

To: Ron.Briel@nebraska.gov, Matthew.Gelvin@nebraska.gov, and Jessie.Enfield@nebraska.gov

Re: Follow-up Answers to Technical Review Committee Members' Questions

Date: 2-1-2022

Technical Review Committee members Darrel Klein and Stephen Peters asked the following questions. The NEABA Public Policy Group has answered and provided additional information to each question outlined below.

Question 1: Please address why under Nebraska Law, Certification or Registration is insufficient to protect the public and to help with third party reimbursement? See 71-6206 & 38-110 and 71-6217 & 38-120. This would replace or augment part of their response to "additional question 2a on page 33.

Answer: 71-6206. Certificate or certification, defined. *Certificate or certification shall mean a voluntary process by which a statutory regulatory entity grants recognition to an individual who has met certain prerequisite qualifications specified by such regulatory entity and who may assume or use certified in the title or designation to perform prescribed tasks.*

38-1,110. Complaint alleging dependence or disability; director; investigation; report; review by board; finding; effect.

(1) When the department has received a complaint or report by any person or any report has been made to the director by the Licensee Assistance Program under section 38-175 alleging that an applicant for a credential or a person credentialed to practice any profession is suffering from abuse of, dependence on, or active addiction to alcohol, any controlled substance, or any mind-altering substance that impairs the ability to practice the profession or illness, deterioration, or disability that impairs the ability to practice the profession, the director shall investigate such complaint to determine if any reasonable cause exists to question the qualification of the applicant or credential holder to practice or to continue to practice such profession.

(2) If the director on the basis of such investigation or, in the absence of such complaint, upon the basis of his or her own independent knowledge finds that reasonable cause exists to question the qualification of the applicant or credential holder to practice such profession because of abuse of, dependence on, or active addiction to alcohol, any controlled substance, or any mind-altering substance that impairs the ability to practice the profession or illness, deterioration, or disability that impairs the ability to practice the profession, the director shall report such finding and evidence supporting it to the appropriate board.

(3) If such board agrees that reasonable cause exists to question the qualification of such applicant or credential holder, the board shall appoint a committee of three qualified physicians or other qualified professionals to examine the applicant or credential holder and to report their findings and conclusions to the board. The cost of the examination shall be treated as a base cost of

credentialing under section 38-152. The board shall then consider the findings and the conclusions of the physicians or other qualified professionals and any other evidence or material which may be submitted to that board by the applicant or credential holder, by the director, or by any other person and shall then determine if the applicant or credential holder is qualified to practice or to continue to practice such profession in the State of Nebraska.

(4) If such board finds the applicant or credential holder to be not qualified to practice or to continue to practice such profession because of abuse of, dependence on, or active addiction to alcohol, any controlled substance, or any mind-altering substance that impairs the ability to practice the profession or illness, deterioration, or disability that impairs the ability to practice the profession, the board shall so certify that fact to the director with a recommendation for the denial, refusal of renewal, limitation, suspension, or revocation of such credential. The director shall thereupon deny, refuse renewal of, suspend, or revoke the credential or limit the ability of the credential holder to practice such profession in the state in such manner and to such extent as the director determines to be necessary for the protection of the public.

71-6217. Registration, defined. *Registration shall mean the formal notification which, prior to rendering services, a practitioner submits to a state agency setting forth the name and address of the practitioner, the location, nature, and operation of the health activity to be practiced, and such other information which is required by the regulatory entity. A registered practitioner may be subject to discipline and standards of professional conduct established by the regulatory entity and may be required to meet any test of education, experience, or training in order to render services.*

NEABA Public Policy Group Response: Certification indicates a professional has expertise in a particular area, but it does not allow for independent practice in the state of Nebraska or allow for 3rd party reimbursement as an independent provider. As noted in the definition above, it is voluntary. Licensure is the credential required for practice and third-party reimbursement in Nebraska and allows for board oversight of those practicing as indicated in the complaint section above. Without licensure and a board, there is not a regulating body to receive a complaint, or who has the authority to investigate a complaint or provide consequences. Licensure allows for professional board oversight of the profession at the state level that certification does not include.

Registration does occur for the purpose of providing consultative assessments and for Medicaid billing as described below. However, there is not a process in place for adjudicating complaints or regulating the practice of those registered.

Question 2: In response to part of question 2, at page 8, listing the “practitioners of the occupations similar to or working closely with members of the occupation dealt with in the application” LMHPs are omitted although they were discussed in the 2010 407 review and are included in the response to question 6 at page 16. Was

Answer: this intentional? And relatedly at page 10 there was no response to “any other group that would have an interest in the application.” Was this intentional? The omission of LMHPs in response to question 6 on page 16 was unintentional. This has been corrected in the most recent updated version of our 407 Application.

We did not have any additional groups to add that we could think of in addition to the one’s listed that would have an interest in the application. No response to this section was intentional.

Question 3: In your application on page 11, answering question 3, you are not presenting that ABAs are currently credentialed by Nebraska, correct? Secondly, the links cited in the application was regulations are not regulations. Please explain their source

Answer: Regulations may be the wrong term to use. There are two primary sources in current Nebraska DHHS policy that govern the practice of BCBA’s. One is Section 8.4 on Consultative Assessments on p. 116 of the 2020 Nebraska DHHS Division of Developmental Disabilities Policy Manual which states:

8.4 Consultative Assessment

Consultative Assessment is provided for the development and implementation of behavioral supports to assist a participant in maintaining their current services while ensuring their safety and the safety of others. Consultative Assessment increases the participant’s independence and involvement in their community. *The service definition and limits outlined below do not include all details and requirements. For the service standards, limitations, provider types and qualifications, and reimbursement information, refer to the Medicaid HCBS DD Waivers.* A. Consultative Assessment is a service offered under both Medicaid HCBS DD Waivers.

B. Consultative Assessment includes: 1. Observing a participant where they lives and receives services in-person or by Telehealth;

2. Completing a behavioral assessment; a. A behavioral assessment identifies specific problem behavior, the purpose or function of the behavior, identifies a positive replacement behavior, and makes recommendations to address the problem behavior.

b. The behavioral assessment is used to develop a positive behavior support plan to teach positive replacement behaviors and reduce problem behaviors.

3. Developing a positive behavior support plan, safety plan, and other supports;

4. Providing training on the behavior support plan, safety plan, and other supports;

5. Giving recommendations to the participant’s ISP team; and

6. Implementing, evaluating, and revising behavior support plan, safety plan, and other supports as necessary.

C. Consultative Assessment is a habilitative service and must include habilitation programs.

D. Consultative Assessment has the following limitations: 1. Consultative Assessment, including the behavioral assessment, must be provided by a Licensed Independent Mental Health Practitioner (LIMHP), Licensed Psychologist, Advanced Practice Registered Nurse (APRN), or a Board-Certified Behavior Analyst (BCBA) supervised by an LIMHP, licensed psychologist, or APRN.

2. The provider or vendor must attend a minimum of two ISP team meetings per year, in-person, by phone, or by Telehealth.

3. The provider's transportation and lodging costs are included in the rate for Consultative Assessment.

4. Consultative Assessment is reimbursed at an hourly rate.

5. Consultative Assessment cannot overlap with, replace, or duplicate other similar services provided through Medicaid.

E. Consultative Assessment can be offered by a DD agency provider, independent provider, or a vendor. A vendor is a company or agency enrolled as a Medicaid provider, but not certified as a DD provider.

F. Consultative Assessment can be self-directed.

G. The cost of Consultative Assessment does not come out of the participant's annual budget. Consultative Assessment has an annual cap of 1,000 hours.

The other is Medicaid which defines the type of behavioral health services covered by Nebraska Medicaid <https://dhhs.ne.gov/Pages/Medicaid-Behavioral-Health-Definitions.aspx> of which BCBAs are listed in two of the service definitions provided in this section (Applied Behavior Analysis and Functional Behavior Assessment).

Question 4: In response to question 9 at page 20 can you present an answer focusing on the current situation in Nebraska, rather than in other states?

Answer: The following paragraph has been added to the response to question 9 on page 20 to provide further clarification to this question:

“In Nebraska, licensed behavior analysts (individuals licensed in Nebraska with a national BCBA certification) would not be supervised. BCBAs practice independently and must follow the supervision guidelines outlined by the BACB. The only exception is that new BCBAs within the first year of their credential who are providing supervision to BCBA and BCaBA trainees must have a consulting supervisor. This consulting supervisor must have at least 5 years experience of holding the BCBA credential. See more information at https://www.bacb.com/wp-content/uploads/2022/01/BCBAHandbook_220110.pdf on pg. 47.”

Question 5: My understanding of their answer to question 16—no prescription is required before the services can be provided, but third party insurers may require a prescription as proof of necessity. No ban on providing services, but it’s a prerequisite for payment.

Answer: Consumers have the option to pay out of pocket for behavior-analytic services, although these costs are quite expensive. Many insurance companies require a referral or a diagnosis for services to be covered through insurance. Some health plans will not pay for behavior-analytic services unless the provider is licensed.

Question 6: “Additional question” 1a page 33 and elsewhere: can hot links be provided to the literature cited in the application if you have them?

Answer: These links have been updated in the most recent version of the application

Question 7: Regarding your response to “additional question” 8a, page 42 is it your intention that ABA be licensed under the UCA as contemplated by the 407 statutes and so the costs of administration would be borne by the ABA licensees in accordance with the UCA?

Answer: Yes, we are proposing that the fees paid by those seeking licensure to practice ABA would cover the costs of administration. The model provided by one of the first states to enact licensure over a decade ago has found this to be self-funding and revenue neutral.

Question 8: I saw references to a model act but did not see a link to one. Is there a model act the applicants propose?

Answer: Please keep in mind this provided link is a model practice act, not the proposed practice act that was submitted on behalf of the NEABA Public Policy Group in the Behavior Analysis 407 Application.
https://cdn.ymaws.com/www.apbahome.net/resource/resmgr/pdf/APBA_ModelLi_censureAct_Aug20.pdf

Question 9: I cannot find anywhere in your proposal where you have clearly defined the issue or issues that your proposal is intended to address. Is there a missing document? Can we ask them to provide such a comment?

Answer: Currently, there are 33 states that have current licensure, but Nebraska does not have licensure. In the state of Nebraska, the number of job postings seeking a BCBA outnumber the current number of BCBA's in Nebraska, which could lead to an increase of individuals who claim to provide ABA services without proper credentials. In fact, a massive influx of LLC companies are establishing centers in Nebraska and are claiming to provide ABA services. These factors combined together create a situation for non-trained and non-credentialed people to come to Nebraska, claim to be providing therapeutic services, mostly with children, without the appropriate training and credential to do so. We do not know if this is occurring because there is not currently any regulatory body overseeing the practice of behavior analysis, thus, no avenue for consumers to report dissatisfaction or concerns with practice. We do know of instances in Nebraska where the person making therapeutic decisions is not located in Nebraska. For example, individuals making therapeutic decisions for children are located out of state, but are instructing in-state technicians to enter the homes of the child and provide ABA-based services without the appropriate oversight. There is the potential that the individuals making the therapeutic decisions are not credentialed to do so or could potentially have lost a license in another state and be practicing in Nebraska because there is no oversight in this jurisdiction.

Question 10: On pages 12-14 they list exemptions but exemptions to what?

Answer: Those listed as exempt from the proposed licensure as a behavior analyst include people who participate in behavior analytic tasks as they are:

- Licensed psychologist whose scope of practice includes applied behavior analysis
- Instructors teaching applied behavior analysis
- Students who are completing practicum or other school related practice activities
- People working toward certification as a behavior analyst and are under the supervision of a licensed behavior analyst.
- Behavior technicians implementing behavior analytic programs who are under the supervision of a behavior analyst
- Caregivers of people who are receiving the services of a behavior analyst as they implement the procedures as trained by the behavior analyst
- Those using applied behavior analysis procedures to train animals rather than humans

In other words, those listed under the exemptions would not need to become credentialed as a licensed behavior analyst should licensure be enacted.

Question 11: ABA is a therapy, not a profession. Why are they trying to license a therapy?

Answer: This application is for the licensure of behavior analysts. Behavior analysis is a distinct discipline where behavior analysts practice applied behavior analysis (ABA). Behavior analysis by itself is not a therapy, but an approach to therapy. Behavior analysis is broadly applicable in a variety of therapeutic settings and with a variety of populations.

Question 12: Are ABA assessments based on rigorous evaluation of empirical data?

Answer: Yes. The hallmark method of assessment known as a functional analysis (FA) was first published by Iwata, Dorsey, Slifer, Bauman and Richman (1982/1994). Since its publication it has been cited more than 2885 times and has been replicated by many clinicians in publications focused on many different behaviors and treatments.

Prior to implementation of services a single-subject design assessment is completed. In a single subject design the individual is the only participant and there are repeated measures which allows for prediction, verification and replication to determine the function of the person's behavior. The person can be exposed to the same condition multiple times to determine its effect on behavior. The results of each condition is graphed for that person. Multiple people may participate in the study, but data is compared only to that individual, not the other subjects. The data from each condition is visually analyzed to determine the impact of the independent variable. A functional relationship between environmental factors and resulting behavior change is determined.

When a behavior analyst takes on a client who presents with a new behavior for which they are uncertain of the best treatment the behavior analyst will turn to the research for examples of successful methods. Data are taken throughout the treatment, visually analyzed on an ongoing basis. If progress is not being made modifications are made to the programming to increase success toward mastery of the skill being taught. Since assessments and treatments are individualized, behavior analysts receive training in decision regarding assessment and intervention.

Question 13: Clear documentation of harm has not been provided.

Answer: There are two avenues to clearly document harm to citizens for services provided by a behavior analyst. One avenue is to file a complaint with the Behavior Analysis Certification Board. There are no complaints that have been filed against BACB certificants in Nebraska. Keep in mind, the board's authority only extends to individuals who hold a certification with that board. In addition, a

consumer may have had concerns about the care they or a loved one received, but did not know what to do with that concern.

Another avenue is to file a complaint to a state licensing board. Since there is no licensure for behavior analysts in Nebraska, this avenue is not available for consumers to file complaints, thus no way to gather data of unidentified harm that is potentially occurring in Nebraska. However, we can look at states surrounding Nebraska that have licensure to see the kinds of violations of state law that have occurred and the sanctions that have been levied. Missouri has had licensure for behavior analysts the longest (since 2010). Below is a list of violations committed by licensees and the actions taken by the state licensing boards. The examples listed below also highlight how the BACB and the local state licensing boards work together to regulate under their appropriate jurisdictions to protect consumers.

- Kathleen Mack (2020): license revoked due to guilty plea of a class C felony, Possession of a Controlled Substance, a class A misdemeanor, unlawful use of drug paraphernalia, Class B misdemeanor, DWI – Drug Intoxication, Class A misdemeanor (Leaving the Scene of a Motor Vehicle Accident), class A misdemeanor Leaving the Scene of a Motor Vehicle Accident, and a class A misdemeanor of Failure to Drive on Right Half of Roadway When Roadway was Sufficient Width, Causing an Immediate Threat of Accident.
(<https://pr.mo.gov/boards/ba/discipline-current/Mack,%20Kathleen%202015007290.pdf>)
- Freda Patterson (2017): The consequences for this person came both from the state licensing board and the BACB. Freda developed a behavior support plan for a client based upon the client's self-injurious and aggressive behaviors. The client required 24 hour care and it was documented that he/she needed assistance with bathing and did not like running water. Freda was observed dragging a client by the legs to the shower area, a distance of 27'6." Freda's license was placed on probation for 3 years (a "Discipline period"). Terms of the probation included the requirement to successfully complete an abuse and neglect training course, complete a 3 credit hour ethics course, restriction from supervising anyone pursuing certification or any assistant behavior analysts, the person must be supervised by a licensed behavior analyst. (It is noted that this discipline did not go into effect due the suspension by the BACB, but upon receipt of current certification and a current license the discipline will begin.)
(<https://pr.mo.gov/boards/ba/discipline-current/Patterson,%20Freda%202012001327.pdf>)
- Alice Blyth (2017): Disciplined by the licensing board via a settlement agreement for practicing behavior analysis without a license.
(<https://pr.mo.gov/boards/ba/discipline-past/Blyth,%20Alice%202012010600.pdf>)
- Sally Crumb (2013): Disciplined by the licensing board via a settlement agreement for practicing behavior analysis without a license.
(<https://pr.mo.gov/boards/ba/discipline-past/Crumb,%20Sally%202013037878.pdf>)

- Jenny Hall (2016): License was revoked in a default decision by the licensing board after the board found cause to discipline Jenny and she failed to file an answer or respond to the complaint. ([https://pr.mo.gov/boards/ba/discipline-past/Hall%20\(Unterstein\),%20Jenny%202012029546.pdf](https://pr.mo.gov/boards/ba/discipline-past/Hall%20(Unterstein),%20Jenny%202012029546.pdf))
- Matthew Stoelb (2013): Placed on Probation by the licensing board for having been previously disciplined by the BACB for unprofessional conduct (the BACB suspended his certification as a BCBA for having a personal relationship with the mother of a client). When Matthew met certain requirements set forth by the BACB, his suspension was lifted, however the state licensing board placed him on an additional one-year probation. (<https://pr.mo.gov/boards/ba/discipline-past/Stoelb,%20Matthew%20%202013026723.pdf>)

Question 14: There is a need for more documentation about the efficacy of ABA treatment regimens.

Answer: The ABA Coding Coalition published the document, "[Model Coverage Policy for ABA Services: Guidelines for Working with CPT® Codes and Developing Payer Policies.](#)" The American Medical Association's CPT Editorial Panel approved 8 CPT codes for ABA services as Category 1 based on a code change application that was submitted to that Panel in 2016. All such applications must include summaries of scientific research on the efficacy of the services represented by the codes. The Panel approves CPT codes as Category I only if the supporting scientific evidence meets the AMA's rigorous evidence standards. Though far from an exhaustive list, the Bibliography on pages 25-31 provides an overview of relevant research supporting the profession of behavior analysis, including systematic reviews and meta-analyses of multiple studies that document the efficacy of many ABA procedures for a wide range of clients.

Also to keep in mind, proof of the efficacy of all procedures in which members of a profession may engage is not a requirement nor a principal reason for licensing that profession. Virtually every profession that is licensed in NE and elsewhere has members who use procedures for which there is little or no supporting scientific evidence or even sound evidence that they're ineffective and harmful. For example, physicians may prescribe nonscientific treatments like ivermectin for COVID-19 (among many others) and SLPs who use Facilitated Communication, even though numerous reviews of research have found no sound evidence that those techniques are effective. One of the benefits of good licensure programs is that they provide a mechanism for consumers to report licensed professionals who use or recommend procedures that are or may be harmful to a local entity that is authorized legally to investigate such reports and to revoke licenses if the allegations are substantiated. Concern about the efficacy of ABA procedures is a reason to support rather than oppose licensure of behavior analysts.

Question 15: Why is licensure needed to address the issues in question? Might there be better alternatives?

Answer: Licensure is necessary for the safety of the citizens of Nebraska. Though there is a certification for Behavior Analysts, certification does not provide the same level of protection that licensure does. For example, a person could falsely claim that they are a certified behavior analyst. The Behavior Analyst Certification Board can only sanction individual who carry that certification.