

Medi-Cal SGD Access Issues 2003-2005

Historically, Medi-Cal reimbursed suppliers of SGDs at their full catalog prices, or MSRP x 100 percent.

November 1, 2003: Payment Rate Reduction # 1

During the Fall, 2003, the California Legislature enacted a series of laws that authorized in some cases, and mandated in others, the reduction of payment rates to suppliers of a wide range of Medi-Cal services. SGDs fell within the scope of one of these laws. California Welfare & Institutions Code, § 14105.48(d) stated:

14105.48. (a) The department shall establish a list of covered services and maximum allowable reimbursement rates for durable medical equipment as defined in Section 51160 of Title 22 of the California Code of Regulations and the list shall be published in provider manuals. The list shall specify utilization controls to be applied to each type of durable medical equipment.

(d) Reimbursement for all durable medical equipment billed to the Medi-Cal program utilizing codes with no specified maximum allowable rate shall be the lesser of (1) the amount billed pursuant to Section 51008.1 of Title 22 of the California Code of Regulations, or (2) the guaranteed acquisition cost negotiated by means of the contracting process provided for pursuant to Section 14105.3 plus a percentage markup to be established by the department, or (3) the actual acquisition cost plus a markup to be established by the department, or **(4) the manufacturer's suggested retail purchase price reduced by a percentage discount not to exceed 20 percent**, or (5) a price established through targeted product-specific cost containment provisions developed with providers.

This law *authorized* Medi-Cal to reduce payment rates by an amount not greater than MSRP x 20 percent. It stated only a maximum allowable reduction: considering the original rate, this law barred Medi-Cal from reducing the rate below MSRP x 80 percent. It did not, however, mandate a reduction in payment rates, nor did it dictate a specific percentage reduction.

Medi-Cal did not read the legislation this way. It reduced the payment rates for SGDs by 20 percent, *i.e.*, the maximum allowed by this statute. In addition, before making this rate reduction, Medi-Cal had no discussions with the SGD suppliers regarding how they would respond to a payment rate of this size, or, to explore how the SGD suppliers might be able to achieve a specific level of cost savings to Medi-Cal through other means.

This payment rate reduction: from MSRP x 100 percent to MSRP x 80 percent, went into effect on November 1, 2003.

Responses to Payment Rate Reduction # 1

From that point forward, access to SGD's approved by Medi-Cal, CCS or Medi-Cal managed care providers was adversely affected. Assistive Technology, Dynavox, Prentke Romich, Words Plus and Zygo – the five largest SGD manufacturers – initially reported to the ATLC they would not accept this payment rate reduction and in response would refuse to ship devices approved by these decision makers. (Ultimately, only Dynavox and Words Plus actually withheld approved devices.)

In May 2004, as the number of approved, withheld devices reached close to 3 dozen, a meeting was held with Medi-Cal officials to discuss this impasse. Following this meeting, Medi-Cal agreed to increase the payment rates for individuals who were dual Medicare and Medi-Cal eligible, roughly one third of the total. No relief was offered to anyone else.

Shortly thereafter, *Joseph Q. v. Shewry* was filed in the United States District Court in Sacramento. Zachary Potter, an attorney at Holland + Knight, in San Francisco, represented the Medi-Cal recipients without charge. *Joseph Q.* challenged the payment rate reduction as both a procedural and substantive violation of the Medicaid "equal access" provision, as well as a violation of the Medicaid EPSDT provision, and Title II of the Americans with Disabilities Act.

Because there are so few Medi-Cal purchases of SGD's, the total savings Medi-Cal will achieve by the payment rate reduction implemented on November 1, 2003 was so small that the program decided it was less expensive to settle the case than to litigate it. Thus, Medi-Cal and the recipients began to discuss settlement almost immediately.

In late October, a final agreement was reached. Medi-Cal agreed to increase the payment rates for SGD's from MSRP x 80 percent, to the applicable Medicare fee schedule x 100 percent for SGD's with MSRP greater than or equal to the fee schedule; to MSRP x 99 percent for SGD's with MSRP less than the fee schedule; and to pay for SGD mounts and accessories at MSRP x 83 percent. This agreement resulted in the release of 53 SGD's that had been approved but withheld due to the payment rate impasse.

Click [here](#) to review a copy of the *Joseph Q.* settlement agreement.

Although this agreement cleared the shelves of devices that had been approved but not shipped, Medi-Cal insisted on a specific cut off date for the agreement, *i.e.*, the increased rates would expire at the end of October 2004. Medi-Cal refused to discuss extending this agreement beyond that date.

November 1, 2004 - Present: Payment Rate Reduction # 2

Medi-Cal's insisted that the *Joseph Q.* agreement cease to be effective after October 31, 2004 because as of November 1, 2004, SGD's became subject to a different section of California Welfare & Institutions Code, § 14105.48, which stated a different payment rate reduction.

As of November 1, 2004, a federal statute requires Medi-Cal to apply the HCPCS coding system for items of durable medical equipment. This is the coding system used by Medicare, and to which the Medicare fee schedule for SGD's applies. When this administrative change occurred, however, SGD's became subject to California Welfare & Institutions Code, § 14105.48(b), which states:

(b) Reimbursement for durable medical equipment, except wheelchairs and wheelchair accessories, shall be the lesser of (1) the amount billed pursuant to Section 51008.1 of Title 22 of the California Code of Regulations, or (2) ***an amount that does not exceed 80 percent of the lowest maximum allowance for California established by the federal Medicare program for the same or similar item or service***, or (3) the guaranteed acquisition cost negotiated by means of the contracting process provided for pursuant to Section 14105.3 plus a percentage markup to be established by the department.

This statutory section *mandates* a payment rate reduction, and identifies a ceiling above which Medi-Cal cannot exceed: Medicare fee schedule x 80 percent. The effect of this change is to reduce the SGD payment rate below what it was in November 2003, *i.e.* below the amount that led to the filing of a lawsuit against Medi-Cal for denying equal access.

Once again Medi-Cal engaged in no discussions with the SGD manufacturers regarding their reaction to this proposed rate cut. Again, in response, the five largest SGD manufacturers reported to the ATLC they would not accept the rate or ship their products if approved by Medi-Cal, CCS, or Medi-Cal managed care providers.

Responses to Rate Reduction # 2

This impasse presents a greater challenge than the first rate reduction. The first one resulted from an exercise in agency discretion and Medi-Cal had the authority to adjust the rates to ensure equal access. By contrast, the second rate reduction is the direct result of a statutory mandate. Instead of full authority, Medi-Cal has no meaningful discretion to raise the rates.

This statutory change forces a change in the forum for solving this impasse: only the Legislature or a court can order or direct an increase in the payment rates.

Before either of those alternatives is pursued, a proposal was made to Medi-Cal administrators to address this issue. The statute mandating the rate cut applies only to items of DME. A comparable statutory provision, § 14105.21, imposes

the same payment limit under the prosthetic device benefit. But there is no comparable payment rate barrier applicable to the speech language pathology benefit. Thus, as long as both SLP services are covered, and SGDs will "fit" can within the speech language pathology benefit, Medi-Cal will have the discretion to adjust the rates to ensure equal access.

SLP services are a covered benefit for Medi-Cal recipients.

In addition, many sources support SGD coverage under SLP services. This was the express holding of *Meyers v. Reagan*, 776 F.2d 241 (8th Cir. 1985), and was one of the holdings in *Will T. v. Taylor*, 1:95 CV 2901A (JEC)(N.D.GA. 2000). These courts applied the federal regulatory definition of speech language pathology services, which states the scope of this service includes "*necessary supplies and equipment.*" 42 C.F.R. § 440.110(c)(1).

The federal government also supports SGD coverage under the Speech Language Pathology service. Numerous HCFA policy letters expressly refer to SLP services as an appropriate service or benefit category for SGD coverage. See HCFA Regional Office III, Medicaid Letter 93-97 (1993) ("Assistive devices and technology" can be covered under DME; prosthetic devices; or as equipment under the therapy benefits); HCFA Regional Office III, Medicaid Letter 93-98 (October 26, 1993) ("communicative assistive devices" can be covered under EPSDT, DME, prosthetic devices, or under one of the therapy benefits); HCFA Regional Office VI, Medical Services Letter 93-110 (November 22, 1993) ("communicative assistive devices" can be covered under EPSDT, DME, prosthetic devices, or under one of the therapy benefits); HCFA Regional Office VI, Medical Services Letter 95-31 (March 7, 1995) (communicative assistive devices can be covered under DME, prosthetic devices, or therapy services). Click [here](#) to review these HCFA policy letters.

Finally, Medi-Cal itself has recognized that SGDs fit within the SLP benefit. When Medi-Cal first adopted SGD coverage in July 1996, it initially covered SGDs under this benefit. See [July 1996 Medi-Cal SGD Coverage Criteria](#).

A proposal for Medi-Cal to re-classify SGDs as SLP equipment was presented to senior Medi-Cal officials on January 31, 2005. Unfortunately, Medi-Cal administrators have not responded to this proposal.

Another response that has been proposed is a change in the statute that governs SGD payment rates. AB 436 was introduced to direct Medi-Cal to pay for SGDs at the same rate approved in the *Joseph Q.* settlement in October 2004. This bill currently is pending. Click [here](#) to access proposed support letters for AB 436.

March 17, 2005

The Honorable Judy Chu
Chair, Assembly Appropriations Committee
State Capitol, Room 2114
Sacramento, California 94249-0049

RE: Support for Passage of AB 436

Dear Assemblywoman Chu:

I write to urge you to support the earliest possible Assembly Appropriations Committee consideration and passage of AB 436. This bill will amend California Welfare & Institutions Code, § 14105.48.

AB 436 has one goal and responds to an urgent need. AB 436 will direct Medi-Cal to restore the payment rates for "speech generating devices (SGDs)" to the amounts Medi-Cal paid for these devices prior to November 1, 2004. Passage of AB 436 is urgently needed because on November 1, 2004, § 14105.48 directed Medi-Cal to lower its SGD payment rate. The resulting amount is so low that SGD suppliers have refused to ship the devices that Medi-Cal has determined to be medically necessary and has approved.

SGDs are items of durable medical equipment (DME) covered by Medi-Cal since 1996. SGDs are essential tools to allow people with severe communication impairments to speak and thereby meet their daily communication needs. These devices serve as a functional substitute for the body parts that produce speech but are mal- or non-functioning due to disability.

This payment rate impasse affects very few Medi-Cal recipients, but its consequences are profound. At present, approximately 2 dozen Medi-Cal recipients who's SGDs have been approved are having their SGDs withheld by suppliers. This total increases by a few more Medi-Cal recipients each week.

The ability to speak has been described as "vital," and the inability to speak has been described as "devastating." The ability to speak and use language is recognized as the functional ability that separates human beings from other species. Whatever the person's primary medical condition: *e.g.*, ALS, cerebral palsy, multiple sclerosis, Parkinson's disease, stroke or traumatic brain injury, the addition of a related communication impairment makes that condition worse. A person unable to speak is unable to express basic needs and wants, unable to communicate information or opinion, and unable to direct or inquire about health care.

Medi-Cal recipients unable to get their SGDs have nowhere else to turn. They have no other sources of funding for these devices. The ongoing SGD payment rate impasse has caused the denial of their access to treatment.

The importance of AB 436 to the lives of Medi-Cal recipients with severe speech impairments is huge, but its dollar cost will be exceedingly small. It is estimated that the total cost of this bill will be less than \$ 80,000 per year.

I ask that you support the Assembly Appropriations Committee's passage of AB 436 at the earliest possible opportunity.

Thank you.

Respectfully submitted,

Address:

Phone:

Interest in AB 436:

March 17, 2005

The Honorable Wilma Chan
Chair, Assembly Health Committee
State Capitol, Room 6005
Sacramento, California 94249-0016

RE: Support for Passage of AB 436

Dear Assemblywoman Chan:

I write to urge you to support the earliest possible Assembly Health Committee consideration and passage of AB 436. This bill will amend California Welfare & Institutions Code, § 14105.48.

AB 436 has one goal and responds to an urgent need. AB 436 will direct Medi-Cal to restore the payment rates for "speech generating devices (SGDs)" to the amounts Medi-Cal paid for these devices prior to November 1, 2004. Passage of AB 436 is urgently needed because on November 1, 2004, § 14105.48 directed Medi-Cal to lower its SGD payment rate. The resulting amount is so low that SGD suppliers have refused to ship the devices that Medi-Cal has determined to be medically necessary and has approved.

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Medi-Cal recipients unable to get their SGDs have nowhere else to turn. They have no other sources of funding for these devices. The ongoing SGD payment rate impasse has caused the denial of their access to treatment.

I ask that you support the Assembly Health Committee's passage of AB 436 at the earliest possible opportunity.

Thank you.

Respectfully submitted,

Address:

Phone:

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