

ACT 205

H.B. NO. 2271

A Bill for an Act Relating to the Practice of Behavior Analysis.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that the State's department of health developmental disabilities division operates the medicaid intellectual and developmental disabilities home and community-based services waiver under the medicaid services section 1915(c) of the Social Security Act (HCBS I/DD waiver). The HCBS I/DD waiver is reviewed and approved by the United States Department of Health and Human Services Centers for Medicare and Medicaid Services and has many requirements to ensure appropriate and efficient provision of services and supports to people with intellectual and developmental disabilities.

For children in the HCBS I/DD waiver who have an autism spectrum disorder, the Centers for Medicare and Medicaid Services has clarified that services for the treatment of autism spectrum disorder must be provided through the child's medicaid health plan through medicaid's early and periodic screening, diagnosis, and treatment benefit. Services cannot be provided under waiver services pursuant to section 1915(c) of the Social Security Act. Therefore, the developmental disabilities division provides behavior analysis services only to adults with behavioral challenges and only in home and community-based settings.

The legislature further finds that the Centers for Medicare and Medicaid Services requires states to provide participant safeguards that ensure the health, safety, and rights of HCBS I/DD waiver participants. The state developmental disabilities division has policies and procedures to ensure that positive behavior supports are used to proactively minimize challenging behaviors, and define and limit the use of restrictive procedures. The developmental disabilities division also conducts oversight for continuous quality assurance to ensure safe and appropriate practices that include a behavior review committee to review quality of care for individuals who need supports to learn new behaviors.

Amending the exemptions for participants in the medicaid intellectual and developmental disabilities waiver will ensure that a qualified workforce can continue to provide necessary behavior interventions while simultaneously facilitating efforts to build an adequate workforce for clients who depend on these services.

The legislature also finds that teachers are critical to ensuring student success. To that end, teachers are encouraged to continue to employ general classroom management techniques in classroom management plans, modifications of content, process, and product. However, a licensed behavior analyst or a licensed psychologist is required to conduct functional behavior assessments and to design and oversee applied behavior analysis services when what the classroom teacher is doing is not resulting in increased learning or improved behavior and the student's behavior impedes their learning or the learning of others. Teachers are not permitted to independently conduct functional behavior assessments, or to design, develop, or independently oversee applied behavior analysis services.

The use of functional behavior assessment is appropriate when the student's behavior impedes learning processes and the school team is considering

the use of a behavior plan or other positive behavior supports. A functional behavior assessment is a results-oriented process that explicitly identifies challenging behaviors and how the behaviors may change across time. At minimum, a functional behavior assessment must result in a summary statement that offers an operational definition of the problem behavior, describe the antecedents and maintaining consequences related to the problem likely to occur.

The purpose of this Act is to:

- (1) Clarify and standardize the terminology used to refer to behavior analysis and the practice of applied behavior analysis;
- (2) Broaden the exemption of certain individuals and licensed or credentialed practitioners practicing within their own recognized scopes of practice from chapter 465D, Hawaii Revised Statutes, the behavior analysts law; and
- (3) Require the department of education to create an implementation plan to seek reimbursement of any medicaid billable applied behavior analysis the department of education may provide to students diagnosed with autism spectrum disorder.

SECTION 2. Section 465-3, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) This chapter shall not apply to:

- (1) Any person teaching, lecturing, consulting, or engaging in research in psychology insofar as the activities are performed as part of or are dependent upon employment in a college or university; provided that the person shall not engage in the practice of psychology outside the responsibilities of the person’s employment;
- (2) Any person who performs any, or any combination of the professional services defined as the practice of psychology under the direction of a licensed psychologist in accordance with rules adopted by the board; provided that the person may use the term “psychological assistant”, but shall not identify the person’s self as a psychologist or imply that the person is licensed to practice psychology;
- (3) Any person employed by a local, state, or federal government agency in a school psychologist or psychological examiner position, or a position that does not involve diagnostic or treatment services, but only at those times when that person is carrying out the functions of such government employment;
- (4) Any person who is a student of psychology, a psychological intern, or a resident in psychology preparing for the profession of psychology under supervision in a training institution or facility and who is designated by a title as “psychology trainee”, “psychology student”, “psychology intern”, or “psychology resident”, that indicates the person’s training status; provided that the person shall not identify the person’s self as a psychologist or imply that the person is licensed to practice psychology;
- (5) Any person who is a member of another profession licensed under the laws of this jurisdiction to render or advertise services, including psychotherapy, within the scope of practice as defined in the statutes or rules regulating the person’s professional practice; provided that, notwithstanding section 465-1, the person does not represent the person’s self to be a psychologist or does not represent that the person is licensed to practice psychology;
- (6) Any person who is a member of a mental health profession not requiring licensure; provided that the person functions only within

- the person's professional capacities; and provided further that the person does not represent the person to be a psychologist, or the person's services as psychological;
- (7) Any person who is a duly recognized member of the clergy; provided that the person functions only within the person's capacities as a member of the clergy; and provided further that the person does not represent the person to be a psychologist, or the person's services as psychological; [øø]
 - (8) Any psychologist employed by the United States Department of Defense, while engaged in the discharge of the psychologist's official duty and providing direct telehealth support or services, as defined in section 431:10A-116.3, to neighbor island beneficiaries within a Hawaii National Guard armory on the island of Kauai, Hawaii, Molokai, or Maui; provided that the psychologist employed by the United States Department of Defense is credentialed by Tripler Army Medical Center[-]; or
 - (9) Any supervisee of a licensed psychologist as defined in section 465D-7.

SECTION 3. Section 465D-7, Hawaii Revised Statutes, is amended to read as follows:

"§465D-7 Exemptions. (a) This chapter is not intended to restrict the practice of other licensed or credentialed practitioners practicing within their own recognized scopes of practice and shall not apply to:

- [(+)] ~~An individual working within the scope of practice or duties of another licensed profession that overlaps with the practice of behavior analysis; provided that the person does not purport to be a behavior analyst;~~
- (1) A licensed psychologist and any supervisee of the licensed psychologist; provided that applied behavior analysis services performed are within the boundaries of the licensed psychologist's education, training, and competence; provided further that neither the licensed psychologist nor any supervisee of the licensed psychologist purports to be a licensed behavior analyst; and provided further that master's level practitioners and postdoctoral fellows may provide training and supervision to direct support workers, paraprofessionals, caregivers, parents and guardians in a manner and to the extent determined by the supervising licensed psychologist. For purposes of this paragraph, "supervisee" means a master's level practitioner, postdoctoral fellow, direct support worker, paraprofessional, caregiver, parent or guardian who provides applied behavior analysis services;
- (2) A licensed classroom teacher or an individual who is working as a classroom teacher and is enrolled in a teacher preparation program working towards licensure who implements but does not design applied behavior analysis services in a school setting in direct collaboration with a licensed behavior analyst or a licensed psychologist on or before July 1, 2019;
- [(-)] (3) An individual who implements or designs applied behavior analysis services and possesses board certification as an assistant behavior analyst by the Behavior Analyst Certification Board and who practices in accordance with the most recent supervisory and ethical requirements adopted by the Behavior Analyst Certification Board

under the direction of a licensed behavior analyst [~~licensed in this State~~];

(3) (4) An individual who directly implements applied behavior analysis services and:

(A) Is credentialed as a registered behavior technician by the Behavior Analyst Certification Board, and is under the direction of a licensed behavior analyst [~~licensed in this State~~]; or

(B) Is a direct support worker who [~~provides autism treatment services pursuant to an individualized education plan~~] directly implements an applied behavior analysis program under the supervision of a licensed behavior analysts or licensed psychologist on or before January 1, [2019;] 2020; [for]

(C) Is a direct support worker who provides medicaid home and community-based services pursuant to section 1915(c) of the Social Security Act on or before January 1, 2019;

provided that for purposes of this paragraph, “direct support worker” means a [~~teacher or~~] paraprofessional who directly implements intervention or assessment plans under supervision and does not design intervention or assessment plans;

(4) (5) A family member [~~or~~], legal guardian, or caregiver implementing an applied behavior analysis plan and who acts under the direction of a licensed behavior analyst [~~licensed in this State~~] or Hawaii-licensed psychologist; provided that for the purposes of this paragraph, “caregiver” means an individual who provides habilitative services in an adult foster home, developmental disabilities domiciliary home, adult residential care home, expanded adult residential care home, special treatment facility, or therapeutic living program pursuant to the medicaid home and community-based services waiver program authorized by section 1915(c) of the Social Security Act;

(5) (6) An individual who designs or implements applied behavior analysis services to participants in the medicaid home and community-based service waiver program pursuant to section 1915(c) of the Social Security Act on or before January 1, 2024;

(7) An individual who engages in the practice of applied behavior analysis with nonhuman or nonpatient clients or consumers including but not limited to applied animal behaviorists and practitioners of organizational behavior management;

(6) (8) A matriculated graduate student or postdoctoral fellow whose activities are part of a defined applied behavior analysis program of study, practicum, or intensive practicum; provided that the student’s or fellow’s activities or practice is directly supervised by a licensed behavior analyst [~~licensed in this State~~], licensed psychologist, or an instructor from a nationally recognized training organization or in a Behavior Analyst Certification Board-approved course sequence; or

(7) (9) An individual pursuing experience in applied behavior analysis consistent with the Behavior Analyst Certification Board’s experience requirements; provided that the experience is supervised by a licensed behavior analyst [~~licensed in this State~~].

(b) Nothing in this chapter shall be construed to prevent any licensed psychologist from engaging in the practice of applied behavior analysis in this State as long as the [~~person~~] licensed psychologist is not in any manner held out to the public as a “licensed behavior analyst” or “behavior analyst” and the

behavior analysis services provided by the licensed psychologist are within the licensed psychologist's recognized scope of practice.”

SECTION 4. Sections 465D-2, 465D-4, 465D-5, and 465D-11, Hawaii Revised Statutes, are amended by substituting the phrase “practice of applied behavior analysis” wherever the phrase “practice of behavior analysis” appears, as the context requires.

SECTION 5. Section 465D-11, Hawaii Revised Statutes, is amended by substituting the phrase “applied behavior analysis” wherever the phrase “behavior analysis” appears, as the context requires.

SECTION 6. (a) The department of education shall create an implementation plan to seek reimbursement of any medicaid billable applied behavior analysis the department of education may provide to students diagnosed with autism spectrum disorder.

(b) The department of education shall submit an initial report to the legislature and board of education within ninety days of the effective date of this Act; provided that the initial report shall include clear objectives on staffing, data collection and analysis, reporting and accountability, and any other necessary points to effectuate the implementation plan pursuant to subsection (a).

(c) After the submission of the initial report to the legislature and board of education pursuant to subsection (b), the department of education shall submit quarterly reports to the legislature and board of education; provided that the quarterly reports shall include the following:

- (1) The number of students diagnosed with autism spectrum disorder;
- (2) The number of students with autism spectrum disorder as part of their individualized education plan;
- (3) The number of students requiring applied behavior analysis;
- (4) Staffing updates and needs;
- (5) Medicaid reimbursement schedules and amounts;
- (6) Licensure updates; and
- (7) Any other information pertinent to the implementation of this Act.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 8. This Act shall take effect upon its approval.

(Approved July 10, 2018.)

Note

1. So in original.