

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF ADOPTION AND
Rules I through VIII and the repeal of)	REPEAL
ARM 37.34.1901, 37.34.1903,)	
37.34.1905, 37.34.1907, 37.34.1909,)	
37.34.1911, 37.34.1913, 37.34.1915,)	
37.34.1917, 37.34.1919, 37.34.1921,)	
37.34.1923, 37.34.1925, 37.34.1927,)	
37.34.1929, 37.34.1931, 37.34.1933,)	
37.34.1935, 37.34.1937, 37.34.1939,)	
37.34.1941, 37.34.1943, 37.34.1945,)	
37.34.1947, 37.34.1949, 37.34.1951,)	
37.34.1953, 37.34.1955, 37.34.1957,)	
37.34.1959, 37.34.1961, 37.34.1963,)	
and 37.34.1965 pertaining to applied)	
behavior analysis services)	

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-947 pertaining to the public hearing on the proposed adoption and repeal of the above-stated rules at page 1444 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has adopted the following rules as proposed: New Rule IV (37.34.1918), V (37.34.1924), VI (37.34.1930), VII (37.34.1936), and VIII (37.34.1942).

3. The department has adopted the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (37.34.1902) DEFINITIONS The definitions applicable to Applied Behavior Analysis (ABA) therapy services are as follows:

(1) through (10) remain as proposed.

(11) "Eligibility criteria" means those criteria established for the purposes of the program of ABA services authorized by the department, as specified in the Montana Medicaid Applied Behavior Analysis Services Manual (ABA Services manual), dated ~~July 26~~ September 24, 2022. The department adopts and incorporates by reference the ABA Services manual which provides the public with greater detail about ABA services. Any conflict between these rules and what is outlined in the ABA Services manual should be resolved in favor of what is written in these rules. A copy may be accessed on the DPHHS website at the following link: <https://medicaidprovider.mt.gov/manuals/appliedbehavioranalysiservicesmanual> or

a paper copy may be obtained from the department by a request in writing to the Department of Public Health and Human Services, Behavioral Health and Developmental Disabilities Division, Developmental Disabilities Program, 111 N. Sanders, P.O. Box 4210, Helena, MT 59604-4210 or at <https://medicaidprovider.mt.gov/76>.

(12) through (20) remain as proposed.

AUTH: 53-2-201, 53-6-113, 53-21-703, MCA
IMP: 53-1-601, 53-1-602, 53-2-201, 53-6-101, MCA

NEW RULE II (37.34.1908) INITIAL ELIGIBILITY (1) For a member to qualify for initial ABA services, the member must meet the functional impairment criteria and ~~must~~ one of the following:

(a) through (3) remain as proposed.

AUTH: 53-2-201, 53-6-113, 53-21-703, MCA
IMP: 53-1-601, 53-1-602, 53-2-201, 53-6-101, 53-6-111, MCA

NEW RULE III (37.34.1912) CONTINUED ELIGIBILITY FOR ADDITIONAL UNITS OF SERVICE (1) through (3)(a)(i) remain as proposed.

(ii) the ~~treatment plan~~ member must demonstrate progress in each of the identified treatment goals or provide a clinical explanation and modification to address a lack of progress; and

(iii) through (7) remain as proposed.

AUTH: 53-2-201, 53-6-113, 53-21-703, MCA
IMP: 53-1-601, 53-1-602, 53-2-201, 53-6-101, 53-6-111, 53-21-701, 53-21-702, MCA

4. The department has repealed the above-stated rules as proposed.

5. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: One commenter requested that a provider, other than a qualified health care professional with expertise in the diagnostic area (QHP), who has performed a diagnostic evaluation for autism spectrum disorder (ASD), be allowed to send that evaluation to a QHP to be reviewed and signed off on to avoid a financial burden to clients who completed an evaluation with a provider other than a QHP.

RESPONSE #1: The department cannot accommodate this request. The standard for evaluating a child for ASD consists of an assessment performed by a lead clinician who has expertise in the diagnosis and management of ASD. As provided in New Rule I, QHP refers to a child and adolescent psychiatrist, a general psychiatrist with child and adolescent experience, a developmental pediatrician, or a neuropsychologist or psychologist.

COMMENT #2: One commenter requested that the phrase "specifically authorized in writing by the department" under New Rule IV(2)(f) be clarified for telehealth services.

RESPONSE #2: In response to this question, the department is developing a telehealth exception request form for requesting authorization of services. The form should be used by providers to seek authorization. The department will review the completed form for clinical appropriateness, based on best practices as defined by the Council of Autism Service Providers (CASP) Practice Parameters for Telehealth-Implementation of Applied Behavior Analysis. The form will be available at <https://medicaidprovider.mt.gov/76>. The department has amended the manual to reflect the addition of this form.

COMMENT #3: One commenter requested clarification on whether a parent's inability to be engaged in treatment precipitates the end of services.

RESPONSE #3: The department clarifies that, although it is best practice for parents or guardians to be actively engaged in treatment, eligibility for additional units of service is based on the member's progress. It is important to note that parent or guardian consent must be obtained prior to the delivery of service.

COMMENT #4: One commenter requests that the department include within the rules a provision for rededicating the services towards free and appropriate public education in the least restrictive environment for anyone receiving ABA services under the program. The commenter states that there are no other good alternatives, especially in the ways that ABA practices often are integrated or run adjacent to primary and secondary education.

RESPONSE #4: Medicaid-funded ABA services may be delivered in a school setting if a provider chooses to do so. As for the suggestion that the department should use Medicaid dollars to fund public education, federal regulations prohibit the department from doing so. The request is contrary to federal regulations, beyond the scope of the department's authority, and outside the scope of this rulemaking.

COMMENT #5: Several commenters expressed concern that the new rules do not contain language regarding intermediate professionals such as in-training board certified behavioral analysts (BCBA) and BCBA students.

RESPONSE #5: Based on this comment, the department will amend the Montana Medicaid Applied Behavior Analysis Manual to clarify that "intermediate professional" means a graduate student who has completed basic coursework requirements for Behavior Analyst Certification Board (BACB) certification and is in process of completing the experience portion of the eligibility requirements as delineated in the Applied Behavior Analysis Treatment of Autism Spectrum Disorder: Practice Guidelines for Healthcare Funders and Managers Second Edition. The

ABA fee schedule includes a fee for services rendered by an intermediate professional.

COMMENT #6: A commenter requests that the department remove PRTF in services that cannot be provided concurrently to the list of concurrent services in New Rule V(2)(a) so that children residing in PRTFs and have behavioral needs may benefit from ABA services.

RESPONSE #6: The department thanks the commenter for this feedback and will take it under advisement and consideration for future programmatic or rulemaking changes.

COMMENT #7: A commenter asked why the state requires a behavior identification assessment (BIA) and not a functional behavior assessment (FBA), which the commenter stated is consistent with the application of ABA. The services are required by a Board Certified Behavior Analyst (BCBA), and BCBA's typically conduct FBAs.

RESPONSE #7: The department clarifies that an FBA can be a component of the assessment process, and a provider may choose to do an FBA in conducting a BIA. The proposed rules are intended to give providers a level of discretion in choosing the tools they use to conduct assessments.

COMMENT #8: A commenter pointed out there should be an "or" after New Rule II(1)(a), or it could be interpreted that a person needs to have ASD and be eligible for developmental disabilities services or have a serious emotional disturbance.

RESPONSE #8: The department appreciates the comment and has amended the introductory language of New Rule II(1) to clarify that (a) through (c) are disjunctive.

COMMENT #9: A commenter requested the department add licensed mental health professionals, LCSWs and LCPCs to definitions to permit those professions to diagnose and authorize ABA services or to provide the department's reasoning for excluding LCSWs and LCPCs. The commenter further requests that ABA rules be consistent across other Children's Mental Health Bureau (CMHB) services and allow all licensed mental health professions to diagnose youth.

RESPONSE #9: The department cannot accommodate this request because although youth with SED may be eligible for ABA services, ABA services are not included in the range of services provided through the department's CMHB. Additionally, the ABA service requires a prescription; because LCSWs and LCPCs are not prescribers, they cannot authorize such service.

COMMENT #10: A commenter requests that New Rule III Continued Eligibility for Additional Units of Service (3)(a)(ii) and (iii) be changed as follows: (3)(a)(ii) "the client must demonstrate progress in each of the identified treatment goals or a clinical explanation is provided to address a lack of progress;" and (3)(a)(iii) "The

member is not experiencing a worsening of skill deficits or behaviors due to the treatment services as evidenced by progress towards treatment goals documentation."

RESPONSE #10: The department appreciates the commenter's feedback and will take this suggestion under advisement for future programmatic or rulemaking changes.

COMMENT #11: A commenter requested clarification on why the treatment plan is called a treatment plan instead of a behavior intervention plan (BIP).

RESPONSE #11: The department clarifies that a BIP is one component of the treatment plan.

COMMENT #12: A commenter expressed concern that the 30-day timeframe for completing the treatment plan would inhibit the quality of care and requested that the timeframe be extended to 60-days.

RESPONSE #12: The department cannot accommodate this request. Completion of the treatment plan in 30 days is consistent with best practices and is reasonable, given that initial eligibility for ABA services is 180 days, or six months. The department's ABA manual allows for an extension to the 30-day timeframe in extenuating circumstances – which may address the commenter's concerns at least in part. In keeping with behavioral health standards, treatment plans must be updated when clinically indicated.

/s/ BRENDA K. ELIAS
Brenda K. Elias
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human
Services

Certified to the Secretary of State September 13, 2022.