

Pursuant to the authority vested in the Commissioner of Health by Section 365-a of the Social Services Law (SSL), Section 505.39 of Title 18 (Social Services) of the Official Compilation of Codes, Rules and Regulations of the State of New York is added, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Section 505.39 Applied Behavior Analysis

(a) Definitions.

(1) *Applied Behavior Analysis* or "ABA," as defined in section eighty-eight hundred one of NYS education law, means the design, implementation, and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior.

(2) *A licensed behavior analyst* is an individual licensed to practice applied behavior analysis under article one hundred sixty-seven of the education law.

(3) *A certified behavior analyst assistant* is an individual certified under article one hundred sixty-seven of NYS education law who provides ABA and works under the supervision of a licensed behavior analyst.

(b) General.

(1) Medical assistance shall include applied behavior analysis where such service is provided by a Licensed Behavior Analyst (LBA) or Certified Behavior Analyst Assistant (CBAA) working under the supervision of an LBA, or other individual specified under article one hundred sixty-seven of NYS education law, for the

behavior health treatment for persons under 21 years of age with autism spectrum disorders and related disorders.

(c) Payment policy.

(1) Payment for applied behavior analysis (ABA) services shall be made to ABA providers at rates or fees established by the Department of Health and approved by the Division of the Budget.

REGULATORY IMPACT STATEMENT

Statutory Authority:

Social Services Law (SSL) section 365-a and Public Health Law (PHL) section 201(l)(v) provide that the Department is the single State agency responsible for supervising the administration of the State's medical assistance ("Medicaid") program and for adopting such regulations, which shall be consistent with law, and as may be necessary to implement the State's Medicaid program. SSL section 365-a authorizes Medicaid coverage for specified medical care, services and supplies, together with such medical care, services and supplies as authorized in the regulations of the Department. The statutory authority for Section 505.39 of Title 18 (Social Services) is found in Social Services Law (SSL) 365-a(3)(b).

Legislative Objectives:

The legislative objective of SSL section 365-a(3)(b) is to set forth the requirements for care and treatment of disabilities and conditions discovered and diagnosed by the early and periodic screening required by SSL section 365-a(3)(a), which include Autism Spectrum Disorder (ASD) and related disorders.

Needs and Benefits:

The amendment is implementing a 2019-2020 budget initiative. The amendment will add medical assistance for Applied Behavior Analysis (ABA) for Medicaid members (fee for service and managed care) under 21 years of age with a diagnosis of Autism Spectrum Disorder (ASD) and related disorders, and define the practitioners authorized to provide ABA services. These services and practitioners are currently covered by Child Health Plus and all major commercial payors. The amendment will allow Medicaid to cover ABA services which are covered by Child Health Plus and all major commercial

payors and align the Medicaid program with the Department of Financial Services and their coverage policy on ABA. This will allow a continuity of care across all payors. The amendment also aligns the Medicaid program with CMS guidance that authorizes Medicaid programs to pay for treatment modalities for individuals with ASD. Potential benefits of leveraging ABA include continuity of care and access as children age out of Early Intervention and increased outcomes to those who have ASD.

Costs:

Costs to the state are estimated to be \$13.1 million annually.

Local Government Mandates:

There are no duties or responsibilities imposed by the proposed rule on local governments.

Paperwork:

This rule imposes no new reporting requirements, forms, or other paperwork.

Duplication:

There are no relevant rules or other legal requirements of the federal or state governments that duplicate, overlap, or conflict with this rule.

Alternatives:

A statutory amendment was considered; however, it was determined unnecessary because ABA meets the definition of an Early and Periodic Screening, Diagnostic, and Treatment defined in SSL 365-a(3)(b).

Federal Standards:

There are no federal standards associated with this rule.

Compliance Schedule:

The amendment, section 505.39 of Title 18 (Social Services), will become effective upon publication of a Notice of Adoption in the New York State Register.

Contact Person: Katherine Ceroalo
New York State Department of Health
Bureau of Program Counsel, Regulatory Affairs Unit
Corning Tower Building, Rm. 2438
Empire State Plaza
Albany, New York 12237
(518) 473-7488
(518) 473-2019 (FAX)
REGSQNA@health.ny.gov

**STATEMENT IN LIEU OF REGULATORY FLEXIBILITY ANALYSIS FOR
SMALL BUSINESSES AND LOCAL GOVERNMENTS**

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments.

STATEMENT IN LIEU OF RURAL AREA FLEXIBILITY ANALYSIS

A rural flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas.

STATEMENT IN LIEU OF JOB IMPACT STATEMENT

A Job Impact Statement is not included because the proposed regulatory amendments will not have an adverse effect on jobs and employment opportunities.

ASSESSMENT OF PUBLIC COMMENT

- 1. Comment** – The New York State Association for Behavior Analysis, the Agencies for Children’s Therapy Services and the Council of Autism Services Providers commented that the regulation should address benefit coverage for ABA services delivered by “unlicensed individuals” as part of a “multi-disciplinary team”.

Response - The Department will reimburse for ABA services when provided in accordance with Article 167 of the NYSED Education Law, which includes provisions for services provided by “unlicensed individuals” as part of a “multi-disciplinary” team.

- 2. Comment** - The New York State Association for Behavior Analysis commented that the Department’s reimbursement rate for ABA services was lower than other state’s Medicaid programs.

Response – The Department will make payment for ABA services at rates approved by the Division of the Budget.