REPORT OF RECOMMENDATIONS AND FINDINGS

By the Applied Behavior Analysts'
Technical Review Committee

To the Nebraska State Board of Health, the
Director of the Division of Public Health, Department of Health and Human
Services, and the Members of the Health and Human
Services Committee of the Legislature

July 21, 2010

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INTRODUCTION

The Credentialing Review Program is a review process advisory to the Legislature which is designed to assess the need for state regulation of health professionals. The credentialing review statute requires that review bodies assess the need for credentialing proposals by examining whether such proposals are in the public interest.

The law directs those health occupations and professions seeking credentialing or a change in scope of practice to submit an application for review to the Department of Health and Human Services, Division of Public Health. The Director of this Division will then appoint an appropriate technical review committee to review the application and make recommendations regarding whether or not the application in question should be approved. These recommendations are made in accordance with four statutory criteria contained in Section 71-6221 of the Nebraska Revised Statutes. These criteria focus the attention of committee members on the public health, safety, and welfare.

The recommendations of technical review committees take the form of written reports that are submitted to the State Board of Health and the Director of the Division along with any other materials requested by these review bodies. These two review bodies formulate their own independent reports on credentialing proposals. All reports that are generated by the program are submitted to the Legislature to assist state senators in their review of proposed legislation pertinent to the credentialing of health care professions.

MEMBERS OF THE APPLIED BEHAVIOR ANALYSTS' TECHNICAL REVIEW COMMITTEE

Dale Michels, M.D. (Chairperson) **(Lincoln)**
Representing the State Board of Health
Family Practice Physician

John Y. Donaldson, M.D. **(Omaha)**
Representing the Nebraska Medical Association
Semi-retired Psychiatrist

Wayne Fisher, Ph.D. **(Omaha)**
Representing the Munroe-Meyer Institute
Director, Center for Autism Spectrum Disorders

Gregory G. Gaden **(Omaha)**
Director of Special Education, Educational Service Unit # 3

Wendy L. McCarty, Ed.D. **(Grand Island)**
Instructor, University of Nebraska at Kearney

Debra L. Parsow **(Omaha)**
Self-Employed Consultant, Parsow Consulting, LLC

Greg Snyder, Ph.D. **(Omaha)**
Representing the Nebraska Psychological Association
Boys Town Outpatient Behavioral Pediatrics & Family Services

EXECUTIVE SUMMARY OF THE PROPOSAL AND RECOMMENDATIONS

Summary of the Applicants' Proposal

The applicant group seeks to license applied behavior analysts in Nebraska. Their proposal would establish two levels of licensure. There would also be a provisional licensure category.

Licensed Behavior Analysis Practitioner

This licensure category would require a master's degree, specific coursework and 1500 hours of supervised practical training. After licensure, these practitioners would be required to receive ongoing supervision from a licensed psychologist with expertise in applied behavior analysis or a licensed behavior analyst who has met the requirements listed for practicing independently.

Licensed Behavior Analyst

This licensure category would require a doctoral degree in applied behavior analysis. Following the conferral of the doctoral degree, the practitioner would be required to complete 3000 hours of supervised practice (inclusive of the postdoctoral-level fellowship), including 1500 hours with clients that are outside of the autism/developmental disabilities population. This supervised practice must be obtained within a time period of not less than two nor more than five years. Supervision would be provided by a licensed psychologist with expertise in applied behavior analysis, as determined by the Nebraska Board of Psychology

The scope of practice sought by the applicant group for Licensed Applied Behavior Analysts would be as follows:

1. Conduct systematic behavioral assessments, including functional behavior intervention plans for individual clients that emphasize identifying and altering environmental events functionally relevant to establishing and shaping new responses, increasing appropriate responses, and reducing behavior problems;
2. Design, implement, evaluate, and modify treatment programs to change the behavior of individuals;
3. Design, implement, evaluate, and modify treatment programs to change the behavior of groups; and
4. Consult with individuals and organizations regarding behavior modification issues and problems.

The applicant group recommended the following exemptions from licensure:

1. The teaching of applied behavior analysis, the conduct of behavior-analytic research, or the provision of applied behavior analysis services or consultation to organizations or institutions if such teaching, research, or service does not involve the delivery or supervision of direct applied behavior analysis services to individuals or groups of individuals who are themselves, rather than a third party, the intended beneficiaries of such services, without regard to the source or extent of payment for services rendered.

2. Recognized professions that are licensed, certified, or regulated under the laws of Nebraska from rendering services consistent with their professional training and code of

ethics and within the scope of practice as set out in the statutes regulating their professional practice if they do not represent themselves to be applied behavior analysts.

3. Educational staff and related service providers may provide applied behavioral analysis services under contract with a school district as approved by the State Board of Education under certification and licensure requirements, if such practice is restricted to regular employment within a setting under the jurisdiction of the State Board of Education.

4. Persons from engaging in activities defined as the practice of applied behavior analysis if they do not represent themselves by the title applied behavior analyst, if they do not use terms other than behavior analysis trainee, behavior analysis intern, behavior analysis resident, or behavior analysis assistant to refer to themselves, and if they perform their activities under the supervision and responsibility of an applied behavior analyst in accordance with the rules and regulations of the Department.

5. Parents, guardians, teachers, teacher's aides, behavioral aides and other authorized individuals executing a therapeutic plan created by a licensed behavioral analyst.

Practitioners under the proposal would be regulated by the Board of Psychology with an advisory committee consisting of three doctoral-level applied behavior analysts with expertise in applied behavior analysis.

The examinations to be adopted by the State of Nebraska for the purpose of licensing the two categories of applied behavior analysts would be based upon the examination developed by the Behavior Analysis Certification Board (BACB), which is the national certifying board of the profession.

Summary of Committee Recommendations

The Committee formulated their final recommendations on the proposal at their June 30, 2010 meeting. The committee members voted to recommend approval of the applicants' proposal. The proposal was approved on all four of the statutory criteria. The committee members also made three ancillary recommendations.

Ancillary Recommendations

1. All recognized professions that are licensed, certified, or regulated under the laws of this State should not be excluded from rendering services consistent with their professional training and code of ethics and within their scope of practice as set out in the statutes regulating their professional practice if they do not represent themselves to be licensed behavior analysts. Such professionals, if appropriately trained in behavior analysis, would be able to continue to use the terms "applied behavior analyst" and "applied behavior analysis" to represent themselves and their services. Statutory language should also include a prohibition against state agencies or third-party payers regulated by the State of Nebraska from excluding licensed psychologists from payment for authorized or mandated ABA services.

2. A statutory definition of applied behavior analysis should be created.

3. A dual track to competency in applied behavior analysis should be established for psychologists. This dual track would include the following:

    a. A certification track that would not include any additional training beyond that received to qualify for a license as a psychologist. This would be for those psychologists who provide services themselves, but do not desire to supervise other professionals providing these services.
    b. A special training and experiential track for those psychologists who seek to supervise other professionals who provide applied behavior analysis services.

ISSUES DISCUSSED BY THE COMMITTEE

1. Is the current situation a source of significant harm or potential for harm to the public health and welfare?

The applicants stated that the interventions provided by Applied Behavior Analysts (ABAs) are very expensive and difficult to perform. Practitioners must address self-injurious behaviors in clients, including behaviors that risk serious injury and even death, such as pediatric feeding disorders, repeated head-banging or head-hitting. The applicants stated that this type of behavior must be addressed by someone who is effectively trained in dealing with those behaviors. They added that there are persons who have set themselves up as applied behavior analysts but are unqualified and/or not adequately trained to provide these services safely and effectively. An example was given of a case in which an unqualified practitioner allowed a young client to engage in severe self-injurious behavior without providing adequate safeguards to ensure the client's safety. These types of problems are likely to become more prevalent if additional funds for the treatment of autism become more readily available because there are no requirements in place in Nebraska to define who can and cannot provide these services. [1]

There are currently no means to ensure that ABA services are designed and provided by practitioners with the necessary expertise to provide them safely and effectively. Such training is essential for the establishment of appropriate training and supervision of paraprofessionals providing ABA services to clients on a daily basis. [2]

The applicants stated that treatment modalities used are substandard and potentially dangerous if provided by persons without appropriate training. As an example, they cited reports describing serious harm and even death of children resulting from the inappropriate use of restraints. Additionally, providers who lack the necessary training are not able to determine which treatment modalities have empirical support and have been proven to be safe and effective, and which have not. [3]

The applicants stated that access to services is a major issue, with access a greater problem in rural areas and for military families. Currently, military providers have little or no training in dealing with these issues appropriately. In the future, grants may become available to train physicians employed by the military to provide qualified services in this area of care. [4]

Some members of the committee commented that the applicants provided little information regarding harm that has occurred to actual clients, and that most of what was provided consists of examples from states other than Nebraska. It was also noted that this information is entirely anecdotal in nature. [5]

The applicant group responded to these concerns by providing the committee members with information taken from charges filed against the Beatrice State Developmental Center (BSDC) by the Department of Justice. The Justice Department charged that the practices of

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[1] Minutes of the Orientation Meeting of the Committee, December 18, 2010

[2] The Applicants' Proposal, Page 5

[3] The Applicants' Proposal, Pages 20 and 21

[4] Minutes of the Orientation Meeting of the Committee, December 18, 2010

[5] Minutes of the Third Meeting of the Committee, February 12, 2010

the BSDC violated the rights of persons with developmental disabilities. [6]

Some committee members stated that the practice of applied behavior analysis is already regulated by the psychology statute and by the statutes regulating Licensed Mental Health Practitioners (LMHPs), and questioned whether there is really a need for the proposal. The applicants stated that those statutes would only regulate the professionals covered by their respective practice acts, and would not prevent unlicensed or unqualified practice on the part of those persons who are not psychologists or LMHPs. They stated that only their proposal, which is specifically targeted at those who provide ABA services, would have the ability to address the problem of unlicensed and unqualified practice in this area of care. [7] Some committee members stated that the problems associated with providing care for autistic children are much greater than the proposal could address. Additionally, medical aspects of the issue are more important to the problem of autism than are the symptomatic aspects of the problem dealt with by ABAs. The applicants responded that their proposal, while not being the sole solution to the problem of autism, would enable ABAs to be more effective in helping to address these problems. [8]

Testimony received in writing from Tammy Westfall of MOSAIC in Nebraska stated that Nebraska already has regulations in place to ensure that standards are met relating to habilitation. Title 205, Chapter 4, "Regulations for Certification of a Developmental Disabilities Service Provider 001 Rationale" provides the framework within which developmental disabilities service providers shall provide services. It was argued that if a service provider has deficiencies in the overall quality of services provided, then that provider would not be approved for certification to provide services. Those who do not meet the standards defined in these regulations do not become providers in Nebraska. [9]

2. Would the proposal create new sources of harm to the public that would cancel out any benefits that might stem from it?

Representatives of the Nebraska Association for Marriage and Family Therapy expressed the concern that applied behavior analysts seem to be too narrowly focused in terms of their education and training to be licensed as independent practitioners. They argued that ABA appears to be more like a treatment modality than a profession, and that these professionals lack the ability to make a diagnosis of a patient's overall mental health condition, or to make an appropriate referral. It was suggested that perhaps it would be best if they were granted a credential that would require some kind of oversight arrangement with more qualified providers rather than credentialing them as independent practitioners. [10]

One committee member expressed concerns about the potential of the proposal to become unnecessarily restrictive with respect to ABA services provided through the public schools. Concern was expressed that parents and teachers might be required to work and/or care for children under the oversight of ABAs. Concern was also expressed that the proposal would prevent bachelors-level ABAs from practicing independently, which could also impede the delivery of services in the public schools.

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[6] Minutes of the Fifth Meeting of the Committee, April 28, 2010

[7] Minutes of the Third Meeting of the Committee, February 12, 2010

[8] Minutes of the Fifth Meeting of the Committee, April 28, 2010

[9] Written Testimony of Tammy Westfall, Regional Vice President of MOSAIC in Nebraska, submitted for the Public Hearing on June 2, 2010

[10] Minutes of the Fourth Meeting of the Committee, March 17, 2010

The applicants responded that the State Board of Education would continue to have effective control over the work of school employees who assist in this area of care. The applicants also stated that their proposal is intended to be helpful to parents and parental guardians, not to restrict their role or activities. The applicant group amended its proposal to clarify that parents, guardians and teachers will be exempt from the terms of the proposal. [11]

A committee member asked whether a psychologist who supervises an ABA would also need to be credentialed as an ABA under the terms of the proposal. The applicants responded that it is not the intention of the applicant group to require psychologists to become credentialed in applied behavior analysis, but clearly, if they are to supervise the work of those who do provide these services, they need to have some documented level of knowledge of the field. The applicants noted that just because someone is licensed as a psychologist does not necessarily mean that they are qualified to oversee the services of ABAs. As an example, practitioners who treat substance abuse cases often receive supervision from psychologists, and the requirements for such supervision are set out in rules and regulation. It was noted that one way to address these concerns might be to require a certain level of competency for psychologists, but to do this within the framework of the psychology statute, via the Board of Psychology. [12] Some committee members commented that the creation of these licensure standards might have the impact of disallowing some current unlicensed providers who might possess appropriate training from providing these services, further narrowing the public's range of choice of providers. [13]

Daniel Ullman, Ph.D., and President of the Nebraska Psychological Association, testified that if the proposal were to pass, psychologists would be prohibited from calling themselves applied behavior analysts or even stating that they are providing behavior analysis services to their patients. This would have the effect of further restricting access to services in Nebraska. Dr. Ullman stated that ABA is explicitly recognized within the scope of practice of licensed psychologists; they are qualified to provide those services safely and effectively; and there is no public safety rationale for prohibiting psychologists from calling themselves applied behavior analysts. [14]

Written testimony submitted by Tammy Westfall, Regional Vice President of MOSAIC in Nebraska, stated that passing the proposal would result in the creation of an unfunded mandate that would be imposed upon Medicaid, and that this situation would negatively impact the funding of developmental disabilities services in Nebraska. She noted that the training programs for applied behavior analysts are located in Omaha, and stated that this would create a hardship for residents of western Nebraska who might be required to take this training if the proposal were to pass. [15]

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[11] Minutes of the Second Meeting, January 13, 2010, and the Minutes of the Fifth Meeting of the Committee, April 28, 2010

[12] Minutes of the Second Meeting of the Committee, January 13, 2010

[13] Minutes of the Fourth Meeting of the Committee, March 17, 2010

[14] The Transcript of the Public Hearing held on June 2, 2010, pgs 46 – 50

[15] Written testimony of Tammy Westfall, Regional Vice President of MOSAIC in Nebraska, submitted for the Public Hearing on June 2, 2010

3. **Would the creation of this proposed credential provide clear benefits to the public?**

The applicants argued that the public would benefit from licensing ABAs because it would ensure that all of those providing those services have the necessary training to provide them safely and effectively. This would protect clients from potential harm and would also decrease the probability that families would expend family resources on ineffective and potentially harmful treatments. [16]

The applicants argued that the proposal would make it more likely that there would be improved access to care since licensure would increase the likelihood of third-party reimbursement for the profession. They noted that licensure provides no assurance that such reimbursement will occur, only that it makes reimbursement more likely. When questioned about the impact of the proposal on patients who depend on Medicaid for health care coverage, the applicants explained that State tobacco settlement funds and federal funds have been allocated for ABA services for a five year-year period. This ABA-specific Medicaid waiver would expand services, especially during the transition to licensure. Autism is covered under a different Medicaid waiver program. [17]

Representatives of the Nebraska Association for Marriage and Family Therapy expressed a lack of confidence about the potential of the proposal to benefit the public. They expressed concern about the narrowness of focus of this profession in terms of training and education. They argued that ABAs are not qualified to diagnose a client's overall mental health and for this reason should not be licensed as independent practitioners. [18] Some committee members argued that autism is essentially a medical issue, and consequently, will likely not be significantly addressed by the applicants' proposal. [19]

4. **Are there more cost-effective means of dealing with the shortcomings of the current situation than licensing Applied Behavior Analysts?**

The applicants argued that licensing ABAs would be the best approach to protecting a vulnerable consumer population from unscrupulous or incompetent practice in this area of care. Another form of credentialing such as certification would only provide title protection and would not be as cost-effective. Certification is a voluntary credential that establishes no practice standards or requirements for those who might seek to provide ABA services. Only licensure as described in the applicants' proposal can effectively provide the consumer with a safe range of choice of ABAs. [20]

The applicants also argued that only licensure can address concerns about access to care. This is because only licensure holds the promise of providing third-party reimbursement of ABA services at some point in the future. Other forms of regulation such as certification do not provide third-party payers with sufficient assurance of comprehensive high standards of care and quality of care to allow them to justify reimbursement for services. [21] The applicants pointed out that it is not clear whether the ABA Medicaid waiver would require

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[16] The Applicants' Proposal, Page 28

[17] Minutes of the Third Meeting of the Committee, February 12, 2010

[18] Minutes of the Fourth Meeting of the Committee, March 17, 2010

[19] Minutes of the Fifth Meeting of the Committee, April 28, 2010

[20] The Applicants' Proposal, Page 32

[21] The Applicants' Proposal, Page 33

licensure of ABAs for reimbursement. They added that the option of certification provides no assurance that quality standards of practice can be established and maintained among those who provide ABA services. [22]

Representatives of the Nebraska Association for Marriage and Family Therapy argued that ABAs should practice under the oversight of professionals better qualified to diagnose the overall health of a client. Under such an arrangement, ABAs would provide their services to clients who are referred to them by such other health professionals. [23]

[22] Minutes of the Third Meeting of the Committee, February 12, 2010

[23] The Minutes of the Fourth Meeting of the Committee, March 17, 2010

COMMITTEE RECOMMENDATIONS

The members of the Applied Behavior Analysts' Technical Review Committee formulated their final recommendations on the proposal during their June 30, 2010 meeting by taking action on the four statutory criteria of the Regulation of Health Professions Act under Nebraska Revised Statutes, Section 71-6221. These four criteria and the committee recommendations are described below. When taken together, these four actions comprise the final recommendation on the entire proposal. The proposal must be supported on all four criteria for it to be positively recommended by the committee.

Criterion One:

Unregulated practice can clearly harm or endanger the health, safety, or welfare of the public and the potential for the harm is easily recognizable and not remote or dependent upon tenuous argument.

Donaldson moved and Parsow seconded that the proposal satisfies the first criterion. Voting aye were Fisher, McCarty, Parsow, and Snyder. Voting nay were Donaldson and Gaden. Michels abstained. The motion carried.

Dr. McCarty stated that although there is currently only slight evidence of harm, it is likely that there will be more evidence in the future, and that being proactive now will help ensure preparation for dealing with unqualified practice when it does occur. Dr. Snyder stated that there is potential for harm because applied behavior analysis is not currently defined anywhere in statute. This gray area creates the potential for some providers to attempt to practice beyond their scope of training and skills.

Dr. Donaldson stated that there is no documented harm from the practice of psychology in this area of care. Mr. Gaden said that the evidence of harm provided by the applicants was too general and was not well focused on those persons currently providing services in Nebraska. He added that there were no complaints from any testifiers at the public hearing about unqualified practice or about services provided by public school employees.

Criterion Two:

Regulation of the profession does not impose significant new economic hardship on the public, significantly diminish the supply of qualified practitioners, or otherwise create barriers to service that are not consistent with the public welfare and interest.

Parsow moved and McCarty seconded that the proposal satisfies the second criterion. Voting aye were Fisher, McCarty, Parsow, and Snyder. Voting nay were Donaldson and Gaden. Michels abstained. The motion carried.

Dr. Donaldson expressed concern that the current proposal does not provide sufficient assurance that psychologists would be allowed to continue to provide ABA services.

Mr. Gaden stated that his principal concern continues to be the potential impact of the proposal on those who currently provide these services for children in the public school systems and on the parents and guardians of those children currently receiving these services. He added that there would likely be an increase in the cost of services and a decrease in their availability were the proposal to pass. There would likely be significant economic hardships imposed on families

with autistic children with the passage of the proposal, and families in rural areas of the state would suffer the most in this regard. He added that the narrow focus of the current proposal seems to preclude other approaches that are just as valid for the treatment of autism. He also expressed concern that licensing ABAs could encourage them to become less willing to practice as part of a multi-disciplinary team with other types of practitioners. It is quite possible that the proposal would create confusion among both providers and the public as to what services providers such as psychologists could provide.

Ms. Parsow stated that there would be a learning curve for both the public and health care practitioners regarding the exact parameters of this proposal, but that once this education occurred, it would be clear that the proposal is not unduly restrictive.

Dr. McCarty stated that the proposal would not prevent psychologists from providing ABA services, and there is no reason to believe that the proposal would adversely impact multi-disciplinary approaches to the treatment of autism. She added that the proposal seeks only to ensure that those who perform these services are qualified to do so. She stated that she is confident that as time passes ABAs will acquire the skills needed to fully participate in those multi-disciplinary teams dealing with the problems of autistic children.

Dr. Fisher stated that the proposal clearly exempts all qualified practitioners from the terms of the proposal, and accordingly, would not decrease the supply of available practitioners.

Criterion Three:

The public needs, and can reasonably be expected to benefit from, assurance of initial and continuing professional ability by the state.

McCarty moved and Parsow seconded that the proposal satisfies the third criterion. Voting aye were Fisher, McCarty, Parsow, and Snyder. Voting nay were Donaldson and Gaden. Michels abstained. The motion carried.

Mr. Gaden reiterated his concern that the proposal would create confusion as to which providers can provide ABA services and which cannot. Dr. Donaldson stated that he has concerns about the narrowness of the profession of applied behavior analysis regarding diagnosis and therapeutic modalities. He added that the applicants should not be granted licensure as independent practitioners.

Criterion Four:

The public cannot be effectively protected by other means in a more cost-effective manner.

Parsow moved and Fisher seconded that the proposal satisfies the fourth criterion. Voting aye were Fisher, McCarty, Parsow, and Snyder. Voting nay were Donaldson and Gaden. Michels abstained. The motion carried.

Dr. Snyder commented that certification might be a better option than licensure for this group. Dr. Donaldson stated that licensure would be more acceptable to him if it were a version of licensure wherein ABAs would practice under the supervision of other licensed providers such as psychologists or physicians.

Dr. Fisher stated that certification would not provide adequate protection for the public because it is voluntary and would not prevent unqualified people from practicing.

By virtue of the actions taken on each of the four criteria, the committee members recommended in favor of the applicants' proposal.

After taking action on the four criteria, the committee members discussed and agreed upon the following ancillary recommendations:

Ancillary Recommendations

1. Snyder moved and Parsow seconded that the committee recommend that all recognized professions that are licensed, certified, or regulated under the laws of this State should not be excluded from rendering services consistent with their professional training and code of ethics and within their scope of practice as set out in the statutes regulating their professional practice if they do not represent themselves to be licensed behavior analysts. Such professionals, if appropriately trained in behavior analysis, would be able to continue to use the terms "applied behavior analyst" and "applied behavior analysis" to represent themselves and their services. Statutory language should also include a prohibition against state agencies or third-party payers regulated by the State of Nebraska from excluding licensed psychologists from payment for authorized or mandated ABA services.

   Voting aye were Donaldson, Fisher, Gaden, McCarty, Parsow and Snyder. There were no nay votes. Michels abstained. The motion carried.

2. Donaldson moved and Parsow seconded that a statutory definition of applied behavior analysis should be created.

   Voting aye were Donaldson, Fisher, Gaden, McCarty, Parsow and Snyder. There were no nay votes. Michels abstained. The motion carried.

3. Snyder moved and Parsow seconded that a dual track to competency in applied behavior analysis should be established for psychologists. This dual track would include the following:

   a. A certification track that would not include any additional training beyond that received to qualify for a license as a psychologist. This would be for those psychologists who provide services themselves, but do not desire to supervise other professionals providing these services.
   b. A special training and experiential track for those psychologists who seek to supervise other professionals who provide applied behavior analysis services.

   Voting aye were Donaldson, Fisher, Gaden, McCarty, Parsow and Snyder. There were no nay votes. Michels abstained. The motion carried.

OVERVIEW OF COMMITTEE PROCEEDINGS

- The committee members met for the first time on December 18, 2009 for orientation to the review process and initial discussion on the proposal.
- On January 13, 2010, the committee members discussed and accepted the applicants' amended proposal and generated questions and issues that they wanted to discuss at the next meeting.
- On February 12, 2010, the committee continued its discussion on the proposal.
- The committee members met on March 17, 2010 to begin formulating preliminary recommendations on the proposal.
- At their April 28, 2010 meeting, the committee members discussed and accepted the applicants' amended proposal and completed their formulation of preliminary recommendations.
- June 2, 2010 was the Public Hearing regarding the proposal.
- The committee members met on June 30, 2010 and finalized their recommendations on the applicants' proposal, including ancillary recommendations in their report.
- On July 21, 2010, the committee approved its report of recommendations and adjourned sine die.