Accessing ABA In School Settings

2024 Autism Law Summit

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Cold Probe

- Medicaid cannot pay for ABA therapy in schools because this would constitute improper double billing.
- A school has no obligation to allow a child to access ABA in school settings unless the child's IEP team concludes that this is necessary to provide a FAPE to the child.
- Schools cannot allow in outside ABA providers because this would violate FERPA.
- Insurers are not obligated to cover ABA in school settings; this is educational ABA and is the school's responsibility.
- Medicaid reimbursable services in school settings are limited to services provided by schools (Medicaid school-based services programs).

ABA in School Settings

Education versus Medical Treatment:
Different standards, rights, providers, purposes.

Education

Sufficient special education and related services to provide a FAPE

• Behavior support, behavior management

School Personnel

Education standard (Endrew F,: related services necessary for appropriately ambitious educational goals in light of the child's circumstances)

No patient relationship

Medical treatment

Medical standard (Correct or ameliorate all impairing ASD symptoms to the maximum extent)

Licensed and/or Nationally Certified Behavior Analysts and closely supervised technicians

Full rage of symptoms and treatment targets

Patient relationship

Governed by professional health care standards

It’s Not Either/Or

- Both systems important and child’s rights under both should be vindicated.
- Work to be done under Endrew F. to access sufficient education.
- Work to be done under ADA to access sufficient healthcare treatment. For purposes of today we will focus on this important area.
- Child’s right to access medically necessary care is not limited to what school personnel believe is necessary for an appropriate education.

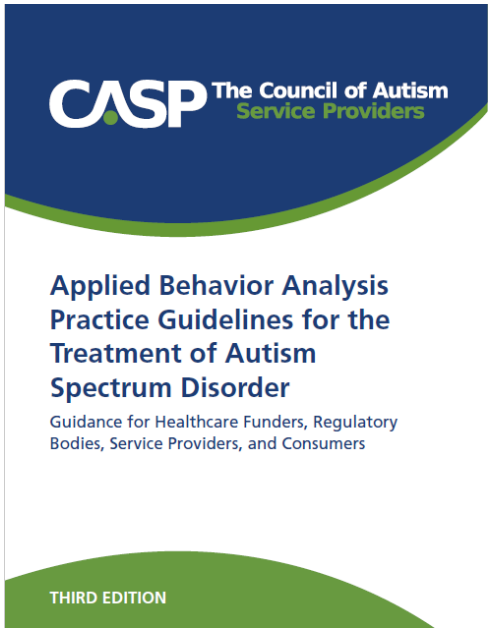
Agenda

- Background on medical necessity of ABA in community settings including schools.
- Funder obligations to cover medically necessary care in community setting including schools
- Legal issues regarding ADA and access to medically necessary ABA care in community settings including schools
    - Cases
    - statutes
- Clinical issues regarding ADA access to care—demonstrating medical necessity and need to access care beyond FAPE in individual cases.
- How to work effectively with school personnel when delivery medically necessary care in the school setting.
- Q and A

Background to the Issue

- ASD is a global developmental disorder involving impairments in social interaction, communication, and behavior, and children with ASD frequently have *difficulty generalizing behaviors across settings*.
- Because of this and because the primary evidence-based treatment for ASD, applied behavior analysis (ABA), involves the interaction between behavior and environment, it is **medically necessary for some children with ASD to receive behavioral health treatment across a variety of settings, including school settings**, to successfully treat their condition and achieve maximum functioning.

Medical Treatment Generally Accepted Standards of Care



"ABA treatment must not be restricted a priori to specific settings but instead should be delivered in the settings that maximize treatment outcomes for the individual patient. It may be medically necessary for a patient to receive services in a particular location for a variety of reasons, including but not limited to generalization needs, the impact of interactions in this environment on skill building or behavioral targets in the treatment program, or to access the required intensity of services for the patient. For example, treatment in various community settings such as daycare, school, or a recreational activity may be medically necessary to promote social-emotional reciprocity, nonverbal communicative behaviors, and the development and maintenance of relationships." P.39

Medically Necessary ABA in School Settings

- ABA may be medically necessary for some children in the school setting.
  - Generalization of skills, treatment consistency, and fidelity
  - Deficiencies or inconsistencies in one setting can affect the child's entire treatment program
  - Challenging behaviors
  - Behavioral, social communication amelioration of deficits
  - Social deficits/interaction not progressing is school setting
  - Independence and safety,
  - Long term functioning
- As with any medically necessary care, if they do not receive it, it negatively impacts their current functioning across settings, their overall treatment program, and their future health and functioning. In short, there are lifelong consequences beyond the quality of their education.

Medicaid and Insurance Funding

Legal Basis for Medicaid and Insurance Funding in School Settings

- Mandates
- MHPAEA (Federal mental health parity)
- State mental health parity laws
- Contract
- Medicaid EPSDT

Insurance-Mandates - *Burke v. IBC* (Pa. 2017)

- Medically necessary care had to be provided in school setting notwithstanding general exclusion in policy.
- 40 Pa. Cons. Stat. § 764h(c) Coverage under this section shall be subject to copayment, deductible and coinsurance provisions and any other general exclusions or limitations of a health insurance policy or government program to the same extent as other medical services covered by the policy or program are subject to these provisions.
- 40 Pa. Cons. Stat. § 764h(f)(1) "Applied behavioral analysis" means the design, implementation and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior or to prevent loss of attained skill or function, including the use of direct observation, measurement and functional analysis of the relations between environment and behavior.

Insurance-Mandates

- “As Mr. Burke stresses and the Law explicitly recognizes, ABA is an environmentally sensitive form of therapy. Ultimately, we simply do not believe that the Legislature intended to permit insurers to exclude coverage in the sensory-laden educational environment where children spend large portions of their days, or to require families to litigate the issue of medical necessity discretely in individual cases to secure such location-specific coverage for the treatment.“ *Burke v. IBC*, 642 Pa. 691, 710 (Pa. 2017)

Insurance-Federal Mental Health Parity (MHPAEA)

- Excluding coverage of ABA services in locations where they are medically necessary is a Nonquantitative treatment limitation subject to the federal Mental Health Parity and Addiction Equity Act. 29 U.S.C. §1185a; 42 U.S.C. § 300gg-26.
  - Cannot have a treatment limitation that applies only to MH condition. 29 U.S.C. § 1185a(a)(3)(A)(ii).
  - Cannot have a non quantitative treatment limitation (NQTL) imposed on MH unless the processes, strategies, evidentiary standards or other factors used in applying the NQTL to MH/SUD benefits are comparable to and applied no more stringently than for medical/surgical benefits. 29 U.S.C. § 1185a(a)(3)(A)(ii).
    - Application of generally accepted standards of care to MH and M/S
    - Restrictions on medically necessary settings

State Mental Health Parity Acts: California SB 855

- Insurer must follow generally accepted standards of care and clinical practice guidelines of relevant nonprofit health care provider professional association in making medical necessity and level of care decisions.
- Prohibits exclusions based on position that services should be or could be covered by a public entitlement program, including, but not limited to, special education or an individualized education program,

Insurance-Contract

- Exclusions for special education services provided by school personnel do not exclude medically necessary behavioral health treatment being delivered in this setting in similar fashion to other community settings.

Medicaid EPSDT

- Medicaid agency has obligation to cover all coverable medically necessary care for Medicaid eligible children under 21 based on individualized determinations of medical necessity regardless of whether such care is currently in the State Plan. 42 U.S.C. §1396d(r)(5).
- Colorado
- Missouri
- Kansas

Access to Care under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act

Schools' Obligation to Allow Access to Medically Necessary ABA under ADA and Section 504

- Section 504 of the federal Rehabilitation Act applies to entities which receive federal financial assistance and prohibits discrimination of the basis of disability.
- The ADA (Americans with Disabilities Act) was passed after Section 504 and applies to private institutions, workplaces, state-funded entities and other institutions that were not covered under section 504.

The Americans with Disabilities Act (ADA)

- Public schools receive federal financial assistance making them subject to both Section 504 of the Rehabilitation Act and the ADA.
- When care is medically necessary for a student in the school setting, being deprived of this care results in impediments to access and access that is not equivalent to that of nondisabled students who do not face these heightened health risks in attending and participating in school programs, activities, and services.
  - For this reason, it is well established that students using service dogs to increase their independence by assisting them in activities and interactions are entitled to this access in school settings just as they are in other community settings.
  - Similarly, students who require support from medical professionals to safely attend schools without compromising their current and long-term treatment and prognosis are entitled to reasonable accommodations to address their healthcare needs.

ADA/504 ABA in Schools Not Limited by FAPE

- Do not have to proceed under IDEA per Supreme Court decision in *Fry v. Napoleon Comm. Sch. Dist.* (2017)
- Plaintiffs in *Fry* sought relief under Section 504 for school's refusal to allow child to attend school with her prescribed service dog did not have to exhaust administrative remedies under the IDEA. Supreme Court held that plaintiffs could proceed in federal court without going through IDEA dispute resolution. Gravamen of complaint was something other than denial of a free and appropriate education (FAPE) required by IDEA.
- Clues: Could First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say, a public theater or library? And second, could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance?

ADA/504 ABA Medically Necessary ABA in Schools

- ADA requires school to make reasonable accommodation to allow child access to medically necessary care in the school setting.
- *K.M. v. Tehachapi School Dist.* (E.D. Ca. 2018) (denying motion to dismiss ABA claims where school refused access to medically necessary ABA; court noted allegations showing a lack of investigation to determine whether the accommodation requested was reasonable).

*K.M. v. Tehachapi Unified Sch. Dist. (*E.D. Ca. 2018)

- Plaintiff stated a claim for violation of ADA/Section 504 based on school district's refusal to make reasonable accommodations to allow a child's ABA therapist to provide ABA therapy at school necessary for her to have meaningful access to school facilities and she therefore was required to stay home to receive needed therapy.
- Claim that plaintiff had not shown that she was provided an "inadequate education" compared to non-disabled peers was not relevant. "Plaintiffs' claim centers on non-discriminatory access to educational facilities to the same degree as non-disabled peers."
- Settled with detailed requirements to be met by the school district and significant costs.

Z.W. v. Horry County School District, 68 F. 4th 915 (4th Cir. 2023)

- The school had used “ABA-like” strategies in response to ongoing regression. MUSC Neurodevelopmental pediatrician prescribed intensive ABA program provided by BACB-certified or registered personnel across settings, including school, as medically necessary. School refused to consider access claiming that its program was meeting child’s educational needs.
- “[The “essence” of Z.W.’s beef with the school district is its refusal to permit him to bring his privately supplied and funded ABA therapist to school with him. Z.W. could file essentially the same claim against a library, a museum, or a summer camp. What is more, a non-student visitor (say, a friend, sibling, or other relative) could make a largely identical claim against the school district if it refused to permit an ABA therapist to accompany the visitor to Z.W.’s school."
- Also, "[b]ecause Z.W.’s complaint requests nothing that would be “provided at public expense . . . and without charge” to him and his parents, § 1401(9), its “essence” or “crux” does not appear to “concern[] the denial of a FAPE” in either “surface” or “substance,” quoting *Fry*, 580 U.S. at 169, 171, 172.)

Legislative Efforts

Louisiana Act 696—Access to Medically Necessary Behavioral Health Services in Schools

- §173. Behavioral health services for students
- 10 (A)(1) A public school governing authority shall not prohibit a behavioral health provider from providing behavioral health services to a student at school during school hours if the student's parent or legal guardian requests such services from the provider.
- (2) Not later than January 1, 2019, each public school governing authority shall adopt a policy to implement the provisions of this Section . . . .
- Not explicitly cover ABA/LABAs, constraints on time/location interfere with access based on nature of ABA

Louisiana Access Statute (L.A.R.S 17.173) Amended to Include Licensed Behavior Analysts and ABA

- (4) “Behavioral health provider” shall mean a provider who is licensed by the Louisiana Department of Health or a health profession licensing board and is in good standing to provide behavioral health services in Louisiana including but not limited to a psychiatrist, psychologist, medical psychologist, licensed specialist in school psychology, marriage and family therapist…
  - professional counselor, clinical social worker, **applied behavior analysis provider**, or a behavioral health provider organization licensed to provide behavioral health services in Louisiana.

Louisiana Access Statute (L.A.R.S 17.173) Amended to Include Licensed Behavior Analysts contd.

- (5) “Behavioral health services” shall include but not be limited to . . . Medically necessary **applied behavior analysis services**.

Florida HB 1401

- ABA Techs included in personnel who can provide services in school pursuant to Florida's statute on Collaboration of public and private instructional personnel. Fla. Stat. § 1003.572.
- Florida HB 1401 passed House last session.
- Previously passed legislation clarifying broad scope of Medicaid's coverage obligations.
- Other states looking at legislation.

Colorado HB22-1260-Codified at Colo Rev. State § 22-20-121

- Preamble recognizes that generally accepted standards of care require that ABA treatment be available across settings, including schools; that insurance and Medicaid have obligations to cover medically necessary care in school settings; that no family should have to choose between a child attending public school or receiving access to medically necessary services; and that ensuring that children have access to these services will also improve the efficacy of their treatment and their integration into the community, as well as reduce long-term costs to the state.
- Children have a right to reasonable accommodations allow access to prescribed medical care necessary for the child to attend school without risks to his or her health and functioning
- Statute requires that SDs must have policy that addresses process in which a private health care specialist may observe the student in the school setting, collaborate with instructional personnel in the school setting, and provide medically necessary treatment in the school setting as required by [section 504} and {the ADA]
- SDs must provide data indicating number of requests for access by private health care providers and whether access was approved or denied.

S.C. Dep’t of Education Memorandum

- Acknowledges difficulties of families in obtaining ACCESS.
- Acknowledges the applicability of the ADA and Section 504.
- Addresses requests for the STUDENT’S qualified healthcare provider to provide treatment in the school setting.
- Requires comprehensive case-by-case consideration of the accommodation request.
- Prohibits blanket denials of this type of request.
- Encourages collaboration so students can reach their FULL potential.

STATE OF SOUTH CAROLINA
DEPARTMENT OF EDUCATION

MEMORANDUM

TO: District Superintendents
District Special Education Directors

FROM: Matthew Ferguson, Ed.D., Esq.
Deputy Superintendent and Chief Academic Officer
Division of College, Career, and Military Readiness

DATE: April 2, 2024

RE: Case-by-Case Consideration of Applied Behavior Analysis (ABA) Therapy Access in Schools

The Process for Requesting Access

- Parent identifies child as a person with a disability seeking accommodations under the ADA/504 to access medically necessary care prescribed in the school setting by a qualified healthcare practitioner.
- Parents must request access for their child's qualified health provider to provide medically necessary treatment (ABA) in the school setting.
    - Reference ADA and any applicable state law or guidance
    - Demonstrate medical necessity.
    - Define the access requested.
        - The initial request for access is likely necessary to assess medical necessity and design appropriate programming in the school setting.
    - Have an insurance/Medicaid-funded provider ready/willing/able to provide the treatment.
- Schools are then to consider and engage in interactive process to investigate and determine how the request can reasonably be accommodated.(classroom procedures, insurance, background checks, etc.)

Individual considerations regarding medically necessary access to care in school settings

Some examples:

- Lack of skill acquisition in shared treatment domain areas (e.g., AAC, ADLS, etc.)
- Social deficits that are improving in ABA but not “keeping up” in school
- Safety concerns not successfully remediated by the IEP goals/IEP services
- Interfering behaviors are reduced/stabilized in the home, community, and center but occur at high rates in school
- Generalization barriers not remediated with care coordination with the IEP team
- Behavioral contrast not successfully remediated without direct Clinical ABA intervention
- Clinical ABA would increase student independence and/or reduction of severe behavior
- Clinical ABA would remediate barriers that reduce adult placement options (e.g., limited living situation options)

Behavioral Contrast

Non Treatment Setting

Attention is still given for the behavior.

Oppositional behavior increases

Treatment Setting

Attention is withheld for behavior

Oppositional

Medical Necessity for ABA in school assessment tool

Cost of Entry	Metric	Response
CE 1	Can reasonable accommodations meet the needs of the student (See "Reasonable Accomodations" tab)	
CE 2	Is the Clinical ABA treatment plan is aligned with symptoms presented from the diagnosis	
CE 3	Would the treatment be necessary across all settings (ie. the public library test)	
CE 4	Are the ABA treatment plan goals contextually appropriate to be run in the school setting?	
CE 5	Do you have a medical referral from the physician stating that Clinical ABA is medically necessary in the school setting for the prescribed dosage as outlined in your treatment plan?	
CE 6	Has the Clinical ABA treatment (in school locations) been approved as medically necessary by another party (ie. funder, physician...)?	
	TOTAL SCORE	

Medical Necessity Criteria	Metric	Response
MN1	Is the student experiencing a lack of skill acquisition in the treatment domain areas shared (e.g. AAC, ADLS, etc) in the ABA Treatment Plan in the school setting (e.g. not meeting at least 50% of IEP goals but making significant progress on similar domain area ABA Treatment Plan goals such as at least 70% of short term benchmarks)?	
MN2	Is the student experiencing social deficits at school that are making adequate progress on the ABA treatment plan (e.g. how to address bullying) but remains a barrier in school?	
MN3	Does the student experience safety concerns in the school setting that are not successfully addressed?	
MN4	Are maladaptive/interfering behaviors reduced in other settings but still occur at high rates in the school setting due to inadvertent staff or peer reinforcement?	
MN5	Are generalization barriers not successfully remediated through at least 3 months of care coordination with IEP team?	
MN6	Is there evidence of behavioral contrast (e.g. behaviors only occurring in non clinic settings) that are not being successfully remediated without direct intervention from ABA team?	
MN7	Would the addition of Clinical ABA treatment in the school setting result in increased student independence and/or reduction of severe behavior?	
MN8	Would the addition of Clinical ABA treatment result in remediation of barriers that reduce adult placement options for the student?	
	TOTAL SCORE	

Instructions for Observation Data Sheet
1. **Teacher Contacts:** Collect data based on observation in school for the outlined metrics below. Record % observed delivered by teacher (e.g. clearly stated expectations, corrective feedback delivered vs praise/positive acknowledgement delivered)
2. **Client Performance:** Collect data on the following prerequisite skills for success in a classroom environment without 1:1 support. Record % independence for each target skill.
3. Attempt to get at least 3 observations scheduled for your assessment when possible to identify a trend. If you cannot get 3 observations due to funder limitations or district limitations, one observation will suffice. Continue to collect data on these metrics throughout the client's time in school at least monthly to measure progress/ generalization if you are NOT treating in school. If you are treating in school, consider whether or not these are medically necessary goals for the client and ensure the IEP does not duplicate any of your goals to avoid funder violations.

Observation Data Sheet	Observation 1	Observation 2	Observation 3
Teacher Contacts (interactions)	Date:	Date:	Date:
1. Clearly stated expectations delivered			
2. Corrective Feedback delivered			
3. Praise delivered/Positive acknowledgement			
Client Performance			
1. Follows Individual Instructions (1st time)			
2. Follows Whole Group Instructions (1st time)			
3. Observational Learning (look to peers for direction)			
4. On Task Intervals (1min)			
5. Engages in self-advocacy appropriately			

ABC Data	Antecedent	Context	Consequence
Behavior 1:			
Behavior 2:			
Behavior 3:			
Behavior 4:			

AUTISM LEGAL RESOURCE CENTER

Common Denial Reasons for Clinical ABA in School

Concerns Expressed by Some Schools	Rebuttal
1. ABA is a pull out service/is disruptive to the classroom and will interfere with educational minutes	ABA is mainly a push in service and is no more disruptive than related service providers deliving treatment in a push in model (e.g OT, Speech). There is ample research supporting the effectiveness of a push in model. RBTs are not more disruptive than paraeducators in a classroom.
2. This ABA schedule will interfere with other related services/school activities/teaching time	Cotreatment is often delivered in a school setting in addition to being an effective treatment model in medical settings. Many students requiring intensive, clinical grade treatment engage in interfering behaviors in related service sessions, reducing progress which can be successfully remediated by cotreating with the clinical ABA team.
3. We cannot allow your staff in because of FERPA concerns	FERPA
4. The student does not need clinical ABA in school because they are progressing/making adequate progress on their IEP goals	The IEP is separate for medical services and should not/does not preclude a student's right to access medical treatment. Progress on IEP goals does not have any correlation to medical necessity as you cannot share IEP/medical goals. IEP goals do not address remediation of medical diagnoses. They address ensuring a student is able to access their education for "merely more than de minimus educational benefit" and does not guarantee any remediation of medical conditions. Ask them to define adequate progress and for a copy of their policy that outlines how they determine whether a student is making adequate progress.
5. We already provide ABA in school/We have a BCBA on staff/RBT in the classroom so we don't need you	Educational vs Clinical ABA Evaluate the school program to determine if the school "ABA" services meet the same criteria as the clinical ABA servicse
6. We cannot allow your staff in due to confidentiality/privacy concerns for the other students	What are your processes for your volunteers? We are happy to accomodate those processes.
7. We cannot allow ABA in school due to liability issues	ABA providers will need to add school locations to their liability insurance policies. Provide a copy to the district as this should satisfy this requirement. (See model policy)
8. We cannot allow your staff in as we have not vetted them. This is a safety concern to allow non district staff in the classroom	ABA providers should provide background checks or offer to have them fingerprinted using whatever system the district uses. (See model policy). Ask how volunteers, sub teachers, etc are vetted and offer to do the same or equivalent.
9. Our nurse does not agree this service is medically necessary	Has your nurse spoken with the student's physician and does the nurse disagree with the physician and diagnostician's prescription and diagnosis?
10. It would be inequitable to other students to allow this student access to clinical ABA in the classroom	It is inequitable to expect this student to attend school without addressing their medical needs, especially when other students' needs are being met by default (i.e., not requiring medical support).
11. Rather than adding clinical ABA, we should be discussing a change of placement to a more restrictive setting.	This violates LRE. Clinical ABA is no more intrusive than adding SLP or OT services to an IEP and should not constitute a change of placement especially as ABA will allow students to access even less restrictive settings and gain skills necessary to move to a less restrictive setting. Clinical ABA is proven to reduce the need for additional IEP services over time, potentially resulting in exiting an IEP.

The Interactive Process under ADA/504

- The obligation is to make reasonable accommodations and modifications to policies. Good-faith dialogue.
- Section 504 and the ADA allow public institutions to deny requests for accommodation where the accommodation would impose an undue hardship or a direct threat to the safety of employees or others.
- Allowing outside providers to deliver services in schools is not uncommon
- If issues are raised, get clarification and details as specific as possible
- Compare and contrast to other scenarios
  - What other third parties are allowed in the building?
  - What do you require of those people before entering? (background checks, bonding?)
- Offer ways to ameliorate named concerns. Work collaboratively on logistics that do not interfere with the accomplishment of treatment goals.

Working in school settings as an outside healthcare provider

- First impression is key
- Be warm, appreciative, and engaging.
    - How you first present will set the groundwork for how the IEP team responds to your presence and your suggestions.
- Ensure the team knows you're not there to judge their performance; you are providing medical treatment to a child.
- Make your end goal known.
    - The goal is for students to be self-sufficient and for us to exit the "medical" support

Skills needed for effective collaboration