IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JUN 23 1995
J. T. NOBLIN, CLERK
BY _____ DEPUTY

CLAIRE MYERS, by and through her next best friend Charlotte Myers, ANGELA WILLIS, by and through her next best friend Clara Maxine Rounds, and OLIVER LEE, by and through his next best friend Angela Lee, on behalf of themselves and other persons similarly situated

PLAINTIFFS

VS.

CIVIL ACTION NO. 3:94CV185LN

STATE OF MISSISSIPPI, OFFICE OF THE GOVERNOR, DIVISION OF MEDICAID and HELEN WETHERBEE, in her Official Capacity as the Executive Director of the Division of Medicaid

DEFENDANTS

MEMORANDUM OPINION AND ORDER

This cause is before the court upon the plaintiffs' Motion for Summary Judgment and the defendants' Cross Motion for Summary Judgment. The parties have consented to proceed before the undersigned United States Magistrate Judge in accordance with the provisions of 28 U.S.C. 636(c) and Rule 73(c) of the Federal Rules of Civil Procedure. The court, having carefully considered the parties' motions and supporting memoranda as well as the appropriate legal authorities, finds that the plaintiffs' Motion for Summary Judgment is well-advised and should be granted. Consequently, the court finds that the defendants' Cross Motion for Summary Judgment is not well-advised and should be denied.

FACTS

The three named plaintiffs, Claire Myers, Angela Willis, and Oliver Lee, are Medicaid recipients under the age of 21. Each plaintiff suffers from cerebral palsy and as a result has a condition known as dysarthria which causes them not to be able to speak. The plaintiffs are eligible for services for which they qualify under the Division of Medicaid's Early Periodic Screening, Diagnosis and Treatment (EPSDT) program. EPSDT makes available to children under 21 Medicaid funding for periodic screening for physical, visual, and auditory screening in order to detect health problems that can be treated early and, therefore, more effectively.

Expanded services may be available for children under this program, even if not covered under the State Plan as long as it is a recognized Medicaid service under Title XIX and as long as the state Medicaid agency determines that the service is medically necessary under its definition of medical necessity. Expanded services must be requested through a child's physician and submitted to the Division's EPSDT program on a Plan of Care.

Each of the three plaintiffs submitted a request through a physician on a Plan of Care for an augmentative assistive communication device (AAC). AAC devices are electronic and non-electronic devices that allow individuals to overcome, to the maximum extent possible, communication limitations that interfere with their daily activities. Buekelman and P. Mirenda, Augmentative & Alternative Communication 104 (1992). They are

recognized as a form of speech language pathology [SLP] treatment which is used when other forms of treatment are unsuccessful in allowing a patient to organically produce speech. Such a device would aid each plaintiff in communicating but would not correct or ameliorate the medical condition that results in their inability to speak. Each of the plaintiffs' requests was evaluated by the Division's Medical Review Team in terms of the Division's definition of medical necessity:

> The determination by the Medical Assistance Program that a service is reasonably necessary to prevent, diagnose, correct, cure, alleviate or prevent the worsening of conditions that endanger life or cause suffering or pain, or result in illness or infirmity, or threaten to cause or aggravate a handicap or cause physical deformity or malfunction. There must also be no other equally effective, more conservative, or substantially less costly course of treatment available or suitable for the client requesting the service.

Each of the plaintiffs' requests was denied based on the team's determination that the device was not medically necessary, as it would not correct, cure, alleviate or prevent the medical condition which causes the child to be unable to speak. The Division's Medical Review Team consisted of a Developmental Pediatrician, Dr. Weir Conner; a Registered Nurse with a background in pediatrics, Tanya Britton, R.N.; and, the Deputy Director for Programs with the Division, Max Cole.

Each of the named plaintiffs requested an administrative appeal from the denial of the request for Medicaid funding for an AAC device. Hearing officers were appointed by the Executive Director of the Division of Medicaid, and hearings were conducted

for each plaintiff. Transcripts of those hearings are contained in the pleadings as Exhibits "E", "F", and "G" to the defendants' cross motion for summary judgment. Dr. Elizabeth Keeling served as the hearing officer at plaintiff Claire Myers' hearing, whereas Mr. Lewis Smith, Director of Long-Term Care of the Division of Medicaid, served as the hearing officer at the hearings regarding the requests of the plaintiffs Angela Willis and Oliver Lee.

At all three hearings, the members of the Medical Review Team, Dr. Conner, Tanya Britton, and Max Cole testified that the requested AAC device did not meet the Division's definition of medical necessity. Exhibit "E", tr. p. 94-95, p. 103. The recommendation of Mr. Lewis Smith, hearing officer for the plaintiffs Willis and Lee, was that the denial of the request be reversed. Melissa Rawls, a speech language pathologist, testified at Angela Willis' hearing that the requested AAC device would correct Angela's *inability to verbally communicate* but would not correct Angela's *inability to speak*. Exhibit "F", tr. p. 30. In recommending that the denial be reversed, Mr. Smith noted that "AAC devices are not medical devices, not even close to being primarily so ... They are assistive communication devices and as such will never precisely meet Medicaid's current definition of 'medical necessity,' the sole reason for Medicaid's denial. The AAC device will not correct, cure, make better, or worsen the cause of Miss Willis' dysarthria . . ." [Exhibit "F", Smith Recommendation, September 8, 1993]. However, Mr. Smith found that the minimal

medical applicability of the device was sufficient to meet the definition.

Ms. Helen Wetherbee, Executive Director, Division of Medicaid, ultimately made the final decisions in all of the plaintiffs' cases, finding that the primary function of the devices would be a remedial one, serving to increase the level of expressive language development in the plaintiffs, but that there was no evidence establishing the medical necessity of the devices.

All parties concede that these plaintiffs meet all the requirements necessary to establish entitlement to this service except the requirement that the AAC devices are "medically necessary". To establish an entitlement to a Medicaid service, a person must show that (1) he is eligible; (2) the requested service is covered; and (3) the service is medically necessary. Eligibility is not at issues in this case, as all three named plaintiffs are currently Medicaid recipients. Coverage is also not at issue; the defendants admit that AAC devices are durable medical equipment and covered under the Early Periodic Screening and Diagnosis Program [EPDST]. Myers Tr. at 103 (Cole). The only issue is whether or not the defendants' finding that these devices are not medically necessary was supported by the evidence.

THE CLAIMS OF THE PARTIES

The three plaintiffs have brought this action in federal court on behalf of themselves individually and on behalf of a class consisting of all such children who have or will have requested Medicaid funding for AAC devices. They seek declaratory and

injunctive relief to compel Medicaid to fund these devices for them. They further claim that defendants' actions violate the Medicaid Act, Title XIX of the Social Security Act, the Rehabilitation Act of 1973, 29 U.S.C. Section 794(a), the American with Disabilities Act, 42 U.S.C. Section 12131(2), and the Due Process Clause of the Fourteenth Amendment. The plaintiffs assert that they are challenging the defendants' refusal to provide the named plaintiffs and all class members the only effective form of treatment for their communication disabilities.

The parties agree that there are no material facts in dispute. Hence, summary judgment is proper "when no genuine issue of material fact exists that would necessitate a trial." Alexandria Associates, Ltd. v. Mitchell Co., 2 F.3d 598, 600 (5th Cir. 1993) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 2552-54, 91 L.Ed.2d 265 (1986)).

The defendants in this cause claim that they apply the medical necessity determination to all requested services under the EPSDT program on a case-by-case basis and on an individual request basis. The defendants claim that AAC devices are not excluded *per se* and are not denied an individual categorically because of the recipient's severity of disability. Exhibits A, B, & C [Affidavits of Helen Wetherbee, Oscar Weir Conner, III, M.D., and Max Cole] to Defendants' Response to Plaintiffs' Motion for Summary Judgment, and Defendants' Cross-Motion for Summary Judgment. The defendants urge that the denial of the AAC device to each of these plaintiffs was based upon an individual determination of medical necessity and

each plaintiff was afforded an administrative hearing upon denial of their requests for Medicaid funding of an AAC device. The defendants categorically deny that the Division of Medicaid has as a matter of policy excluded coverage of AAC devices. According to the defendants, if this were their policy, why would have a Medicaid Review Team have reviewed each case for determination of medical necessity and why would have administrative hearings been afforded?

The defendants further state that they are limited by the federal guidelines handed to Medicaid agencies regarding funding of services under the EPSDT program which interpret how the EPSDT program works under federal law and regulations. According to the defendants, an October 7, 1992, Health Care Financing Authority's (HCFA) Transmittal Notice, provides that it is the state agency's responsibility to determine medical necessity before approving any services under ESPDT, and the determination of medical necessity belongs solely to the state. Furthermore, federal guidelines contained in the May 26, 1993, program letter from DHHS reiterate that it is within the state agency's authority and responsibility to set up procedures to prior authorize services under the EPSDT program that are not normally provided in the Mississippi State Plan; however, these services can be available under the EPSDT program if they meet, for each requesting recipient, the definition of medical necessity.

The plaintiffs assert that the Mississippi Medicaid program is administered under the presumption that AAC devices are not

medically necessary for persons with severe expressive communication disabilities who are unable to effectively communicate through other means. According to the plaintiffs, the defendants refuse to acknowledge under any circumstances that AAC is medically necessary for the named plaintiffs and class members. The plaintiffs cite Max Cole's statement that "[i]t is our policy that this device doesn't meet the criteria of medical necessity." Max Cole at Myers Tr. at 105. According to Dr. Conner, an AAC would only be medically necessary if it was used solely (100% of the time) to express "pain, hunger or medical symptoms." Dr. Oscar Weir Conner III at Lee Tr. at 32.

The plaintiffs urge that this test applied by the defendants is insupportable in medical science and that it is illegal as a matter of law because it is applied only to recipients needing AAC treatment and serves as an absolute bar to covered services.

The plaintiffs concede that the defendants are required to apply a test of medical necessity to the plaintiffs' claims and that they did apply such a test. However, the plaintiffs urge that the defendants did not apply or interpret their definition of medical need *correctly*.

THE LAW

The parties concede that the federal Medicaid regulations authorize states to apply a "medical necessity" standard to requests for covered services. 42 C.F.R. §440.230(d). *See* Beal v. Doe, 97 S.Ct. 2366 (1977). Although the defendants have been mandated to apply such a necessity test, they are not immunized

from scrutiny in their application of the test. Congress has mandated that each state Medicaid program be administered in the "best interests of the recipients." 42 U.S.C. §1396(a)(19). See also, S.Rep. No. 404, 89th Cong. 1st Sess., reprinted in [1965] U.S. Code Cong. & Admin. News, 1943, 2104. The Medicaid Act was passed

> for the purpose of enabling each State . . . to furnish . . . rehabilitation and other services to help such families and individuals attain or retain capability for independence or self care.

42 U.S.C. §1396. Courts have found that attaining or retaining the capability for independence is the "primary goal for Medicaid." Meyers v. Reagan, 776 F.2d 241, 243 (8th Cir. 1985).

Although the State has much discretion in administering its Medicaid program, that discretion is not unfettered.

> A state's discretion in administering its Medicaid program does not shelter it from judicial action on those occasions where it has transgressed the strictures of the Social Security Act.

Jeneski v. Myers, 209 Cal.Rptr. 178, 187 (Cal. App. 2d Dist. 1984) (*quoting* Smith v. Miller, 665 F.2d 172, 178 (7th Cir. 1981)); Mitchell v. Johnston, 701 F.2d 337, 340, 351 (5th Cir. 1983); Rush v. Parham, 625 F.2d 1150, 1155-56 (5th Cir. 1980). *See generally* White v. Roughton, 530 F.2d 750 (7th Cir. 1976).

Once a state chooses to voluntarily participate in the Medicaid program, it must comply with relevant provisions of the Medicaid Act and its regulations. *See* Mitchell v. Johnston, 701 F.2d 337, 340 (5th Cir. 1983). As the plaintiffs point out,

judicial review is available to determine whether the defendants' medical need interpretation about AAC devices is consistent with contemporary research, policy and practice about speech-language pathology and AAC intervention. See Daubert v. Merrell Dow Pharm., 113 S.Ct. 2786, 2796-7 (1993), *see also* decision on remand, 43 F.3d 1311 (9th Cir. 1995); Detsel v. Sullivan, 859 F.2d 59 (2d Cir. 1990).

The state's application of its medical necessity test must obviously be supported by substantial evidence. These defendants have failed to ensure their program policies and practices are consistent with "accepted medical practice." Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 762 (1988); Akron Center for Reproductive Health v. City of Akron, 462 U.S. 416, 430-31, 435-37 (1983) (Accepted medical practice is the "touchstone" in deciding whether Medicaid program policies and practices are reasonable); Beal v. Doe, 432 U.S. 438, 450 (1977) (Brennan, J., dissenting). Additionally, the defendants have failed to ensure their policies and practices are consistent with the contemporary thoughts and practices of those specialists who are concerned with a specific discipline. Detsel v. Sullivan, 859 F.2d 59 (2d Cir. 1990) (federal Medicaid interpretation of private duty nursing services based on out of date view of how service is provided is arbitrary and capricious and unenforceable).

CONCLUSION

The court agrees with the plaintiffs' position that the application by the defendants of the medical necessity test to

these plaintiffs' claims was without scientific foundation. The evidence establishes that the defendants' policy regarding AAC devices is based solely on the testimony of Dr. Conner that the devices are not medically necessary and that communication is only medically necessary when the message is of medical symptoms. The court finds that the opinions of Dr. Conner in this regard are not supported by the weight of the credible evidence put forth and are, in fact, rebutted by the evidence put forth by these plaintiffs. The court further finds that Dr. Conner's opinions cannot be considered valid expert evidence under Fed. R.Evid. 702 because it does not meet the two-prong analysis required by Daubert v. Merrell Dow Pharmaceutical, Inc., ____ U.S. ____, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469 (1993).

The first prong of the Daubert test requires that the testimony be derived by the scientific method and supported by appropriate validation. Id. at 2795. Key inquiries in determining this include whether an expert's reasoning rests upon scientific methods and procedures rather than unsupported reasoning; whether the opinion is based upon outdated facts; whether the opinion has been subjected to peer review and publication; and whether the opinion is generally accepted within the scientific community. Id. at 2795-2797. The plaintiffs have proven by convincing evidence that the opinions of Dr. Conner do not meet the first prong of the Daubert test. Generally, Dr. Conner, who has never prescribed an AAC device, and who does not have expert knowledge of SLP and the current state of the science underlying communication disorders,

cannot provide substantial evidence to support the defendants' application of its medical necessity standard. The defendants have provided no facts to show their interpretations of medical need for speech-language pathology, AAC interventions and severe dysarthria are based on valid, scientific principles, as the law requires. Conversely, the plaintiffs have put forth credible and substantial evidence showing that AAC devices are reasonably medically necessary to alleviate these plaintiffs' inability to communicate, via testimony at the hearings and through the Affidavits of Judith Frumkin, Coordinator of Special Education for the Madison-Oneida Board of Cooperative Education Services (BOCES) in Verona, New York; Gloria Kellum, professor of Communicative Disorders at the University of Mississippi Speech & Hearing Center; Howard Shane, Ph.D., a professor at the Harvard Medical School; and, Diane Paul-Brown, Ph.D., the director of the speech-language pathology division of the American Speech-Language-Hearing Association. The defendants have failed to controvert this evidence.

Though this fact is certainly not controlling, the court does find it instructive that forty other Medicaid programs do pay for AAC devices, i.e., finds them medically necessary. See Affidavit of Elaine Koch, Exhibit 11 to plaintiff's memorandum; Affidavit of Beth Sinteff, Exhibit 12 to plaintiff's memorandum. Furthermore, the Washington State Medicaid program pays for AAC devices while using a medical need definition that is identical to Mississippi's. Exhibit 21 to plaintiffs' memorandum. Moreover, over 200 health insurance providers pay for AAC devices. Koch Affidavit.

The court finds that these defendants' application of its medical necessity test *to these particular plaintiffs* was arbitrarily applied, contrary to the overwhelming weight of the evidence, and manifestly wrong. As such, these defendants violated the rights of these plaintiffs as protected by the Due Process Clause of the United States Constitution. A judgment only in favor of these individual plaintiffs shall be entered; any effort of plaintiff to make this a class action or apply this ruling to the facts of persons other than these plaintiffs is denied.

For these reasons, the court does hereby find and order that the plaintiffs' Motion for Summary Judgment, is hereby granted. A Final Judgment in accordance with this Memorandum Opinion and Order will be entered.

SO ORDERED, this the 23RD day of June, 1995.

Alfred H. Nicols, Jr.
UNITED STATES MAGISTRATE JUDGE

COPY

SOUTHERN DISTRICT OF MISSISSIPPI
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OCT 16 1995
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BY _____ DEPUTY

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CLAIRE MYERS,
by and through her
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Charlotte Myers,
ANGELA WILLIS,
by and through her
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Clara Maxine Rounds,
and OLIVER LEE,
by and through his
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Angela Lee,
on behalf of themselves
and all other persons
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STATE OF MISSISSIPPI,
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DIVISION OF MEDICAID
and HELEN WETHERBEE
in her Official Capacity
as the Executive Director
of the Division of Medicaid DEFENDANTS

ORDER CORRECTING FINAL JUDGMENT

This cause is before the Court on the Motion of Plaintiffs to correct the Final Judgment and Memorandum Opinion entered on June 23, 1995. Having been informed of the premises that this action was certified as a class on July 26, 1994, the Court finds that the Motion is supported by good cause and should be granted.

THEREFORE, IT IS ORDERED AND ADJUDGED that:

1. The permanent injunctive relief granted by the Final Judgment enjoining defendants "from administering the Mississippi Medicaid program under the presumption that AAC devices [Augmentative Communication Devices] are not medically necessary

for persons with severe expressive communication disabilities who are unable to effective communicate through verbal or other means" shall apply to both the named Plaintiffs and Class Members

2. The statement in the Memorandum Opinion and Order "[a] judgment only in favor of these individual plaintiffs shall be entered; any effort of plaintiff to make this a class action or apply this ruling to the facts of persons other than these plaintiffs is denied" shall not be construed inconsistently with the permanent injunction prohibiting the presumption that AAC device are not medically necessary referred to in the above paragraph.

SO ORDERED, this the 16th day of October, 1995.

Alfred G. Nicols, Jr.
UNITED STATES MAGISTRATE JUDGE

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