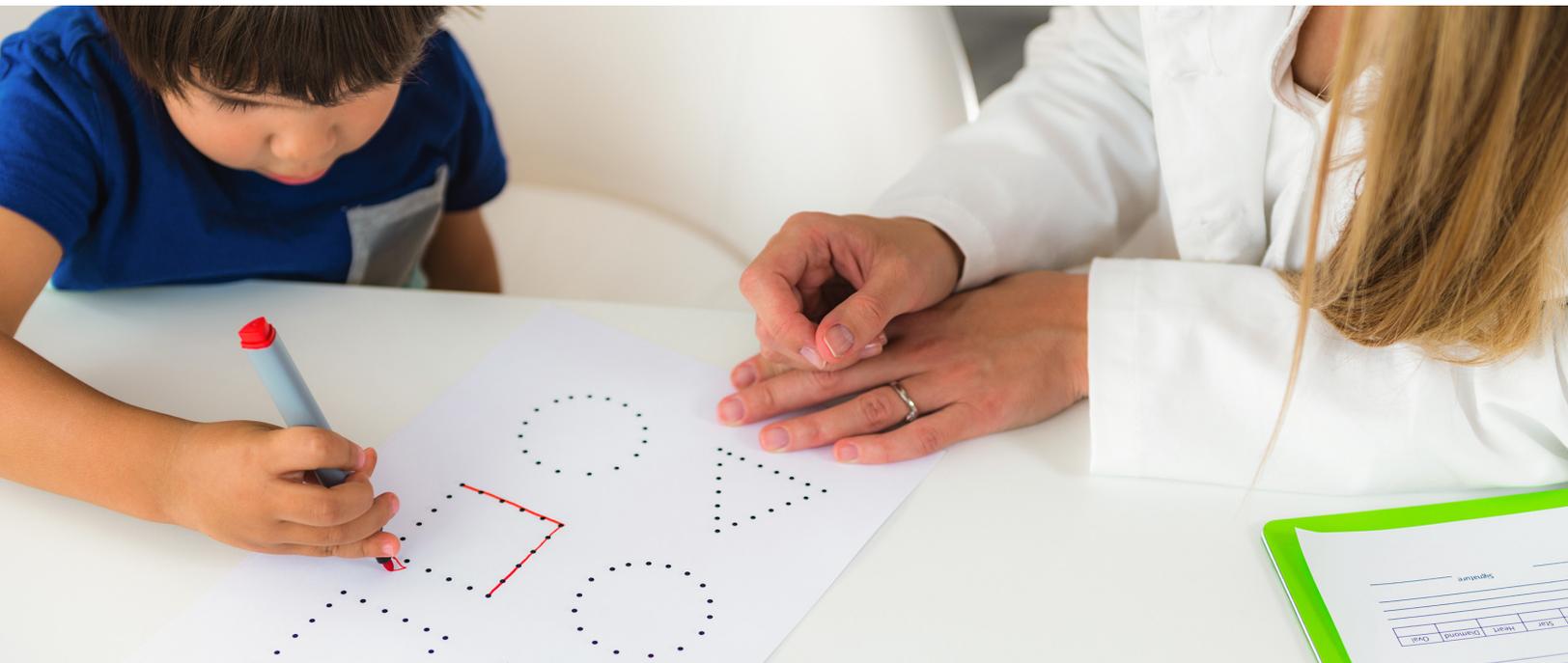


# Sunset Evaluation: Regulation of Behavior Analysts

A Report to the Governor  
and the Legislature of  
the State of Hawai'i

**Report No. 20-20**  
December 2020



**OFFICE OF THE AUDITOR**  
STATE OF HAWAII



## OFFICE OF THE AUDITOR STATE OF HAWAII

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## Foreword

This sunset evaluation represents our findings on whether the State's continued oversight of behavior analysts complies with policies in the sunset law and whether there is a reasonable need to protect the health, safety, and welfare of children and adults receiving services from a behavior analyst.

Leslie H. Kondo  
State Auditor



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## Sunset Evaluation: Regulation of Behavior Analysts

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### Introduction

**S**INCE 2016, the State of Hawai‘i has regulated behavior analysts, requiring a license to engage in the practice of applied behavior analysis. The practice of applied behavior analysis is defined under state law as “the design, implementation, and evaluation of instructional and environmental modifications to produce socially significant improvements in human behavior.”

The practice of applied behavior analysis seeks to understand and change the behavior of individuals. Behavior analysts evaluate a person’s behavior, identify target problem behaviors, and establish intervention tools based on evidence-based principles of behavior analysis that are designed to decrease the problem behaviors and increase desired behaviors. Some individuals with severe behavioral issues can cause physical harm to themselves or others, which underscores the importance of applied behavior analysis. Applied behavior analysis is used in a variety of settings, including homes, clinics, schools, and universities, and practitioners often provide services to vulnerable children and adults.

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**Behavior analysts evaluate a person’s behavior, identify target problem behaviors, and establish intervention tools based on evidence-based principles of behavior analysis that are designed to decrease the problem behaviors and increase desired behaviors.**

Behavior analysts must pass an examination administered by the Behavior Analyst Certification Board and maintain active status as a Board Certified Behavior Analyst or Board Certified Behavior Analyst-Doctoral to be licensed in the state. The Behavior Analyst Certification Board is a nonprofit organization that provides professional credentialing for behavior analysts.

Licenses are issued by the Department of Commerce and Consumer Affairs (DCCA) and are required for a behavior analyst to engage in the practice of applied behavior analysis in Hawai‘i.

The regulation will “sunset” on June 30, 2021, after which there will be no state oversight of the profession unless the Legislature enacts legislation to continue regulating behavior analysts in Hawai‘i.

Based on our review of the practice of applied behavior analysis and the current regulatory program, we conclude that regulation of behavior analysts is consistent with and supported by the criteria for professional licensing set forth in the Hawai‘i Regulatory Licensing Reform Act, Chapter 26H, Hawai‘i Revised Statutes (HRS). In our view, the current licensing requirement for behavior analysts is reasonably necessary to protect the health, safety, and welfare of children and adults receiving services from a behavior analyst; does not artificially increase the cost of those services to the consumers; likely increases the access to the services of behavior analysts; does not unreasonably restrict entry into the profession by qualified persons; and the aggregate of the fees is not less than the full cost of administering the program; and, therefore, satisfies the criteria for continued regulation of the profession of applied behavior analysis. If the Legislature continues the current regulation of behavior analysts, we recommend that behavior analysts be required to provide DCCA with proof of their active status as a Board Certified Behavior Analyst or Board Certified Behavior Analyst-Doctoral as part of the license renewal process.

## Objectives of the Study

1. Assess whether the current regulation of behavior analysts is consistent with and supported by policies in the Hawai‘i Regulatory Licensing Reform Act, specifically Section 26H-2, HRS, which limits regulation of professions to those where government oversight is reasonably necessary to protect the health, safety, or welfare of consumers of the profession’s service.
2. Assess whether the public interest requires the regulation of behavior analysts be reenacted, modified, or permitted to expire.<sup>1</sup>

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<sup>1</sup> HRS Section 26H-4 (Supp. 2019) requires the Auditor to analyze the program prior to its June 30, 2021 repeal date.

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## Hawai'i Regulatory Licensing Reform Act

### Section 26H-2, HRS

*The Hawai'i Regulatory Licensing Reform Act requires the Auditor to analyze proposed regulatory measures that, if enacted, would subject unregulated professions and vocations to licensing or other regulatory controls. The policies that the Legislature adopted regarding regulation of professions and vocations are as follows:*

**The State may regulate** professions and vocations only where reasonably necessary to protect the health, safety, or welfare of consumers, and not that of the regulated profession or vocation;

**The State must regulate** professions or vocations when the health, safety, or welfare of the consumer may be jeopardized by the nature of the service offered by the provider;

**Evidence of abuses** by providers of the service must be given great weight in determining whether regulation is desirable;

**Regulation must be avoided** if it will artificially increase the cost of goods and services to consumers, except in cases where this cost is exceeded by the potential danger to the consumer;

**Regulation must not** unreasonably restrict entry into professions and vocations by all qualified persons; and

**Aggregate costs** for regulation and licensure must not be less than the full costs of administering that program.

Source: Office of the Auditor

## Overview of the Behavior Analyst Licensing Program

During the 2015 legislative session, the Legislature determined that “the practice of behavior analysis in Hawai'i affects the public's health, safety, and welfare” and that the profession should be subject to state regulation. The Legislature further declared a “special state interest” in licensing behavior analysts warranted exempting the proposed regulation from the “sunrise” analysis required by Section 26H-6, HRS. Act 199, Session Laws of Hawai'i (SLH) 2015, which was codified as Chapter 465D, HRS, requires any person engaged in the “practice of behavior analysis” to be licensed by the DCCA. See *Luke's Law* side bar on page 4.

Under Section 465D-2, HRS, the practice of applied behavior analysis includes:

- The empirical identification of functional relations between behavior and environmental factors, known as functional assessment and analysis;
- The use of contextual factors, motivating operations, antecedent stimuli, positive reinforcement, and other consequences to help people develop new behaviors, increase or decrease existing behaviors, and emit behaviors under specific environmental conditions; but,

- It expressly excludes psychological testing or diagnosis of a mental or physical disorder, neuropsychology, psychotherapy, cognitive therapy, sex therapy, psychoanalysis, hypnotherapy, and long-term counseling as treatment modalities.



## Luke's Law

The regulation of behavior analysts was created in conjunction with Act 235, SLH 2015, which required health insurers, mutual benefit societies, and health maintenance organizations to provide coverage for autism diagnosis and treatment. Also known as Luke's Law, the legislation was spurred by pleas from a Big Island mother who was denied insurance coverage for autism services for her son, Luke. Act 199, SLH 2015, was enacted because health insurance plans in Hawai'i would not provide reimbursement for services provided by behavior analysts unless those individuals were licensed in the State. The acts, in combination, sought expanded access to applied behavior analysis services provided by licensed professionals via health insurance plan funding.

The regulatory regime, which required licensure as of January 1, 2016, was subsequently amended by Act 107, SLH 2016. Among other things, that amendment provided a temporary exemption allowing teachers and others to provide behavior analysis services under supervision of a licensed behavior analyst or psychologist. That provision was meant to provide a period of time for behavior analysts to fulfill the requirements to obtain their licenses to practice applied behavior analysis in Hawai'i; however, the exemption was only effective through July 1, 2019. Act 123, SLH 2016, also reduced the surcharge on the license and renewal fee from \$100 to \$50 to cover the start-up cost to implement the behavior analyst program to encourage licensure and increase the number of licensed behavior analysts by easing the financial burden of licensing.

Act 205, SLH 2018, further amended Chapter 465D, HRS, by clarifying that teachers could continue to employ general classroom management techniques so long as they did not independently design or oversee applied behavior analysis services. It also created an exemption that expired on July 1, 2019, for teachers who implemented, but did not design, applied behavior analysis services in collaboration with a licensed behavior analyst or licensed psychologist. However, under the amendments, only licensed behavior analysts and licensed psychologists could conduct functional behavior assessments and design and monitor applied behavior analysis plans. A functional behavior assessment explicitly identifies challenging behaviors and sets the foundation for behavior intervention plans.

Chapter 465D, HRS, requires that those practicing applied behavior analysis or using the title "licensed behavior analyst" or "behavior analyst" must have a current license issued by the DCCA director. All licenses must be renewed biennially in odd-numbered years, and are effective as of the following even-numbered year.

The DCCA director is charged with administering the regulatory program and is statutorily empowered to, among other things, refuse, issue, renew, and terminate licenses; discipline licensees; adopt and amend Hawai'i Administrative Rules; and establish fees. In addition, licenses can be revoked, suspended, or conditioned. Any person found to have violated provisions of the program is subject to a fine of up to \$1,000 per day, per offense. DCCA has not promulgated Hawai'i Administrative Rules related to the regulatory program.

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## Applied Behavior Analysis and the Department of Education

As of July 2020, Department of Education (DOE) reported having the following applied behavior analysis staff and contracted personnel:

Employees in Behavioral Technician positions	16
Assistants pursuing Registered Behavior Technician credentialing	84
Employees in Behavior Analyst positions	3
Employees in Behavior Analyst Teacher positions	0
Employees pursuing graduate studies in Behavior Analysis and under Licensed Behavior Analyst supervision	41
Licensed Psychologists doing Applied Behavior Analysis work	3
Contracted Applied Behavior Analysis Paraprofessionals/Registered Behavior Technicians	414
Contracted Licensed Psychologists/Licensed Behavior Analysts (full-time & part-time)	92

Source: DOE Report on Act 205 (2018), *Report on Autism Spectrum Disorder and Applied Behavior Analysis*.

According to DOE, in 2018, its annual cost per contracted behavior analyst was approximately \$250,000.

DOE has created new positions in accordance with the behavior analyst licensing requirements, including behavior analysts and behavior analyst teachers. According to DOE, the major duties of a behavior analyst teacher include conducting functional behavior assessments and designing, developing, and overseeing implementation of behavior intervention plans. The position requires both a valid Hawai'i state teacher license and a current Hawai'i behavior analyst license.

Under Act 205, SLH 2018, DOE is required to create an implementation plan to seek reimbursement of any Medicaid billable applied behavior analysis services the department may provide to students diagnosed with autism spectrum disorder.



## Autism Spectrum Disorder and Children

**APPLIED BEHAVIOR ANALYSIS** is often associated with the treatment of individuals with autism spectrum disorder, which is a developmental disability characterized by persistent impairments in social interaction and the presence of restricted, repetitive patterns of behaviors, interests, or activities. The disorder affects about 1 in 54 children, according to estimates from the Centers for Disease Control and Prevention. Applied behavior analysis aims to improve the functional, communication, and social skills of children on the spectrum. A behavior analyst attempts to help children on the autism spectrum to refrain from inappropriate behavior and communicate in ways that others can understand. Ineffective treatment provided to children with autism during the “critical window of development” could have long-term negative effects on that child’s development, as well as delayed progress and lack of

generalization of learned skills to other environments.

DOE tracks the number of students currently eligible for Individuals with Disabilities Education Act services under the category of autism spectrum disorder. That count was 2,088 in 2019. As of July 2020, 317 students who received applied behavior analysis services were classified as having autism spectrum disorder. Under U.S. Department of Education requirements, applied behavior analysis services are required when a “student’s behavior impedes their learning or the learning of others.” According to Hawai‘i’s DOE, cases typically involve a behavior analyst developing and supervising a behavior program when there are incidents of a student’s physical aggression, property destruction, and self-injurious behaviors.

Source: Office of the Auditor

The DCCA director also may issue a license by endorsement to an applicant who has a current and unencumbered license as a behavior analyst in another state, provided that the requirements for a license in that state are deemed by the director to be equivalent to or higher than the current requirements for licensure in Hawai‘i.

As of August 26, 2020, there were 352 licensed behavior analysts, according to DCCA. No application has been denied since program inception, and no license has been revoked, suspended, or conditioned.

According to the DCCA Regulated Industries Complaints Office, there have been 12 behavior analyst-related complaints since the program was implemented. Of those, eight were closed for lack of evidence or other reasons. As of August 2020, three of the complaints were pending (one from 2020 and two from 2017). A separate case involving a failure to inform clients of a right to a grievance process was resolved by a Program Final Order approving a \$250 fine.

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As of September 2020, DCCA reported that application fees (\$310 per applicant, every two years) generated total revenues of \$145,865 from fiscal year (FY) 2016 through FY 2020. This included a \$50 fee assessed to every applicant to cover the start-up cost to implement the program. Application fees paid in even-numbered years provide for a two-year license period, while fees paid in odd-numbered years are lower as they only provide for a one year license. According to DCCA, revenues are not sufficient in odd-numbered years to cover the cost of the program so excess revenues collected in even-numbered years, when all behavior analysts must reapply, are applied to cover the shortfall. However, DCCA's costs to administer the behavior analyst program can only be estimated because DCCA does not track its specific expenditures by licensing area given that many of its overhead costs are shared across different licensing areas.

DCCA's Professional and Vocational Licensing Division is responsible for implementing the licensing regulations for 52 different professions and vocations. It provides staff support to licensing regulatory boards, handles applications and licenses, reviews and processes renewals, and maintains license records. The division also provides regulated professions with guidance on proper implementation of the licensing laws and administrative rules. Expenses such as database support, supplies, associated personnel, and other administrative overhead costs to license these professions and vocations are shared across the Professional and Vocational Licensing Division's overall operating budget.

## Registration and certification requirements for behavior analysts

To obtain a license in Hawai'i, an applicant must have passed the Board Certified Behavior Analyst examination and maintain an active status with the Behavior Analyst Certification Board as a certified behavior analyst. Applicants must attach a copy of their certification status to the license application, as well as have the board directly provide DCCA with a letter confirming the applicant's current certification status. In addition, applicants must provide information about pending criminal convictions and disciplinary actions. Upon receipt of a complete application and payment of a registration fee, applicants are licensed as behavior analysts and are entitled to engage in the practice of applied behavior analysis statewide.

## Other Types of Conditions Treated by Behavior Analysts

Although often associated with autism, applied behavior analysis is used to treat individuals with a variety of disorders that impair proper behavior. Among these are:

**Attention deficit hyperactivity disorder (ADHD):** Those suffering from this disorder have difficulty concentrating and controlling impulsive behaviors. A behavior analyst teaches individuals to focus on their bodies and to stop and think about what they do before they do it. For those suffering from ADHD, rather than punishing the individual after the inappropriate action, applied behavior analysis teaches the individual to think about it first and find an appropriate alternative.

**Obsessive compulsive disorder (OCD):** Those suffering from this disorder experience an obsession, not necessarily real, that a certain compulsive action must be performed to prevent something bad from happening. A behavior analyst can help those suffering overcome the compulsive behavior and determine where and when the obsession originated.

**Post-traumatic stress disorder (PTSD):** Those experiencing this disorder may feel extreme panic and anxiety when certain stimuli trigger the painful memories of the original event. A behavior analyst can help individuals suffering from PTSD by triggering their memories in a supportive and controlled environment. Individuals may also be taught how to exhibit positive behaviors when memories are triggered.

Source: Applied Behavior Analysis Programs Guide



## What a behavior analyst does

A behavior analyst works with individuals to identify treatments based on reaction and behavior. Behavior analysts are typically at the top of a treatment hierarchy acting as case supervisors responsible for assessing, designing, and implementing behavior change programs, while also training and supporting other related service providers such as Board Certified Assistant Behavior Analysts, Registered Behavior Technicians, parents, educators, or others who comprise multidisciplinary teams serving an individual receiving behavior analysis services.

When providing behavior assessments and selecting interventions, behavior analysts conduct a range of tasks, including:

- Determining the need for behavior-analytic services;
- Identifying and prioritizing socially significant behavior-change goals;
- Conducting assessments of relevant skill strengths and deficits;
- Conducting a descriptive assessment and functional analysis of problem behavior;
- Identifying potential interventions based on assessment results and the best available scientific evidence;
- Recommending intervention goals and strategies based on factors such as client preferences, supporting environments, risks, constraints, and social validity;

- Stating intervention goals in observable and measurable terms;
- When a target behavior is to be decreased, selecting an acceptable alternative behavior to be established or increased;
- Planning for possible unwanted effects when using reinforcement, extinction, and punishment procedures;
- Monitoring client progress and treatment integrity; and
- Making data-based decisions about the effectiveness of the intervention and the need for treatment revision, and ongoing services.

According to the Hawai'i Association for Behavior Analysis, in special cases, if individuals exhibit severe challenging behaviors, including causing harm to themselves or others, behavior analysts can recommend or perform physically invasive or potentially hazardous procedures that require specialized training.

In school settings, behavior analysts work collaboratively with Registered Behavior Technicians and teachers to design applied behavior analysis services. The behavior analyst observes and provides feedback to ensure the behavior intervention plan is being met and provides feedback and training to those implementing the behavior intervention plan. The behavior analyst will also meet with the teacher to keep them apprised of the student's progress.

Source: Office of the Auditor research

The chapter includes exemptions to the licensing requirement, including for:

- A licensed psychologist and any supervisee of the licensed psychologist, provided that applied behavior analysis services performed are within the boundaries of the licensed psychologist’s education, training, and competence; and
- A family member, legal guardian, or caregiver implementing an applied behavior analysis plan acting under the direction of a licensed behavior analyst or Hawai‘i-licensed psychologist.

Since Hawai‘i’s licensing requirement took effect in 2016, the number of licensed behavioral analysts has nearly doubled.

### Licensing Applications of Hawai‘i Behavior Analysts by Fiscal Year

Fiscal Year	New Licenses	Current Licenses
2016	140	147
2017	48	185
2018	50	206
2019	68	278

Source: DCCA data as of October 17, 2019

A number of Hawai‘i behavior analysts are represented by the Hawai‘i Association for Behavior Analysis (HABA), a professional organization with 225 Board Certified Behavior Analyst members.

### Behavior analyst licensing requirements protect the public health and should be maintained

According to the Hawai‘i Regulatory Licensing Reform Act, the regulation and licensing of professions and vocations shall be undertaken only where reasonably necessary to protect the health, safety, or welfare of consumers of the services. Further, regulation in the form of full licensure or other restrictions on certain professions or vocations shall be retained or adopted when the health, safety, or welfare of the consumer may be jeopardized by the nature of the service offered by the provider.

### The Behavior Analyst Certification Board

The Behavior Analyst Certification Board has three accredited certification programs: Board Certified Behavior Analyst, Board Certified Assistant Behavior Analyst, and Registered Behavior Technician.

A **Board Certified Behavior Analyst** is a graduate-level certification in behavior analysis. A Board Certified Behavior Analyst-Doctoral is a doctoral designation for Board Certified Behavior Analysts with doctoral training in behavior analysis.

A **Board Certified Assistant Behavior Analyst** is an undergraduate-level certification in behavior analysis and provides behavior analysis services under the supervision of a Board Certified Behavior Analyst.

A **Registered Behavior Technician** is a high school level paraprofessional certification in behavior analysis and practices under the close supervision of a Board Certified Behavior Analyst or Board Certified Assistant Behavior Analyst.



## The DOE Individualized Education Program

According to the DOE, when concerning behavior is identified, an individualized education program is developed by a team comprised of a behavior analyst or licensed psychologist, parent, school administrator, and special education teacher. During that process, a functional behavioral assessment is conducted by either a behavior analyst or licensed psychologist. That assessment analyzes the behavior of concern and tries to identify a hypothesized function of that behavior so that the assessor can develop a clinical recommendation for that student. Should the team find that applied behavior analysis services are appropriate for the student, then a recommendation is included in that assessment along with other recommendations for services.

The individualized education program serves as an evaluation device when used to determine the extent of the child's progress toward accomplishing projected goals. It is reviewed annually (and sometimes more often) to assess the child's progress and to note any changes to required services as needed.

Behavior analysts treat a wide range of conditions and the health, safety, and welfare of consumers may be jeopardized based on care recommended or provided. The behavior analyst utilizes principles and procedures to improve skills in a range of common activities including communication, learning, eating, playing, and sleeping. Therapies include the use of contextual factors, motivating operations, antecedent stimuli, positive reinforcement, and other consequences to help people develop new behaviors, increase or decrease existing behaviors, and emit behaviors under specific environmental conditions. In particular, behavior analysts develop and supervise treatment in cases involving aggressive and impulsive behaviors including physical aggression, property destruction, and self-injury.

In unique cases, if individuals exhibit severe challenging behaviors, including causing harm to themselves or others, behavior analysts can perform physically invasive or potentially hazardous procedures that require specialized training. These specialized procedures are used primarily to de-escalate dangerous situations. In contrast, treatment by unqualified providers of applied behavior analysis could lead to ineffective or delayed treatments of those with behavioral problems, which could even exacerbate problems and result in life-long deleterious effects. For children who use the services of a behavior analyst, inappropriate or incorrectly provided early intervention services can damage a child and foster increased problems as a child matures.

Applied behavior analysis can potentially jeopardize the health, safety, or welfare of children and adults receiving services, and the current regulatory regime that requires licensing of behavior analysts appears reasonable and necessary for assuring behavior analysts practicing in the state meet minimum qualifications as established by statute.

### **Regulation assures that behavior analysts are licensed professionals providing services that are eligible for insurance reimbursement**

The Hawai'i Regulatory Licensing Reform Act states that professional and vocational regulations which artificially increase the costs of goods and services to the consumer shall be avoided except in those cases where the Legislature determines that this cost is exceeded by the potential danger to the consumer. Hawai'i's regulation of behavior analysts does not appear to artificially increase consumer costs, but rather, increases access to insurance coverage for such services, which likely lowers consumer costs. When creating behavior analyst regulation in 2015, the Legislature also mandated insurance coverage for the diagnosis and treatment of autism under Luke's Law. According to the measure's legislative history, health insurance

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plans in Hawai‘i did not provide reimbursement for services provided by behavior analysts unless those individuals were licensed in the State. The licensure law, in conjunction with Luke’s Law, fosters the availability of insurance-covered applied behavior analysis services while it ensures such services are provided by qualified professionals.

### **Licensing does not unreasonably restrict entry into the practice of applied behavior analysis in Hawai‘i and licensing fees cover the cost to administer the program**

The Hawai‘i Regulatory Licensing Reform Act states that regulation shall not “unreasonably restrict entry into professions and vocations by all qualified persons.” As described above, the licensing requirement to engage in the practice of applied behavior analysis requires applicants to have passed the Board Certified Behavior Analyst examination and maintain active status as a Board Certified Behavior Analyst or Board Certified Behavior Analyst-Doctoral. Those requirements are consistent with regulation requirements adopted in many states. According to the Association of Professional Behavior Analysts (APBA), 29 states allow Board Certified Behavior Analyst certificants or registrants to qualify for licensure. The standards are available to anyone meeting the education and practicum requirements and are similar to those established by other states that license or otherwise regulate behavior analysts.

Moreover, we found no evidence the cost to obtain a license in Hawai‘i is deterring applicants. Applicants pay \$260 for a two-year behavior analyst license, which does not include a \$25 fee charged by the Behavior Analyst Certification Board to provide DCCA with verification that an applicant has an active certification. The application fee, which applies to first-time applicants and renewals, was reduced by \$50 this year, from \$310 to \$260. Renewal fees are \$220 for an active license and \$12 for an inactive license. Overall, fees charged to behavior analysts do not appear to unnecessarily increase the cost of services to consumers.

As noted earlier, DCCA does not track its specific expenditures by licensing area; however, it appears based on DCCA’s estimated cost of the behavior analyst licensing program, the aggregate of the fees collected from licensees cover the full cost of administering the program.

In our opinion, the current regulation program does not appear to unreasonably restrict entry into the field of applied behavior analysis and according to DCCA’s estimates, the cost of administering the program is covered by licensing fees.

### **Board Certified Behavior Analyst Certification Requirements**

To obtain Board Certified Behavior Analyst certification, applicants must pass the Board Certified Behavior Analyst examination. To take the Board Certified Behavior Analyst examination, applicants must satisfy other requirements, including possessing a graduate degree (e.g., master’s or doctoral) and having practical experience in applied behavior analysis in a supervised clinical setting of either 1,000 hours of practicum experience or 750 hours of intensive practicum experience, depending on the pathway being pursued.

To maintain Board Certified Behavior Analyst certification, a certificate holder must complete 32 hours of continuing education within each 2-year cycle, adhere to ethics and self-reporting requirements, and apply to the Behavior Analyst Certification Board for recertification every two years.

## Risk of harm from inadequate applied behavior analysis services

According to a 2018 report by Ontario, Canada's Health Professions Regulatory Advisory Council, applied behavior analysis poses a significant and inherent risk of harm for children and adults receiving treatment for behavior issues by unqualified service providers. Among other things, the Council found that those receiving applied behavior analysis services were at various risk of harm depending on a combination of factors including the degree of the individual's problem behavior, their individual needs and strengths, and the quality of interventions implemented. This risk escalates significantly for adolescent or adult individuals exhibiting behaviors such as extreme self-harm and violent harm to others. Such risks can manifest during the following four phases of an intervention:

1

### The assessment

When the method involves creating situations to trigger the undesired behavior in order to determine its cause.

2

### Intervention plan design

Selecting the wrong behavior change procedure may not only be ineffective, but may exacerbate the individual's inappropriate behavior.

3

### Intervention plan delivery

An increase in problem behavior may result if a behavior analyst does not deliver the plan as written or misses steps due to lack of competency.

4

### Monitoring and evaluation

Ignoring or failing to interpret the feedback necessary to make adjustments could lead to negative implications that include extreme undesirable behavior.

Source: Applied Behaviour Analysis: Risk of Harm and Oversight, the Health Professions Regulatory Advisory Council (2018)



## Renewal of License

DCCA's licensing practices require that applicants for a new license show proof of valid Behavior Analyst Certification Board credentials. Active status as a Board Certified Behavior Analyst is a primary criteria for licensure as a behavior analyst in Hawai'i. While evidence of active status is required for an initial license, DCCA does not require similar evidence of an active Behavior Analyst Certification Board certification to renew a license. DCCA explained that a licensed behavior analyst is required to report in writing to the agency's director if their Behavior Analyst Certification Board certification is revoked. However, the agency's current licensing practices provide DCCA no evidence that licensees whose Hawai'i licenses are up for renewal still meet licensing requirements at the time of renewal.

Our review of a sample of 12 active licenses found that 9 of them were renewed despite the fact that the applicants' board certifications on file at DCCA had expired. Documentation for the three remaining licenses selected for review was unavailable at the time of our request. However, we separately reviewed the certificate status of each of these 12 licensees at the online Behavior Analyst Certification Board Certificant Registry and determined that all 12 were active (and hence eligible for a Hawai'i license) as of September 2020.

We recommend that DCCA require applicants seeking to renew a license to provide evidence that the Behavior Analyst Certification Board classifies their certification as active. While Hawai'i's licensing laws may require a licensee to separately report in writing a loss of certification to DCCA, requiring proof of active status with the Behavior Analyst Certification Board at the time of renewal provides a safety net should a licensee fail to report the information.

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## Summary of Findings

1. Licensing requirements governing the practice of applied behavior analysis are reasonably necessary to protect the health, safety, or welfare of those receiving services, and therefore should be maintained. In particular, behavior analysts develop and supervise treatment in cases involving aggressive and impulsive behaviors including physical aggression, property destruction, and self-injury. Licensing the practice of applied behavior analysis protects consumers by establishing certain minimum qualifications, as treatment by unqualified individuals could worsen behavior and result in other negative social outcomes.
2. The current regulation of behavior analysts does not appear to unreasonably restrict individuals from entering the profession of applied behavior analysis.
3. Licensing does not appear to artificially increase the cost of behavior analyst services. In fact, behavior analysts must be licensed in order for their services to qualify for reimbursement under health insurance plans that, since 2015, are mandated by the State to cover applied behavior analysis services for autism treatment. Hence, the cost of the services is likely covered by insurance, thus reducing the cost of behavior analyst services.
4. Based on DCCA's estimated costs of the behavior analyst licensing program, the aggregate of the fees collected from licensees appear to cover the full cost of administering the program.
5. The criteria for regulating professions contained in Section 26H-2, Hawai'i Revised Statutes, supports continued regulation of the applied behavior analysis profession.
6. Should licensing of behavior analysts continue, we recommend that DCCA require applicants seeking to renew a license to practice applied behavior analysis provide evidence of active status as a Board Certified Behavior Analyst or Board Certified Behavior Analyst-Doctorial with the Behavior Analyst Certification Board.

## Appendix A

### Scope and Methodology

The Legislature mandates that providers of services that jeopardize consumer health, safety, or welfare be regulated.<sup>1</sup> This is to ensure that the State only regulate a profession or a vocation when reasonably necessary to protect consumers. In accordance with the Hawai‘i Regulatory Licensing Reform Act, the Auditor must determine and report on whether behavior analyst regulation complies with the State’s policies for regulating professions and vocations; and whether public interest requires that the law establishing the program be reenacted, modified, or permitted to expire, prior to its June 30, 2021, repeal date.<sup>2</sup> Our examination included determining whether the services provided by behavior analysts jeopardize consumer health, and whether such regulation unreasonably restricts entry into the profession. Our evaluation also accounts for complaints regarding applied behavior analysis services, the impact of regulation on the costs of such services, and whether licensing fees cover the costs of regulating behavior analysts.<sup>3</sup>

To accomplish the objectives of our sunset evaluation, we reviewed the literature on behavior analysts, including their current scope of practice, their education, and regulation in other states.

We inquired about complaints filed at DCCA’s Regulated Industries Complaints Office, its Office of Consumer Protection, and the Hawai‘i Better Business Bureau to determine harm to consumers. We reviewed files and other documentation pertaining to regulatory operations at the DCCA’s licensing division. We also contacted staff at the Hawai‘i Association for Behavior Analysis, DCCA, and DOE, and reviewed recent legislative testimony by those organizations as well as other stakeholders. We also attempted to identify the costs and possible impacts of the regulation. The assessment was conducted from August through September 2020.

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<sup>1</sup> Section 26H-2, HRS.

<sup>2</sup> Sections 26H-4 and 26H-5, HRS.

<sup>3</sup> Section 26H-2, HRS.

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## Appendix B

### Exemptions to the Behavior Analyst Program

Section 465D-7 of the Hawai‘i Revised Statutes

(a) This chapter is not intended to restrict the practice of other licensed or credentialed practitioners practicing within their own recognized scopes of practice and shall not apply to:

(1) A licensed psychologist and any supervisee of the licensed psychologist; provided that applied behavior analysis services performed are within the boundaries of the licensed psychologist’s education, training, and competence; provided further that neither the licensed psychologist nor any supervisee of the licensed psychologist purports to be a licensed behavior analyst; and provided further that master’s level practitioners and postdoctoral fellows may provide training and supervision to direct support workers, paraprofessionals, caregivers, parents and guardians in a manner and to the extent determined by the supervising licensed psychologist.

For purposes of this paragraph, “supervisee” means a master’s level practitioner, postdoctoral fellow, direct support worker, paraprofessional, caregiver, parent or guardian who provides applied behavior analysis services;

- (2) A licensed classroom teacher or an individual who is working as a classroom teacher and is enrolled in a teacher preparation program working towards licensure who implements but does not design applied behavior analysis services in a school setting in direct collaboration with a licensed behavior analyst or a licensed psychologist on or before July 1, 2019;
- (3) An individual who implements or designs applied behavior analysis services and possesses board certification as an assistant behavior analyst by the Behavior Analyst Certification Board and who practices in accordance with the most recent supervisory and ethical requirements adopted by the Behavior Analyst Certification Board under the direction of a licensed behavior analyst;
- (4) An individual who directly implements applied behavior analysis services and:
- (A) Is credentialed as a registered behavior technician by the Behavior Analyst Certification Board, and is under the direction of a licensed behavior analyst; or

(B) Is a direct support worker who directly implements an applied behavior analysis program under the supervision of a licensed behavior analyst or licensed psychologist on or before January 1, 2020;

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

- (5) A family member, legal guardian, or caregiver implementing an applied behavior analysis plan and who acts under the direction of a licensed behavior analyst or Hawai‘i licensed psychologist; provided that for the purposes of this paragraph, “caregiver” means an individual who provides habilitative services in an adult foster home, developmental disabilities domiciliary home, adult residential care home, expanded adult residential care home, special treatment facility, or therapeutic living program pursuant to the medicaid home and community-based services waiver program authorized by section 1915(c) of the Social Security Act;
- (6) An individual who designs or implements applied behavior analysis services to participants in the Medicaid home and community-based service waiver program pursuant to section 1915(c) of the Social Security Act on or before January 1, 2024;
- (7) An individual who engages in the practice of applied behavior analysis with nonhuman or nonpatient clients or consumers including but not limited to applied animal behaviorists and practitioners of organizational behavior management;
- (8) A matriculated graduate student or postdoctoral fellow whose activities are part of a defined applied behavior analysis program of study, practicum, or intensive practicum; provided that the student’s or fellow’s activities or practice is directly supervised by a licensed behavior analyst, licensed psychologist, or an instructor from a nationally recognized training organization or in a Behavior Analyst Certification Board-approved course sequence; or

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- (9) An individual pursuing experience in applied behavior analysis consistent with the Behavior Analyst Certification Board's experience requirements; provided that the experience is supervised by a licensed behavior analyst.
- (b) Nothing in this chapter shall be construed to prevent any licensed psychologist from engaging in the practice of applied behavior analysis in this State as long as the licensed psychologist is not in any manner held out to the public as a "licensed behavior analyst" or "behavior analyst" and the behavior analysis services provided by the licensed psychologist are within the licensed psychologist's recognized scope of practice.

## Office of the Auditor's Comments on the Department of Commerce and Consumer Affairs' Response

**WE TRANSMITTED A DRAFT** of this report to the Department of Commerce and Consumer Affairs (DCCA) and received the department's response to the draft on December 21, 2020, which is included in its entirety as Attachment 1.

In response to our recommendation that DCCA require evidence of active status by the Behavior Analyst Certification Board as a Board Certified Behavior Analyst or Board Certified Behavior Analyst-Doctoral as part of the license renewal process, the department represents that it does not have authority under Chapter 465D, Hawai'i Revised Statutes (HRS), to require such information, notwithstanding that active status is the primary criteria for licensure in Hawai'i. DCCA asserts that Section 465D-10, HRS, which relates to license renewal, does not require evidence of active status with the Behavior Analyst Certification Board. That provision provides the department will renew a license "upon the payment of a renewal fee within sixty days before the expiration of the license." DCCA suggests that we recommend the Legislature amend the statute to add such a requirement.

We disagree with the department's interpretation of Chapter 465D, HRS. Section 465D-11(a)(1), HRS, expressly provides that the DCCA director may refuse to renew any license for a licensee's failure "to meet or maintain the conditions and requirements necessary to qualify for the granting of a license." As we noted above and in the report, active status with the Behavior Analyst Certification Board as a Board Certified Behavior Analyst or Board Certified Behavior Analyst-Doctoral is a requirement for licensure as a certified behavior analyst. Contrary to the department's position, Section 465D-11(a)(1), HRS, appears to empower DCCA to require evidence of active status with the Behavior Analyst Certification Board at the time of renewal – a requirement that the Legislature deemed to be critical to protect the health, safety, and welfare of those under the care of behavior analysts.

Additionally, both DCCA's initial application and renewal application for a behavior analyst require applicants to provide information about criminal convictions and disciplinary actions, neither of which are required in the sections of the chapter relating to application for licensure and renewal of license. The requirement that applicants provide the information is presumably pursuant to the director's authority under Section 465D-11, HRS. Requiring confirmation of active status as a Board Certified Behavior Analyst or Board Certified

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Behavior Analyst-Doctoral seems to be substantively identical to requiring information about an applicant’s criminal and disciplinary history – i.e., the director can deem such information to be “conditions and requirements necessary to qualify for the granting of a license.”

Moreover, DCCA is empowered to promulgate administrative rules as necessary to carry out the regulation of applied behavior analysis and should consider exercising that authority, if necessary, to ensure that its regulatory program is consistent with the Legislature’s clear intent that behavior analysts must maintain active status with the board as a Board Certified Behavior Analyst or Board Certified Behavior Analyst-Doctoral. We emphasize that DCCA is responsible for implementing regulation of behavior analysts, which regulation was deemed necessary by the Legislature to protect public health, safety, and welfare. We question whether the department’s practice of renewing licenses without verifying active status of the applicants is protecting the adults and children under the care of a behavior analyst, many of whom are vulnerable, as the Legislature intended.

DCCA’s response also requested that we remove certain details about pending complaints involving behavior analysts and states that the department would have withheld the information had DCCA known it would be included in the report. We note the department’s objections to the language about complaints handled by the Regulated Industries Complaints Office and have modified the report to exclude certain specific information about pending complaints. We have also amended the language to reflect the resolution of a separate case was done with the program’s approval.

We are compelled to address the department’s comment that, in retrospect, it would have considered withholding information from us that it considers to be confidential. Agencies are expected to cooperate with the Office of the Auditor, which includes unimpeded access to records relevant to and necessary for our work. We do not report or otherwise disclose information a department deems to be confidential or otherwise exempt from disclosure under Hawai‘i’s Uniform Information Practices Act. DCCA had the opportunity to provide comments about the draft report and identified what it considered to be confidential information in the draft. We have removed that information from the report. That review process prevents the inadvertent disclosure of information an agency deems to be confidential or otherwise protected. Here, disclosure of the information to the Auditor was appropriate and information DCCA considers to be confidential or otherwise protected was protected by the Auditor.

We have incorporated several other edits and suggestions to improve the readability of the report.



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December 21, 2020

Mr. Leslie H. Kondo  
Office of the Auditor  
465 S. King Street, Room 500  
Honolulu, Hawaii 96813-2917

Dear Mr. Kondo:

Thank you for the opportunity to comment on the Draft Report entitled *DRAFT Sunset Evaluation: Regulation of Behavior Analysts*. We have reviewed the report and respectfully provide the following comments:

**Draft Report - Page 2**

Auditor's comment: If the Legislature continues the current regulation of behavior analysts, behavior analysts should be required to provide the DCCA with proof of their active status as a Board Certified Behavior Analyst or Board Certified Behavior Analyst-Doctoral as part of their renewal process.

DCCA response: Please see our comment on this issue in the note for draft report pages 12 and 13, below.

Mr. Leslie H. Kondo  
December 21, 2020  
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### **Draft Report - Pages 6 and 7**

Auditor's comment: Pages 6 and 7 include a recitation of the complaints made to the DCCA's Regulated Industries Complaints Office (RICO) and the status and outcome of complaints.

DCCA Response: We recommend revising the paragraph regarding complaints on pages 6 and 7 to: (1) remove details about pending cases by deleting the fourth and fifth sentences in the paragraph; and (2) more accurately characterize the nature of the final order that resulted in a \$250 fine.

Consistent with applicable Hawaii law, we do not disclose to the public information about pending RICO complaints, and the information is not available on our public-facing complaints history website. The premature disclosure of pending complaint information would frustrate RICO's ability to investigate. Licensees also have a significant privacy interest in evaluations and investigations involving their fitness. See Uniform Information Practices Act (UIPA), §§92F-13(3) and 92F-14(7), Hawaii Revised Statutes (HRS). When your office requested RICO complaints records in August, we provided a summary of the allegations or claims for the pending and closed complaints to assist your review. However, we would not have disclosed any pending complaints information, other than their existence, had we known the information would be included in a public report.

Regarding the last sentence of the paragraph, we suggest the sentence read as follows:

A separate case involving a failure to inform clients of a right to a grievance process ended with a Program Final Order approving a \$250 fine.

The suggested language will more accurately reflect the actual outcome of the case.

### **Draft Report - Page 9**

Auditor's comment: The draft report notes the exemptions to the licensing requirement including:

- A licensed psychologist and any supervisee of the licensed psychologist, provided that applied behavior analysis services performed are within the boundaries of the licensed psychologist's education, training, and competence; and
- A family member, legal guardian, or caregiver implementing an applied behavior analysis plan acting under the direction of an [sic] licensed behavior analyst or Hawaii-licensed psychologist.

Mr. Leslie H. Kondo  
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DCCA response: For clarity, we recommend the above-mentioned exemptions include a footnote to reference the draft report's Appendix B: Exemptions to the Behavior Analysts Program, §465D-7 of the Hawaii Revised Statutes.

Auditor's comment: The column labeled **The Behavior Analyst Certification Board** includes the following:

A **Board Certified Assistant Behavior Analyst** is an undergraduate-level certification in behavior analysis and provides behavior analysis services under the supervision of a Board Certified [sic] Behavior Analyst. A Board Certified Behavior Analyst-Doctoral is a doctoral designation for Board Certified Behavior Analysts with doctoral training in behavior analysis.

DCCA response: There is an extra "w" in the word "Certified" near the end of the first sentence. In addition, we recommend placing the last sentence in its own paragraph above "A Board Certified Behavior Analyst," as it has its own level of certification by the Behavior Analyst Certification Board.

### Draft Report - Page 12

Auditor's comment: In the Renewal of License block, the draft report notes that the DCCA's current licensing practices provide no evidence that licensees whose licenses are up for renewal still meet licensing requirements at the time of renewal.

DCCA Response: The DCCA does not have the statutory authority to require documentation of a licensee's continued certification with the Behavior Analyst Certification Board for renewal, as it is not a requirement stated in §465D-10, HRS. Accordingly, we recommend amending the paragraph to read as follows:

The DCCA's licensing practices require that applicants for a new license show proof of valid Behavior Analyst Certification Board credentials. Active status as a Board Certified Behavior Analyst is a primary criteria for licensure as a behavior analyst in Hawaii. The DCCA explained that a licensed behavior analyst is required to report in writing to the agency's director if the analyst's Behavior Analyst Certification Board certification is revoked. However, the DCCA does not have the statutory authority to require documentation of a licensee's continued certification with the Behavior Analyst Certification Board, as it is not a condition of renewal stated in HRS chapter 465D.

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Mr. Leslie H. Kondo  
December 21, 2020  
Page 4

Auditor's comment: The last paragraph of this page of the draft report recommends that the DCCA require applicants seeking to renew a license to provide evidence that the Behavior Analyst Certification Board classifies their certification as active.

DCCA Response: As documentation of a licensee's continued certification with the Behavior Analyst Certification Board is not a requirement stated in §465D-10, HRS, the DCCA cannot compel the filing of that evidence as part of the license renewal process. We recommend amending the paragraph to note the absence of such authority and suggest that the auditor consider recommending a statutory amendment, if deemed appropriate.

**Draft Report - Page 13**

Auditor's comment: Summary of finding number six recommends that the DCCA require applicants seeking to renew a license to practice applied behavior analysis provide evidence of active status as a Board Certified Behavior Analyst or Board Certified Behavior Analyst-Doctoral with the Behavior Analyst Certification Board.

DCCA response: We recommend amending the finding to reflect that the DCCA cannot currently compel such evidence, as the statute does not require it.

We appreciate the opportunity to comment on the draft report. Should you or your staff have additional questions regarding the subject of this draft report, please feel free to contact me at 586-2850.

Sincerely,



CATHERINE P. AWAKUNI COLÓN  
Director

CPAC:kt