

CONFIDENTIAL
LEGISLATIVE BILL REVIEW FORM: 2015

Bill Number: S.136 Name of Bill: An act relating to licensing and regulating applied behavior analysts and their assistants.

Agency/ Dept: DVHA Author of Bill Review: Ashley Berliner

Date of Bill Review: 3/13/2015 Related Bills and Key Players: OPR

Status of Bill: (check one): ☒ Upon Introduction ☐ As passed by 1st body ☐ As passed by both

Recommended Position:

☐ Support ☐ Oppose ☐ Remain Neutral ☒ Support with modifications identified in #8 below

Analysis of Bill

1. Summary of bill and issue it addresses.

The proposal is for the Office of Professional Regulation (OPR) to provide and maintain licensure of the clinical profession of behavior analysts and assistant behavior analysts. Behavior analysts provide applied behavior analysis (ABA), an evidence-based treatment for children diagnosed with autism spectrum disorder (ASD) aged 18 months to 21 years. Assistant behavior analysts provide ABA under the supervision of a behavior analyst.

Issues addressed are:

- Licensure of applied behavior analysts and their assistants allows consumers to identify behavior analysts and assistants with defined competencies. This high level of regulation and protection will ensure the necessary appropriate delivery of ABA to a vulnerable population.
- It promotes creditability in the field of ABA and defines scope of practice within State law.
- Licensure provides the State with the authority to respond to complaints of unethical practices, which protects not only consumers but also professionals who practice by following ethical and responsible conduct guidelines.
- Continued oversight of the professions will be maintained through professionals needing to reapply for licensure every 2 years. Re-licensure will include continuing education and proof that the applicant satisfactorily passed the nationally recognized Behavior Analyst Certification Board approved re-examination for recertification.

2. Is there a need for this bill?

Yes. ACT 158 requires Vermont Medicaid and private health insurance plans to cover evidence-based diagnosis and treatment of early childhood developmental disorders, including ASD, through the clinical treatment of ABA. Currently, Vermont Medicaid is not able to provide this service outside of the Designated Agency system without a State Plan Amendment (SPA) to add behavior analysts as reimbursable Medicaid providers. To date, the Centers for Medicare and Medicaid Services (CMS) has only approved ABA SPAs in two states, both requiring that behavior analysts be licensed by the state.

ABA as a treatment for ASD may require physical holds and restraints to control aggressive and self-injurious behavior that are characteristic of children diagnosed with ASD. The use of restraints and physical holds on a vulnerable population should be used with adequate clinical oversight and controls that are regulated and monitored through a state regulatory body.

The protections offered to the public through professional licensure of behavior analysts and assistant behavior analysts are highly valued by parents. Without licensure, parents are left without a concrete way of distinguishing a qualified provider from one who is not. This is particularly challenging to parents due to the fact that effectiveness of

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ABA decreases as a child ages. Out of desperation to get treatment for their child in a timely manner, parents might seek out any willing provider who may not have the means or education necessary to carry out ABA services.

The nationally recognized Behavior Analysts Certification Board offers certification for behavior analysts and assistant behavior analysts, but it does not have the time, resources or legal authority to provide the necessary oversight at the local level to protect the public. The designation of Board Certified Behavior Analyst or Board Certified Assistant Behavior Analyst given at the national level without regulatory oversight at Vermont's local level does not provide the necessary safeguards to identify malpractice.

DVHA supports the professional licensure of behavior analysts and assistant behavior analysts. Professional licensure provides Vermont Medicaid assurance that ABA providers are competent to practice, improves state wide accessibility to quality service and care, and serves as an essential safeguard in the event of malpractice.

3. What are likely to be the fiscal and programmatic implications of this bill for this Department?

Programmatic Impact:

- DVHA would need CMS approval on an amendment to Vermont's Medicaid State Plan in order to add licensed behavior analysts and licensed assistant behavior analysts as reimbursable providers under "other licensed practitioners". CMS SPA approval is needed to secure federal match for the reimbursement of behavior analysts.
- There are implementation considerations for DVHA, including enrolling new providers, determining supervision requirements for behavior therapists (AKA behavior interventionists/1-on-1 staff), defining billing requirements and making necessary changes to the Medicaid Management Information System (MMIS). Staff time will be needed to administer Medicaid's ABA benefit, which will include utilization management and processing grievances and appeals.

Fiscal Impact:

Providing licensure for behavior analysts and assistant behavior analysts will not directly impact DVHA's budget. Regardless of professional licensure, Medicaid is mandated under Early, Periodic, Diagnostic, Screening and Treatment Services (EPSDT) to provide medically necessary services to Medicaid-enrolled children under age 21 (42 U.S.C. 1396d). EPSDT covers not only medically necessary treatment to correct or ameliorate identified conditions, but also preventive and maintenance services including ABA for children with autism.

Licensure will improve access to ABA for families with commercial coverage, reducing Medicaid's financial burden as the payer of last resort for children with commercial insurance and removing existing incentives for families to drop commercial coverage in an attempt to receive Medicaid funded ABA services through the DAs.

4. What might be the fiscal and programmatic implications of this bill for other departments in state government, and what is likely to be their perspective on it?

The Office of Professional Regulation (OPR) will face programmatic implications through the need to regulate the professions of behavior analysts and assistant behavior analysts, which will require additional staff resources. Fiscal impact is unknown at this time, but would likely be offset through OPR's collection of licensure fees for new professionals and renewal fees from professionals who are in need of re-licensure.

5. What might be the fiscal and programmatic implications of this bill for others, and what is likely to be their perspective on it?

Behavior analysts and assistant behavior analysts currently practicing in Vermont: Will need to apply and go through the process of becoming licensed. There will be a cost associated with obtaining a license, which will be established by OPR. Behavior analysts and employers of behavior analysts and assistant behavior analysts are testified in support of

licensure at the OPR public hearing in November of 2014 and to the House Committee on Government Operations this session.

Commercial insurance providers: Will need to design an ABA benefit based on licensed providers. Programmatic and fiscal implications are expected to be similar to Vermont Medicaid. In 2014, MVP and BCBS testified to the House Committee on Health Care regarding coverage, enrollment and reimbursement challenges due to unlicensed ABA providers, similar to those faced by VT Medicaid.

Designated Agencies (DAs): Have been supportive of licensure for ABA providers. DAs will need to comply with Medicaid's ABA coverage and billing policies, including:

- Provider qualifications.
- Medicaid prior authorization of ABA services.
- Medicaid's billing policies, which will require changes to the DA's existing billing practices and system.

6. Other Stakeholders:

6.1 Who else is likely to support the proposal and why?

Professionals who are practicing as behavior analysts, assistant behavior analysts or who are working towards certification support licensure for the following reasons:

- Private behavior analyst and assistant behavior analysts will be able to enroll in and bill Medicaid once there is a CMS approved benefit including licensure of the provider types.
- Ability for state laws to define the scope of practice and to provide the necessary ethical and quality standards for the professions.
- State regulation provides protection of the profession.
- Distinguishes qualified behavior analysts and assistant behavior analysts from those who are not qualified.

Parents, families and ASD advocates, including the Medicaid and Exchange Advisory Board, support licensure for the following reasons:

- A regulatory body will help ensure that providers are qualified, adequately trained and practicing within their scope according to the law.
- Licensure will help to expand access to qualified and competent providers.
- Regulation and protection will ensure the necessary appropriate delivery of ABA to a vulnerable population.

6.2 Who else is likely to oppose the proposal and why?

OPR is recommending regulation of this profession through certification rather than licensure for the following reasons:

- They state that there is insufficient evidence that the unregulated practice of the professionals practicing ABA poses a real danger to public health and safety.
- They state that the national certification already provides employers and individuals hiring behavior analysts and assistant behavior analysts assurance that an individual is appropriately trained and does not pose a risk of harm to the public.
- They state that licensure has the potential of eliminating professionals who are providing ABA services, but who are not nationally credentialed by the Behavior Analysts Certification Board. OPR feels that this could dramatically reduce the provider network in a state whose network is already limited.

7. Rationale for recommendation:

Public Safety: Requiring licensure for behavior analysts is particularly important due to the nature of their services and the vulnerable population they serve. ABA often appropriately requires physical holds and restraints in order to

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control aggressive or self-injurious behavior. When working with a vulnerable population that is characterized by challenged communication and is commonly accompanied by physical behaviors, it is vital to public safety that provider ethics and clinical treatment be regulated and monitored.

The unregulated practice of behavior analysts and assistants working with one of Vermont's most vulnerable populations, children with Autism spectrum disorders, provides ample opportunity to harm and puts the health and safety of children and their families at an elevated and unnecessary level of risk. Professional licensure would provide families and health insurance plans with a tool to assure that behavior analysts are component to practice, and would serve as an essential safeguard in the event of professional malpractice.

Expanded Access: Without licensure, Medicaid will face significant challenges expanding ABA services beyond the existing designated agency network. The current Medicaid network of ABA providers available through the DAs is inadequate to meet the needs of children and families. Currently, only 4 of the 10 DAs in Vermont have capacity to provide ABA services to Vermonters, while several more are working to build a workforce that will take years before it can adequately serve all the needs of Vermont children and families. Families are not able to wait years for a service where effectiveness is decreased as a child ages. Providing licensure for ABA providers will allow Medicaid and commercial insurers to open the doors to increase ABA access to families in need this year.

Potential to reduce the cost shift occurring from commercials to Medicaid:

Vermont Medicaid has heard through testimony, the DAs, families and advocates that commercial insurers are not sufficiently providing ABA coverage to children in need. Medicaid is bearing an unfair share of ABA costs. As the payer of last resort, Medicaid pays for services not covered by supplemental insurer. While ACT 158 requires insurers to cover ABA services, unlicensed providers have been a significant obstacle in ensuring insurance coverage for commercial insurers and Medicaid alike. Where Medicaid is able to pay for ABA services provided by unlicensed providers in the DAs, some DAs have had difficulty billing commercial insurers. DVHA has heard first hand from families and advocates that families have chosen to drop commercial coverage entirely in order to receive ABA services through the DAs, paid for by Medicaid. Not only does this impact Medicaid's budget around costly ABA services, but also most other medical services in which Medicaid is the payer of last resort. Providing licensure to behavior analysts and assistant behavior analysts removes the barrier to enrollment and reimbursement by commercial insurers and will eliminate families' incentive to drop commercial coverage in order to have Medicaid as primary.

CMS SPA Approval: The State cannot expand Medicaid coverage for ABA without an approved State Plan Amendment to add behavioral analysts as Medicaid reimbursable providers. At this time, CMS has limited approval for Medicaid coverage of behavior analysts to only two states under the federal authority for "Other Licensed Practitioner Services," and has not approved any State Plan Amendments for unlicensed Board Certified Behavior Analysts. Pursuing CMS approval for unlicensed providers is an unproven path that will at best extend the timeline for receiving federal authority and require significantly greater staff resources.

8. Specific modifications that would be needed to recommend support of this bill:

Bill needs to address the behavior analyst's role in supervision of behavior therapists/interventionists. Behavior therapists work with children 1-on-1 to implement the behavior analyst's ABA treatment plan.

9. Gubernatorial appointments to board or commission?

Secretary/Commissioner has reviewed this document: Steven M. Costantino **Date:** 3/13/15