

Klein comments 3-31-22

These are my comments in response to the Applicant's 2-1-22 responses to my questions submitted after the first TRC meeting, Credentialing Review - Applied Behavior Analysts - Klein Questions (ne.gov).

I voiced some of these at the 2-10-22 meeting, and some may have been answered in part at that meeting. However, my understanding of Applicant's statements at the 2-10-22 TRC meeting seem to be somewhat at odds with the Applicant's written responses to my questions. In connection with the suggestion by Amy Reynoldson of the NMA, that if the Applicant provided an actual draft bill, many question *might* be answered, I agree, but reiterate no such draft is required as part of the review.

My written comments, which follow, are made to address the *written* responses the applicant made to my previous questions. I have used "ABA" throughout, usually referring to Applied Behavior Analysts, but also Applied Behavior Analysis as context demands.

Applicant's Response to Question 1.

Applicant quoted NEB. REV. STAT. § 38-1,110. I suspect this was done in error, as the statute I referred to in my question was NEB. REV. STAT. § 38-110, the definition of "certificate" from the Uniform Credentialing Act. I also cited to the statutes defining "registration" in the Nebraska Regulation of Health Professions Act *and* in the Uniform Credentialing Act.

My question was and is based on the Applicant's apparent incomplete understanding of the Uniform Credentialing Act and upon NEB. REV. STAT. § 71-6222 which sets out the directive of the Nebraska Regulation of Health Professions Act that regulation of a health profession – if found to be necessary under that Act's criteria - be by the *least* restrictive alternative.

Applicant alleges that there is no mechanism for complaint investigations or oversight for credentials other than licensure. This is simply untrue; see NEB. REV. STAT. § 38-113 which includes certification and registration as types of "credential" and section 38-178 which provides for discipline of a "credential."

Portions of the Application, original and revised, and Applicant's answers to my previous written questions, imply ABA are currently prohibited from independent *practice*. To clarify, it is my understanding from the Application, comments and NEB. REV. STAT. § 44-7,106 that ABA are in fact currently practicing and that third-party reimbursement for treatment of autism is provided for by Nebraska law.

It is my understanding that ABA *reimbursement* may be dependent on referral, but the practice of ABA is *not* currently restricted to a particular licensed profession(s).

If the Applicant's proposal is successful, the practice of ABA would require a credential – at whatever level - under the Uniform Credentialing Act. I sincerely urge the Applicant to

fully understand that Act's scheme, with the aim of making the proposal consistent with Nebraska law.

Assertions in an application that are inaccurate and easily disproven are not helpful.

Applicant's Response to Question 3.

The portion of the Application that led to my question pertains to the scope of practice of professions that are currently credentialed in Nebraska. I was puzzled the Applicant responded to this portion and asked if Applicant was representing that ABAs were currently credentialed. No response was given to this portion of my question.

My understanding from materials and comments is that ABA are not currently credentialed, nor are they prohibited from practice.

For the remainder of the response, I understand the documents cited as regulations are in fact DHHS DD and MLTC policy statements that pertain to reimbursement standards.

I still note the revised Application still refers to the cited definitions as "regulations." They are not regulations, which are legally binding requirements adopted pursuant to the Administrative Procedure Act, so this portion of the Application remains inaccurate.

Applicant's Response to Question 4.

My question was: "[i]n response to question 9 at page 20 can you present an answer focusing on the current situation in Nebraska, rather than in other states?" [emphasis added for this comment].

Although Applicant added language to the Application further expressing the intentions of the proposal, the response did not address my question regarding the current situation in Nebraska.

As I stated above, it is my understanding from the Application, comments and NEB. REV. STAT. § 44-7,106 that ABA are in fact currently practicing and that third-party reimbursement for autism is provided for by Nebraska law.

It is my understanding that ABA *reimbursement* may be dependent on referral, but the practice of ABA is *not* currently restricted to a particular licensed profession(s).

Applicant's Response to Question 5.

I asked if a prescription is required before ABA services can be provided or if third party insurers may require a prescription as proof of necessity. No ban on providing services, but it's a prerequisite for payment.

To clarify: if the law requires a prescription, providing the services without a prescription would be illegal. If no prescription is legally required, but an insurer will not reimburse without a prescription, then providing the services is still legal, it is simply a matter of reimbursement.

From Applicant's answer, I conclude that the current law does not require a prescription for behavior-analytic services, so there is no legal impediment for the provision of those services, but many insurance companies require a referral or a diagnosis (by a state-credentialed provider) for services to be reimbursed and some health plans will not pay for behavior-analytic services unless the provider is licensed by the state.

I conclude that the practice of ABA is not currently restricted by law, but that there are reimbursement barriers when non-credentialed persons practice ABA.