

STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing Nos.	17,070
	)		17,326
Appeal of	)		17,410
	)		17,490
	)		& 17,522

INTRODUCTION

The petitioners in these consolidated appeals are Medicaid beneficiaries under the age of twenty-one who have applied for and have been denied coverage for orthodontic treatment because they do not meet criteria adopted by the Department of Prevention, Assistance, Transition, and Health Access (PATH) for treatment. The issues are whether the written criteria adopted by the Department and its application of those criteria violate federal Medicaid law.

PROPOSED FINDINGS OF FACT

General Program Facts

1. The Vermont State Medicaid plan does not cover orthodontic services for adults and is not required to do so by the federal Medicaid laws. The Early Periodic Screening, Diagnosis and Treatment (EPSDT) provisions of Medicaid do require all states participating in the program to provide

some level of dental services, including orthodontics to recipients under the age of twenty-one.

2. PATH's (at that time the Department of Social Welfare's) response to the EPSDT requirements has been the implementation of a "medically necessary" orthodontic treatment program for an individual under the age of twenty-one "to correct a severe malocclusion." The terms in quotations are further defined in the regulations as requiring that the individual's "condition must have one major or two minor malocclusions according to diagnostic criteria adopted by the department's dental consultant or if otherwise necessary under EPSDT found at M100." (Emphasis supplied.) Orthodontic treatment provided by PATH can be either "interceptive" which prevents a developing malocclusion due to harmful habits, or "comprehensive" which treats a malocclusion which already exists.

3. The criteria referred to above were adopted by a committee of dental health professionals, including dentists from the Department of Health, orthodontists who practice in the community, and, since 1994, the President of the Vermont Society of Orthodontists. The committee meets from time to time to review the criteria and to update it if necessary.

4. The most recent "diagnostic treatment criteria" used by PATH for either interceptive or comprehensive orthodontic treatment are as follows: Major criteria: Cleft palate; severe skeletal Class III; Posterior crossbite (3+ teeth); other severe cranio-facial anomaly; Minor criteria: Impacted cuspid, 2 Blocked cupsids per arch (deficient by at least 1/3 of needed space); 3 Congenitally missing teeth, per arch (excluding third molars); Anterior open bite 3 or more teeth (4+mm); Crowding per arch (10+mm), Anterior crossbite (3+ teeth); Traumatic deep bite impinging on palate, Overjet 10+mm (measured from labial to labial).

5. Medicaid orthodontic providers are given forms containing these criteria and are informed that eligibility for treatment depends upon a malocclusion which is "severe enough to meet a minimum of 1 major or 2 minor diagnostic treatment criteria." Providers are asked to check off all of the criteria that apply. Although the form contains a space to list a diagnosis it does not allow the listing of other conditions which might exist.

6. When a child has only a dental impairment, as opposed to a combined impairment from dental and medical problems, PATH reviews information provided on its form by the treating orthodontist to see if one major or two minor

criteria are met. If the criteria are met, the child is granted without further evaluation or review. If the criteria are not met, the child is denied, again, without further evaluation or review.

7. If the child has both a dental and medical problem, the request is reviewed "as otherwise necessary under EPSDT found at M100." PATH never uses this EPSDT criteria passage to evaluate strictly dental problems. None of the petitioners in this matter alleges a combination dental and medical problem.

8. PATH's dental health professionals state that their goal in providing orthodontic treatment is to insure that "handicapping malocclusions" are treated. They define this term as a malocclusion that impedes function in relation to chewing, speech or digestion. It is their opinion that this is the coverage contemplated by EPSDT regulations. They believe that functional impediments of this type are relatively rare. They estimate that ninety percent of children who meet one major or two minor criteria they have adopted do not actually have "handicapping malocclusions". They have adopted what they believe are generous criteria which may sweep in non-handicapping conditions as well but which are designed to insure that no child with a truly

"handicapping" condition is left untreated. The line was purposefully drawn at a low level of impediment for the "safety" of the children.

9. PATH's written regulation does not contain the definition of "severe malocclusion" offered by PATH's dental experts. The term "severe" is defined only with reference to the listed impairments.

Individual Petitioner Facts

Petitioner C.J.

10. The petitioner C.J. is a thirteen-year-old girl whose orthodontist requested Medicaid coverage of treatment he proposed for her on February 2, 2001. This treatment was requested on the form prepared by PATH labeled "Comprehensive Orthodontic Authorization Request." (See paragraph 5, supra.) The petitioner's orthodontist checked off under the rubric "minor criteria" that the petitioner met two of these: that she had a "traumatic deep bite impinging upon her palate" and that she had an "overjet of 10 or more mm measured from labial to labial". Since there was no place on the form to list other diagnostic criteria, the orthodontist crossed out the criteria for "impacted cuspid" and noted that the petitioner had, in addition, an "impacted bicuspid". In a note written

in a blank space on the bottom, he explained that the overjet was actually a little less than 10 mm but hoped that the treatment would be approved anyway.

11. Upon review of this form, PATH agreed that the petitioner had a traumatic deep bite impinging upon her palate but disagreed that the overjet was over 9mm. Measurements taken of photos sent by the orthodontist indicated to the Department that the overjet was 6-7mm. The petitioner was denied coverage on March 23, 2001 because her condition was not "severe" enough to warrant treatment.

12. At the request of the petitioner's guardian, the orthodontist went ahead and started work anyway, which is currently in progress. An appeal was filed in May of 2001 after which the parties attempted to resolve this matter. After they were unable to do so, a hearing was convened at which both the petitioner's orthodontist and the Department's dental consultant testified. A further hearing was scheduled some time later in order to allow further testimony from both of these experts.<sup>1</sup>

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<sup>1</sup> The Department attempted to enter an affidavit of its expert witness into evidence following the first hearing which was objected to by the petitioner. The petitioner's objection was upheld and a further hearing was convened to allow the Department's expert to testify about this evidence and to allow the petitioner's expert to testify further about equivalency.

13. The only true dispute between the experts with regard to the petitioner's condition is the size of the overjet. The petitioner's orthodontist testified that his actual in-person measurement of the petitioner's dentition showed a 9+mm overjet. The Department's consultant who is a dentist, not an orthodontist, measured photographs, models, and X-rays but not the petitioner herself and concluded that the overjet was between 6 and 7mm. The orthodontist explained that the photographs can be misleading because they do not always show true perspective because it is possible to bite down in several different places. The Department's consultant did not disagree with that statement nor did he ask to examine the child personally.

14. Because the petitioner's orthodontist is the only one of the two experts who actually saw and measured the petitioner, his version of the measurement is found to be more accurate and her overjet is thus found to be 9+mm.

15. The petitioner has a number of defects in her dentition based on the facts that her lower jaw is too far back relative to the upper jaw (a Class II, Division I malocclusion) and that both of her arches are crowded. The petitioner has a sixty percent traumatic deep bite impinging on her palate which means that her bottom teeth are touching,

although just barely, the roof of her mouth and that sixty percent of the lower front teeth are covered. This can cause some irritation of the roof and less frequently pain although the orthodontist was not aware of any complaints of pain from the petitioner. Her class II occlusion has resulted in a 9+mm overjet which is the measurement of how much the upper teeth project forward relative to the lower teeth. These are the only malocclusions which the petitioner has that are listed in the Department's diagnostic criteria, although the overjet is just below the sufficient magnitude.

16. The petitioner also has a number of other malocclusions, including: an impacted bicuspid which is keeping one of those teeth from entering properly into the correct place in her arch; a "buccal cross-bite in the upper right arch" which means that one of her molars is turned toward her cheek and is not biting properly against the tooth below it; and, a molar on the lower right side is also partially blocked due to crowding and is protruding lingually, or toward the tongue.

17. The petitioner's orthodontist and the Department's dentist agree that the petitioner is probably at a low risk for losing the usual functional ability of her teeth due to these problems. Thus, she is expected to be able to chew,

digest and speak even with these deficits. There was also no observed or reported pain, infection, or bleeding based on these conditions.<sup>2</sup> Both agree that the petitioner is not disfigured by her malocclusions. The primary risks which the petitioner is exposed to by these problems is wear due to the lack of a perfect bite, a possibility of trauma to the front teeth because of their protruding position, and somewhat more difficulty in keeping the teeth clean due to crowding.

However, decay can usually be avoided in these situations with normal diligence to oral hygiene. The petitioner's dental hygiene was described as good. Her orthodontist says that she needs to have her teeth straightened in order to "optimize" her dental health, as function always follows form. It cannot be found, however, that the petitioner will be unable to maintain her dental health without orthodontic treatment.

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<sup>2</sup> The petitioner testified that she was experiencing pain and blisters in her mouth which she did not discuss with her orthodontist. She says the pain and blisters are gone since she has started treatment. While there is no reason not to believe what this young petitioner says, her failure to discuss this problem with her orthodontist and his lack of notation of pain and blisters make it difficult to conclude as an evidentiary matter what particular condition caused the pain and what steps were medically indicated to reduce the pain which might not have included orthodonture. It must be noted that the child's orthodontist did not agree that it was likely that she would experience pain from any of her conditions.

18. The Department declined to reconsider its position denying coverage to the petitioner. The Department's dental consultant based the original decision on the strict application of PATH's listings of "Diagnostic Treatment Criteria." Since the petitioner did not have one major or two minor criteria as set out in that listing, she was not granted. Since that time, however, she was assessed to see if her condition was indeed "handicapping" and PATH determined that it is not.

19. The petitioner's orthodontist does not know if he would characterize the petitioner's condition as "handicapping" because he does not know what that term means. He believes, however, that a child with a 9+mm overjet and a deep traumatic bite who also has an impacted bicuspid, a blocked molar and a buccal cross-bite is as functionally impaired if not more so than a child who only has a 10+mm overjet and a deep traumatic bite, two criteria adopted by PATH as "handicapping." This opinion was not rebutted by expert testimony and is thus found as a fact in this matter.<sup>3</sup>

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<sup>3</sup> PATH's expert attempted to refute this by saying that the child's condition was not equal to those on the list because her condition was not disabling. However, that answer begs the question of whether all conditions on the list are disabling. PATH itself had admitted that they are not.

Petitioner D.B.

20. The petitioner D.B. is a fourteen-year-old girl who was evaluated for orthodontic treatment in April of 2001. Her orthodontist sent a request to PATH dated July 30, 2001 for "Comprehensive Orthodontic" treatment on a form prepared by PATH. He checked that she had "2 blocked cuspids, per arch", "crowding per arch (10+mm)" and "overjet 10+mm", all minor criteria. He provided models and X-rays to the Department. PATH reviewed the request and found after review of the models and X-rays that only one of the criteria was actually met, the "2 blocked cuspids". The crowding was assessed as only 7-8mm and the overjet at about 4mm. The petitioner's request was denied.

21. Some time after the appeal was filed, the Department had the petitioner examined by another orthodontist who has been practicing for some fifteen years and who is board certified. He played some part in setting up the criteria used by the Department to determine severity. The petitioner's orthodontist and PATH's consultant agree that the petitioner has 2 blocked cuspids which means that her cuspids have erupted into her gums but have no room to move into the arch of her teeth. They also agree that the petitioner has a

4mm "overjet" which is the amount by which the top teeth extend forward over the bottom teeth. This "overjet" is accompanied by a 60 percent deep bite impingement. They agree as well that the crowding in the top arches is between 6-8 mm (a little over half a tooth) and in the bottom arch 1/3 to 1/2 a tooth. The consultant also noted during his examination that the petitioner is experiencing joint noises which was not noted by the petitioner's own orthodontist who had not examined her in the last few months prior to his testimony.

22. The orthodontic consultant characterized the petitioner's overall condition as a mild to moderate malocclusion which, while not ideal, allowed reasonable function. He agreed that a lack of proper cuspid guidance resulting from the 2 blocked bicuspids (a minor criteria which the petitioner does meet) was a problem for the petitioner. However, he did not feel that the petitioner was likely to have serious problems in the future with her dentition as long as she cared for her teeth, although he acknowledged that it requires more effort to care for crowded and misaligned teeth. It was his opinion that the noise in the jaw was not significant and that orthodonture would not be a reason to treat a noise in the jaw. He conceded that the petitioner's dental health would be improved with orthodontic treatment and

that such treatment would not be merely cosmetic. It was his opinion, though, that the petitioner's combination of impairments was "not even close" to meeting the severity levels which are contained in the department's criteria.

23. The petitioner's orthodontist has been a dentist for thirty years and an orthodontist for twenty-seven years. He is board eligible but has not taken the tests to become board certified in orthodonture. His practice includes adults as well as children. Most of the adults he treats have temporomandibular joint dysfunction (TMJ). One hundred percent of those adults had noises in their jaws prior to developing TMJ. He has a different assessment of the severity of the petitioner's situation. He does not disagree with any of the objective assessments of the child's situation and added that he checked off boxes which he knew were not technically met to alert PATH that the child had problems in these areas because there was no place on the form to explain this. He said his X-rays and models would show exactly the level of magnitude. His opinion is that the petitioner's combination of problems has caused a serious midline misalignment of her jaws which is worsening as indicated by the recent noises caused by her jaw. He re-examined the petitioner on June 21, 2002 subsequent to the consultant's report and noted significant temporo-

mandibular joint sounds. He recommended moist heat and muscular massage at that time. It was his opinion that while noise in the jaw does not definitively mean that a person will develop temporo-mandibular joint disease (TMJ), it does indicate that there is already a malfunction in the joint which is of great significance for developing the disease. He noted that there was no place on the Department's form or in the criteria to note the jaw noises that often precede TMJ. The disease is essentially irreversible once it has taken hold and it is his opinion that immediate orthodontic correction is the only way to insure that her condition does not further deteriorate.

24. In addition, it was his opinion that the crowding in the arch which he described as much closer to 8mm is a severe magnitude of crowding. It was his opinion that the 2 blocked cuspids, the magnitude of arch crowding which is 2mm below the criteria, the mild overjet and the jaw noises while not meeting the criteria used by the Department, certainly equaled the criteria in terms of severity. It was his opinion that orthodonture would resolve these dental conditions and prevent deterioration.

25. The two orthodontists who testified in this case were persons who attested that they have a great deal of

respect for each other's competence and opinions. However, they have disagreed in their assessments of the severity of the situation and a resolution must be reached as to which opinion most accurately reflects the situation. The consulting orthodontist was involved in developing these criteria and agrees with the Department that they represent the most severe cases. However, his opinion that the petitioner's case is "not even close" to severe is puzzling in light of the fact that she has met one of the minor criteria and is extremely close to meeting a second (crowding per arch) minor criteria in addition to her joint noises and other malocclusions. It would seem reasonable based on this information to find that she is at the level of severity established in PATH's own criteria on the two listed problems (blocked cuspid and crowding) alone. While he may be correct to assess her overjet problem as mild, his dismissal of the clicking joint noise as not important (except as a benchmark) without further comment on its relationship to TMJ is reason to question his opinion. Finally, the consultant did not offer any analysis in rebuttal to the petitioner's orthodontist as to why the combination of a malfunctioning jaw, a "severe" problem (the cuspids), a "moderate" problem (the crowding) and a "mild" problem (the overbite) does not

have a functional impact on the petitioner at least as great as any two of the listed criteria.

26. On the other hand, the treating orthodontist acknowledged that he generally does not agree with the Department's criteria of what is severe enough to treat and criticizes the fact that the forms he must fill out for Medicaid coverage do not allow for any mention of other problems which might impact on the overall severity of the condition. However, in spite of his criticism of the Medicaid rules, the hearing officer finds him to be sincere, fair and certainly an expert in the field of TMJ who offered very detailed testimony and explanations to support his opinions. His opinion that the combination of the four dental problems experienced by this child are at least as severe as any two combinations listed in the PATH rules is entirely credible. His opinion that the petitioner is at serious risk for disabling temporo-mandibular joint dysfunction is also found to be entirely credible. His opinions, are therefore, accepted as a closer representation of fact for purposes of this appeal than that of the consultant.

Petitioner H.B.

27. The petitioner is the younger sister of D.B. and has similar malocclusions although she has not developed them to the degree of severity of her sister. She was examined by the same orthodontist as her sister and on October 2, 2001, he submitted a request for "interceptive" orthodontic treatment for her checking in the boxes on PATH's form that she had "2 blocked cuspids", "traumatic deep bite impinging on palate" and "overjet of 10+ mm". He has constructed an appliance which she wears to prevent developing a malocclusion.

28. PATH denied the request stating that she actually only met one of the criteria--2 blocked cuspids--and not the other two.

29. At the initial hearing, the treating orthodontist testified that he had seen H.B. on March 1, 2001 and at that time she had teeth out of position but that she was not compromised with regard to her ability to speak or chew. He said she had some gum disease (a loss of tissue in the lower front teeth) which was standard for adolescents. He felt, however, that she had a combination of problems at least as significant as any two on the form and that her condition was disfiguring to some degree because her teeth were descending high in her gums. He was also concerned about her lack of

cuspid guidance. He admitted, however, that the appliance he put in place has done some good in reversing the disfigurement and lack of guidance effects.

30. The petitioner was seen by the same consulting orthodontist as her sister. He agreed that she does meet the level of severity for the 2 blocked cuspids and that she had no cuspid guidance. However, he found the other two problems to be very mild. It was his opinion that she has less of a deep bite than her sister and has almost a normal overbite. The crowding was described as mild. He noted that she had nice engagement of her upper and lower jaws, especially laterally and that the cuspids would probably drop down into the correct position because there was room for them. It was his opinion that her case was not severe and that she should have no future dental problems without orthodonture.

31. The petitioner's treating orthodontist believes that the consultant underestimated the degree of the crowding and did not note the loss of some tissue in the lower incisors, probably due to poor hygiene, but does not otherwise disagree with his testimony. He stated that he fitted the petitioner with a removable appliance in July of 2001 and that it appears that as of May 2002 she has shown benefits from this therapy and very well may have improved since the time he made the

initial request for orthodontic coverage since he did not "remember her very well". If the consultant's more recent examination is correct, he agrees that even the one original severe problem, the blocked cuspids has been ameliorated by the intervention.

32. The petitioner's treating physician was given time to re-examine the petitioner to see if the consultant's more recent examination was correct. Upon re-examination in June of 2001, he stated that she has no joint sounds but that she had a propensity toward dysfunction and that her "malocclusion" is worsening although he did not say how. He did not offer any specific disagreement with the consultant's examination. Because the treating physician's analysis lacked specificity and is inconsistent with both his former statements at hearing and those of the consultant, the consultant's opinion as to the petitioner's current condition is found to be most accurate.

33. It is found based on the credible testimony of the consultant that the petitioner's condition met one of the criteria for severity but that it and her other deficits have since been ameliorated by interim interventions. Her ability to function is not currently threatened and she is able to maintain her dental health. Her dental condition does not

equal the level of severity of a child who has either one major or any two of the minor criteria listed by PATH as "handicapping."

Petitioner L.T.<sup>4</sup>

34. Petitioner L.T. is a ten-year-old girl who is treated by the same orthodontist as the siblings, D.B. and H.B. On November 27, 2001, that orthodontist requested "interceptive" orthodontic treatment for L.T. through a form prepared by PATH. On that form he checked off three minor criteria: "2 blocked cupids, per arch (deficient by at least

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<sup>4</sup> Unlike the live testimony in the other cases, petitioners L.T. and M.W. presented evidence through a written opinion by their orthodontist. PATH was allowed to submit a written response from its dental experts to this written report. PATH's attorneys indicated in a letter dated June 6, 2002 that they wanted to have a status conference to discuss the evidence. Because the hearing officer missed this letter which was attached to PATH's written submissions, no formal status conference was held thereon. PATH never renewed its request but rather commented upon this lack of a conference in its final memorandum on September 12, 2002 as creating a prejudice for PATH. In response to these complaints and subsequent written allegations, which suggested that the hearing officer was biased in this matter, the hearing officer convened a status conference on October 9, 2002. During the course of that conference, PATH indicated that had a conference been held earlier, it would have asked to subpoena and cross-examine the petitioners' treating orthodontist. The hearing officer asked if there was some way that this could be done in a quick manner now. The petitioners insisted that it was too late to make such a request now and that a motion for the same should have been submitted prior to the close of the briefing schedule. PATH then indicated that it would not make such a motion and that it was satisfied with the written evidence. PATH also indicated at the meeting that it had not meant to suggest that the hearing officer was biased but was rather expressing its dissatisfaction with the record. That position was confirmed in writing by a letter dated October 10, 2002.

1/3 of needed space)", "anterior open bite 3 or more teeth (4+mm)" and "anterior crossbite (3+ teeth)."

35. The request was reviewed by PATH and denied because the petitioner was found to actually meet none of the above criteria. Her space due to the blocked cuspid was less than the one-third of needed space, she did not have an anterior open bite of the measured dimension and her anterior crossbite affected only 2 teeth.

36. The petitioner's orthodontist does not disagree that the measurement in the criteria are not met for any condition. However, he feels that the exact measurements are not critical when the condition exists. He feels that blocked cuspids prevent guidance necessary for proper functioning regardless of how great the resulting space deficiency and lead to "a breakdown of the supporting dental structure and the possibility of tempero-mandibular disorder." This problem is also "related" to the hyperfunctioning of the back teeth, creating greater stress on those teeth and their supporting structure. It is also "related" to a lack of function of anterior teeth through (disuse) atrophy. He also stated that the anterior open bite condition although it only involved two teeth would nevertheless have a negative impact on L.T.'s functioning in the future due to crowding in the lower and

upper teeth. Without treatment, he felt that L.T's condition could "require increased financial expenditure, including the possibility of corrective maxillofacial surgery" and significantly increases the risk for pain and infection in the future.

37. It is the opinion of PATH's consulting dentist that the risks of lack of function, pain and infection based on these conditions are too vague and speculative. He stated that "while it may be ideal" to have cuspid guidance, "it is not critical to function" and "people with blocked cuspids function quite adequately." He added that the two teeth which are involved in the anterior crossbite are not being traumatized and they are in no danger of being lost. His opinion is that the concensus of the committee of dental professionals and orthodontists that the measurements are necessary and related to determining if a particular condition is severe enough should be deferred to by Medicaid providers.

38. While it is clear that the petitioner's orthodontist is concerned that her conditions could lead to functional problems, as the consultant points out, the evidence is far from clear that it is likely. For that reason, it cannot be found that the petitioner's current conditions are causing or are likely to cause any impairment in her ability to chew,

speaking, or digest food. Neither can it be found that having a measurement below the level of any criterion has exactly the same impact as having the measurements described in the criterion.

39. The treating orthodontist offered the opinion that the petitioner's multiple malocclusions (anterior crossbite, anterior open bite, blocked cuspids and crowding) in combination are at least as severe as actually having any two minor criteria listed by the Department in terms of functional compromise. This opinion was not countered by PATH's dental consultant who merely stated that she doesn't meet the criteria. Since the treating orthodontist's opinion is uncontroverted and reasonable, it is found that the petitioner's malocclusions are at least as severe as those listed in PATH's regulations as approved for coverage.

Petitioner M.W.

40. Petitioner M.W. is a nine-year-old girl who is also the patient of the treating orthodontist of the four children listed above. On December 19, 2001, he requested interceptive orthodontic treatment for her indicating on PATH's form that she has one major criteria described as "other severe cranio-facial anomaly", specifically "anterior open bite" and two

minor criteria "2 blocked cuspids, per arch (deficient by at least 1/3 of needed space)", "Crowding per arch (10+mm)" and "anterior open bite 3 or more teeth (4+mm)". The latter appears to be the same criterion described under the "major" criteria heading.

41. After review, PATH agreed that the petitioner meets the criterion for 2 blocked cuspids but no other. Based on this failure to meet the criteria, the petitioner was denied benefits.

42. The petitioner's orthodontist offered a written assessment that in addition to the agreed upon condition of 2 blocked cuspids, the petitioner also has an anterior open bite of something less than 4+mm and crowding in the upper dental arch greater than 10mm and slightly less than 10mm in the lower arch. His testimony as to her condition is not disputed and is found as a fact in this matter.

43. The petitioner's orthodontist also offered the opinion that the lack of cuspid guidance will lead to a "possible breakdown of the supporting structure and the possibility of Temporomandibular Disorder." He also opined that this condition in combination with the anterior open bite affect the anterior teeth which "may break down" as a result of disuse atrophy. He opined that the impact of these

conditions is "potentially devastating" and "will interfere with her ability to chew food thoroughly" because of lack of contact of her front teeth. The crowding in her teeth make it more difficult to maintain cleanliness. He felt that without intervention now, she would certainly need comprehensive orthodonture in the future and that permanent teeth "may" have to be extracted. He also felt that if her dentition deteriorated significant discomfort "could result" and she will be more at risk for gum disease. It was further his opinion that there was little functional difference between measurements within these conditions that were just above and just below the cut off levels.

44. PATH's dentist thoroughly rejected the treating orthodontist's opinion as exaggerated and too vague. His opinion was that any individual condition that did not meet PATH's criteria could not be "potentially devastating" because the condition itself is not sufficiently severe. Cuspid guidance is not essential to function and crowded teeth can be kept clean. He added that there was no measurement of the risk or negative impact offered by the treating orthodontist as to future functioning and that PATH's criteria do not extend to treating patients who have only a "possibility" of lack of future function.

45. Because there is always some risk of a future problem with any malocclusion and that risk was not quantified in any way by the petitioner's orthodontist, PATH's consultant's opinion that no current functional compromise or likely functional compromise has been demonstrated here is found to be the fact.

46. The petitioner's treating orthodontist offered the opinion that the combination of the three impairments experienced by this child--the 2 blocked cuspids which meet the criteria, the crowding which meets the criteria in the upper arch but is barely below the criteria in the lower arch and the anterior open bite which is something less than the measurement in the criteria--are at least as severe in terms of present functioning as any two combinations listed on PATH's authorization form. PATH's expert offered no opinion on this matter other than to say that PATH had adopted its criteria which must be deferred to. As the treating orthodontist's opinion is both reasonable and uncontradicted in the evidence, his opinion in this paragraph is accepted as fact.

RECOMMENDATION

The decision of PATH should be reversed with regard to petitioners C.J., D.B., M.W. and L.T. but should be affirmed with regard to petitioner H.B.

REASONS

I EPSDT Requirements

All of the petitioners argue that the Department of PATH should be providing them orthodontic coverage to remedy their dental defects pursuant to the federal Early Periodic Screening and Diagnostic provisions of the Medicaid Act. See 42 U.S.C. §§ 1396a(a)(10), 1396a(a)(43), 1396a(a)4(B), 1396d(r)(5). This law obligates states to provide a comprehensive package of preventive services that meet reasonable standards of medical necessity. 42 U.S.C. §§ 1396a(a)(43) and 1396d(r). It also generally expands Medicaid services to include "[s]uch other necessary health care, diagnostic services, treatment and other measures described [as medical assistance] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." Id § 1396d(r)(5).

The statute further defines general "medical assistance" as "other diagnostic, screening, preventive and rehabilitative

services, including any medical or remedial services (provided in a facility, a home or other setting) . . . for the maximum reduction of physical or mental disability and restoration of the individual to the best possible functional level." 42 U.S.C. 1396d(a)(13). The statute contains a specific provision requiring coverage of dental services which "shall at a minimum include relief of pain, infections, restoration of teeth and maintenance of dental health." 42 U.S.C. § 1396d(r)(3).

These statutory provisions have been implemented through regulations adopted by the Centers for Medicare and Medicaid Services (CMS) of the Department of Health and Human Services (HHS). According to those regulations, EPSDT in general means "health care, treatment and other measures to correct or ameliorate any defects and chronic conditions discovered." 42 U.S.C. § 440.40(b)(2). The regulations also require state agencies to "provide to eligible EPSDT recipients, the following services, the need for which is indicated by screening, even if the services are not included in the plan . . . dental care, at as early an age as necessary, needed for relief of pain and infections, restoration of teeth and maintenance of dental health." 42 C.F.R. 441.56.

The petitioners argue that these EPSDT provisions require PATH to provide orthodontic treatment to correct any defects in the dentition of children in order to maximize their health and prevent any potential future problems. In support of their argument, they seize on the general statutory and regulatory language requiring the "correction or amelioration of all physical defects" and describing dental services as including the "restoration of teeth and maintenance of dental health." They argue that this language does not require a showing that there be any actual or likely impairment in functional level so long as the service can improve a child's dental health.

PATH disagrees with this interpretation of the EPSDT requirements. It points out that the Medicaid statute gives states wide discretion in deciding what services will be covered so long as the standard is "reasonable." White v. Beal, 413 F.Supp. 1141, 1153 (E.D.Pa. 1976). It argues that it has determined to provide orthodontic treatment for "handicapping malocclusions" as described by the written criteria it uses. PATH's consulting dental experts offered a further definition during the course of the hearing that such a condition would cause pain, infection or would impede function in relation to chewing, speech or digestion. PATH

adds that the listed criteria cover many conditions that are not actually "handicapping" but come close to that level in order to insure its goal of covering the most severe cases. It was never its goal to treat all dental defects in children without regard to their "handicapping" potential.

In support of its position, PATH relies on statutory language which defines "medically necessary" services under EPSDT as the "maximum reduction of a physical disability and restoration to the best possible functional level". 42 U.S.C. § 1396d(a)(13), supra. Furthermore PATH points to a written interpretation from the Centers for Medicare and Medicaid Services (CMS), the agency charged with implementing the EPSDT program, which was sent to all state agencies regarding the extent of orthodontic coverage required by EPSDT. That transmittal states that EPSDT requires "orthodontic treatment when medically necessary to correct handicapping malocclusions." CCH-ANNO, MED-GUIDE § 14,551.17, Guidelines No. 6, HCFA Pub/45-5 § 5124, Transmittal No. 10 (April 1995).

The petitioners argue that the CMS interpretation does not have the force of law because it is not a written policy and is entitled to no deference. However, the opinion of CMS is "entitled to considerable deference as the interpretation of the agency created by Congress to administer the Act."

NLRB v. Town and Country Electric Inc., 516 US 85, 116 S.Ct.

450 (1995). The United States Supreme Court said in that decision that the federal agency's interpretation must be deferred to so long as it is consistent with the Act's language and purpose and other court decisions in this area.

Id.

The general language used in the EPSDT statute and regulations speaks of treatment as meaning "measures to correct or ameliorate any defects and chronic conditions discovered" and describes medical assistance as meaning remedial services for the "reduction of physical . . . disability" and the "restoration of an individual to the best possible functional level." It is possible, as CMS has done, to read these two in combination as requiring services to ameliorate disabling defects and not defects which have little or no impact upon function. The EPSDT section which specifically focuses on dental services conveys some very specific ideas when it comes to treatment, namely the "relief of infection and pain" and the "restoration of teeth". It also conveys a very general treatment concept, namely the "maintenance of dental health." It cannot be said, as the petitioners argue, that this particular language compels any state to provide treatment for all dental defects regardless

of their impact on dental functioning. It is not unreasonable to interpret this provision as requiring treatment of conditions which significantly interfere with the maintenance of dental health. Thus, it cannot be said that CMS' interpretation of the statute and regulations is inconsistent with the language of the same.

Neither can it be said that CMS' interpretation is at odds with the purpose of the statute. The EPSDT statute's aim is "ensuring that poor children receive comprehensive health care at an early age" and is designed "to provide health education, preventive care, and effective follow-up for conditions identified during check-ups." Antrican v. Buell 1558 F.Supp.2d. 663 (E.D.N.C. 2001). CMS has decreed that in order to "maintain dental health" all children with "handicapping malocclusions" must be identified and treated. There is nothing in this interpretation which conflicts with the aims of the statute, particularly since the statute and regulations appear to limit the "conditions" treated to those likely to significantly impact dental health. It is unlikely that Congress would have intended to require states to ameliorate every defect in the dentition of children, even those that might be desirable in terms of improved appearance

or increased ease of hygienic maintenance, as a condition to receiving Medicaid funding.

Several courts have had the opportunity to look at the EPSDT language with regard to dental treatments. A Maine state Court concluded that the EPSDT statute required the state to provide orthodontic services to children when "necessary" to maintain dental health, not when it was merely "desirable." Brooks v. Smith 356 A.2d. 723 (Maine 1976). The Court concluded that a state could not "deny a reasonable treatment without which a child's dental health could not be maintained and irreversible damage to the teeth and supporting structures could not be avoided." Id. A federal appeals court in Pennsylvania concluded that EPSDT required that state to have an orthodonture program which provided treatment to prevent "acute dental problems" or "irreversible damage." Philadelphia Welfare Rights Organization v. Shapp, 602 F.2d. 1114. (3<sup>rd</sup> C. 1979) Both of these cases relied on an old (apparently superseded) internal Medicaid Manual used by the Department of Health, Education and Welfare (now HHS) which told states subject to EPSDT that "(a)t a minimum dental services must include services for dental disease, which if left untreated, may become acute dental problems or may cause irreversible damage to teeth or supporting structures." Id.

In a more recent case a federal district court in Illinois determined that EPSDT "requires the [state] to pay for medically necessary orthodontic treatment in cases of severe handicapping malocclusions for the categorically needy children." Chappell by Savage v. Bradley 834 F.Supp. 1030, 1035 (N.D. Ill. 1993). The Court defined "handicapping" further as those conditions which are a "hazard to the maintenance of oral health" and that "interfere with the well-being of the child by adversely affecting mandibular function or speech." Id.

The petitioners have cited other cases which they argue reach a different result. However, none of the cases cited by the petitioners involve an attempt to interpret the scope of dental services required by the EPSDT statute and regulations. In Persico v. Maher 465 A.2d. 308 (Conn. 1983), the state court declared the lack of a childhood orthodonture program in the state Medicaid plan to violate EPSDT requirements. The Court declared that a provision that made orthodonture discretionary with the state agency was stricter than the federal law. It did not say what that orthodonture program had to contain. Similarly, in Antrican, supra, the North Carolina federal court citing the language in the EPSDT statute found that the state program was required to provide

"at a minimum . . . relief of pain and infection, restoration of teeth, and maintenance of dental health" but did not define what "maintenance of dental health" means. Finally, in a recent state superior court decision from Georgia, a determination was made that the state was required by EPSDT to use different and broader "medical necessity" standards for children than for adults. Freels v. Commissioner, Superior Court of DeKalb County, State of Georgia, Civil Action File No. 01-CV-2932-10 (October 10, 2001). The court equated "medical necessity" with the language in the federal statute requiring the state to "correct or ameliorate a defect or condition" but did not interpret that language in terms of dental treatment.

While it is certainly possible to adopt a different interpretation of the general concepts found in the EPSDT statutes and regulations, it is not permissible for the reviewing body to do so if the federal agency's interpretation is reasonable and in accord with the language and goals of the statute and Court decisions. NLRB v. Town and Country Electric, Inc., supra. CMS' written interpretation of the statute and regulations it administers is in accord with the language of the statute, the goals of the program and the interpretations of the Court. Thus, it cannot be concluded

that this program requires PATH to cover any dental defects beyond "handicapping malocclusions".

II Does PATH's regulation **as written** meet EPSDT standards?

PATH has adopted regulations for the coverage of orthodontics in the Medicaid program which include the following:

M622 Orthodontic Treatment

M622.1 Definition

Medically necessary orthodontic treatment involves the use of one or more prosthetic devices to correct a severe malocclusion. This definition is consistent with the federal definition found at 42 C.F.R. § 440.120(c).<sup>5</sup>

M622.2 Eligibility for Care

Coverage for orthodontic services is limited to Medicaid recipients under the age of 21.

M622.3

Services that have been preapproved for coverage are limited to medically necessary orthodontic treatment, as defined in M622.4

M622.4

To be considered medically necessary, the patient's condition must have one major or two minor malocclusions according to diagnostic criteria adopted by the

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<sup>5</sup> This section defines the term "prosthetic devices" as, among other things, "corrective or supportive devices" to "prevent or correct physical deformity or malfunction."

department's dental consultant or if otherwise medically necessary under EPSDT found at M100.<sup>6</sup>

The first part of PATH's regulation at M622.4 restricts orthodontic coverage to "severe" malocclusions which term PATH interprets as meaning "handicapping" malocclusions. The regulation itself does not offer a definition of "severe" or "handicapping" malocclusion except with reference to the "diagnostic criteria". Those criteria contain lists of

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<sup>6</sup> M100 echoes the federal EPSDT statute and regulations:

. . .

The scope of coverage for children under the Early Periodic Screening, Diagnosis and Treatment (EPSDT) provisions of Title XIX is different and more extensive than coverage for adults. The EPSDT provisions of Medicaid law specify that services that are optional for adults are mandatory covered services for all Medicaid-eligible children under age 21 when such services are determined necessary as a result of an EPSDT screen. Specifically, Vermont is required to provide

...such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of [1396d] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State [Medicaid]plan. 42 U.S.C. § 1396d(r)(5).

A further definition of the scope of EPSDT services is found in 42 C.F.R. § 1396d(a)(13) which requires states to provide

other diagnostic, screening, preventive, and rehabilitative services, including any medical or remedial services (provided in a facility, home or other setting) recommended by a physician or other licensed professional of the healing arts within the scope of their practice under State Law, for the maximum reduction of physical or mental disability and restoration of an individual to the best functional level.

. . .

specific dental conditions which PATH considers severe enough to warrant the provision of orthodontic services. The second part of PATH's written regulation contains an alternative procedure which allows consideration of an applicant's condition under "EPSDT" standards if "otherwise medically necessary."

Under the Medicaid Act, state plans for assistance must "include reasonable standards . . . which are consistent with the objectives of [the Act]." 42 U.S.C. § 1396(a)(17). Medicaid law and regulations also require that services provided by the states must be "sufficient" in "amount, duration and scope to reasonably achieve its purpose." 42 C.F.R. § 440.230(b), see also 42 U.S.C. § 1396a(10)(b)(i). States have broad discretion in designing their programs and defining medical necessity and may even limit mandatory services for fiscal reasons so long as the federal purpose is achieved. Doe V. Beal 523 F.2d. 611 (3<sup>rd</sup> Cir. 1975)

Under the above provisions, PATH clearly has the authority under the latter cited Medicaid provision to define medical necessity and to provide orthodontic services only to those children who meet its chosen *standard of severity* so long as the standard chosen achieves the federal purpose--in

this case remediating "handicapping malocclusions" for children. No credible evidence was presented at hearing that the *standard of severity* chosen by PATH in its written regulation is unreasonable or is insufficient to identify "handicapping" conditions, however that term is defined. The evidence, on the contrary, suggests that the lower reaches of conditions described as severe is generous in order to accomplish the federal goal and actually includes many conditions which PATH's dental consultants do not actually consider "handicapping". In fact, by PATH's estimate almost ninety percent of the children it covers are not actually "handicapped" as that term is defined by their consultants.

Furthermore, it is reasonable under the Medicaid regulations to use a list of covered conditions to describe a standard of severity so long as the list is not exclusive and there are reasonably available procedures for including conditions which are equally severe, that is those that meet the same level of medical necessity necessary for provision of the service. In addition to the listed criteria, PATH's regulation as written does contain an alternative procedure for seeking inclusion of conditions not specifically listed by allowing for further review if "otherwise necessary." With

this mechanism children with conditions which are not on the diagnostic list but which may be equal to or greater than the level of severity which PATH has determined to cover can also be reviewed for and receive services. The regulation fully covers services for children who meet the level of severity with either comprehensive or interceptive orthodonture as needed.

Because the plain language in the regulation sets reasonable limits on coverage consistent with EPSDT standards, has a procedure for considering every condition which might meet the standards of severity adopted by PATH and provides full coverage for severe conditions, it cannot be said that the regulation as written runs afoul of federal Medicaid requirements. See Brisson v. Department of Social Welfare, 167 Vt. 148 (1997).

III Does PATH's Regulation **as applied** meet federal Medicaid standards?

The testimony offered at hearing made it clear that PATH routinely reviews requests for orthodontic treatment by matching the applicant's condition with the listed conditions without any further review. While it has the authority under

its own regulation to further review any application with regard to EPSDT standards, PATH made it clear that it does not do so except when an applicant alleges a physical problem affected by a dental defect. Consistent with this approach, the forms which PATH provides to treating orthodontists do not solicit any information which would alert PATH to other conditions or the existence of multiple conditions at or above the level of described severity. If the treating orthodontist is able to check off the condition or combination of conditions used by PATH in its listings, the service is offered, if she or he cannot check off those exact conditions, the service is denied.

The petitioners argue that the practice of using only the listings is illegal because they have a right to review of their specific conditions under both the clear language of PATH's own regulation and under the federal Medicaid Act.

1. PATH's Practice of Excluding Children with Conditions Not on the List Despite Having Equal Medical Need Violates PATH's Own Regulation

With regard to the petitioner's first argument, it is axiomatic that "an administrative agency must abide by its regulations as written until it rescinds or amends them."

Lamphear v. Tognelli, 157 Vt. 560, 563 (1991), citing In Re Peel Gallery, 149 Vt. 348, 351 (1988). The plain language of

the statute defines medically necessary in two ways: meeting the diagnostic criteria adopted by the dental consultant or "if otherwise medically necessary under EPSDT." PATH urges an interpretation of its regulations which would preclude review except in some very narrow situations, saying that is what it intended when it wrote the regulation. However, there is absolutely nothing in the plain language of the regulation which supports that interpretation.

Assuming arguendo, that PATH's regulation, as it urges, was not intended to allow for benefits except for those conditions specifically listed in the "diagnostic criteria", it must be considered whether such an interpretation would be in violation of the federal Medicaid Act.

The Medicaid Act at 42 U.S.C. § 1396a(10)(B) contains a "comparability provision" which has been interpreted by the Health Care Financing Administration (HCFA—the agency responsible for administering state Medicaid plans) in its written regulations as follows:

"[t]he Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . to an otherwise eligible recipient solely because of diagnosis, type of illness or condition."

42 C.F.R. § 440.230(c)

Orthodontic services are required medical services under the EPSDT section of the Medicaid program. See Section I above. Services provided by a state are required to be sufficient to carry out the federal purpose of remediating "handicapping malocclusions." See Section II above. "Handicapping malocclusions" are not further defined by the federal law. For purposes of Vermont's coverage, PATH has itself defined "severe" or "handicapping" malocclusions" with reference to a list of conditions. In so doing, PATH has established a level of severity which it considers "handicapping" for purposes of providing orthodontic services. Although PATH urges the adoption of the more stringent definition and level of "handicapping" referred to by its dental consultants at hearing (pain, infection and compromise of the ability to eat, speak, see page 30 above), this more stringent definition is not contained anywhere in its written regulation.<sup>7</sup> The definition of "severe" which was actually adopted by regulation--the reference to the listed criteria--

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<sup>7</sup> If PATH wishes to adopt this standard as a written regulation, it does not appear that EPSDT regulations would prevent it from doing so. See Section 1. However, the Board must consider the standard adopted in the regulation and not some other standard even if it is a sensible one. See Lamphear, supra.

is the one which must be used in determining whether federal comparability standards are met.

The evidence shows that several of the children have conditions which are not on the list of diagnostic criteria but are greater than or equal to some of the conditions listed by PATH in terms of the severity of their impact on dental functioning. The only reason these children are not offered services is that their specific combination of conditions are not on the list. The Pennsylvania federal appeals court considered the legality of a similar situation in which persons were provided eyeglasses if they had a certain condition (disease of the eye) but were not provided if they had another (refractive error) even though the evidence showed that many in the latter class had a medical need as great as those in the covered class. White v. Beal, 555 F.2d 1146 (3<sup>rd</sup> C 1977).<sup>8</sup> The Court concluded that the federal law and regulation cited above<sup>9</sup> prohibits discrimination "based upon etiology [the medical cause of the problem] rather than need for the service." Id. at 1151.

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<sup>8</sup> This decision was cited by the Second circuit Court of appeals as the applicable law in this area in a recent decision with distinguishable facts from these. See Rodriguez v. New York, 197 F.3d 611, 616 (1999)

<sup>9</sup> The regulation contained the same language but was 45 C.F.R. § 249.10(a)(5)(I).

The Vermont federal court reached the same conclusion in Simpson v. Wilson, 480 F.Supp. 97 (D.C. Vt. 1979) with regard to similar provisions in the Vermont Medicaid program at that time. Citing the White case above, the Court concluded that a state may place appropriate limits on a service based on medical necessity or utilization control procedures (citing 42 C.F.R. 440.230©(2)) but it "may not deny or reduce the amount, duration or scope of a required service . . . to an otherwise eligible recipient solely because of diagnosis, type of illness or condition" under 42 C.F.R. § 440.230(c)(1). Id at 103.

The regulation at 42 C.F.R. § 440.230(b) has recently been reviewed by the Vermont Supreme Court as well in a case in which PATH agreed to pay for full dentures for persons who had no teeth but not for partial dentures for those with some teeth. Cushion v. PATH and Yates v. PATH, supra. The evidence showed that some persons who still had some teeth were at least as medically needy as persons with no teeth at all. After affirming the discretion that PATH has in designing its programs and the standard of reasonableness that it must meet, the Court concluded, "that a state Medicaid plan is not reasonable" under this federal statute if it "fails to provide service to those in greatest need" including those who

"demonstrated a medical need for partial dentures that is at least as great as those who need full dentures." Id. at p. 3.

The Court concluded that PATH's exclusion of persons with equal medical need based on their condition (having some teeth as opposed to having no teeth) was not permissible under the federal law at 42 U.S.C. § 1396(a)(17) and the federal regulation at 42 C.F.R. § 440.230 (b)<sup>10</sup> requiring that the programs adopted be reasonably related to achieving the federal Medicaid goals.

It is seen that PATH's urged interpretation is not only contrary to the plain language of its regulation but would violate the proscription in federal Medicaid law against discriminating against persons based on their condition rather than medical need. The Vermont Supreme Court has made it clear that regulations are to be interpreted in such a way that will harmonize them with federal law and not create invalid conflicts. Cushion v. PATH and Yates v. PATH, supra at p. 4. Thus, PATH's interpretation of this regulation to exclude all but listed conditions must also be rejected to avoid conflict with federal law.

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<sup>10</sup> The Vermont Court used a different subparagraph of the same regulation to reach the same result as the other courts with regard to comparable treatment.

As PATH's regulation clearly allows for an alternative method of establishing medical severity than meeting the major and minor criteria in the diagnostic listings, PATH has failed to follow its own regulation when it does not consider whether these children with different conditions also meet the level of severity it has established for EPSDT coverage. The petitioners stand in the same shoes as the petitioners in White, Simpson and Cushion. They had a right under PATH's own regulation and Medicaid law to be assessed for medical need despite the absence of their condition on the list. The credible evidence indicates that petitioners D.B., C.J., L.T. and M.W. have the same medical need as children whose conditions are on the list. Thus, they must receive the benefit of the regulation and be found eligible for orthodontic services. The weight of the evidence shows, however, that petitioner H.B.'s medical condition is not as severe as others covered for orthodontic services. Therefore, she was correctly denied benefits.

As this matter is decided on statutory grounds, it is not necessary to consider the petitioners arguments that PATH's denial of coverage to them violates the Vermont Constitution.

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