

Senate Bill 2155 – Department of Human Services
Senate Human Services Committee
Senator Lee, Chairman
February 14, 2011

Chairman Lee, members of the Senate Human Services Committee, I am Paul Kolstoe, Clinical Director and a licensed Clinical Psychologist at the North Dakota Developmental Center of the Department of Human Services. I am here today to testify in support of Senate 2155, with a list of amendments that I will explain in my testimony.

My role at the North Dakota Developmental Center includes directing the new statewide CARES Intellectual Disabilities Behavioral Health Service to prevent institutionalization of people with intellectual disabilities. I want to point out that this bill does not impact my practice as a licensed psychologist, but does as a leader of people doing behavior analysis in the state. I was asked by Superintendent Schweitzer to assemble a work group to craft amendments to this valuable effort to professionalize behavior analysis.

The bill as proposed is intended to enable professionals with national certification in behavior analysis to help children with autism using critically important behavioral technology in a regulated profession. Besides helping children in desperate need, it can provide an avenue to authorize financial and other resources to make a dramatic change in their lives.

However, in its current form the bill would be problematic to the network of behavior analysts currently serving people with intellectual disabilities throughout the state. This network has been critical in supporting people to live in their communities and avoid institutionalization. It would also have

the unintended impact to require regulation of a number of professionals currently working as program coordinators and similar roles, and likely complicate work in daycares and other settings.

Using the foundation of the proposed bill with the amendments proposed today I believe we can accomplish the original goal without creating issues for existing supports. These amendments were developed by a work group including two members of the State Board of Psychologist Examiners, a license exempt psychologist, a state employed behavior modification specialist, one of the two nationally Board Certified Behavior Analysts (or BCBA) that we have in North Dakota, and two behavior analysts employed with private providers serving children and adults with intellectual disabilities. The work group was chaired by this presenter.

Let me start with a brief overview of the work group recommendations, and then get into the meat of the proposed amendments:

1. The psychology act is an appropriate and acceptable place to regulate applied behavior analysis as a recognized sub-domain of psychology.
2. Align language with regulatory conventions, including the removal of specific diagnosis in licensure law.
3. Recommend replacing 'certification' with 'licensure and registration', which are terms more commonly used in professional regulation.
4. Create registered applied behavior analysts who would require supervision, in a manner similar to the national standards.
5. Leave specific qualifications for the Board to set through administrative code, where they can adjust it to conditions over time in North Dakota. The national Behavior Analysis Certification Board (BACB) standards are too limited to reflect issues unique to North Dakota in recruiting and retaining behavior analysts.

6. Modify exemptions to avoid the unintended under-regulation of professionals in schools, and unintended over-regulation in intellectual disabilities and daycares, and in family situations.
7. Include a series of 'grandparent clauses' that permit existing behavior analysts a smooth incorporation into the new regulatory standards so as to not disrupt existing supports.

Let me turn to specifics: Certification is changed to the regulatory terms of licensure and registration. In general, 'certification' is a term that is generally used when the professional groups recognize achievements; whereas, licensure and registration are terms used when regulation is passed into law. The national Behavior Analysis Certification Board is an example of a professional association recognizing accomplishments of individual professionals, while North Dakota would be regulating the professional activities of those individuals.

Several amendments on Page 1 revise elements that are needed for consistency across the section when adding behavior analysis.

On page 1, line 9 the Board members recommend that it is more consistent to define the role of applied behavior analyst, rather than the act of behavior analysis itself as the original bill does. This is consistent with the existing sections of the psychologist licensing law, and removes lines 10 through 13. On page 2, line 3 adds the licensed behavior analyst to the section, but separates the 'registered behavior analyst', defined in a later amendment.

Also on page 2, deleting lines 8 and 9, we recommend eliminating the diagnosis of autism from the bill. The inclusion of any specific diagnosis is not useful to the licensing process, becomes problematic to update as

language changes, and in this specific case is currently inaccurate. The specific term of 'autism spectrum disorder' is not yet an accepted diagnosis – although it likely will be in the next edition of the diagnostic manual. The rest of the sentence is simply removing the repeated definitional statement.

Further on page 2, line 11 the amendment specifies that a behavior analyst's service is to change the behavior of individuals. While behavior analysts use a range of contexts including groups, we distinguish behavior analyst activities from those of an industrial/organizational psychologist defined elsewhere in the statute. Industrial/organizational psychologists work in group-change strategies and not at the individual level.

On page 3, line 5 is inserted the amendment that creates the 'registered' level of applied behavior analyst. Within the amended bill, two levels of practice are created to be consistent with the nationally recognized Behavior Analysis Certification Board (BACB): Licensure for Masters Level and Registration for supervised Bachelors level practitioners. The Licensed level is the independent level of practice, requiring a Masters degree in psychology or behavior analysis. Meeting the Board Certification in Behavior Analysis (BCBA) is one method of directly qualifying for this as would be addressed in Administrative Code. The Registration level is a full practitioner, requiring at least a Bachelors degree but includes supervision by a Licensed Applied Behavior Analyst or Licensed Psychologist. This is similar to what the BACB calls the Board Certified Assistant Behavior Analyst or BCaBA. The next line renumbers the paragraphs.

Sections on rule-making, continuing education and renewal were not addressed in the original version of the bill, but are required for behavior analysts to be fully addressed. The amendments beginning on Page 3, after

line 9 insert the appropriate references to applied behavior analyst, registrant, or similar terms to make the sections consistent.

The first one, on rule making, is necessary to authorize further clarifications needed in administrative code. The rest of the amendments add requirements for continuing education and renewals that will be further spelled out in Administrative Code as is done for psychologists.

In section 5, it recognizes the separation of the licensure from registration levels with regard to examinations. In sections 6 and 7, annual renewals are required with the addition that "registered" behavior analysts will have to submit work reviews from their supervisor. Further updates adding the 'registration' information and removing duplicate 'license' references are proposed in sections 8 and 9. On Page 3, Line 12 to line 19 amendments further updates the 'certification' to the 'license' or 'registration' levels of behavior analysis.

The next area is exemptions. Beginning on Page 3, line 22 in the bill, there was a clear intent to duplicate clauses from the original psychologist code of those 'exempt' from regulation. Exemptions concern licensing boards because too many gaps can be created. In amendments created by the work group, we refine the school related services to ensure there is no interference with teachers and their duties. However, please note that the current language exempts anyone – as it is listed as an exemption - working in schools without any regulatory oversight. Instead, we recommend specifying operating within their practice license or certification and activities are part of an educational plan, which is consistent with accepted practices. Lastly, they cannot represent themselves as an applied behavior analyst.

We recommend adding an area of exemption starting on page 3, after line 22 with a new item b). This area is of serious concern to intellectual disability private and public providers. Although the definition of the practice of behavior analysis is consistent with those used nationally and in most states, it is over regulating in this area. The definition is so broad that it includes the professional activities of program coordinators and day care providers. The remedy we recommend is an amendment, similar to that in schools, that would apply to professionals designing and implementing support plans for people of all ages with intellectual disabilities to acquire general life skills. The amendment links their activities to the person's support plan within a licensed agency, and that the individual does not represent themselves as an applied behavior analyst.

Finally in the area of exemptions, the behavior analyst work group is also concerned that families of children with autism, and other disabilities, may need to have people care for their child in many environments throughout the day for consistent implementation of behavioral training. We are concerned that those agents, whether paid or voluntary, should be allowed to carry out behavioral programming at the direction of the family, but they do not represent themselves to be applied behavior analysts.

The final two exemptions in the original bill are appropriate. These exemptions, in total, will clarify the original bill to prevent interference with teachers in schools while also not leaving the door 'wide open' to those not qualified in behavior analysis. Yet they protect intellectual disabilities providers, daycares, and family situations so long as they do not represent themselves as applied behavior analysts.

Beginning on Page 3, line 24 through Page 4, line 9 are amendments that are primarily re-numbering or re-lettering, and further replace forms of 'certification' with 'licensure' or 'registration' and similar terms.

For Page 4, line 11 we propose removing the limit of fees set at two hundred dollars because such limits are problematic for the board. The cost of administering applications for applied behavior analysts, just as is true for administering psychologist applications, has costs beyond the Board's control and requires adjustment over time. Setting this limit in legislation imposes a resource and flexibility hardship. The board itself has had a history of conservative price setting based on costs incurred. Furthermore, they do not have such a limit on psychologist licensure and this has not been a problem to date. The next line also just amends the 'certification' language.

The original bill promotes, but does not require, reliance on the specific national standard such as the BACB. Beginning on Page 4, line 15 we recommend amendments that broaden the qualifications to enable more candidates in North Dakota where we have difficulties in training, recruiting, and retention.

The result of this set of amendments is to enable the board to recognize the Board Certified Behavior Analyst (BCBA) directly as one standard to automatically accept. In addition, it permits the board to set slightly broader qualifications than the national standard individualized to North Dakota. These would be outlined in Administrative Code. Board members caution how difficult Code is to codify alternatives to such standards, but recognize that right now in North Dakota BACB is seriously unrealistic.

While the recommended amendments remove the specific requirement of the behavior analyst examination, it is replaced with a 'demonstration of competence specific to the profession' which would allow use of the BACB examination when possible. The problem is no examination is readily accessible right now. In order to even sit for the BACB examination a person must also meet all their other requirements of education and supervised experience. This means that all mid-career behavior analysts with master's degrees, or even doctorates, would have to acquire another master's degree and start their supervision experience – 1500-hours worth – from scratch before taking the examination. We have searched, and right now cannot be certain that we can find a satisfactory examination to have people take. However, there may be alternatives such as submitting work product examples that might serve us well until such an exam becomes available. This would be spelled out in the Administrative Code, and the Board has a history of setting high standards. These are the changes in referenced for lines 17, 18 and 19 on Page 4.

In the proposed amendment to Page 4, line 20, the supervised experience requirement is outlined for the Board to set as well rather than the reference to national standards. Also, it sets a requirement for 'registered' applied behavior analysts to have a supervision plan when applying. The specifications for these would be identified in the Administrative Code, where similar requirements are described for Psychology Residents for example.

One problem with references to the national Behavior Analysis Certification Board is that it can create sovereignty issues by allowing other entities, in this case the national BACB, to set and arbitrarily change state standards for licensing requirements. The Administrative Code is the place to recognize such certification as one form of evidence of professional competence.

There is reasonable concern about what should or should not be in the Administrative Code versus Century Code. Among our work group this was debated, as once in the Administrative Code arena members of the Psychologist Examiners have the final decision-making even after public input. This bill introduces a whole new volume of work for the licensing board. It is their plan, should this bill pass, to appoint a standing committee comprised of licensed applied behavior analysts and psychologists to develop the Administrative Code and review applicants. The committee would submit their recommendation of 'approve' or 'disapprove' to the board itself. There are many details to be worked out in the Administrative Code.

Amendments from Page 4, line 21 through Page 5, line 6 again replace 'certification' with 'licensed' and or 'registered' language.

Every time a new profession becomes regulated, such as applied behavior analysts, we encounter a startup period and a transition from un-regulated practitioners. A 'grandfather clause' recognizes current networks of seasoned professionals and allows services to be uninterrupted. We have a number of such people who have been serving North Dakota citizens over the past 30 years in the absence of a regulated profession.

Three circumstances of 'grandfather' clause are proposed in amendments for people who meet the following: in positions on January 1, 2011; currently employed in good standing; make their applications; and pay fees by July 1, 2012.

The first group, called License Exempt Psychologist, is already known to the Board of Psychologist Examiners. There used to be a provision for the Board

to grant exemptions to be psychologists for master's level psychology-trained people when hardship in hiring licensed psychologists could be demonstrated. At one time there were nearly 20 people so exempted; in fact I was one for nearly 10 years. The Board ceased granting exemptions in 1999 and the legislature removed the option in 2009, leaving the people exempt in place until they leave their current employment. There are five people remaining, and this would grant them – in addition to their license exemption as a psychologist – a license as a behavior analyst in recognition of their skills and experience. The license exemption cannot move with the person – they lose it when they leave the job; however, the applied behavior analyst license would be theirs to take with them.

The second group of 'grandfather' clause is people also with their master's degree in psychology or behavior analysis practicing as behavior analysts, either for the state – such as people in Behavior Modification Specialist positions – or for private providers as behavior analysts or similar titles. There are people in school districts who may qualify as well. Because behavior analysts have been difficult to find and keep, some private providers hired them to supplement their services. As well, the Developmental Center, State Hospital, and Human Service Centers have had state employed behavior analysts for 30 years. This would grant a license to these current practitioners so long as their employment is in good standing.

The last group for the 'grandfather' clause is other currently practicing applied behavior analysts who do not have their masters degree in the appropriate field but have years of recognized experience. They would be granted registration status if they establish appropriate licensed supervision. In all these cases, the professionals have demonstrated their competence through years of successful employment and supervised experiences.

I apologize for the number of amendments requiring such length of the testimony, and hope it was relatively clear to follow. These changes are critical to the entry of behavior analysis as a regulated profession, and to mesh with the responsibilities of the State Board of Psychologist Examiners. The changes will also align us with the national Behavior Analysis Certification Board model which will serve the state as behavior analysis matures in the future. It provides a framework for Administrative Code that can adjust to these changes over the next several years, yet meet the immediate needs of our citizens.

The importance of this bill is the protection of the people of North Dakota for professional applied behavior analysis services. These services are critically important to people with intellectual disabilities, especially those with what is being called Autism Spectrum Disorders, and others. In providing these protections, the two levels create assurances that can enable services to develop through funding, service access, and treatment consistency the public can trust.

As a result of these amendments, fully qualified applied behavior analysts could be recruited immediately. Existing behavior analysts – who have been operating in an unregulated profession until now – are recognized while gradually more stringent standards are put into effect.

While the work group did not initiate the bill, we do recognize the serious issues it is intended to address. Our amendments have been crafted by a working group that includes stakeholders from the many diverse contexts where behavior analysis is now used. We earnestly believe we have addressed the needs and yet have offered strong regulatory measures. I

was impressed by the input of the Board of Psychologist Examiners members to help address some of these complicated issues with concern and fairness.

While specific interests may take issue with individual items in this bill and these amendments, I do urge you to consider these amendments as the best collective solution to bringing regulation to the profession of applied behavior analysis. It would be best to endorse these amendments as a single, comprehensive regulatory code.

In conclusion, let me restate that:

- The Department of Human Services supports the passage of this bill with proposed amendments to current psychologist licensing laws that include applied behavior analysis at License and Registration levels.
- These amendments follow models suggested by the national Behavior Analysis Certification Board, with important additional features to recognize issues unique to North Dakota.
- The current regulations licensing psychologists would not be compromised, but clarifies applied behavior analysis as a legitimate sub-domain of psychology.
- Psychologists are difficult to recruit to North Dakota. The same is true for behavior analysts of any significant qualifications. I have been trying to recruit psychologists and behavior analysts for the past 27 years with great difficulty. The proposed legislation respects these issues yet sets strong, firm qualifications to govern practicing professional applied behavior analysts.

I appreciate this opportunity to provide you with this testimony and would be happy to answer any questions.