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Behavior Analysts Sunrise Application Review

Preliminary Assessment on Request for Licensure

Behavior analysts seek regulation via licensure by the State of Vermont. Pursuant to 3 V.S.A. § 3105(d) behavior analysts have requested that the Office of Professional Regulation prepare a Preliminary Assessment of their request for licensure. Their application may be reviewed on the Office of Professional Regulation web site at: <https://www.sec.state.vt.us/professional-regulation/sunrise-review/behavior-analysts.aspx>. The supporting documentation they provided is also available on the same web page.

Regulatory Considerations State Policy on Regulation of Professions

Chapter 57 of Title 26 of the Vermont Statutes states:

“26 V.S.A. § 3101 Policy and Purpose.

It is the policy of the state of Vermont that regulation be imposed upon a profession or occupation solely for the purpose of protecting the public. The legislature believes that all individuals should be permitted to enter into a profession or occupation unless there is a demonstrated need for the state to protect the interests of the public by restricting entry into the profession or occupation. If such a need is identified, the form of regulation adopted by the state shall be the least restrictive form of regulation necessary to protect the public interest....”

Vermont law 26 V.S.A. § 3105(a) provides a detailed set of criteria which must exist before regulation of a profession may occur:

“A profession or occupation shall be regulated by the state only when:

- (1) it can be demonstrated that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative;
- (2) the public can reasonably be expected to benefit from an assurance of initial and continuing professional ability; and
- (3) the public cannot be effectively protected by other means.”

The Legislature delegates responsibility for a preliminary assessment of requests for regulation to the Office of Professional Regulation (OPR or “the Office”). “Prior to review under this chapter and consideration by the legislature of any bill to regulate a profession or occupation, the Office of Professional Regulation shall make, in writing, a preliminary assessment of whether any particular request for regulation meets the criteria set forth in subsection (a) of this section. The office shall report its preliminary assessment to the appropriate house or senate committee on government operations.” 26 V.S.A. § 3105(d).

Process

The Office of Professional Regulation has evaluated the Application and conducted its own limited investigation. The Sunrise Application was posted on the Office of Professional Regulation website with a link for interested persons to submit comments. An invitation to comment on the Sunrise Application was sent to each superintendent of each school district and each principal of each school in Vermont. The Office of Professional Regulation held a properly noticed public hearing on November 19, 2014 at the Office of Professional Regulation in Montpelier. The hearing took evidence beyond that contained in the Application for Sunrise Review. Attending the hearing were behavior analysts, parents of autistic children, and attorneys interested in seeing behavior analysts become a licensed profession. Also present were representatives of the State of Vermont Department of Health Access who testified in favor of licensure. All written comments received by OPR support licensure of behavior analysts. No one has expressed opposition to licensure of behavior analysts. The office received no comments from the schools or principals invited to comment. Late in the process the office became aware of the existence of “behavior specialists” and “behavior interventionists.” How these two groups might be affected by regulation of behavior analysts is discussed below. They were not mentioned in the Sunrise Application.

History of Seeking Licensure: Regulation and Review by Other States

The Vermont Sunrise Application continues a national effort to establish legitimacy for Behavior Analyst Credentials Board (BACB) approved programs and certified individuals. Their national lobbying effort follows the guide published by the Association for Behavior Analysis International, “Licensing Behavior Analysts: Risks and Alternatives.” http://www.pubfacts.com/fulltext_frame.php?PMID=22477698&title=Licensing%20behavior%20analysts:%20risks%20and%20alternatives. Since 1990, 15 states have adopted some kind of regulation of behavior analysts. Some states have adopted statutes mandating insurance for behavior analysts like Vermont did in 2011 and which is discussed below. Most states regulating behavior analysts require BACB certification, though some allow roughly equivalent standards which BACB candidates meet. The Vermont Association for Behavior Analysis, established in 2004, lists as one of its mission/objectives, “To support the development of professional credentialing for the practice of behavior analysis within the State of Vermont.”

Only West Virginia, Washington, and Arizona are believed to have conducted a Sunrise Review or similar evaluation. West Virginia recommended against licensure. West Virginia has an insurance statute like Vermont’s. Its sunrise criteria are similar to Vermont’s. Their review concluded that “national certification provides adequate protection to the citizens of the state.”

Arizona recommended licensure. Its criteria are unlike Vermont's. The Washington sunrise report is still in draft status. With caveats, the draft recommends licensure. This is in part because other Washington laws require a license for Medicaid reimbursement. See the reimbursement discussion later in this review. The Washington report also recommends substantial changes in Washington's proposed statutes to accommodate teachers and paraprofessionals and to include regulation of behavioral technicians and "assistant behavior analysts." As a possible alternative to licensing behavior analysts, the Washington review suggests "certification." Arizona requires a licensed professional to provide behavior analysis services. Licensing was seen as necessary under Arizona law to assure access to behavior analysis services.

Overview of the Profession

Behavior analysis comes from the study of behavior as a natural science. The field encompasses experimental analysis of behavior and applied behavior analysis. Behavior analysis is based on the idea that most human behavior is learned over time and maintained by consequences within the environment. It is for the practice of *applied* behavior analysis that applicants seek regulation in the form of licensure. All subsequent references to behavior analysis in this review refer to applied behavior analysis.

Behavior analysts provide professional services with the goal of changing human behavior. Those seeking licensure in Vermont work primarily with children and young adults with autism, autism spectrum disorders, or developmental disabilities. Behavior analysis is used also to assist others with diverse issues from career decision making to drinking or smoking behaviors, or rehabilitation after an injury.

Behavior analysts' clients can be non-verbal and can have severe emotional issues. Under federal law, the Individuals with Disabilities Education Act (IDEA), educators, as part of an IEP must, "[I]n the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;..." 34 CFR § 300.324(a)(2)(i).

Behavior analysts use principles of learning to address behavior needs. Behavior analysts work with clients directly or train others such as teachers or family members to work with their clients. They suggest ways of adjusting and modifying behaviors to reduce pain and suffering and increase personal happiness and quality of life. Behavior analysis was originally seen as a branch of psychology. The applicants assert that the services they provide are not psychotherapy because they focus on alleviating behaviors not mental disorders.

Behavior analysts evaluate a person's behavior and the environment and circumstances in which it occurs. Observation may occur at a school or in the home. They may consult parents, teachers, and others and observe the child.

A behavior analyst identifies target problem behaviors and sets steps (intervention tools) based on evidence-based principles of behavior analysis to decrease the problem behaviors and increase the desired or desirable behaviors. The behavior analyst observes how the child

responds and recommends program modifications when needed.

Because many of the clients are quite young, the interventions and behavior treatments they receive can have long lasting effects. Early gains can enhance subsequent learning opportunities and further develop strengths. On the other hand, early intervention services incorrectly provided can scar a child and increase her problems as she matures.

Many behavior analysts provide services in schools through contracts with their employing designated agencies. Some are employed directly by schools. Some are in group private practices. Applicants report that there are roughly 50 actively working behavior analysts in Vermont. The BACB website reports 52. Most are employed by the State of Vermont's designated agencies which are part of Vermont's mental health system and are accountable to the State of Vermont. One private firm employs at least 9 behavior analysts and 8 people with assistant behavior analyst credentials. The behavior analysts in this one private practice bill insurance or receive payment directly from clients' families. Behavior analysts' services are covered by insurance, or Medicaid indirectly through the budgets of the agencies receiving State grants for autism treatment. There is no known individual behavior analyst in independent solo practice in Vermont at this time.

The applicants for the sunrise review are behavior analysts certified by the Behavior Analyst Certification Board (BACB). They are members of a relatively new profession. Behavior analysts are not yet listed as a discrete profession in the Bureau of Labor Statistics listing of professions and occupations. The closest listed profession is "substance abuse and behavior disorder counselors." Behavior analysts are one group of several who provide necessary treatment to clients on the autism spectrum. Also providing similar services are social workers, clinical mental health counselors, and psychologists. Applicants state that special educators and speech language pathologists provide similar services.

Children with autism spectrum disorders live in all parts of Vermont. The services they receive are sometimes provided by individuals calling themselves behavior analysts but who are not BACB certified. They may not have the education, training, and experience equivalent to BACB behavior analysts. It is unclear who is providing similar services in areas where no BACB behavior analysts practice.

The Vermont General Assembly has recognized the value of nationally certified behavior analysts as a profession. 8 V.S.A. § 4088i provides, "**Coverage for diagnosis and treatment of early childhood developmental disorders** (a)(1) A health insurance plan shall provide coverage for the evidence-based diagnosis and treatment of early childhood developmental disorders, including applied behavior analysis supervised by a *nationally board-certified behavior analyst*, for children, beginning at birth and continuing until the child reaches age 21." The statute defines "Applied behavior analysis" to mean "... the design, implementation, and evaluation of environmental modifications using behavioral stimuli and consequences to produce socially significant improvement in human behavior. The term includes the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior." 8 V.S.A. § 4088i(f)(1). Vermont educational support systems for public schools require an "educational support team and a range of support and remedial services, including instructional

and behavioral interventions and accommodations.” 16 V.S.A. § 2902(a). The statute adopts national certification as an indicator of competence. Any current BACB certified behavior analyst is eligible for insurance reimbursement. National certification gives schools and other entities who wish to employ behavior analysts an easy means to assure that a behavior analyst possesses the education and training necessary for their work.

Non-Regulatory Protections

Vermont law 8 V.S.A. § 4088i (above) already provides a means to assure initial and continuing competence and a means by which schools and others can find a properly trained individual to provide behavior analysis treatment. All current behavior analysts are accountable through their employers.

Education and Training.

Applicants state that accepted training to become a behavior analyst is attained through programs and standards set by the BACB. Applicants suggest that licensure in Vermont as a behavior analyst should require BACB certification. To obtain that certification one must obtain a master’s degree in behavior analysis or other natural science, education, human services, engineering, medicine or a field related to behavior analysis and approved by the BACB and additional course work dedicated to behavior analysis. The education must be obtained in an accredited U.S. or Canadian institution or equivalent international education. The BACB required specific curriculum through December, 2014 includes 225 classroom hours covering: ethics, definition and characteristics and principles, processes and concepts, behavior assessment and selecting intervention outcomes and strategies; experimental evaluation of interventions; measurement of behavior and displaying & interpreting behavior data; behavior change procedures and systems support; and discretionary behavior-analytic content. Beginning in 2015, 270 classroom hours will be required for the behavior analysis course work. As generally accepted, 225 classroom hours would be the equivalent of 15 graduate credits. 270 classroom hours equals 18 graduate credits. This is significantly less than the 60 credits needed to become a licensed clinical mental health counselor, or 48 credits for marriage and family therapists. Each applicant must complete between 750 hours of practicum and 1,500 hours of supervised practice independent of the BA program and must pass a national certification examination.

Johnson State College’s behavior analysis program is approved by the BACB. It awards a 30 credit master’s degree in Education: Applied Behavior Analysis. Of the 30 credits, 18 are devoted to behavior analysis study. Graduates of its program are eligible after supervised practice for BACB approval and certification. Johnson State’s master’s course work is significantly less than the requirements for licensure as a clinical mental health counselor (60 credits) or marriage and family therapist (48 credits). Students in the Johnson State program who already have a master’s degree in education or psychology must take 18 credits dedicated to behavior analysis to be eligible for BACB certification. Two of the courses deal in part with autism.

To maintain BACB certification, an individual must obtain 32 continuing education hours with mandatory ethics over two years. Applicants state that they all meet BACB standards and

would be immediately eligible for licensure if this profession is regulated.

Discipline

The BACB has a disciplinary process for those accused of violating its “Guidelines for Responsible Conduct for Behavior Analysts” and “Professional Ethical Compliance Code of Behavior Analysts” and for the new code of ethics that will replace them in 2016. One of the main arguments applicants submit for licensure is that their profession’s disciplinary process is insufficient to protect the public, that a state run disciplinary process is necessary. This argument is most likely true for all professions, since no private group of people can remove one of their members from practice. The process has a limited ability to sanction violators. It can revoke certification or impose other sanctions. But, it cannot prevent an individual from continuing to practice. The BACB would not necessarily take action against a behavior analyst for all conduct that could be considered under Vermont law to be “unprofessional conduct.” Most often the BACB will not initiate action against an individual until other regulatory or governmental entities have concluded their own investigations and taken or withheld action. It defers to local agencies, schools or regulatory entities. The BACB is reportedly under-funded and under-staffed. Lack of an effective certification disciplinary process is relevant to whether this profession, unregulated, poses a real risk to the public health, safety and welfare.

Apart from the sunrise application no instances of behavior analyst malfeasance have been reported to OPR for investigation. The Agency of Education reports none. There are no known reports of any criminal activity regarding practicing behavior analysts in Vermont.

Overlap with Other Professions

The application for sunrise review revealed that social workers, psychologists, clinical mental health counselors also provide services to the clients that behavior analysts serve. The American Psychological Association offers a diplomate (post Ph.D.) in behavioral psychology. Part of the definition of “practice of psychology” is “predicting and influencing behavior.” 26 V.S.A. 3001(1). The approaches the other professions take with their clients may differ from those used by behavior analysts. The approaches of other professionals reflect the philosophy and training of each of those professions. Behavior specialists and behavior interventionists have responsibilities that overlap with those described for behavior analysts.

Vermont schools provide and coordinate behavior services. “Social work services” in Vermont schools for special education students include, “assisting in developing positive behavioral intervention strategies.” Agency of Education Administrative Rule 2360.2.16(d)(14)(v). In Vermont, providing services to children on the autism spectrum includes the use of “behavior specialists,” “behavior support specialists,” and “behavior interventionists.”

A recently advertised “behavior support specialist” job announcement for a position in Brattleboro lists the tasks expected, “Responsibilities include classroom and child observation, consultation with teachers, on-spot coaching, social skill building, behavior assessment and behavior support planning, teacher training, and collaboration with families and outside agencies.” This position requires a Bachelor’s degree in Early Childhood education or a related

field. <http://jobview.local-jobs.monster.com/BEHAVIOR-SUPPORT-SPECIALIST-Job-Brattleboro-VT-US-143860169.aspx?ch=brattleboro&mescoid=4300715001001>. This behavior support specialist will perform many of the same functions behavior analysts do.

“Behavior interventionists,” as described in a job posting for the northwest part of Vermont, “are responsible for supporting social, emotional and behavior skills development within the constructs of an individualized behavior plan, while working cooperatively with team members, school personnel, and families. Excellent opportunity for advanced training in applied behavior analysis (including BCBA supervision), childhood trauma and associated interventions, crisis intervention and conflict resolution, and children’s mental health.” That position requires a Bachelor’s degree in Human Services. There is great overlap between behavior specialists, behavior interventionists, behavior support specialists and behavior analysts. Behavior specialists, interventionists and support specialists are not licensed. There has been no proposal to license them.

Harm from Not Regulating Behavior Analysts

In their Sunrise Review Application the applicants state that their profession’s disciplinary standards are insufficient to protect the public.

Applicants claim that as non-licensed professionals they are “excluded from full practice as behavioral health professionals within the behavioral health system in Vermont” causing risk to consumers. The statute discussed above specifically references “nationally certified behavior analysts.” Lack of licensure does not exclude behavior analysts from practice.

Applicants claim that there are situations where untrained staff not properly supervised by a behavior analysts are “prone to abuse.” Applicants state: such abuses have been the subject of many administrative complaints to the Vermont Department of Education and the Office of Civil rights over the years. Office inquiries to the Department of Education could not confirm this claim. The Human Rights Commission website reveals no mention of behavior analysts.

Applicants argue that Medicaid regulations restrict trade of behavior analysts and that Vermont agencies will not hire unlicensed individuals because Medicaid regulations prevent the agencies from receiving reimbursement for their services. There is no evidence of restricted practice. The applicant’s roster of members shows that a majority of the behavior analysts in Vermont are employed by the state’s designated agencies.

Another “harm” claimed is that available public funding for behavior analysts is insufficient to meet the need for their services in Vermont, and that families who have only Medicaid have less access to behavior analysts than others. This, they claim, results in a lack of treatment and harm to individuals and “hugely increased societal costs over time.” The unregulated practice of behavior analysts does not cause insufficient public funding. 26 V.S.A. § 3105(1). Regulation of a profession is permitted only upon meeting the factors set forth in 26 V.S.A. § 3105 et seq. Imposing regulation on this profession is not the appropriate means to overcome fiscal obstacles imposed by other programs.

Applicants say that many consumers have difficulty identifying competent behavior analysts. Despite national certification, “many universities and training centers have begun to offer certificates in behavior analysis.” Licensing based on BACB standards, they suggest, “would address this issue.” Vermont law already recognizes “nationally board certified behavior analyst[s]” and mandates Medicaid and insurance coverage for their services. Identification of BACB nationally board certified behavior analysts requires only a quick visit to the BACB website which lists all 52 board certified behavior analysts in Vermont. There is no indication that the public is unable to distinguish board certified behavior analysts from others. The public’s difficulty, if any, in finding a qualified behavior analyst arises from a lack of public awareness of the existence of nationally board certified behavior analysts. Regulation of a profession is imposed to protect the public, not to raise awareness of a profession’s existence.

Applicants suggest that there will inevitably be behavior analysts who are in one way or another impaired, and that those individuals will benefit from state-imposed rehabilitation. Applicants admit they do not “know how widespread the problem is for behavior analysis in Vermont...” Applicants have provided no evidence of impaired behavior analysts in Vermont. They refer to studies for mental health counselors suggesting that impairment of some behavior analysts is inevitable. They hope that they may benefit from a regulatory impairment program. From entry level minimum wage positions to the highest positions in society no occupation is immune from impaired individuals. There is no indication that employers lack the means to detect and assist individuals who become impaired and insist on practicing. Nor is there any indication that the assistance available to any impaired individual is, outside of a regulatory system, insufficient. This claim of harm is speculative. 26 V.S.A. § 3105.

Specific Instances of Harm

At the public hearing individuals testifying in favor of licensing promised to send examples of harm caused by behavior analysts. After the public hearing the applicants submitted via email a list of incidents to show harm caused by behavior analysts in Vermont. Their examples are quoted below. Please note that none of the allegations of misconduct or malfeasance have been investigated by this office. All of the following incidents as described were submitted by one person supporting licensure. The reports do not appear to be based on first-hand knowledge. It is unknown who may have witnessed these incidents. The Office of Professional Regulation has insufficient background information to judge the veracity of the reports. Finally, what follows may be only “one side of the story.”

“1) In Bennington County: A young child with autism was placed repeatedly placed in seclusionary time out (in a room by himself) at the direction of a BCBA [Board certified Behavior Analyst] without “eyes on,” a breach of professional ethics and potentially physically harmful, not to speak of emotionally harmful. This intervention was initiated without any positive preventative practices.” One cannot tell from this recitation whether the action taken was the first response to a behavior or a subsequent response when less drastic means were unavailing. More information is necessary, including information about the person who actually placed the child in time out. Was it a school or agency behavior specialist or interventionist? What type of communication was there with the behavior analyst?

“(2) In Windsor County: Parent of a 10 year old with autism advised by a BCBA to ignore his severe self-injurious behaviors which included diving head first at the floor. Clinically horrible advice, obviously dangerous and serious breach of ethics.” Autistic children may engage in attention-getting behavior. When that occurs, responding to a behavior can reward it, rather than discourage it. In this instance it is important to know if other strategies were considered and tried and exhausted. Was use of a padded room part of the instruction. This scenario presents too little information to be fully instructive.

“(3) In Windsor County: At a judicial hearing deciding restrictive placement, BCBA presented data to support restrictive placement that was clearly fabricated, a huge breach of professional ethics with potential unnecessary restriction for the child in question.” Without knowledge of the specifics of this case and the bias, if any of the reporter, it is impossible to gauge the veracity of this report.

“(4) In Rutland County: Teacher of disabled children advised by a BCBA that when a child becomes disruptive, staff should knock over a container of materials in front of the child’s desk and then make the child pick them up. Abusive and degrading not to speak of clinically appalling.”

“(5) In Washington County: Second grader under the care of a BCBA repeatedly physically restrained without clear criteria for doing so, a significant clinical blunder, and without proper documentation (AOE Rule 4500) or the consent of his parents. Child very distressed, defecated in his pants during restraint and humiliated in front of his peers. These incidents were clearly clinically preventable through basic behavior analytic good practice.” Again, more information is needed. What communication were there between the BCBA and the person (behavior specialist, interventionist?) regarding restraint? Is this a matter of documentation or a lack of guidelines, or both?

“(6) In Chittenden County: Data presented by a BCBA during a mediation process that purported to show a child’s behavior in school. Data included days when the child was home sick and snow days. As above, it is a major breach of professional ethics to fabricate data. Doctors and nurses are severely sanctioned for this.”

“(7) In Orleans County: At the advice of a BCBA, child removed to a janitor’s closet and intermittently restrained for lengthy periods of time for disruptive behavior in the classroom. This occurred over a period of 10 months with no improvement in behavior and without the parent's knowledge or consent.”

This report cannot determine the veracity or accuracy of the examples above. Several questions arise. Who knew of these incidents and when? What exactly was the role of the behavior analyst in each? Were school or agency behavior specialists or behavior interventionists involved? What if any communication was there among the various members of any child’s treatment team. Were these events reported to courts, schools, designated agencies, parents, employers or supervisors? If not reported, why not? What, if any, action was taken in response to them? From the information provided to the Office it appears that each of the practitioners involved is either employed by a school or by an agency. Schools are tightly

regulated. Designated agencies are accountable to the State. See Agency of Human Services, Department of Developmental and Mental Health Services, Administrative Rules on Agency Designation. At the very least, each should be accountable to his or her employer.

Those attending the public hearing said that schools or agencies often do not hold their employees accountable. They said that bad practitioners leave jobs and are hired elsewhere, something that regulatory discipline can prevent. Civil consumer action, when taken, can be expensive and time consuming and an ineffective means to correct or prevent bad practices.

As noted above, the Vermont Agency of Education reports no complaints against any individual providing behavior analyst services. The Office of Professional Regulation has received no inquiries or complaints regarding anyone providing behavior analysis. No reported Vermont court cases mention behavior analysts or behavior analysis.

Applicants list the benefits expected from licensure. Applicants suggest that licensure will provide an effective means to investigate and respond to complaints of harmful or unethical practices by behavior analysts.

Regulation Versus Access to Services

This sunrise review revealed two state policies which should not be incompatible, but whose implementation is problematic. Sunrise criteria “impose” regulation only when unregulated practice harms or endangers health, safety, or welfare and no less restrictive alternative exists. Under this rubric, consideration of how professional services are reimbursed is not a permissible factor in the decision of whether to regulate.

At the same time the State has expressed a desire to make access to behavior analysts’ services readily available. 8 V.S.A. § 4088i provides, “**Coverage for diagnosis and treatment of early childhood developmental disorders** (a)(1) A health insurance plan shall provide coverage for the evidence-based diagnosis and treatment of early childhood developmental disorders, including applied behavior analysis supervised by a *nationally board-certified behavior analyst*, for children, beginning at birth and continuing until the child reaches age 21. (2) Coverage provided pursuant to this section by Medicaid or any other public health care assistance program shall comply with all federal requirements imposed by the Centers for Medicare and Medicaid Services[CMS].”

One strong proponent of licensure is the Department of Vermont Health Access. Licensure of behavior analysts in Vermont will permit Medicaid reimbursement for their services. Medicaid now pays indirectly for behavior analysis services through grants to Vermont’s designated agencies. Medicaid pays the agencies. It does not reimburse individual practitioners. Notwithstanding the State’s expressed preference for payment for nationally certified behavior analysts, Medicaid will reimburse individual practitioners only if they are licensed by the state. The Department strongly advocates licensure because it will increase access to behavior analysts’ services. Should this position prevail, OPR could face an onslaught of new professions seeking licensure for no reason other than to qualify for Medicaid funds. Sunrise statutes do not sanction use of licensure to expand available professional forces. As this

review must follow the criteria in the sunrise statutes, we cannot advocate imposition of regulation on behavior analysts solely because CMS demands it as a prerequisite to reimbursement.

Comment on Behavior Analyst Dedication and Professionalism

The application for sunrise review seeks recognition and licensure of BACB approved and trained individuals. This sunrise review focuses on those individuals who, by virtue of BACB certification, call themselves behavior analysts and wish to be recognized by and have the benefits of licensure. The BACB appears as the standard for applied behavior analysts' education and training. Fifteen states accept its practitioners. The information for this review focuses on what BACB certified providers can do, the claimed harm they can cause, and the benefits of using them to prevent harm by others. Applicants are forced by the sunrise process to show their expertise and training while at the same time showing that regulation needs to be imposed on them to protect the public. They make a convincing case that they are competent and skillful providers of services to needy clients. Their reports of harm by a few in no way detract from the quality services the rest provide. They appear dedicated and professional in every way.

The Problems with Licensure

“‘Licensing’ and ‘licensure’ mean a process by which a statutory regulatory entity grants to an individual, who has met certain prerequisite qualifications, the right to perform prescribed professional and occupational tasks and to use the title of the profession or occupation. Practice without a license is unlawful.” 26 V.S.A. § 3101a(2). From the limited information presented for this review, it not clear that the unknown number of others who provide behavior analysis services but are not BACB certified are less effective or safe.

Licensure of behavior analysts would restrict entry into and practice of the profession. If behavior analysts are licensed, part of the practices of by behavior specialists, interventionists and paraprofessionals could be considered illegal “unlicensed practice.” Who will serve the children whom the unlicensed behavior specialists, behavior interventionists, and paraprofessionals serve now? In the parts of Vermont where none of the 52 board certified behavior analysts practice, how many providers will be barred from their current duties?

The applicants suggest one way to avoid ending the practice of other providers: create an exemption from licensure. This was done in the State of Kentucky.

“The provisions of this chapter shall not apply to any person who is:

- (a) Providing applied behavior analysis services to an individual in a public school setting;
- (b) Implementing applied behavior analysis intervention services to an immediate family member or as a supervisee;
- (c) Licensed, certified, or registered as a health or allied health professional under any other provisions of the Kentucky Revised Statutes, including but not limited to physicians, psychologists, social workers, nurses, counselors, therapists, including occupational therapists, physical therapists and speech therapists, or students within accredited training programs of these professions. Nothing in this chapter shall be

construed to limit, interfere with, or restrict the practice, descriptions of services, or manner in which the health or allied health professional listed in this subsection hold themselves out to the public; or (d) Providing applicable Medicaid waiver services.” KRS § 319C.020.

Adopted here, this exemption would swallow the rule. A major premise of the sunrise application is that those providing behavior analysis services through schools can cause harm. Licensure was sought in large part to prevent or sanction BABC certified analyst harm to children in schools. Indeed, most of the “harm” scenarios sent to OPR appear to come from school situations. Licensure with exemptions will create two categories school service providers; certified behavior analysts who need licenses and others who do not. There is no justification for exempting a large group of providers. The distinction is arbitrary. Licensure cannot be necessary to protect the public when it is not required for all.

Potential Remedies

Two choices present themselves: regulate all providers of behavior analysis services, or allow the designated agencies and schools to select their own providers as they do now. BACB certification makes the selection easier for them. “Certification” means a voluntary process by which a statutory regulatory entity grants to an individual, who has met certain prerequisite qualifications, the right to assume or to use the title of the profession or occupation, or the right to assume or use the term “certified” in conjunction with the title. Use of the title or the term ‘certified,’ as the case may be, by a person who is not certified is unlawful.” 26 V.S.A. § 3101a(1).

Certification of behavior analysts would distinguish and prevent those who have not achieved BACB or other national certification from claiming they have. Certification would allow others currently providing these services to continue their work. If necessary to avoid false claims of BACB certification, Vermont could impose state certification.

Comparison to Statutory Criteria

26 V.S.A. § 3101. It is the policy of the state of Vermont that regulation be imposed upon a profession or occupation solely for the purpose of protecting the public.

The legislature believes that all individuals should be permitted to enter into a profession or occupation unless there is a demonstrated need for the state to protect the interests of the public by restricting entry into the profession or occupation. If such a need is identified, the form of regulation adopted by the state shall be the least restrictive form of regulation necessary to protect the public interest.

26 V.S.A. § 3105. A profession or occupation shall be regulated by the State only when:

(1) it can be demonstrated that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative.

Applicants have presented uncorroborated evidence which, if true, can show that the

unregulated practice of behavior analysts poses a real, as opposed to a speculative risk to the public. The group seeking licensure does not include all those providing behavior analysis services. The sunrise application presents insufficient evidence that the unregulated practice of all those practicing behavior analysis poses a real, as opposed to a speculative risk. Because no behavior analyst practices solo, employer safeguards can respond to malfeasance. Licensure of the small number of BACB behavior analysts in Vermont would preclude others currently providing behavior analysis in underserved areas from continuing their work. A need to restrict entry into the profession or occupation has not been shown.

(2) the public can reasonably be expected to benefit from an assurance of initial and continuing professional ability.

National certification of behavior analysts gives employers and individuals hiring a behavior analyst a readily available means to assure that an individual is appropriately trained and displays initial professional ability to practice as a behavior analyst. As West Virginia found, “national certification provides adequate protection to the citizens of the state.” Absent a strong showing of false claims of BACB certification, State regulation through certification would be redundant.

(3) the public cannot be effectively protected by other means.

Aside from the BACB disciplinary process, the sunrise application does not address whether legal means other than licensure of individual behavior analysts would be sufficient to protect the public. Only one employer is not state regulated. There is no indication that other means short of regulating practitioners would not be sufficient to protect the public.

Recommendation

Based on these conclusions, the Office of Professional Regulation does not recommend regulation of Behavior Analysts at this time. If any regulation is deemed appropriate, it should be limited to registration or certification.

Respectfully submitted:

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Office of Professional Regulation
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