The History, Pitfalls, and Promise of Licensure in the Field of Behavior Analysis

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A confluence of laws, public policies, professional societies, and scholarly research has propelled the field of behavior analysis to the forefront of the effort to treat the deficits and behaviors associated with autism spectrum disorder (ASD). Although behavior analysts often emphasize the broad utility of behavior analysis in addressing a variety of conditions, this chapter addresses the licensure of behavior analysts, which, for now, is inextricably tied to the wealth of research that demonstrates the effectiveness of applied behavior analysis (ABA) in treating ASD (Granpeesheh, Tarbox, & Dixon, 2009; Matson & Smith, 2008). As the field of behavior analysis has grown and ABA has gained acceptance as a health-care service, the licensing of behavior analysts has gained momentum at a time when licensure laws have come under fire for the potential barriers they may create, both for the consumers they are meant to protect and the professionals they aim to regulate. As the field of behavior analysis joins the regulatory fray of state licensure, this chapter examines the impetus of such laws, the elements of an effective law, the features of a disruptive law, and when and whether licensing of behavior analysts makes sense.

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History of Occupational Licensing

The history of occupational licensing is – perhaps surprisingly – fraught with drama arising from professional and ideological partisanship. Along with the professionals targeted for regulation, economists have strong opinions about the purpose of regulation and the effect of regulation on the economy. As one might imagine, many elements of occupational regulation are either great or horrible, depending on whom you ask, and a few variables are not quite so simply black or white.

Occupational regulation arose in the late nineteenth century as the United States transitioned from a service-oriented economy to a manufacturing-based economy, and legislators, consumers, and professionals sought to establish mechanisms that would ensure quality and consumer safety (Kleiner & Krueger, 2010). In its earliest form, licensure of an occupation acted as a resource for consumers who sought to identify a professional's minimal qualifications. Qualifications – or standards – for a given occupation are typically developed by members of that occupation, who then often act as the gatekeepers to new members of the field in the form of a regulatory or licensure board. For this reason, some would argue that occupational licensing is not solely intended to ensure consumer protection and act as a mechanism by which to set and preserve standards. Renowned economist Milton Friedman characterized

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J.L. Matson (ed.), *Handbook of Treatments for Autism Spectrum Disorder*,
Autism and Child Psychopathology Series, DOI 10.1007/978-3-319-61738-1_6

occupational regulation as an effort to impose the monopoly that is anathema to capitalist economies, asserting that regulation of professions was intended to limit those who could join the profession and thereby drive up the cost for consumers of the professionals' services (Friedman, 1962).

The number of licensing laws across the United States has grown considerably, with 4.5% of the workforce holding at least one occupational license in the 1950s and approximately 29% of the workforce holding some sort of occupational license in 2009 (Kleiner & Park, 2014). As recently as July of 2015, President Obama's administration weighed in on the practice of occupational licensing, acknowledging potential benefits to consumer health and safety but cautioning states to weigh the costs and benefits of licensing to both the profession and its consumers and urging state regulators to identify best practices and evaluate whether their state licensing practices warrant reform (Department of the Treasury Office of Economic Policy, the Council of Economic Advisers, and the Department of Labor, 2015).

Authority of States to License

While federal labor laws typically supersede state law, this is not true for occupational licensing. In the late 1800s, the US Supreme Court issued a decision in Dent v. West Virginia (1988) that "took away the federal right of preemption in the arena of occupational licensing and gave it to the states" (Kleiner, 2006, p. 21). That is, Dent v. West (1988) empowered states to enact licensing laws without federal oversight. As a result, occupational licensing varies widely from state to state, both in terms of the occupations that are regulated and the regulatory framework that underpins those licensing laws. Additionally, because professional licenses are granted at the state level, professionals who practice in more than one state are often required to attain and maintain multiple licenses. This aspect of licensure is becoming more relevant as health-care systems increasingly rely on telehealth to deliver health care to underserved and rural areas (Thomas & Capistrant, 2016).

Forms of Occupational Regulation

Occupational regulation may take the form of registration, certification, or licensure. Registration is the least restrictive form of regulation, with states typically requiring minimal information, such as an individual's name, address, and qualifications. Certification may require the same basic information but likely incorporates an exam or some other applicant assessment in order for the government to *certify* an applicant's qualifications. Licensure imposes the greatest amount of regulation and – barring exclusions – makes it illegal to practice the profession without a license (Kleiner & Park, 2014).

Emergence of Licensing of Behavior Analysts

Licensure of behavior analysts has arisen for different reasons in different states. As a wealth of research studies have demonstrated the effectiveness of ABA in treating autism, ensuing legislation and regulatory guidance have increased access to ABA (Granpeesheh et al., 2009; Matson & Smith, 2008). Insurance reform (i.e., autism mandates), the Affordable Care Act (ACA), clarification that autism treatment is a covered benefit under Medicaid for beneficiaries under 21 years of age (Centers for Medicare and Medicaid Services, 2014), and a stronger federal mental health parity law (Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008) have collectively paved the way for reimbursement of ABA in the health-care field. As a result, the field of behavior analysis has grown considerably since the first study demonstrating the effectiveness of ABA in treating ASD (Lovaas, 1987).

States have responded to this growth in many instances by legislating standards, enacting licensure laws, and/or creating registries in an effort to regulate behavior analysts, safeguard consumers, and – in some instances – comply with a state's legal or regulatory framework for insurance reimbursement. In states where licensure is required for delivery of health-care services or a

perception exists that licensure is required, either for reimbursement by a third-party payer (e.g., insurance carrier, health plan, state agency, etc.) or as a general requirement of state insurance laws and regulations, passage of a bill to license behavior analysts has often accompanied or shortly followed the passage of the state's autism mandate (i.e., a law requiring some or all state-regulated insurance policies to include coverage of autism treatment) or implementation of an autism treatment benefit under Medicaid.

Some states have sought licensure in response to successful campaigns for licensure by prominent members of the field of behavior analysis who view licensure of behavior analysts as an opportunity to protect both consumers and the field of behavior analysis from unqualified practitioners; codify educational, training, and experiential standards; and ensure that behavior analysts have the right to practice ABA independently without the supervision of another licensed professional, such as a psychologist (Dorsey, Weinberg, Zane, & Guidi, 2009; Hassert, Kelly, Pritchard, & Cautilli, 2008). Whereas some states have enacted licensure laws without much controversy, other states have encountered opposition, ranging in intensity from mild to fierce. In states with active resistance to licensure, the effort to license behavior analysts likely requires a combination of political will, professional consensus, and consumer support.

Political Will Political will plays an important role in efforts to expand licensure of behavior analysts. Beyond the fundamental need for a legislator to be motivated to sponsor a licensing bill, the legislative committees through which a bill passes scrutinize a wide-ranging variety of elements, including potential revenue from license fees, costs associated with a new licensing board, the support or opposition of special interest groups, and the impact of licensure on constituents. In general, political will arises when a problem exists that has produced widespread concern which, in turn, engenders widespread support for potential solutions. Political will is fragile, though, and fades quickly amidst controversy. Green and Johnston (2009) called the political process "perhaps the greatest challenge" in the effort to license behavior analysts and stated that "Some professions are well-equipped to participate in the political process. Behavior analysis is not one of them at present" (p. 61).

Professional Consensus For better or worse, professional organizations typically play a critical role in developing a state's licensure framework, from engendering the political will to pass a licensure law and drafting the text of that law to influencing the selection of the first members of the licensing board. As the prevalence of ASD has increased and the framework for autism treatment has evolved, professional consensus on whether to license behavior analysts has been elusive. As recently as 2009, dueling articles appeared in *Behavior Analysis in Practice* offering two different perspectives on the licensure of behavior analysts. In their article *Licensing Behavior Analysts: Risks and Alternatives*, Green and Johnston (2009) assert that pursuit of licensure for behavior analysts is premature and that the role of the Behavior Analyst Certification Board (BACB) as a certifying entity is sufficient, whereas Dorsey et al. (2009) make the case that licensure is overdue and that "continued dependence on a board certification process will not be adequate to protect consumers" (p. 53).

Green and Johnston (2009) ask a critical question that may foreshadow the problems that arise as licensing of behavior analysts begins to proliferate: "Are there enough practitioners eligible for licensure to provide easy access to services for consumers?" This question lies at the heart of the struggle to find professional consensus in the effort to enact licensure laws. On the one hand, legislators and consumers are loathe to support a licensing bill that could hinder access to ABA by prohibiting individuals who currently provide ABA services from practicing. On the other hand, many behavior analysts worry that the quality of ABA services will be diminished if the scope of a licensure act encompasses other licensed professionals, making the point that "competence in behavior analysis cannot be assumed" of psychologists and other licensed professionals (Shook, 1993). Consequently, as some behavior

analysts seek to limit licensure to BACB certificants, others work to ensure the ability of other licensed professionals (e.g., psychologists, marriage and family therapists, etc.) to practice ABA, either by exempting them from the licensure act or by allowing such professionals to qualify for licensure as behavior analysts. Wrongly or rightly, the effort to strike a balance between expanding access to treatment without diluting treatment quality is inevitably influenced by the insufficient number of BACB certificants in light of the rate of ASD.

Consumer Support Although consumer protection is a primary impetus for most state licensing laws, consumers in the autism community may be wary of the potential for licensure to limit access to treatment by imposing requirements that proscribe some providers from practicing ABA. Consumers who are accustomed to ABA may be confident in their ability to choose a provider and hesitant to have that choice limited by a licensure requirement. Consumers for whom ABA is uncharted territory may, in turn, be more supportive of a licensure law that gives ABA treatment the regulatory structure of most other health-care services. Certainly, consumer support – or, at a minimum, lack of vocal consumer opposition – plays a role in the effort to pass any licensure bill, including those that would license behavior analysts (Kleiner, 2006).

To BACB or Not to BACB

In 2007, the credentialing programs of the Behavior Analyst Certification Board (BACB), in use since the 1990s (Kazemi & Shapiro, 2013), were accredited by the National Commission for Certifying Agencies (NCCA), demonstrating that the credentialing programs for the Board Certified Behavior Analyst (BCBA) and the Board Certified Assistant Behavior Analyst (BCaBA) met the rigorous standards of the NCCA and, therefore, effectively assessed professional competency. With its credentialing process, the BACB has established a certification for behavior analysts and assistant behavior analysts that identifies the education, training, and experience requirements that make an individual eligible to sit for the BCBA or BCaBA exam. As of 2016, 20,000 professionals had secured the BCBA or Board Certified Behavior Analyst-Doctoral (BCBA-D) credential, and 2,315 professionals held a BCaBA (Behavior Analyst Certification Board [BACB], 2016b). Through its certification programs, the BACB has created a valuable framework for practitioners of behavior analysis. In fact, Dixon et al. (2016) found that "supervisors with BCBA certifications produce 73.7% greater mastery of learning objective per hour as compared to supervisors without a BCBA."

The *Model Act for Licensing/Regulating Behavior Analysts, Revised September 2012* (BACB, 2012), offered by the BACB to states contemplating licensure of behavior analysts, seeks to codify the BACB's BCBA and BCaBA credentials as the primary paths to licensure. As a result of the effective dissemination of the BACB's Model Act, many state licensure requirements mirror the BACB's certification requirements. Given the effectiveness of BCBAs in producing a higher rate of skill mastery in children with ASD, the BACB's Model Act contains important education, training, and experience requirements that have demonstrated their effectiveness (Dixon et al., 2016). The drawbacks created by relying solely on the BACB Model Act, however, echo the challenges experienced in the effort to reach professional consensus. One recurring issue in licensure initiatives is that not all behavior analysts have pursued BACB certification; most often, the careers of these behavior analysts predate the establishment of the BACB and its credentials. That is, prominent behavior analysts have chosen not to add the BCBA credential to their existing degrees, having worked for decades without any such credential. While the BACB Model Act exempts some professionals from the license requirement, it precludes all but psychologists from calling themselves behavior analysts.

Notably, the BACB is careful to ensure that the BCBA and BCaBA credentials are not autism specific but, rather, pertain to the entire field of behavior analysis as a whole. Therefore, it is relevant to note that an individual can complete the

extensive education, training, and experience requirements and pass the BCBA or BCaBA exam without having any knowledge of or experience with people affected by ASD. In that context, behavior analysts whose education, training, and careers predate the founding of the BACB may be hard-pressed to understand why they find themselves struggling to preserve their right to practice when a licensure law is implemented that gives the only path to licensure to BCBAs and BCaBAs.

Oregon's recent experience with its effort to license behavior analysts is illustrative of the controversy that may arise between BCBAs and non-BCBAs. In many states, such as Oregon, coverage of autism treatment by a third-party payer is relatively new, and the number of BCBAs with clinical practices specializing in autism is quite small. When Oregonians first had access to autism treatment through health insurance, Oregon likely had an autism population numbering over 12,000[1] but fewer than 50 BCBAs (BACB, 2016a), and only about half of those were autism treatment providers. Despite the daunting gulf between demand and supply, prominent behavior analysts led the charge to impose a licensing structure that would limit licensure to BACB certificants. Although other professionals may have been able to continue *practicing* ABA, they would likely have been unsuccessful in any effort to be reimbursed by insurance entities.

Another controversial component of the BACB Model Act may be that it contains language that technically makes it illegal for family members to use ABA outside of the home, only exempting family members from licensure "within the home" as long as they are acting "under the extended authority and direction of a Licensed Behavior Analyst or a Licensed Assistant Behavior Analyst" (BACB, 2012, p. 7). This restrictive language has prompted consumers to oppose licensing bills in the past. The BACB Model Act also incorporates "compliance with the BACB Professional Disciplinary and Ethical Standards and the BACB Guidelines for Responsible Conduct for Behavior Analysts" (BACB, 2012, p.4). States may be reluctant to link a state license to an ethical code whose content is not controlled by the state and whose causes for disciplinary action may include proprietary matters that do not reflect the state's interests.

[1]Based on US Census Bureau Population Estimate for 2013 of Individuals Under 18 and CDC Prevalence Rate of 1:68.

Licensure Boards

When a licensure law is enacted, oversight of the license may fall to a state agency or may be delegated to a licensing board. These boards typically promulgate rules to implement the licensure law. Behavior analysts are regulated by their own board in just under one-third of the states that require behavior analysts to be licensed (Association of Professional Behavior Analysts, 2015). Depending on the language in the licensure act, an existing board (e.g., psychology) may be directed to incorporate oversight of behavior analysts. The composition of a board varies but typically includes members of the profession, members of related professions, and consumers who are served by the profession. The BACB Model Act recommends that "An overwhelming majority of the members of the Regulatory Authority should be Board Certified Behavior Analysts with additional membership of at least one Board Certified Assistant Behavior Analyst and at least one Consumer/Public Member" (BACB, 2012, p. 2–3). A recent decision by the US Supreme Court in North Carolina State Board of Dental Examiners v. Federal Trade Commission (2015) may cause state licensing boards, including those that regulate behavior analysts, to rethink their board composition and licensure regulations. In its decision, the Supreme Court held that "State licensing boards are not automatically exempted from antitrust scrutiny…if a controlling number of board members are themselves 'active market participants'" (Department of the Treasury Office of Economic Policy, the Council of Economic Advisers, and the Department of Labor, 2015). That is, if a majority of the members of a licensing board that regulates behavior analysts earn income as practitioners of behavior

analysis, then behavior analysts whose market participation (i.e., income) is adversely affected by the rules promulgated by that board may have cause to pursue antitrust litigation. This decision seems to be in harmony with Milton Friedman's view that occupational regulation can produce monopolies (Friedman, 1962). State boards are less vulnerable to antitrust allegations when states play a greater role in the supervision of their regulatory boards and if the majority of board members are not "active market participants" (Department of the Treasury Office of Economic Policy, the Council of Economic Advisers, and the Department of Labor, 2015, p. 52).

Guest Licensure and Reciprocity Provisions

Since licensure laws are enacted at the state level, guest licensure provisions are common. Without a guest licensure provision, a licensed professional in one state is not allowed to practice in another state that requires licensure until s/he secures that state's license. Guest licensure enables a behavior analyst who is licensed in State "A" to practice in State "B" for a specified period of time before being subject to the licensure requirements of State "B." Guest licensure provisions are important for a number of reasons. Such provisions act as de facto grace periods when a behavior analyst moves from one state to another, so the behavior analyst can work as a behavior analyst on his/her first day in a new state. Guest licensure provisions also facilitate the use of telehealth, so a behavior analyst living in State "A" can occasionally or temporarily provide services in State "B." This is especially useful in bridging gaps created by provider shortages, which are systemic in the field of autism treatment.

Nearly all states include a guest licensure provision in their licensure laws for psychologists. For example, Arizona allows psychologists who are licensed in another state to practice in Arizona without an Arizona license up to 20 days per year. California allows out-of-state psychologists to practice up to 30 days annually without obtaining a California license. Guest licensure provisions are uncommon in licensing acts for behavior analysts, however, and this missing element in the licensure of behavior analysts is likely to exacerbate delays and provider shortages, especially if additional states decide to license behavior analysts.

Often in licensure laws, states grant *reciprocity* or *license by endorsement* to a person who is licensed in another state that "imposes comparable licensure requirements" (BACB, 2012, p. 9). Unlike guest licensure provisions, reciprocity provisions offer temporary or permanent licensure in the state granting the reciprocity. Although the BACB includes a provision for reciprocity in its Model Act (BACB 2012, p. 9), it does not appear to be a provision that has been adopted frequently, possibly because reciprocity in behavior analyst licensure is less relevant when states rely on the BCBA and BCaBA certifications, which do not vary from one state to the next.

Conclusion

As the field of behavior analysis continues to grow and ABA is increasingly recognized as a medically necessary treatment, licensure seems to be a natural next-step, especially in states that require health-care providers to be licensed. While occupational regulation has the potential to legitimize a field, elevate its standards, and protect consumers, it also has the potential to act as an impediment to growth and access to medically necessary treatment.

Despite the significant growth of the field of behavior analysis, the field has not been able to keep pace with the extraordinary demand for its services. As long as the number of behavior analysts is insufficient to meet the demand for behavior analytic services, efforts to exempt other licensed professionals from a license act that would otherwise proscribe them from practicing ABA are likely to be regarded as in the best interests of the public. To this point, consider that 1:68

children in the United States are diagnosed with ASD (Christensen et al., 2016) and that the number of BCBAs and BCaBAs in the United States totaled under 25,000 in 2016 (BACB, 2016a). If we relied solely on BCBAs and BCaBAs to treat the autism population under 18 [US CENSUS Bureau Population Estimate for 2013 of individuals under 18], every BACB certificant in the United States would need to maintain a caseload of nearly 50 children for supply to meet demand. Then, consider that this scenario omits the number of adults who need ABA and overlooks the many BACB certificants who do not work as autism treatment providers, and any proliferation of licensure laws that hinders access to ABA may very well be the source of a public health emergency, not only depriving individuals with ASD of the treatment they need but, also, shifting the cost of caring for these individuals from insurance entities to state and local governments whose budgets grow more strained each year.

Common justification for licensure is the assertion that it preserves or increases the quality of service, thus protecting consumers from the harm of receiving services from a less qualified or unqualified person. Such consumer protection is in a state's interests to ensure the well-being of its citizens and insulate the state from the likely financial consequences of a consumer's poor decision, i.e., providing long-term services and supports to consumers who may not have required them had they been prevented – or protected – from receiving services from an unqualified person. If licensure substantially narrows the field of available behavior analysts, though, family members may be relegated to implementing "do-it-yourself remedies," the consequences of which are unlikely to be captured in any assessment of a license law's effectiveness (Svorny, 2000, p. 297). Recent guidance from the federal government suggests that additional scrutiny of all licensure laws is warranted to ensure that the benefits do, in fact, outweigh the cost and that the laws function effectively for the consumers they seek to protect and the professionals they seek to regulate.

When consumers, behavior analysts, and legislators agree on the need to license behavior analysts, the details of the licensing bill may be divisive as legislators consider the educational, training, and experience requirements, as well as which professionals to exempt from the license law. In addition to exacerbating a pervasive shortage of autism treatment providers, license laws that limit the practice of ABA to BCBAs draw the ire of psychologists, social workers, and other licensed professionals for whom ABA may be in their scope of practice. On the other hand, licensure efforts that place oversight of behavior analysts under a board of psychology, such as the license bill that failed in California,[2] are viewed by some behavior analysts as diluting the effort to assert behavior analysis as its own profession, worthy of its own regulatory board. Often, a regulatory board promulgates the rules that have the greatest impact on access to ABA, so the composition of the board is critical. Additionally, board composition that creates a majority of active market participants may be vulnerable to antitrust allegations.

Currently, licensure of behavior analysts is in its early days, so we can only hypothesize about effective elements of licensure laws governing behavior analysts. (See Table 6.1 for *Considerations in Evaluating Effectiveness of Licensure Laws & Regulations for Behavior Analysts.*) Going forward, states should solicit and provide data to demonstrate the effectiveness of these laws. Additionally, states – or professional organizations acting on behalf of the states – should survey practitioners and consumers of behavior analysis to identify challenges that may have been inadvertently created by licensure laws, recognizing, in the face of the prevalence of ASD, that it is in the best interests of the state to facilitate liberal access to behavior analysis to ensure that consumers do not encounter unnecessary barriers to critical treatment.

[2]California Assembly Bill (2016) is an act to amend Sections 27 and 2920 of; to amend, repeal, and add Sections 2922, 2923, and 2927 of; to add Chapter 6.7 (commencing with Section 2999.10) to Division 2 of; and to repeal Sections 2999.20, 2999.26, 2999.31, and 2999.33 of the Business and Professions Code, relating to healing arts.

Table 6.1 Considerations in evaluating effectiveness of licensure laws and regulations for behavior analysts

Inquiry	Consideration(s)
Will current practitioners of ABA be able to continue practicing once the law takes effect?	Given the current rate of ASD and the limited number of BACB certificants, states should examine whether it is helpful to ensure that the licensure law allows non-BACB certificants to practice.
Are behavior analysts able to practice independently?	Master's and doctoral-level behavior analysts should be allowed to practice without supervision from another licensed professional as long as they are acting within the scope of their competency.
Do education, training, and experience requirements reflect the standard of care?	Setting aside the BACB certification, licensure acts should incorporate education, training, and experience requirements that reflect the standard of care.
Does the licensure act support the tiered-delivery model of ABA?	Licensure acts should incorporate all three levels of ABA treatment delivery: (1) a master's or doctoral-level supervisor, (2) a bachelor's level assistant supervisor, and (3) a behavior technician who meets minimal education and training requirements.
Do the behavior technician requirements, if addressed, reflect the standard of care?	The position of behavior technician is an entry-level position, and requirements should be minimal (i.e., a high school diploma or equivalent or higher, 40 h of training, and 15 h of practicum).
Are family members, teachers, and other caregivers able to implement ABA across all environments?	Outcomes are likely to be optimized when caregivers have the opportunity to support treatment by implementing ABA to the best of their ability. While training caregivers is important, a licensure act should not prohibit family members and others from implementing ABA as long as they do not call themselves behavior analysts or seek reimbursement.
Does the composition of the board adequately represent all stakeholders while protecting the interests of the state?	To avoid scrutiny for potential antitrust violations, a majority of board members should not be active market participants. Consideration should be given to individuals who do not earn income as practitioners of behavior analysis. All stakeholders should be represented.
Is consumer safety adequately addressed?	Consumer safety is greatest when every member of the treatment team is required to submit proof of an active (ongoing) background check. Ideally, the state should offer public access to a registry through which credentials and active background checks can be confirmed. A mechanism should be in place to receive and evaluate complaints and, when necessary, impose disciplinary action.
Does the licensure act include a guest licensure provision?	To avoid unnecessary barriers to ABA, a licensure act should include a guest licensure provision that allows behavior analysts who are licensed in another state to practice a specified number of days each year without a license.
Is the ethics code culturally sensitive?	Ethics codes should accommodate efforts of licensees to be culturally sensitive; e.g., a rule that prohibits the licensee from accepting gifts from the patient should incorporate professional discretion that allows a licensee to accept, for example, a plate of cookies from a parent who may be offended if the offering is declined.

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