

the above criteria", but she still has a "severe functional impairment (an impairment that results in an inability to chew, swallow or speak)", then another "handicapping malocclusion" could be described and detailed. There is also a space on the form to document "special medical consideration."

3. The treating orthodontist checked one minor criteria box on the form, "posterior crossbite (3+teeth)". No information was entered under "other handicapping malocclusion" or "special medical consideration" sections. At the bottom, the treating orthodontist wrote "Mother requested that we submit despite us telling her she does not qualify."

4. On December 3, 2004, DCF notified the petitioner that her daughter's request was denied because "orthodontic problem does not meet the state's criteria for orthodontic treatment, and orthodontic treatment not otherwise necessary under EPSDT found at M100. (M622.4)".

5. The petitioner appealed and at a hearing held on March 17, 2005, the petitioner was advised to get more detailed medical evidence from her orthodontist. She was specifically advised in writing at that time that her daughter may qualify if her treating orthodontist felt she

had impairments which equaled in severity either the major or minor criteria used by the Department.

6. On March 18, 2005, the petitioner submitted a letter from her daughter's treatment coordinator in the orthodontic practice. The letter reads as follows:

In response to your request I had Dr. [Z] write [your daughter's] diagnosis for you. She says that according to the state criteria Christina does not satisfy the requirements to be eligible for treatment.

[Your daughter] is a 15 year old 4 month female with an Orthognathic profile in permanent dentition with Class I malocclusion characterized by severe upper and lower crowding and previous history of treatment with an expander and lip bumper. She has also had four permanent teeth pulled and has a bilateral posterior crossbite with partial anterior crossbite of the upper right and left permanent lateral incisors. [Your daughter] has a slight deep bite with significant crowding of the upper arch and residual extraction space in the lower arch. There are four wisdom teeth present, obtuse naso labial angle and competent lips.

Treatment plan: Rapid Palatal Expander with upper and lower braces followed by upper and lower retainers. Estimated treatment time of 24-30 months fee: \$4880.00.

7. DCF reviewed this new letter and decided not to change its original determination of ineligibility.

ORDER

The decision of DCF is affirmed.

REASONS

Regulations adopted by DCF provide that orthodontic treatment is available to children in the Medicaid program under the following circumstances:

To be considered medically necessary, the beneficiary'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.

M622.4

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 the 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.

M100

The Vermont Supreme Court has interpreted the above provision as requiring orthodontic treatment for children when either the criteria adopted by DCF for "major or minor criteria" are met or the medical evidence shows that the child has a combination of medical impairments which are equal in severity to those listed in the adopted criteria.

Jacobus, et al. v. Department of PATH, Supreme Court Docket No. 2003-220, July 29, 2004.¹

The only way that a lay trier of fact can judge the severity of a medical impairment is through the expert

¹ The Board notes that the form now supplied to orthodontists for securing prior approval does not ask the orthodontist to say whether or not he or she believes the child's conditions are "equal to or greater than the severity of those in the listed criteria", the standard adopted by the Court. The form merely asks the orthodontist whether there are other "handicapping malocclusions which result in an inability to chew, swallow or speak." That is not the standard adopted by the Court. That language, as well as the requirement that the orthodontist get a second opinion before submitting a request, both misleads the orthodontist as to the standard involved and places a heavy burden on the orthodontist and the petitioner to involve another orthodontist that would likely preclude filing such claims. In this case, the hearing officer wrote out the correct standard for the petitioner and said she would accept her orthodontist's opinion alone as prima facie evidence in the case. Had the petitioner provided evidence to make the prima facie case, the Department could have corroborated or rebutted it through the second opinion of another examining source which it could more easily obtain. Although the orthodontist said that the petitioner's child does not meet the state requirement for treatment, the letter does not indicate that the orthodontist understands the new requirements, even after the hearing officer's intervention. The petitioner is encouraged to take this decision to her orthodontist and to legal aid to see if she can get assistance, if the facts so warrant, in obtaining an opinion consonant with the Supreme Court's decision. The Department should be aware that in the future, instead of having its hearing officer intervene in this manner, the Board may reverse these cases on procedural grounds if the Department fails to elicit all pertinent information, including opinions, from recipients' treating sources in a timely manner.

opinion of treating, consulting, examining and reviewing sources. The petitioner was specifically asked to obtain such an opinion from her daughter's treating orthodontist but she was unable to provide such a statement. Instead, the petitioner provided a listing of the child's orthodontic problems with no assessment of their severity in relation to the listings. That evidence is not sufficient to make a finding that this child suffers from a "handicapping malocclusion" as that term is defined by DCF in its listing of criteria. Since the petitioner has failed in her burden of showing that her child meets the standards in the regulation, DCF must be upheld in its decision. If in the future the petitioner is able to obtain evidence of the sort detailed in this decision, she is encouraged to reapply. It is recommended again that the petitioner consult with legal aid on this case.

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