

Support SB135: Improve Regulation of ABA

Testimony to Oregon Senate
Committee on Health Care by

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Introduction – Paul Terdal

- Resident of Northwest Portland, Senate District 18 / House District 36
- 25+ years of professional experience in regulated environments
 - Lead critical projects; develop business processes, systems for regulatory compliance
 - Nuclear, healthcare, communications, education, high technology
 - MBA, Yale School of Management
 - John M. Olin Fellow in the Study of Markets and Regulatory Behavior
- Volunteer consumer advocate assisting families with insurance appeals related to autism and related medical / mental health coverage
 - Assisted more than 100 families with insurance denials, coverage issues
- Lead consumer advocate on key autism legislation
 - SB365 (2013) – Autism Health Insurance Reform
 - SB696 (2015) – Behavior Analysis Regulatory Board
 - HB2839 (2017) – Prohibits discrimination in organ transplantation

SB135 Improves Regulation of Applied Behavior Analysis

- **Base bill / -1 Amendment – Employer Accountability:** Makes the employer, in addition to the practitioner, legally accountable for adhering to existing Oregon law governing the practice of behavior analysis
- **-2 Amendment – Practice Act:** Clarifies that the unlicensed practice of behavior analysis is illegal and gives the Health Licensing Office the authority to take enforcement action against unlicensed providers

Employer Accountability

Base Bill with -1 Amendment

Behavior Analysis Regulatory Board and Health Licensing Office have authority over Licensees and Registrants

- Board has established establish guidelines for the professional methods and procedures to be used by Licensed Behavior Analysts – based on national standard BACB, Inc. Professional and Ethical Compliance Code
- Consumers can file complaints if Licensee violates law or rules – but not against companies that employ them

If Employer adopts a company policy or orders a Licensee to violate the law or rules, only the Licensee – the employee – is accountable. Recent Real Examples:

- Immediate termination of services without a transition plan
- Limiting supervision of technician to minimal levels and prohibiting Licensees from answering client questions about service levels
- Removing documents from ABA service record despite requirement to retain records for 7 years

SB135 would make employer accountable for directing a Licensee or Registrant to violate Oregon Law or Oregon Administrative Rules

Applied Behavior Analysis

Definition of Applied Behavior Analysis:

- ORS 676.802 (1)(a) “Applied behavior analysis” means the design, implementation and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce significant improvement in human social behavior, including the use of direct observation, measurement and functional analysis of the relationship between environment and behavior.
- (b) “Applied behavior analysis” does not mean psychological testing, neuropsychology, psychotherapy, cognitive therapy, sex therapy, psychoanalysis, hypnotherapy or long-term counseling as treatment modalities.

Applied Behavior Analysis is an evidence-based behavioral health treatment

- Best known as a treatment for Autism Spectrum Disorder
- Other established indications include:
 - Self-injurious behavior, traumatic brain injury, problem behavior, intellectual disability

Current regulatory structure

Behavior Analysis Regulatory Board and Health Licensing Office license / register ABA specialists:

- Licensed Behavior Analysts – master's degree level professionals with BCBA certification
- Registered Behavior Analysis Interventionists – technicians supervised by Licensed Behavior Analysts or other Licensed Health Care Professionals

Other Licensed Health Care Professionals practice ABA within scope of their professional license and oversight by any of the following boards:

- Occupational Therapy Licensing Board
- Oregon Board of Licensed Professional Counselors and Therapists
- Oregon Medical Board
- Oregon State Board of Nursing
- Physical Therapist Licensing Board
- State Board of Examiners for Speech-Language Pathology and Audiology
- State Board of Licensed Social Workers
- Oregon Board of Psychology

BARB and HLO have no authority over unlicensed ABA providers

- Other boards do have authority over unlicensed ABA providers....

Behavioral therapist, 28, found guilty of raping, sexually abusing 13-year-old autistic boy in her care



<https://www.oregonlive.com/crime/2019/03/behavioral-therapist-28-found-guilty-of-raping-sexually-abusing-13-year-old-autistic-boy-in-her-care.html>

Updated Mar 6, 2019; Posted Mar 4, 2019

CHARGE INFORMATION

Charges: Kim, Abigail Minjung

	Statute	Level	Date
1. Rape in the Second Degree	163.365	Felony Class B	04/01/2017
2. Sodomy in the Second Degree	163.395	Felony Class B	04/01/2017
3. Sexual Abuse in the First Degree	163.427	Felony Class B	04/01/2017
4. Sexual Abuse in the First Degree	163.427	Felony Class B	04/01/2017
5. Sexual Abuse in the First Degree	163.427	Felony Class B	04/01/2017
6. Sexual Abuse in the First Degree	163.427	Felony Class B	04/01/2017
7. Sexual Abuse in the First Degree	163.427	Felony Class B	04/01/2017
8. Sexual Abuse in the First Degree	163.427	Felony Class B	04/01/2017

Therapist was not licensed or registered to practice ABA in Oregon

- Therapist was working for a Licensed Behavior Analyst, and did have “RBT” from BACB, Inc.
- Health Licensing Office had no authority over unlicensed provider – complaint was dismissed by HLO for lack of jurisdiction
- Convicted of rape, sodomy, and sexual abuse during course of multiple therapy sessions
- Attempted to use lack of licensure as a defense – claimed lack of mandatory training

Oregon’s ABA providers have widely varying approaches to licensing compliance

- Some comply rigorously, and require licensure / registration before start of work with patients
- Others allow “grace periods” of 90 days or more of practice without licensure / registration
- Companies that comply rigorously risk losing new hires to companies with lax policies

Applied Behavior Analysis has been established as a Medical Service by courts and regulators (1 of 2)

U.S. District Court, McHenry v PacificSource, January 5, 2010 and September 28, 2010

- “ABA therapy is firmly supported by decades of research and application and is a well-established treatment modality of autism and other PDDs.”
- “ABA therapy is not primarily academic or social skills training, but is behavioral training. Accordingly, it is not subject to the exclusions under the Plan for academic or social skills training.”

U.S. District Court, AF v Providence, August 8, 2014

- “... ABA therapy is a medical service.”

Oregon Department of Justice, November 11, 2014

- “Is ABA a “medical service” required by the pervasive developmental disabilities (PDD) mandate? Yes.”
- “ABA is a behavioral service like occupational therapy and speech therapy. Like them, ABA is therefore included among ‘all medical services.’”

Oregon Insurance Division Bulletin INS 2014-2, November 11, 2014

- “ABA therapy is a medical service for purposes of ORS 743A.190.”
- “ABA is a behavioral service and is included among ‘all medical services.’”

Applied Behavior Analysis has been established as a Medical Service by courts and regulators (2 of 2)

CA Court of Appeals, Consumer Watchdog v DMHC, September 10, 2013

- “We therefore necessarily reach the conclusion that no party or amicus wishes us to reach: the practice of ABA constitutes the practice of psychology. It follows that, prior to the enactment of the ABA statute, BACB-certified therapists were engaging in the unlicensed practice of psychology. We stress the reluctance with which we reach this legally-mandated conclusion. BACB-certified therapists are indisputably recognized as proper practitioners of ABA.”
- “ABA involves the application of psychological methods to influence behavior, and can be considered a form of behavior modification. When used as a treatment for autism, it therefore falls within the definition of psychology. As ABA falls solidly within the definition of psychology, its practice by an individual who is not licensed to practice psychology, or permitted to do so by another license, constitutes the unlicensed practice of psychology.”

Applied Behavior Analysis has been established as a Medical Service by the American Medical Association

The American Medical Association has developed CPT billing codes for “Adaptive Behavior Assessment and Treatment” (ABA)

Includes services by Physician or other “Qualified Health Professionals”:

- Licensed Behavior Analysts
- Board Certified Behavior Analyst-Doctoral
- Board Certified Behavior Analyst
- Psychologist
- other credentialed professional whose scope of practice, training, and competence includes ABA
- Technician supervised by Physician or QHP

Adaptive Behavior Assessment and Treatment Code Conversion Table

Essential Elements of Applied Behavior Analysis Services ¹	General Description	HCPCS Code(s) ²	2014 Category III CPT ³ Codes for Adaptive Behavior Services				2019 Category I/III CPT ³ Codes for Adaptive Behavior Services			
			Descriptor	Code	Time/Units	Attended By	Descriptor	Code	Time/Units	Attended By
Assessment Codes	Development of individualized treatment plan by supervising behavior analyst/QHP. Assessment may include: • review of file information about client's medical status, prior assessments, prior treatments; • site holder interviews and rating scales; • review of assessments by other professionals; • direct observation and measurement of client behavior in structured and unstructured situations; • determination of baseline levels of adaptive and maladaptive behaviors; • functional behavior analysis.	H0031, H0032, 96150, 96151, 68539	Behavior identification assessment by the physician or other qualified healthcare professional, face-to-face with patient and caregiver(s). Includes administration of standardized and non-standardized tests, detailed behavioral history, patient observation and caregiver interview, interpretation of test results, discussion of findings and recommendations with the primary guardian/caregiver(s), and preparation of report.	0359T	untimed	client, QHP ⁴	Behavior identification assessment, administered by a physician or other qualified healthcare professional, each 15 minutes of the physician's or other qualified healthcare professional's time face-to-face with patient and caregiver(s) and interpreting assessments and discussing findings and recommendations, and non-face-to-face a nursing past data, scoring/interpreting the assessment, and preparing the report/treatment plan.	97151	per 15 min	client, QHP ⁴
			Observational behavioral follow-up assessment. Includes physician or other qualified healthcare professional direction with interpretation and report, administered by one technician first 30 minutes of technician time, face-to-face with the patient.	0360T	first 30 min	client, technician QHP as assistant for the technician	Behavior identification supporting assessment, administered by one technician under the direction of a physician or other qualified healthcare professional, face-to-face with the patient, each 15 minutes.	97152	per 15 min	client, technician QHP as supervisor for the technician
			Observational behavioral follow-up assessment, each additional 30 minutes of technician time, face-to-face with the patient (list separately in addition to code for primary procedure).	0361T	each add'l 30 min	client, technician QHP as assistant for the technician				
			Exposure behavioral follow-up assessment. Includes physician or other qualified healthcare professional direction with interpretation and report, administered by physician or other qualified healthcare professional with the assistance of one or more technicians; first 30 minutes of technician(s) time, face-to-face with the patient.	0362T	first 30 min	client and 2 or more technicians, QHP ⁴	Behavior identification supporting assessment, each 15 minutes of technician's time face-to-face with a patient, requiring the following components: • administered by the physician or other qualified healthcare professional who is on site; • with the assistance of two or more technicians; • for a patient who exhibits destructive behavior; • completed in an environment that is customized to the patient's behavior.	0362T	per 15 min	client and 2 or more technicians, QHP ⁴
Exposure behavioral follow-up assessment, each additional 30 minutes of technician(s) time, face-to-face with the patient (list separately in addition to code for primary procedure).	0363T	each add'l 30 min	client and 2 or more technicians, QHP ⁴							
Indirect Services by QHP ⁵	Treatment plan development, includes: • selection of treatment targets in collaboration with family members and other stakeholders • development of written protocols for treating and measuring all treatment targets	H0032	Bundled with services above and below.				Bundled with services above and below.			
	Direction of technicians by QHP ⁶	H0032, S5148, 69072, 96152	Direction of technician by QHP ⁶				If QHP ⁵ is directing the technician without the client present this is a bundled service and is captured by the codes above and below. If the QHP ⁵ is directing a technician or caregiver with the client present, report using the 97155 code below. 97155 may be reported concurrently with technical delivered services 97153 when the patient is present, one or more protocols have been modified, and the QHP ⁵ is directing the technician.			

Modifiers commonly used with these codes include R01/P for the supervising behavior analyst/QHP and HM/HL for the technician. Other modifiers vary by state and/or payer.

¹Source: Behavior Analyst Certification Board (BACB), Applied Behavior Analysis Technician for Autism Spectrum Disorders, Guidelines for Healthcare Functions and Protocols, 10th Edition, 10/16/16, available at <http://bacb.com/independent-practitioner-document/>

²All payers utilize some combination of HCPCS codes prior to the development of the Category III CPT codes set to report ABA services. Some payers continue to use HCPCS codes for this purpose.

³QHP = Qualified Healthcare Professional, Licensed Behavior Analyst, Board Certified Behavior Analyst-Doctoral, Board Certified Behavior Analyst, Psychologist or other credentialed professional whose scope of practice, training, and competence includes applied behavior analysis.

⁴"On site" is defined as, immediately available and immediately present to provide assistance and direction throughout the performance of the procedure; however, the physician or other qualified healthcare professional does not need to be present in the room when the procedure is performed.

It is already unlawful to practice ABA or any other therapy for the purpose of treating a mental, emotional or behavioral disorder without a license

Scope of Practice of Medicine

- ORS 677.085(4) Offer or undertake to diagnose, cure or treat in any manner, or by any means, methods, devices or instrumentalities, any disease, illness, pain, wound, fracture, infirmity, deformity, defect or abnormal physical or mental condition of any person.
- ABA is a medical treatment for autism and other conditions. ABA is in the scope of practice of medicine
- ORS 677.080 prohibits practice of medicine without a license

Scope of Practice of Psychology

- ORS 675.010(4) “Practice of psychology” means rendering or offering to render supervision, consultation, evaluation or therapy services to individuals, groups or organizations for the purpose of diagnosing or treating behavioral, emotional or mental disorders.
- ABA is a therapy service; use of ABA for the purpose of treating behavioral, emotional or mental disorders – such as autism – is in the scope of practice of psychology (and Clinical Social Work, Professional counseling, Marriage and family therapy)
- ORS 675.020 prohibits practice of psychology without a license

SB135 -2 Amendment gives HLO authority to take enforcement action against unlicensed providers

What SB135 -2 Amendment Does:

- Clarifies in plain language what is already true – it is unlawful to practice ABA for the purpose of treating a mental, emotional or behavioral disorder without a license or registration as an interventionist
- Gives HLO enforcement authority over unlicensed providers – in coordination with other boards (e.g., Medicine, Psychology, Speech-Language Pathology)

What SB135 -2 Amendment Does NOT Do:

- Does NOT prevent teachers from using ABA principles and methods for educational purposes unrelated to treatment of mental, emotional or behavioral disorders
 - Teachers may use ABA techniques for teaching or classroom management just as they use principles and techniques of psychology without a psychology license
 - Teachers are already prohibited from providing health care without a license (e.g., SLP, OT, School Psychologist, Nurse, etc.)
- Does NOT impose any new licensing requirements on other Licensed Health Care Professionals – they remain under the authority of their own boards

Oregon Health Authority recognizes school-based ABA as a “School Based *Health Service*”

Letter sent to all Oregon school districts:

- “For IDEA services leveraging Medicaid under OHA’s School Based Health Services (SBHS) program, OHA will submit a State Plan Amendment to the Centers for Medicare and Medicaid Services (CMS). Once approved by CMS, the amendment will allow OHA to reimburse SBHS providers for ABA services provided to OHP-eligible children under an IEP or IFSP as part of cost-sharing under federal financial participation.”
- Schools seeking Medicaid funding for ABA as a health service must use licensed / registered providers

No Oregon school districts have responded to work with OHA on Medicaid funding for ABA

<https://www.oregon.gov/oha/HSD/OHP/Announcements/Coordinating%20care%20for%20Oregon%20Health%20Plan%20members%20who%20receive%20applied%20behavior%20analysis%20services.pdf>



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Date: May 13, 2016

To: Coordinated care organizations
School superintendents
Education Service District superintendents
Early Intervention/Early Childhood Special Education (E/ECSE) contractors

From: Don Ross, Manager
Medicaid Operations and Policy, Health Systems Division¹

Subject: Coordinating care for Oregon Health Plan members who receive applied behavioral analysis services

Starting July 1, 2016, coordinated care organizations (CCOs) will coordinate applied behavioral analysis (ABA) services for their members. This means that the CCO will approve ABA services delivered to CCO members in the community or clinic setting. The CCO also will be responsible for payment of these services.

Some CCO members (those who are eligible for services under the federal Individuals with Disabilities Education Act, or IDEA) may also be receiving school-based ABA services, if specified in their Individualized Education Programs (IEP) or Individualized Family Service Plans (IFSP), developed by public education agencies in accordance with federal and state law.

- It would be very helpful to the CCOs to know if their members are receiving school-based ABA services. Any community-based care these CCO members may receive will not be affected.
- For example, information about school-based ABA services will not apply toward any therapy benefit limits the CCO may have, and will not affect CCO decisions about approving community-based ABA coverage.

Why is this happening?

CCOs coordinate all types of care (medical, dental, behavioral health and specialty care) to help keep their members healthy. The Oregon Health Authority encourages coordination across all care systems to support the ultimate goal of health system transformation: to deliver the right care in the right place at the right time.

What should you do?

If possible and if the parents or guardians of children receiving school-based ABA services approve, please inform the child’s CCO about the ABA services the child is receiving through their IEP or IFSP.

When you do share information with the child’s CCO, please follow all protections of personally identifiable information required by public education agencies under the Family Educational Rights and Privacy Act (FERPA) and IDEA, including those that address the re-disclosure of information.

¹ The Addictions and Mental Health Division and Division of Medical Assistance Programs are now united as the Health Systems Division.

Supplemental Materials

It is already unlawful to practice ABA or any other therapy for the purpose of treating a mental, emotional or behavioral disorder without a license

Scope of Speech-Language Pathology

- ORS 681.205 (5) “Practice speech-language pathology” means to apply the principles, methods and procedures of measurement, prediction, evaluation, testing, counseling, consultation and instruction that relate to the development and disorders of speech, voice, swallowing and related language and hearing disorders to prevent or modify the disorders or to assist individuals in cognition-language and communication skills.
- ABA is a method that can be used to assist individuals with communication skills or swallowing (feeding) disorders
- ORS 681.250 prohibits practice of Speech-Language Pathology without a license