Sunrise Analysis: Nurse Aides

A Report to the Governor and the Legislature of the State of Hawai‘i

Report No. 07-06
April 2007

THE AUDITOR
STATE OF HAWAI‘I

Office of the Auditor

The missions of the Office of the Auditor are assigned by the Hawai‘i 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.

Under its assigned missions, the office conducts the following types of examinations:

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2. *Management audits*, which are also referred to as *performance audits*, examine the effectiveness of programs or the efficiency of agencies or both. These audits are also called *program audits*, when they focus on whether programs are attaining the objectives and results expected of them, and *operations audits*, when they examine how well agencies are organized and managed and how efficiently they acquire and utilize resources.

3. *Sunset evaluations* evaluate new professional and occupational licensing programs to determine whether the programs should be terminated, continued, or modified. These evaluations are conducted in accordance with criteria established by statute.

4. *Sunrise analyses* are similar to sunset evaluations, but they apply to proposed rather than existing regulatory programs. Before a new professional and occupational licensing program can be enacted, the statutes require that the measure be analyzed by the Office of the Auditor as to its probable effects.

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Hawai‘i’s laws provide the Auditor with broad powers to examine all books, records, files, papers, and documents and all financial affairs of every agency. The Auditor also has the authority to summon persons to produce records and to question persons under oath. However, the Office of the Auditor exercises no control function, and its authority is limited to reviewing, evaluating, and reporting on its findings and recommendations to the Legislature and the Governor.

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OVERVIEW

Sunrise Analysis: Nurse Aides

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Summary

Nurse aides work under the supervision of nurses and medical staff in various healthcare settings. They may also be primary care givers in adult residential care homes. Their duties may include serving and collecting food trays, helping patients to get out of bed, bathe, and dress, changing bed linens, delivering messages, sterilizing instruments, and assisting in all activities of daily living.

Currently, there are approximately 8,963 certified nurse aides in Hawai'i. For ease of description, these nurse aides are informally categorized into three groups based on their employment: "Group 1"—nurse aides employed in Medicare or Medicaid-certified nursing facilities; "Group 2"—nurse aides employed in state-licensed or –certified healthcare settings; and "Group 3"—nurse aides who are self-employed, are employed in physicians' offices, or whose employers are not Department of Human Services (DHS), or Department of Health (DOH)-licensed or –certified facilities, such as home care placement agencies. Nurse aides in Group 1 number approximately 2,726, with the remaining 6,237 nurse aides in Groups 2 and 3, who are not required to be certified by either federal or state law. Senate Bill No. 3277, Senate Draft 2, introduced in the 2006 Regular Session, proposed state regulation of Group 2 only. The Legislature requested the Auditor to analyze this proposal in House Concurrent Resolution No. 73, House Draft 1 of the 2006 session.

Federal regulations require certification of nurse aides in Group 1. In 1990, the State through Chapter 457A, Hawai'i Revised Statutes (HRS), established a certification program for nurse aides that the Department of Commerce and Consumer Affairs (DCCA), the lead agency, voluntarily extended to *all* nurse aides. However, by 2004, the DCCA attempted to discontinue certification and recertification of Groups 2 and 3. It was met with much opposition.

The DCCA is responsible for administering the certification program and maintaining the nurse aide registry. The department has contracted the American Red Cross to handle the application, testing, and other processing tasks. The Department of Human Services (DHS), the State's Medicaid Agency, is responsible for establishing the curriculum requirements for Nurse Aide Training Programs and determining the content of the Competency Evaluation Program. The DOH has contracted with the federal Centers for Medicare and Medicaid Services to implement the federal survey and certification program which includes the investigation of allegations of abuse, neglect, and misappropriation of resident property against certified nurse aides employed in certified nursing facilities and is the only entity that can place findings on the certified nurse aide registry.

The Hawai'i Regulatory Licensing Reform Act, Chapter 26H, HRS, provides the criteria for assessing whether the State should regulate professions and occupations.

The primary criterion is protecting the health, safety, and welfare of consumers. Evidence of abuse and harm must be given great weight. We found evidence of actual and potential harm by the already-regulated Group 1 nurse aides. We therefore conclude that regulation of *all* nurse aides is warranted.

Furthermore, we found that other protections do not exist to adequately safeguard the public. The current complaints process addresses only Group 1, which leaves no recourse to consumers should they have complaints against nurse aides in Groups 2 and 3. The proposed measure, which leaves out Group 3, leaves the public with no recourse should harm occur from more than one-third of the nurse aides in Hawai'i.

In addition, Section 26H-2, HRS, requires that regulation of an occupation take place only to protect consumers from harm by incompetent practitioners. We found that the competency of the individual nurse aide does not appear to be the primary criterion under the current proposed regulatory scheme, but employment is. Those who argue for regulation of only Groups 1 and 2 base their position on government "oversight" of the facilities where the nurse aides are employed. However, those were the very facilities where we found evidence of harm from Group 1. Extending certification to those who work in state-regulated locations but not where the state has no oversight over employers ignores the possibly greater harm posed to consumers by Group 3.

Recommendations and Response

We recommend that the State regulate all nurse aides to protect the public from harm. Senate Bill No. 3277, Senate Draft 2 of the 2006 legislative session should be amended to include nurse aides in Group 3, thereby shifting emphasis to regulation of individuals based on their competency and not their employment.

Both the DCCA and the DHS disagreed with our recommendation, preferring to limit the expanded certification to Group 2, whose employers are state-licensed or –certified healthcare settings. We recognize the basis of the departments' position—that the federal government has set the bar by incorporating employment status with competency in requiring the regulation of Group 1 nurse aides.

But we are bound by the State's policies in Section 26H-2—that regulation of an occupation takes place only to protect consumers from harm by incompetent practitioners. Regulating nurse aides should be no different conceptually than regulating nurses, who are licensed on their individual competency and not on their employment.

The Department of Health concurred with our recommendation, agreeing that nurse aides in Groups 2 and 3 should also be certified in order to provide baseline competency.

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Governor
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Hawai‘i

Submitted by

THE AUDITOR
STATE OF HAWAI‘I

Report No. 07-06
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Foreword

The "sunrise" report on nurse aides was prepared in response to a provision in the Hawai'i Regulatory Licensing Reform Act, Chapter 26H, Hawai'i Revised Statutes, that requires the Auditor to evaluate proposals to regulate previously unregulated professions or vocations.

In House Concurrent Resolution No. 73, House Draft 1 of the 2006 Regular Session, the Legislature requested an analysis of the proposal to regulate nurse aides who work in settings other than Medicare- or Medicaid-certified nursing facilities as provided by Senate Bill No. 3277, Senate Draft 2 of the 2006 session. This analysis presents our findings and recommendation on whether the proposed regulation complies with policies in the licensing reform law and whether a reasonable need exists to regulate nurse aides who work in settings other than Medicare- or Medicaid-certified nursing facilities to protect the health, safety, or welfare of the public.

We wish to express our appreciation to the Department of Commerce and Consumer Affairs, the Department of Health, the Department of Human Services, and other organizations and individuals that we contacted during the course of the analysis.

Marion M. Higa
State Auditor

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Chapter 1
Introduction

This report on the proposed regulation of nurse aides who work in settings other than Medicare/Medicaid-certified nursing facilities responds to a "sunrise" provision of the Hawai'i Regulatory Licensing Reform Act—Chapter 26H, Hawai'i Revised Statutes (HRS). The sunrise provision requires that, prior to enactment, legislative bills proposing regulation of previously unregulated professions or vocations be referred to the State Auditor for analysis. The State Auditor is to assess whether the proposed regulation is necessary to protect the health, safety, or welfare of consumers and is consistent with the regulatory policies in Chapter 26H, HRS. In addition, the State Auditor is to examine the probable effects of the proposed regulation and assess alternative forms of regulation.

Senate Bill No. 3277, Senate Draft 2 of the 2006 legislative session proposed to regulate nurse aides employed in state-licensed or state-certified health care settings and Medicare or Medicaid facilities. The Legislature specifically requested an analysis of this proposal in House Concurrent Resolution No. 73, House Draft 1 of the 2006 legislative session.

Background on Nurse Aides

Nurse aides work under the supervision of nurses and medical staff. Nurse aides may also be primary care givers in adult residential care homes. Duties vary depending on the work setting and include serving and collecting food trays, and helping patients to get out of bed, bathe, and dress. Nurse aides may also change bed linens, deliver messages, sterilize instruments, and assist in all activities of daily living.

Nurse aides work primarily in hospitals, clinics, nursing homes, and home health agencies. Nurse aides must be able to communicate with staff and patients and be able to cope with physically demanding and stressful situations.

Regulatory program

Act 271, Session Laws of Hawai'i 1990 (codified as Chapter 457A, HRS) established a certification program for nurse aides in Hawai'i that complies with federal laws in 42 U.S.C. Sections 1395i-3 and 1396r. The federal law requires certification of nurse aides who work in nursing facilities that participate in Medicare and Medicaid programs.

The purpose of the certification program is to ensure that nurse aides have a minimum level of competency to perform their duties at these facilities. Nurse aides must be recertified biennially. To be eligible for recertification, they must have worked as a nurse aide at least seven hours at a Medicare/Medicaid certified nursing facility with additional requirements such as completion of an annual performance review and 12 hours of in-service training within the last two-year period. The program also requires a nurse aide registry that lists the names and places of employment of certified nurse aides.

Current state law does not require certification of nurse aides who work in facilities that do not receive Medicare or Medicaid funding (non-Medicare or non-Medicaid settings). However, the Department of Commerce and Consumer Affairs since 1990 has certified and recertified *all* nurse aides even though it has no requirement to do so. From 2000 to 2004, the Department of Commerce and Consumer Affairs met with the Department of Health and the Department of Human Services to address problems relating to training and recertification of nurse aides working in non-Medicare or non-Medicaid facilities. The Healthcare Association of Hawai‘i and the Hawaii Long Term Care Association, which are organizations that represents healthcare providers, also met with the departments. By 2004, the Department of Commerce and Consumer Affairs decided that there was no recourse but to adhere to the statute and notified the nurse aides who did not work in Medicare or Medicare participating facilities that it was going to discontinue certification and recertification.

Through House Concurrent Resolution No. 73, House Draft 1, the Legislature requested that the Department of Commerce and Consumer Affairs rescind its decision to discontinue certification of nurse aides who work in non-Medicare and non-Medicaid settings and to extend all current certifications of these nurse aides until the earlier of (a) December 31, 2007, or (b) the date a law requiring these nurse aides to be certified by the State is enacted by the Legislature. However, on July 28, 2006, the Department of Commerce and Consumer Affairs took a policy position to extend the certification of nurse aides who work in state-certified or state-licensed facilities and to discontinue the certification of nurse aides who are self-employed or work for employers who are not overseen by the Department of Health or Department of Human Services. The Department of Commerce and Consumer Affairs says it made this decision out of concern for consumer safety.

Under Chapter 457A, HRS, the Department of Commerce and Consumer Affairs is responsible for administering the certification program and maintaining the nurse aide registry. Presently, the department has contracted the American Red Cross to handle the certification and recertification of nurse aides, administer the nurse aide examination,

carry out the ministerial duties in the daily operation of the registry, and issue certification and recertification cards. The department reviews only those applications for both initial certification and recertification that are referred by the American Red Cross which contain prior disciplinary action or criminal convictions.

Other departmental roles and responsibilities

The Department of Human Services and the Department of Health are also involved in the nurse aide certification program.

The Department of Human Services is the State's Medicaid Agency, which is responsible for establishing the curriculum requirements for state certification of Nurse Aide Training Programs (NATPs) and determining the content of the Competency Evaluation Program pursuant to federal regulations. In addition, the department determines whether a NATP qualifies for state certification. As of November 13, 2006, there were 22 state approved certified nurse aide training programs in the state.

The Department of Health, Office of Health Care Assurance, is responsible for managing the state licensing and federal certification of medical and health care facilities, agencies, and services provided throughout the state in the effort to ensure acceptable standards of care. There are two sections of the Office of Health Care Assurance: State Licensing Section and Medicare Section.

The State Licensing Section licenses adult residential care homes, expanded adult residential care homes Type I and Type II, assisted living facilities, and others. (Expanded adult residential care homes Type I and Type II provide 24-hour-a-day living accommodations to adults who require at least minimal assistance in the activities of daily living, personal care services, protection, and health care services, and who may need the professional health services provided in an intermediate care facility or skilled nursing facility. A Type I home consists of five or fewer residents and a Type II home consists of six or more residents.)

The Medicare Section is responsible for both state licensing and/or federal certification of hospitals and medical facilities in Hawai‘i which include home health agencies and nursing facilities. Also, the Medicare Section has a contract with the Centers for Medicare & Medicaid Services to implement the federal survey and certification program which include the investigation of allegations of abuse, neglect, and misappropriation of resident property against only certified nurse aides employed in certified nursing facilities. As the designated State Survey Agency, the Office of Health Care Assurance, Medicare Section is the only entity which can place findings on the Hawai‘i State Certified Nurse Aide Registry.

Nurse aides in Hawai'i

Currently, there are approximately 8,963 certified nurse aides in Hawai'i. Approximately 2,726 nurse aides are employed in Medicare or Medicaid nursing facilities. The remaining 6,237 nurse aides are not required to be certified. To determine the type of facilities in which these remaining nurse aides are employed, the Department of Commerce and Consumer Affairs, the Department of Human Services, and the Department of Health categorized the nurse aides into three groups:

"Group 1": Nurse aides employed in Medicare or Medicaid nursing facilities;

"Group 2": Nurse aides employed in state-licensed or -certified healthcare settings; and

"Group 3": Nurse aides who are self-employed, employed in physicians' offices, or whose employers are not Department of Human Services- or Department of Health-licensed or -certified facilities, such as home care placement agencies.

Group 1 nurse aides are required to be certified by federal law, which the current statute provides for. There is no statutory authority requiring certification or recertification of nurse aides in Groups 2 and 3.

Prior sunset evaluation

Our 1993 *Sunset Evaluation Report: Nurse Aides,* Report No. 93-4, concluded that the regulation of nurse aides should continue because nurse aides give direct patient care and could cause harm. In addition, the State must certify nurse aides in order to participate in the Medicare and Medicaid programs. The objectives of the 1993 evaluation were to:

1. Determine whether there is a reasonable need to regulate nurse aides to protect the health, safety, and welfare of the public;

2. Determine whether current regulatory requirements are appropriate for protecting the public;

3. Establish whether the regulatory program is being implemented effectively and efficiently; and

4. Make recommendations based on findings in these areas.

The report also stated that "[n]urse aides must be skilled in caring for the residents' physical needs and communicating with them to meet their emotional and social needs. Certifying nurse aides ensures a minimum level of competency to deal with these needs and helps reduce the potential for harm."

Regulation of nurse aides in other states

Although the federal law requires the certification of nurse aides who work in Medicaid and Medicare nursing facilities, we surveyed other jurisdictions to inquire whether they regulate nurse aides who work in settings other than Medicare or Medicaid. Based on the responses received, we could not draw a valid conclusion on how many other jurisdictions regulate nurse aides who work in such settings. It further appears that no national organization of nurse aides has been established.

Associations whose members employ nurse aides

Two associations, Healthcare Association of Hawai'i (HAH) and Hawaii Long Term Care Association (HLTCA), are involved in representing Hawai'i's healthcare providers. Together, they represent a small segment of community based providers employing nurse aides. The HAH's primary mission is to represent and advocate on behalf of their members, the State's health care system, and the health care of Hawai'i's citizens with Congress, the state Legislature, government agencies and departments, the news media, and the public. The HLTCA is a full-spectrum professional, political, and policy voice for community-based long term care in the State. The HAH and HLTCA are actively involved with the proposed legislation for nurse aide regulation.

Proposed regulation

Senate Bill No. 3277, Senate Draft 2 of the 2006 legislative session proposed to regulate nurse aides in "Groups 1 and 2." The purpose of this measure is to ensure that quality health care is being provided by nurse aides to patients at state-licensed and state-certified health care facilities. Specifically, this measure establishes certification and recertification procedures for nurse aides employed in these settings. Such certification will allow the Department of Commerce and Consumer Affairs, Department of Human Services, and the Department of Health to monitor and evaluate the quality and competency of these nurse aides practicing in the State. However, Senate Bill No. 3277, Senate Draft 2, does not include the regulation of nurse aides in "Group 3."

Testimony on Senate Bill No. 3277, Senate Draft 2

Among those who testified in support of the proposal were the Departments of Commerce and Consumer Affairs (DCCA), Health (DOH), and Human Services (DHS), and Hawaii Long Term Care Association. The proponents argued that the proposal would:

- Enhance consumer safety,
- Codify existing responsibilities of the three state agencies, DCCA, DOH, and DHS; and

- Provide that nurse aides working in Medicare or Medicaid certified facilities and state-licensed and state-certified health care settings be certified to ensure competency.

Objectives

The objectives of this analysis were to:

1. Determine whether there is a reasonable need to regulate nurse aides who work in settings other than Medicare/Medicaid-certified nursing facilities to protect the health, safety, or welfare of the public.

2. Assess the probable effects of regulation, specifically, the effects on nurse aides who work in settings other than Medicare/Medicaid-certified nursing facilities and the services of these nurse aides.

3. Make recommendations, as appropriate, based on our findings.

Scope and Methodology

To assess the need to regulate nurse aides as proposed in Senate Bill No. 3277, Senate Draft 2, we applied the criteria set forth in Section 26H-2, HRS, of the Hawai‘i Regulatory Licensing Reform Act. The Legislature established these policies to ensure that regulation of an occupation occurs only when needed to protect consumers. Regulation is an exercise of the State's police power and should not be imposed lightly. Its primary purpose is not to benefit the practitioners of the occupation who often seek regulation for reasons that go beyond consumer protection. For example, some practitioners believe that licensing will enhance their professional status and upgrade the public perception of the occupation.

The consumer protection purpose of regulation is clearly articulated in Section 26H-2, HRS. These policies state that:

- The State should regulate professions and vocations only where reasonably necessary to protect consumers;

- Regulation should protect the health, safety, and welfare of consumers and not the profession;

- Evidence of abuses 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 potential dangers to the consumers;

- Regulation should be eliminated when it has no further benefit 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 costs of administering the program.

We were also guided by the 1994 edition of *Questions A Legislator Should Ask,*[1] by Benjamin Shimberg and Doug Roederer (published by the Council on Licensure, Enforcement and Regulation, a national organization). According to this publication, the primary guiding principle for legislators 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.

In addition to regulatory policies in Chapter 26H, HRS, we used additional criteria for this 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 incompetence or insufficient skill;

- The occupational skill needed to prevent harm can be defined in law and measured;

- No alternatives provide sufficient protection to consumers (such as federal programs, other state laws, marketplace constraints, private action, or supervision); and

- Most other states regulate the occupation for the same reasons.

In assessing the need for regulation and the specific regulatory proposal, we placed the burden of proof on proponents of the measure to demonstrate the need for regulation. We evaluated their arguments against the criteria stated above. We examined the regulatory proposal and determined whether the administration and proponents had made a strong enough case for regulation. In accordance with sunrise criteria, even if regulation *may* have *some* benefits, we recommend regulation only if it is *demonstrably* necessary to protect the public.

We scrutinized the appropriateness and the regulatory approach taken by the proposed legislation. Three approaches are commonly taken to occupational regulation:

- *Licensing*, the most restrictive form, confers the legal right to practice to those who meet certain qualifications. Penalties may be imposed on those who practice without a license. Licensing laws usually authorize a board that includes members of the profession to establish and implement rules and standards of practice.

- *Certification* restricts the use of certain titles (for example, social worker) to persons who meet certain qualifications, but does not bar others who offer such services from using the title. Certification is sometimes called *title protection*. Government certification should be distinguished from professional certification, or credentialing, by private organizations. For example, social workers may gain professional certification from the National Association of Social Workers.

- *Registration* simply involves practitioners signing 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 assessing the need for regulation and the specific legislative proposal, we considered the appropriateness of other regulatory alternatives.

To accomplish the objectives of our analysis, we reviewed literature on nurse aides, Hawai‘i statutes and rules, and federal law and regulations on nurse aides. We interviewed staff at the Departments of Commerce and Consumer Affairs, Health, and Human Services. We reviewed whether there were complaints filed at the Department of Commerce and Consumer Affairs-Regulated Industries Complaints Office and Office of Consumer Protection, Office of the Ombudsman, Department of Health-Office of Health Care Assurance-Medicare Section, and Department of Human Services-Adult Protective Services. We also obtained views from local associations. We conducted interviews with the American Red Cross, Healthcare Association of Hawai‘i, and Hawaii Long Term Care Association.

We conducted our assessment from October 2006 to January 2007 according to generally accepted government auditing standards.

Chapter 2

Regulation of All Nurse Aides Is Warranted for Consumer Protection

This chapter presents our findings and recommendations on the need to regulate nurse aides who work in settings other than Medicare/Medicaid-certified nursing facilities. Because nurse aides provide direct patient care, we conclude that regulation is needed to protect the public from potential harm. The situation meets the criteria for regulation in Chapter 26H, Hawai‘i Revised Statutes, the Hawai‘i Regulatory Licensing Reform Act. However, we also conclude that regulation as proposed in Senate Bill No. 3277, Senate Draft 2, 2006 Regular Session is not sufficient and should be extended to all nurse aides.

Summary of Findings

1. Regulation of nurse aides who work in settings other than Medicare/Medicaid-certified nursing facilities is warranted to protect the health, safety, or welfare of the public.

2. The proposed regulatory scheme as provided by Senate Bill No. 3277, Senate Draft 2, 2006 session, is problematic.

Regulation of Nurse Aides Is Necessary

The Hawai‘i Regulatory Licensing Reform Act states that regulation should be undertaken only when necessary to protect the health, safety, and welfare of consumers. In assessing the need for regulation, evidence of abuse and harm must be given great weight. We found evidence of actual and potential harm to consumers that would warrant regulation of all nurse aides who work in settings other than Medicare/Medicaid-certified nursing facilities.

In this chapter, nurse aides will be referred to as “Group 1,” “Group 2,” and “Group 3,” as previously identified in Chapter 1.

Evidence of actual harm exists

In order to determine whether consumers of nurse aide services are at risk, we sought information on complaints against nurse aides from the places where the public would usually file complaints. These offices included: Department of Commerce and Consumer Affairs-Regulated Industries Complaints Office and Office of Consumer Protection, Office of the Ombudsman, Better Business Bureau, Department of Human

Services-Adult Protective Services, Department of Health-Long Term Care Ombudsman, and Department of Health-Office of Health Care Assurance, Medicare Section.

We found that no consumer complaints on nurse aides were filed during the last three years at the Department of Commerce and Consumer Affairs-Office of Consumer Protection or the Office of the Ombudsman. We were informed that the Department of Commerce and Consumer Affairs-Regulated Industries Complaints Office (RICO) may have received complaint information involving persons who are nurse aides. The complaints would have been entered into the RICO database under the name of the nurse aide and not under a particular category. As a result, RICO does not have the nurse aide complaints information as we requested. We were also informed that the Department of Human Services-Adult Protective Services does not keep statistical data on the number and types of complaints received on nurse aides. We received no response from the Better Business Bureau and the Department of Health-Long Term Care Ombudsman.

The Office of Health Care Assurance (OHCA), Medicare Section of the Department of Health, was the only state agency that provided our office with complaint-related information on nurse aides. The office's Medicare Section is the state survey agency responsible for:

- Reviewing and investigating allegations of neglect, abuse, and misappropriation of resident property by nurse aides in Group 1;
- Placing and removing findings on the nurse aide registry; and
- Surveying nursing facilities that participate in Medicaid and Medicare.

Investigating allegations

Nursing facilities that participate in Medicare and Medicaid are required by federal law to report allegations that arise from complaints and/or incidence reports of neglect, abuse, and misappropriation of resident property to the OHCA, Medicare Section, and to the Adult Protective Services. The nursing facilities must also conduct their own investigations and report their findings within five days to the OHCA, Medicare Section. Additionally, the OHCA, Medicare Section will undertake a separate investigation.

The OHCA, Medicare Section investigations are conducted by surveyors that consist of registered nurses, a social worker, and a nutritionist. Complaints and/or allegations are received from nursing facilities, family members, and/or residents. Initially, the surveyor reviews a complaint

and/or allegation, then conducts interviews with the parties involved. Upon completion of an investigation, the surveyor submits the findings in a written report. If the complaint and/or allegation is substantiated, a letter is sent to notify the nurse aide of this finding, which will be placed on the nurse aide registry. The nurse aide has the right to appeal by requesting an administrative hearing (within 30 days from date of notification). If an administrative hearing is requested, a hearing is then scheduled. If the Hearings Officer decides to overturn the OHCA, Medicare Section finding, no finding is placed on the registry. However, if the Hearings Officer's decision agrees with the OHCA, Medicare Section decision, a finding is placed on the nurse aide registry.

Effect on nurse aide registry

Findings are placed on the nurse aide registry by the OHCA, Medicare Section in two ways: (1) in the case of investigations that are substantiated by OHCA, Medicare Section, for neglect, abuse, and misappropriation of property; and (2) in cases where the nurse aide has a conviction in a court of law. The OHCA, Medicare Section informs the Department of Commerce and Consumer Affairs (DCCA), Professional and Vocational Licensing Branch (PVL), when a finding needs to be placed on the nurse aide registry. The DCCA, PVL, then notifies the American Red Cross (ARC). Most findings are a permanent record and cannot be removed from the nurse aide registry. Only findings on neglect can be petitioned by the nurse aide after one year to be taken off the nurse aide registry on the basis of good behavior. Nurse aides who have findings on the registry are not able to work in nursing facilities participating in Medicare or Medicaid.

Court convictions on individuals who work in the capacity of nurse aides are also reported to the OHCA, Medicare Section. These individuals are checked against the State nurse aide registry. If the individual's name appears on the registry, a finding is placed. However, if the individual's name does not appear on the registry, the convictions are filed in a binder, and no further action is taken.

Surveying facilities

The OHCA, Medicare Section is also responsible to conduct surveys of the Medicare and Medicaid nursing facilities. These nursing facilities are required to comply with federal and state regulations. The Medicare Section is required to survey approximately 48 nursing facilities every 12 to 15 months. We were informed that the investigations of nurse aide complaints are not a priority with this section, a situation made worse when the facilities are not surveyed on a timely basis because the investigations on nurse aides and facility surveys are usually done concurrently. With four vacant surveyor positions, the OHCA has not

been able to complete its investigations on schedule. However, we were also informed that there is no set timeframe in which nurse aide investigations are to be completed.

Evidence of actual harm

We reviewed information provided by the Department of Health, OHCA, Medicare Section, regarding substantiated findings and court convictions on 46 nurse aides. Thirty-seven of these nurse aide findings involve criminal convictions for physical abuse, neglect, sexual assault, endangering the welfare of an incompetent person, verbal abuse, theft, murder, kidnapping, harassment, manslaughter, and mental abuse. Seven of the convictions are for nurse aides in Group 2. There were 14 other convictions on nurse aides that could not be identified as Groups 1, 2, or 3. These substantiated findings and court convictions are an indication that evidence of actual harm exists in Hawai‘i for nurse aides in Groups 1, 2 and possibly 3, without regard to where they are employed.

Potential harm exists

We also found evidence indicating that nurse aides can cause potential harm to consumers. We reviewed complaints and allegations on nurse aides in Group 1 from the OHCA, Medicare Section. The Section receives approximately one to two complaints per month on nurse aides in Group 1. Most complaints and allegations are received from the nursing facilities, family members, and residents. The allegations involve verbal abuse, rough handling of patients, neglect, and physical abuse. From 1999 to 2006, we found that there were approximately 246 allegations filed against nurse aides for neglect, abuse, and/or mistreatment at the OHCA, Medicare Section. Eight of these allegations were substantiated by OHCA, Medicare Section. Although eight seems to be a small number of substantiated allegations, we were informed that residents are not always considered credible witnesses in order to substantiate allegations. Moreover, currently, there are 25 allegations that are not assigned to surveyors due to backlog created by the four vacant surveyor positions.

Although the above complaints and allegations are for nurse aides in Group 1, we can assume that nurse aides in Groups 2 and 3 may be subject to the same types of complaints and allegations as they provide the same type of services regardless of employment locale. Therefore, consumers would be subject to potential harm by nurse aides in Groups 2 and 3.

Other protections do not exist

We found that other protections do not exist to adequately safeguard the public and consumers. The public is not protected as the current

complaints process does not address all nurse aides. In addition, there is no recourse available to the consumers should they have complaints against nurse aides in Groups 2 and 3.

Complaints process does not address all nurse aides

As previously stated, the Department of Health, OHCA, Medicare Section complaints process addresses only nurse aides in Group 1. Put simply, the OHCA, Medicare Section, does *not* have the authority to investigate complaints and/or allegations on nurse aides in Groups 2 and 3. Complaints received against nurse aides in Groups 2 and 3 are transferred to various agencies such as Adult Protective Services and the Medicaid Fraud Control Unit. Consumers are also referred to the police depending on the type of complaint.

Moreover, the DCCA's website provides misleading and erroneous information to the public at large. The website reads: "Formal Complaints, Gerald Chung, Department of Health – Office of Health Care Assurance, (808) 692-7420." But in actuality, the OHCA, Medicare Section, does not investigate complaints on nurse aides in Groups 2 and 3—only those in Group 1. The DCCA's website should reflect this information accurately.

No recourse available to the public for complaints against more than two-thirds of the nurse aides

The Regulated Industries Complaints Office (RICO) is an agency of the DCCA. RICO enforces the regulatory standards for over 40 professions, occupations, and programs by receiving, investigating, and prosecuting complaints. RICO's jurisdiction involves the enforcement of licensing laws for the boards and programs licensed by the DCCA, Professional and Vocational Licensing Division. Since the director of DCCA is responsible for administering the nurse aide certification program and maintaining the nurse aide registry, it is assumed that consumers would be able to file their complaints on all nurse aides with RICO. However, we were informed that the deputy attorney general assigned to the nurse aide program opined that RICO is not responsible for handling complaints for nurse aides in Groups 2 and 3. Therefore, there is no agency in the State that functions like RICO to intake, review, and investigate complaints on nurse aides in Groups 2 and 3, which leaves no recourse available to the public for two-thirds of the nurse aides. Many complaints on nurse aides in Groups 2 and 3 may go unreported as the public may be unaware of the proper agency to contact.

Further, there is no public recourse available for consumers who utilize the services of these nurse aides who are allowed by federal law the opportunity to take or "challenge" the nurse aide examination without

also taking a Department of Human Services (DHS)-approved training course—that is, Group 3. Upon passing both the written and skills examinations, the nurse aide is issued a valid certification card by the American Red Cross. The current certification card lists the following three categories of training:

- "Completed Training Program": According to the American Red Cross, this means the nurse aide obtained training from a program not approved by the DHS, or completed training from a program prior to September 1, 2005, when DHS established the first state-approved training program.

- "State Approved Training": According to the American Red Cross, this means the nurse aide obtained training from programs approved by DHS, as of September 1, 2005.

- "Unknown": According to the American Red Cross, this means the nurse aide had no training, or did not indicate training on the application, or did not submit a certificate of completed training.

The American Red Cross checks off the category by which the nurse aide obtains certification. For nurse aides who take, or "challenge" and pass the examinations but have no training, the category "unknown" is checked off. The State is required to put these nurse aides on the nurse aide registry. These nurse aides will thus have a valid certification card and will be able to work as a nurse aide under current law.

1993 sunset evaluation report on nurse aides supports regulation

Our present finding of potential harm from nurse aides echoes our previous finding in *Sunset Evaluation Report: Nurse Aides,* Report No. 93-4. The 1993 sunset evaluation concluded that "nurse aides should continue to be regulated because of their potential to cause harm and the need to meet federal regulatory requirements." The finding defined the need to protect the public from potential harm. Moreover, the finding did not differentiate between nurse aides who work in Medicaid or Medicare facilities and those who do not. Instead, the evaluation was done on nurse aides in general.

2006 Bill Is Problematic

Senate Bill No. 3277, Senate Draft 2, of the 2006 legislative session, is problematic. The bill seeks to regulate only a portion of nurse aides in Hawai'i because it ties certification for nurse aides to government-regulated employment and not solely to individual competency. The proposed regulatory scheme does not allow for the certification for nurse aides in Group 3 and does not provide the public any recourse should harm occur from this group, which comprises more than one-third of all

nurse aides in Hawai'i. The sunrise criteria in Chapter 26H call for public to be protected from potential harm from all nurse aides, not just those in Groups 1 and 2. Therefore, nurse aides in Group 3 should be included in any regulatory legislation that moves forward. Below, we describe some deficiencies in the bill.

Certification should be based on competency, not employment

In addition to the sunrise criteria in Section 26H-2, HRS, the supplemental criteria on whether "the cause of harm is the practitioner's incompetence or insufficient skill" was applied in this sunrise analysis. We found that the competency of the individual nurse aide does not appear to be the issue under the current proposed regulatory scheme. The distinction between nurse aides in Groups 1, 2, and 3 is based on employment rather than the competency of the individual.

The argument made by proponents for regulation of nurse aides in Groups 1 and 2 is based on government "oversight" of the facilities where the nurse aides are employed. The definition of "oversight" is unclear, as we will later discuss. We found evidence of actual and potential harm attributable to nurse aides in Group 1, where government has "oversight" of the facilities in which they are employed. This situation argues for certification based on the competency of the individual rather than employment. Further, regulation is necessary for nurse aides in Group 3 because the potential of harm may be greater to consumers who utilize services that are rendered without government "oversight."

Proponents argue for certification of nurse aides who work in state-licensed or -certified facilities

The proposed bill addresses certification for nurse aides in Group 2. The proponents who advocate regulation for nurse aides in Group 2 have not addressed the harm issue for nurse aides in Group 3. As previously discussed, one of their reasons for supporting nurse aides in Group 2 is government "oversight" of the facilities in which the aides are employed.

We reviewed the following reasons provided by DCCA to discontinue the certification of nurse aides in Group 3:

1. Such employers in Group 3 as doctors' offices or nurse staffing agencies are basically employment agencies that do not have to meet the stringent requirements of hospitals, long term care facilities, assisted living facilities, or adult residential care homes;

2. These employers also do not have continuing competency checks on the nurse aides they have working for them or send to work for other employers in Groups 1 and 2; and

3. Nurse aides misuse their status of state certification to mislead the public. These nurse aides open up their own businesses that they are not legally licensed to operate. The greatest danger of Group 3 is that these nurse aides can practice beyond their scope and use their certificates as verification that they are qualified according to the State.

We discuss these arguments in the following sections.

Title protection language does not protect the public

The title protection language contained in the proposed bill allows any person who works in a Medicare/Medicaid nursing facility or a state-licensed or state-certified health care setting, and who holds a valid certificate to practice as a certified nurse aide in this state, to have the right to use the title "certified nurse aide" and the abbreviation "C.N.A." However, the title protection language inserted in the proposed bill would not protect the public from harm since, according to federal law, the nurse aides in Group 3 are able to take, or "challenge," the nurse aide examination without completing a state-approved training program. Upon passing the exam, the nurse aides are placed on the nurse aide registry and issued a valid certification card. One proponent agreed that once a nurse aide *challenges* and passes the exam, the aide is allowed to use the *C.N.A.* designation. Two years later, these nurse aides would be able to get recertified if they took and passed the exam again. This would not preclude them from being a *C.N.A.* since they passed the exam. The proponent further stated that "the federal law allows nurse aides to challenge the exam and the state cannot stop them."

However, the interpretation by other proponents of the title protection language in the proposed bill differed. Some proponents stated that "should this bill pass, nurse aides in Group 3 will no longer be able to challenge the exam until they meet the requirements of passing a state-approved training program." The proponents also stated that should this bill pass, nurse aides in Group 3 would not be issued a certification card if they did not complete a state-approved training program.

The interpretation of the title protection language in the bill is confusing. It appears that nurse aides in Group 3 would be able to practice and use the title, "C.N.A.," but others disagree.

Definition of "oversight" is unclear

"Oversight" was one of the major factors presented to us to distinguish between Groups 2 and 3. The proponents of certification agreed to include Group 2 nurse aides in the proposed bill because of government "oversight." During our interview process, we found that the definition of "oversight" varied among the proponents. Several proponents defined "oversight" as the direct supervision exercised by a licensed person such

as a registered nurse, licensed practical nurse, or the director of the facility. Other proponents defined "oversight" as federal and/or state government "oversight" of the facilities in which nurse aides are employed. While the first definition of "oversight" would be more likely to ensure competency of the individual, the second definition, the nurse aide's employment site appears to be more commonly meant. That being the case, government "oversight" of the facilities in which nurse aides are employed does not address the harm issue for consumers.

The definition of "oversight" appears to be unclear among the proponents. Without clarity and a commonly accepted definition, government "oversight" of employers is further weakened as a factor to distinguish nurse aides in Group 2 from Group 3.

State proposing more stringent requirements than the federal law

Senate Bill No. 3277, Senate Draft 2, proposes more stringent requirements for certification and recertification of nurse aides in Group 3. The federal law allows nurse aides the opportunity to take, or "challenge," the nurse aide examination; however, the proposed bill requires that *all* nurse aides complete a state-approved training program before being certified. Nurse aides who did not complete a training program before certification will, two years later, be required to take a program before being allowed to renew their certification. The departments—DCCA, DOH, and DHS—intend for the bill to carve out Group 3 nurse aides from government's stamp of approval. It remains unclear, however, if the proposed language in fact adds requirements over and above the clear mandate of the federal law, which is to allow applicants to take the examination without completing prerequisites. According to the federal law, applicants who successfully pass the examination are to be placed in the nurse aide registry.

Conclusion

We conclude that the regulation of nurse aides who work in settings other than Medicare/Medicaid-certified nursing facilities meets the criteria for regulation in the Hawai'i Regulatory Licensing Reform Act. We found evidence of harm and potential harm to the public that would warrant the regulation of nurse aides who work in settings other than Medicare/Medicaid-certified facilities. In addition, the proposed regulation would not meet the objectives of protecting the public from harm and should be amended to provide regulation for all nurse aides.

Recommendation

We recommend that the state regulate all nurse aides to protect the public from harm. This could be accomplished by enacting an amended Senate Bill No. 3277, Senate Draft 2 of the 2006 legislative session. The bill

should be amended to include nurse aides who are self-employed or who work for employers over which the Department of Health or Department of Human Services does not have oversight, thereby shifting emphasis to regulation of individuals based on their competency and not on their employment. Implementation of certification in this manner should include an enforcement component, also handled through the licensing authority.

Notes

Chapter 1

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

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Responses of the Affected Agencies

Comments on Agency Responses

We transmitted a draft of this report to the Department of Commerce and Consumer Affairs, Department of Health, and Department of Human Services on April 5, 2007. A copy of the transmittal letter to the Department of Commerce and Consumer Affairs is included as Attachment 1. Similar transmittal letters were sent to the Department of Health and the Department of Human Services. The responses of the three departments are included as Attachment 2, Attachment 3, and Attachment 4, respectively.

Both the Department of Commerce and Consumer Affairs and the Department of Human Services disagreed with our recommendation preferring to limit the expanded certification to "Group 2," those nurse aides who are employed in state-licensed or –certified healthcare settings. The departments continue to argue for certification based on employment, thereby excluding nurse aides in "Group 3," whose employers are not Department of Human Services or Department of Health-licensed or-certified, or who are self-employed or employed in physician's offices. We understand the basis of the departments' position—that the federal government has set the bar by incorporating competency and employment status in requiring the regulation of nurse aides employed in Medicare- or Medicaid-certified healthcare facilities.

However, we are bound by the State's policies in Section 26H-2, Hawai'i Revised Statutes (HRS),—that regulation of an occupation takes place only to protect consumers from harm by incompetent practitioners. This policy is not mandated by place of employment or whether the State regulates the employers. Section 26H-2, HRS, lists specific criteria for us to consider when determining whether a profession should be regulated, one of which is that evidence of abuses should be given great weight in determining whether a reasonable need for regulation exists. Since we found such evidence even among those nurse aides already certified, we stand by our conclusion that regulation of nurse aides who work in settings other than Medicare/Medicaid-certified nursing facilities in Hawai'i is warranted. Regulating all nurse aides should be no different conceptually than regulating nurses, who are licensed on their individual competency and not on their employment.

The Department of Health concurred with our recommendation, agreeing that nurse aides who work in arenas outside that of Medicare and Medicaid healthcare facilities should also be certified in order to provide

baseline competency. We commend the Department of Health for its willingness to dialogue further on the details to regulate those nurse aides who work in Group 3.

The departments all indicated that legislation is pending before the 2007 Legislature that has undergone many changes since the introduction of the 2006 legislation that we were requested to analyze.

The departments also provided other information and clarifications, most of which we incorporated into the report.

STATE OF HAWAI'I
OFFICE OF THE AUDITOR
465 S. King Street, Room 500
Honolulu, Hawai'i 96813-2917

MARION M. HIGA
State Auditor

(808) 587-0800
FAX: (808) 587-0830

April 5, 2007

COPY

The Honorable Mark E. Recktenwald, Director
Department of Commerce and Consumer Affairs
King Kalakaua Building
335 Merchant Street
Honolulu, Hawai'i 96813

Dear Mr. Recktenwald:

Enclosed for your information are three copies, numbered 6 to 8, of our confidential draft report, *Sunrise Analysis: Nurse Aides*. We ask that you telephone us by Tuesday, April 10, 2007, 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 Friday, April 13, 2007.

The Department of Health, Department of Human Services, Governor, and presiding officers of the two houses of the Legislature have also been provided copies of this confidential 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,

Marion M. Higa
State Auditor

Enclosures

ATTACHMENT 2

LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LT. GOVERNOR

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MARK E. RECKTENWALD
DIRECTOR

LAWRENCE M. REIFURTH
DEPUTY DIRECTOR

April 17, 2007

The Honorable Marion M. Higa, State Auditor
State of Hawai'i
Office of the Auditor
465 S. King Street, Room 500
Honolulu, Hawai'i 96813

Dear Ms. Higa:

Thank you for providing the Department of Commerce and Consumer Affairs ("DCCA" or "Department") the opportunity to comment on the Sunrise Analysis on Nurse Aides ("Draft Report"). The Department will comment on the following recommendation as it appears on page 17, as well as statements in the report relative to this recommendation.

> "We recommend that the state regulate all nurse aides to protect the public from harm. This could be accomplished by enacting an amended Senate Bill No. 3277, Senate Draft 2 of the 2006 legislative session. The bill should be amended to include nurse aides who are self-employed or who work for employers over which the Department of Health or Department of Human Services does not have oversight, thereby shifting emphasis to regulation of individuals based on their competency and not on their employment. Implementation of certification in this manner should include an enforcement component, also handled through the licensing authority."

The Department shares the Auditor's interest in protecting the public from harm, but respectfully disagrees with the recommendation above as it involves the adoption of a less rigorous standard of regulation for self-employed nurse aides or those who work for employers over which the Department of Health or Department of Human Services does not have oversight ("Unregulated Nurse Aides"). We believe that the proposal is flawed in two principal respects: (1) the proposal involves a reduced standard of regulation for Unregulated Nurse Aides; and (2) the proposed regulatory structure is inconsistent with the regulation currently imposed (and to be imposed) on other Nurse Aides.

Patient safety is the foundation upon which current federal and State nurse aide certification regulation is built. The federal government established patient safety standards for nurse aides employed in Medicare and Medicaid facilities by requiring nurse aide training and a written/oral and clinical examination to qualify for initial certification, administration of a continuing competency evaluation by the employing entity and passage of such continuing competency evaluation by the certified nurse aide for re-certification purposes. Further, employing agencies are accountable to and under the watchful eye of both the Department of Health ("DOH") and Department of Human Services ("DHS") for any patient care and safety issues of abuse and neglect. All components have equal value and importance in the overall goal of patient safety.

As you are aware, a bill is in the 2007 Legislature regarding expanding the State regulation to certify nurse aides to not only include nurse aides employed in Medicare/Medicaid facilities, but those nurse aides employed in facilities that are state-certified by the Department of Human Services or state licensed by the Department of Health (House Bill 71, S.D. 2). It is a bill that is endorsed by DOH, DHS, DCCA, the Hawaii Long Term Care Association, the Healthcare Association of Hawaii, and the Hawaii Coalition of Care Home Administrators. It is an amended and improved form of the bill that was the basis of this sunrise analysis.

The 2007 legislation specifically excludes the Unlicensed Nurses Aides. The exclusion is intentional because regulation of this group leaves no one accountable. Neither the DOH nor the DHS can assume responsibility for actions of this group that may affect patient care and safety issues of abuse and neglect. While the draft report discounts the importance of DOH/DHS accountability, and suggests that DCCA enforcement can substitute, the suggestion fails to account for the fact that DCCA lacks enforcement authority over employers of the Unlicensed Nurse Aides. In light of this widely-shared concern, all Departments and Associations that worked together on the proposed House Bill 71 agreed that regulating any new group of nurse aides must minimally comport with ALL existing certification standards for reasons of patient safety as well as having consistent standards for all those regulated.

The Draft Report's premise that regulation for nurse aides should be no different than the regulation of all other professions and vocations in the Professional and Vocational Licensing Division is a good point from which to start. In this case, though, the federal government has set the bar by incorporating competency and employment status in the formulation of its own regulation of nurse aides. It is impossible to make the federal and state regulatory standards compatible without changing the federal regulation (over which we have no control) or including the employment status component in the state regulatory scheme. The Department, along with the DOH and DHS have concluded that the State should respect the federal standard since we share the goal of patient safety with the federal regulators. Although we strongly appreciate the Draft Report's focus on the value of making state regulatory

programs consistent across the board, we believe that nurse aides may need to be treated differently because of the pre-existing federal regulation. We respectfully submit that to the extent that the State's nurse aide regulation differs from the regulation of other professions (i.e. not based solely on competency), that difference (requiring oversight of DOH/DHS) is warranted under the circumstances.

The Draft Report does not address the question of whether Unregulated Nurse Aides or their employers are able, under the regulation proposed in the Report, to ensure or vouch for compliance with the patient safety standards currently in existence or that are proposed in the 2007 legislative proposal. From discussions that the Department has had with these stakeholders, none of the employers were willing to meet all of the requirements, nor were they willing to develop additional training and evaluations in order to verify continued competency of their nurse aides and have those programs approved by DHS, for the nurse aide to be re-certified. An even more serious problem is raised by the inability of self-employed nurse aides to measure their own continued competency. The difficulty in ensuring proper oversight, the Department believes, makes it imperative that the Analysis explore and consider the perspectives of these stakeholders.

There are other statements in the Analysis that we wish to comment on:

- On page 2, paragraph two, the following statement is made:

  "However, the Department of Commerce and Consumer Affairs since 1990 has certified and recertified all nurse aides even though it has no authority to do so."

This statement is incorrect. The Department has had since 1990 the authority to certify and recertify nurse aides. Under sections 457A-2 and 457A-3, Hawai'i Revised Statutes, the Department was directed to implement federal laws and regulations regarding the implementation of a nurse aide registry. Congress directed that states evaluate nurse aide competency by means of either a nurse aide training and competency evaluation (§ 483.152, C.F.R.) or a nurse aide competency evaluation (§ 483.154, C.F.R.). As a result, the Department proceeded to implement the second, nurse aide competency evaluation without regard to whether nurse aides were employed in Medicare/Medicaid facilities. Regarding the biennial re-certification, the federal law requires the employing agency and nurse aide to attest to proof of completing a state approved continued competency evaluation. 42 U.S.C. § 1395i-3(a)(D). Here too, there is no distinction that the nurse aide re-certification process is limited to those that work in Medicare/Medicaid facilities.

- On pages 10, 12, and 13, regarding the Department's handling of consumer complaints, statements made are based on assumptions that are not entirely accurate.

In response to the Auditor's request for nurse aide complaints filed with RICO, the Department explained that "to the extent we may have received complaint information involving persons who are nurse aides, the complaints would have been entered into our database under the name of the nurse aide and not under a particular category. As such, we do not have the nurse aide complaints information that you have requested." Given the Department's response, the statement in the Draft Report that no consumer complaints on nurse aides were filed during the last three years at the Office of Consumer Protection or the Regulated Industries Complaints Office cannot be confirmed.

More importantly, although nurse aide complaints would not be investigated by RICO as possible licensing violations, consumers can file complaints with the division's Consumer Resource Center (CRC). CRC is a branch of RICO that provides consumer information and receives complaints for both RICO and the Office of Consumer Protection, and in that capacity, CRC receives many complaints that do not involve licensing violations. CRC staff is trained to evaluate complaints for possible RICO or OCP jurisdiction and where appropriate, make referrals to other agencies, including but not limited to the Department of Health, the Office of the Ombudsman, Adult Protective Services, or criminal law enforcement agencies.

- On page 14, paragraphs 1, 2, and 4 are incorrect:

  > The Analysis provides the following: "'Completed Training Program': This means the nurse aide obtained training from a program not approved by the DHS, or completed training from a program prior to September 1, 2005, when DHS established the first state-approved training program."

The correct interpretation of "Completed Training Program" means that the nurse aide was certified by endorsement and the preceding nurse aide registry has verified that the nurse aide has successfully completed a state approved training in accordance with federal law. Federal law also allows state nurse aide registries to endorse the training programs and examinations of nurse aides as long as the preceding registry verifies that both meet federal standards.

> The Analysis provides the following: "'State Approved Training': This means the nurse aide obtained training from programs approved by DHS, as of September 1, 2005."

The correct interpretation of "State Approved Training" means the nurse aide successfully completed training either between April 19, 1991 through December 9, 1996 or

March 21, 2006 to the present time.[1] September 1, 2005 was not the date that the DHS first established its training programs. The first list of approved training programs is dated April 19, 1991.

> The Analysis provides the following: "The American Red Cross checks off the category by which the nurse aide obtains certification. For nurse aides who take, or 'challenge' and pass the examinations, the category 'unknown:' is checked off. The State is required to put these nurse aides on the nurse aide registry. These nurse aides will thus have a valid certification card and will be able to work as a nurse aide under current law."

The correct interpretation is that the American Red Cross checks off "unknown" only if the nurse aide has not completed any training and not because they passed the examinations.

- On page 5, paragraph one, the Analysis states that, "...[W]e could not draw a valid conclusion on whether other jurisdictions regulate nurse aides who work in such settings."

The Department's regular communication with other jurisdictions, including discussions about this very subject, permits us to conclude that those jurisdictions do not regulate this group because those jurisdictions face the same problems that we have identified in ensuring that this group of nurse aides minimally comports with ALL existing certification standards for reasons of patient safety as well as having consistent standards for all those regulated. We would be pleased to provide contact information that would enable verification of this claim.

Again, thank you for the opportunity to provide comments on the recommendation and substance of the Sunrise Analysis on nurse aides.

Very truly yours,

Lawrence M. Reifurth

Mark E. Recktenwald
Director

MER:lkm

[1] Completed a training program between April 19, 1991 and December 9, 1996. During this period the Hawaii DHS did not have a list of approved training programs. On March 21, 2006, the DHS began to provide lists of Hawaii training programs which it approved.

LINDA LINGLE
GOVERNOR OF HAWAII

CHIYOME L. FUKINO, M.D.
DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. Box 3378
HONOLULU, HAWAII 96801-3378

In reply, please refer to:
File:

April 13, 2007

Ms. Marion M. Higa
State Auditor
Office of the Auditor
465 South King Street, Room 500
Honolulu, Hawaii 96812-2917

Dear Ms. Higa:

Thank you for providing the Department of Health the opportunity to comment on your draft report entitled "Sunrise Analysis: Nurse Aides."

At the outset, we concur with the recommendation that nurse aides working in arenas outside that of nursing facilities participating in the Medicare and Medicaid program also be certified in order to provide baseline competency requirements. We would like to point out that there is legislation pending before the 2007 Legislature (SB 713 and HB 71) that has under gone many changes since the initial introduction of the legislation in 2006. As the current bills have support from the three Departments with relevant jurisdiction as well as provider organizations, we would like to see the legislation passed this session. We welcome the opportunity to dialogue further regarding those nurse aides that work in Group 3. We hope that this document will not negatively affect enactment of the legislation.

We are also including the following suggestions and ask for your consideration:

CHAPTER 1 – Regulatory program

1. Page 2. In the narrative explaining the purpose of the certification program, the draft states "To be eligible for recertification, they must have worked as a nurse aide at least seven hours at a nursing facility within the last two-year period." However, it is significant to note these "seven hours" must be in a Medicare/Medicaid certified nursing facility with additional requirements such as completion of an annual performance review and 12 hours of in-service training.

2. Page 2. When describing participants who met with the Departments with jurisdiction over these issues, the Hawaii Long Term Care Association (HLTCA), in addition to the Healthcare Association of Hawaii (HAH), participated in the meetings occurring between 2000 and 2004. Both organizations provided tremendous input and played key leadership roles.

CHAPTER 1 – Other departmental roles and responsibilities

1. Page 3. In the narrative explaining that the Department of Human Services determines whether a Nurse Aide Training Program (NATP) qualifies for state certification, the draft states " . . . there were 22 certified nurse aide (CNA) training programs in the state." However, it is significant to note these are State approved CNA training programs as there may be additional training programs which are not State approved.

2. Page 3. The formal name specifying differences between care homes is Type I and II. Please include the word "Type" before "I and II" in the two uses in the fourth paragraph.

3. Page 3. The draft narrative explaining the role of both the State Licensing and Medicare Sections, respectively, of Office of Health Care Assurance (OHCA) is both inaccurate and confusing. The State Licensing Section licenses adult residential care homes, expanded adult residential care homes, developmental disabilities domiciliary homes, assisted living facilities, special treatment facilities, and therapeutic living programs.

4. The Medicare Section is responsible for both state licensing and/or federal certification of hospitals and medical facilities in Hawaii which include home health agencies and nursing facilities. Also, the Medicare Section has a contract with the Centers for Medicare & Medicaid Services (CMS) to implement the federal survey and certification program which include the investigation of allegations of abuse, neglect, and misappropriation of resident property against only certified nurse aides employed in certified nursing facilities. As the designated State Survey Agency, the OHCA, Medicare Section is the only entity which can place findings on the Hawaii State CNA Registry.

CHAPTER 1 – Nurse aides in Hawaii

1. Page 3. The draft narrative states "Approximately 2,726 nurse aides are employed in Medicare or Medicaid facilities." This should probably read "employed in Medicare or Medicaid nursing facilities." There are also nurse aides employed in other types of Medicare or Medicaid facilities which may not be included in this count.

2. Page 4. The first line on this page is duplicative; it repeats a sentence on the previous page. Please delete line one of page four.

3. Page 4. Consistent with the explanation in point number 1 of this section, "Group 1" should indicate "Medicare or Medicaid nursing facilities."

4. Page 4. "Group 2" should indicate "state-licensed or certified healthcare settings." It was not the intent to certify nurse aides who may be employed at other types of licensed and/or certified facilities not involved with CNA responsibilities.

5. Page 4. "Group 3" should list the Department of Human Services in addition to the Department of Health.

CHAPTER 1 – Regulation of nurse aides in other states

Page 4. Again, the distinction needs to be made with respect to the federal survey and certification requirements of nurse aides who work in Medicare and/or Medicaid nursing facilities. Currently, there is no federal regulation requiring CNAs in other certified provider types (such as hospitals, home health agencies, hospices, intermediate care facilities for the mentally retarded [ICF/MR], etc.).

CHAPTER 1 – Associations whose members employ nurse aides

Page 5. HAH and HLTCA represent a small segment of community based providers employing nurse aides. The sentence currently implies that the two associations represent all community based providers, which is not wholly correct.

CHAPTER 2 – Evidence of actual harm exists (Investigating allegations)

1. Page 10. Again, the responsibilities of the OHCA, Medicare Section are incorrectly stated as in "Chapter 1 – Other departmental roles and responsibilities."

2. Page 10. The draft statement, "A copy of the report is also forwarded to the nursing facilities." is incorrect. Investigation reports completed by OHCA are confidential and are not readily released to the nursing facilities.

CHAPTER 2 – Evidence of actual harm exists (Effect on nurse aide registry)

Page 11. The statement of how findings are placed on the CNA registry is incorrect. According to the Federal regulation, only the OHCA, Medicare Section, as the designated State Survey Agency, can place findings on the Hawaii CNA Registry. Findings placed on the CNA registry is the result of either a substantiated finding from an investigation completed by the State Survey Agency; or a report of a conviction (related to abuse, neglect, misappropriation of resident property; or for a reason which makes the individual unsuited to work in a nursing home (such as a felony conviction of child abuse, sexual assault, or assault with a deadly weapon, etc.) in a court of law. A court of law cannot place a finding on the CNA registry as stated in the draft.

CHAPTER 2 - Evidence of actual harm exists (Surveying facilities)

1. Page 11. Again, the stated responsibility of the OHCA, Medicare Section, is incorrectly stated ("The OHCA, Medicare Section's primary responsibility is to conduct state surveys of the Medicare and Medicaid facilities and those facilities licensed or certified by the State.").

2. Page 11. Again, it is significant to make reference to certified nursing facilities when discussing the OHCA, Medicare Section responsibilities ("The Medicare Section is required to survey 48 facilities every 12 to 15 months."). The OHCA, Medicare Section has approximately 200 different provider/suppliers of 16 provider/supplier types which are surveyed at different frequencies.

   Investigations on nurse aides and facility surveys are NOT usually done concurrently. While it is practical and an ideal for the OHCA, Medicare Section, to complete complaint investigations (all types, including CNA investigations) and survey activities at the same time while onsite at a facility for a routine survey it is not always possible. The OHCA, Medicare Section generally must complete CNA investigations at other times because of the time involved with staff/resident/family interviews, and additional record reviews. The OHCA, Medicare Section must also do so while complying with the CMS contractual requirements for survey and certification activity which dictate the workload priorities (currently, mandatory survey activity for nursing facilities, ICF/MR facilities, and home health agencies.).

CHAPTER 2 – Potential harm exists

1. Page 12. The assumption that nurse aides in Groups 2 and 3 may be subject to the same types of complaints and allegations as they provide the same type of services regardless of employment locale is not necessarily correct. The nurse aides in Group 1 generally would be subject to a larger target group (more residents assigned to CNA in a nursing home compared to other provider types, resulting in a higher frequency of complaints about their care), and wider variety of services and expectations for resident care (providing meaningful, therapeutic activities; repositioning residents because of strict monitoring of pressure sores and physical restraints; feeding residents with dietary concerns; monitoring residents with behavioral concerns; dealing with more family members; awareness of resident rights; bathing; transferring; etc.) due to the numerous licensing and certification requirements.

   In reviewing the OHCA CNA complaint data previously shared with the auditor's office, there were 247 CNA allegations logged by OHCA from 1999 to 2006. There were nine allegations substantiated, eight by the State Survey Agency and one by the Medicaid Fraud Control Unit (MFCU - formerly, the Medicaid Investigations Division [MID]). Of

the eight CNA allegations substantiated by OHCA, one was the result of OHCA obtaining confirmation that the CNA already had a substantiated finding in another state (Oklahoma) CNA Registry, thereby prohibiting the CNA from being employed at any certified nursing facility in the nation.

In reviewing the CNA findings reported to the Hawaii CNA Registry, of the 46 findings reported to the Hawaii CNA Registry, eight were the result of OHCA's substantiated findings; and the remaining the result of court convictions of these CNAs related to abuse, neglect, misappropriation of resident property; or for reasons which made the individual unsuited to work in a nursing home (such as a felony conviction of child abuse, sexual assault, or assault with a deadly weapon, etc.). In addition, 20 of the 46 CNAs with findings reported to the Hawaii CNA Registry were not currently employed in a certified nursing facility.

The MFCU has investigated and brought criminal action against these 20 nurse aides. The MFCU receives referrals from the OHCA, Medicare Section, Adult Protective Services (APS) and other sources. It is not clear if these nurse aides work in Group 2 or Group 3, as there is no tracking mechanism.

The OHCA, State Licensing Section does conduct investigations on allegations of abuse, neglect and exploitation of residents for those settings that they license. Some of these individuals may be nurse aides; however, the OHCA, State Licensing Section regulations do not require these nurse aides to be certified. The OHCA, State Licensing Section also refers allegations of abuse, neglect and exploitation to APS and MFCU for investigation.

CHAPTER 2 - Other protections do not exist (Complaints process does not address all nurse aides

Page 13. The draft statement "Put simply, the OHCA, Medicare Section, does not have the authority to investigate complaints and/or allegations on nurse aides in Groups 2 and 3." is not entirely accurate. The OHCA, Medicare Section does conduct investigations of abuse/neglect on those providers that we license that may happen to be nurse aides or have nurse aides.

CHAPTER 2 - 2006 Bill is problematic

Page 14. Nurse aides with a valid certification card will not be permitted to work in Medicare and Medicaid certified nursing facilities unless they have completed a state-approved training program, as required by federal law. Please correct the closing sentence of the paragraph.

CHAPTER 2 - Recommendation

1. Page 17. The closing sentence states that certification should include an enforcement component, also handled through the licensing authority. Please clarify which agency is being referred to.

Thank you for the opportunity to provide comments.

Sincerely,

for Chiyome Leinaala Fukino, M.D.
Director of Health

c: OHCA

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April 17, 2007

Ms. Marion M. Higa, State Auditor
Office of the Auditor
465 S. King Street, Room 500
Honolulu, Hawaii 96813-2917

Dear Ms. Higa:

I am in receipt of your letter dated April 5, 2007 and the confidential draft report, *Sunrise Analysis: Nurse Aides.* I thank you for the opportunity to review the report and make changes prior to the public release of the report.

The Department is in agreement that current state and federal law do not require certification of nurse aides who work in facilities or settings other than in Medicare and/or Medicaid certified nursing facilities. The Auditor's report also clearly stated that the Department is the State's single Medicaid agency and responsible for the certification of State approved nurse aide training programs that meet State curriculum requirements. However, the Competency Evaluation Program, including the maintenance of the nurse aide registry, is managed by the Department of Commerce and Consumer Affairs (DCCA) through its contractor.

Over the past few years, the Department has been working with the Department of Commerce and Consumer Affairs, the Department of Health's Office of Health Care Assurance (OHCA), the Hawaii Long Term Care Association (HLTCA) and the Healthcare Association of Hawaii (HAH) to address issues of quality of care provided by nurse aides in settings other than Medicare/Medicaid certified nursing facilities. All agencies clearly understand that a majority of nurse aides work in settings other that Medicare/Medicaid nursing facilities and that there are no statutes to address the competency of these nurse aide and the quality of care they provide.

Furthermore, we acknowledged that although not required, many nurse aides who work in settings other than Medicare/Medicaid nursing facilities want to be able to be "certified" nurse aides (CNAs) and are willing to receive training and be assessed to obtain and maintain certification. The problematic issue was that there was no State requirement for training and assessment for these nurse aides (Groups 2 and 3), no agency with statutory jurisdiction over the quality of care provided, and no mechanism for mandatory reporting and investigation of cases

in which a nurse aide in Groups 2 or 3 is alleged to have committed fraud, patient physical and/or verbal abuse, and/or misappropriation of patient's funds.

There is proposed legislation this session concerning CNA certification that would identify the Department of Health (DOH) and the Department of Human Services (DHS) as the State Departments responsible for the state licensure and certification of settings in which many nurse aides are employed (Group 2). If this legislation becomes law, the DOH and DHS will be given the responsibility to ensure that their respective state licensed/certified settings assess a nurse aide's on-going competency and the quality of care provided by the nurse aide as well as the ability to sanction the nurse aide based on substantiated fraud, abuse, and/or misappropriation of patient funds.

There are no State agencies or Departments with the legal right to enter a patient's home or a program not licensed/certified by the DOH or DHS to ensure that ALL independently employed nurse aides are competent to provide service and there is no requirement for agencies not licensed/certified by the DOH or DHS to train and assess the quality of care provided by the nurse aides they employ.

Also, it has been brought to my attention that the number of nurse aides who have not qualified for recertification under Groups 1 and 2 totals 418. Thus, there are only 418 nurse aides in Group 3.

It is important to understand that under current processes, the 418 nurse aides in Group 3 can continue to be certified if they pass the State approved competency examination every two years before their existing certifications end. Proposed legislation would allow Group 3 nurse aides to continue to be certified if they pass the State approved competency examination and the State approved training every two years before their existing certifications end. Thus, a process for continuing certification for Group 3 exists and will continue to exist.

In conclusion, the Department of Human Services cannot support the recommendation in the Auditor's report (Page 17). Because Group 3 nurse aides are self-employed or work in uncertified/unlicensed programs, the risk of harm to the public cannot be decreased by including them in legislation for the optional certification of Group 2 nurse aides unless legislation clearly identifies, provides funding of staffing and other administrative costs, and gives specific authority to an agency to require certification of all Group 3 nurse aides and specific authority to closely monitor their quality of care and competency in non-licensed/certified settings and specific authority to investigate allegations of violations of patient rights. Also, since "certification" for Group 2 is optional, it would mean that Group 3 nurse aides will be held to a higher standard than Group 2. Should you have any further questions, please contact Dr. Lynette Honbo at 692-8106.

Sincerely,

Lillian B. Koller
Director