

April 15, 2013

To: Senate Committee On Health Care and Human Services
From: Paul Terdal
Re: SB365 – insurer proposals regarding External Review process

In their amendments to SB365, the insurers have proposed changes to limit or overturn the current “External Review” process, by which consumers may ask an Independent Review Organization (IRO) appointed by the Insurance Division to review adverse benefit decisions based on medical necessity, whether the service is “experimental or investigational,” or is related to continuity of care.

So far, out of 20 IRO decisions in Oregon related to Applied Behavior Analysis (ABA), 17 denials have been overturned; two have been upheld; and one was declined by the IRO on grounds that the case was a contractual dispute. In both of the two cases that were upheld, subsequent investigations by the Insurance Division concluded that the IROs failed to follow Oregon Administrative Rules and statutes regarding references to accepted standards of medical, scientific, and cost effectiveness evidence to support their position.

In 2011, after a similar experience with Independent Medical Review decisions on ABA coverage, the California Department of Insurance wrote:

“Since the great majority of these ABA IMR cases have overturned insurer denials of treatment and found in favor of the insured, and the clinical literature has established ABA therapy as the gold standard for young and autistic patients, CDI concludes that ABA therapy is not an experimental or investigational treatment and, with few exceptions, is a medically necessary treatment for autism. As such, ABA must be covered under all health insurance policies regulated by CDI. CDI regulated insurers may not legally continue to deny ABA claims unless there is a clear basis for determining that for that specific patient at that point in time, ABA therapy is not medically necessary.”

In a separate enforcement memo, CDI described the practice of forcing ABA referrals to Independent Medical Review as an “unfair and deceptive act or practice” in violation of Insurance Code section 790.03. (See “CA Action on IMRs re ABA 2011-07-13.pdf”, attached). Oregon’s law on unfair claim settlement practices (ORS 746.230) is essentially the same as California’s.

These repeated denials of coverage of ABA therapy would likewise appear to be in violation of Oregon’s Unfair Claim Settlement Practices act – ORS 746.230(1)(a), (f), and (L).

The Insurance Industry can escape from the growing burden of complying with future IRO decisions overturning their improper ABA denials at any time – by complying with the law right now, and approving coverage of ABA without sending cases to IRO in the first place. There is no need for legislation to save them from the consequences of their own misconduct.

If the insurance industry believes that there is a systemic problem with Oregon's External Review process – a process which was modeled on NAIC model regulations, and has been certified by the Federal government for compliance with the Affordable Care Act – then we should convene a workgroup under the direction of the Insurance Commissioner to examine the process for all conditions, and ways of improving it that are consistent with federal law.

Thanks,

A handwritten signature in black ink, appearing to read "Paul Terdal". The signature is fluid and cursive, with a large initial "P" and "T".

Paul Terdal

Attachments:

- Oregon External Review Appeals related to Autism as of April 15, 2013
- E-mail from Rhett Stoyer, Oregon Insurance Division, confirming completeness of list of External Review decisions, April 15, 2013
- Notice from California Department of Insurance on "Enforcement of Independent Medical Review Statutes", as regards to ABA coverage for autism, citing potential violations of Insurance Code, May 17, 2011
- California Department of Insurance Testimony to Senate Select Committee on July 13, 2011, on experience with IMR cases regarding ABA coverage for autism, and CDI enforcement action

Oregon External Review Appeals related to Autism as of April 15, 2013

Case #	Patient Description:	Insurer:	Service:	Denial Type:	IRO:	Decision Date:	Outcome:
ER07057	Male, age 6, autistic disorder	Providence	ABA	Experimental / Investigational	I PRO	8/8/2007	Overturned
ER11015	Male, age 3, autistic disorder	Kaiser	Evaluation at CDRC	Medical Necessity	Permedion	4/6/2011	Overturned
ER11056	Male, age 5, autistic disorder	Kaiser	Occupational Therapy	Medical Necessity	I PRO	8/9/2011	Upheld
ER11057	Male, age 3, autistic disorder	Kaiser	Speech Therapy	Medical Necessity	Permedion	7/29/2011	Overturned
ER11060	Male, age 5, autistic disorder	Kaiser	Speech Therapy	Medical Necessity	Lumetra	7/27/2011	Overturned
ER11089	Male, age 13, autism spectrum disorder	Kaiser	ABA, in-patient at KKI NBU	Medical Necessity	I PRO	6/30/2011	Overturned
ER11104	Male, age 4, autistic disorder	Kaiser	ABA	Medical Necessity	Lumetra	11/22/2011	Upheld
ER11105	Male, age 6, autistic disorder	Kaiser	ABA	Medical Necessity	I PRO	12/2/2011	Overturned
ER11125	Male, age 13, autism spectrum disorder (same as ER11089)	Kaiser	ABA, in-patient at KKI NBU, extension from ER11089	Medical Necessity	AMR	12/16/2011	Overturned
ER11127	Male, age 3 yrs 11 months, autism spectrum disorder	Kaiser	ABA	Medical Necessity	I PRO	1/27/2012	Overturned
ER11137	Female, age 3, Fragile X and autism	Kaiser	ABA	Medical Necessity	I PRO	1/20/2012	Overturned
ER11138	Male, age 6, autistic disorder	Kaiser	Evaluation at CDRC	Medical Necessity	AMR	1/5/2012	Upheld
ER11139	Male, age 4, autistic disorder	Kaiser	Evaluation at CDRC	Medical Necessity	Medwork	1/25/2012	Upheld
ER11140	Male, age 5, autistic disorder	Kaiser	ABA	Medical Necessity	Permedion	1/13/2012	Overturned
ER12005	Male, age 3 yrs 1 month, autism spectrum disorder	Providence	ABA	Experimental / Investigational	Permedion	2/2/2012	Overturned
ER12025	Male, age 6, autistic disorder	Kaiser	ABA	Medical Necessity	Medwork	3/16/2012	Overturned
ER12052	Male, age 4, autistic disorder	Kaiser	ABA	Medical Necessity / Licensure	Medwork	5/18/2012	Overturned
ER12053	Male, age 6, autistic disorder	Kaiser	ABA	Licensure	Permedion	5/11/2012	Declined
ER12054	Male, age 4, autistic disorder	Kaiser	ABA	Medical Necessity	I PRO	5/21/2012	Overturned
ER12077	Male, age 6, autistic disorder	Kaiser (PEBB)	ABA	Medical Necessity	I PRO	6/22/2012	Overturned
ER12085	Male, age 7, autistic disorder	Kaiser	ABA	Medical Necessity	Permedion	7/6/2012	Overturned
ER12095	Male, age 5, Asperger's	Kaiser (PEBB)	ABA	Medical Necessity	AMR	7/30/2012	Overturned
ER12102	Male, age 3, autistic disorder	Kaiser (Employee)	ABA	Medical Necessity	I PRO	8/16/2012	Overturned
ER12112	Male, age 5, autism	Kaiser	ABA	Medical Necessity	Medwork	8/31/2012	Overturned
ER12131	Male, age 13, autism	Kaiser	ABA	Medical Necessity	Medwork	10/16/2012	Upheld
ER12144	Male, age 7, autistic disorder	Kaiser	ABA / Feeding Therapy at KKI	Medical Necessity	AMR	11/9/2012	Overturned
ER13024	Male, age 3, autistic disorder	Kaiser	Speech Therapy	Medical Necessity	Permedion	3/12/2013	Upheld

Paul N. Terdal

From: Stoyer Rhett B <rhett.b.stoyer@state.or.us>
Sent: Monday, April 15, 2013 10:37 AM
To: Paul N. Terdal; shane@jacksongovrelations.com
Cc: Leslie Berri L; Savage Louis D
Subject: RE: External Review Synopses, Round 3

Mr. Terdal,

That is correct, the case numbers you provided below match the cases that I have e-mailed you. If you have any questions or concerns whatsoever about the cases please let me know.

Have a great day,

Rhett B. Stoyer
Support Specialist, Market Regulation
Oregon Insurance Division
Department of Consumer & Business Services
Phone: 503-947-7208 Fax: 503-378-4351
rhett.b.stoyer@state.or.us

From: Paul N. Terdal [<mailto:pterdal@digisphere.net>]
Sent: Monday, April 15, 2013 10:30 AM
To: Stoyer Rhett B; shane@jacksongovrelations.com
Cc: Leslie Berri L; Savage Louis D
Subject: RE: External Review Synopses, Round 3

Thanks for your help with this!

To confirm, you have provided me with 27 synopses of External Review appeals related to autism:

1. ER07057
2. ER11015
3. ER11056
4. ER11057
5. ER11060
6. ER11089
7. ER11104
8. ER11105
9. ER11125
10. ER11127
11. ER11137

12. ER11138
13. ER11139
14. ER11140
15. ER12005
16. ER12025
17. ER12052
18. ER12053
19. ER12054
20. ER12077
21. ER12085
22. ER12095
23. ER12102
24. ER12112
25. ER12131
26. ER12144
27. ER13024

Based on your review of the records, this is a complete list of all External Review appeals associated with autism.

Thanks,

Paul Terdal

From: Stoyer Rhett B [<mailto:rhett.b.stoyer@state.or.us>]
Sent: Monday, April 15, 2013 10:23 AM
To: Paul N. Terdal; shane@jacksongovrelations.com
Cc: Leslie Berri L; Savage Louis D
Subject: External Review Synopses, Round 3

Mr. Terdal,

I have attached the remaining two cases that relate to autism. This brings the total number of cases to 27.

Please let me know if you have any questions.

Rhett B. Stoyer
Support Specialist, Market Regulation
Oregon Insurance Division
Department of Consumer & Business Services
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rhett.b.stoyer@state.or.us

DEPARTMENT OF INSURANCE

Executive Office
45 Fremont Street, Suite 2300
San Francisco, CA 94105

**NOTICE**

TO: All Admitted Health Insurers and Other Interested Persons

DATE: May 17, 2011

SUBJECT: Enforcement of Independent Medical Review Statutes

This Notice reminds insurers that the California Department of Insurance (CDI) is committed to enforcing the provisions of the Insurance Code governing Independent Medical Review (IMR) of disputed health care services to ensure the full protection under the law of insureds with policies of health care insurance regulated by the CDI. The CDI requires that insurers fully comply with Insurance Code Section 10169 governing IMR as well as with Insurance Code Section 10169.3(f), which specifies that the Insurance Commissioner's written decisions adopting the determination of the independent medical review organization shall be binding on the insurer.

Please also take notice that CDI evaluates insurers' communications with insureds regarding coverage of health care services, and payment of claims for those services, for compliance with Insurance Code Section 790.03. This statute defines, and prohibits as unfair methods of competition and unfair and deceptive acts or practices, the following conduct, among other acts:

(a) Making...or causing to be made...any...statement misrepresenting the terms of any policy issued, or the benefits or advantages promised thereby....

(h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:

(l) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue;

(5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

Additionally, please note that the CDI website at <http://www.insurance.ca.gov/0100-consumers/0020-health-related/imr2010stats.cfm>, identifies nine separate instances in 2010 in which insurers' denials of behavioral therapy such as Applied Behavioral Analysis have been overturned in IMR. In two of those instances, the insurers' denials - based on a contention that the therapy was experimental or investigational - were overturned because such treatment is now recognized as the standard of care for autism. In another seven instances, the IMR reviewers overturned the insurer's denial, finding that the treatment was medically necessary for the insured.

All health insurers should take steps to evaluate how they are processing, paying for, and denying health insurance claims to ensure that they are complying with the above statutes.

If you have any questions, please contact Patricia Sturdevant, Deputy Insurance Commissioner, at 916-492-3578 or via email at patricia.sturdevant@insurance.ca.gov.

Cal. Donna Dept of Insurance Testimony to Senate Select Committee on Autism, 7/13/2011

F. What has been the number of cases related to BIT that have gone to IMR during the past 5 years? (Please review and discuss the implications of these findings).

CDI has tracked BIT (ABA) cases since 2009. Since 2009, CDI has received 32 cases related to BIT or ABA therapy that have gone to IMR. Of those 32 insurer denials, 28 were overturned by the reviewers, finding in favor of the insured receiving treatment. See Table A below.

Table A: Autism, ABA Therapy IMR Data 2009-2011 (YTD)

	2009	2010	2011 (thru 5/16/11)	Total
Number of Cases CDI received that involve BIT or ABA Therapy	10	18	4	32
Total sent to IMR Program	10	18	4	32
Total IMR decisions that Overturned the insurer denial.	7	17	4	28
Total IMR decisions that Upheld the insurer denial.	3	1	0	4

Summary and analysis of these findings: Since the great majority of these ABA IMR cases have overturned insurer denials of treatment and found in favor of the insured, and the clinical literature has established ABA therapy as the gold standard for young autistic patients, CDI concludes that ABA therapy is not an experimental or investigational treatment and, with few exceptions, is a medically necessary treatment for autism. As such, ABA must be covered under all health insurance policies regulated by CDI. CDI regulated health insurers may not legally continue to deny ABA claims unless there is a clear basis for determining that for that specific patient at that point in time, ABA therapy is not medically necessary.

Currently, despite the virtually unanimous findings in IMR, insurers continue to improperly deny insureds' claims for ABA therapy. Insurers have denied ABA therapy on the grounds that include (1) ABA treatment is not medically necessary, (2) ABA is not a covered benefit, (3) Autism is not a covered diagnosis (violation of parity laws), (4) ABA is experimental, (5) ABA is educational, and (6) the ABA provider is not licensed. Therefore, CDI is taking action to stop these practices, as is more fully described in the answer to question D relating to the third panel.

G. What happens if the health plans fail to implement the IMR findings and recommendations?

Section 10169.3(f) requires the Commissioner to immediately adopt the decision resulting from the independent medical review. This section also makes the written decision binding