

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of )  
 )  
O S ) OAH No. 21-0792-MDX  
 ) Agency No.  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

The Division of Health Care Services denied a request seeking authorization for comprehensive orthodontia services for O S.<sup>1</sup> However, as discussed below, she does not qualify for the services sought under the applicable regulation. Because O does not meet the required standard, the Division’s decision denying her services is affirmed.

**II. Facts**

O is a 15-year-old who is alleged to have experienced crowded teeth, ectopically erupted teeth, and a posterior crossbite.<sup>2</sup> On January 18, 2021, her treating orthodontist, Dr. U X, submitted a Medicaid dental service request on her behalf seeking authorization for comprehensive orthodontia treatment,<sup>3</sup> the most extensive form of orthodontic services.<sup>4</sup> Included with the request was an index used in the dental industry to assess a person’s severity of need for orthodontia services, called the Handicapping Labiolingual Deviation Index (HLD Index).<sup>5</sup> Dr. X scored O an 18 on the HLD Index.<sup>6</sup>

Under the Division’s regulations, an applicant who does not have one of the automatic qualifying conditions must score at least a 26 on the HLD Index to be eligible for comprehensive orthodontia services.<sup>7</sup> O does not have any of the deformities or bite conditions that are an automatic qualifier.<sup>8</sup> Because her score on the HLD Index was only 18, on February 5, 2021, the Division denied the request for orthodontia services.<sup>9</sup> That denial was not appealed.

On March 23, 2021, another orthodontist, Dr. K Y submitted a Medicaid dental service request seeking authorization for comprehensive orthodontia treatment for O. As Dr. X had done

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<sup>1</sup> O is a minor who was represented in this proceeding by her mother and legal guardian, N S. Throughout the remainder of this decision and for ease of reference, O will be referenced by her first name and her mother will be referenced as Ms. S.

<sup>2</sup> See generally Ex. F.

<sup>3</sup> Ex. G, pp. 1, 9-12.

<sup>4</sup> 7 AAC 110.153(a).

<sup>5</sup> 7 AAC 110.153(a)(3)(C); Ex. G, p. 10.

<sup>6</sup> Ex. G, p. 10.

<sup>7</sup> 7 AAC 110.153(a)(3).

<sup>8</sup> Compare 7 AAC 110.153(a)(3) with Exs. F and G.

<sup>9</sup> Ex. H, pp. 3-5.

previously, Dr. Y also asked that O be authorized for “Comprehensive Orthodontic Treatment” for Class I crowding, multiple ectopic teeth and posterior crossbite.<sup>10</sup> Included with Dr. Y’s request was a HLD Index scoring O a 31.<sup>11</sup>

The Division denied O’s second request for comprehensive orthodontia services. As it indicated, the request for services was reviewed and determined to not meet the minimum HLD Index score required.<sup>12</sup> A fair hearing was requested on O’s behalf challenging the Division’s denial.<sup>13</sup>

Prior to the hearing, the Division was ordered to supplement the record with:

- a tooth chart, commonly used in the dental industry, identifying the location and individual identifying numbers for adult teeth;
- the HLD Index scoring instructions found on p. 2 of the HLD index; and
- the denial of authorization made by the Division regarding the comprehensive orthodontia service request by Dr. X, on behalf of O, on January 18, 2021.<sup>14</sup>

It did so and a telephonic hearing took place on June 8, 2021.<sup>15</sup> The evidence and arguments presented at the hearing are discussed below.

### **III. Discussion**

The issue here is whether the Division correctly denied prior authorization for O to receive Medicaid coverage for comprehensive orthodontia services. O and her mother bear the burden of proof in this case to show that the Division erred in denying the prior authorization request by Dr. Y.<sup>16</sup>

Despite O and her mother bearing the initial burden of proof in this case, it is noted that the prior authorization request was made by O’s treating orthodontist, Dr. Y. She essentially indicated that the services were medically necessary and exceeded the minimum HLD index score required by regulation.<sup>17</sup>

Federal courts have held that an opinion by an individual’s treating physician regarding treatment is presumed correct:

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<sup>10</sup> Ex. F, p. 1.

<sup>11</sup> Ex. F, p. 2.

<sup>12</sup> Ex. D, pp. 1-3.

<sup>13</sup> Ex. C.

<sup>14</sup> Order Rescheduling Hearing and For Supplementation of Record (May 19, 2021).

<sup>15</sup> Ex. H.

<sup>16</sup> 7 AAC 49.135.

<sup>17</sup> Ex. F.

The Medicaid statute and regulatory scheme *create a presumption in favor of the medical judgment of the attending physician* in determining the medical necessity of treatment.<sup>18</sup>

In general, more weight is given to a treating physician’s opinion than the opinions of those who do not treat a claimant.<sup>19</sup> An examining physician’s opinion is “entitled to greater weight than the opinion of a nonexamining physician.”<sup>20</sup> An administrative law judge must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of either a treating or examining physician.<sup>21</sup> Even when a treating or examining physician’s opinion is contradicted, that opinion “can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record.”<sup>22</sup> “The opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician *or* a treating physician.”<sup>23</sup> As further discussed below, this presumption in favor of the medical judgment of the treating physician is likely applicable here and has been taken into consideration.

This analysis begins with 7 AAC 110.153(a)(3), which is the regulation of the Department of Health and Social Services addressing payment of comprehensive orthodontia services. It provides that the Department will pay for such services for recipients under the age of 21 for:

comprehensive orthodontic procedures for treatment of cleft palate, for treatment in conjunction with orthognathic surgery for a class III skeletal malocclusion, or for treatment based on medical necessity due to functional impairment and a score of 26 or greater on the *Handicapping Labiolingual Deviation (HLD) Index Report* completed by an orthodontist; a prior authorization submitted by the orthodontist is required for comprehensive orthodontic treatment. . . .<sup>24</sup>

Under the regulation, what is required when comprehensive orthodontia procedures are sought is that a recipient must either have one of the conditions specified in the regulation, or alternatively, the need for treatment based on medical necessity *and* an HLD score of 26 or greater. For patients whose needs do not rise to the level of comprehensive orthodontic services, the Division may be able to offer one of the lower levels of orthodontia services. These include

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<sup>18</sup> *Weaver v. Reagen*, 886 F.2d 194, 200 (8<sup>th</sup> Cir. 1989) (emphasis added).

<sup>19</sup> *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996).

<sup>20</sup> *Id.* at 830 – 831.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 830 – 831.

<sup>23</sup> *Id.* at 831.

<sup>24</sup> 7 AAC 110.153(a)(3).

“limited orthodontic treatment” or “interceptive orthodontic treatment.”<sup>25</sup> But here, those more limited services were not requested and are not at issue.<sup>26</sup>

In this case, there is no dispute that despite O’s potential need for comprehensive orthodontia procedures, she does not have one of the requisite deformities or bite conditions that are an automatic qualifier under the regulation. Therefore, the question in this instance is whether Dr. Y’s March 23, 2021, authorization request indicating an HLD Index score of 31, satisfies the regulatory requirements for comprehensive orthodontia services. And, whether it does so given the above-referenced presumption.

At the hearing, however, substantial clear and convincing evidence established that Dr. Y’s HLD Index score of 31 was overstated. This evidence included a second HLD Index score, provided by another of O’s own treating orthodontists, Dr. X, on January 18, 2021. That score was only 18 and was made a mere 64 days earlier.<sup>27</sup> As one of the Division’s reviewing dentists testified, it was highly improbable based on the dental issues O is experiencing, that her condition changed little, if at all, during the 64-day period between the two HLD Index scores performed by her separate treating orthodontists.<sup>28</sup> Instead, the discrepancy between the two scores was likely because Dr. X’s score was accurate while Dr. Y’s score overstated O’s condition and misapplied the indexing criteria.<sup>29</sup>

Another consideration in weighing the evidence was a review of the prior authorization requests performed by one of the Division’s reviewing dentists, Dr. Dale Burke. As Dr. Burke opined in a written review, the HLD Index score submitted by Dr. X was supported by the evidence, including close-up and detailed imagery of O’s teeth.<sup>30</sup> In analyzing the HLD Index score of 31 by Dr. Y, however, Dr. Burke maintained:

The clinical photographs submitted do not support that score. From the photographs submitted: A. Only one ectopic tooth can be scored, that is #28, as it is out of position, erupted to the lingual. #5 is in normal position, and #'s 29 and 20 are also in normal position, but rotated. Teeth that are rotated, but in normal position, cannot be scored as ectopic. B. There is no crowding evident on the maxillary anterior teeth. Taking into these findings into consideration, an HLD score of 20 is more supported. (This is close to Dr X score of 18).

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<sup>25</sup> 7 AAC 110.153(a)(1) - (2).

<sup>26</sup> Ex. G, p. 2.

<sup>27</sup> Ex. G, p. 10.

<sup>28</sup> Testimony of Dr. Owen Mandanas.

<sup>29</sup> Testimony of Dr. Owen Mandanas.

<sup>30</sup> Ex. G, p. 1; Testimony of Dr. Owen Mandanas.

I recommend denial comprehensive orthodontics in this case based upon the following:

1. HLD cannot be supported as 31, and is closer to 18-20.
2. Although the patient does not have a perfect occlusion, she does have a stable occlusion, with good molar support and anterior function.
3. She does not present with an handicapped mal-occlusion of medical necessity to qualify for comprehensive orthodontics in the program.<sup>31</sup>

A final consideration in weighing the evidence was the testimony provided by another of the Division's reviewing dentists, Dr. Owen Mandanas. Dr. Mandanas possesses 21 years of experience as a dentist, including much of it in performing orthodontic work in rural Alaska. As she testified, because of the needs that arise in rural Alaska, many dentists such as herself are called upon to perform significant amounts of orthodontia work. Qualified dentists are allowed to perform such work, as long as they are comfortable doing so, and despite not possessing a specialty designation as an orthodontist. Based on her years of experience in rural Alaska as well as her current practice, she possesses significant orthodontia experience and is deemed qualified to do so.<sup>32</sup>

In this case, Dr. Mandanas testified that she agrees with Dr. X's score and disagrees with the score provided by Dr. Y. As she stated, Dr. Y's score was "way off the charts" and unsupported.<sup>33</sup> As she explained, an ectopically erupted tooth means a tooth that did not appear where it was supposed to as the child's teeth developed. She testified that Dr. Y had indicated that three of O's teeth met the ectopic eruption criteria. But, as Dr. Mandanas stated, the pictures simply show that the teeth issue are instead, simply crooked, rotated, or crowded. As Dr. Mandanas explained, even a severely crooked or rotated tooth is not properly scored as an ectopically erupted tooth. Rotated teeth do not qualify for any points scored under the HLD Index.<sup>34</sup>

As Dr. Mandanas concluded, because Dr. Y scored nine points for the three teeth she claimed were ectopically erupted, and because both Dr. Mandanas and Dr. X conclude that none of O's teeth are ectopically erupted, this difference equates to nine points (suggesting a HLD Index score of merely 22, even if the lack of anterior crowding is considered). Even if O were

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<sup>31</sup> Ex. G, p. 1.

<sup>32</sup> Testimony of Dr. Owen Mandanas.

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<sup>34</sup> Testimony of Dr. Owen Mandanas.

scored for one ectopically erupted tooth, providing her a score of three, and all other scoring remained the same under Dr. Y's analysis, O's HLD Index score would still only be 25, below the regulatory requirement.<sup>35</sup> Finally, as Dr. Mandanas testified, and Dr. Burke also confirmed, O does not possess any crowding of the upper anterior teeth.<sup>36</sup> Consequently, she is only eligible for five of the 10 HLD index points Dr. Y scored for anterior crowding. Based on the above, Dr. Mandanas agrees with the HLD Index score of 18 as initially provided by Dr. X.

In this case, even if Dr. X's HLD Index score were not considered at all, the Division has overcome the presumption in favor of Dr. Y by clear and convincing evidence. Here, in contrast to the conclusory HLD Index score provided by Dr. Y, the Division has provided a detailed narrative from Dr. Burke explaining the flaws regarding Dr. Y's conclusions. It has also provided the detailed and helpful testimony of Dr. Mandanas. Unlike the conclusions made by Dr. Y in the HLD Index scoring, the written analysis by Dr. Burke and the testimony from Dr. Mandanas both provide detailed, reasoned and a critical analysis explaining the HLD Index criteria and how they are applied.

This evidence was also helpful in allowing a review and understanding of the photographic and X-ray evidence supplied as part of this case.<sup>37</sup> Review of that evidence further supports the HLD Index scoring conclusions of doctors X, Burke and Mandanas.

It is also important to note that, in this instance, there are very different HLD Index scores, provided by O's different treating orthodontists. As such, quite arguably, the presumption in favor of a treating doctor as cited above does not even apply in this case. This is because which of the two orthodontists are entitled to the presumption under these facts, Dr. X, or Dr. Y? This question is certainly open to debate. It is easily argued that, in an instance such as this, where the scoring by one treating doctor is well above the eligibility requirement and the score of another treating doctor is well below it, the differing opinions cancel themselves. In other words, no presumption applies at all. If that were the case, then O would be required to establish by a preponderance of the evidence that the Division erred in denying her prior authorization.<sup>38</sup> Clearly, she has failed to do so.

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<sup>35</sup> Compare Ex. G, p. 5, with Ex. G, p. 10.

<sup>36</sup> Testimony of Dr. Owen Mandanas; Ex. G, p. 1.

<sup>37</sup> See Ex. G, pp. 3, 4 and 11.

<sup>38</sup> 7 AAC 49.135.

However, it is not necessary in this instance to address whether the presumption in favor of a treating physician applies or not. This is because even if it does, and as confirmed above, the Division has overcome the presumption in this case by substantial clear and convincing evidence. Based on this evidence, O's HLD Index score is 18-20, not 31 as Dr. Y concluded.

The regulations of the Department are binding on the Divisions and in this proceeding.<sup>39</sup> Further, 7 AAC 110.153(a)(3) is unambiguous. Absent an automatic qualifying condition, a score of 26 is an absolute requirement for comprehensive orthodontic services for a child under 21.<sup>40</sup> O fails to meet the standard established by the regulation.

#### IV. Conclusion

The Division's decision denying comprehensive orthodontic services to O is affirmed.

DATED this 2<sup>nd</sup> day of July, 2021.

By: Signed  
Z. Kent Sullivan  
Administrative Law Judge

### Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 13<sup>th</sup> day of July, 2021.

By: Signed  
Name: Z. Kent Sullivan  
Title: Administrative Law Judge

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

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<sup>39</sup> See, e.g., *United States v. RCA Alaska Commc'ns, Inc.*, 597 P.2d 489, 498 (Alaska 1978) ("In general, an administrative agency must comply with its own regulations.").

<sup>40</sup> 7 AAC 110.153(a)(3).