

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

SAM H., by his Mother, Alison, H., )  
GLORIELYZ R., by her Mother, Gloria C., )  
ROBERT C., by his Mother, Arcenia C. )  
STEVEN L., )  
BENNETT C., by his Mother, Kathleen K., )  
on behalf of themselves and all others )  
similarly situated; and )  
MEDICAID ORTHODONTISTS )  
OF MASSACHUSETTS, INC., )  
Plaintiffs, )

Case No.: 1:14-cv-10106-MLW

v. )  
)  
DEVAL PATRICK, Governor; )  
JOHN POLANOWICZ, Secretary of the )  
Executive Office of Health and Human Services )  
KRISTIN THORN, Acting Medicaid Director; )  
BRENT MARTIN, Dental Director, )  
DENTAL SERVICE OF MASSACHUSETTS, )  
INC., and DENTAQUEST, LLC, )  
Defendants. )

**AMENDED COMPLAINT**

**INTRODUCTION**

1. This case challenges the refusal of the Massachusetts Medicaid program (“MassHealth”) to cover medically necessary orthodontic treatment for low-income children in the Commonwealth.

2. This case is filed on behalf of children enrolled in MassHealth who have debilitating oral health problems but who are being denied the medically necessary orthodontic care that will treat these problems because of the defendants’ arbitrary and improper policies. Without this coverage, the children are suffering handicaps, infections, deformities and functional deficits that leave them unable to eat, speak clearly, learn, or live without pain.

3. MassHealth is the Medicaid program in Massachusetts. The defendants must

operate the MassHealth program consistent with requirements set forth in the Medicaid Act.

4. The Medicaid Act requires participating states to provide Early and Periodic Screening, Diagnostic and Treatment (EPSDT) for Medicaid-eligible children under age 21. Required EPSDT services include “[d]ental services ... which shall at a minimum include relief of pain and infections, restoration of teeth, and maintenance of dental health.” 42 U.S.C. § 1396d(r)(3). Under EPSDT, children are entitled to “necessary health care, diagnostic services, treatment, and other measures ... to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.” *Id.* § 1396d(r)(5).

5. The Medicaid Act also requires participating states to “include reasonable standards ... for determining eligibility for and the extent of medical assistance.” *Id.* § 1396a(a)(17).

6. When a claim for assistance is denied or not acted upon with reasonable promptness, the Medicaid Act requires the state Medicaid agency to provide the individual with the opportunity for a “fair hearing,” which must include adequate individualized notice. *Id.* § 1396a(a)(3); 42 C.F.R. part 431 (implementing constitutional due process requirements set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

7. In violation of federal law, the defendants have failed to provide medically necessary orthodontic services, to establish an adequate and effective screening and assessment process to identify children with severely misaligned teeth, to create and apply reasonable standards for determining each individual child’s orthodontic coverage needs, and to provide adequate due process when coverage is denied.

8. The defendants adopted a new testing and coverage regime for children’s

orthodontic treatment in mid-2012. Since that time the percentage of cases authorized for orthodontic treatment has dropped from 70 percent to 30 percent.

9. To obtain prior approval for comprehensive orthodontic services, children must meet the standards set forth on a state form known as the HLD Index. Defendants require a numeric score on the HLD Index that is unreasonably high and unsupported by research or clinical evidence. Further, even when the child's dentist certifies that the child does satisfy the form's requirements, the defendants, through their agent, DentaQuest, often improperly reject the child's application without explanation.

10. The plaintiffs seek prospective injunctive and declaratory relief to require the defendants to comply with Medicaid's coverage requirements for providing medically necessary orthodontic care.

#### JURISDICTION AND VENUE

11. This is a civil action authorized by 42 U.S.C. § 1983 to redress the deprivation under color of state law of rights, privileges, and immunities guaranteed by federal law. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3), and 1343(4).

12. This Court has jurisdiction over this action for declaratory relief pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure. Injunctive relief is authorized by 28 U.S.C. § 2202, 42 U.S.C. § 1983, and Rule 65 of the Federal Rules of Civil Procedure.

13. Venue is proper in the District of Massachusetts pursuant to 28 U.S.C. § 1391(b)(2), as a substantial part of the events or omissions giving rise to these claims occur within the Commonwealth of Massachusetts.

## PARTIES

### A. Plaintiffs

14. Plaintiff Sam H. is an eleven-year-old boy with severe orthodontic problems. He is a resident of Somerville, Middlesex County, Massachusetts, and brings this action through his Mother, Alison, H.

15. Plaintiff Glorielyz R. is a ten-year-old girl with severe orthodontic problems. She is a resident of Lawrence, Essex County, Massachusetts, and brings this action through her Mother, Gloria C.

16. Plaintiff Robert C. is a thirteen-year-old boy with severe orthodontic problems. He is a resident of Burlington, Middlesex County, Massachusetts, and brings this action through his mother Arcenia C.

17. Plaintiff Steven L. is a nineteen-year-old, who was diagnosed with severe orthodontic problems. He is a resident of Revere, Suffolk County, Massachusetts.

18. Bennett C. is a thirteen-year-old boy with autism and cerebral palsy who has severe orthodontic problems. He is a resident of Cambridge, Middlesex County, Massachusetts, and brings this action through his mother, Kathleen K.

19. Plaintiffs Sam H, Glorielyz R., Robert C., Steven L., and Bennet C. will be referred to collectively in this Complaint as the (“child plaintiffs”).

20. Plaintiff Medicaid Orthodontists of Massachusetts Association, Inc. (“MOMA”) is an organization whose mission is to advocate for and provide quality orthodontic systems and care that are consistent with the Medicaid Act for EPSDT-entitled children in Massachusetts. MOMA’s members include families and children who are Medicaid beneficiaries who need or may need orthodontic services and orthodontists who participate as providers in the MassHealth

Medicaid program who are personally aggrieved by the denial of necessary orthodontic services to their Medicaid patients. MOMA's principal place of business is 30 College Avenue, Somerville, Middlesex County, Massachusetts.

B Defendants

21. Deval Patrick, Governor of Massachusetts, is the Chief Executive Officer of the Commonwealth. He is responsible for seeking funds from the legislature to implement the Medicaid program. He also oversees the various executive departments of state government including the multiple secretariats and agencies responsible for the care and treatment of children, such as the Executive Office of Health and Human Services (EOHHS), and the Executive Office of Administration and Finance (EOAF), and the Division of Medical Assistance ("DMA"). He is sued in his official capacity.

22. John Polanowicz, Secretary of EOHHS, is responsible for the oversight, supervision, and control of the health and human services departments within the executive branch, including the Division of Medical Assistance (DMA). He is sued in his official capacity.

23. Kristin Thorn is the Acting Director of DMA. She is responsible for the direction, supervision, and control of DMA, the designated single state agency that operates the Massachusetts Office of Medicaid. The Massachusetts Medicaid program is known as MassHealth. Acting Director Thorn oversees the development and execution of the Massachusetts Medicaid Plan, all Medicaid policies, procedures, contracts, and practices, including those regarding services provided to children with dental and orthodontic diseases. She is responsible for ensuring that MassHealth operates as federal law requires and is sued in her official capacity.

24. Brent Martin is the Director of Dental Services appointed pursuant to G.L. c.

118E, § 2A. He is responsible for overseeing the MassHealth dental program, including its contractors. He is sued in his official capacity.

25. Dental Service of Massachusetts, Inc. (“DSM”) is a corporation with principal offices located at 465 Medford Street in Boston, Suffolk County, Massachusetts, and is the Dental Third-Party Administrator under contract with MassHealth effective August 1, 2006 and amended and restated from time to time. As the third-party administrator, DSM is responsible for administering aspects of the MassHealth Dental Program as requested by the single state Medicaid agency DMA, including evaluating requests for prior authorization of comprehensive orthodontic care.

26. DentaQuest, LLC (“DentaQuest”) is a foreign limited liability company with a principal place of business at 12121 Corporate Parkway, Mequon, Wisconsin, and a local office at 465 Medford Street, Boston, Suffolk County, Massachusetts. DentaQuest is DSM’s “significant subcontractor,” responsible for implementing aspects of the MassHealth dental program under the DSM contract.

C. The Plaintiff Class

27. Pursuant to Fed. R. Civ. P. 23(a) and (b)(2), the child plaintiffs bring this action as a class action on behalf of all Medicaid-eligible residents of Massachusetts under the age of twenty-one whose requests for MassHealth coverage of orthodontic services to treat severe and handicapping malocclusions have been denied by MassHealth or any of its employees, contractors, agents or assigns.

28. The plaintiff class is so numerous that joinder of all members is impracticable.

29. There are questions of law and fact common to the plaintiff class including.

a whether the manner in which MassHealth and its agents and contractors review

the treating doctors' applications for comprehensive orthodontic care is reasonable under the Medicaid Act;

- b whether the MassHealth process for authorizing orthodontic care meets the minimum requirements for relief of pain and infections, restoration of teeth, and maintenance of dental health under the EPSDT provisions of the Medicaid Act;
- c. whether the requirement of a threshold score of 28 on the MassHealth HLD index is a reasonable standard for determining whether comprehensive orthodontic care is medically necessary; and
- d whether the MassHealth process for notifying individuals that their claims for orthodontic coverage have been denied violates the Medicaid Act and Due Process Clause of the U.S. Constitution.

30. The claims of the named child plaintiffs are typical of the claims of the plaintiff class. As a result of the defendants' policies, practices, and procedures, all of the individual child plaintiffs and class members are not obtaining MassHealth coverage of necessary comprehensive orthodontic care to address their orthodontic conditions and diseases.

31. The child plaintiffs will fairly and adequately represent the interests of the class. The individual child plaintiffs have a clearly defined and personally vital controversy with the defendants, which dictates that they will fully and vigorously prosecute this action. At stake for these child plaintiffs is their ability to obtain medically necessary orthodontic care.

32. The plaintiffs are represented by attorneys experienced in federal class action litigation and public assistance benefits, particularly Medicaid EPSDT. The named plaintiffs seek relief that will inure to the benefit of the plaintiff class as a whole.

33. The plaintiffs seek certification of a class pursuant to Fed. R. Civ. P. 23(b)(2) on

the grounds that the defendants' policies, practices, and procedures in failing to provide for comprehensive orthodontic care deny the child plaintiffs access to medically necessary services, thereby making initial and final injunctive and declaratory relief appropriate with respect to the whole plaintiff class.

### FACTS

#### A. The Federal Medicaid Program

34. The Medicaid program, authorized pursuant to Title XIX of the Social Security Act, is a joint federal-state medical assistance program for low-income persons. *See* 42 U.S.C. §§ 1396 - 1396w-5.

35. States are not required to participate in Medicaid, but when a state agrees to do so, it must comply with the requirements imposed by the Medicaid statutes and by the Secretary of Health and Human Services. Massachusetts participates in the Medicaid program.

36. States are reimbursed by the federal government for a portion of the cost of providing Medicaid benefits. Massachusetts receives approximately fifty cents in federal reimbursement for every dollar it spends on Medicaid services.

37. Federal law requires participating states to cover certain mandatory services. One mandatory service is Early and Periodic Screening, Diagnostic and Treatment (EPSDT) for Medicaid-eligible children under age 21. 42 U.S.C. §§ 1366a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r). The EPSDT mandate of the Medicaid Act requires participating States to:

- a. inform all persons in the state who are under the age of 21 and who are eligible for Medicaid of the availability of EPSDT services as described in § 1396d(r);

- b. provide or arrange for screening services in all cases where they are requested as required by § 1396d(r)(5); and
- c. arrange for corrective treatment the need for which is disclosed by such child health screening services. 42 U.S.C. § 1396(a)(43).

38. EPSDT services must include dental services provided at intervals that meet reasonable standards of dental practice, as determined by the State after consultation with recognized dental organizations involved in child health care, and at other intervals, when necessary to determine the existence of a suspected illness or condition. 42 U.S.C. § 1396d(r)(3).

39. EPSDT services must include dental services that “shall at a minimum include relief of pain and infections, restoration of teeth, and maintenance of dental health.” 42 U.S.C. § 1396d(r)(3)(B).

40. The Centers for Medicare & Medicaid Services (CMS), the federal Medicaid agency, has published controlling guidance for participating states in the *State Medicaid Manual*, which requires coverage of orthodontic treatment when medically necessary to “correct handicapping malocclusion.” CMS, *State Medicaid Manual* § 5124.B.2.b.

41. Under the Medicaid Act, EPSDT services must include all of the services listed in 42 U.S.C. § 1396d(a) when necessary to “correct or ameliorate” a disorder or condition. Dental services are listed in § 1396d(a)(10).

42. EPSDT services must be initiated in a timely manner, as the individual needs of the child require, and must be consistent with accepted medical standards, no later than six months from the date of request. 42 C.F.R. § 441.56(e).

43. The purpose of EPSDT is to ascertain children's physical and mental impairments and to arrange for or provide such health care, treatment, or other measures to treat or ameliorate

their impairments and chronic conditions. The policy underlying the EPSDT mandate is to prevent illness as well as to ensure that children's health problems are comprehensively diagnosed and then treated as soon as they are detected, before they become more complex and their treatment more difficult and costly.

44. A state's Medicaid plan must "include reasonable standards ... for determining eligibility for and the extent of medical assistance." 42 U.S.C. § 1396a(a)(17).

45. The Medicaid Act requires participating states to provide each Medicaid recipient with the opportunity for a fair hearing when their claim for assistance is denied or not acted on with reasonable promptness. 42 U.S.C. § 1396a(a)(3). Implementing Medicaid regulations require participating states to provide each Medicaid recipient with adequate written notice when services are denied, reduced, or terminated, including denials that are subjected to prior authorization. 42 C.F.R. § 431.206(c)(2). All hearings must be conducted at a reasonable time, date and place. 42 C.F.R. § 430.240.

46. A Medicaid recipient has the right to appoint a representative to act on his/her behalf in exercising the right to a fair hearing. The recipient or his/her representative has the right to obtain information about the claim, submit evidence, make statements about facts and law, examine all documents and records used by the state (or its agents), and question testimony or evidence, including by confronting and examining adverse witnesses. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 410.242.

47. The Due Process Clause of the U.S. Constitution requires the state Medicaid agency to provide each Medicaid recipient with adequate written notice and an opportunity for an impartial hearing before services are denied, reduced or terminated. U.S. Const. amend. XIV; *Goldberg v. Kelly*, 397 U.S. 254 (1970).

B. The Massachusetts Medicaid Program

48. Massachusetts has chosen to participate in the Medicaid program. DMA, under the name MassHealth, is the designated single state agency that must administer and implement the Massachusetts Medicaid program consistent with the requirements of federal law. *See* 42 U.S.C. § 1396a(a)(5); M.G.L. c. 118E *et seq.*

49. As required by the Medicaid Act, Massachusetts has prepared a State Plan that the U.S. Department of Health and Human Services has reviewed and approved. The Plan includes EPSDT.

50. MassHealth covers orthodontic care for needy children. For a child to obtain coverage of orthodontic treatment, the treating provider must first receive a determination from MassHealth that the care is medically necessary. *See* 130 CMR 420.410.

51. Massachusetts regulations provide that care 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. 130 CMR 450.204(A).

C MassHealth Orthodontia Coverage Standards

52. MassHealth considers comprehensive orthodontic care to be medically necessary, and thus covered under Medicaid, when the child has a “severe and handicapping malocclusion.” 130 CMR 420.431(E)(1).

53. MassHealth has established standards for determining whether a malocclusion is

severe and handicapping in Appendix D of the Dental Manual. Appendix D is a document called the HLD (Handicapping Labio-Lingual Deviations) Index. 130 CMR 420.431(E) (HLD Index, attached as Exhibit A.) The HLD Index used by MassHealth states: “A score of 28 and over constitutes a severe and handicapping malocclusion.”

54. The HLD Index also provides that certain conditions, called “autoqualifiers,” automatically qualify a child for comprehensive orthodontic care without regard to the score. Autoqualifiers include, among other things, anterior impaction, reverse overjet greater than 3.5 mm, and deep impinging overbite.

55. To apply for authorization, the orthodontist examines the child and records the findings on the HLD Index, which s/he submits to MassHealth along with X-rays, photographs and a narrative.

56. In submitting an HLD Index to MassHealth a licensed orthodontist must certify that comprehensive orthodontic care is medically necessary and sign the form under penalties of perjury.

57. MassHealth will provide comprehensive orthodontic coverage only to children who obtain a threshold score of at least 28 on the HLD or an “autoqualifying” condition. MassHealth does not otherwise consider the child’s individual circumstances or consider whether the child’s condition causes pain, physical deformity or malfunction.

58. The adoption of the HLD and the threshold score of 28 (“the 2012 Standard”) became a prerequisite for approval of comprehensive orthodontic treatment on or about July 1, 2012.

59. Prior to the adoption of the 2012 Standard, approximately 70 percent of requests for comprehensive orthodontic treatment were approved. Since the adoption of the 2012

Standard, approximately 30 percent of the requests are approved.

60. The HLD Index was first proposed in 1960 as a screening device for public health administrators to use in demonstrating the presence or absence of a handicapping condition and measuring its severity. In his paper introducing the index as a diagnostic tool, Harold L. Draker, D.D.S., identified a score of 13 as establishing a handicapping malocclusion.

61. Academic studies of the HLD Index indicate that a threshold score between 12 and 13 is optimal for identifying cases of handicapping conditions that require comprehensive orthodontic treatment. As the threshold score rises, the HLD's sensitivity declines to the point where the test excludes most medically necessary cases. According to academic studies, a minimum score of 26 fails to identify between 60 and 75 percent of cases where treatment is medically necessary.

62. On information and belief, MassHealth chose the 2012 Standard without any scientific or clinical rationale.

63. Massachusetts relies entirely on the HLD score and the autoqualifying conditions and has no statutory requirement for the consideration of other factors relevant to medical necessity.

64. The Office Reference Manual permits the treating dentist to record information regarding exceptional cases where the HLD score does not reflect the severity of the patient's condition due to severe deviations that, if left untreated, will cause irreversible damage. (Office Reference Manual (b)(i).) In practice, however, the reviewers consider only the HLD score and autoqualifiers.

65. The definitions Massachusetts has set forth in the Massachusetts HLD Index often are inconsistent with standards of dental practice. For example, the Massachusetts index defines

a “normal” bite as one in which the lower incisors are touching the top incisors. Such a bite would make it impossible to chew with the back teeth and would result in the breakage of the incisors. Thus, any individual with a “normal” bite under the Massachusetts definition would in fact have a severe handicap.

66. By setting the HLD threshold at a level that screens out most deserving cases, by using incorrect definitions, and by failing to provide for individualized consideration of whether treatment is otherwise medically necessary, MassHealth violates the Medicaid Act.

D MassHealth’s Scoring Methods

67. On or about August 1, 2006, DMA, the single state Medicaid agency, entered into a contract with Dental Service of Massachusetts (DSM) to administer aspects of the MassHealth Dental Program. *See* Dental Third Party Administrator Contract, Effective August 1, 2006, amended and restated April 27, 2010 [hereinafter Contract].

68. The Contract provides that DSM is responsible for performing its obligations under this Contract through its “Significant Subcontractor,” DentaQuest, LLC. *See* Contract at i.

69. DSM and DentaQuest are responsible for reviewing requests for prior authorization (“PA”) of comprehensive orthodontic treatment in accordance with 130 CMR 420.000 ff. and 450.000 ff. Among other things, DSM and DentaQuest are required to:

- a. ensure that each prior authorization request for orthodontic services is reviewed and determined only by “licensed dentists with a specialty in orthodontics,” Contract at 2.1.D.8 and 3.4.A.3.c.; and
- b. specifically provide the clinical basis for any denial of a request for prior authorization or for use in any appeal of the decision. Contract at 3.4.B.5.

70. DentaQuest has employed reviewers who are generally identified only by their initials. Starting in or around September 2013, at least some reviewers have been identified by their full names. A reviewer approves or denies treatment for each case submitted. The review involves the interpretation of X-rays and photographs and other medically relevant information and requires the reviewer to make a diagnosis.

71. A diagnosis constitutes the practice of dentistry. G.L. c. 112, § 50.

72. Dentists who are not licensed in Massachusetts are not permitted to diagnose Massachusetts orthodontic cases. 234 CMR 2.03.

73. On information and belief, the DentaQuest reviewers include the following dentists licensed in Wisconsin: Thomas F. Gengler, David S. Bogenschutz, Paul R. Schulze, and Richard E. Nellen. None are licensed to practice in Massachusetts.

74. DentaQuest admits that until recently it assigned orthodontic cases to reviewers who were not licensed dentists with a specialty in orthodontics. It claims that only licensed orthodontists now review requests for prior authorization but has refused to provide the qualifications of its reviewers.

75. When a case is denied, DentaQuest has generally provided the reviewer's initials and the HLD score the reviewer assigned. DentaQuest reviewers have not historically explained the basis for the HLD score, found facts, or provided any other explanation of the denial.

76. On information and belief, in response to criticism from MOMA and others, DentaQuest began, in or about September 2013, to support its denials with a scoring sheet, signed with the reviewers' full names, rather than initials only. The scoring sheet still does not explain the basis for the HLD score, find facts, or provide any other explanation of the denial. It does not explain why, for example, autoqualifiers are ignored or why DentaQuest reviewers

disregard measurements taken by the treating dentist.

77. On information and belief, Defendants also have a practice of denying orthodontic coverage for children with transitional dentition (one or more baby teeth).

78. MassHealth has not adopted any regulation excluding children with transitional dentition from coverage and in fact maintains payment code D8070 for “comprehensive orthodontic treatment of the transitional dentition.” 114.3 CMR 14.05. (Compare 130 CMR 420.431(E)(1), stating that “permanent dentition must be reasonably complete.”)

79. The practice of denying coverage to children with transitional dentition can result in the exacerbation of a treatable condition.

80. There is no legitimate medical basis for denying comprehensive orthodontic treatment to children with transitional dentition, and the manner in which the policy is applied is inconsistent, arbitrary and capricious.

81. The determination form provided by the DentaQuest reviewers directs the treating orthodontist to submit any appeals to DentaQuest.

82. Appeals are often decided by the same DentaQuest reviewer who initially denied approval for treatment.

83. Medicaid requires MassHealth to provide a “fair hearing” process for individuals who wish to appeal a denial of medical assistance. 42 U.S.C. § 1396a(a)(3).

84. MassHealth has typically held hearings on denials of orthodontic coverage only in Quincy. Medicaid recipients (low-income families and children and people with disabilities) living in other parts of the state, including the named child plaintiffs and their parents, have not been able to travel to Quincy and have effectively been deprived of their due process right to a fair hearing.

E. The Crisis for the Individual Plaintiffs

85. Sam H. is an eleven-year-old boy from Somerville. He lives with his nine-year-old sister, his mother, who has been unemployed for some time, and his father, who has a job.

86. Sam requested oral health screening services that revealed two impacted lower anterior (front) teeth. An “anterior impaction” is a front tooth that does not erupt into the dental arch when it should, often because another tooth is in the way. In Sam’s case, two impacted canines are pushing into his lower incisors, which are being eaten away. (Panorex, attached as Exhibit B.) His back teeth also grind and can be uncomfortable when he eats or talks.

87. Under defendants’ policies, an anterior impaction automatically qualifies Sam for comprehensive orthodontic care. Nevertheless, MassHealth’s reviewer, identified as TG, ignored the autoqualifier and assigned an HLD score of 13 to the case, denying authorization for treatment. MassHealth did not provide any explanation of the basis for the score or why treatment was denied.

88. During a “peer review” with Sam’s dentist, a DentaQuest representative justified the denial of coverage for an automatically qualifying condition on the basis that Sam had not yet lost all his baby teeth. Sam’s dentist pointed out that it is a characteristic of impacted teeth that they cannot displace the transitional dentition and that the condition would worsen if it was not treated. The DentaQuest representative agreed but stated that he was bound by MassHealth’s policy.

89. If Sam does not receive orthodontic treatment promptly, he will likely require implants or other oral surgery, and he will continue to suffer discomfort.

90. Glorielyz R. is a ten-year-old girl from Lawrence. She lives with her two siblings, her mother who is unemployed, and her father who works in an industrial company earning nine dollars per hour. Neither of her parents speaks English.

91. Glorielyz requested oral health screening services that revealed a reverse overjet greater than 3.5 mm. A reverse overjet occurs when the lower front teeth are in front of, or hitting, the upper front teeth. In Glorielyz's case, her top and bottom incisors hit when she chews or speaks. (Photograph, attached as Exhibit C.) Her condition is causing her to suffer bone and gum loss, which is rare at her age. Her teeth hurt when she chews, and she has recurring pain in her lower jaw.

92. A reverse overjet greater than 3.5 mm automatically qualifies Glorielyz for comprehensive orthodontic care. Nevertheless, MassHealth's reviewer, Thomas Gengler, ignored the autoqualifier and assigned an HLD score of 23 to the case, denying authorization for treatment. Gengler relied entirely on the measurements and documentation submitted by Glorielyz's orthodontist and had no independent basis to score the case differently.

93. If Glorielyz does not receive orthodontic treatment promptly, she will continue to suffer pain and will likely require surgery and/or dental implants.

94. Robert C. is a thirteen-year-old boy from Burlington. He lives with his father and mother and two brothers. His father is a landscaper. His mother is trying to start a business but is not drawing a salary.

95. Robert requested oral health screening services that revealed an anterior impaction. His upper left canine is running into the root of the adjoining premolar and is causing it to be resorbed—the impacted canine is “eating” the root. (Panorex, attached as Exhibit D.)

96. Robert has several other misalignments of his teeth, resulting in a score of 28 on the HLD Index.

97. An impacted anterior tooth is an autoqualifier. MassHealth's reviewer Thomas Gengler assigned the case a score of 18, did not apply the autoqualifier, and denied authorization for Robert's care. On information and belief, Gengler assigned the HLD score relying entirely on the measurements taken by Robert's orthodontist and had no independent basis to score the case differently.

98. If Robert does not receive treatment, he will probably lose one or more teeth and may require surgery or dental implants.

99. Steven L. is a nineteen-year-old young man from Revere. He is attending UMass Amherst. When he is not in school, he lives with his mother and father. His mother works two jobs, cleaning houses and clerking in a convenience store. His father is a house painter.

100. During the second half of 2012, Steven developed recurring pain in his lower jaw and teeth. Steven requested oral health screening services that revealed a Class III Malocclusion. His whole lower jaw is pushed forward, so the high points of the top and bottom teeth hit, and he cannot chew his food properly. (Photograph, attached as Exhibit E.)

101. Steven requested oral health screening services, and his orthodontist scored him 44 on the HLD Index. MassHealth's reviewer, identified as TG, scored his case 21 on the HLD Index, denying authorization for treatment. MassHealth did not provide any explanation of how Steven's condition was scored.

102. Steven's orthodontist appealed the denial to MassHealth's agent, DentaQuest, providing a narrative explaining the basis for his score of 44.

103. A second MassHealth reviewer, identified as DB, reviewed Steven's case, assigned him a score of 24, and again denied coverage. MassHealth did not provide any explanation of how it arrived at that score.

104. Steven's orthodontist appealed the denial again. This time, DentaQuest stated that "the Dental Director reviewed your appeal and decided the denial for orthodontic treatment stands." DentaQuest did not provide any explanation for its decision.

105. Working two jobs and attending college, Steven is trying to pay for his own orthodontic treatment.

106. Bennett C. is a thirteen-year-old boy from Cambridge who has autism and cerebral palsy. He lives with his mother, who cannot afford orthodontic treatment for him.

107. Bennett's mother noticed that Bennett was not using his front teeth to bite food. Instead, he would bite into a sandwich, for example, with his side teeth. He complained of pain in his upper front teeth.

108. Bennett's mother requested oral health screening services for Bennett that revealed a deep impinging overbite. (Photograph, attached as Exhibit F.) A "deep impinging overbite" occurs when the lower front teeth bite into the gum tissue behind the upper teeth. Bennett chews gingerly, because his bottom teeth hit his upper jaw and hurt him. He cannot properly macerate his food. He is particularly sensitive to hot or cold foods.

109. Bennett's orthodontist noted that a deep impinging overbite is an autoqualifier and also scored the case 32 on the HLD Index.

110. MassHealth's reviewer, identified as TG, ignored the autoqualifier and scored the case 25, denying approval of treatment. MassHealth did provide any explanation of the basis for that score.

111. Bennett's mother traveled to Quincy for a fair hearing appeal. She had no dental training and could not effectively advocate for her son. She was only able to testify regarding her own observations of the pain her son was experiencing. Bennett lacked the verbal skills to testify on his own behalf at a hearing.

112. DentaQuest's expert witness made a statement to the effect of: "I'm not saying your son doesn't need braces. He does. But I have to follow the MassHealth rules." The hearing officer denied treatment.

F Defendants' Responsibility for the Crisis

113. The Defendants are on notice of the extent, severity, and consequences of the children's orthodontic crisis in Massachusetts.

114. Despite this knowledge, the defendants have failed and are failing to conduct medically valid reviews of requests for orthodontic treatment to determine which children have a medical necessity for such treatment.

115. The plaintiffs have no way to gain access to the orthodontic care they need other than through the Medicaid program.

116. The defendants have failed and are failing to provide or arrange for medically necessary orthodontic treatment to Medicaid-eligible children under age 21 throughout the Commonwealth.

117. The defendants have failed and are failing to adopt reasonable standards for approval of requests for orthodontic care that are scientifically valid measures of medical necessity.

118. The defendants have failed and are failing to put in place standards to assure that the DentaQuest reviewers: (a) are qualified orthodontists; (b) are licensed in Massachusetts; (c)

are performing reviews competently and consistently with controlling Medicaid law; and (d) are authorizing medically necessary care.

119. The defendants have failed and are failing to make an individualized determination of medical necessity, other than the patient's score on the HLD test.

120. The defendants have employed and are employing reviewers who are neither licensed in Massachusetts nor who are qualified orthodontists.

121. The defendants' improper limits on coverage of comprehensive orthodontic treatment result from, among other things:

- a. the use of a score to qualify for approval (28 on the HLD Index) that is not clinically valid;
- b. refusing to recognize autoqualifiers that, if present, mean the services are medically necessary;
- c. the failure to make individualized determinations of medical necessity;
- d. inadequate diagnostic assessments;
- e. the use of unqualified and unlicensed reviewers;
- f. the failure to provide written notice of the basis for the denial of prior authorization for treatment;
- g. the improper conflation of a raw score on the HLD test with medical necessity;
- h. improperly refusing medically necessary care when deciduous teeth are present;
- i. the refusal to deal with recipients' representatives for purposes of the fair hearing process;
- j. conducting hearings at inconvenient times and locations; and
- k. policies, procedures, and program definitions which arbitrarily limit access to

comprehensive orthodontic care.

122. Defendants have knowingly failed and continue to fail to comply with their responsibilities under the Medicaid Act, including the EPSDT mandate, with regard to coverage of children's orthodontic treatment by implementing policies that decrease children's access to treatment. Defendants have adopted a standard that has diminished the oral health care provided to children. They have made prior authorization policies less effective than they were before the new standard was adopted in 2012.

123. The state official defendants have knowingly failed to adequately supervise DSM/DentaQuest in order to ensure that DSM/DentaQuest complies with federal law in implementing EPSDT coverage of orthodontic services. The state official defendants have knowingly failed to manage the DSM/DentaQuest contract effectively. They have allowed DentaQuest to use guidelines for coverage determinations that do not effectively evaluate medical necessity. The state official defendants, through their agents/contractor DSM/DentaQuest, have engaged in numerous practices that violate the Medicaid and the Due Process Clause of the U.S. Constitution. The state official defendants and his designees have, for each allegation herein, specifically authorized the illegal policy, procedure or practice of DSM/DentaQuest or repeatedly failed to adequately supervise DSM/DentaQuest and to timely and effectively take corrective action to require DSM/DentaQuest to obey the law.

124. The plaintiffs and members of the plaintiff class have no adequate remedy at law and, therefore, seek immediate and permanent injunctive relief to compel the defendants to arrange for the provision of medically necessary comprehensive orthodontic services.

125. The plaintiffs and members of the plaintiff class have suffered and continue to suffer irreparable harm due to the defendants' policies, practices, procedures, and contracts that

cause the denial of, or delay in, the provision of medically necessary comprehensive orthodontic services that are required to treat the plaintiffs' conditions.

COUNT I  
Medicaid EPSDT

126. Plaintiffs incorporate and re-allege paragraphs 1 through 125 as if fully set forth herein.

127. Defendants' policies and practices for denying coverage of orthodontic services as alleged herein, are repeated and knowing and violate the Medicaid Act's EPSDT provisions, 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), and 1396d(r), which are enforceable by the Plaintiffs and plaintiff class pursuant to 42 U.S.C. § 1983.

COUNT II  
Medicaid Reasonable Standards

128. Plaintiffs incorporate and re-allege paragraphs 1 through 127 as if fully set forth herein.

129. Defendants' ongoing policy, as stated in its HLD Index, which requires a score of 28 to qualify for Medicaid coverage of orthodontic services, is in conflict with the reasonable standards requirement of the Medicaid Act, 42 U.S.C. § 1396a(a)(17), and is preempted by the Supremacy Clause of the United States Constitution, art. VI.

COUNT III  
Medicaid Due Process

130. Plaintiffs incorporate and re-allege paragraphs 1 through 129 as if fully set forth herein.

131. Defendants' policies and practices, alleged herein, are repeated and knowing and violate the Medicaid Act due process requirements, 42 U.S.C. § 1396a(a)(3), which are enforceable by the Plaintiffs and plaintiff class pursuant to 42 U.S.C. § 1983.

COUNT IV  
Constitutional Due Process

132. Plaintiffs incorporate and re-allege paragraphs 1 through 131 as if fully set forth herein.

133. Defendants' policies and procedures, alleged herein, violate the Due Process clause of the Fourteenth Amendment to the U.S. Constitution by, among other things, denying the Plaintiffs and Plaintiff class adequate, timely notice and a meaningful opportunity for a fair hearing when their requests for Medicaid coverage of orthodontic care are denied.

134. These violations, which have been repeated and knowing, entitle the Plaintiffs and plaintiff class to relief under the Fourteenth Amendment to the United States Constitution, which is enforceable by the Plaintiffs and plaintiff class pursuant to 42 U.S.C. § 1983.

REQUEST FOR RELIEF

WHEREFORE, the plaintiffs respectfully request that this Court:

1. Certify this case as a class action pursuant to Fed. R. Civ. P. 23(a) and (b)(2) and appoint counsel listed below as plaintiffs' counsel pursuant to Rule 23(g);
2. Grant a preliminary and permanent injunction requiring the defendants to:
  - a. establish and implement reasonable policies, procedures, and practices for screening and evaluating the plaintiffs and members of the plaintiff class to determine whether comprehensive orthodontic care is medically necessary to treat their dental conditions;
  - b. conduct professionally adequate assessments of all plaintiffs to determine whether comprehensive orthodontic services are medically necessary to treat their dental conditions;
  - c. require that, if the HLD Index is to be used as part of the screening process for

comprehensive orthodontic care, the threshold score for coverage have an evidentiary basis and thus be set at no higher than 13;

- d. require an individualized determination of medical necessity, in those cases where the child does not meet the threshold score of the HLD Index;
  - e. require that requests for comprehensive orthodontic care are to be reviewed only by orthodontists licensed to practice in Massachusetts;
  - f. require denials to be in writing and include the specific medical basis of the denial and, for each category on the HLD index where the treating dentist has assigned a score or found an autoqualifier, stating the MassHealth's reviewer's HLD index score and the basis for any finding that the autoqualifier was improperly diagnosed;
  - g. order that the plaintiffs and existing plaintiff class be reevaluated pursuant to the new standards and procedures;
  - h. order the defendants to ensure that hearings will be held at a reasonable place and time and final decisions made by impartial hearing officials; and
  - i. order defendants to include Comprehensive Orthodontic Treatment of Transitional Dentition (code D8070) in MassHealth orthodontic coverage.
3. Issue a declaratory judgment declaring that the defendants have violated Title XIX of the Social Security Act in their failure to provide necessary EPSDT services to Medicaid-eligible children with orthodontic impairments and to comply with the fair hearing requirements of the Medicaid Act and U.S. Constitution when denying coverage of orthodontic care.

4. Waive the requirement for the posting of a bond as security for the entry of temporary and preliminary relief.
5. Retain jurisdiction over this action to insure defendants' compliance with the mandates of the Court's Orders.
6. Award the plaintiffs the costs of this litigation and their reasonable attorneys' fees pursuant to 42 U.S.C. § 1988.
7. Grant such further and other relief as may be just and proper.

SAM H., by his Mother, Alison, H.,  
GLORIELYZ R., by her Mother, Gloria C.,  
ROBERT C., by his Mother, Arcenia C.,  
STEVEN L., BENNETT C., by his Mother, Kathleen K. and  
MEDICAID ORTHODONTISTS OF MASSACHUSETTS, INC.,  
BY THEIR ATTORNEYS,

ROSEN LAW OFFICE, P.C.

*/s/ Joel Rosen*

Joel Rosen (BBO 567788)  
ROSEN LAW OFFICE, P.C.  
204 Andover St., Ste. 402  
Andover, MA 01810  
978-474-0100  
[jrosen@rosenlawoffice.com](mailto:jrosen@rosenlawoffice.com)  
on behalf of all plaintiffs

*/s/ Peter Fisher*

Peter Fisher (BBO 679254)  
ROSEN LAW OFFICE, P.C.  
204 Andover St., Ste. 402  
Andover, MA 01810  
978-474-0100  
[pfisher@rosenlawoffice.com](mailto:pfisher@rosenlawoffice.com)  
on behalf of all plaintiffs

NATIONAL HEALTH LAW PROGRAM

*/s/ Jane Perkins*

Jane Perkins (Admitted Pro Hac Vice)  
NATIONAL HEALTH LAW PROGRAM  
101 East Weaver St., Ste. G-7  
Carrboro, NC 27510  
919-968-6308  
[perkins@healthlaw.org](mailto:perkins@healthlaw.org)  
on behalf of the child plaintiffs

*/s/ Abbi Coursolle*

Abbi Coursolle (Admitted Pro Hac Vice)  
NATIONAL HEALTH LAW PROGRAM  
3701 Wilshire Blvd., Ste. 750  
Los Angeles, CA 90010  
310-204-6010  
[coursolle@healthlaw.org](mailto:coursolle@healthlaw.org)  
on behalf of the child plaintiffs

Dated: April 28, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on the date specified below.

Dated: April 28, 2014

/s/ Peter Fisher \_\_\_\_\_  
Peter Fisher