

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	2112242
<b>Decision Date:</b>	9/24/2021	<b>Hearing Date:</b>	06/09/2021
<b>Hearing Officer:</b>	Christopher Jones	<b>Record Open to:</b>	07/27/2021

**Appearance for Appellant:**




**Appearance for MassHealth:**

Dr. Harold Kaplan



*The Commonwealth of Massachusetts  
Executive Office of Health and Human Services  
Office of Medicaid  
Board of Hearings  
100 Hancock Street, Quincy, Massachusetts 02171*

# APPEAL DECISION

<b>Appeal Decision:</b>	Denied	<b>Issue:</b>	Prior Authorization – Orthodontia
<b>Decision Date:</b>	9/24/2021	<b>Hearing Date:</b>	06/09/2021
<b>MassHealth’s Rep.:</b>	Dr. Harold Kaplan	<b>Appellant’s Rep.:</b>	
<b>Hearing Location:</b>	Quincy Harbor South Tower		

## Authority

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

## Jurisdiction

Through a notice dated March 17, 2021, MassHealth denied the appellant’s prior authorization request for comprehensive orthodontia. Exhibit 2. The appellant filed this timely appeal on March 25, 2021. Exhibit 2; 130 CMR 610.015(B).<sup>1</sup> Denial of assistance is valid grounds for appeal. 130 CMR 610.032. Following the hearing, the record was left open until July 27, 2021 for the appellant to supplement the hearing record.

## Action Taken by MassHealth

MassHealth denied the appellant’s request for comprehensive orthodontia because the appellant has fewer than 22 points on the Handicapping Labio-lingual Deviations Scale.

## Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 420.431, in determining that that comprehensive orthodontia was not medically necessary for the appellant.

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<sup>1</sup> This appeal designates Dr. Mouhab Rizkallah as the Appeal Representative and is signed by the appellant’s mother on March 12, 2021.

# Summary of Evidence

## HLD Score

On or around March 16, 2021, the appellant's provider, Dr. Rizkallah, submitted a prior authorization request on the appellant's behalf seeking MassHealth coverage for comprehensive orthodontic treatment. Along with photographs and x-rays, Dr. Rizkallah submitted a Handicapping Labio-Lingual Deviations ("HLD") Form, with a total score of 26 points.<sup>2</sup> Dr. Rizkallah also attached a document of his own devising labeled "Medical Necessity Narrative Form." Dr. Rizkallah's HLD score was comprised of:

- Five points for five mm of overjet;
- Two points for two mm of overbite;
- Six points for two ectopic eruptions;
- Five points for anterior crowding greater than 3.5 mm in one arch; and
- Eight points for labio-lingual spread of 8 mm.

DentaQuest, MassHealth's dental review contractor, reviewed the submitted images and determined the appellant's HLD score to be 12 points, based upon two mm of overjet, two mm of overbite, three mm of labio-lingual spread, and five points for mandibular, anterior crowding greater than 3.5 mm.

Dr. Kaplan explained that MassHealth developed the HLD system to ensure that the agency can continue to afford to provide orthodontic treatment to those in the Commonwealth who need it the most. He explained that these limitations include only allowing orthodontia for children and requiring an HLD score of 22 or above or the existence of one of seven automatic qualifying characteristics. Dr. Kaplan testified that there are many people who need orthodontia, according to the standards of care for orthodontia, who do not qualify for MassHealth to cover their orthodontia.<sup>3</sup>

Dr. Kaplan made his own measurements based upon the submitted images and arrived at an HLD score of 18 points. He agreed with MassHealth's measurements regarding overbite and overjet and he also allowed five points mandibular crowding. However, he found six mm of labio-lingual spread, and he saw one maxillary ectopic eruption worth three points. The scoring instructions for the HLD Form explain that an ectopic eruption cannot be scored in the same arch for which points

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<sup>2</sup> The HLD Form was signed January 25, 2021, at the time the x-rays and photographs were taken.

<sup>3</sup> This hearing occurred as one of 12 in a day for which Dr. Kaplan and Dr. Rizkallah were the only testifying witnesses. The witnesses' general arguments were set out most thoroughly during Appeal No. 2112449, though the witnesses referenced those arguments throughout the day in each of the hearings. Of the 12 hearings, Dr. Kaplan overturned MassHealth's denial in three, Dr. Rizkallah accepted that three did not qualify for orthodontia and withdrew their claims. The remaining six went to a fair hearing decision.

are awarded for anterior crowding. Dr. Rizkallah conceded that the appellant does not qualify for orthodontia under the HLD Form's scoring methodology and instead turned to his medical necessity argument.

## **Legal Arguments**

Dr. Rizkallah submitted a lengthy exhibit packet. In Appendix Q, he reviewed certain disagreements he had with previous fair hearing decisions regarding coverage for orthodontia. Citing 130 CMR 420.408, Dr. Rizkallah argued that MassHealth members who are eligible for Early and Periodic Screening, Diagnosis and Treatment ("EPSDT") Services need only show that their requested services are "medically necessary," and their request cannot be prevented by the other service restrictions detailed in 130 CMR 420.000. If the remainder of 130 CMR 420.000 is ignored, the only guidance for determining whether services are covered is the definition of "medical necessity" at 130 CMR 450.204. Dr. Rizkallah also highlighted that the HLD Form itself only requires the provider to certify that the requested services are "medically necessary" as defined by 130 CMR 450.204, and it does not reference any other regulation.

Dr. Rizkallah acknowledged the federal law makes no mention of orthodontia. However, he argued that this means there is no limit to what dentistry could be required to be covered by EPSDT services. He argued further that by accepting federal funding for EPSDT services, Massachusetts opted into an "expanded" Medicaid benefits scheme, which requires Massachusetts to cover orthodontia. No specific legal citation was given for this assertion. Only MassHealth Standard and CommonHealth members under the age of 21 are EPSDT-eligible. Dr. Rizkallah believed that all patients for whom he requested orthodontia coverage from MassHealth were MassHealth Standard members because he was unaware that other coverage types existed through which MassHealth would cover orthodontia. Nothing was entered into the record to establish the appellant's MassHealth coverage type.

## **Medical Necessity**

Dr. Rizkallah devised his own medical necessity "narrative," which was submitted as part of the appellant's prior authorization request. This narrative is designed as a flowchart that starts with the definition of "medical necessity" at 130 CMR 450.204 and checks off boxes for each criterion of the definition of medical necessity. For the appellant, Dr. Rizkallah checked boxes indicating that the requested treatment would "Alleviate a Condition" that "Causes Physical Deformity," "Threatens to cause a handicap," and "Results in an infirmity (Physical or Mental)." Boxes are checked to indicate that no other medical service was available, suitable, would have a comparable effect, or be less costly or more conservative. The form then finds "Spacing (gingival food-impaction)" as the harmful conditions and "Causes Gum & Bone Infirmity" and "Causes Tooth Infirmity" are listed as harmful effects.

Dr. Rizkallah references his exhibit, Appendix F, which included a study Published in 2018 that concluded that maxillary incisor spacing causes significant periodontal disease.<sup>4</sup> The study was started in 1969 by the Department of Veteran's Affairs ("VA"), enrolling "1231 mostly white, medically healthy, community-dwelling male veterans" who received their medical and dental care through the private sector, rather than through the VA. The study reviewed a "retrospective sample of 400 maxillary and 408 mandibular plaster casts" of participants who had at least three triennial periodontal examinations between 1971 and 2009, had all their front teeth at the beginning of the study, and not undergone orthodontic treatment. The conclusion of the study was that there is "evidence that certain malalignment traits (maxillary incisor crowding, maxillary incisor spacing, mandibular incisor mild crowding, mandibular incisor moderate-to-severe crowding, mandibular incisor moderate irregularity, and mandibular incisor severe irregularity) are risk factors in periodontal disease progression." Therefore, Dr. Rizkallah argued that in the absence of this treatment, it is reasonably calculated that the appellant will develop significant periodontal disease.

Dr. Kaplan argued that he was not in a position to predict what conditions will cause periodontal problems in the future. Dr. Rizkallah rebutted that Dr. Kaplan was choosing not to predict, but that in fact was exactly what medical providers do on a regular basis with regards to preventative care. Dr. Kaplan responded that MassHealth must consider the urgency of the treatment in developing its method for covering care in order to be able to afford to provide care to those who need it most.

## Findings of Fact

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

1. On or around March 16, 2021, Dr. Rizkallah submitted a prior authorization request on the appellant's behalf seeking MassHealth coverage for comprehensive orthodontic treatment. Included with this request were an HLD Form, x-rays and photographs, and a "Medical Necessity Narrative Form." Exhibit 3.
2. Dr. Rizkallah agreed at the hearing that the appellant had fewer than 22 points under MassHealth's HLD scoring system. Testimony by Dr. Rizkallah and Dr. Kaplan.
3. The appellant has maxillary incisor spacing. Testimony by Dr. Rizkallah.
4. The appellant's MassHealth benefit type is unknown. Testimony by Dr. Rizkallah.
5. Maxillary incisor spacing is a risk factor for periodontal disease progression at the age of 50 if left untreated. Exhibit 4, pp. 54-65.

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<sup>4</sup> Alsulaiman A.A., Kaye E., Jones J., Cabral H., Leone C., Will L., Garcia R. "Incisor malalignment and the risk of periodontal disease progression." Am. J. Orthod. Dentofac. Orthop. 153:512-522 (Apr. 2018).

## Analysis and Conclusions of Law

Federal law requires that Medicaid agencies provide “early and periodic screening, diagnostic, and treatment services” to “all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance including services described in section 1396d(a)(4)(B) of this title ... .” 42 USC § 1396a(a)(43). “Medical assistance” includes “early and periodic screening, diagnostic, and treatment services (as defined in subsection (r)) for individuals who are eligible under the plan and are under the age of 21 ... .” 42 USC § 1396(a)(4)(B).

The term “early and periodic screening, diagnostic, and treatment services” means the following items and services:

...

(3) Dental services—

(A) which are provided—

(i) at intervals which meet reasonable standards of dental practice, as determined by the State after consultation with recognized dental organizations involved in child health care, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include relief of pain and infections, restoration of teeth, and maintenance of dental health.

42 USC § 1396d(r), (3).<sup>5</sup>

MassHealth’s regulations limit eligibility for early and periodic screening, diagnostic, and treatment (“EPSDT”) services to “MassHealth Standard and MassHealth CommonHealth members younger than 21 years old ... .” 130 CMR 450.140(A)(1). MassHealth’s dental benefits, as detailed at 130 CMR 420.000, are available for more coverage types than just CommonHealth and Standard members under the age of 21. See 130 CMR 450.105. Additional guidance regarding when MassHealth will determine a treatment to be “medically necessary” is provided in the MassHealth Dental Manual and the Office Reference Manual (“ORM”). See 130 CMR 420.410 (requiring prior

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<sup>5</sup> Federal regulation mirrors the statutory language:

(c) *Diagnosis and treatment.* In addition to any diagnostic and treatment services included in the plan, the agency must provide to eligible EPSDT beneficiaries, the following services, the need for which is indicated by screening, even if the services are not included in the plan

—

(2) Dental care, at as early an age as necessary, needed for relief of pain and infections, restoration of teeth and maintenance of dental health; and ...

42 CFR § 441.56.

authorization for services identified in the Dental Manual and in accordance with procedures laid out in the ORM).<sup>6</sup>

## Eligibility for Orthodontia under 130 CMR 420.000

MassHealth requires that members establish their eligibility for dental procedures, including orthodontia, in accordance with the MassHealth dental regulations, the Dental Manual, and the ORM. The regulatory language regarding orthodontia is:

### 420.431: Service Descriptions and Limitations: Orthodontic Services

(A) General Conditions. The MassHealth agency pays for orthodontic treatment, subject to prior authorization, service descriptions and limitations as described in 130 CMR 420.431. The provider must seek prior authorization for orthodontic treatment and begin initial placement and insertion of orthodontic appliances and partial banding or full banding and brackets prior to the member's 21 birthday.

...

(C) Service Limitations and Requirements.

...

(3) Comprehensive Orthodontics. The MassHealth agency pays for comprehensive orthodontic treatment, subject to prior authorization, once per member per lifetime younger than 21 years old **and only when the member has a handicapping malocclusion**. The MassHealth agency determines whether a malocclusion is handicapping **based on clinical standards for medical necessity as described in Appendix D of the Dental Manual**. Upon the completion of orthodontic treatment, the provider must take post treatment photographic prints and maintain them in the member's dental record.

130 CMR 420.431 (emphasis **in bold**).

Appendix D of the Dental Manual, the HLD Form, sets forth three avenues for establishing that the member has a handicapping malocclusion, which would mean that orthodontia is “medically necessary.”<sup>7</sup> First, the member could have one of seven “autoqualifiers,” conditions so severe that

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<sup>6</sup> Federal law requires that state Medicaid agencies create such “procedures relating to the utilization of, and the payment for, care and services available under the plan ... as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care ...” 42 USC § 1396a(30)(A).

<sup>7</sup> The Dental Manual and Appendix D are available on MassHealth’s website, in the MassHealth Provider Library. (Available at <https://www.mass.gov/lists/dental-manual-for-masshealth-providers>, last visited August 16, 2021). Additional guidance is at the MassHealth Dental Program Office Reference Manual (“ORM”), available at: <https://www.masshealth-dental.net/MassHealth/media/Docs/MassHealth-ORM.pdf> (last visited August 16, 2021). The relevant HLD Form is also published through Transmittal Letter DEN-108, available at: <https://www.mass.gov/doc/den-108-revised-appendix-d-0/download> (last visited August 16, 2021).

they automatically qualify as handicapping. Second, objective measurements of various bite conditions are scored using the HLD scale; if the member's score is 22 points or higher, they are found to have a handicap. Finally, the HLD Form provides instructions for submitting a "Medical Necessity Narrative and Supporting Documentation":

Providers may establish that comprehensive orthodontic treatment is medically necessary by submitting a medical necessity narrative and supporting documentation, where applicable. The narrative must establish that comprehensive orthodontic treatment is medically necessary to treat a handicapping malocclusion, including to correct or significantly ameliorate

- i. a severe deviation affecting the patient's mouth and/or underlying dentofacial structures;
- ii. a diagnosed mental, emotional, or behavioral condition caused by the patient's malocclusion;
- iii. a diagnosed nutritional deficiency and/or a substantiated inability to eat or chew caused by the patient's malocclusion;
- iv. a diagnosed speech or language pathology caused by the patient's malocclusion; or
- v. a condition in which the overall severity or impact of the patient's malocclusion is not otherwise apparent.

Providers may submit a medical necessity narrative (along with the required completed HLD) in any case where, in the professional judgment of the requesting provider and any other involved clinician(s), comprehensive orthodontic treatment is medically necessary to treat a handicapping malocclusion. Providers must submit this narrative in cases where the patient does not have an autoqualifying condition or meet the threshold score on the HLD, but where, in the professional judgment of the requesting provider and any other involved clinician(s), comprehensive orthodontic treatment is medically necessary to treat a handicapping malocclusion.

The medical necessity narrative must clearly demonstrate why comprehensive orthodontic treatment is medically necessary for the patient. If any part of the requesting provider's justification of medical necessity involves a mental, emotional, or behavioral condition; a nutritional deficiency; a speech or language pathology; or the presence of any other condition that would typically require the diagnosis, opinion, or expertise of a licensed clinician other than the requesting provider, then the narrative and any attached documentation must

- i. clearly identify the appropriately qualified and licensed clinician(s) who furnished the diagnosis or opinion substantiating the condition or pathology (e.g., general dentist, oral surgeon, physician, clinical psychologist, clinical dietitian, speech therapist);



- ii. describe the nature and extent of the identified clinician(s) involvement and interaction with the patient, including dates of treatment;
- iii. state the specific diagnosis or other opinion of the patient's condition furnished by the identified clinician(s);
- iv. document the recommendation by the clinician(s) to seek orthodontic evaluation or treatment (if such a recommendation was made);
- v. discuss any treatments for the patient's condition (other than comprehensive orthodontic treatment) considered or attempted by the clinician(s); and
- vi. provide any other relevant information from the clinician(s) that supports the requesting provider's justification of the medical necessity of comprehensive orthodontic treatment. The medical necessity narrative must be signed and dated by the requesting provider and submitted on the office letterhead of the provider. If applicable, any supporting documentation from the other involved clinician(s) must also be signed and dated by such clinician(s), and appear on office letterhead of such clinician(s). The requesting provider is responsible for coordinating with the other involved clinician(s) and is responsible for compiling and submitting any supporting documentation furnished by other involved clinician(s) along with the medical necessity narrative.

The appellant does not qualify under the HLD Form. The appellant did not have an auto-qualifying condition, their HLD score did not total 22 points or more, and the submitted "medical necessity" flowchart does not satisfy the instructions in the HLD form for a "medical necessity narrative." The submitted flowchart does not identify "a handicapping malocclusion," it identifies a "harmful condition" that could potentially cause a "harmful effect." It does not "discuss any treatments for the patient's condition (other than comprehensive orthodontic treatment) considered or attempted by the clinician(s)." Dr. Rizkallah argued that this flowchart is allowable based upon the arguments outlined in the submitted Appendix Q.

Part of this argument turns upon the use of "including" before listing five conditions that could be identified as needing to be "correct[ed] or significantly ameliorate[d]" on the instructions to the HLD Form. By using "including," the appellant argued the HLD Form's instructions allow the provider to identify any potentially harmful condition that would be corrected or ameliorated. Dr. Rizkallah created his form to reference 130 CMR 450.204(A)'s definition of "medical necessity" since that is a more inclusive definition than the five examples listed on the HLD Form's instructions. The appellant's argument is that any restriction on the application of the broadest definition of "medical necessity" under 130 CMR 450.204(A) is a "service limitation" that may be disregarded according to 130 CMR 420.408. ("[A]ll medically necessary dental services for EPSDT-eligible members ... without regard to services limitations described in 130 CMR 420.000.")

However, this method shortcuts MassHealth's duly promulgated, and federally required, "procedures relating to the utilization of, and the payment for, care and services available under the plan ... ." 42 USC § 1396a(30)(A). MassHealth's procedures require that member must have "**a handicapping malocclusion.**" 130 CMR 420.431(C)(3); Appendix D; ORM, § 16.1. This term is partially defined by the seven auto-qualifying conditions and it is partially defined by the HLD scoring methodology. The medical necessity narrative does not allow for a more lenient review of what is a "handicapping malocclusion," rather it is an acknowledgement that in some, rare circumstances, the HLD Form may not capture a medical or dental condition that gives rise to a handicapping malocclusion. In those circumstances, the provider must identify what that "handicapping malocclusion" is and explain what other treatments have been considered and why they are lacking.

The HLD scoring methodology is incorporated into the definition of EPSDT-services and "medical necessity."

Dental Care — dental services customarily furnished by or through dental providers **as defined in 130 CMR 420.000: Dental Services**, to the extent the furnishing of those services is authorized by the MassHealth agency.

EPSDT Dental Protocol and Periodicity Schedule (the Dental Schedule) — a schedule (see Appendix W: EPSDT Services: Medical and Dental Protocols and Periodicity Schedules of all MassHealth provider manuals) developed and periodically updated by the MassHealth agency in consultation with recognized medical and dental organizations involved in child health care. The Dental Schedule consists of screening and treatment procedures arranged according to the intervals or age levels at which each procedure is to be provided.

130 CMR 450.141 (emphasis **in bold**).

450.204: Medical Necessity

The MassHealth agency does 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: *Potential Sources of Health Care*, or 517.007: *Utilization of Potential Benefits*.

...

**(D) Additional requirements about the medical necessity of MassHealth services are contained in other MassHealth regulations and medical necessity and coverage guidelines.**

...

130 CMR 450.204 (emphasis **in bold**).

The regulatory structure in place requires “medical necessity,” as defined by 130 CMR 450.204(A), be established in accordance with the “[a]dditional requirements ... contained in other MassHealth regulations and medical necessity and coverage guidelines.” For dental services, that guidance is 130 CMR 420.000, and by extension the Dental Manual and the ORM. MassHealth satisfies its obligation to provide “medically necessary” orthodontic services to EPSDT-eligible members by allowing them to prove that they have a handicapping malocclusion through narrative explanation. The exemption detailed at 130 CMR 420.408 continues to make sense where it removes any purely technical limitations that may prevent a member from receiving care to alleviate an indisputably handicapping malocclusion. For instance, the once-per-lifetime limitation on orthodontia or the maximum coverage period of three years.<sup>8</sup>

The fact that the appellant disagrees with the MassHealth’s methodology—that a member must have a “handicapping malocclusion” rather than any malocclusion—does not obviate the complicated regulatory framework in place for reviewing eligibility for MassHealth to cover orthodontia. Dr. Rizkallah testified that the dental condition giving rise to the need for orthodontia is anterior maxillary spacing. This is a condition already contemplated by the HLD Form in its determination of when a condition should qualify as “handicapping.” For this reason, the appellant has failed to identify that orthodontia is “medically necessary” to treat a “handicapping malocclusion.” This appeal is DENIED.

To the extent that the appellant argues that this regulatory structure is an illegal restriction upon EPSDT services as mandated federal law, that issue is outside the scope of a fair hearing and must be addressed to the Superior Court. See 130 CMR 610.082(C)(2).

## Order for MassHealth

None.

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<sup>8</sup> This decision offers no opinion as to whether or how prior authorization should be reviewed for such requests.

## 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.

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Christopher Jones  
Hearing Officer  
Board of Hearings

cc: DentaQuest

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