

SUPREME COURT OF THE STATE OF NEW YORK  
Appellate Division, Fourth Judicial Department

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PRESENT: PIGOTT, JR., P. J., PINE, WISNER AND HURLBUTT, JJ.

TP 99-770

MATTER OF CHESTER LAGOWSKI, PETITIONER,

V

DENNIS WHALEN, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF  
HEALTH, RESPONDENT.

This proceeding having duly come on to be heard before this Court upon the petition of Chester Lagowski, by William F. Mastroleo, verified on June 2, 1999, the notice of petition, the answer and return, and the order entered September 1, 1999, pursuant to the provisions of article 78 of the CPLR by the Honorable Joseph D. Mintz, a Justice of the Supreme Court at a term of the Supreme Court held in and for the County of Erie, and the matter having been submitted by William F. Mastroleo of counsel for petitioner, Frank Brady of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED that the determination be and the same hereby is unanimously annulled on the law without costs and the petition is granted.

Memorandum that is hereby made a part hereof.

Entered: March 29, 2000

CARL M. DARNALL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK  
*Appellate Division, Fourth Judicial Department*

(283) TP 99-770. (Erie Co.) -- MATTER OF CHESTER LAGOWSKI, PETITIONER, V DENNIS WHALEN, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT. -- Determination unanimously annulled on the law without costs and petition granted. Memorandum: We agree with petitioner that the determination denying his request for the purchase of a Dynabyte 3100 communication device must be annulled and the petition granted. Petitioner has been diagnosed with cerebral vascular accident with right hemiparesis and aphasia; he receives speech language therapy and adult aphasia communication therapeutic support. He requires a communication device to communicate with his family as well as staff at the facility where he resides. At a fair hearing, petitioner presented the testimony of a speech language pathologist that the Dynabyte 3100 would best suit petitioner's needs because it allows a person able to see a computer screen to respond with one hand/finger using direct selection, unlike other communication devices such as the Digi Vox 2, which requires manual changing of overlays. Additionally, the Dynabyte 3100 is more portable and weighs less than the Digi Vox 2 and other alternative communication devices. A representative from petitioner's health care facility supported the use of the Dynabyte 3100 because it would enhance petitioner's overall quality of life and would enable the staff "to more efficiently meet [petitioner's] needs as it would give [petitioner] the ability to express himself". Another speech pathologist testified that the Digi Vox 2 would not allow petitioner "to communicate quickly and effectively, because the message might not even be relevant" by the time petitioner found the overlays; additionally, the speech pathologist believed that the condition of petitioner's fine motor skills would make it difficult for petitioner to use the overlays. The Office of Medicaid Management waived its appearance and submitted on papers, contending that there were less costly devices available than the Dynabyte 3100 and that petitioner's alleged need for the Dynabyte 3100 was not medical in nature.

Social Services Law § 365-a (2) defines medical assistance as "the cost of medically necessary medical, dental and remedial care, services and supplies \* \* \* which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with such person's capacity for normal activity, or threaten some significant handicap". The statute "must be interpreted and enforced in a reasonable and humane manner in accordance with its manifest intent and purpose" (*Matter of Sabot v Lavine*, 42 NY2d 1068, 1069; see, *Matter of Denton v Perales*, 72 NY2d 979, 981).

The evidence is uncontroverted that petitioner has difficulty manipulating manual overlays and consequently is often unable to express his immediate needs to facility staff and family. On this record respondent's determination that the Dynamite 3100 is not medically necessary is not supported by substantial evidence (see, *Matter of Johnson v Wing*, 237 AD2d 960; *Matter of Gartz v Wing*, 236 AD2d 890; *Matter of Dobson v Perales*, 175 AD2d 628). (CPLR art 78 Proceeding Transferred by Order of Supreme Court, Erie County, Mintz, J.) PRESENT: PIGOTT, JR., P. J., PINE, WISNER AND HURLBUTT, JJ. (Filed Mar. 29, 2000.)

**Supreme Court**  
APPELLATE DIVISION,  
Fourth Judicial Department.  
Clerk's Office, Rochester, N.Y.

*I, CARL M. DARNALL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.*



IN WITNESS WHEREOF, *I have hereunto set my*  
*hand and affixed the seal of said Court at the City of*  
*Rochester, New York, this MAR 29 2000*

*Carl M. Darnall*

Clerk.