

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1401 Applied Behavior Analysis Services

SPONSOR(S): Plasencia & Others

TIED BILLS: **IDEN./SIM. BILLS:** SB 1794

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Finance & Facilities Subcommittee	18 Y, 0 N	Grabowski	Lloyd
2) Health Care Appropriations Subcommittee	15 Y, 0 N	Nobles	Clark
3) Health & Human Services Committee			

SUMMARY ANALYSIS

Applied Behavior Analysis (ABA) is an umbrella term referring to the principles and techniques used to assess, treat, and prevent challenging behaviors while promoting new, desired behaviors. ABA has been recognized as a treatment option for a range of behavioral health conditions, with an emphasis on the treatment of autism spectrum disorder. ABA services are covered under the Florida Medicaid program, when medically necessary, and also under group health insurance plans and health management organization contracts.

Research suggests that ABA interventions should generally be provided under the supervision of a trained behavioral psychologist or behavior analyst. While the Florida Statutes do not currently require licensure for ABA providers, several levels of professional certification are available to ABA providers.

The Florida Medicaid program requires such certification to participate in Medicaid. Providers of ABA services who are not enrolled in Medicaid must be licensed under the Florida Health Care Clinic Act, which includes additional fiduciary and administrative requirements for health care providers.

Current law allows certified ABA professionals and mental health professionals licensed under ch. 490 or 491, F.S., to provide services in the K-12 classroom setting. However, behavior technicians and other non-certified professionals working under the direction of these certified or licensed professional are not allowed to provide services in the K-12 classroom setting.

The bill exempts all group practices that provide ABA services from the requirements of the Health Care Clinic Act.

The bill also adds registered behavior technicians who hold recognized certification and practice under the supervision of either certified behavior analysts or professionals licensed under ch. 490 or ch. 491, F.S., to the list of private instructional personnel who may provide ABA services in the classroom setting. This change would allow registered behavior technicians to provide ABA services to students in a public K-12 school.

The bill has an indeterminate, but likely insignificant, fiscal impact on the Agency for Health Care Administration and no fiscal impact on local governments.

The bill provides an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Applied Behavior Analysis

Applied Behavior Analysis (ABA) is an umbrella term referring to the principles and techniques used to assess, treat, and prevent challenging behaviors while promoting new, desired behaviors. ABA focuses on improving social skills, communication, reading, and academics as well as adaptive learning skills, such as fine motor dexterity, hygiene, grooming, domestic capabilities, punctuality, and job competence. ABA can be effective for children and adults with psychological disorders in a variety of settings, including schools, workplaces, homes, and clinics.¹

ABA has been recognized as a therapeutic intervention in the treatment of autism spectrum disorder (ASD). ASD is a developmental disability that impacts the social, emotional, and communication skills of affected individuals. The disorder includes a range of conditions that were previously diagnosed separately – such as autism, Asperger syndrome, and other non-specific developmental disorders.²

ABA has become widely accepted among health care professionals, is used in many schools and treatment clinics, and is considered an evidence-based best practice treatment by the U.S. Surgeon General, American Psychological Association, American Academy of Child and Adolescent Psychiatry, and American Academy of Pediatrics.

Providers of ABA Services

Research suggests that ABA interventions should generally be provided under the supervision of a trained behavioral psychologist or behavior analyst. In general, behavior analysts perform patient assessments to determine levels of adaptive and maladaptive behaviors, and develop a treatment plan. Behavior analysts supervise other professionals, such as behavior technicians, who implement the treatment plan, and monitor progress.³

While the Florida Statutes do not currently require licensure for behavior analysts or other types of ABA providers, several levels of professional certification are available.

The Behavior Analyst Certification Board (BACB) was established in 2008 to develop uniform standards for determining who is qualified to provide professional ABA services. It is an independent, nonprofit organization whose behavior analyst credentialing programs are accredited by the National Commission for Certifying Agencies (NCCA) of the Institute for Credentialing Excellence.⁴ The BACB certifies professional practitioners at two levels: the Board Certified Behavior Analyst (BCBA) and the Board Certified Assistant Behavior Analyst (BCaBA). The BACB also issues a credential for paraprofessionals, known as the Registered Behavior Technician (RBT). Requirements for the three credentials are:⁵

¹ "Applied Behavior Analysis", *Psychology Today*, <https://www.psychologytoday.com/us/therapy-types/applied-behavior-analysis> (last accessed March 23, 2021).

² U.S. Centers for Disease Control and Prevention, "What is Autism Spectrum Disorder?", <https://www.cdc.gov/ncbddd/autism/facts.html> (last accessed March 23, 2021).

³ Association of Professional Behavior Analysts, *Identifying Applied Behavior Analysis Interventions*, 2017, <https://cdn.ymaws.com/www.apbahome.net/resource/collection/1FDDBDD2-5CAF-4B2A-AB3F-DAE5E72111BF/APBAwhitepaperABAinterventions.pdf> (last accessed March 23, 2021).

⁴ Id.

⁵ Id.

<p>Board Certified Behavior Analyst (BCBA)</p> <ul style="list-style-type: none"> • At least a master’s degree in applied behavior analysis or a closely-related field; • Completion of 270 hours of graduate-level instruction in specified behavior analysis topics; • Completion of specified hours of supervised experiential training in ABA; and, • Passage of the BCBA examination.
<p>Board Certified Assistant Behavior Analyst (BCaBA)</p> <ul style="list-style-type: none"> • At least a bachelor’s degree; • Completion of 180 classroom hours of instruction in specified behavior analysis topics; • Completion of specified hours of supervised experiential training in ABA; and, • Passage of the BCaBA examination.
<p>Registered Behavior Technician (RBT)</p> <ul style="list-style-type: none"> • At least a high school diploma; • Completion of 40 hours of training in specified behavior analysis topics; • Completion of the RBT competency assessment; and, • Passage of the RBT examination.

BACB recently added the BCBA-D distinction to recognize board certified analysts who hold doctoral degrees. The BACB specifies it is mandatory that BCaBAs practice under the supervision of a BCBA. All individuals certified BACB (whether BCBA, BCBA-D, or BCaBA) must accumulate continuing education credits to maintain their credentials.⁶

ABA Services under Florida Medicaid

Medicaid is a joint federal- and state-funded program that provides health care for low-income Floridians, administered by the Agency for Health Care Administration (AHCA) under ch. 409, F.S. Federal law establishes the mandatory services to be covered in order to receive federal matching funds.

States have some flexibility in the provision of Medicaid services. Section 1915(b) of the Social Security Act provides authority for the Secretary of the U.S. Department of Health and Human Services to waive requirements to the extent that he or she “finds it to be cost-effective and efficient and not inconsistent with the purposes of this title.” Also, Section 1115 of the Social Security Act allows states to use innovative service delivery systems that improve care, increase efficiency, and reduce costs.

Medicaid reimburses health care providers that have a provider agreement with AHCA only for medically necessary goods and services that are covered by the Medicaid program and only for individuals who are eligible for medical assistance under Medicaid. Section 409.907, F.S., establishes requirements for Medicaid provider agreements, which include, among other things, background screening requirements, notification requirements for change of ownership of a Medicaid provider, authority for AHCA site visits of provider service locations, and surety bond requirements.

In 2008, the Florida Legislature authorized AHCA to seek federal approval through a Medicaid waiver or state plan amendment for the provision of occupational therapy, speech therapy, physical therapy, *behavior analysis*, and *behavior assistant services* to individuals five years of age and under diagnosed with ASD or Down syndrome.⁷

Provision of ABA services under the Florida Medicaid program actually began in 2012, following a federal court order which recognized ABA as a covered service for children when medically necessary.⁸

⁶ Behavior Analyst Certification Board, *Board Certified Behavior Analyst Handbook*, February 2021, https://www.bacb.com/wp-content/uploads/2020/11/BCBAHandbook_210212.pdf (last accessed March 23, 2021).

⁷ Ch. 2008-30, L.O.F. The bill also mandated coverage of applied behavior analysis by commercial group health insurance plans and health maintenance organizations; see ss. 627.6686, 641.31098, F.S.

⁸ See *K.G. v. Dudek*, 839 F.Supp.2d 1254 (2011); *K.G. ex rel. Garrido v. Dudek*, 864 F. Supp. 2d 1314 (S.D. Fla. 2012); D. C. Docket No. 1:11-cv-20684-JAL.

In the absence of administrative rule or formal department policy, AHCA established provider qualifications and service requirements through alerts sent to prospective providers. Between March 2012 and February 2017,⁹ ABA services under the Medicaid program were provided through multiple programs and provider types that included:

- Certified behavior analysts and behavior assistants enrolled under the developmental disabilities waiver program (now the iBudget waiver);
- Infant toddler developmental specialists with certification in behavior analysis enrolled as early intervention service providers; and,
- Certified behavior analysts and certified assistant behavior analysts enrolled as community behavior health services providers.

In February 2017, AHCA adopted an administrative rule setting a formal classification for ABA providers that closely follows the certification hierarchy of the BACB. The rule established “lead analysts” as those professionals either holding a BCBA certification or licensed by the state under chs. 490 and 491, F.S., such as clinical social workers or school psychologists. The rule also recognizes other personnel who are permitted to provide ABA services, such as those holding BCaBA credentials, RBT credentials, and behavior assistants who have experience and training in providing services to individuals with mental health conditions or developmental or intellectual disabilities.¹⁰

Effective May 1, 2018, AHCA instituted a moratorium on Medicaid enrollment for behavior analysis practices in Broward and Miami-Dade counties.¹¹ The moratorium resulted from AHCA’s determination that some providers of ABA services in the affected areas had falsified enrollment credentials and used fraudulent billing practices. AHCA initially authorized the moratorium for a six-month period, but has extended the moratorium several times and it continues in effect until at least May 2021.¹²

Health Care Clinic Act

The Health Care Clinic Act (Act)¹³ was enacted in 2003 to reduce fraud and abuse in the personal injury protection (PIP) insurance system.¹⁴ Pursuant to the Act, AHCA licenses health care clinics, ensures that such clinics meet basic standards, and provides administrative oversight.

Any entity that meets the definition of a health care clinic must be licensed as a health care clinic. Although all clinics must be licensed by AHCA, the Act creates many exceptions from the health care clinic licensure requirements.¹⁵ To be licensed, an entity must submit a completed application form to AHCA¹⁶ and must:

- Submit to a Level 2 background screening including owners and certain employees and officers of the entity;
- Provide a description or explanation of any exclusions, suspensions, or terminations of the applicant from the Medicare, Medicaid, or federal Clinical Laboratory Improvement Amendment programs;

⁹ During this time period, AHCA had yet to adopt formal regulations that classified providers of ABA services.

¹⁰ Rule 59G-4.125, F.A.C.

¹¹ Agency for Health Care Administration, *Initial Request for State Implemented Moratorium: Behavior Analysis*, submitted to U.S. Department of Health and Human Services, see https://ahca.myflorida.com/Executive/Communications/Press_Releases/pdf/BA_provider_release5142018.pdf (last accessed March 23, 2021).

¹² Agency for Health Care Administration, *Florida Medicaid Health Care Alert - Moratorium Extension: Behavior Analysis Provider Enrollment in Miami-Dade & Broward Counties*, November 17, 2020.

https://ahca.myflorida.com/Medicaid/pdf/files/provider_alerts/2020_11/Moratorium_Extension_BA_Provider_Enrollment_in_Miami-Dade-Broward_Counties_111720.pdf (last accessed March 23, 2021).

¹³ Ss. 400.990 – 400.995, F.S.

¹⁴ Chapter 2003-411, L.O.F. PIP insurance is no fault auto insurance that provides certain benefits for individuals injured as a result of a motor vehicle accident. All motor vehicles registered in this state must have PIP insurance.

¹⁵ S. 400.9905(4), F.S.

¹⁶ S. 408.806, F.S.

- Demonstrate financial ability to operate by showing that the applicant's assets, credits, and projected revenues will meet or exceed projected liabilities and expense¹⁷ or provide a surety bond of at least \$500,000 payable to AHCA;¹⁸
- Provide proof of the applicant's legal right to occupy the property in which the clinic is located; and
- Provide proof of any required insurance.¹⁹

AHCA has 60 days after the receipt of the completed application for licensure to approve or deny the application. Licenses must be renewed biennially.

Each clinic must appoint a medical or clinical director. A medical director must be a physician employed or under contract with a clinic and who maintains an unencumbered license as an allopathic physician, osteopathic physician, chiropractor, or podiatrist.²⁰ In lieu of a medical director, a health care clinic may appoint a clinical director if the clinic does not provide services that are regulated by one of the aforementioned physician practice acts.

The medical or clinical director must agree in writing to accept the legal responsibility for the following activities on behalf of the clinic:

- Display signs that identify the medical or clinical director posted in a conspicuous location within the clinic readily visible to all patients;
- Ensure that all practitioners providing health care services or supplies to patients maintain a current active and unencumbered Florida license;
- Review any patient referral contracts or agreements executed by the clinic;
- Ensure that all health care practitioners at the clinic have active appropriate certification or licensure for the level of care being provided;
- Serve as the clinic records owner;
- Ensure compliance with the recordkeeping, office surgery, and adverse incident reporting requirements;
- Conduct systematic reviews of clinic billings to ensure that the billings are not fraudulent or unlawful;
- Not refer a patient to the clinic if the clinic performs magnetic resonance imaging, static radiographs, computed tomography, or positron emission tomography; and
- Ensure that the clinic publishes a schedule of charges for the medical services offered to patients.²¹

If the health care clinic's medical director is a physician, it may provide any health care service or treatment that a physician is authorized to provide. However, if the health care clinic employs another health care practitioner as its clinic director, the health care services it may offer is limited to those services within the scope of practice of that health care practitioner's license.²²

Other than the personnel requirement to have a medical or clinical director, the Health Care Clinic Act does not authorize AHCA to establish or enforce clinical standards or outcomes, and a clinic's obligations under the Act relate to PIP fraud prevention.

Behavior Analysis Practices

¹⁷ S. 408.8069, F.S. This also includes providing AHCA with financial statements, including balance sheet, income and expense statement, a statement of cash flow for the first 2 years of operation that provides evidence that the applicant has sufficient assets, credits, and projected revenues to cover liabilities and expenses, and a statement of the applicant's startup costs and sources of funds through the breakeven point.

¹⁸ S. 408.8069, F.S.

¹⁹ S. 408.810, F.S.

²⁰ S. 400.9905(5), F.S.

²¹ S. 400.9935, F.S.

²² Supra note 17.

In 2019, AHCA required all ABA provider groups to be licensed as health care clinics under ch. 400, F.S., as a condition of Medicaid enrollment, effective July 1, 2020.²³ This change required ABA provider groups to employ a medical or clinical director and meet certain financial requirements, in addition to those required of all Medicaid enrolled providers.

In 2020, however, the Legislature exempted Medicaid providers from the licensure requirements of the Act, including behavior analysis practices enrolled in Medicaid.²⁴ An ABA practice not providing Medicaid services must still comply with the Health Care Clinic Act, and must retain a state-licensed health care practitioner as its medical or clinical director in order to do so.

ABA Services in Schools

Current law requires school districts to accommodate ABA services in the school setting. Section 1003.572, F.S., defines ABA providers as “private instructional personnel”, and sets parameters under which they must be allowed to enter the classroom to observe or provide services to a student in a public K-12 school. Private instructional personnel who are hired or contracted by parents to collaborate with public instructional personnel must be permitted to observe the student in the educational setting, collaborate with instructional personnel in the educational setting, and provide services in the educational setting, so long as certain requirements are met. For example, private instructional personnel must pass criminal background screening and the principal and teacher must consent to the time and place of service provision.

Among the professionals included in the definition of private instructional personnel are behavior analysts certified by BACB²⁵ to provide ABA services, as well as mental health professionals licensed under chapter 490 or 491 of the Florida Statutes.²⁶ The statute does not expressly address other behavior analysis professionals, such as RBTs, who implement the treatment plans established by behavior analysts.

Effect of the Bill

The bill would exempt all group practices that provide ABA services from licensure under the Health Care Clinic Act. Most of these practices are already exempt from the Act, pursuant to action taken by the Legislature in 2020.²⁷

The bill also amends s. 1003.572, F.S., to add RBTs holding recognized paraprofessional certification and who practice under the supervision of either certified behavior analysts or professionals licensed under ch. 490 or ch. 491, F.S., to the list of private instructional personnel who may provide ABA services in the classroom setting. This change would allow RBTs to provide ABA services to students in a public K-12 school.

B. SECTION DIRECTORY:

- Section 1:** Amends s. 400.9905, F.S., relating to definitions.
- Section 2:** Amends s. 1003.572, F.S., relating to collaboration of public and private instructional personnel.
- Section 3:** Provides an effective date of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

²³ Rule 59A-33.006, F.A.C.

²⁴ Ch. 2020-156, L.O.F.

²⁵ Or, by the Agency for Persons with Disabilities (APD) pursuant to s. 393.17, F.S. APD relies on BACB for its program, and does not independently certify behavior analysts.

²⁶ These chapters regulate psychologists, school psychologists, mental health counselors, marriage and family therapists, and social workers.

²⁷ Supra note 22.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill's exemption from licensure under the Health Care Clinic Act may reduce anticipated increases in workload for the AHCA Division of Health Quality Assurance.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive fiscal impact on providers of ABA services who are not enrolled in Medicaid, since it will exempt them from the fiduciary and administrative requirements of the Health Care Clinic Act.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

AHCA has sufficient rulemaking authority to implement the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES