

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2301779
Decision Date:	5/17/2023	Hearing Date:	04/04/2023
Hearing Officer:	Paul C. Moore		

Appellant Representative:

 (by telephone)


MassHealth Representative:

Sara Pedone, licensed physical therapist,
Optum (by telephone)



*Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, 6th Floor
North Quincy, MA 02171*

APPEAL DECISION

Appeal Decision:	Denied	Issue:	Durable Medical Equipment
Decision Date:	5/17/2023	Hearing Date:	04/04/2023
MassHealth Rep.:	Ms. Pedone	Appellant Rep.:	
Hearing Location:	Board of Hearings (remote)		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

By notice dated December 29, 2022, MassHealth denied the appellant's PA request for a Special Tomato Activity Chair because it is not medically necessary (Exhibit 1). The appellant filed this appeal in a timely manner with the Board of Hearings (BOH) on March 1, 2023 (Exhibit 2).¹ Denial of assistance is valid grounds for appeal to BOH (130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied the appellant's PA request for a Special Tomato Activity Chair.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 450.204 and 130 CMR

¹ MassHealth Eligibility Operations Memo 20-09, "MassHealth Response to Coronavirus Disease 2019 (COVID-19)," issued April 7, 2020, states in relevant part: "In response to the current Coronavirus Disease 2019 (COVID-19) national emergency, MassHealth is implementing the following protocols to support the public health efforts to expedite medical care and maintain care for both new MassHealth applicants and existing members. Regarding Fair Hearings during the COVID-19 outbreak national emergency, and through the end of the month in which such national emergency period ends: All appeal hearings will be telephonic; and **Individuals will have up to 120 days, instead of the standard 30 days, to request a fair hearing for member eligibility-related concerns.**"

409.414(B), in denying the appellant's PA request for a Special Tomato Activity Chair.

Summary of Evidence

The MassHealth representative, a licensed physical therapist and a consultant with Optum, testified by telephone that MassHealth received a PA request on behalf of the appellant from National Seating and Mobility, Inc., a durable medical equipment (DME) provider, on December 27, 2022. The PA request sought MassHealth coverage for a Special Tomato Activity Chair ("tomato chair"). The MassHealth representative testified that MassHealth denied the PA request via written notice to the appellant dated December 29, 2022; the denial notice states in relevant part:

The Division will not pay for DME or medical/surgical supplies that are not both necessary and reasonable for the treatment of a member's medical condition. MassHealth is denying [the appellant's] PA request.

The Division will not pay for items that are more costly than medically appropriate and feasible alternative pieces of equipment or that serve essentially the same purpose as equipment already available to the member.

MassHealth is denying your request for PA. The reason for this decision is that the documentation submitted on your behalf indicates that the requested services do not meet professionally recognized standards of health care.

MassHealth has denied the request for a Special Tomato Activity Chair. Coverage has been provided to meet the member's positioning and mobility needs at home and in the community with a Rifton activity chair for the home and a stroller for use in the community. A third device is not indicated or medically necessary.

(Exh. 1)

An undated letter of medical necessity ("LOMN") by Breanne Dusel Babcock, the appellant's physical therapist, was submitted to MassHealth with the instant PA request. The LOMN notes in relevant part:

[The appellant] is a [REDACTED] male with [medical diagnoses of global developmental delay and spastic diplegic cerebral palsy].

Concerns of parent: [The appellant] is unable to maintain a safe and appropriate sitting position when out in the community due to medical diagnoses and associated presentation with global muscular weakness, discoordination, truncal hypotonicity, and LE hypotonicity. This prevents his ability to safely participate in meaningful social activities outside of the home or school setting.

Medical history: . . .

Vision status: cortical visual impairment

Hearing status: Intact

Communication: Nonverbal, knows a few sign language words (i.e., 'eat,' 'more,' 'all done,' 'yes/no')

Bowel/Bladder Function: completely reliant upon use of diapers; unable to communicate when needing to use toilet

Social history:

Home set-up – [Appellant] lives with his family in a 2-story home, requires physical assist for stair navigation.

Transportation – [Appellant] currently fits in normal car seat.

School Environment – [Appellant] attends summer schooling 2-3x/week and attends specialized schooling during the school year; entering second year of preschool.

Current services – school PT/OT/speech, vision therapy in school, outpatient ABA [applied behavior analysis].

Other activities: hippotherapy. . .

Current equipment: bilateral custom [ankle-foot orthotics] with soft boot insert and plantar flexion stop. [Appellant] currently has an over-the-counter toddler booster seat and high chair that he is too large for in terms of height and weight; as well as does not provide adequate safety and support. [Appellant] was recently approved for the Rifton Activity Chair for use at home and at school for safe positioning when eating and performing fine motor activities. . . .

Recommended Equipment: Special Tomato Soft Touch Liner. . . Seat Cushion Size: Size 4; Back Cushion Size: Size 5; no recline

The Special Tomato Soft Touch Liner is of medical necessity for [the appellant]. Due to his diagnosis of spastic diplegic cerebral palsy, [the appellant] has increased tonicity of his bilateral hamstrings, hip flexors, hip adductors, and gastrocs. He has concurrent truncal hypotonicity. The combination of these two tonicity impairments means that he requires a higher level of truncal/pelvic support as well as lower extremity positioning in order to safely and appropriately sit within a seating device. He requires a higher level of support than what commercial grade seating systems can provide due to these impairments. Given [the appellant's] truncal hypotonicity in combination with lower extremity spasticity, he is at an increased risk of developing spinal misalignment such as scoliosis and/or joint contractures should his trunk and pelvis not be captured safely and appropriately within a supportive seating system. Given his gross motor delays, [the appellant] spends extended amounts of time in the seated position. [The appellant's] ability to meaningfully participate in activities outside his home relies heavily on his ability to maintain a safe and supportive sitting position. He is unable to achieve this sitting position in commercial grade booster seats or chairs due to the lack

of safety harness and spinal/pelvic/lower extremity positioning options.

The Special Tomato seating device would not only provide the best amount of positional support and safety, but promote self independence (*sic*) and ability to interact meaningfully with his family and peers for seated activities and tasks outside of the home. He cannot feasibly utilize his Rifton Activity chair in these situations due to the size and weight of the piece of the equipment. Please consider that the absence of this seating system could negatively impact [the appellant's] physiological and social development. . . .

(Exh. 4, pp. 8-10)

The MassHealth representative testified that the total cost of the tomato chair to MassHealth is \$544.46, including a markup charged by the retailer. She noted that according to the LOMN, the appellant needs assistance with transfers, has impaired sitting balance, and has poor static and dynamic standing balance. She noted that MassHealth has already purchased a Convaid cruiser/stroller for the appellant for use in the community, and has purchased a Rifton Activity chair for the appellant for use at home; she asserted that as such, a third medical device is not medically necessary for the appellant (Testimony).

The MassHealth representative pointed out that a second LOMN by Ms. Babcock (the appellant's physical therapist) in support of a prior PA request for the Rifton activity chair, approved in September, 2022, seems to contradict the current LOMN in support of the tomato chair (Exh. 5). In particular, the second LOMN asserts that "other medical grade seating devices such as Tumbleform and Tomato systems have been considered but lack the appropriate amount of support for both the spine/pelvis and lower extremities that [the appellant] requires. . . ." (*Id.*). According to the MassHealth representative, these letters present conflicting information about the medical necessity of the tomato chair for the appellant (Testimony).

Because MassHealth has already provided DME that supports the appellant's positioning needs both in the community (Convaid cruiser/stroller) and at home (Rifton Activity chair), the instant PA request for the tomato chair was denied. The MassHealth representative stated that pursuant to 130 CMR 409.414(B), MassHealth does not pay for DME that is more costly than alternative medically appropriate, feasible pieces of DME, or for DME that serves the same purposes as DME already in use by the member (Testimony).

The appellant's mother testified by telephone that the appellant, who is now [REDACTED], has difficulty walking long distances, and sitting upright in a chair. She testified that specifically, the back cushion and bottom cushion of the requested tomato chair provide trunk support for the appellant, and prevent him from sliding out of a chair. The cushions are "strapped on" to a regular chair. She asserted that the Rifton Activity chair is very heavy and cannot easily be transported to settings outside the home. She added that the Convaid cruiser/stroller is also heavy and bulky to transport, even when folded and transported in a sports utility vehicle. One activity that the appellant enjoys, according to his mother, is having dinner at his grandfather's home on Fridays;

his grandfather lives on the second floor of a two-story condominium. The appellant's mother testified that on those occasions, the appellant will sit in the lap of his mother or another relative at the dinner table, because it is just not possible to carry the Convoid cruiser/stroller upstairs to his grandfather's home (Testimony).

The MassHealth representative stated that the Rifton Activity chair has laterals on the sides, and a headrest, armrest, and foot plates to keep the appellant's posture upright. She added that both the requested tomato chair and the Rifton Activity chair have safety belts and/or harnesses to ensure the appellant does not fall or slide out of the chairs (Testimony).

The appellant's mother stated that the Rifton Activity chair used by the appellant has two pelvic straps and a lap strap. These straps prevent the appellant from sliding out of the chair. She added, however, that the tomato chair has straps and/or clips around the waist and legs, which are easier to fasten (Testimony).

She added that the Convoid cruiser/stroller is very large, and does not fit under a table when other persons are sitting in chairs at the table. Also, the height of the Convoid cruiser/stroller does not reach the top of a dining room table. Thus, at an event where his peers might be seated at a table, the appellant would need to sit in the cruiser/stroller off to the side and may feel excluded, according to the appellant's mother (Testimony).

The MassHealth representative noted that the back cushion and the bottom cushion of the tomato chair each weigh 3 lbs. On the other hand, according to the MassHealth representative, the Convoid cruiser/stroller weighs 28 lbs. (Testimony).

The MassHealth representative added that MassHealth does not ever remove or "take back" DME from a member and replace it with other DME, if the former has been deemed medically necessary for the member by MassHealth (Testimony).

The appellant's mother addressed the previous letter from Ms. Babcock, the appellant's physical therapist (indicating that the tomato chair lacks the appropriate amount of support required for his spine/pelvis and lower extremities), asserting that the appellant has made gains since the date of the letter in the late summer of 2022. She believes that the tomato chair would now provide the appropriate spinal and pelvic support, and leg support, that the appellant needs (Testimony).

The appellant's mother added that the appellant has gained trunk strength through hippotherapy, in which he rides a horse at a therapeutic riding center in Rehoboth. This therapy trains, conditions and strengthens the appellant's muscles, according to the appellant's mother (Testimony).

Findings of Fact

Based on a preponderance of the evidence, I find the following:

1. The appellant is a [REDACTED] MassHealth member with diagnoses of global developmental

delay and spastic diplegic cerebral palsy (Testimony, Exh. 4).

2. MassHealth received a PA request on behalf of the appellant from National Seating and Mobility, a DME provider, on December 27, 2022 seeking coverage for a Special Tomato Activity Chair (“tomato chair”).
3. MassHealth denied the PA request via written notice to the appellant dated December 29, 2022; the denial notice states in relevant part: “The Division will not pay for DME or medical/surgical supplies that are not both necessary and reasonable for the treatment of a member’s medical condition. MassHealth is denying [the appellant’s] PA request. The Division will not pay for items that are more costly than medically appropriate and feasible alternative pieces of equipment or that serve essentially the same purpose as equipment already available to the member. MassHealth is denying your request for PA. The reason for this decision is that the documentation submitted on your behalf indicates that the requested services do not meet professionally recognized standards of health care. MassHealth has denied the request for a Special Tomato Activity Chair. Coverage has been provided to meet the member’s positioning and mobility needs at home and in the community with a Rifton activity chair for the home and a stroller for use in the community. A third device is not indicated or medically necessary” (Exh. 1).
4. The appellant filed a timely appeal of this denial on March 1, 2023 (Exh. 2).
5. MassHealth approved coverage for a Rifton Activity chair for the appellant, for use in his home, in September, 2022 (Testimony, Exh. 5).
6. MassHealth also approved coverage for a Convaid cruiser/stroller for the appellant for use in his home (Testimony).
7. An undated LOMN from the appellant’s physical therapist reflects that the appellant is unable to maintain a safe and appropriate sitting position when out in the community due to medical diagnoses and associated presentation with global muscular weakness, discoordination, truncal hypotonicity, and LE hypotonicity (Exh. 4).
8. The LOMN also states that the appellant requires physical assistance for stair navigation and wears bilateral custom ankle-foot orthotics (*Id.*).
9. The LOMN asserts: “The Special Tomato Soft Touch Liner is of medical necessity for [the appellant]. Due to his diagnosis of spastic diplegic cerebral palsy, [the appellant] has increased tonicity of his bilateral hamstrings, hip flexors, hip adductors, and gastrocs. He has concurrent truncal hypotonicity. The combination of these two tonicity impairments means that he requires a higher level of truncal/pelvic support as well as lower extremity positioning in order to safely and appropriately sit within a seating device. He requires a higher level of support than what commercial grade seating systems can provide due to these impairments. Given [the appellant’s] truncal hypotonicity in combination with lower

extremity spasticity, he is at an increased risk of developing spinal misalignment such as scoliosis and/or joint contractures should his trunk and pelvis not be captured safely and appropriately within a supportive seating system. Given his gross motor delays, [the appellant] spends extended amounts of time in the seated position. [The appellant's] ability to meaningfully participate in activities outside his home relies heavily on his ability to maintain a safe and supportive sitting position. He is unable to achieve this sitting position in commercial grade booster seats of chairs due to the lack of safety harness and spinal/pelvic/lower extremity positioning options. The Special Tomato seating device would not only provide the best amount of positional support and safety, but promote self independence (*sic*) and ability to interact meaningfully with his family and peers for seated activities and tasks outside of the home. He cannot feasibly utilize his Rifton Activity chair in these situations due to the size and weight of the piece of the equipment. Please consider that the absence of this seating system could negatively impact [the appellant's] physiological and social development. . . " (Exh. 4).

10. The total cost of the tomato chair to MassHealth is \$544.46 (Testimony, Exh. 4).
11. The Rifton Activity chair cannot be used easily outside the appellant's home due to its weight and bulk (Testimony).
12. The Convoid cruiser/stroller is foldable and portable (Testimony).
13. The Convoid cruiser/stroller weighs 28 lbs. (Testimony).
14. The back cushion of the requested tomato chair weighs three lbs., and the bottom cushion of the requested tomato chair also weighs 3 lbs. (Testimony).
15. The tomato chair may be attached to a regular chair and once the safety straps are buckled, it protects the user from sliding out of the chair (Testimony).
16. The safety straps on the requested tomato chair go around the user's waist and legs and are easier to fasten than the straps on the Convoid cruiser/stroller (Testimony).
17. The Rifton Activity chair has laterals on the sides, and a headrest, armrest, and foot plates to keep the appellant's posture upright (Testimony).
18. The Convoid cruiser/stroller does not fit under a table when other persons are sitting in chairs at the table, and does not reach the top of a dining room table (Testimony).
19. The appellant has gained trunk strength through hippotherapy, in which he rides a horse at a therapeutic riding center. This therapy trains, conditions and strengthens the appellant's muscles (Testimony).
20. A previous LOMN written by the appellant's physical therapist in the summer of 2022 in

support of a PA request for a Rifton Activity chair stated, "other medical grade seating devices such as Tumbleform and Tomato systems have been considered but lack the appropriate amount of support for both the spine/pelvis and lower extremities that [the appellant] requires. . . ." (Exh. 5).

21. The appellant's mother asserted that the appellant can now better support his own spine and pelvis, and lower extremities, than he could in the summer of 2022 (Testimony).

Analysis and Conclusions of Law

Pursuant to MassHealth regulation 130 CMR 450.204:

The MassHealth agency will not pay a provider for services that are not medically necessary and may impose sanctions on a provider for providing or prescribing a service or for admitting a member to an inpatient facility where such service or admission is not medically necessary.

(A) A service is "medically necessary" if:

(1) it is reasonably calculated to prevent, diagnose, prevent the worsening of, alleviate, correct, or cure conditions in the member that endanger life, cause suffering or pain, cause physical deformity or malfunction, threaten to cause or to aggravate a handicap, or result in illness or infirmity; and

(2) there is no other medical service or site of service, comparable in effect, available, and suitable for the member requesting the service, that is more conservative or less costly to the MassHealth agency. Services that are less costly to the MassHealth agency include, but are not limited to, health care reasonably known by the provider, or identified by the MassHealth agency pursuant to a prior-authorization request, to be available to the member through sources described in 130 CMR 450.317(C), 503.007, or 517.007.

(B) Medically necessary services must be of a quality that meets professionally recognized standards of health care, and must be substantiated by records including evidence of such medical necessity and quality. A provider must make those records, including medical records, available to the MassHealth agency upon request. (See 42 U.S.C. 1396a(a)(30) and 42 CFR 440.230 and 440.260.)

(Emphasis added)

Pursuant to MassHealth regulation 130 CMR 409.413(A):

MassHealth covers medically necessary DME that can be appropriately used in the member's home or setting in which normal life activities take place, and in certain circumstances described in 130 CMR 409.415 for use in facilities. All DME must be approved for community use by the federal Food and Drug Administration (FDA).

DME that is appropriate for use in the member's home may also be used in the community.

For DME such as a wheelchair, a prior authorization request must be submitted to MassHealth (130 CMR 409.418).

Next, pursuant to 130 CMR 409.414, "Non-Covered Services:"

The MassHealth agency does not pay for the following:

- (A) DME that is experimental or investigational in nature;
- (B) DME that is determined by the MassHealth agency not to be medically necessary pursuant to 130 CMR 409.000, and 130 CMR 450.204: Medical Necessity. This includes, but is not limited to, items that:
 - (1) cannot reasonably be expected to make a meaningful contribution to the treatment of a member's illness, disability, or injury;
 - (2) are more costly than medically appropriate and feasible alternative pieces of equipment; or**
 - (3) serve the same purpose as DME already in use by the member,** with the exception of the devices described in 130 CMR 409.413(D);

...

(Emphasis added)

In the instant appeal, the appellant seeks coverage of a special tomato chair, that has both a back cushion and bottom cushion that may be attached to a regular chair. The special tomato chair also has straps and/or clips for the user's waist and legs that, once fastened, help the user to sit upright and prevent the user from sliding out of the chair.

The appellant already has supportive DME that MassHealth covered for him in the past, *to wit*, a Rifton Activity chair and a Convaid cruiser/stroller. These wheelchairs enable the appellant to propel himself and remain upright at home, and in the community.

The appellant's mother argued that the requested tomato chair is light and easily transported, while the Convaid cruiser/stroller is heavy (28 lbs.) and even if transported for use in another's home, does not fit well under a dining room table where others may be seated. As a result, according to the appellant's mother, the appellant often needs to sit away from others in the cruiser/stroller at social events.

There is no evidence that the Convaid cruiser/stroller does not fit under *any* table; it may be that the Convaid cruiser/stroller simply does not fit well under one particular dining room table.

Further, the appellant's mother indicated that the safety straps on the requested tomato chair are easier to fasten than those of the Convaid cruiser/stroller. However, caregiver convenience and ease are not part of MassHealth's inquiry about medical necessity for DME.

There is no dispute that both the Convaid cruiser/stroller and the requested tomato chair will protect the appellant, keep his body in alignment, and will allow him to maintain a safe and supportive sitting position when in use.

MassHealth has already determined that the appellant medically needs supportive seating at home and in the community, and has provided coverage for such DME. The requested tomato chair, although lighter and easier to transport, would, if approved, duplicate the functions and benefits already served by the Convaid cruiser/stroller.

I agree with MassHealth that the requested DME serves the same purposes as DME already in use by the appellant; as such, it is excluded from coverage under 130 CMR 409.414(B)(3).

Also, because there is another medical service or site of service, comparable in effect, available, and suitable for the appellant requesting the service, that is more conservative or less costly to the MassHealth agency (the Rifton Activity chair and the Convaid cruiser/stroller, respectively), the requested tomato chair is not medically necessary for the appellant at this time under 130 CMR 450.204(A)(2), above.

For all of these reasons, this appeal must be DENIED.

Order for MassHealth

None.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Paul C. Moore
Hearing Officer
Board of Hearings

cc: Optum appeals representative