even when a well-written letter of justification is submitted the DOH may deny the request. The justification letter will then become very important if the case goes to a fair hearing.

The letter should be extremely detailed. The author needs to convince the reader that he or she is medically qualified to make the opinions expressed in the letter. We suggest that the letter begin with an introduction of the author, including the author's qualifications and/or credentials: this is not the time for the author to be humble or shy about any relevant work or educational experience he or she may have. The letter should include such details as how long the author has worked with this particular population and how often the author has evaluated the child (or adult) for medical equipment such as the adaptive tricycle.

The letter must be dated. While this may seem obvious to many, we have seen undated letters of medical justification. The letter should look as professional as possible because it will make the letter more credible. If letterhead is available, the letter should be on letterhead. Proper grammar, punctuation, and absence of typographical errors are essential elements of a well-constructed letter.

The letter should include an explanation of how the author knows the child (or adult) needing the adaptive tricycle. Again, this helps build the credibility of the opinions expressed in the letter. After all, the opinion of a treating physical or occupational therapist that has been seeing the child three times per week for the last three years should carry more weight than the opinion of a therapist who never saw or evaluated the individual. If the recommendation was made after consultation with other medical professionals, such as last year's physical or occupational therapist, the letter should so state.

The letter should include a description of the individual in non-medical terms because at some point in the process, the reader of the letter may not be a medical professional. Even if the Medicaid reviewer is a physical therapist, he or she may have no clinical experience with children. The agency doctors who oversee the prior approval review may have no experience in prescribing medical equipment. If the Medicaid agency denies coverage and the individual asks for a fair hearing, the matter is heard by an Administrative Law Judge, who is an attorney.

The letter of medical justification should include a description of the tricycle, including all the accessories and features that make the requested tricycle an adaptive one and not one off-the-shelf. At one fair hearing involving an adaptive tricycle, the child's mother stated that she purchased an off-the-shelf tricycle and unsuccessfully tried to adapt it to meet her child's needs. In detail, she described the features on the adaptive tricycle that were missing on the stock tricycle. A well-drafted letter of medical justification will do likewise.

What medical need(s) will the adaptive tricycle meet? Medicaid only covers DME that is medically necessary. The Medicaid agency's regulations provide that an item is medically necessary if it will:

- Meet the person's medical needs;
- Reduce the person's physical or mental disability;
- Restore the person to his or her best possible functional level; or
- Improve the person's capacity for normal activity.

Some of the benefits of cycling were listed above, but each individual is unique and there may be medical reasons that are also unique. The letter should discuss other equipment or medical interventions that were considered and why they will not meet the individual's medical needs, or will not meet them more cheaply than the adaptive tricycle. There should also be a discussion of whether there are other less costly adaptive tricycles. The letter should specifically mention alternative manufacturers and models. A more detailed discussion of letters of medical justification can be found on the website of the our State AT Advocacy Project, at www.nls.org/at/atwinter05.htm.

The importance of proof-reading the finished letter before submitting it cannot be overstated. In fact, if possible, someone else should review the letter to make sure it is free of typographical errors, is grammatically correct, is easy to understand, hits all the necessary points, and does not mistakenly name a different client or patient.

The Medicaid Agency May Request Additional Information

Medicaid often responds to a prior approval request for an adaptive tricycle by requesting additional information. This request is known as a missing information letter. In one case involving a young child named JV, the missing information letter asked, "[w]hat other less costly means have been explored to allow independent exercise for range of motion, strength, mobility and coordination? Address why PT goals cannot be met with his existing walker, 4 times a week physical therapy sessions and the PT department or school's tricycle." The letter may also ask about whether there is a plan of care for use during the winter and other periods of inclement weather, and whether there are other funding options, including a Medicaid waiver program.

While it is important to respond to a missing information letter, suppliers, medical professionals and Medicaid recipients need to be alert to the possibility that the missing information letter may actually be a denial. For example, in JV's case the missing information letter also stated, "[a]lthough a tricycle may be a useful therapy modality, it is primarily and customarily a recreational item and not covered under the scope of this medical program...Providing exercise through the use of a recreational items is not a medical need." This missing information letter is essentially a denial. We will talk about how to challenge Medicaid denials in a later section.

Common Reasons Medicaid Gives for Denying Adaptive Tricycles

Unfortunately, New York Medicaid routinely denies adaptive tricycle prior approval requests for a variety of reasons. As noted above, the Medicaid agency has claimed that adaptive tricycles are not durable medical equipment. This is not an appropriate basis for a denial of adaptive tricycles. In a number of prior approval appeals, the Administrative Law Judge has found that adaptive tricycles meet the state's definition of DME.

More recently, Medicaid has denied funding for adaptive tricycles, claiming that Medicaid does not cover exercise equipment. This is also not a valid reason for denying adaptive tricycles. Categorically denying items of DME because they might also be exercise equipment violates the federal Medicaid Act and denials like this have been successfully challenged at administrative fair hearings. At one fair hearing, the Medicaid agency produced a *Medicare* document to support its position that exercise equipment cannot be covered. However, Medicare and Medicaid are two entirely different programs with different criteria. Whether Medicare covers adaptive tricycles or not, Medicaid must cover medically necessary items that meet the definition of DME.

In more recent cases, the Medicaid agency has claimed that adaptive tricycles are not medically necessary because they can only be used seasonally. It should be possible to rebut that claim by presenting a well-thought-out plan of care for use of the adaptive tricycle, particularly during inclement or winter weather. The plan of care should address the following:

- How often the tricycle should be used and for how long;
- Who will be present to supervise; and
- Where the tricycle will be used.

Also, is there an indoor venue that can be used during long periods of inclement winter weather (basement, garage, mall, etc.)? If there are no options for indoor use, does the person have a tolerance for winter weather? Will the sidewalks, driveways, or parking lots be shoveled or plowed sufficiently to permit the recommended use?

In a fair hearing involving a 19 year old with multiple diagnoses, an adaptive tricycle was prescribed to help improve balance and ability to maneuver in space. The Medicaid agency denied the request, in part because they claimed use would be intermittent because of winter weather. At the hearing, the child's father stated that she would be able to use the tricycle all year. He noted that his daughter enjoys the outdoors and has no health issues that would prevent her from being outside in cold weather. He stated that he has a concrete driveway, that half his yard is paved with concrete, and that he regularly keeps these areas free from snow. He also described a large paved, cleared area across the street that she could use. Further, he said he could transport the tricycle to an indoor venue such as a mall. These are the kind of details that could be included in the letter of medical justification.

If there are no options for use during periods of inclement weather, the therapist or doctor should be prepared to discuss why the adaptive tricycle is still medically necessary. In other words, will the child be able to sustain the medical gains achieved through regular use of the tricycle, even during those times the tricycle cannot be used?

The Medicaid agency has also argued that recipients must first seek payment from a Medicaid home and community based waiver program. Again, this is not an appropriate reason for Medicaid to deny funding of an item that otherwise meets the definition of DME. Medicaid waiver programs are intended to only pay for assistive technology and specialized equipment not covered by the traditional Medicaid program and, therefore, the Medicaid agency should not be deferring to the waiver program. In some instances, home and community based waiver programs have paid for adaptive tricycles. This often occurs after a Medicaid waiver recipient is denied Medicaid funding.

Denials of Prior Approval Requests can be Appealed!

When Medicaid denies prior approval, the recipient may request a fair hearing. A hearing can also be requested if the Medicaid agency voids, rejects, inactivates, or otherwise fails to act on a prior approval request. The notice of denial should explain that the recipient has 60 days to request the fair hearing.

Hearings can be requested by US mail, telephone, fax or online at www.otda.ny.gov/oah/fhreq.asp. If you request a fair hearing online, remember to print your copy so that you have verification of the request. If you receive a State Department of Health denial, you have 60 calendar days from the date of that notice to request a fair hearing. It is very important to keep track of that deadline as failure to meet the 60-day deadline means your hearing request will not be honored (unless you have "good cause" for missing the deadline which is rare).

If the Medicaid recipient plans to seek our help with an appeal, we suggest that you speak with us as soon as you are denied. This will give us a chance to discuss the facts of your case with you, review any documents submitted in your case, and make a determination of whether or not we are willing to represent you at the fair hearing. If we

are in agreement that the State AT Project will represent you, we will often request your fair hearing unless we specifically tell you to do so. When in doubt, the Medicaid recipient should request the fair hearing as the 60 days could run out while we and the recipient (or person assisting them) are exchanging phone messages.

As we discussed above, Medicaid programs should pay for, and have been directed to pay for adaptive tricycles that have been shown to be medically necessary. If the medical professionals have done a good job of documenting why the tricycle is medically necessary and why less costly alternatives, including alternative pieces of equipment or medical interventions, will not meet the recipient's needs, the child or adult should ultimately get funding for the adaptive tricycle, either during the prior approval process or after the fair hearing.

Conclusion

This is first electronic-only version of our *IMPACT* newsletter and the first in our Medicaid Equipment Series. Readers who have questions about the funding of adaptive tricycles may call Marge Gustas at 716-847-0655 ext. 256 or email her at mgustas@nls.org. You should also contact Marge if you have any questions about Medicaid funding of DME.

Several Fair Hearing Decisions Awarded Medicaid Funding for Adaptive Tricycles

The NY State Assistive Technology Advocacy Project at Neighborhood Legal Services has won several fair hearings involving adaptive tricycles. The hearing decisions are important because they discuss the elements necessary to win Medicaid funding for an adaptive tricycle. Copies of these decisions are available upon request. Please contact Marge Gustas, at mgustas@nls.org, or Diana Straube, at dstraube@nls.org.

In the ***Matter of K*** (FH # 4034949N): K, an eight year old girl with multiple diagnoses, was able to walk only short distances and relied on a stroller for transportation. She needed the tricycle to help her cardiovascular and respiratory systems, strengthen her legs, and promote healthy functioning of her gastrointestinal system. A number of K's treating medical professionals supported the request for the adaptive tricycle. A letter from K's physical therapist stated that K needed cardiovascular exercise at least five times per week, and the only means of substantial exercise that she could participate in was cycling. Her cardiologist confirmed that she needed to engage in cardiovascular exercise. A letter from her orthopedic doctor stated that an adaptive tricycle would help her orthopedic problems (those problems were detailed in the letter). Her physical therapist added that to date, the only effective means of addressing K's need for cardiovascular exercise was with the adaptive tricycle. There was also testimony that K

used adaptive tricycles during physical therapy sessions at school, and that off-the-shelf tricycles could not be modified to meet her needs.

In light of all the evidence presented at the hearing, the decision found the adaptive tricycle to be durable medical equipment (DME) and medically necessary for K.

In the **Matter of D** (FH # 4366825Z): D was a 15-year old girl with cerebral palsy, scoliosis, and developmental delay. She also had spasticity throughout her body and decreased flexibility of her hamstrings, adductors, and internal rotators. She used an adaptive tricycle three times per week in therapy provided in school, and an adaptive tricycle was prescribed for home use so that she could use it daily. Her medical team noted that the tricycle improved her cardiovascular health, pulmonary function, vascular health in her legs, and corrected her poor posture caused by the scoliosis. Additionally, it would help prevent contractures in her legs and increase her endurance.

At the hearing, D's mother stated that her daughter does not have enough strength in her legs to walk fast enough to elevate her heartbeat. She leans to the right and does not have sufficient balance to use a treadmill. She said cycling loosens up the muscles in her daughter's legs, which tend to contract and for which she has needed surgery in the past. Without cycling, her daughter's legs ache. Further, before cycling, her daughter's legs would turn purple and be cold from lack of circulation. After cycling, her legs no longer turn purple or become cold.

The hearing decision rejected the agency's argument that adaptive tricycles are not DME and directed the agency to approve funding of the tricycle as medically necessary for the child.

In the **Matter of A** (FH # 5695234N): A was 19 years old, had a gross motor age of two-and-a-half, and used the adaptive tricycle at school to improve balance and her ability to maneuver in space. According to her physical therapist, the tricycle addressed those areas that impact on A's ability to walk independently, and she had shown substantial improvement in her strength, balance and coordination since she began using the tricycle several years earlier. The physical therapist stated that no other therapy provided the same physical challenges and no other therapy yielded as much improvement. She also stated that A could pedal the tricycle independently and her steering abilities were improving with use: she had moved from handheld assistance with steering to verbal cues. She believed A would benefit from home use of an adaptive tricycle.

While state Medicaid law does not require that a piece of DME be used in a trial, this case showed that a successful trial (actually a long-term history of use in A's school program) can be very helpful at winning a fair hearing. After hearing all the evidence, the hearing decision held that adaptive tricycles are DME and found the adaptive tricycle for home use to be medically necessary for A.

In the **Matter of J** (FH # 5731516R): At the fair hearing, the physical therapist of a five year old child stated that learning to pedal an adaptive tricycle and practicing the reciprocal movement of pedaling had helped the child learn to walk. Also, the child had tactile defensiveness and holding the handlebars of the tricycle led to a greater tolerance for holding onto his walker.

J's mother stated that they have a barn at the end of their paved driveway. She described the barn as having a hard, packed dirt floor, and ample floor space in which to ride a tricycle during inclement weather. Another option for winter-time use was the grandmother's two-car heated garage, located near the child's home.

The hearing decision found that the evidence established the connection between the child's use of the tricycle and his improved balance and mobility and the effectiveness of using the tricycle at home to allow these improvements to continue. In light of all the evidence, the fair hearing decision found the adaptive tricycle to be DME and medically necessary for J.

New York Court Awards Medicaid Funding for Bantam Sit-to-Stand Stander

In New York State, as noted above, when Medicaid denies funding for equipment an individual can appeal through the fair hearing process. If the fair hearing decision also denies funding, that decision can be appealed into state court through a process called the Article 78 appeal. (Alternatively, the matter can often be pursued in federal court.) In the case of *Godfrey ex rel. Godfrey v. Shah*, 91 AD 3d (NYAD 4 Dept 2012), New York's Appellate Division in Rochester heard this appeal from an unfavorable fair hearing decision and ruled in favor of the individual.

In its decision, the court found that the Bantam stander for this seven-year-old girl was medically necessary. The court specifically held that "petitioner had established that the Bantam would allow her to engage in weight bearing, would assist with her reflux, bowel and bladder health, and would increase her bone density." The court also held that petitioner met her burden of establishing that there were no less costly alternatives that "would provide those precise benefits while also enabling [her] to be transferred safely to and from her wheelchair." Finally, the court pointed out that "the testimony of the physical therapist that the petitioner is at risk for being dropped and injured without the use of the Bantam 'is entitled to significant weight . . . and cannot be outweighed solely by the opinions of non-medical personnel or persons not within the same medical profession as the ordering or treating practitioner' (18 NYCRR 513.6[e])." Marge Gustas of our State AT Advocacy Project represented this individual at the fair hearing and the evidence she put in at the hearing made it possible to win in court.

If you would like a copy of the court's decision or the briefs filed by Diana Straube or by Medicaid's attorney in this case, contact Diana at dstraube@nls.org.

The Technical Assistance Corner

Question Presented: What should I expect at a fair hearing?

Our Answer: Administrative hearings are a semi-formal, recorded fact gathering proceeding where the Medicaid recipient and his or her witnesses are allowed to offer additional evidence in support of their prior approval request or expand upon evidence that has already been provided to Medicaid. While the thought of attending a fair hearing can be nerve wracking, the hearing is a golden opportunity to address and clarify critical information for resolving your case with a favorable decision.

The fair hearing will start with the Administrative Law Judge introducing himself or herself and explaining how the hearing will proceed. A Medicaid agency representative will explain why it denied your request. You or your advocate will have the chance to question Medicaid about its decision making process. If you are not represented, the judge may ask the Medicaid representative questions. Then, you and your witnesses will be allowed to tell the judge why you believe Medicaid is wrong. Medicaid and the judge may ask questions of you or your witness as well. The recording will stop when the judge closes the record.

While fair hearings can be done by Medicaid recipients, their families or therapists, the State AT Project strongly suggests that you discuss whether or not you want our assistance or representation at the fair hearing. Recipients who are represented and prepared by trained advocates report that they are not as nervous about the fair hearing process.

The NY State Assistive Technology Advocacy Project

Our Staff, Our Services

Our Staff:

- **Marge Gustas, Staff Paralegal** (mgustas@nls.org, 716-847-0650 ext 256) – primary contact for new referrals/technical assistance questions; handles administrative hearings and other appeals
- **Diana M. Straube, Staff Attorney** (dstraube@nls.org) – handles administrative hearings, other appeals and litigation
- **James R. Sheldon, Jr., Supervising Attorney** (jsheldon@nls.org) – is also Project Supervisor of our National AT Advocacy Project
- **Lynn Urquhart, Project Secretary** (lurquhart@nls.org) – primary contact to get added to our newsletter electronic mailing list

Our Services:

- **Individual Representation** – before any agency which denies funding for assistive technology (e.g., Medicaid, Medicare, private insurance, special education programs, ACCES-VR, Commission for the Blind)
- **Publications, Including IMPACT Newsletter** – also have publications to support training; have access to materials produced by National AT Advocacy Project/other projects of Neighborhood Legal Services
- **Training** – contact Marge Gustas if you would like a speaker for your conference or agency training event
- **Resources to Support Attorneys, Other Advocates** (includes technical assistance, resource materials, copies of winning hearing decisions) – contact Marge Gustas

Send Us Your Winning Hearing Decisions, Other Support Materials

We maintain a resource library of Medicaid hearing decisions, briefs from court cases, and medical/technology publications that will support advocacy before Medicaid and other funding sources. Please send us any of these documents so that we can use them and make them available to others.

Please note: If you no longer wish to receive e-mail announcements of upcoming IMPACT issues, please unsubscribe to our mailing list by contacting lurquhart@nls.org.

For pictures of more adaptive tricycles go to www.rifton.com and www.triaid.com