

**DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF DEVELOPMENTAL DISABILITY SERVICES**

Statutory Authority: 18 Delaware Code, Section 3361(f) and 3570A (11 Del.C. §§3361(f) and 3570A)

FINAL

ORDER

2102 Autism Service Providers

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services (“Department”) / Division of Developmental Disability Services initiated proceedings to amend 2102 Autism Service Providers. The Department’s proceedings to amend its regulations were initiated pursuant to 18 **Delaware Code** Sections 3361(f) and 3570A and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to in the March 2013 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by March 31, 2013 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

The proposal creates regulations regarding standards for certifying qualified autism services providers as required by the passage of Senate Bill 22 and Title 18 of the Delaware Code, Sections 3361(f) and 3570A.

Statutory Authority

Senate Bill 22: Title 18 of the Delaware Code, Sections 3361(f) and 3570A.

Background

SB22 was enacted into law in 2012 and requires DHSS to create regulations that establish standards for certifying qualified autism services providers for purposes of the insurance reimbursement now required by Delaware law.

Summary of Proposal

The purpose of the proposed regulations is to establish standards for certifying qualified autism services providers.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE

Autism Delaware, the Community Legal Aid Society, Inc., Delaware Association for Behavior Analysis, The Governor’s Advisory Council for Exceptional Citizens, and The State Council for Persons with Disabilities offered the following observations summarized below. The Division of Developmental Disabilities Services has considered each comment and responds as follows.

Comment: 1.

In §2.0, the definition of “applied behavior analysis” is not co-terminus with the statutory definition. The regulation adds two sentences which limit the scope of ABA and amount to an invitation to insurers to deny payment based on the exclusions and limitations. It is improper to have a regulatory definition which is narrower than a statutory definition. The enabling legislation does not confer authority on DHSS to further define ABA and the attempt is “ultra vires”.

Response: Upon consideration and review of available comments, the Division will define “applied behavior analysis” per the statute to ensure continuity of the definition. The additional sentences written in the regulation are removed.

Comment: 2.

In §2.0, the definition of “autism services provider” covers a “board-certified behavior analyst” (BCBA) but omits a Board

Certified Behavior-Analyst Doctoral (BCBA-D) which is treated as a distinct provider throughout the regulations. See, e.g. §2.0, definition of “behavioral technician” and §§3.1, 3.2, and 4.1.1. A reference to the BCBA-D should be added to the definition of “autism services provider”.

Response: The Division used the terminology “practitioners with the national certification of board-certified behavior analyst” as a broad description to refer to individuals holding any title relative to a certified behavior analyst including Board Certified Behavior Analyst-Doctoral® (BCBA-D), Board Certified Behavior Analyst ® (BCBA), Board Certified Assistant Behavior Analyst ® (BCaBA). Upon consideration and review of available comments, the Division will add the titles to the definition of “Autism Services Provider” to clarify the definition.

Comment: 3.

In §2.0, definition of “autism services provider”, the reference to “authorized by this section” is copied directly from the statute and makes no sense in the context of §2.0 of the regulations. Consider substituting “by this regulation” or, based on the reference to “these regulations” in the definition of “behavioral technician”, substitute “these regulations”.

Response: Upon review and consideration of the available comments, the Division substitutes the terminology in the “autism services provider” and the “behavioral technician” sections as suggested for clarity and continuity of the regulation.

Comment: 4.

In §2.0, definition of “therapeutic care”, insert “acting” between “assistant” and “under”. Compare comparable reference in definition of “psychological care”.

Response: In maintaining continuity and clarity of the regulation, the Division inserts the term “acting” as referenced in the comment.

Comment: 5.

In §3.1, first sentence, delete “to be” since the regulation(s) are establishing the standards now, not in the future.

Response: In maintaining clarity of the regulation, the Division deletes the statement as referenced in the comment.

Comment: 6.

In §3.1, second sentence, substitute “it certifies” for “they certify” since the antecedent (Board) is singular.

Response: In maintaining clarity of the regulation, the Division modifies the statement as referenced in the comment.

Comment: 7.

In §3.1, referring to a website that may change in a regulation may be imprudent. It would be preferable to simply refer to the most recent ethical and practice standards adopted by the Behavior Analyst Certification Board. For example, in §2.0, definition of autism spectrum disorders”, the reference is to the most recent edition of the DSM, not a version appearing on a website.

Response: The Division amends the regulation as specified in the comment for clarity and continuity.

Comment: 8.

In §3.2, the reference to “2.2” should be “§2.0”.

Response: In maintaining continuity of the regulation, the Division modifies the reference number as specified in the comment.

Comments: 9, 10, 11, 12, 13, 14.

In §3.3.1, first sentence, substitute “reflects” or “must reflect” for “should reflect”. The word “should” is hortatory. Cf. Delaware Administrative Code Style Manual, §6.3.

AND

In §3.3.1, second sentence, substitute “hours per week” for “hours a week”. Compare reference in §3.3.2.

AND

In §3.3.1, second sentence, substitute “clinical management and case supervision” for “supervision” for consistency.

AND

§§3.3.1 and 3.3.2 are ostensibly inconsistent. Section 3.3.1 establishes a 1.5/10 hourly ratio of supervision to treatment. Thus, a supervisor could spend 0.75 hours supervising a technician conducting 5 hours of treatment. Section 3.3.2, however, would literally require a supervisor to spend 1.5 hours in supervision for a technician conducting 5 hours of treatment. Indeed, the reference to “10 hours per week or less” results in the need to spend 1.5 hours in supervision for a

technician spending 1 minute to 9.99 hours in direct treatment.

AND

Sections 3.3.1 and 3.3.2 are unclear and conflicting. In 3.3.1, a ratio of 1.5:10 hours for supervision to direct treatment hours is set but then only two supervision hours are required if ABA is more than 10 hours per week. Conceivably 30 hours a week could have only two hours of supervision, contradictory to the first part of the section. 3.3.1 also does not indicate the expectation that a behavioral technician is providing those direct treatment hours. In 3.3.2, the ratio is more straightforward but does not provide the two hours of supervision for cases in which less than ten hours of ABA are delivered.

AND

For clarity, we strongly recommend one clause regarding supervision and the ratio of supervised hours to non-supervised hours, and further suggest that for less than ten hours of treatment per week, one hour of supervision per week is appropriate. We recommend the following text as 3.3.1, while renumbering sections 3.3.3-3.3.9 as 3.3.2-3.3.8.

Response: Upon reflection of the available comments and recommendations, the Division is in agreement with Autism Delaware and the Delaware Association for Behavior Analysis relative to the supervision requirements. These groups provide the services of applied behavior analysis; therefore, they possess the knowledge and understanding of the requirements of supervising behavioral technicians. In accordance to the recommendations of Autism Delaware and the Delaware Association for Behavior Analysis, the Division amends the regulation to reflect their standard of supervision. This modification will result in a renumber in the sequence of the sections following 3.3.1.

Comment: 15.

§3.3.3 refers to “other requirements” It would be preferable to clarify that this applies to “behavioral technicians”.

Response: Subsequent to a previous modification, 3.3.3 is now known as 3.3.2 referring to other requirements for behavior technicians. In maintaining clarity and continuity of the regulation, the Division modifies the statement to include “for behavioral technicians” as referenced in the comment.

Comment: 16.

§3.3.3.7, first sentence, delete the period after “BCBA”.

Response: Subsequent to a previous modification, 3.3.3.7 is now known as 3.3.2.7. The Division reviewed section 3.3.2.7 locating a comma not a period after BCBA; however, the comma was removed as it is deemed unnecessary.

Comments: 17, 18, 19.

The proposed section 3.3.3.8 requires Autism Delaware or the Delaware Association of Behavior Analysts to approve courses on ABA principles taken toward qualifying as a behavioral technician. Autism Delaware previously recommended that appropriate ABA courses be identified in a similar way to the autism courses outlined in the proposed section 3.3.3.6.

AND

In the proposed section 3.3.3.8, Autism Delaware or the Delaware Association for Behavior Analysis are required to approve courses on ABA principles for behavioral technicians. Once again, we concur with Autism Delaware that this requirement should be removed.

AND

Council understands and concurs with Autism Delaware that §3.3.3.8 should be similar in context to §3.3.3.6 of the entity approving courses. Therefore in §3.3.3.8 behavior analysis (BCaBA) should be removed.

Response: Subsequent to a previous modification, 3.3.3.8 is now known as 3.3.2.8. Upon consideration and review of available comments, the Division is in agreement with Autism Delaware and the Delaware Association for Behavior Analysis relative to training requirements. Autism Delaware and the Delaware Association for Behavior Analysis provide the services of applied behavior analysis; therefore, their expertise of the requirements for training is considered significant. The Division amends the regulation to reflect standard of training of Autism Delaware and the Delaware Association for Behavior Analysis with the addition of a BCBA-D as an entity qualified to provide training.

Comment: 20.

Referring to 3.3.2.8 of the aforementioned changes to the training standard (see 17-19 comments and response) - We suggest additional wording to the last sentence: “or someone with similar training and experience with ABA and autism spectrum disorders.” This will allow individuals who are trained in ABA principles and autism who are not Board Certified to provide training, thus increasing the pool of qualified technicians.

Response: Upon reflection and consideration of adding the statement “or someone with similar training and experience with ABA and autism spectrum disorders,” the Division did not modify the training requirements because it is not congruent with the training standards set forth in this regulation requiring the supervision and training of behavioral technicians to be

completed by BCBA's and BCBA-Ds.

Comment: 21.

We further recommend two changes to proposed section 3.3.3.6. We suggest inserting the words "offered by a provider" between "that is" and "on the list." We also request that the words "so long as such training is offered by a BCBA" be deleted, as there are other types of professionals who can very competently teach about autism spectrum disorders. We do believe in-house training in ABA principles should still be taught by a BCBA.

Response: In maintaining clarity of the regulation, the Division modifies the wording to include "offered by a provider" as referenced in the comment. In addition, the Division deletes the "so long as such training is offered by a BCBA" for the reasons stated in the comment.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the March 2013 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Division of Developmental Disability Services Autism Services Providers is adopted and shall be final effective May 10, 2013.

Rita M. Landgraf, Secretary, DHSS

2102 Autism Service Providers

1.0 Purpose

Title 18, Sections 3361(f) and 3570A of the Delaware Code require that the Department of Health and Social Services promulgate regulations establishing standards for certifying qualified autism services providers. Once the regulations are promulgated, payment for the treatment of autism spectrum disorders covered under Sections 3361(f) and 3570A shall only be required to be made to autism services providers who meet the standards.

2.0 Definitions

"Applied behavior analysis" or "ABA" means the design, implementation, and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior. ~~[Applied behavior analysis interventions are based on scientific research and the direct observation and measurement of behavior and environment. They utilize contextual factors, motivating operations, antecedent stimuli, positive reinforcement, and other consequences to help people develop new behaviors, increase or decrease existing behaviors, and emit behaviors under specific environmental conditions. The practice of applied behavior analysis expressly excludes psychological testing, neuropsychology, psychotherapy, cognitive therapy, sex therapy, psychoanalysis, hypnotherapy, and long term counseling as treatment modalities.]~~

"Autism services provider" means any person, entity, or group authorized by this ~~[section regulation]~~ that designs, supervises, and/or provides treatment of autism spectrum disorders. This includes licensed physicians, psychologists or their assistants, psychiatrists, speech therapists or their aides, occupational therapists or their aides, physical therapists or their assistants, practitioners with the national certification of board-certified behavior analyst [(Board Certified Behavior Analyst-Doctoral® (BCBA-D®), Board Certified Behavior Analyst ® (BCBA®), Board Certified Assistant Behavior Analyst ® (BCaBA®) working under supervision),] and behavioral technicians working under ~~[their the]~~ supervision [of a board-certified behavior analyst (BCBA® or BCBA-D®)], licensed professional counselors of mental health, licensed clinical social workers, and advanced practice nurses.

"Autism spectrum disorders" means any of the pervasive developmental disorders as defined by the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM), including Autistic Disorder, Asperger's Disorder and Pervasive Developmental Disorder Not Otherwise Specified, as such may be amended hereafter from time to time.

"Behavioral health treatment" means professional counseling, guidance services or treatment programs, including applied behavior analysis, that are necessary to develop, maintain, or restore, to the maximum extent practicable, the functioning of an individual. This definition also applies to treatment or counseling to improve social skills and function.

“Behavioral Technician” means a person meeting the requirements set forth in Section 3 of ~~[these this]~~ regulations who implements components of an applied behavior analysis treatment plan designed and supervised by a Board Certified Behavior Analyst® (BCBA) or a Board Certified Behavior Analyst-Doctoral® (BCBA-D).

“Medically necessary” means reasonably expected to do the following:

- prevent the onset of an illness, condition, injury, or disability;
- reduce or ameliorate the physical, mental, or developmental effects of an illness, condition, injury, or disability; or
- assist to achieve or maintain maximum functional capacity in performing daily activities, taking into account both the functional capacity of the individual and the functional capacities that are appropriate for individuals of the same age.

“Pharmacy care” means medications prescribed by a licensed practitioner and any health-related services deemed medically necessary to determine the need or effectiveness of the medications.

“Psychiatric care” means direct or consultative services provided by a psychiatrist licensed in the state in which the psychiatrist practices.

“Psychological care” means direct or consultative services provided by a psychologist licensed in the state in which the psychologist practices or by a psychological assistant acting under the supervision of a psychologist.

“Screening and diagnosis of autism spectrum disorders” means medically necessary assessments, evaluations, or tests to diagnose whether an individual has or is at risk for one of the autism spectrum disorders.

“Therapeutic care” means services provided by speech, occupational, or physical therapists or an aide or assistant **[acting]** under their supervision.

“Treatment for autism spectrum disorders” shall include the following care prescribed or ordered for an individual diagnosed with one of the autism spectrum disorders by a licensed physician or licensed psychologist who determines the care to be medically necessary:

- behavioral health treatment;
- pharmacy care;
- psychiatric care;
- psychological care;
- therapeutic care;
- items and equipment necessary to provide, receive, or advance in the above listed services, including those necessary for applied behavioral analysis.

3.0 Qualified Autism Service Providers

3.1 If an autism services provider is currently certified as a BCBA or BCBA-D, such autism services provider shall be deemed to have met the standards ~~[to be]~~ established under this section to provide applied behavior analysis services. The Behavior Analyst Certification Board sets forth a task list of acceptable activities of an individual ~~[they certify it certifies]~~ and maintains disciplinary and ethical standards. Certified individuals must act within the scope of these documents and their certification, as currently set forth and as subsequently amended ~~[by the Behavior Analyst Certification Board (BACB). These documents and requirements are set forth on the Behavior Analyst Certification Board website, www.bacb.com.]~~

3.2 Professionals and their aides and assistants listed in ~~[2.2 2.0]~~ may provide treatment for autism spectrum disorders, provided that such services are medically necessary and within the professional’s scope of practice and scope of competence and training. Aides and assistants must work under the direction and supervision of the professional. Only people certified as a BCBA or BCBA-D or behavioral technicians who work under the supervision of a BCBA or BCBA-D are considered qualified, under these regulations, to provide applied behavior analysis.

3.3 Behavioral Technicians who work under the supervision of a BCBA or BCBA-D and who meet the criteria listed below may implement components of applied behavior analysis treatment plans. The supervising BCBA or BCBA-D must verify that the criteria set forth have been met.

3.3.1 ~~[The supervision by BCBA or BCBA-D must be such that the ratio of clinical management and case supervision hours to direct treatment hours should reflect the needs of the client but shall not be less than 1.5:10. If ABA treatment is more than 10 hours a week, 2 hours of supervision is required. Supervision by a BCBA or BCBA-D includes clinical management and case supervision and may include direct treatment. The ratio of such supervision hours provided by the BCBA or BCBA-D to those direct treatment hours provided by a behavioral technician should reflect the needs of the~~

client but shall not be less than 1.5:10 per week. In the case that less than 10 hours per week of ABA is prescribed and delivered, a minimum of 1 hour of supervision per week is required.]

~~3.3.2 [Supervision means that for every 10 hours per week or less of ABA treatment delivered by a Behavioral Technician, the supervising professional provides a minimum of 1.5 hours per week of clinical management and case supervision.~~

3.3.3] Other requirements [for behavioral technicians]:

3.3.~~[32].1~~ High School Diploma or GED;

3.3.~~[32].2~~ Proof of passing a federal and state criminal background and child and adult abuse registry check;

3.3.~~[32].3~~ Annual CPR certification;

3.3.~~[32].4~~ Annual signed statement that they have read and understand an explanation of Delaware's mandatory child abuse reporting law (including hotline);

3.3.~~[32].5~~ Signed statement that they have read and understand an explanation of HIPAA;

3.3.~~[32].6~~ Proof of successful completion of an online or in-person course on Autism Spectrum Disorders that is **[offered by a provider]** on the list of continuing education providers authorized by the BACB, provided by any accredited two or four year college (online or in-person), or provided by an ABA or behavioral health agency training its own staff ~~[so long as such training is done by a BCBA].~~

3.3.~~[32].7~~ Proof of completion of competency-based training in implementing applied behavior analysis procedures delivered and verified by the supervising BCBA, or BCBA-D. A person holding a current certification of board certified assistant behavior analyst (BCaBA) is deemed to have met this requirement.

3.3.~~[32].8~~ ~~[Proof of successful completion of an online or in-person course on ABA principles that has been approved by the Delaware Association of Behavior Analysts or Autism Delaware. This may include coursework offered by an agency which provides ABA therapy and trains its employees in-house. A person holding a current certification of board certified assistant behavior analyst (BCaBA) is deemed to have met this requirement. Proof of successful completion of an online or in-person course on Applied Behavior Analysis principles that is offered by a provider on the list of continuing education providers authorized by the BACB, provided by any accredited two or four year college (online or in-person), or provided by an ABA or behavioral health agency training its own staff so long as such training is done by a BCBA or BCBA-D.]~~

3.3.~~[32].9~~ After completion of the above, a minimum of 10 hours of competency-based training and direct service, observed by the BCBA or BCBA-D, before providing one-on-one service.

4.0 Disqualification of Autism Service Providers

4.1 A person who meets a definition of an Autism Service Provider under section 3.0 becomes disqualified if

4.1.1 The BCBA or BCBA-D no longer has a credential issued by the Behavior Analyst Certification Board.

4.1.2 The professional license under which a person practices is suspended or revoked;

4.1.3 The person is under investigation and review for or is substantiated for or convicted of abuse, mistreatment, neglect, or exploitation; or

4.1.4 An aide, assistant, or behavioral technician ceases employment or the agreement under which the person is supervised by the Autism Service Provider is terminated.