
Analysis of a Proposal to Expand the Regulation of Occupational Therapists

A Report to the
Governor
and the
Legislature of
the State of
Hawaii

Report No. 97-15
December 1997



THE AUDITOR
STATE OF HAWAII

The Office of the Auditor

The missions of the Office of the Auditor are assigned by the Hawaii State Constitution (Article VII, Section 10). The primary mission is to conduct post audits of the transactions, accounts, programs, and performance of public agencies. A supplemental mission is to conduct such other investigations and prepare such additional reports as may be directed by the Legislature.

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OVERVIEW

THE AUDITOR
STATE OF HAWAII

Analysis of a Proposal to Expand the Regulation of Occupational Therapists

Summary

We analyzed whether occupational therapy practitioners should be regulated and, if so, in what form. We conclude that regulation is not warranted and recent proposals to expand regulation should not be enacted. If regulation is deemed necessary, it should be minimal.

Occupational therapists and occupational therapy assistants help individuals who are disabled by mental, physical, developmental, or emotional conditions to develop, recover, or maintain the skills of daily living and work. Chapter 457G of the Hawaii Revised Statutes (HRS) requires persons who identify themselves as occupational therapists or occupational therapy assistants to meet certain private certification requirements. Hawaii's attorney general or the Office of Consumer Protection in the Department of Commerce and Consumer Affairs is authorized to bring proceedings to halt and fine any violations.

As requested in House Concurrent Resolution No. 49 of the 1997 legislative session, we assessed the need for regulating the practice of occupational therapy and considered House Bill No. 1099, House Draft 1 of 1997. The bill would expand regulation by establishing a licensing program for occupational therapists to be administered within the Department of Commerce and Consumer Affairs. We also considered other regulatory alternatives.

In our analysis, we applied the principles of the Hawaii Regulatory Licensing Reform Act, Chapter 26H, HRS. The law states that professions and vocations should be regulated only when reasonably necessary to protect the health, safety, and welfare of consumers. In assessing the need for regulation, the Auditor is to give great weight to evidence of abuse by providers. Other considerations include whether alternatives provide sufficient protection to consumers, and whether the benefits of regulation outweigh the costs.

We found that regulation of the practice of occupational therapy is not warranted. The practice poses little risk of serious harm to consumers. In Hawaii, we found no documented evidence of actual harm. Furthermore, adequate private protections for consumers are already in place. Occupational therapists work under orders from the patient's physician and are employed by knowledgeable health care providers. The American Occupational Therapy Association and the National Board for Certification in Occupational Therapy help ensure competent practice. Criminal laws provide additional protection.

Moreover, regulation could be costly. For example, if House Bill No. 1099, House Draft 1, were enacted, each occupational therapist could pay an initial licensing fee of at least \$659 and possibly more. The required fees could restrict entry into the profession.

We also found that if the Legislature considers it necessary to regulate occupational therapy, simple registration of occupational therapists should be sufficient. This would create a roster to inform the public of the nature of their services and enable the State to keep track of them. Occupational therapy assistants would not have to register because they work in controlled settings with monitoring by occupational therapists. An alternative would simply be to keep Chapter 457G on the books, because it has been implemented at little or no cost and with no apparent problems.

Recommendation and Response

We recommend that occupational therapy not be regulated and that Chapter 457G, HRS, be repealed. If the Legislature deems regulation necessary, simple registration of occupational therapists, or at most, continuing Chapter 457G for occupational therapists and occupational therapy assistants, should be sufficient. If retained, Chapter 457G should be amended to reflect the current name of the certifying organization, the National Board for Certification in Occupational Therapy.

The Department of Commerce and Consumer Affairs did not submit a response to a draft of this report.

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Hawaii

Submitted by

THE AUDITOR
STATE OF HAWAII

Report No. 97-15
December 1997

Foreword

This report was prepared in response to the Legislature's request in House Concurrent Resolution No. 49 of the 1997 Regular Session. The resolution asked the State Auditor to study the need for regulating the practice of occupational therapy and to consider House Bill No. 1099, House Draft 1 of the session, which would expand the State's current regulation of this profession.

We acknowledge the cooperation of the Department of Commerce and Consumer Affairs and other organizations and individuals knowledgeable about the profession whom we contacted during the course of our analysis.

Marion M. Higa
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Chapter 1

Introduction

Since 1978, state law in Hawaii has required persons who identify themselves as occupational therapists or occupational therapy assistants to meet certain private certification requirements. House Concurrent Resolution No. 49 of the 1997 legislative session requested the State Auditor to study the need for regulating the practice of occupational therapy and to consider House Bill No. 1099, House Draft 1 of 1997, which would expand the State's current regulation of this profession. The following report responds to the Legislature's request.

Background on Occupational Therapy Practice

Occupational therapy practitioners help individuals who are disabled by mental, physical, developmental, or emotional conditions to develop, recover, or maintain the skills of daily living and work. The goal is to assist the patient in achieving an independent, productive, and satisfying life.

Occupational therapy can include helping patients to improve their basic motor functions, reasoning abilities, and work skills or compensate for permanent loss of function. Practitioners may provide a wide range of assistance. Some examples are helping with daily activities such as cooking; demonstrating physical exercises to increase strength and dexterity; providing computer programs to develop reasoning skills; and providing wheelchairs and other special equipment. Occupational therapy that is designed to help the patient find and keep a job is called industrial therapy.

Occupational therapy is performed in such locations as acute care hospitals, skilled nursing facilities, psychiatric facilities, rehabilitation centers, and patients' homes. Federal regulations require that occupational therapy services be provided to special education children in their schools; in Hawaii, these services are provided by the state Department of Health.

Occupational therapy patients include victims of strokes, aging impairments, arthritis, psychological problems, and developmental problems. The increasing number of elderly in the United States is expected to greatly increase the need for occupational therapy practitioners. Many colleges and universities throughout the nation are adding occupational therapy curricula to meet the rising demand.

Professional organizations

The American Occupational Therapy Association represents the professional interests of occupational therapy practitioners nationally by conducting research and educational programs, standards review, political action, and other activities.

The National Board for Certification in Occupational Therapy is a national, voluntary, private credentialing organization. It awards the professional credentials of registered occupational therapist and certified occupational therapy assistant.

The Occupational Therapy Association of Hawaii is affiliated with the American Occupational Therapy Association. The primary goals of the Hawaii association are education for occupational therapy practitioners and professional affiliation.

Practitioners and their qualifications

The field of occupational therapy has two practitioner levels—the occupational therapist and the occupational therapy assistant. Registered occupational therapists have a minimum of a bachelor’s degree with six months of approved internship. They must pass the national certification examination of the National Board for Certification in Occupational Therapy. Certified occupational therapy assistants earn a two-year degree with three months of approved fieldwork and also must pass the board’s exam. Foreign-educated therapists may be certified by the board through a separate process that verifies their education and level of competency. The Accreditation Council for Occupational Therapy Education (within the American Occupational Therapy Association) accredits curricula for both therapists and assistants.

Numbers in Hawaii

Hawaii has about 250 registered occupational therapists and 80 certified occupational therapy assistants.

Regulation in other states

According to the American Occupational Therapy Association, all 50 states regulate occupational therapy, with 47 states regulating both occupational therapists and occupational therapy assistants and three states regulating occupational therapists only. As illustrated in Exhibit 1.1, licensure is the most common form of regulation, followed by certification, registration, and “trademark” protection (Hawaii takes the “trademark” approach). The exhibit explains how the association uses these terms.

Exhibit 1.1
State Regulation of Occupational Therapy Nationwide
as of July 1997

Type of Regulation	Number of States Regulating Occupational Therapists	Number of States Regulating Occupational Therapy Assistants
Licensure	40	39
Certification	4	3
Registration	3	3
"Trademark" Protection	3*	2*
Total	50	47

* includes Hawaii

Source: American Occupational Therapy Association

Note: The association defines the terms as follows: licensing prohibits individuals not licensed by the state from practicing occupational therapy or referring to themselves as occupational therapists or occupational therapy assistants; certification prohibits individuals not certified by the state from referring to themselves as occupational therapists or occupational therapy assistants; mandatory registration is similar to certification but unlike licensing and certification may not mandate entry-level competency; voluntary registration has no state requirements for practice; and "trademark" protection prohibits individuals not certified by the National Board for Certification in Occupational Therapy from referring to themselves as occupational therapists or occupational therapy assistants.

Current and Proposed Regulation in Hawaii

Occupational therapy is already regulated in Hawaii. Efforts have been made to expand regulation.

Existing law

Occupational therapy is currently regulated under Chapter 457G, Hawaii Revised Statutes (HRS) (Occupational Therapy Practice). This law simply requires that persons who indicate or imply that they are occupational therapists or occupational therapy assistants must have completed the educational requirements and supervised fieldwork experience required by the American Occupational Therapy Association. They must also have passed a national certification examination

administered by the association. (Chapter 2 of our report recommends that if Chapter 457G is retained, it should be corrected to refer to the National Board for Certification in Occupational Therapy, not the American Occupational Therapy Association.)

Chapter 457G also authorizes Hawaii's attorney general or the director of the Office of Consumer Protection in the Department of Commerce and Consumer Affairs to bring proceedings to enjoin (halt) and fine any violations.

House Bill No. 1099

During the 1997 regular session, House Bill No. 1099 relating to occupational therapists was introduced. The bill sought to repeal Chapter 457G, HRS, and establish a new regulatory scheme including a Board of Occupational Therapy Practice, licensing requirements for occupational therapists and occupational therapy assistants, and grounds for disciplinary action.

Under the bill, persons who wish to practice occupational therapy, or purport to be occupational therapists or occupational therapy assistants, would need a license from the State. The stated purpose of the bill was to (1) safeguard the public health, safety, and welfare, (2) protect consumers from incompetent, unscrupulous, and unauthorized persons, (3) assure the highest degree of professional conduct, and (4) assure the availability of high quality services.

House Bill No. 1099, House Draft 1

The House Committee on Health passed House Bill No. 1099 with amendments as House Bill No. 1099, House Draft 1. While the draft has purposes similar to the original bill and would repeal Chapter 457G, the draft differs significantly from the original bill. Instead of establishing a Board of Occupational Therapy Practice, the draft establishes a licensing program administered by the director of the Department of Commerce and Consumer Affairs with the assistance of an advisory committee of occupational therapists. Instead of including both practice regulation and title regulation, the draft focuses on title regulation, requiring a license before one could use titles or words indicating that one is an occupational therapist.

Licensing requirements

Under H.B. 1099, H.D. 1, licensing as an occupational therapist would require a bachelor's or higher degree in a program approved by the Accreditation Council for Occupational Therapy Education. Passing the examination of the National Board for Certification in Occupational Therapy would also be required. The director of commerce and consumer affairs could waive the education and examination

requirements for an applicant licensed by another state with requirements equal to or higher than Hawaii's.

Occupational therapy assistants would not have to be licensed. They could work under the general supervision of a licensed occupational therapist if the assistant had completed a post-secondary program approved by the accreditation council.

Exemptions

H.B. 1099, H.D. 1 would exempt the following persons from regulation:

- Practitioners of other professions or occupations licensed by another Hawaii law;
- Persons in military services or in federal facilities doing work within their duties;
- Students in an accredited or approved educational program in a supervised course of study;
- Persons fulfilling the supervised fieldwork requirements for a baccalaureate; and
- Persons licensed by another state to practice occupational therapy who conduct educational demonstrations or seminars sponsored by an appropriate organization.

Disciplinary provisions

H.B. 1099, H.D. 1 authorizes the director of commerce and consumer affairs to deny, revoke, suspend, or place restrictions on the license of any occupational therapist who violates the regulatory law. Violators can also be fined up to \$1,000 per day.

Request for Analysis

After H.B. 1099, H.D. 1 passed out of the health committee, the Legislature passed House Concurrent Resolution No. 49, requesting the Auditor to study and report on the need to regulate the practice of occupational therapy. The resolution asks the Auditor to perform a sunrise review of the regulation of occupational therapy practitioners, in particular: (1) the probable effects of regulating both occupational therapists and occupational therapy assistants, (2) whether regulation would be consistent with the policies set forth in Section 26H-2, HRS, and (3) the preferred form of regulation, if appropriate.

In conducting the review, the Auditor is asked to consider the form of regulation proposed by the Occupational Therapy Association of Hawaii in H. B. 1099, H.D. 1. The Auditor is also asked to examine the volume of work required of, and the additional resources needed by, the implementing agency (the Department of Commerce and Consumer Affairs), and the financial impact on applicants and licensees.

Objectives of the Analysis

1. Determine whether regulation of the practice of occupational therapy is warranted.
 2. Assess the appropriateness of alternative forms of regulation.
 3. Make recommendations based on our findings.
-

Scope and Methodology

We assessed the need to expand the existing regulation of occupational therapy practice as proposed in H. B. 1099, H. D. 1. In doing so, we applied the regulation criteria set forth in Section 26H-2, HRS, of the Hawaii Regulatory Licensing Reform Act.

The Legislature established the policies in Section 26H-2 to ensure that regulation of an occupation takes place only for the right reason: to protect consumers. Regulation is an exercise of the State's police power and should not be taken lightly. Consumers rarely initiate regulation. More often, practitioners themselves request regulation for benefits that go beyond consumer protection. They often equate licensure with professional status in seeking respect for the occupation. Also, through regulation, they may gain access to third-party reimbursements for their services and control entry into their field.

The policies in Section 26H-2, recently amended by Act 45, SLH 1996, continue to reinforce the primary purpose of consumer protection:

- The State should regulate professions and vocations only where reasonably necessary to protect consumers;
- Regulation should protect the public health, safety, and welfare and not the profession;
- Evidence of abuses by providers of the service should be given great weight in determining whether a reasonable need for regulation exists;

- Regulation should be avoided if it artificially increases the costs of goods and services to the consumer unless the cost is exceeded by the potential danger to the consumer;
- Regulation should be eliminated when it has no further benefits to consumers;
- Regulation should not unreasonably restrict qualified persons from entering the profession; and
- Aggregate fees for regulation and licensure must not be less than the full cost of administering the program.

We were also guided by, and applied as appropriate, any related criteria from the publication *Questions a Legislator Should Ask*, published by the national Council on Licensure, Enforcement and Regulation. The primary guiding principle for legislators, according to this publication, is whether the unregulated profession presents a clear and present danger to the public's health, safety, and welfare. If it does, regulation may be necessary; if not, regulation is unnecessary and wastes taxpayers' money.¹

We used additional criteria for our analysis, including whether:

- The incidence or severity of harm based on documented evidence is sufficiently real or serious to warrant regulation;
- The cause of harm is the practitioner's insufficient skill or incompetence;
- The occupational skill needed to prevent harm can be defined in law and measured;
- No alternatives provide sufficient protection to consumers, for example federal programs, other state laws, marketplace constraints, private action, or supervision; and
- Most other states regulate the occupation for the same reasons.

We also assessed H. B. 1099, H.D. 1 as to whether:

- The scope of practice to be regulated is clearly defined and enforceable;
- The licensing requirements are constitutional and legal, for example, no residency or citizenship requirements;

- Licensing requirements, such as experience or continuing education, are directly related to preventing harm;
- Provisions are not unduly restrictive and do not violate federal competition laws;
- Prohibited practices are directly related to protecting the public; and
- Disciplinary provisions are appropriate.

Burden of proof

In assessing the need for regulation and the specific regulatory proposal, we take the position that the burden of proof is on those in the occupation to justify their request for regulation and defend their proposed legislation. We evaluate their arguments and data against the criteria stated above.

We examine the regulatory proposal and determine whether practitioners and their professional associations have made a strong enough case for regulation. It is not enough that regulation *may* have *some* benefits. We recommend regulation only if it is *demonstrably* necessary to protect the public. We also scrutinize the language of the regulatory proposal for appropriateness.

Types of regulation

In examining the type of regulation being proposed, we typically determine whether it is one of three approaches to occupational regulation:

Licensing. A licensing law gives persons who meet certain qualifications the legal right to deliver services, that is, to practice the profession (for example, social work). Penalties may be imposed on those who practice without a license. To institute and monitor minimum standards of practice, licensing laws usually authorize a board that includes members of the profession to establish and implement rules and standards.

Certification. A certification law restricts the use of certain titles (for example, social worker) to persons who meet certain qualifications, but does not bar others who do not use the title from offering such services. This is sometimes called title protection. (Government certification should not be confused with professional certification, or credentialing, by private organizations. For example, social workers receive accreditation from the National Association of Social Workers.)

Registration. A registration law simply requires practitioners to sign up with the State so that a roster or registry will exist to inform the public of the nature of their services and to enable the State to keep track of them. Registration may be mandatory or voluntary.

In addition to considering whether regulation of occupational therapists is warranted and whether the approach proposed in H.B. 1099, H.D. 1 is appropriate, we also considered the appropriateness of other regulatory alternatives, including simple registration, or the existing approach of Chapter 457G (a fourth type of regulation called “trademark” protection), or the approach of the original H.B. 1099 (licensure through a board).

H.B. 1099, H.D. 1 would not license occupational therapy assistants. However, in light of the language of House Concurrent Resolution No. 49, we analyzed the need to regulate assistants, using the applicable criteria stated above.

We reviewed the literature on occupational therapy practitioners and their regulation, including information from other states. We reviewed complaints and other evidence of harm to consumers.

We obtained information from national and Hawaii organizations for occupational therapy. We interviewed representatives of associations and academic programs in the field of occupational therapy. We contacted staff of the Department of Commerce and Consumer Affairs and other government agencies as appropriate.

Our work was performed from June 1997 through November 1997 in accordance with generally accepted government auditing standards.

Chapter 2

The State Should Not Expand Its Regulation of Occupational Therapists

The practice of occupational therapy is regulated by Chapter 457G of the Hawaii Revised Statutes (HRS). The following chapter of our report presents our findings and recommendations on whether regulation should continue, and if so, in what form. We conclude that regulation is not warranted and recent proposals to expand regulation should not be enacted. If regulation is deemed necessary, it should be minimal.

Summary of Findings

1. Regulation of the practice of occupational therapy is not warranted. The practice poses little risk of serious harm to consumers. Other protections such as medical direction and standards of private organizations make regulation unnecessary to protect the public. Also, regulation can be costly.
2. If the Legislature finds it necessary to regulate occupational therapy, a simple registration of occupational therapists, or at most, continuing Chapter 457G, HRS, should be sufficient. If Chapter 457G is retained, it should be amended to reflect the current name of the national professional credentialing organization.

Regulation of Occupational Therapy Practitioners Is Not Warranted

Section 26H-2 of the Hawaii Regulatory Licensing Reform Act states that professions and vocations should be regulated only when necessary to protect the health, safety, and welfare of consumers. In assessing the need for regulation, the Auditor is to give great weight to evidence of abuse by practitioners. Among other things, we assess whether the frequency or severity of the harm based on documented evidence is serious enough to warrant regulation, and whether the cause of the harm is the practitioner's insufficient skill or incompetence. We also consider whether alternatives to regulation provide sufficient protection to consumers, and whether the benefits of regulation outweigh the costs.

We found that regulation of the practice of occupational therapy is unnecessary because the risk of serious harm to consumers is low. We also found that sufficient private protections exist. Regulation is duplicative and can produce substantial costs to members of the profession.

We recognize that leaders in the field of occupational therapy favor regulation and that all states currently regulate the profession. However, the available evidence still does not persuade us that regulation is justified.

Risk of harm to consumers appears low

We are simply not convinced that the improper practice of occupational therapy is likely to cause serious harm to the public. Therapy activities and procedures require special skills—such as training patients to dress and feed themselves and helping with range-of-motion exercises—but the risk of severe harm to patients seems quite limited. Occupational therapists and occupational therapy assistants do not work in emergency or life-threatening situations. Their negligence, poor clinical assessment, or improper use and maintenance of therapy equipment will probably not result in major harm to the patient.

Some potential for injury does exist. For example, one proponent of regulation said that patients could be harmed by the misuse of equipment. Ultrasound and electrical equipment could hurt patients if used at extreme settings. Burns are possible, and heart pacemakers could be disrupted. Over-aggressive treatment could lead to harm.

However, in Hawaii, we found no documented evidence of actual harm to patients caused by occupational therapy practitioners. Furthermore, of the 400 complaints reviewed by the National Board for Certification in Occupational Therapy against practitioners *nationwide* in the past 11 years, only 22 were in the categories of patient harm or practitioner incompetence. Five of these 22 complaints were found valid and sanctions were imposed. The remaining 378 complaints were for falsification and misrepresentation of education and credentials, felonies, patient abuse, and other similar misconduct. No complaints were recorded from Hawaii.

Another proponent of regulation knew of, or had heard of, cases where a therapist physically, verbally, or sexually abused patients. However, these situations are unlikely to be prevented by regulation.

It could be argued that the requirement of Chapter 457G, HRS, that persons who identify themselves as occupational therapists or occupational therapy assistants meet privately established national standards, helps ensure that consumers are not harmed by practitioners. However, we do not believe that this has been demonstrated. We also note that a 1990 study published in Colorado found no documented patient harm caused by occupational therapists, despite the absence of regulation at the time.¹

Other protections exist

Adequate private protections for consumers are already in place. Occupational therapists work under orders from the patient's physician and are employed by knowledgeable health care providers. Moreover, the national board provides a framework of standards and a system of disciplinary action that appear adequate to police the profession. Criminal laws provide additional protection.

Practitioners receive direction from knowledgeable employers

Occupational therapy practitioners perform services that require special skills, knowledge, and judgment. However, they are not fully independent health care practitioners. Occupational therapy practitioners are not employed by patients directly. The hospitals, clinics, and school systems that employ them are sophisticated and knowledgeable consumers. They are responsible for establishing and maintaining standards for the protection of patients.

In Hawaii, all occupational therapy in hospitals, clinics, and home settings begins with an order from a doctor. Rehabilitation units in which occupational therapists often work usually rely on treatment teams consisting of a physical therapist, speech therapist, and occupational therapist. Rehabilitation units have protocols to assess the needs of the various types of patients. The occupational therapist assesses the patient and determines the therapy program required. The treatment may be performed by the occupational therapist or by an occupational therapy assistant monitored by the therapist.

Newly hired practitioners generally are monitored by their supervisors to determine their level of expertise. One supervisor of a hospital clinic stated that recently graduated occupational therapists can practice outside the clinic setting only after one year, so the administrators can assess the practitioner's competency.

Occupational therapy practitioners who work in home care settings receive indirect medical supervision. Nationally and in Hawaii, these practitioners generally are employed by hospitals and rehabilitation clinics. In schools the Department of Health provides supervision of occupational therapy.

In Hawaii, occupational therapists are not known to work as independent practitioners, although nationally a small number do work independently. Generally, third party payers do not pay for occupational therapy unless it is ordered by a doctor. This reduces the likelihood of a patient seeking direct help from a practitioner. The requirements for obtaining third-party reimbursement also are an important reason for occupational therapists to work in recognized medical organizations.

In theory, the risk of harm to the public increases when occupational therapy is administered in a home setting where supervision is lacking. However, we found no cases of harm in home settings in Hawaii.

Two professional organizations set standards

Two major national organizations help ensure the competent practice of occupational therapy. The American Occupational Therapy Association accredits college curricula for occupational therapists and occupational therapy assistants. Hawaii's chapter conducts seminars for the continuing education of its members and pursues the profession's interests.

The National Board for Certification in Occupational Therapy awards credentials to practitioners who pass examinations designed to ensure uniform minimal competency. Also, the board investigates written complaints and takes action against applicants and members. Possible actions include suspension, probation, reprimand, censure, and ineligibility for certification.

Practitioners' background can be checked

Hospitals, rehabilitation clinics, schools, and other employers are responsible for verifying the qualifications and credentials of applicants for occupational therapy positions. Credentials can be verified through the national board. The board also publishes a quarterly newsletter that lists practitioners who have been recently disciplined.

If employers want more verification concerning an applicant's qualifications, they can contact his or her college and previous employers directly. In-home therapy does not significantly increase the possibility of unprofessional, unethical, or incompetent treatment. Patients do not independently hire practitioners but are referred by doctors to clinics to manage the therapy.

It appears that diligent hiring practices, such as reference and credential checks, can and do effectively prevent an individual who was fired for unsatisfactory or dangerous conduct from being hired as an occupational therapy practitioner.

Again, it could be argued that without Chapter 457G, HRS—which requires persons who identify themselves as occupational therapy practitioners to obtain professional credentials—employers would be less likely to insist on the credentials. This may or may not be the case. The 1990 Colorado study found that even without regulation, professional credentials were well known, well accepted, and usually required for employment.²

Penalties for drug abuse and sexual misconduct exist

Substance abuse and sexual misconduct are significant problems in all professions today. However, state occupational regulation is not necessary to deal with these problems.

The national board revokes credentials upon conviction of certain crimes. The board also publishes information regarding disciplinary actions against practitioners. Furthermore, Hawaii's laws provide penalties upon conviction of crimes involving sexual misconduct or substance abuse.

Situation differs from physical therapy and massage therapy

In previous reports, we examined whether continued regulation of physical therapists and massage therapists was warranted.³ In both cases, we recommended continued regulation. We should explain our different conclusion concerning the regulation of occupational therapists.

Despite few complaints of injury, we favored regulation of physical therapists because of their hands-on contact with patients having serious health conditions such as stroke and spinal cord injuries and because of the technical knowledge necessary for safe treatment. Although occupational therapists also treat such patients, their treatment is less hands-on and less dangerous.

We also favored regulation of massage therapists despite few reported injuries because improperly applying pressure to certain parts of the body could cause harm. Massage could also harm clients who are pregnant, physically disabled, or who have certain medical conditions such as skin irritations, acute inflammatory diseases, and tumors. Hands-on contact is the essence of massage therapy, unlike occupational therapy. Furthermore, we found that if massage were not regulated, its once-common association with prostitution might thrive—a problem that does not apply to occupational therapy.

Regulation would be duplicative and could be costly

Section 26H-2, HRS, requires that regulation be avoided if it artificially increases the costs of goods and services to consumers, unless the cost is exceeded by the potential danger to consumers. Regulation should be eliminated when it has no further benefits to consumers. The law also requires that regulation should not unreasonably restrict qualified persons from entering the profession, and that aggregate fees for regulation and licensure must not be less than the full cost of administering the program.

We examined the costs of four alternative approaches to regulating occupational therapy that we identified: (1) require registration of

occupational therapists; (2) continue Chapter 457G, HRS, regulating both occupational therapists and occupational therapy assistants; (3) enact House Bill No. 1099 of the Regular Session of 1997, regulating occupational therapists and occupational therapy assistants; or (4) enact House Bill No. 1099, House Draft 1 of the 1997 session, regulating occupational therapists.

Exhibit 2.1 shows the main features of the alternatives; their costs are based primarily on cost estimates provided to us by the Department of Commerce and Consumer Affairs, which we relied on simply for discussion purposes.

In estimating costs and fees for Alternatives 1, 3, and 4, the department worked from our estimate that 250 occupational therapists would initially apply for registration or licensure, 250 occupational therapists would renew their registration or license in the first renewal period, and 10 additional occupational therapists would apply for registration or licensure each year after the initial group. In addition, for Alternative 3, the department worked from the Office of the Auditor's estimate that 80 occupational therapy assistants would initially apply for licensure, 80 would renew their license in the first renewal period, and 6 new applicants would apply each year thereafter.

Alternatives 1, 3, and 4 would be administered by the department's Professional and Vocational Licensing Division. The department reports that the division operates its programs from its own revenues without funds from the state general fund.

For the first biennium of a simple registration program for occupational therapists only, with no other regulatory requirements and no enforcement component (Alternative 1), the department estimates personnel and operational costs totaling \$69,884. Using our estimates of the number of applicants for registration, the department says it would need to charge each therapist an initial application/registration fee of \$269 to fully recover its biennium costs. The department estimates costs for each subsequent biennium at \$61,884, requiring a two-year renewal fee of \$217 for each registrant.

For the first biennium of a comprehensive licensing program for both occupational therapists and occupational therapy assistants including an enforcement component, as proposed in H.B. 1099 (Alternative 3), the department estimates personnel and operational costs of \$177,696. Again using our estimates of the number of applicants, the department said it would need to charge each therapist an application/license fee of \$472 and each assistant an application/license fee of \$641 to recover this cost. Estimated costs for each subsequent biennium are also \$177,696, requiring a \$435 two-year renewal fee for therapists and a \$551 two-year renewal fee for assistants. Adding a required \$70 fee to support the

**Exhibit 2.1
Four Alternatives for Regulation of Occupational Therapy**

Alternatives	Nature of Regulation	Administrative Structure	Degree of Complexity	Estimated Licensing Program Costs	Estimated Fees on Practitioners
<p>Alternative 1 Registration</p>	<p>Occupational therapists register names and addresses for public roster. Occupational therapy assistants do not register. No other regulatory requirements and no enforcement provisions would exist.</p>	<p>Administered by the director of the Department of Commerce and Consumer Affairs (DCCA) through its Professional and Vocational Licensing Division.</p>	<p>Non-complex. Clerical work only, to maintain roster of occupational therapists.</p>	<p>\$69,884 - 1st biennium of program \$61,884 - 2nd and subsequent bienniums</p>	<p>\$269 initial registration fee and \$217 two-year renewal fee for occupational therapists.</p>
<p>Alternative 2 Existing Chapter 457G, Hawaii Revised Statutes</p>	<p>Persons who indicate they are therapists or assistants must meet national standards. Enforcement includes fines and injunctions.</p>	<p>No administrative program required. Attorney general and director of Office of Consumer Protection in DCCA are authorized to seek fines or injunctions for violations.</p>	<p>Normally not complex. No registration or licensing program to administer. However, investigation and prosecution of violations is complex involving a variety of state personnel.</p>	<p>No predictable program costs. Absence of alleged violations makes cost estimates difficult. Investigation and prosecution of a violation could cost about \$32,000.</p>	<p>No registration or licensing fees.</p>
<p>Alternative 3 House Bill No. 1099 1997 Legislative Session</p>	<p>Persons who practice therapy and call themselves therapists or assistants must be licensed and meet national standards. Enforcement includes license revocation, suspension, and fines.</p>	<p>Administered and enforced by Board of Occupational Therapy Practice supported by DCCA's Professional and Vocational Licensing Division, Regulated Industries Complaints Office, and Office of Administrative Hearings.</p>	<p>Complex. Board approves degrees, field work, and exams and sets standards for ethics and continuing education. DCCA enforces licensure standards and assists board.</p>	<p>\$177,696 - 1st biennium of program \$177,696 - 2nd and subsequent bienniums</p>	<p>\$542 initial licensing fee for therapists and \$711 for assistants. \$505 license renewal fee for therapists and \$621 for assistants. Above fees include \$70 per license for Compliance Resolution Fund to support enforcement.</p>
<p>Alternative 4 House Bill No. 1099, House Draft 1, 1997 Legislative Session</p>	<p>Persons calling themselves therapists must be licensed and meet national standards. Enforcement includes license revocation, suspension, and fines.</p>	<p>Administered and enforced by DCCA director supported by licensing division, advisory committee of occupational therapists, complaints office, and hearings office.</p>	<p>Semi-complex. Director of DCCA approves degrees, field work, and exams. DCCA monitors practitioners with assistance of advisory board.</p>	<p>\$153,234 - 1st biennium of program. \$153,234 - 2nd and subsequent bienniums</p>	<p>\$659 initial licensing fee and \$614 license renewal fee for therapists. Above fees include \$70 per license for Compliance Resolution Fund to support enforcement.</p>

enforcement account of the department's Compliance Resolution Fund would result in total fees of \$542, \$711, \$505, and \$621, respectively. Examination fees could make initial application/license fees even higher.

For the first biennium of a program to license persons who use the title of occupational therapist, including an enforcement component, as proposed in H.B. 1099, H.D. 1 (Alternative 4), the department estimates personnel and operational costs of \$153,234. The department said it would need to charge each therapist an application/license fee of \$589 to recover this cost. Estimated cost for each subsequent biennium continues at \$153,234, and requires a \$544 renewal fee for therapists. Adding the Compliance Resolution Fund fee of \$70 would mean total fees of \$659 and \$614 respectively. Again, examination costs could increase fees for initial licensure.

Alternative 2 is the existing program under Chapter 457G, in which the department's Office of Consumer Protection or the Department of the Attorney General is responsible for enforcing the requirement that persons identifying themselves as occupational therapy practitioners meet private certification requirements. Both the Office of Consumer Protection and the Department of the Attorney General informed us that they have received no complaints of violations of Chapter 457G. The consumer protection agency indicated that its cost of investigating and prosecuting a violation would be about \$32,000. The Department of the Attorney general did not estimate its potential enforcement costs. Under Chapter 457G, practitioners are not registered or licensed by the State, so they pay no application or renewal fees.

For Alternatives 1, 3, and 4, the Department of Commerce and Consumer Affairs would also have to decide how to finance start-up costs incurred for three months prior to the legal effective date of the new program. According to the department, start-up costs could be paid from the Compliance Resolution Fund, or from an increase in the initial registration or license application fees assessed by the department on applicants during the first biennium of the program, or from the state general fund reimbursed by the department through increased initial registration or license application fees, or from the general fund with no reimbursement.

The department is hesitant to use the first financing mechanism for start-up costs. If the second or third mechanisms were used, initial registration or licensing fees for the first group of applicants would be anywhere from \$37 to \$80 higher than those presented above. For example, the fee for an occupational therapist under Alternative 4 would be \$74 higher totalling \$733 and the fee for an occupational therapist assistant under Alternative 3 would be \$80 higher totalling \$791.

If the fourth mechanism for financing start-up costs were used—relying solely on the general fund—costs to the general fund would be nearly \$10,000 for Alternative 1, over \$22,000 for Alternative 3, and over \$19,000 for Alternative 4.

Management efficiencies—for example, allocating part of the program staff to other regulatory programs in the department—could reduce costs and fees of Alternatives 1, 3, and 4.

The department calculated separate licensing fees for occupational therapists and occupational therapy assistants, in response to our request that the department show which costs are attributable to each of the groups. Another approach would be to lump both groups together with each group paying the same licensing fee.

Costs are not justified by benefits

We believe the State should not allocate its limited general fund resources to regulate occupational therapy practice when current protections are sufficient, regulation is duplicative, and its benefits are so uncertain. While the State can protect the general fund and recover its annual personnel and operating costs for Alternatives 1, 3, and 4 by imposing fees on practitioners, the fees could restrict entry into the profession. Increasing initial registration or licensee fees even more to protect the general fund from start-up costs could further restrict entry. Alternative 2 is currently being implemented at little or no cost to the State because no complaints have been filed under Chapter 457G. However, potential future costs are still a concern.

Any Regulation Should Be Minimal

We concluded above that regulation of occupational therapy is not warranted. As such, we favor repeal of Chapter 457G, HRS, the current regulatory law, and the adoption of no new regulation. However, the Legislature could conclude that some form of regulation is needed if it believes that there is some potential for harm and in light of the existence of regulation in all the states.

The extent of regulation required to protect the consumer is generally determined by the probability of serious harm occurring and the capacity of regulation to prevent such harm.

Simple registration or Chapter 457G would suffice

Because the likelihood of harm from occupational therapy is minimal, and complex regulation is not necessary to control the risks that do exist, we find that any regulation should be minimal. Alternative 1—simple registration of occupational therapists—appears sufficient. Its purpose

would simply be to create a roster to inform the public of the nature of their services and enable the State to keep track of them. Occupational therapy assistants would not have to register because they work in controlled settings with monitoring by occupational therapists.

An alternative would simply be to keep Chapter 457G on the books, because it has been implemented at little or no cost and with no apparent problems. This involves stronger regulation than registration and may already have had some benefits in helping to ensure that both therapists and assistants have professional credentials, although this cannot be proven.

Either simple registration or the existing Chapter 457G would permit the State to observe the profession and enact tighter regulation should conditions warrant.

If Chapter 457G is retained, Section 457G-2 should be amended to reflect the current name of the certifying organization, the National Board for Certification in Occupational Therapy. Currently the law incorrectly refers to the American Occupational Therapy Association.

***Additional observations
on House Bill No. 1099,
H.D. 1***

As part of our analysis, we scrutinized the language of House Bill No. 1099, House Draft 1, the most recent proposal for regulation, for appropriateness. We oppose enactment of this bill because it is not necessary for protecting consumers. We also wish to note that problems in the bill include an unclear reference to the minimum licensure requirements, and the use of “practice” regulation in the guise of “title” regulation.

The bill requires the director of commerce and consumer affairs to “consider” as minimum evidence for licensure qualification the applicant’s holding a baccalaureate degree or higher from an accredited program and passing the certification exam of the National Board for Certification in Occupational Therapy. The word “consider” could be interpreted to mean that the director may require different minimal standards, thus opening the door to excessive or inadequate standards that would not protect the public appropriately.

Also, the bill may be more restrictive than it appears. It is written in the language of “title” regulation, requiring that persons wishing to use titles or words indicating that they are occupational therapists obtain a license from the State. Thus it appears to be a less stringent form of regulation than the “practice” regulation of the original House Bill No. 1099, which also requires that persons wishing to practice occupational therapy have a license.

Supposedly, title regulation leaves room for some people to carry out the activities of an occupational therapist so long as they do not identify themselves as occupational therapists. Practically speaking, however, persons who are not permitted to identify themselves by what they do may effectively be barred from such activity.

Recommendation

Occupational therapy should not be regulated and Chapter 457G, HRS, should be repealed.

If the Legislature deems regulation necessary, simple registration of occupational therapists, or at most, continuing Chapter 457G for occupational therapists and occupational therapy assistants, should be sufficient. If retained, Chapter 457G should be amended to reflect the current name of the certifying organization, the National Board for Certification in Occupational Therapy.

Notes

Chapter 1

1. Benjamin Shimberg and Doug Roederer, *Questions a Legislator Should Ask*, 2d ed., Lexington, Kentucky, The Council on Licensure, Enforcement and Regulation, 1994, p. 24.

Chapter 2

1. Colorado, Department of Regulatory Agencies, *Sunrise Review—Occupational Therapists*, Denver, June 1990, pp. 5-7.
2. *Ibid.*, p. 6.
3. Hawaii, The Auditor, *Sunset Evaluation Report: Physical Therapy*, Report No. 92-20, Honolulu, November 1992, and *Sunset Evaluation Update: Massage*, Report No. 92-17, Honolulu, November 1992.

Response of the Affected Agency

Comments on Agency Response

We transmitted a draft of this report to the Department of Commerce and Consumer Affairs on November 25, 1997. A copy of the transmittal letter is included as Attachment 1. The department elected not to submit a response to the draft report.

The final report reflects a couple of editorial changes that we made for purposes of clarification.

STATE OF HAWAII
OFFICE OF THE AUDITOR
465 S. King Street, Room 500
Honolulu, Hawaii 96813-2917



MARION M. HIGA
State Auditor
(808) 587-0800
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November 25, 1997

COPY

The Honorable Kathryn S. Matayoshi, Director
Department of Commerce and Consumer Affairs
Kamamalu Building
1010 Richards Street
Honolulu, Hawaii 96813

Dear Ms. Matayoshi:

Enclosed for your information are three copies, numbered 6 to 8 of our draft report, *Analysis of a Proposal to Expand the Regulation of Occupational Therapists*. We ask that you telephone us by Monday, December 1, 1997, on whether or not you intend to comment on our recommendations. If you wish your comments to be included in the report, please submit them no later than Tuesday, December 9, 1997.

The Governor and presiding officers of the two houses of the Legislature have also been provided copies of this draft report.

Since this report is not in final form and changes may be made to it, access to the report should be restricted to those assisting you in preparing your response. Public release of the report will be made solely by our office and only after the report is published in its final form.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Marion M. Higa'.

Marion M. Higa
State Auditor

Enclosures

