

Subject: Re: Formal notice: the NDIS's treatment of some autistic children is likely to be illegal
From: Bob Buckley - A4 Co-convenor <convenor@a4.org.au>
Date: 23/08/2023, 7:42 am
To: "The Hon. Mr. Shorten MP" <Bill.Shorten.MP@aph.gov.au>
CC: daniel.white@dss.gov.au
BCC: Shannon Eeles <eeles.shannon@autismpartnership.com.au>, David Edelman <davidedelman76@gmail.com>, Kelly Parkes <kellyparkes@live.com.au>, Emily Cooper <emilyk.cooper95@gmail.com>, Rhett Ellis <ellis.rhett@gmail.com>, Rachel Worsley <worsleyrachel@gmail.com>, "jenkaravolos@outlook.com" <jenkaravolos@outlook.com>

Dear Mr Shorten

I hereby request a meeting ASAP. Such a meeting would be the first ever formal meeting between a Minister for the NDIS and the Disability Representative Organisation (DRO) representing autistic NDIS participants ... who are the most numerous primary disability in the NDIS.

Bob Buckley
Co-convenor, Autism Aspergers Advocacy Australia (A4)
website: <http://a4.org.au/>

A4 is the national grassroots organisation advocating for autistic people, their families, carers and associates. A4 is internet based so that Australians anywhere can participate in and contribute to A4's advocacy for autistic people, their carers and allies.

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"The first step in solving any problem is recognising there is one." Jeff Daniels as Will McEvoy in The Newsroom.

On 11/8/23 9:42 am, Bob Buckley (Co-convenor) wrote:

Dear The Hon. Mr. Shorten MP (and Minister for the NDIS)

I write to you formally and personally because I believe the NDIS's treatment of some young autistic children is cruel and highly likely to be illegal. I think it is especially important that you are informed that some of the NDIS's current practices and procedures do not meet legislative requirements, are detrimental for young autistic children and cause substantially increased cost to the Australian governments and the community in the future.

I have been trying to engage with senior NDIS staff and staff in your office over the issues raised in the email below, but with little success. The NDIS's treatment of autistic children seeking evidence-based early intervention for their autism has become substantially worse under your government. I am concerned that you may not be aware of or fully understand how badly the NDIS is treating these children and their Informal Supports.

I now bring the issues below to your direct and personal attention. I formally request that you meet me to discuss these matters ASAP.

--

Bob Buckley

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----- Forwarded Message -----

Subject:Fwd: AAT, NDIS and more

Date:Thu, 10 Aug 2023 13:27:05 +1000

From:Bob Buckley (Co-convenor) <convenor@a4.org.au>

Organisation:Autism Aspergers Advocacy Australia (A4)

To:daniel.white@dss.gov.au

CC:The Hon. Mr. Shorten MP <Bill.Shorten.MP@aph.gov.au>, attorney@ag.gov.au
<attorney@ag.gov.au>

Dear Mr White

Please read the email below and call me to discuss today or tomorrow - on 0418677288. I can come into Parliament House to meet if that suits you.

Please note that I am aware of another autistic child in a similar situation. There are substantial problems with the AAT process for autistic children over early intervention and the NDIS. Immediate change is needed.

--

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----- Forwarded Message -----

Subject:Re: AAT - RKYH and NDIA (2023/1027) and much more

Date:Thu, 10 Aug 2023 12:18:40 +1000

From:Bob Buckley (Co-convenor) <convenor@a4.org.au>

Organisation:Autism Aspergers Advocacy Australia (A4)

To:Falkingham, Rebecca <Rebecca.Falkingham@ndis.gov.au>, McKenzie, Corri <Corri.McKenzie@ndis.gov.au>

CC:crystaljingyang@hotmail.com <crystaljingyang@hotmail.com>, Jeremiah, Gavin <Gavin.Jeremiah@ndis.gov.au>, Sharon Taylor <STaylor@moray.com.au>, Victoria Ginnane <vginnane@moray.com.au>, Basava Salini Atluri <shaliniatluri@gmail.com>

Dear Rebecca and Corri

It's about time that your legal section acknowledged my concerns, the concerns of the people I'm helping and the general concerns of the autism sector about funding for crucial early intervention for autistic children while their support needs are disregarded through extended AAT processes.

I really do not appreciate the letter I received from Gavin Jeremiah below. He attached 6 emails from Ms Sharon Taylor, your legal representative who is handling this matter. Since he included these emails, I will comment on them below.

1. The first email on 13/4/2023 invites Ms Yang to "let us know whether you believe Isaac will require additional interim funds in his current plan whilst the Tribunal application remains on foot".
2. Ms Taylor's email on the 16/6/2023 apparently reiterates that Ms Yang should seek a s48(1) reassessment (review). This may now be appropriate since the AAT process changed substantially on 1 July 2022, the impact of those changes has been far from clear to me (and many in the disability, from what I understand). When Ms Yang investigated this option, she was told it was not possible.
The email refers to an offer made on 8/6/2023 - clearly that offer met the NDIA's requirement for s34(1) of the NDIS Act 2013.
Also note that in her email (at the bottom), Ms Yang indicated that not only would her son miss out on essential supports due to a lack of funding, he would also experience substantial detriment due to interruption to his early intervention stopping.
3. Ms Taylor's email to me on 21/6/2023 says "as advised" ... where was that advised? And "a s42D remittal is not appropriate at this stage as there is still sufficient funding in the

Applicant's plan". Justification for a s42D has nothing to do with how much funding remains. It's about delivering partial agreement, so the NDIA could have implemented the offer of 8/6/2023 while the rest of the matter was reviewed by then Tribunal. It is my understanding that was a purpose of s42D of the AAT Act. I still regard s42D as an appropriate option in such circumstances - the Respondent has not yet provided contrary argument.

Clearly there was not enough funding remaining in RKYH's plan as it did run out.

The spectacularly brief answer to my question about s48, mentioning s47A and s103 was not helpful at the time. Neither Ms Yang nor myself have any legal training or expertise. I am not aware that the NDIA has done anything to help advocates like me to understand the changes; nor do I recall these changes being discussed with the sector during their drafting and introduction. And clearly, many NDIA staff were equally uninformed since they gave Ms Yang conflicting information.

I now understand that it is a viable alternative; I presume that the NDIA feels that it is the preferred alternative because it is possible under legislative changes. But that does not seem like a good argument to me.

I always feel it is safer to conduct discussion with lawyers on the record.

4. Ms Taylor's email to Ms Yang, also 21/6/2023, again suggests Ms Yang to request a s48(1) review. Ms Yang points out that the Respondent failed to provide the information requested, and again the information request is ignored. Ms Taylor "encourages" Ms Yang again "to lodge a request for a plan reassessment or a plan variation with the Agency" - she suggests that Ms Yang should do the same thing and expect a different outcome: that is quite disrespectful. For this to work, the Respondent needs to take action to ensure that process is open to Ms Yang. We disagree with the Respondent's selective interpretation of *Kupara and National Disability Insurance Agency [2022] AATA 3091 (16 September 2022)*. The Respondent's response ignore that its offer of a s42C remittal shows clearly that the Statement of Supports in the Applicant's NDIS Plan is seriously deficient; and the NDIS's intent is to maintain (persist with) that deficiency.
5. Ms Taylor's email to Ms Yang 26/6/2023 advises her "about the best method of obtaining interim funding" but fails again to recognise that NDIA representatives who are part of that process denied her that request. It also says "the third case conference is listed on 10 August 2023" when it should have been apparent that that date was not achievable as the IME report would not be available in time.
6. Ms Yang's email 2/8/2023 advised the Respondent that , as anticipates (and ignored repeatedly by the Respondent), "I have completely depleted my NDIS funding". Ms Taylor's email to Ms Yang 2/8/2023 in response says that "the most appropriate method to obtain interim funding is to lodge a plan reassessment or a plan variation with the Agency while the AAT application is on foot". We understand that "the most appropriate" may not be "the best", "the only" or even "a possible" method. This is the first time that the Respondent has mentioned that the changes to the *NDIS Act 2013* as on 1 July 2022 made a significant difference, something the NDIA officials Ms Yang contacted about a plan reassessment were unaware of. The "method" is not possible when key NDIA officials involved in the process would not lodge the request.

We have now received the IME report and are considering what it says. There is a further delay and RYKH's funding has been exhausted while the process drags on.

If you have any doubts about the confusion over s24D, S48 and s100 etc. please note that on 6/6/2023, Ms Victoria Ginnane, Senior Associate at Moray & Agnew (the same firm as Ms Taylor is from) acting on behalf of the NDIA, wrote to Mr Johnny Le of Legal Services Commission

South Australia, acting for DRXK in the AAT (who withdrew when ADR failed), "If an alternate decision is made under section 100 of the NDIS Act, a new AAT application will be required as the Tribunal doesn't have jurisdiction to consider the outcome of any section 100 review in the current proceedings". I expect this would also be true of an alternate decision made under s48(1) of the *NDIS Act 2013*. Advice from your own legal representatives is inconsistent.

The s42D process is also under a cloud. The AAT recently asked me for a submission on the impact of *Klewer v NDIS FCA 630* in a matter now awaiting the Tribunal's decision. Frankly this is way beyond my already non-existent legal training and expertise.

I note that the IME has repeatedly advised that many autistic children including RKYH and DRXK need substantially more intensive early intervention than is currently in their plans. The NDIA does not even accept and act on the advice of its own so-called "Independent Medical Expert" until compelled to do so.

I ask again, please can you ensure this is fixed ASAP?

Bob Buckley

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On 9/08/2023 2:15 pm, Jeremiah, Gavin wrote:

Dear Mr Buckley,

Cc: *Ms Crystal Yang*

Thank you for your email.

The Agency acknowledges your concerns about the options to obtain interim funding.

The Agency's representative, Sharon Taylor, had written to Ms Yang on numerous occasions (attached), to explain that an s42D is not an appropriate option, and to request an s47A plan variation and s48 plan reassessment if funding was due to be exhausted prior to the scheduled review date.

Ms Yang contacted Isaac's ECEI Coordinator to request an s48 plan reassessment. The AAT Branch advised the ECEI Coordinator that a plan reassessment can be requested whilst there is an active AAT application on foot. Isaac's ECEI Coordinator has lodged the s48 plan reassessment request and escalated the request to a Delegate of the CEO for a decision.

This request will progress through our National Delivery Team, and Isaac's ECEI Coordinator will contact Ms Yang again in due course when a decision is made.

Kind regards,

Gavin Jeremiah
Assistant Director
AAT Case Management Branch
National Disability Insurance Agency
E: gavin.jeremiah@ndis.gov.au



The NDIA acknowledges the Traditional Custodians of Country throughout Australia and their continuing connection to land, sea and community. We pay our respects to them and their cultures and to Elders past, present and emerging.

From: Bob Buckley (Co-convenor) <convenor@a4.org.au>
Sent: Friday, August 4, 2023 4:41 PM
To: Falkingham, Rebecca <Rebecca.Falkingham@ndis.gov.au>; McKenzie, Corri <Corri.McKenzie@ndis.gov.au>
Subject: young child's plan has run out ...

Dear Rebecca and Corri

Please see the attached emails. Ms Yang's RKYH is now out of funding.

The Agency and it's representative have provided conflicting information ... and giving her the run around. She has asked repeatedly for the situation to be remedied but no one does anything.

I do not believe that it is appropriate for Ms Yang to ask for a plan review. That will cause a total nightmare in the AAT. This must be addressed via s42D of the AAT Act (even though that also seems now to be a legal nightmare since *Klewer v NDIA* [2023] FCA 630).

Please can you ensure this is fixed ASAP?

--

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