

# Statements by the DOE on Applied Behavior Analysis

## February 4, 2016 – Email to Leeward School Administrators

“Dear School Administrators - ACT 199 (signed into law July 2, 2015) basically says that anyone doing behavior analysis for a child with autism needs to be a licensed behavior analyst as of January 1, 2016. Behavior analysis refers to Applied Behavior Analysis programs, trainings, principles/components/processes, etc. The DESes have been awaiting guidance or word of being exempt from State Sped, however none received yet. In the interim Leeward Autism will be proactive and refrain from saying and providing: ABA student programs, trainings of ABA awareness/methods or implement ABA principles throughout the day, etc. We will instead describe and continue to train/implement developmentally appropriate educational practices/intervention strategies in our work. There are implications for anyone servicing students with ASD. This would not apply to those with a license as described in ACT 199. Please consider talking to your respective school staff that service students with ASD. Thank you for your understanding and cooperation. Feel free to call me if you have questions. 675-0384”

## February 12, 2016: Oral testimony – Assistant Superintendent Suzanne Mulcahy (HIDOE) to Senators Baker and Kidani

“Clearly there is confusion surrounding the applicability to the Department of Education of Act 199, passed in 2015, as it relates to the licensing of behavior analyst. As we look ahead, we acknowledge our need to engage and work with our partnering agencies, the attorney general and the DCCA, as well as the behavior analyst community to address and find resolution. Since the counterpart to SB1311 hearing in the house education committee, the Department has met with the leadership of HABA. We appreciate their willingness to meet and the opportunity to address our questions and our differences. As a result of this time together, we have found four initial areas in the law that we bring to this committee and what we anticipate will be the foundation for continued discussions.”

“As written the applicability to teachers and other DOE staff is unclear. To some, it applies to other licensed; which may then apply to the DOE. But to others it reads other licensed or credentialed health care practitioners, which would then exclude DOE from this exemption section. As part of our discussions with HABA, we please ask this committee to amend this section to be very clear.”

“It is our collective intent that this will make it clear to our schools, our parents, and our providers for who this law applies and for who it does not. Further there was extensive discussion about each of the roles, especially the roles of our teachers, educational assistants, school psychologists and others, as it relates to the practice of ABA in the schools. We agree more research, more state comparisons, more cost and implementation analysis and more discussions will be needed as we continue this legislative session.”

Submitted by: Amanda N Kelly, PhD, BCBA-D, LBA ([forourkeiki@gmail.com](mailto:forourkeiki@gmail.com))

"Further, it has become clear that even with the exemption language there will be impact and implementation issues that will require both time and added financial resources for the department to successfully adapt to this new law. As this licensure law has already gone into effect, the department is requesting consideration for an amendment that will delay full exemption for the DOE for a period to be discussed and applies an exemption retroactively. This will allow the department to address what we anticipate to be substantial staffing analysis, collective bargaining issues, training and policy and procedure adjustments that will need to be made so we can implement."

"Lastly, the department cannot yet provide the legislature with a fiscal analysis of this new law. At a minimum, the department does anticipate future staffing related costs. In addition if the exemption in this proposal is not retained to apply to a DOE employee who provides ABA to its students and the DOE contracted providers, then the costs for these services will greatly escalate. While Medicaid reimbursement may one day cover a portion of these costs, the demand in cost of services we anticipate, will still drive state costs upward. Per Act 199, DCCA could also impose penalties on the department."

"We welcome and appreciate this committee input and support as we work to clarify the law. Again, we thank you for your consideration of this matter."

**March 21, 2016 - Legislative FIN Hearing on DOE Exemption Bill  
Representative Belatti & Assistant Superintendent Mulcahy (HIDOE)**

Rep Belatti: How many BCBA's in the DOE?

Mulcahy: "20"

Rep Belatti: What is the breakdown?

Mulcahy: "The majority are in Windward Complex. There are some in the pipe."

Rep Belatti: How many RBT's in the Hawaii DOE:

Mulcahy: "I do want to clarify. There is no position in the department called a BCBA."  
"We are not directly recruiting for someone who would be called a BCBA. Those kind of positions don't exist."

Rep Belatti: Number of children with IEPs in the state?

Mulcahy: "We know the number of children that are autistic. About 1,786 and about 400 of them are Medicaid eligible and have ABA."

Rep Belatti: "...in their IEP's?"

Mulcahy: "Yes".

Rep Belatti: "I'm not going to ask the questions about the contracts but I think that's going to be important because that's part of your plan for coming into compliance so that we can avoid lawsuits."

Mulcahy: "That's correct."

**March 30, 2016 – Oral Testimony, Assistant Superintendent Suzanne Mulcahy to FIN Committee, Rep Luke**

The behavior analyst licensure law passed, without an auditor's sunrise analysis, which could have provided insight into the financial, operational, educational, and staffing impact on the department of education. The department is now faced with addressing the financial, operational, educational, professional development and potential collective bargaining discussion necessary to implement this measure with fidelity. To that end, we anticipate the need for additional time, and likely substantial funding. In closing, we welcome and appreciate this committee's input and support as we try to clarify this law. Malia Espinda, our Government Relations Specialist and I will be available to answer any questions you may have."

**October 2016 – IEP Meeting  
Written on IEP Grid**

"Mrs. XXX would like Applied Behavior Analysis to be identified in the Supplementary Aids and Services, Program Modification and Supports for School Personnel section, however, it is not our practice to name specific sciences and/or programs.

**March 28, 2017 – News Report: "State struggles to provide services to students with autism"**

The Department of Education "provides ABA services as it relates to the educational needs of our students. For those that require it as part of their individualized education program, the Department has and will continue to provide access to ABA licensed staff and providers," said assistant Superintendent Suzanne Mulcahy.

**April 2017  
Prior Written Notice – IEP Haleiwa Elementary**

"XXXX's home therapist, Amanda Kelly attended the meeting. During the meeting, the question was raised whether State Law required that a Licensed Behavior Analyst was required to assess, develop, and monitor the Behavior Support Plan. Clarification was sought and received from the State Office which indicated that Act 199 deals with health care providers and licensing centered around Autism and does not apply for school Behavioral Support Plans."

**May 23, 2017 – Transcription of meeting between District Education Specialist (DES) and Dr. Amanda N. Kelly**

Dr. Kelly: "He is prescribed 40 hours. We are going to have to figure that out. If the schools are not providing the comparable service then the parents option is to advocate for it to happen in school through insurance, which has not yet happened—

Ms. Brinich: "—it has not yet happened. I can't tell you that it won't."

Dr. Kelly: "I don't know either, but the other option is...I'm not recommending they pull him out of school for his services, but his services are more important than being in school without them. The other option I can think of for the family is to go for, or look for a private placement, because the child should be in school. What happened is, I'm just going to be frank with you, because I feel like I can be, is regardless of who is being told they can or can't do something or if its legal or illegal or whatever, Daniel does not have the competency to do what he did."

Ms. Brinich: "...and you're telling me that. I've got him going to a training."

Dr. Kelly: "What training? What training has he gone to?"

DES: "FBA/BSP training"

Dr. Kelly: "But who's doing the training?"

Ms. Brinich: "My Clinical Psychs"

Dr. Kelly: "Exactly, and many clinical psychologists are not being reimbursed through health insurance for doing ABA or FBAs either. Although a clinical psychologist might be able to skirt under the law, there are very few with competencies to do functional behavior assessments (FBA) that are appropriate. Nothing personal against the field of psychology or psychologists, I cannot do a lot of the assessments they can do. There's certainly a benefit to having them on the team." "But --we're not supposed to be covering our asses we're supposed to be helping the kids. I believe you care for the kids."

Ms. Brinich: "I do. I'm frustrated. I hope the new Superintendent helps our kids."

Dr. Kelly: "I've already tried reaching out to her."

Ms. Brinich: "Good. I really hope she makes a difference. I really and truly hope that OCSIS gets its layering together and their act together and starts producing memos"

Dr. Kelly: "Speaking of memos, I have one. Let's talk about it. Explain that to me (hands memo).

*Ms. Brinich: "This is um, verbatim, sitting at a DES meeting, with all of the DES's present, sitting next to SBBH DES, SBBH and myself, that I sent to my staff that this is exactly what Debbie Farmer quoted.*

Dr. Kelly: "So you wrote this."

Ms. Brinich: "Well this is the word document but the email said, I'm sitting at a meeting and this is verbatim what I'm being told."

Dr. Kelly: "Okay, so that's helpful."

Ms. Brinich: "This is verbatim what was said."

**July 18, 2017 – Email Communication between Debra Farmer (HIDOE) and Dr. Kelly  
“Health Plan Approval for ABA During the School Day”**

“Amanda – Parents should be following the process under IDEA and Chapter 60 with the IEP team, for services requested by the parent. If a parent wants the school to consider a service, documentation needs to be provided, so the IEP team can consider the request. Consistent with your information that these are HIPPA protected services, DHS has sent out a memo dated May 31, 2017 to Quest health providers, including Kaiser and HMSA. The memo states, “If justification is provided indicating the ABA service is medically necessary and approved by the QI (Hawaii’s Quest Integration) health plan, the health plan will be responsible to provide and cover ABA services before or after school and when school is not in session. thanks, Debbie”

**July 18, 2017 – Email from HIDOE Haleiwa Principal to Dr. Kelly**

“Hi Amanda and Mr. and Mrs. XXX, Thank you for resending your note to me. I appreciate you sharing that you are currently working with state leadership to help resolved the matter. Unfortunately, in my experience as a DOE administrator, I have NOT encountered any medical/school partnerships. I am aware of other schools working with doctors for medically fragile students, but I have never had those experiences. As for ABA services, personally, I do not know of any other situations. So I apologize, this is very foreign territory for me. Like you, I have been seeking guidance –but my guidance come from Joanne, who I am sure consults with Debbie Farmer. I will wait t see what guidance you receive from Debbie or if I receive something on my side, I will let you know. Thank you, Malaea”

**July 19, 2017 – Email Communication between Debra Farmer (HIDOE) and Dr. Kelly  
“Health Plan Approval for ABA During the School Day”**

“Amanda, I realize I have not been clear, please let me clarify. The medical service I referenced was skilled nursing, which is delivered on a school campus. Although this service is medical, parents do not pay for this service through their health insurance, rather this service is funded by DOE during the school day on a school campus. Skilled nursing is a related service under IDEA/Chapter 60, it is documented in the IEP. Skilled nursing on a school campus is considered an educational service protected under FEHPA, not HIPPA. The relevance of the DHS memo, is the unlikely position that both Kaiser and HMSA will treat their members differently based on their income status. I doubt that both health providers would discriminate between Quest and non-Quest members. However, I will verify the position of both health plans, Kaiser and HMSA, to be sure. The Department’s position is that only educational services are delivered within the school day. Those services that are medically necessary, such as skilled nursing, are delivered during the school day on a school campus at DOE expense, documented in the IEP and considered educational services. Since the services you mentioned are protected by HIPPA and are paid through the parent’s health plan, these are not educational services and are not be delivered during the school day on a school campus. The DOE has a specific mission to educate school age children/youth and our schools take this mission seriously. thanks, Debbie”

**September 18, 2017**

**Community Forum – Meet the Superintendent, Kona, Hawai'i**

When asked, "Do you have appropriately licensed and credentialed ABA providers in the DOE now", Superintendent Kishimoto replied: "I'm not going to be cornered at a community meeting when I don't have the data in front of me. As I mentioned this is an area I am paying attention to, so thank you. You may know this better than me at this point, but we can get this data out."

When asked, "Where do you stand on Chapter 465D and with coming into compliance with state and federal laws now", Superintendent Kishimoto replied, "My focus as the Superintendent is to be compliant with state and federal law. In terms of that I'm not going to answer because we are in a general back-and-forth in terms of legal action. Once we get there, I'm not--"

When asked, "What is the mechanism for change?" Superintendent Kishimoto: "I'm not going to answer in a community forum how I respond on an individual case. What I can say is that legislators, Senators and our state reps are in my office and I'm in theirs. I've been talking to our state representatives and I will continue to do so."

**October 2, 2017 – Letter from Supt. Kishimoto to Senator Donovan Dela-Cruz**

"The HDOE currently recognizes the following licensed or credentialed professionals, whose practice commonly overlaps with behavior analysis, as exempt from the licensed behavior analyst requirement."

- General Education Teachers
- Special Education Teachers
- Resource Teachers
- School Psychologists
- Clinical Psychologists
- Behavior Health Specialists
- Counselors
- Related services providers (i.e., Speech Language Pathologist, Occupational Therapist, Physical Therapist, etc.)
- Social Worker

**October 3, 2017 – Letter from Annie Kalama (HDOE) to Dr. Kelly  
In response to Dr. Kelly's "Letter to Governor Ige", dated August 3, 2017**

"The HDOE is required to comply with the Individuals with Disabilities Education Act (IDEA) and Hawai'i Administrative Rules Chapter 8-60; and therefore, must ensure that each student's Individualized Education Program (IEP) is developed by the IEP team and designed to maximize the child's access to and progress in the general education curriculum. Any parent(s)/legal guardians(s) requesting Applied Behavior Analysis (ABA) services through a healthcare provider during the school day may bring the healthcare plan to the IEP team for consideration. It is the IEP team's responsibility to review the healthcare plan and its educational relevance and benefit to the student regarding accessing and progressing in the general education

curriculum. Any recommendations and/or services from the healthcare plan determined to be educationally relevant and included in the child's IEP will be provided by the HDOE. Your collaboration with and support of our schools during this transition is appreciated."

**October 18, 2017 – Attorney General (AG) from Education Division speaks to Special Education staff at Mililani Mauka**

AG: "...if you guys all agree that ABA methodology, you know was the appropriate methodology to be applied in the classroom, for this student, then you need to specify it. I'm not telling you don't do that, that's what your judgment is, that's fine, but be careful. That 9th circuit case doesn't say just cause someone says, "Oh, we need ABA methodology" — and that is an issue that crops up from time to time. Some of you might be aware that there's a particular advocate, for ABA services, named Amanda Kelly and she's pushing an agenda against the DOE — in different areas, but one of those is pushing ABA services to be provided by a BCBA, behavior analyst, in the classroom. I don't know if that means supplanting the teaching or as a supplementary service, because that part is not clear to me. The 9th circuit case is not clear to me what they meant by ABA methodology. Is it teaching? Or, if they meant behavioral services as a supplementary service. That is one of the areas we are exploring as an education division, because that part of the decision isn't that clear. It doesn't give the guidance to the DOE, how do we use this case, like in some of these other areas, like ABA methodology. Right now the advice that I'm giving you who have this issue, in any case where we have this issue, I tell them "we're not going to, you know (inaudible) when it comes to ABA methodology, we're not putting it on the IEP". However, if you as the IEP team believe it is an appropriate teaching methodology and you want to cite that, then fine. But that's different from than "Oh we also need ABA/behavioral services in this classroom, by a BCBA".

Audience: "So, if you were to use the words, ABA methodology, doesn't that term, that term like, you would have to be certified, right? In order to use that terminology or no?"

AG: Okay, um that's another little area. Are you guys aware of the licensing law that the DOE is facing? Chapter HRS 465-D.

Audience: No, I mean I know that...

AG: Okay, they refer to something called licensure for a behavioral analysis. Uh, there is a part, and it's not part of I.D.E.A., there is a sub-part in Hawaii Chapter, statutory law, licensing of behavioral analysis or analysts. Okay? That's related to something else, which has to do with insurance reimbursement for ABA service providers. But growing out of that, there's a change in the licensing laws for the state. The licensing laws for the state have a section on licensing of behavioral analysis. And in that law, — all you need to know is that all of you licensed teachers are exempt from those licensing issues. So, for instance, some teachers are aware of this, others are not. And I was taught this by a BCBA, a mom, that as part of your teaching, you use ABA methodologies. You may not recognize it as specific ABA methodology, but you use



ABA methodologies. Now this person told me that not all of our teachers know that expressly. Understand that they do. Okay, anyway that licensing requirement has an exemption for people like licensed teachers. People in your profession that might use behavioral services, that touch on ABA, they're not prohibited from using techniques, which some like ABA methodology. All I am telling you is that at an IEP meeting, if you use the buzz words, they need to have ABA methodology, blah, blah, blah, trust me, someone will make a claim, okay we need an IEP and then that will lead to another claim, which is now we would also like ABA behavioral services, implemented by a BCBA. I mean look, if that's what the team agrees is necessary then that's fine. But I just want you to be aware of it. If that's not what you meant, be weary of talking about it. You have stuff that you do in your ordinary teaching that is, that someone could say is ABA methodology. But you don't have to say, you don't have to make excuses for that. You don't have to say, well okay, you can do it. All I can say is you can do it. Licensing laws clearly have an exemption for you. The problem for the DOE and it doesn't touch on any of you guys, the problem for the DOE is, it does not apply to the kind of people that you get help from in the district. You have like these BHS's, the ones I've run into are not licensed teachers, they could be licensed in other areas, like counseling. They are not licensed teachers and they are not licensed by that national board that licenses behavior analysts. Okay, the BACB. So they are not Board Certified technicians, under the BACB. They are DOE trained professionals that provide assistance for autistic kids. Uh, and that's a discussion that I think we should have with the state's SPED office. I'll work with them to work that out. Because that is a potential problem area, but that's nothing for you guys to worry about right now. This is a problem area. But for you teachers, this is a non-issue. Just do what you always have done. Okay? All I'm saying is listen. Momi [Patricia Robbins-Makaila, Autism Consulting Teacher] has touched on a point in that 9th circuit case that talked about ABA methodologies and all I'm telling you is unlike transition services that discussion by that court on ABA methodology is not as clear.

**November 17, 2017**

**Central District Oahu IEP Meeting**

"Parents requested that Behavior Analysis be added under the data collection methods section in the (goals and objectives section of the) IEP. The team discussed the recent updates to Hawai'i law about including Applied Behavior Analysis (ABA) in the IEP. The Autism Consultant Teacher [ACT], Dr. Lissa Goya indicated that Hawai'i DOE does not do ABA during the school day. The insurance funded behavior analyst clarified the new Hawai'i law that stated behavior analytic strategies (for example, but not limited to: data collection methods, reinforcements, FBA/BSP, data analysis) should be reflected on the IEP when it's an integral part of education, also citing the REB vs. HIDOE case as a point of reference. At present time, Dr. Goya is pursuing coursework to become a Behavior Analyst and is being supervised by Wendi Park, BCBA/LBA, therefore utilizing Behavior Analysis as a data collection method is appropriate."



**November 28, 2017 – Letter from Office of Superintendent Kishimoto  
“Functional Behavior Assessment/Behavior Support Plan Signature Page Procedures**

“The process of conducting a FBA or/and developing and implementing a BSP is a team effort. It is imperative that individuals who are knowledgeable of the student (including the parent) and professionals who are knowledgeable about behavior change make up the team.”

**November 29, 2017  
Email from HIDOE Student Services Coordinator (SSC) to Parent**

“There is no designated Board Certified Behavior Analyst (BCBA) for the Leeward District. XXX XXXX will be attending the meeting and she is under BCBA supervision.”

**December 10, 2017  
Letter from Annie Kalama (HIDOE) to Debi Hoohuli-Rosa, in response to the letter written to Governor Ige by Ms. Hoohuli-Rosa on 10/10/2017**

“As you may be aware, healthcare providers such as HMSA will pay for medically necessary ABA “therapy” pursuant to a treatment plan developed outside of the IEP process. The treatment team does not decide whether a student requires ABA services for educational purpose, which is a decision reserved for the IEP team. In other words, medically necessary ABA “therapy” pursuant to a treatment plan developed outside of the IEP process. The treatment team does not decide whether a student requires ABA services for educational purposes which is a decision reserved for the IEP team. In other words, it is the IEP team 's responsibility to determine whether a particular student requires a specific methodology (e.g., ABA) in order to make progress on his/her IEP goals and objectives. In addition, the HIDOE is not required to implement a student’s medically-related treatment plan. It is a HIDOE policy not to allow private providers on campus as it would interfere with the school's obligation to implement a student’s IEP and to provide special education and related services under the IDEA. Be assured, however, that the HIDOE does currently employ a number of licensed Behavior Analysts and Board Certified Behavior Analyst candidates and continues its efforts to train and hire additional personnel with these qualifications.”

**December 12, 2017  
Email from HIDOE Principal to Parent**

“Thank you for your response and I would like to wish a speedy recovery to full health for your child who was ill. In looking ahead, should you wish to have Dr. Kelly participate in any of our IEP meeting, I kindly request that you provide the school with an advance notice of at least one week. Thank you for your partnership in supporting learning.”

**December 18, 2017**  
**Leeward District – IEP Meeting**

Dr. Yvonne Humble: “The district needs to ensure we have these [ABA] resources. At this time, we do not have these. Until admin. has an opportunity to discuss this, outside of the team, my answer to you is “No”, although I understand it is the recommendation. The team has considered it, and at this time, the answer is NO.”

**January 5, 2018 - HIDOE Legislative Report**  
**In regards to the Practice of Behavior Analysis**

“Health insurance plans pay for medically necessary ABA therapy pursuant to a treatment plan. HMSA, Kaiser, and Quest have acknowledged the HDOE’s responsibility for developing and implementing ABA as part of the student’s IEP.”

“The HDOE’s guidance does not allow a parent’s private provider on campus during the school day to serve students, as this would interfere with the school’s obligation to implement the student’s educational program. All educationally relevant services, including ABA, are provided by the HDOE.”

“In addition, the HDOE is not required to implement a student’s medically-related treatment plan. It is a HDOE policy not to allow private providers on campus as it would interfere with the school’s obligation to implement a student’s IEP and to provide special education and related services under the IDEA.”

“The HDOE’s implementation plan is focused on ensuring that all students in need of ABA are served by qualified professionals.”

“Contracting LBAs and RBTs when needed – To address shortages in geographic areas, the HDOE is considering a request for proposal that would require providers to hold BACB credentials.”

**January 31, 2018**  
**Written Testimony, Superintendent Kishimoto to Senator Kidani**

“The Department recognizes building internal staff capacity to provide behavior analysis services to students will take time; therefore, contracted services by private providers will be needed. The additional funding proposed in this measure will assist the Department to address contracted service costs.”

**February 16, 2018 - Email from Principal to Parent**  
**Subject: RE: ABA**

“Yes, it addresses the fact that we will be working on that however, the team will determine his needs. It is important to note that ABA is a science not a program, it is a science that speaks to setting up an environment and utilizing strategies to address behaviors.”

“As to your question about ADOS, this assessment is geared for those children that do not have a diagnosis of Autism. Your son has a diagnosis so they would not administer that particular assessment.”

**February 28, 2018**

**Written Testimony, Superintendent Kishimoto to Senators Kidani and Baker (SB 2925)**

“Any other licensed professional, designing interventions and/or supervising an EA, are subject to a daily fine of not more than \$1000 by the Hawaii State Department of Commerce and Consumer Affairs (DCCA). This sanction is stressing Department staff, may trigger union grievances, and possibly result in a review by the Hawaii Labor Relations Board.”

“The Department needs additional time to continue building its internal capacity of licensed LBA and RBTs who provide evidence-based interventions as part of an ABA program.”

“The BACB professional competencies for both BCBA's and RBTs are rigorous and includes both coursework and field performance. While the Department has increased the number of BACB credentialed employees (see table below), it will take at least an additional three (3) years to reach full capacity.”

“...the Department anticipates initial program implementation costs to be approximately \$2.0M with additional post-implementation costs to sustain internal capacity. Additional funding would need to be expended by the Department to procure licensed contractors to provide services to students.”

“The Department recognizes the practice of behavior analysis in the school setting for all students is valuable.”

“The Department is committed to providing students in need of ABA with a LBA and RBT, as part of their educational team.”

**February 28, 2018**

**Superintendent Testifying to Senators Kidani and Baker (SB 2925)**

Senator Kidani: Department of Education please. Is uh your AG here?

Superintendent Kishimoto: No.

Senator Kidani: So, I guess this question is for you, Dr. Kishimoto, um with regards to the comments and other testimony. Is it the DOE's contention that a teacher is a licensed professional that can do ABA in the classroom without additional training?

Superintendent Kishimoto: No, I would say that's our position. Our position is that we need our LBAs as resources to work with our teachers. I think we are talking about the scope of behavior support services that our students need, and teachers are part of that and not every behavior support service is ABA level. And, I think that

we've been talking about everything from when we need licensure and also our systems of where decisions for supports are made.

Senator Kidani: Correct, but for the past three years —and I know you were not here, but staff behind you or most of them were here. You know we have talked about this and Senator Baker has done extensive work on this issue, and we did have language in a bill that was passed to support our students and in your testimony you talk about how important it is for our students to get a quality education, etc. The Medicaid, and we talk about Medicaid coverage and billing, so that we can recoup our costs, so it's not like it's additional costs. Yes, we are going to have to hire additional positions, but... Medicaid does not recognize a teacher's license, which means that the DOE cannot bill for teachers for doing ABA. So, why would the DOE not want to create a platform that would allow DOE to offset services?

Superintendent Kishimoto: I'm going to have Suzanne talk about what we've been setting up.

Assistant Superintendent: We do want to be able to bill for ABA. So, let me, um let me reiterate that we want our students who require ABA and have it on their IEP to receive those from a Licensed Behavior Analyst and an RBT, depending on how their services are warranted —and for those services we can and are developing a platform —as you've stated. So, that is not the rub for us. What we are talking about is clarifying the language. So that the students who do require this, have it and we can bill. Um, and that the students who might have other behavioral needs who do not rise to this level could receive those from the teachers and personnel providing that already. But they don't need applied behavior analysis. But they might have some kind of behavioral intervention as happens quite often in classrooms.

Senator Kidani: But without, uh —if we're not able to bill it. Is your assertion that billing for ABA with a licensed professional like um, a psychologist or behavior analyst is not acceptable to the DOE?

Assistant Superintendent Mulcahy: No, not is not at all what I mean, so let me clarify that. Um, we need to have licensed individuals delivering applied behavior analysis to those kids who require it, but we can only bill for kids who have autism. But there are other students who require ABA and we cannot bill for them because they do not have autism. Then there are other children who might need a behavioral intervention, but it is not applied behavior analysis. That's what we are trying to clarify here.

Senator Kidani: The federal medical technical assistant guide to school health states: "The Medicaid program can pay for certain medically necessary services which are specified in Medicaid law when provided to individuals eligible under the state plan for medical assistance. The Individuals with Disabilities Education Act (IDEA), formerly called the Education of the Handicapped Act, authorized Federal funding to states for two programs that impact Medicaid payment for services provided in schools. Section 411(k)(13) of the Medicare Catastrophic Coverage Act of 1988 (P.L. 100-360) amended section 1903(e) of the Act to permit Medicaid payment for medical services provided to children under IDEA through a child's Individual

Education Plan (IEP) or Individualized Family Service Plan (IFSP). This amendment was enacted to ensure that Medicaid would cover the health-related services under IDEA.” That is not just limited to autistic children.

[https://www.medicaid.gov/medicaid/finance/downloads/school\\_based\\_user\\_guide.pdf](https://www.medicaid.gov/medicaid/finance/downloads/school_based_user_guide.pdf)

Assistant Superintendent Mulcahy: Well, right now, as we work with the Department of Human Services, um we have to follow their guidance, because they’re the ones who provide MedQuest. What would like to be able to do is to be able to bill for these services. My understanding, —and I am not in charge of school health, and I do not know it as well as other things, but at this point, we can bill for our students with autism, but I will take that back, because we are meeting regularly with the people who are...

Senator Kidani: But where are the specialists in that? Are they here?

Assistant Superintendent Mulcahy: No.

Superintendent Kishimoto: Senator, I do have a meeting coming up with DHS and all of us at the table to review the scope of what can be covered by Medicaid and what process we need in place to put to bed these questions about Medicaid.

Senator Kidani: Well, we’ve had three years to do that, I think. You know and we cover, Medicaid covers physical therapy, speech therapy, occupational therapy. Correct. And that’s why we established “Luke’s Law”. I feel like I am in a time warp. I’m sure Senator Baker feels the same way. And here sits Luke (gestures) still begging for services, so I’m just kind of appalled. I really am.

Superintendent Kishimoto: So, while um —

Senator Kidani: If the DOE really feels like they are providing the best support for our students in need, our students with disabilities: take a good look around at the parents and the students here. Because I will tell you, I don’t believe that is correct. I’m getting a little frustrated. Senators, is there any other questions?

Senator Baker: I would echo the concerns, clearly there are others that can provide behavior analysis services, psychologists or others, but the concerns that most of us share is that we don’t see contracts for services or employment contracts. Because some people might be willing to do like a fee for service kind of contract or purchase a service contract, not necessarily be employees of the Department of Education. Have you explored any of that as a means of making sure that services are available?

Assistant Superintendent Mulcahy: We do have DES who have contracted providers because they do not have personnel, or the DOE does not have employees who provide it and they are doing that now. The state office is developing a state um, contract that those DES can also bill themselves to make it easier for them to procure those services.

Senator Baker: So, from your vantage point, of the school population that needs these services, what are the percentage that are getting them?

Assistant Superintendent Mulcahy: The ones that we quoted here in our testimony 17%, I believe Lou also used that number from our testimony 17% of 1,909 students that have autism are receiving ABA per their IEP.

Senator Baker: Well we heard a number of testimonies this afternoon that indicated that their IEP doesn't mention ABA or any kind of services in that regard. So how do square with what you are telling us and what's been testified by others who have kids in the system.

Assistant Superintendent Mulcahy: Well, I'm not familiar with these individuals since I am not on their IEP team and I cannot access that information. However, I know that from our DES that they have reported to us that there are 575 students who have ABA services in the Department of Education right now on their IEP. Approximately 300 of them have autism and the remaining students do not have autism, but still require those services to access their education.

Senator Baker: Now, I don't think any of us are saying it's only autistic diagnosed students that need these services. Um, since the Felix Decree, we have been woefully inaccurate in providing special education services to students who have special needs and we were hoping that with the measure that had been passed, the DOE would be really stepping up and making sure that those services would be provided. But there is a disconnect between what was testified by the parents here and what you folks are testifying in terms of them feeling like they're not getting services and there are not appropriate services on their IEP. I guess I am a little concerned about how we get that disconnect taken care of so we are making sure that all of our students in our public schools are getting an appropriate education?

Superintendent Kishimoto: So Senator, I am um, I have asked for a review of our IEPs, to really have an understanding of which of our families who have either requested ABA services and haven't received it or received other types of services, so I can see the continuum of services the way they are now. The difficulty is that in public I am not able answer to what the parents — while parents can speak to their children, I cannot speak to the parents here. But I do want to say that it does concern me what I am hearing, but I am looking at the data right now. There's a lot being said at the same time. We want to make sure the licensure is clear in terms of who needs it and who are, where's the continuum of professionals who need it and can work outside of that in terms of continuous supports. And then there are other questions being raised as implementation and application of those services, which we agreed we need to be providing. But we are hearing from some families, questioning why they are not receiving those services.

Senator Baker: So how will you be following up to make sure that we can get rid of that disconnect and that these services are bring appropriate provided?

Superintendent Kishimoto: Well I am doing a review right now of our data is and the data specifically what is in our IEPs. I have met with some DES' I've had

conversations with them about, about auditing or taking a look at their own self audit, reviewing all the caseloads, what the continuum of services is we are currently providing, where we have questions being raised about application of those services, so I can appropriately follow up in terms deeper into the areas where we have continued being asked.

Senator Baker: Do you have as a standard practice doing case reviews, you know, random case reviews to make sure that what's in there is actually being provided?

Superintendent Kishimoto: That's a great question. We have done those case reviews in the past. I am putting those into a standard of practice. We have to have periodic standardized case reviews, not just in terms of this, but overall for special needs education. The whole continuum of support services should have periodic case reviews. And you know, I'm in a funny position of coming in and trying to catch up, and trying to be responsive as quickly as possible. Special Education always been an area I am highly dedicated to. It is very frustrating for my parents, for my community, to be in this continual waiting game in terms of some of that responsiveness and I understand that. I want parents to be able to articulate what they're, what they are looking for in terms of their expectations for their kids. At the same time, we will continue to do the work through an IEP process. It is extremely important for both for the protections, especially for the protections of the families. The IEP process has to be solid and followed well.

Senator Baker: One more question before I yield the floor up to my Vice chair, with regard to billing to Medicaid, what's it going to take to get that process started?

Superintendent Kishimoto: So the process has started. We needed to have. Can you answer the shirrtails of what we needed to get from the department?

Assistant Superintendent Mulcahy: Well I can't answer specific details, but I can answer the questions at we are working very closely with Judy Mohr Peterson. We are very close to bill before ABA. We hope to do that within 30-60 days. We are excited about that. We just met this morning and yesterday about that with both internal and external partners on that. Not only with ABA, but also with Skilled Nursing.

Senator Baker: So is that only prospective, or can you go back to the beginning of the school year?

Assistant Superintendent Mulcahy: Yes.

**February 28, 2018**

**Hearing Q&A: Representative Mizuno & Department of Education**

Dr. Ruth Ballinger, HIDEOE Educational Specialist: "We need a competent professional to provide services for our students. Very much a lot of agreement around people who have some severe issues. I don't think there's any disagreement with a licensed behavior analysts need to get on board if an individual needs support for the team and teacher. The other question is about other students, who don't have such significant needs, the extent to which this could possibly limit a teacher's ability



to provide for the needs of those students. I think what Momi is saying is, 'when there are students who have needs that are within the scope of the teacher, and the teacher's team of professionals who all work together for that student, that we don't have language in a bill that requires there be a licensed behavior analyst. Just to summarize, no question there are absolutely students who need ABA programs and they need a licensed behavior analyst and there's no problem with that. That's happening now in many cases. The issue becomes many, many other students, and whether those students, and their teams are have to have licensed behavior analysts, whether or not that service is actually needed or not. I think that's what Momi's taking about.'

Suzanne Mulcahy, HIDOE Assistant Superintendent

"I do support these statements, as well as Specialist Ballinger. I understand the DOH's one-word change, and I do support our teacher, Momi as well. I did not hear her testimony until we arrived, but I believe we can align."

**March 13, 2018 – Written Testimony, Superintendent Kishimoto, HIDOE to Representative Mizuno**

"The Department is committed to providing students exhibiting extreme behaviors and in need of ABA with a licensed behavior analyst (LBA) and a Registered Behavior Technician (RBT) as part of their educational team."

"The Department recognizes the need for ABA services to be designed by LBAs and implemented by RBTs for students in need of an ABA program."

".it is expected that it will take at least an additional 3 years to reach full capacity."

**March 21, 2018 – Written Testimony, Superintendent Kishimoto, HIDOE to Representatives Ohno and Woodson**

"The Department recognizes that licensed special education teachers possess the training and professional competencies to provide applied behavior analysis services."

**April 4, 2018**

**Written Testimony, Momi Robins, Central District HIDOE Autism Consulting Teacher**

"I am an autism consulting teacher in the Mililani District. I support many special education teachers in that district who are capable of designing plans for their students. They engage in this practice regularly. For the small percentage of the cases for children that may require a strict ABA program and or an LBA or BCBA, special education teachers and their multi-disciplinary teams can make that call at their IEP, and SFT meetings. A positive result of this long discussion is that more teachers are aware of the option to consult with BCBA's, however, BCBA's and ABA strict ABA therapy is not needed for all students with autism. Of the 114 cases in our district only 1% of students are actually receiving ABA services, yet all students are making good progress in their schools."

**April 4, 2018 (HB2271)**

**Written Testimony, Superintendent Kishimoto, HDOE to Senators Baker and Kidani**

“The Department's work to provide students with applied behavior analysis (ABA) in a school setting is a work in progress.”

“Based on original versions of this measure, the Department estimated 38 licensed behavior analysts (LBAs) and 575 registered behavior technicians will be needed based on 575 total students who are receiving ABA services.”

“The Department recognizes the practice of behavioral analysis in the school setting for all students is valuable. However, required licensure requirements for the Department should be limited to practitioners designing and implementing an applied behavior analysis program for students who exhibit extreme behaviors and for whom less intensive interventions were unsuccessful.”

“As of February 1, 2018, 1909 students with Autism Spectrum Disorder (ASD) are enrolled in Hawaii public schools. Three hundred thirty-five (335) of the total 1909 ASD students, or 17.5%, have IEPs that include ABA services. All 335 of those students are receiving an ABA program. An additional 240 students who are non-ASD also receive ABA services per their IEP to support their learning. Given the broad application of HB 2271 HD2 in providing services to all students, the Department anticipates the scope of students who receive services will expand. Notably, due to the lack of licensed individuals statewide, the Department would not be able to satisfy the needs of all students.”

“The Department needs additional time to build its internal capacity of licensed behavior analysts (LBA) and credentialed paraprofessionals that provide evidence-based interventions as part of an ABA program.”