

VIA FIRST-CLASS MAIL

Hon. Charles Baker
Massachusetts State House
Office of the Governor
Room 280
Boston, MA 02133

Hon. Marylou Sudders
Executive Office of Health and Human Services
Secretary of Health and Human Services
One Ashburton Place
Boston, MA 02108

Daniel Tsai
Executive Office of Health and Human Services
Assistant Secretary for MassHealth
One Ashburton Place
Boston, MA 02108

Re: Russell Leino

Dear Governor Baker, Secretary Sudders and Mr. Tsai:

I represent the Medicaid Orthodontists of Massachusetts Association, Inc. (“MOMA”), an organization of MassHealth providers and members. Our membership includes some of the largest orthodontic practices in the state, at least 83 of whom are MassHealth providers. I am writing to request that Russell Leino be reassigned to a position in which he does not influence or interpret MassHealth policy as it relates to orthodontics.

Attorney Leino is deputy general counsel at EOHHS. Over the past several months, Attorney Leino and his associates have poisoned the relationship between MassHealth and its providers by knowingly misrepresenting the content and effect of MassHealth regulations and by discourtesy to providers. Let me provide the background of the dispute between the providers and the executive office. Then I will explain how Mr. Leino has exacerbated the conflict.

1. Background.

MassHealth pays orthodontists about half what other insurers pay for the same services. Those orthodontists who are willing to accept the lower rate are entitled to payments for three services: (a) putting on the braces; (b) periodically adjusting the braces; and (c) taking off the braces and providing a retainer. The periodic adjustments, Code D8670, usually provide half of the total compensation. Historically, a provider could expect eight to ten quarterly payments of \$268. With the other payments, the provider would make a profit of around \$673 per case after expenses. This reimbursement rate has not increased for over a decade.

EOHHS enacted new regulations effective July 1, 2017. The executive office said the regulations would not save MassHealth any money and were merely a “clarification.” In fact, the changes lowered the reimbursement rate to the point where providers could no longer serve certain patients. EOHHS has never provided any rationale for the new regulations. Attorney Leino and his legal team repeatedly said the executive office had no duty to explain the purpose of the regulations to the people who were harmed by them.

The providers and members brought actions in the Superior Court and at the Division of Administrative Law Appeals, challenging the “clarification” as an illegal rate reduction. Those cases are pending. Meanwhile, providers could no longer afford to accept patients who had moved and needed to transfer to a different orthodontist. Hundreds of children in braces could find no one to accept them as patients. Some suffered pain, decay, and tooth and jaw problems that were irreversible.

EOHHS eventually admitted the new regulations were “unworkable,” in a statement to the Massachusetts Association of Orthodontists. It issued a transmittal letter saying that it would restore certain aspects of the former regulations. An agency cannot enact regulations that way, and the transmittal letter had no legal significance. However, all the providers once again changed their billing practices as the executive office directed. On February 1, the executive office promulgated “emergency regulations,” which tracked the language in the transmittal letter.

While the emergency regulations appeared similar those that existed in June 2017, MassHealth announced¹ that it would interpret the regulations in a way that would, again: (a) cause providers to lose money on most cases; (b) result in no savings to MassHealth; and (c) have no rational basis that the agency was willing to explain.

Although EOHHS claimed it had restored the June 2017 payment structure, that was not true. Providers used to be able to bill, in one year, for four contiguous quarters in which they saw patients. Now they must bill for discrete, 90-day periods, which may be months apart. Exhibit B shows how a provider, who sees a patient three times in a year, currently receives one payment rather than three. Secondly, providers used to be paid for

¹ See MassHealth Transmittal Letter DEN-99, attached as Exhibit A, and Office Reference Manual, January 18, 2018, p. 48.

adjustment visits anytime after banding. Providers now are not paid for any adjustments during the month when the patient receives braces. Providers who once made a profit of \$673 per case, now may *lose* up to \$762 per case. (See Exhibit C.)

2. Attorney Leino's conduct.

Mr. Leino pretended not to understand the impact of the changes. He has expressed, individually or through the agency's attorneys,² the ridiculous position that EOHHS can lower reimbursement rates--by requiring more appointments for the same money or paying less for the same number of appointments—without regard to the requirements of G.L. c. 118E, § 13D and G.L. c. 30A. Mr. Leino has represented to DALA, and allowed EOHHS's attorneys to represent in court, that the providers' claims are moot because the payment regime is the same as it was in June.

On March 30, 2018, some 50 MassHealth providers canceled their patient appointments and took the day off work to attend a public hearing in Quincy. They submitted written explanations of how the regulatory changes were affecting their practice; some indicated they would have to leave the program. If Mr. Leino honestly thought the reimbursement regime had not changed over the past year, he should at least have considered that 50 doctors strongly disagreed.

These doctors were highly educated men and women who were well informed about insurance billing and coding in general and about MassHealth in particular. They knew the reimbursement had changed, and Attorney Leino might have solved the problem, if he had listened. Instead, he gave the impression that the hearing was simply a formality to be endured. A provider criticized him on the record for smirking and rolling his eyes while they talked, shaking his head and doodling on a legal pad.

3. Basis for removal.

Executive Department employees are expected to follow a Code of Conduct and Mutual respect. The Code provides: "State employees are expected to act professionally towards all internal and external customers and provide good customer service." It is neither professional, nor is it good customer service to:

- Knowingly misrepresent the intent or effect of the Commonwealth's regulations;
- Refuse to discuss with customers the basis of his interpretation;
- Refuse to provide any rational basis for apparently arbitrary conduct on the agency's part;

² It is our understanding that Attorney Leino directs the assistant attorney generals who appear in court on behalf of EOHHS as the representative of "the client." He generally accompanies them to hearings, consults with them before and during argument, speaks in open court, and participates in conference calls. The positions we attribute to Mr. Leino were either expressed by him directly or by the attorneys on his team.

- Perpetuate a regulatory environment that denies healthcare to children who are entitled to it;
- Interact discourteously with individuals giving testimony, instead of listening respectfully and attempting to arrive at a fair decision.

Mass. R. Prof. Cond. 3.1 says: “A lawyer shall not bring, continue, or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous....” The comment to the rule adds: “What is required of lawyers ... is that they inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions.”

Mass. R. Prof. Cond. 4.1 says: “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client....”

It is inconsistent with those rules to:

- State that the reimbursement regime has not changed, when he knows that is not true;
- Argue that an agency can enact a rate change without complying with state law, unless the agency chooses to define it as a rate change;
- State falsely that a rate change is a clarification.

4. Conclusion.

The MassHealth regulations for orthodontists have changed three times in the past year in ways that are extremely confusing. These changes make it impossible for providers to serve the poorest children in the Commonwealth. Kids get hurt while Attorney Leino smirks and doodles and rolls his eyes.

Ironically, the providers and MassHealth are not far apart. The providers are only asking to return to the regulatory environment that existed ten months ago. This apparently worked for the agency and, although providers have long deserved a rate increase, they were willing to provide services under the old rate structure. Kids were getting care. The agency frankly acknowledges that it is not saving any money. If there was any reason to throw the system into turmoil, the agency can’t explain what it was.

Based on the comments at the public hearing, many providers lack confidence in Mr. Leino's ability to broker a compromise that would enable them to serve the members. They feel he is an impediment. MOMA respectfully requests that he be replaced with someone who will deal fairly with the providers and work cooperatively to restore confidence in the MassHealth agency and services to its members.

Very truly yours,

Joel Rosen