



The Delaware Code (31 Del. C. §520) provides for judicial review of hearing decisions. In order to have a review of this decision in Court, a notice of appeal must be filed with the clerk (Prothonotary) of the Superior Court within 30 days of the date of the decision. An appeal may result in a reversal of the decision. Readers are directed to notify the DSS Hearing Office, P.O. Box 906, New Castle, DE 19720 of any formal errors in the text so that corrections can be made.

In Re: Redacted v. DMMA

DCIS No. Redacted

Appearances: Redacted, Mother and *Pro se* Representative for Minor Redacted
Redacted, Minor **Appellant**, Witness for Herself

Annette Lang, Presenter for the Division of Medicaid and Medical Assistance (DMMA), **Appellee**
Dr. Gregory McClure, DMD, MPH, State Dental Director for DHSS/DPH,
Witness for the Appellee (via telephone)

I. Background

Redacted, mother and representative of minor Appellant Redacted, appeals the decision of the Division of and Medical Assistance (DMMA) to deny coverage for comprehensive orthodontic treatment for the minor Appellant to acquire braces. DMMA claims that the Appellant's case does not meet Medicaid requirements for handicapping malocclusion, which would be required for Medicaid coverage of comprehensive orthodontic treatment. A Fair Hearing was held on May 20, 2010 concerning this appeal. This is the Hearing Officer's Decision regarding the matter.

II. Summary of Evidence

Annette Lang, Representative for DMMA, was sworn in and testified on behalf of DMMA. Ms. Lang testified the way the process usually works for orthodontic care services is that a patient goes to a Medicaid participating orthodontist, in this case Dr. Honig, who is given the relevant scoring criteria and instructions, and who completes it based on their judgment and

evaluation. The scoring criteria of the HLD Index and instructions were submitted without objection as *State's Exhibit #3*. The orthodontist then sends this completed evaluation form, dental records, x-rays, pictures, and a plaster model to the State, currently to herself as the program's administrator, who keeps the record in order.

Ms. Lang testified that if a request is approved, the plaster models are returned to the originating orthodontist. If the request is denied, then the plaster models are kept in Dover until the time frame for a Fair Hearing has passed.

This form and supporting documentation is then sent to the State Dental Director, in this case Dr. McClure, who actually looks at it from a clinical perspective, completes their own scoring sheet, and then determines eligibility based on their review of the record and documentation that was submitted. She stated that after Dr. McClure completed his review, he denied the Appellant for the orthodontic services requested. Ms. Lang submitted, without objection, as *State's Exhibit #2*, a copy of Dr. McClure's orthodontic evaluation scoring sheet denying the Appellant for services.

Section 3.6.1 of the Delaware Medicaid's Dental Provider Policy Manual states:

Orthodontics is a covered service under Medicaid's EPSDT Dental Program for children through age 20 years who have been diagnosed with "handicapping" or "crippling" malocclusion.

Ms. Lang later testified that when an a request has been denied, typically the patient or parent/guardian, and the orthodontist receive a notice that the case has been denied. Ms. Lang stated that she speaks to orthodontist offices pretty routinely and they could always ask a question or discuss whether certain things were taken into consideration; but this did not happen in this case. She testified that she has spoken with Dr. Honig's office staff all the time and they know that they can resubmit a request. She stated that this may have happened once. Ms. Lang

testified that she believes the denial notice issued to orthodontists is a generic one and does not provide any instruction regarding disputing a denial finding. Ms. Lang admitted copies of the denial letters to Redacted and Dr. Honig's as *State's Exhibit #4*).

Ms. Lang testified that it is not feasible for Dr. McClure as the State's Dental Director, to evaluate each patient individually based on the sheer volume of requests her office receives for comprehensive orthodontics. Ms. Lang suggested that Dr. Honig resubmit an orthodontal request since Dr. McClure apparently did not see what he saw and many things have changed since the plaster model was taken close to a year ago including tooth extraction.

Ms. Lang testified that while there was no internal appeal process for patients, there is an internal appeal process in place for providers. She stated there is a limited time frame for providers to request an appeal which she believes is 60 (sixty) days, however, the date of the denial letter was January 13, 2010.

Dr. Gregory McClure, DMD, MPH, State Dental Director for DHSS/DPH, was sworn in and testified on behalf of DMMA. Dr. McClure testified that he reviews all orthodontic submissions from Medicaid dental providers in the state of Delaware to determine if they meet the criteria for handicapping malocclusion. Dr. McClure defined "malocclusion" as the relationship between the upper and lower jaw and the teeth. He stated that "handicapping" is determined based on the severity of deviation from what is considered the norm. Dr. McClure testified that most people could likely benefit from braces to some degree; however, to be considered "handicapping," it must be severe enough to effect the way a person sleeps, eats, breathes, and perhaps emotions. He stated in order to determine this; an evaluation index is in place which scores the components of the malocclusion and the score determines whether a deviation is severe enough to meet medical necessity for braces.

Dr. McClure testified that in each case, in addition to the HLD ClaMod Index referenced previously he receives from a patient's orthodontist, he also reviews plaster models of the patient's mouth, radiographs, sometimes photographs of the mouth, and any diagnostic and treatment notes the doctor has which may give additional insight into a case.

Dr. McClure testified that a doctor's insight may shed some light on some factors that may not be listed in the standard criteria that may invoke exceptions where there is automatic approval such as in the case of a cleft palate. In addition, the notes may disclose other conditions which may not be in the criteria, which if severe enough will be approved.

In regards to scoring on HLD ClaMod Index (see *Appellant's Exhibit #1* and *State's Exhibit #2*), Dr. McClure testified that an orthodontist would look at each of the sections and determine whether it applies and to what degree if applicable. Dr. McClure stated that the first five (5) descriptions are considered exceptions. Dr. McClure testified that some of the conditions require specific attributes such as #2 and #3, deep impinging overbite and crossbites, there must be destruction of soft tissue of the palate. Moving on to the standard criteria beginning with #6, Dr. McClure stated that an overjet is the distance the upper jaw is advanced in relation to the lower jaw. He stated that overbite (#7) is the height distance teeth overlap. He testified that #8, mandibular protrusion is the reverse of an overjet; and openbite (#9) is where the front teeth come together; #10 ectopic eruption is referencing crowding.

Dr. McClure testified that the State advises providers that if after a case is evaluated and it does not meet the minimum criteria (a score of at least 26, see *State's Exhibit #3*), then they should not send the case in for review. Dr. McClure's scoring evaluation on the HLD CalMod Index (*State's Exhibit #2*) differed from that of the Appellant's orthodontist, Dr. Honig (*Appellant's Exhibit #1*). Dr. McClure began to explain the discrepancies by first referring to #2

on Dr. Honig's scoring sheet (*Appellant's Exhibit #1* regarding deep impinging overbite. He stated that although Dr. Honig marked this as being 5m in deviation from the norm, as it states on the form, the overbite must result in destruction of soft tissue of the palate.

In reviewing a case to see if there is destruction of soft tissue of the palate, Dr. McClure testified that what he normally looks at is the model that the orthodontist submits and it usually has to be destruction that is clearly distinguishable. He stated that if there is no evidence of destruction of soft tissue, then these exceptions (#2 & #3) cannot apply because there is insufficient evidence. Dr. McClure stated that he did also review the pictures submitted to see if there was any destruction of soft tissue (see page 4 of *Appellant's Exhibit #2*) but he generally relies on the plaster models to capture the impression of the condition. Dr. McClure testified that what he looks for on the model to determine destruction of soft tissue are indentations where teeth would be hitting against the tissue or gingival that is receding away from teeth.

Dr. McClure testified that he did not see any destruction of soft tissue from the overbite in the plaster model and that Dr. Honig did not mention any destruction of soft tissue in his notes that were submitted. As a matter-of-fact, Dr. Honig's notes indicate that gingival condition looks healthy (see page 1 of *Appellant's Exhibit #2* under "Soft Tissue Evaluation"). He believes that what Dr. Honig did was check this off because the patient does have a deep impinging overbite, but without any indication that there is destruction of soft tissue. He stated that he frequently finds that many orthodontist check this off without realizing that it must result in destruction of soft tissue.

In reference to Dr. Honig checking off #6, crossbite, Dr. McClure testified that the State again did not find any evidence of destruction of soft tissue and there was no notation of such in Dr. Honig's notes. Dr. McClure stated that there were certainly no indication of sever traumatic

deviations (#4) in this patient [Redacted] but could understand why Dr. Honig checked this off. He stated that there is another term in the industry called a “deviation” which is where the teeth deviate from a normal opening or closing and Dr. Honig may have mistakenly believed that that this is what was meant by “severe traumatic deviations.” What this section actually references is when there has been some trauma to the jaw such as a severe burn or anything that has caused a defect in the closing of the lower and upper jaw. He stated that this condition is rarely seen. Looking at Dr. Honig’s score sheet, he marked three sections for exceptions (see #2, #3, and #4 on *Appellant’s Exhibit #1*) where in fact, none of them meet the exception criteria. Dr. McClure testified that if any of the exceptions did meet all of the criteria, then actually, the evaluation does not need to go any further because these exceptions are automatic approvals.

Dr. McClure continued his testimony regarding scoring deviations between himself and Dr. Honig and stated that they both scored overjet (#7) and overbite (#8) the same. In reference to #10 (ectopic eruption) and #11 (anterior crowding), Dr. Honig gave both sections the highest possible score and included both section scores in his total. Dr. McClure testified however, that the way these two sections are scored, is that the higher of the two scores is included but not both. In this case, Dr. Honig scored ectopic eruption with a 9 and anterior crowding with a 10 and therefore only the 10 would be included in the score. Dr. McClure agreed with Dr. Honig’s evaluation of a 10 for anterior crowding and included that score in his evaluation (see *State’s Exhibit #2*). Dr. McClure also gave a score of 4 for #12, labiolingual spread, which Dr. Honig did not give any score for. Dr. McClure stated that after the form was scored correctly per the rules of the index, [Redacted] score is actually 21 and a minimum score of 26 is required for approval if there are no exceptions.

Dr. McClure noted that if an orthodontist feels that something was overlooked after receiving a denial notice, they can call the department to review the case again, but he does not believe that Dr. Honig ever followed up with his office after the [Appellant's] denial was issued. He stated that this does not happen often and typically a case will only be reviewed again if the orthodontist feels strongly.

Redacted, Redacted mother, revisited Dr. McClure's testimony regarding the definition of handicapping in relation to emotional issues and advised Dr. McClure that Redacted has been experiencing an increasing amount of emotional distress to the degree where she is now afraid to smile and they are considering counseling for her to address her issues. She informed Dr. McClure that in addition, Redacted sometimes does not eat because it causes her pain. Ms. Redacted inquired how an orthodontist would know to include such information he testified could make a difference in evaluating the severity if it is not listed anywhere on the HDL Index. Dr. McClure stated that there would be some type of documentation advising DMMA of these conditions and their severity. He stated that there was nothing in Dr. Honig's evaluation indicating that [Redacted] could not eat, that she was suffering from pain, or that she had emotional issues.

Ms. Redacted stated that Redacted bites down on the side of her mouth when she chews sometimes because she has so much overcrowding. Dr. McClure responded that Redacted cheek biting should be evaluated and the cause of it should be reported on her examination.

Ms. Redacted stated that one of Redacted teeth, which cannot be seen in the pictures supplied by Dr. Honig (page 3 of *Appellant's Exhibit #2*), goes into her mouth and although it has been ground down, it still cuts her tongue and pokes into her bottom gum. Upon asking Dr. McClure whether this would be considered destruction of soft tissue, Dr. McClure conceded that

it would be but that he did not see this on the plastic model submitted. Ms. Redacted then asked if it was possible for Dr. McClure to see Redacted in person because she does not believe that the pictures or the plaster model submitted do Redacted mouth justice in the sense of what type of havoc her teeth are creating in her mouth. Dr. McClure responded that he does not practice clinically and seeing patients in person is not part of DMMA's process. He stated the procedure is that a patient's orthodontist does the evaluation and provides them with the necessary information. Mr. McClure conceded that his evaluation (*State's Exhibit #2*) was solely based on the documentation provided to him by Dr. Honig and he never inquired or talked to Dr. Honig as to why he scored Redacted so high. Dr. McClure testified that depending on what the issue is, DMMA would want to review a specialist's diagnosis regarding any of the issues mentioned as a result of her orthodontal issues.

Redacted, Mother and *Pro se* Representative for minor, Redacted, was sworn in and testified on behalf of her daughter. Ms. Redacted testified that Redacted has significant crowding and that her teeth actually cut her tongue. She stated that although her teeth have been filed down, it has not helped because there is not enough room in her mouth. Ms. Redacted testified that both her dentist and Dr. Honig, the orthodontist her dentist referred her to, agreed that Redacted needed braces due to the pain and discomfort she was having. She stated that if Redacted does not get braces, she will have to get tooth, after tooth, after tooth, pulled. She stated that both her dentist and Dr. Honig advised her obtaining braces to straighten out Redacted teeth and planting an extender to extend her jaw a little would eliminate a lot of Redacted pain and discomfort.

Ms. Redacted testified that Dr. Honig's office advised her that the State changed the way it was scoring the need requirement and that although Dr. Honig scored Redacted case at a 31,

DMMA did not take some of these numbers and their doctor scored her just below the minimum score of 26. Ms. Redacted admitted into evidence, without objection, as *Appellant's Exhibit #1*, a copy of a letter dated July 16, 2009 showing Dr. Honig's findings and treatment recommendations after an initial exam which took place on July 13, 2009.

Ms. Redacted testified that she does not believe an orthodontist would dispute a denial unless a parent or the patient pursues it, but she was not aware that she could challenge the State's findings through her orthodontist and was told that she had to go through a Fair Hearing.

Redacted Redacted, Minor Appellant, was sworn in and testified on behalf of herself. Redacted testified that the top of her mouth has been bothering for over a year now and although she has tried mouth guards and other things to help ease the pain, however, because her teeth are so crooked on the top, they are pushing her bottom teeth out. She stated that because of the severe overcrowding, she actually had to have a tooth pulled because there is not where for her teeth to go. She stated that many times when she eats, the problem makes her bite her tongue and the sides of her mouth and many times it comes to a point where she doesn't want to eat anymore.

III. Findings of Fact

The factual findings of an administrative officer must "be supported by substantial evidence on the record as a whole." *See* 31 *Del. C.* § 520. *Dean v. Delaware Dept. of Health and Soc. Serv.*, 2000 Del. Super. LEXIS 490, *aff'd sub. nom.* 781 A.2d 693; 2001 Del. LEXIS 205 (Del. 2001). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Morales v. Apfel*, 225 F.3d 310, 316 (3d Cir. 2000) (quoting *Plummer v. Apfel*, 186 F.3d 422, 422 (3d Cir. 1999)).

The Hearing Officer accepts all testimony given during this proceeding by the Appellant, Redacted, her mother and representative, Redacted, the State's representative, Annette Lang, and Dr. Gregory McClure as a State's witness, as being true and concise to the best of their ability. Despite this, some of the relevant facts must be filtered out and noted in order to make a proper decision.

Minor Appellant, Redacted, has several orthodontal issues including crowding and malocclusion or misalignment of teeth and jaws. According to the Appellant and her mother, Redacted, these orthodontal conditions have caused Redacted pain, self-consciousness, and have prevented her from eating comfortably for over a year. The Appellant's dentist referred her to Medicaid participating orthodontist, Gordon C. Honig, DMD, PA for an evaluation. Dr. Honig completed an orthodontic survey and diagnosis on Redacted on 7/13/09. Ms. Redacted contends that Dr. Honig advised her that obtaining braces to straighten out Redacted teeth and planting an extender to extend her jaw a little would eliminate a lot of Redacted pain and discomfort.

Dr. Honig presented DMMA with a summary of his findings and treatment recommendations on 7/16/09 (see *Appellant's Exhibit #2*). Also submitted along with this summary, were photographs of Redacted mouth, x-rays, and a plaster model. The comprehensive orthodontic treatment the Appellant was requesting was braces. Although the Appellant claims that her condition(s) caused her not to eat at times, was painful, and caused her to suffer with emotional issues; none of these were indicated on Dr. Honig's medical record or notes submitted.

Along with this information, Medicaid participating orthodontists must complete a Delaware Special Dental Orthodontic Evaluation form derived from the California Modification of the Handicapping Labiolingual Deviation or HLD/CalMod Index. This is a scoring system which determines if a patient has handicapping malocclusion requiring comprehensive

orthodontic treatment. All Delaware Medicaid participating orthodontists were given instructions with a copy of this form prior to the implementation of its use by DMMA (see *State's Exhibit #3*). In order for a patient's condition to be considered medically necessary and the orthodontic treatment request approved, the patient's condition(s) must score a 26 or greater on this scale (see page 2 of instructions in *State's Exhibit #3*). Dr. Honig scored Redacted case at 31; however, his scoring method was not entirely correct per the HLD Index instructions.

Conditions 1 through 5 on the HLD Index are conditions which if proven, are considered automatic approvals without any further scoring needed. The instructions on page 2 state that, "If conditions 1 through 5 are present, then further scoring is not needed." However, although the chart states in parenthesis that this condition must result in destruction of soft tissue, it is not clear that this must be evidenced through the orthodontist's submissions.

After being organized and sorted by Ms. Lang as Medicaid's dental program administrator, Redacted case was sent to the State Dental Director at the time, Dr. Gregory McClure, for evaluation and approval. Dr. McClure conducted his own evaluation based on the submitted information from Dr. Honig and scored Redacted case at a 21 (see *State's Exhibit #2*). Two significant factors contributed to the score discrepancy between Dr. Honig and Dr. McClure. First, although Dr. Honig marked that Redacted had exception numbers 2 through 4 on the HLD Index (see *Appellant's Exhibit #1*), Dr. McClure testified that there was insufficient support for these exceptions in the medical record supplied by Dr. Honig. Specifically, there was no evidence of destruction of soft tissue. It is possible that Dr. Honig believed that destruction of soft tissue was present and merely checked off the condition thinking that that was all that was necessary. Secondly, Dr. Honig erroneously included the score for both section #10 (ectopic eruption) and #11 (anterior crowding) where the index instructions state that the higher of the

two scores should be counted and not both (see 'NOTE' section under chart on page 1 of *State's Exhibit #3*).

The HLD instructions (page 2 of *State's Exhibit #3*) also state that if a person does not have one of the automatic conditions (#s 1 through 5), or has a total score of less than 26, then he/she may be eligible under the EPSDT exception of medical necessity is documented. However, I do not find that Dr. Honig's provided record, as is, shows medical necessity for braces.

The Appellant was denied on January 13, 2010 with the vague statement "Request does not meet policy guidelines." None of the standard set of documents regarding orthodontic requests submitted into evidence, suggest that an orthodontist may dispute a denial if they feel strongly. The denial notice does not mention how to challenge a State decision but does state to call Ms. Lang with any questions. This referral to Ms. Lang is not indicated on a patient's denial letter (see *State's Exhibit #4*). The HLD CalMod Index's instructions issued to all orthodontists in Delaware do not indicate any appeal process for providers, nor does the orientation letter regarding the HLD Index issued to Dr. Honig on June 18, 2008 (see *State's Exhibit #5*). Although I believe that Ms. Lang has good rapport with various orthodontist office staff in Delaware, it is not clear whether orthodontic office staff in Delaware actually know that they can dispute a State's denial decision. It is very likely that the office staff does not think about disputing a denial and leave it up to the patient to pursue the case further. This is especially so when considering that neither denial letter (the one to the patient and the one sent to the orthodontist) make any mention of appealing the State's decision through the orthodontist office and merely just attaches a Fair Hearing request form to the patient's denial letter (see *State's Exhibit #4*). Under these circumstances it is understandable that Ms. Redacted did not know she

could request Dr. Honig, as her recommending orthodontist, to ask that her daughter's case be reevaluated.

IV. Positions of the Parties

The State's position is that its decision to deny Redacted for comprehensive orthodontic treatment to acquire braces was correct because it is in compliance with medical assistance program policy and criteria. The State contends that Medicaid's EPSDT Program requires a diagnosis of "handicapping" or "crippling" malocclusion and that a review of the Appellant's orthodontist report and other medical evidence did not support such a diagnosis. The State claims that the Appellant's case did not meet minimum scoring criteria for this diagnosis and thus, its decision to deny coverage should be upheld.

The Appellant argues that both the Appellant's dentist and orthodontist recommended and believed that the Appellant, Redacted, needed braces in order to avoid pain and discomfort. She contends that the State was provided with the referral it required, and now she is being denied anyway.

V. Applicable Law

The mandate of the hearing officer with respect to Medicaid statutes and regulations is to "apply the State rules except to the extent they are in conflict with applicable federal regulations." 16 *DSSM* § 5406.1(1). "[T]he decision of the hearing officer [must be] supported by substantial evidence and [be] free of legal error." *Brooks v. Meconi*, 2004 Del. Super. Lexis 363, *3 (Del. Super. Ct. 2004).

Section 3.6.1 of the Delaware Medicaid's Dental Provider Policy Manual states:

Orthodontics is a covered service under Medicaid's EPSDT Dental Program for children through age 20 years who have been diagnosed with "handicapping" or "crippling" malocclusion.

Section 5301(4) for the DSSM requires that all notices, including computer generated notices, contain information needed for the claimant to determine, from the notice alone, the accuracy of the Division's action or intended action. At a minimum all notices must:

- a) Indicate the action or proposed action to be taken (i.e., denial, reduction, or termination of assistance);
- b) Provide citation(s) to the regulation(s) supporting the action being taken;
- c) Provide a detailed individualized explanation of the reasons(s) for the action being taken which includes, in terms comprehensible to the claimant, an explanation of why the action is being taken and, if the action is being taken because of the claimant's failure to perform an act required by a regulation, an explanation of what the claimant was required by the regulation to do and why his or her actions fail to meet this standard; and
- d) If calculations of income or resources are involved, set forth the calculations used by the agency, including any disregards or deductions used in the calculations, explanations of what income and/or resources the agency considers available to the claimant and the source or identity of these funds, and the relevant eligibility limits and maximum benefit payment levels for a family or assistance unit of the claimant's size.

VI. Conclusions of Law

A Fair Hearing was requested in this case in order to determine whether DMMA made the correct decision in the Appellant's case in denying her for orthodontic treatment for braces. What has been evoked by a review of the case however is an apparent violation of the Appellant's due process rights in regards to notice. The details of the denial were not made known to the Appellant until the Fair Hearing which thwarts her ability to adequately challenge the decision and present her case. Under these circumstances, the primary and only appropriate focus of this case is whether DMMA violated the Appellant's due process rights by not fully advising her of the denial decision particulars in a timely manner. This and some discussion regarding the relevant substance of this case is discussed below.

First, the more important issue regarding the insufficiency of the denial notice provided by DMMA to the Appellant will be addressed. The simple statement, "Request does not meet

policy guidelines,” alone, is too vague and unspecific to sufficiently give Appellants notice of why their requested service was denied.

Orthodontic services for Medicaid-eligible children transitioned from being under the Division of Public Health to the Division of Medicaid and Medical Assistance effective retroactively from July 1, 2006 (see *State’s Exhibit #5*). All requests for orthodontic care and reimbursement now flow through DMMA. Under either division, the State is required to adhere to the applicable rules and regulations in the Delaware Social Services Manual or DSSM. DSSM § 5301(4) requires that all denial notices, including computer generated notices, contain the following, at a minimum:

- a) An indication of the action or proposed action to be taken (i.e., denial, reduction, or termination of assistance);
- b) Provide citation(s) to the regulation(s) supporting the action being taken; and
- c) Provide a detailed individualized explanation of the reasons(s) for the action being taken which includes, in terms comprehensible to the claimant, an explanation of why the action is being taken and, if the action is being taken because of the claimant's failure to perform an act required by a regulation, an explanation of what the claimant was required by the regulation to do and why his or her actions fail to meet this standard.

These requirements are in place so an Appellant can determine from the notice alone (emphasis added), the accuracy of the Division’s action(s). *DSSM § 5301(4)* The denial notice generated to the Appellant (see first page of *State’s Exhibit #4*) only complied with the first requirement under (a) and advises the Appellant that she had been denied with the vague statement “Request does not meet policy guidelines.” The notice did not provide any citations to any regulations supporting the action as required under section (b), nor provide a detailed individualized explanation of the reason(s) for the denial as required by section (c). Even if a denial reason is too lengthy and involved to completely list on a denial notice, the notice, at a minimum, should

list a phone number for a claimant to call in the event that they want more detailed information as to the reasoning for the denial.

The notice sent to the Appellant dismissively directs her to request a Fair Hearing if she disagrees with the decision (see *State's Exhibit #4*). As a result, the Appellant did not know the reasoning behind her denial until she appeared at the Fair Hearing, which made her unprepared to fully present her case. In addition, an Appellant should not be relegated to referring to her orthodontist's office as her only option to try and determine why her case was denied. Dr. Honig's denial letter was not any more detailed than the Appellant's (see *State's Exhibit #5*) and if the doctor's office does not have the time or willingness to look into it, as in this case, the Appellant is left, again, without knowledge as to why they were denied. This scenario is unacceptable and waiting until a Fair Hearing to be advised of the reasoning behind a denial is violation of the Appellant's due process rights.

Section (c) goes further and requires that if an action is taken due to a failure to perform an act required, the State is required to explain what an applicant was required to do and why their actions failed to meet the standard. Per this section, the State would be required to indicate specifically to the Appellant, why Dr. Honig's scoring method was incorrect and what was lacking in his records. This information needs to be relayed *prior* to any Fair Hearing request.

Although it is true that Dr. Honig did not provide more detailed information regarding the exceptions he marked off on the HLD Index, it is not clear per the HLD Index or its instructions, that the orthodontist must supply evidence of the destruction of soft tissue for certain exceptions to apply. Regardless of whether or not Dr. Honig can provide sufficient evidence for support of one of these exceptions, he must none-the-less be made aware of the evidentiary requirement and given an opportunity to do so. In addition, although Dr. McClure testified that certain

psychological and physical effects of a patient's condition may impact a decision, the HLD Index does not question or inquire into "other notable effects" of any condition. On top of that, the internal appeal process that is in place is basically unknown to most orthodontists, which leaves those wishing to appeal with even less options. Therefore, orthodontists would have little chance in figuring out that they could challenge the State's denial decision and provide "other information" which could be helpful to their patient's case.

More importantly, the Appellant did not even seem to be aware that the overall reason for the denial was that the State did not feel there was enough evidence to conclude that the procedure was medically necessary per the medical records and exhibits provided by Dr. Honig's office. At a minimum, there needs to be more detailed communications between the administrative office of this program and the orthodontist offices to preserve a patient's due process right to specifically know why they were denied coverage.

Turning now briefly to Dr. Honig's notice, none of the orthodontal documentation regarding DMMA submissions notify the orthodontist that proof of destruction of soft tissue must be provided for conditions #2 and #3 on the HLD Index to apply. On the same token, Ms. Redacted made a good point during her cross-examination of Dr. McClure in inquiring as to how an orthodontist would know to include symptoms such as eating issues, sleeping issues, and emotional issues if there is no place for such things on the HLD Index. Dr. McClure deflected the question by merely stating that he found no evidence of emotional issues, pain, or discomfort in eating in Dr. Honig's evaluation and would need something from the medical professional to describe such conditions. This response indicates what was not present on Dr. Honig's evaluation, but does not answer the question of how an orthodontist would know to include such information in an evaluation when per Dr. McClure's testimony, it could make a difference.

Since Redacted and Redacted continued to describe her problems eating, sleeping, pain, discomfort, and emotional issues even before Dr. McClure began his testimony, I find their testimony regarding such to be credible and this sequence of events where such important information is absent is an indication of someone dropping the ball at the expense of the patient: either Dr. Honig for not inquiring or disclosing such conditions in his evaluation and the State which does not provide an avenue for such information to be reported while claiming that it could make a difference regarding approval.

Now turning to the substance of the case, it is notable that Dr. Honig's treatment recommendations supplied to DMMA do not recommend braces. What Dr. Honig does suggest is a palatal expansion appliance; to band and bond upper and lower arches; non-extraction for now, but possibly permanent extraction(s) later; and essix retainers after debanding to maintain alignment. Both doctors agreed that a major issue for Redacted was crowding. Based on the evidence presented during the Fair Hearing, primarily Dr. Honig's patient record and notes and Dr. McClure's testimony, Dr. Honig's written treatment recommendation (*Appellant's Exhibit #2*) regarding tooth extraction(s) and not bonding or braces, seems to be the best recommended course of action for crowding.

The problem with a violation of due process rights as to notice is exactly what happened to the Appellant in this case. The patient went straight to a Fair Hearing without discussing with anyone what the specific issue was for the denial (in this case no evidence of destruction of soft tissue) and the orthodontist never took any further steps to challenge the decision because there was no indication on the denial notice that he or she could do so. This is not to say that DMMA would not communicate to a provider or the patient what the specific issue is, but as in this case, an inordinate amount of time has gone by (almost a year) before the specifics of the case were

ever discussed. This case could have been potentially resolved shortly after the denial with a discussion between the patient and/or orthodontist and the State regarding why Redacted case was not approved and how it could be resolved.

Although I find that Dr. Honig's supplied evaluation and treatment recommendations provided to DMMA do not support a medical necessity for braces, the decision of whether DMMA appropriately denied the Appellant is reserved until a future date when the violation in the Appellant's due process rights has been cured. This deficiency can only be cured by giving the Appellant and Dr. Honig an opportunity to respond to the State's position and provide evidence of their own to substantiate their position.

WHEREFORE, the decision of the Division of Medicaid and Medical Assistance is **REMANDED** consistent with this opinion. Because of the violation of the Appellant's due process rights regarding the denial notice in this case, the Appellant will not be required to reapply for the orthodontic treatment she originally requested, but instead, the case can be *reopened* with updated information being provided as needed. Under the circumstances, the Appellant and her family should not be required to duplicate work that had already been done in the case and instead, the State is ordered to coordinate communications between itself, the Appellant, and Dr. Honig's office as to what was lacking in Redacted case and provide Dr. Honig with an opportunity to indicate why he believes Redacted case is one warranting braces and provide appropriate evidence to that effect as would be normally be necessary.

After the Appellant and Dr. Honig have been given a reasonable opportunity to challenge the State's original decision and provide supporting evidence (**within 30 days of the issuance of this decision**), the State will reevaluate Redacted case again, including any additional information and evidence subsequently provided by Dr. Honig's office, and issue another

decision in this case. If the Dental Director again denies the case, DMMA must issue a detailed denial notice in compliance with the requirements of DSSM § 5301(4).

Date: July 26, 2010

/s/ Maria C. Tedeman-Poliquin
MARIA C. TEDEMAN-POLIQUIN
HEARING OFFICER

THE FOREGOING IS THE FINAL DECISION OF THE
DEPARTMENT OF HEALTH AND SOCIAL SERVICES

July 26, 2010
POSTED

cc: Redacted and Redacted, Mother and *Pro se* Minor Appellant
Annette Lang, Presenter for DMMA, Appellee
Dr. Gregory McClure, DMD, MPH, State Dental Director for DHSS/DPH

EXHIBITS

STATE'S EXHIBITS

Exhibit #1 - (1 page) Relevant section (§ 3.6.1) of DMMA's Dental Services Provider Policy Manual regarding Orthodontic Services.

Exhibit #2 – (1 page) Copy of Dr. McClure's orthodontic evaluation scoring sheet denying the Appellant for services with a score of 21.

Exhibit #3 – (2 pages) HLD Cal Mod Index instruction sheet.

Exhibit #4 – (3 pages) Copies of denial letter sent to Redacted and Dr. Honig.

Exhibit #5 - (4 pages) Orientation letter sent to Dr. Honig dated June 18, 2008 regarding HDL Index and transition of coverage from Division of Public Health to DMMA.

APPELLANT'S EXHIBITS

Exhibit #1 - (1 page) Copy of Dr. Honig's Orthodontic Evaluation scoring sheet indicating issues he sees with Redacted teeth and scoring her issues at a 31.

Exhibit #2 – (4 pages) Copy of letter dated July 16, 2009 showing Dr. Honig's findings and treatment recommendations after an initial exam on July 13, 2009 including determinations of initial exam and photos of teeth positioning.