

BILL ANALYSIS

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By: Lucio
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The clinical practice of applied behavior analysis (ABA) requires extensive training and ongoing professional development as it incorporates knowledge drawn from the scientific literature and utilizes scientific methods. ABA comprises many evidence-based techniques or procedures that are effective for building useful skills and reducing problematic behaviors. ABA involves the design, implementation, and evaluation of instructional and environmental modifications to improve socially significant behavior to a meaningful degree. Behavior analysts must be highly skilled since they primarily treat diverse and vulnerable populations and their treatments target severe and complex behavior disorders. Treatments employed by behavior analysts require systematic evaluation between behavior and environmental events, an approach called functional assessment. A misapplication of functional assessment often leads to worsening of behavior disorders, such as aggression and self-injury.

Currently, there is no regulatory entity in Texas for practitioners of ABA. Since no mechanism exists to protect consumers, employers, and state agencies from individuals who are not adequately trained, or whose practice is not consistent with the profession's ethical and disciplinary standards, the unregulated practice of ABA may thus significantly harm or endanger the public health, safety, and welfare. Under the status quo, citizens who are harmed by unregulated practitioners have little or no protection or legal recourse.

S.B. 589 intends to establish a regulatory framework under the licensing and regulation of the practice of ABA in order to protect consumers and practitioners of these services.

As proposed, S.B. 589 amends current law relating to the establishment of the Texas Board of Behavior Analyst Examiners and the requirement to obtain a license to practice as a behavior analyst or assistant behavior analyst, imposes fees, and provides an administrative penalty.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Texas Board of Behavior Analyst Examiners in SECTION 1 (Section 506.151, 506.153, 506.155, 506.157, 506.202, 506.204, 506.256, 506.258, 506.259, 506.301, 506.353, 506.355, and 506.402, Occupations Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Subtitle I, Title 3, Occupations Code, by adding Chapter 506, as follows:

CHAPTER 506. BEHAVIOR ANALYSTS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 506.001. SHORT TITLE. Authorizes this chapter to be cited as the Behavior Analyst Licensing Act.

Sec. 506.002. DEFINITIONS. Defines "behavior analyst board," "certifying entity," "executive director," "license holder," "licensed assistant behavior analyst," "licensed behavior analyst," "medical board," and "physician."

Sec. 506.003. PRACTICE OF APPLIED BEHAVIOR ANALYSIS. (a) Provides that the practice of applied behavior analysis (ABA) is the design, implementation, and evaluation of instructional and environmental modifications to produce socially significant improvements in human behavior.

(b) Provides that the practice of ABA includes the empirical identification of functional relations between behavior and environmental factors, known as functional assessment or functional analysis.

(c) Provides that ABA interventions are based on scientific research and the direct observation and measurement of behavior and environment and use contextual factors, motivating operations, antecedent stimuli, positive reinforcement, and other procedures to help individuals develop new behaviors, increase or decrease existing behaviors, and elicit or evoke behaviors under specific environmental conditions.

(d) Provides that the practice of ABA does not include psychological testing, psychotherapy, cognitive therapy, psychoanalysis, hypnotherapy, or counseling as treatment modalities, or the diagnosis of disorders.

SUBCHAPTER B. APPLICATION OF CHAPTER; USE OF TITLE

Sec. 506.051. LICENSED PSYCHOLOGISTS. Provides that this chapter does not apply to a person licensed to practice psychology in this state if the ABA services provided are within the scope of the licensed psychologist's education, training, and competence.

Sec. 506.052. OTHER LICENSED PROFESSIONALS. Provides that this chapter does not apply to a person licensed to practice another profession in this state if the ABA services provided are within a certain scope.

Sec. 506.053. FAMILY MEMBERS AND GUARDIANS. Provides that this chapter does not apply to a family member or guardian of a recipient of ABA services who is implementing a behavior analysis treatment plan for the recipient under the extended authority and direction of a licensed behavior analyst or licensed assistant behavior analyst.

Sec. 506.054. PARAPROFESSIONALS. Provides that this chapter does not apply to a paraprofessional technician who delivers ABA services if certain conditions are met.

Sec. 506.055. STUDENTS, INTERNS, AND FELLOWS. Provides that this chapter does not apply to an ABA activity or service of a college or university student, intern, or fellow if certain conditions are met.

Sec. 506.056. SUPERVISED EXPERIENCE. Provides that this chapter does not apply to an unlicensed person pursuing supervised experience in ABA if the supervised experience is consistent with the requirements of the certifying entity and Texas Board of Behavior Analyst Examiners (TBBAE) rules.

Sec. 506.057. TEMPORARY SERVICES OF BEHAVIOR ANALYST FROM ANOTHER STATE. (a) Provides that this chapter does not apply to a behavior analyst licensed in another jurisdiction or certified by the certifying entity if the activities and services conducted in this state meet certain requirements.

(b) Requires that a behavior analyst described by Subsection (a) inform the recipient of ABA services, or a parent or guardian of the recipient if the recipient is under 18 years of age, of certain information.

Sec. 506.058. TEACHER OR EMPLOYEE OF SCHOOL DISTRICT. (a) Provides that this chapter does not apply to a teacher or employee of a private or public school who

provides ABA services if the teacher or employee is performing duties within the scope of the teacher's or employee's employment.

(b) Prohibits a person described by Subsection (a) from taking certain actions.

Sec. 506.059. USE OF TITLE "BEHAVIOR ANALYST." (a) Provides that this chapter does not apply to a person described by Subsection (b).

(b) Authorizes a person to use the title "behavior analyst" if the person meets certain criteria.

SUBCHAPTER C. TEXAS BOARD OF BEHAVIOR ANALYST EXAMINERS

Sec. 506.101 BOARD MEMBERSHIP. (a) Provides that TBBAE is composed of nine certain members appointed by the governor with the advice and consent of the senate. Sets forth the composition of TBBAE.

(b) Requires a person, to be qualified for appointment under Subsection (a)(1) (relating to TBBAE member composition, including four licensed behavior analysts, at least one of whom must be certified as a Board Certified Behavior Analyst—Doctoral or hold an equivalent certification issued by the certifying entity), to have at least five years of experience as a licensed behavior analyst after being certified by the certifying entity.

(c) Requires that appointments to TBBAE be made without regard to the race, color, disability, sex, religion, age, or national origin of the appointee.

Sec. 506.102. ELIGIBILITY OF PUBLIC MEMBERS. Provides that a person is not eligible for appointment as a public member of TBBAE if the person meets certain criteria.

Sec. 506.103. MEMBERSHIP AND EMPLOYEE RESTRICTIONS. (a) Defines "Texas trade association."

(b) Prohibits a person from being a TBBAE member and from being an employee of the Texas Medical Board (TMB) or TBBAE employed in a "bona fide executive, administrative, or professional capacity," as that phrase is used for purposes of establishing an exemption to the overtime provisions of the federal Fair Labor Standards Act of 1938 (29 U.S.C. Section 201 et seq.) if the person meets certain criteria.

(c) Prohibits a person from being a TBBAE member or acting as general counsel to TMB or TBBAE if the person is required to register as a lobbyist under Chapter 305 (Registration of Lobbyists), Government Code, because of the person's activities for compensation on behalf of a profession related to the operation of TBBAE.

Sec. 506.104. TERMS; VACANCY. (a) Provides that TBBAE members serve staggered six-year terms, with the terms of three members expiring February 1 of each odd-numbered year.

(b) Prohibits a member from serving more than two consecutive six-year terms.

(c) Requires that the governor appoint a member to fill the unexpired term if a vacancy occurs during a member's term.

(d) Requires that a member serve until a successor is appointed and assumes office.

Sec. 506.105. OFFICERS. Requires that TBBAE elect from its members certain officers at the TBBAE meeting held on the date closest to August 31 of each year.

Sec. 506.106. GROUNDS FOR REMOVAL. (a) Sets forth grounds for removal from TBBAE.

(b) Provides that the validity of an action of TBBAE is not affected by the fact that the action is taken when a ground for removal of a member exists.

(c) Requires the TBBAE executive director (executive director), if the executive director has knowledge that a potential ground for removal exists, to notify the presiding officer of TBBAE of the potential ground. Requires that the presiding officer then notify the governor and the Texas attorney general (attorney general) that a potential ground for removal exists. Requires that the executive director, if the potential ground for removal involves the presiding officer, notify the next highest ranking officer of TBBAE, who is required then to notify the governor and attorney general that a potential ground for removal exists.

Sec. 506.107. COMPENSATION; REIMBURSEMENT. (a) Prohibits a TBBAE member from receiving compensation for the member's services. Provides that a member is entitled to a per diem and travel allowance for each day the member engages in TBBAE business at the rate set for state employees in the General Appropriations Act (GAA).

(b) Authorizes the per diem and travel allowance authorized by this section to be paid only from fees collected under this chapter.

Sec. 506.108. MEETINGS. (a) Requires that TBBAE meet at least twice each year.

(b) Authorizes TBBAE to meet at other times at the call of the presiding officer or a majority of the members.

Sec. 506.109. TRAINING PROGRAM FOR MEMBERS. (a) Prohibits a person who is appointed to and qualifies for office as a TBBAE member from voting, deliberating, or being counted as a member in attendance at a TBBAE meeting until the person completes a training program that complies with this section.

(b) Requires that the training program provide the person with certain information.

(c) Provides that a person appointed to TBBAE is entitled to reimbursement, as provided by GAA, for the travel expenses incurred in attending the training program regardless of whether the attendance at the program occurs before or after the person qualifies for office.

Sec. 506.110. CIVIL LIABILITY. Provides that a TBBAE member is not liable in a civil action for an act performed in good faith while performing duties as a member.

SUBCHAPTER D. POWERS AND DUTIES OF BEHAVIOR ANALYST BOARD AND MEDICAL BOARD

Sec. 506.151. GENERAL POWERS AND DUTIES OF BEHAVIOR ANALYST BOARD. (a) Requires that TBBAE, subject to the advice and approval of TMB, adopt rules consistent with this chapter to carry out TBBAE's duties in administering this chapter and establish standards of conduct and adopt a code of professional ethics for license holders.

(b) Requires that TBBAE take certain actions.

Sec. 506.152. ASSISTANCE BY MEDICAL BOARD. (a) Requires that TMB provide administrative and clerical employees as necessary to enable TBBAE to administer this chapter.

(b) Requires that TBBAE, subject to the advice and approval of TMB, develop and implement policies that clearly separate the policy-making responsibilities of TBBAE and the management responsibilities of the executive director and the staff of TMB.

Sec. 506.153. FEES. (a) Requires that TBBAE, with the advice and approval of TMB, by rule set fees in the amounts reasonable and necessary to cover the costs of administering this chapter.

(b) Authorizes funds to administer this chapter to be appropriated only from fees collected under this chapter.

Sec. 506.154. RULES RESTRICTING ADVERTISING OR COMPETITIVE BIDDING.

(a) Prohibits TMB or TBBAE from adopting rules restricting advertising or competitive bidding by a license holder except to prohibit false, misleading, or deceptive practices.

(b) Prohibits TMB or TBBAE from including in rules to prohibit false, misleading, or deceptive practices by a license holder a rule that restricts certain aspects of advertising.

Sec. 506.155. RULES ON CONSEQUENCES OF CRIMINAL CONVICTION. (a) Requires that TBBAE adopt rules necessary to comply with Chapter 53 (Consequences of Criminal Conviction).

(b) Requires that TBBAE, in TBBAE's rules under this section, list the specific offenses for which a conviction would constitute grounds for TBBAE to take action under Section 53.021 (Authority to Revoke, Suspend, or Deny License).

Sec. 506.156. ANNUAL REGISTRY. (a) Requires that TBBAE annually prepare a registry of all license holders.

(b) Requires that TBBAE make the registry available to the public, license holders, and other state agencies.

Sec. 506.157. BEHAVIOR ANALYST BOARD DUTIES REGARDING COMPLAINTS. (a) Requires that TBBAE, by rule, adopt a standardized form for filing complaints with TBBAE and prescribe information to be provided when a person files a complaint with TBBAE.

(b) Requires that TBBAE provide reasonable assistance to a person who wishes to file a complaint with the board.

Sec. 506.158. USE OF TECHNOLOGY. Requires that TBBAE, subject to the advice and approval of TMB, implement a policy requiring TBBAE to use appropriate technological solutions to improve TBBAE's ability to perform TBBAE's functions. Requires that the policy ensure that the public is able to interact with TBBAE on the Internet.

Sec. 506.159. NEGOTIATED RULEMAKING AND ALTERNATIVE DISPUTE RESOLUTION POLICY. (a) Requires that TBBAE, subject to the advice and approval of TMB, develop and implement a policy to encourage use of certain procedures.

(b) Requires that TBBAE's procedures relating to alternative dispute resolution (ADR) to conform, to the extent possible, to any model guidelines issued by the State Office of Administrative Hearings (SOAH) for the use of ADR by state agencies.

(c) Requires that TBBAE designate a trained person to take certain actions related to negotiated rulemaking and ADR policy.

SUBCHAPTER E. PUBLIC INTEREST INFORMATION AND COMPLAINT PROCEDURES

Sec. 506.201. PUBLIC INTEREST INFORMATION. (a) Requires that TBBAE prepare information of public interest describing the functions of TBBAE.

(b) Requires that TBBAE make the information available to the public and appropriate state agencies.

Sec. 506.202. COMPLAINTS. (a) Requires that TBBAE, by rule, establish methods by which service recipients are notified of certain information of TBBAE for the purpose of directing complaints to TBBAE. Authorizes TBBAE to provide for that notice in a certain manner.

(b) Requires that TBBAE list with its regular telephone number any toll-free telephone number established under other state law that may be called to present a complaint about a health professional.

Sec. 506.203. INFORMATION ABOUT COMPLAINT ACTIONS. (a) Requires that TBBAE maintain a system to promptly and efficiently act on complaints filed with TBBAE. Requires that TBBAE maintain certain information about a complaint.

(b) Requires that TBBAE make information available describing its procedures for complaint investigation and resolution.

(c) Requires that TBBAE periodically notify the complaint parties of the status of the complaint until final disposition.

(d) Requires that TBBAE analyze complaints filed with TBBAE to identify certain trends or issues related to certain violations.

Sec. 506.204. GENERAL RULES REGARDING COMPLAINT INVESTIGATION AND DISPOSITION. Requires that TBBAE adopt rules concerning the investigation of a complaint filed with TBBAE. Requires the rules to fulfill certain criteria.

Sec. 506.205. CONFIDENTIALITY OF COMPLAINT INFORMATION. (a) Provides that except as provided by Subsection (b), a complaint and investigation concerning a license holder and all information and materials compiled by TBBAE in connection with the complaint and investigation are not subject to certain disclosures.

(b) Authorizes a complaint or investigation subject to Subsection (a) and all information and materials compiled by TBBAE in connection with the complaint, in accordance with Chapter 611 (Mental Health Records), Health and Safety Code, to be disclosed to certain parties.

(c) Requires TBBAE, unless good cause for delay is shown to the presiding officer at the hearing, to provide the license holder with access to all information that TBBAE intends to offer into evidence at the hearing not later than the 30th day after the date TBBAE receives written request from a license holder who is entitled to a hearing under this chapter or from the license holder's attorney of record.

(d) Requires that TBBAE protect the identity of any patient, except certain patients, whose records are examined in connection with a disciplinary investigation or proceeding against a license holder.

Sec. 506.206. PUBLIC PARTICIPATION. (a) Requires that TBBAE develop and implement policies that provide the public with a reasonable opportunity to appear before TBBAE and to speak on any issue under TBBAE's jurisdiction.

(b) Requires that TBBAE prepare and maintain a written plan that describes how a person who does not speak English may be provided reasonable access to TBBAE's programs.

Sec. 506.207. SUBPOENAS. (a) Authorizes the presiding officer of TBBAE, in an investigation of a complaint filed with TBBAE, to issue a subpoena to compel the attendance of a relevant witness or the production, for inspection or copying, of relevant evidence that is in this state.

(b) Authorizes a subpoena to be served personally or by certified mail.

(c) Authorizes TBBAE, acting through the attorney general, if a person fails to comply with a subpoena, to file suit to enforce the subpoena in a district court in Travis County or in the county in which a hearing conducted by TBBAE is authorized to be held.

(d) Requires that the court, on finding that good cause exists for issuing the subpoena, order the person to comply with the subpoena. Authorizes the court to punish a person who fails to obey the court order.

(e) Requires that TBBAE pay for photocopies subpoenaed under this section a reasonable fee in an amount not to exceed the amount TBBAE is authorized to charge for copies of its records.

(f) Provides that the reimbursement of the expenses of a witness whose attendance is compelled under this section is governed by Section 2001.103 (Expenses of Witness or Deponent), Government Code.

(g) Authorizes information and materials subpoenaed or compiled by TBBAE in connection with the investigation of a complaint to be disclosed only as provided by Section 506.205.

SUBCHAPTER F. LICENSE REQUIREMENTS

Sec. 506.251. LICENSE REQUIRED. (a) Prohibits a person, except as provided by Subchapter B, from engaging in the practice of ABA unless the person holds a license under this chapter.

(b) Prohibits a person from using the title "licensed behavior analyst" or "licensed assistant behavior analyst," as appropriate, unless the person is licensed under this chapter.

(c) Prohibits a person, except as provided by Subchapter B, from using the title "behavior analyst" unless the person is licensed under this chapter.

Sec. 506.252. LICENSE APPLICATION. Requires that each applicant for a license under this chapter submit an application and the required fees to TBBAE. Requires the application to include sufficient evidence, as defined by TBBAE rules, that the applicant meets certain criteria.

Sec. 506.253. REQUIREMENTS FOR LICENSED BEHAVIOR ANALYST. Requires that an applicant for a license as a licensed behavior analyst present evidence to TBBAE that the applicant meets certain education and certification criteria.

Sec. 506.254. REQUIREMENTS FOR LICENSED ASSISTANT BEHAVIOR ANALYST. Requires that an applicant for a license as a licensed assistant behavior analyst present evidence to TBBAE that the applicant meets certain criteria.

Sec. 506.255. ISSUANCE OF LICENSE. Requires that TBBAE issue a license as a licensed behavior analyst or a licensed assistant behavior analyst, as appropriate, to an applicant who meets certain requirements.

Sec. 506.256. TEMPORARY LICENSE. (a) Authorizes TBBAE, by rule, to provide for the issuance of a temporary license.

(b) Requires that rules under this section include a time limit for a temporary license.

Sec. 506.257. RECIPROCITY. (a) Requires that TBBAE issue a license to a person who is currently licensed as a behavior analyst or as an assistant behavior analyst from another state or jurisdiction that imposes licensure requirements similar to those specified in this chapter.

(b) Requires that an applicant for a reciprocal license meet certain requirements.

Sec. 506.258. INACTIVE STATUS. Authorizes TBBAE, by rule, to provide for a person licensed under this chapter to be placed on inactive status.

Sec. 506.259. RETIREMENT STATUS. Authorizes TBBAE by rule to adopt a system for placing a person licensed under this chapter on retirement status.

SUBCHAPTER G. LICENSE RENEWAL

Sec. 506.301. LICENSE EXPIRATION. (a) Provides that a license issued under this chapter expires on the second anniversary of the date of issuance.

(b) Authorizes TBBAE, by rule, to adopt a system under which licenses expire on various dates during the year. Requires that TBBAE, for a year in which the expiration date is changed, prorate the licensing fee so that each license holder pays only the portion of the fee that is allocable to the number of months during which the license is valid. Provides that on renewal of the license on the new expiration date, the entire licensing fee is payable.

Sec. 506.302. LICENSE RENEWAL. Authorizes a license, before the expiration of a license, to be renewed by certain methods.

SUBCHAPTER H. LICENSE DENIAL AND DISCIPLINARY PROCEDURES

Sec. 506.351. GROUNDS FOR LICENSE DENIAL AND DISCIPLINARY ACTION. Authorizes TBBAE, after a hearing, to deny a license to an applicant, suspend or revoke a person's license, or place on probation a license holder if the applicant or license holder takes certain inappropriate actions.

Sec. 506.352. PROBATION. Authorizes TBBAE, if a license suspension is probated, to require a license holder to take certain actions.

Sec. 506.353. INFORMAL PROCEEDINGS. (a) Requires that TBBAE, by rule, adopt procedures governing certain dispositions and proceedings.

(b) Requires that rules adopted under this section meet certain requirements.

Sec. 506.354. HEARING. Provides that a license holder is entitled to a hearing before SOAH before a sanction is imposed under this subchapter.

Sec. 506.355. SCHEDULE OF SANCTIONS. (a) Requires that TBBAE, by rule, adopt a broad schedule of sanctions for violations under this chapter.

(b) Requires that SOAH use the schedule for any sanction imposed under this chapter as the result of a hearing conducted by SOAH.

Sec. 506.356. EMERGENCY SUSPENSION. (a) Requires that TBBAE, or a three-member committee of TBBAE members designated by TBBAE, temporarily suspend the license of a license holder if TBBAE or committee determines from the evidence or information presented to TBBAE or committee that continued practice by the license holder would constitute a continuing and imminent threat to the public welfare.

(b) Authorizes a license to be suspended under this section without notice or hearing on the complaint if certain conditions are met.

(c) Requires that SOAH hold a preliminary hearing not later than the 14th day after the date of the temporary suspension to determine if there is probable cause to believe that a continuing and imminent threat to the public welfare still exists. Requires that a final hearing on the matter be held not later than the 61st day after the date of the temporary suspension.

SUBCHAPTER I. PENALTIES AND ENFORCEMENT PROCEDURES

Sec. 506.401. INJUNCTIVE RELIEF. Authorizes TBBAE or the attorney general to institute a proceeding to enforce this chapter, including a suit to enjoin a person from practicing ABA without complying with this chapter.

Sec. 506.402. MONITORING OF LICENSE HOLDER. Requires that TBBAE, by rule, develop a system for monitoring a license holder's compliance with this chapter. Requires the rules to include certain procedures for monitoring certain license holders.

Sec. 506.403. ADMINISTRATIVE PENALTY. (a) Authorizes TBBAE to impose an administrative penalty against a person licensed under this chapter who violates this chapter or a rule or order adopted under this chapter.

(b) Prohibits an administrative penalty from exceeding \$200. Provides that each day a violation continues or occurs is a separate violation for the purpose of imposing a penalty. Requires that the amount of the penalty be based on certain criteria.

(c) Authorizes the person to stay enforcement during the time the order is under judicial review if the person pays the penalty to the court clerk or files a supersedeas bond with the court in the amount of the penalty. Authorizes a person who cannot afford to pay the penalty or file the bond to stay enforcement by filing an affidavit like that required by the Texas Rules of Civil Procedure for a party who cannot afford to file security for costs, except that TBBAE is authorized to contest the affidavit as provided by those rules.

(d) Provides that a proceeding to impose an administrative penalty is subject to Chapter 2001 (Administrative Procedure), Government Code.

Sec. 506.404. CIVIL PENALTY. (a) Provides that a person found by a court to have violated this chapter is liable to this state for a civil penalty of \$200 for each day the violation continues.

(b) Authorizes a civil penalty to be recovered in a suit brought by the attorney general, a district attorney, or a county attorney.

Sec. 506.405. CRIMINAL OFFENSE. (a) Provides that a person commits an offense of the person knowingly violates this chapter.

(b) Provides that an offense under this section as a Class A misdemeanor.

(c) Provides that each day of violation constitutes a separate offense.

SECTION 2. Requires the governor, as soon as practicable after the effective date of this Act, to appoint nine members to TBBAE in accordance with Chapter 506, Occupations Code, as added by this Act. Requires the governor, in making the initial appointments, to designate three members for terms expiring February 1, 2019, three members for terms expiring February 1, 2021, and three members for terms expiring February 1, 2023.

SECTION 3. Requires that TBBAE, not later than January 1, 2018, adopt the rules, procedures, and fees necessary to administer Chapter 506, Occupations Code, as added by this Act.

SECTION 4. Provides that notwithstanding Chapter 506, Occupations Code, as added by this Act, a behavior analyst or assistant behavior analyst is not required to hold a license under that chapter to practice as a licensed behavior analyst or licensed assistant behavior analyst in this state before June 1, 2018.

SECTION 5. (a) Effective date, except as provided by Subsection (b) of this section: September 1, 2017.

(b) Effective date, Section 506.251, Occupations Code, and Subchapter I, Chapter 506, Occupations Code, as added by this Act: June 1, 2018.