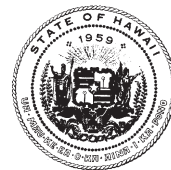

Sunset Evaluation: Respiratory Therapists

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

Report No. 15-08
June 2015



THE AUDITOR
STATE OF HAWAII

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:

1. Financial audits attest to the fairness of the financial statements of agencies. They examine the adequacy of the financial records and accounting and internal controls, and they determine the legality and propriety of expenditures.
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.
5. Health insurance analyses examine bills that propose to mandate certain health insurance benefits. Such bills cannot be enacted unless they are referred to the Office of the Auditor for an assessment of the social and financial impact of the proposed measure.
6. Analyses of proposed special funds and existing trust and revolving funds determine if proposals to establish these funds are existing funds meet legislative criteria.
7. Procurement compliance audits and other procurement-related monitoring assist the Legislature in overseeing government procurement practices.
8. Fiscal accountability reports analyze expenditures by the state Department of Education in various areas.
9. Special studies respond to requests from both houses of the Legislature. The studies usually address specific problems for which the Legislature is seeking solutions.

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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State of Hawai'i

Professional and vocational regulations are to be eliminated if they have no further benefits to consumers.

—Hawai'i sunset law, Section 26H-2, HRS

Recommendations

Response

Prior Reports

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<http://auditor.hawaii.gov/>

Sunset Evaluation: Respiratory Therapists

Report No. 15-08, June 2015

Regulation of respiratory therapists benefits consumers but program could be improved

The *Hawai'i Regulatory Licensing Reform Act*, Chapter 26H, HRS, establishes policies for regulating certain professions and vocations and schedules the repeal of newly enacted occupational regulatory programs. It also requires the Auditor to evaluate each board, commission, and regulatory program prior to its repeal date. We evaluated the regulation of respiratory therapists under Chapter 466D, HRS (*Respiratory Therapists*), which is scheduled for repeal on June 30, 2016.

Regulation of respiratory therapists complies with statutory criteria, continues to benefit consumers, and is warranted

We found that continued state regulation of respiratory therapists is warranted because key statutory criteria have been fulfilled. Regulation of respiratory therapists is reasonably necessary to protect the health and safety of consumers. Licensure, the strictest form of state regulation, is consistent with other health-related occupations (such as doctors, nurses, and others) and is warranted because consumers' health and safety may be jeopardized by the nature of services offered by respiratory therapists—some of which are invasive and potentially hazardous. Furthermore, the cost of respiratory therapy services to consumers has not been increased by the regulation of respiratory therapists; regulation has not unreasonably restricted entry into the profession by qualified persons; and fees appear to be covering the cost of the regulatory program. We conclude that regulation of respiratory therapists has benefits to consumers and should continue. In addition, every state except Alaska regulates respiratory therapists. We recommend that Section 26H-4, HRS, be amended to rescind the repeal of Chapter 466D, HRS.

Department should improve the respiratory therapists program

The Department of Commerce and Consumer Affairs could make several improvements to the respiratory therapist program's operations. Specifically, it should determine whether the program is breaking even, better document its review of applicants' qualifications, amend the license application to remove an overly broad question and correct a technical statutory reference, adopt administrative rules for the program and consider adding program fees to existing administrative rules, improve the program's website, and amend the Regulated Industries Complaints Office form to include respiratory therapists.

Agency response

The department agreed with most of our recommendations and supports the continued regulation of respiratory therapists. It disagreed with our recommendation to request information concerning only prior convictions related to respiratory care, stating it is in the interest of public protection to consider convictions outside the profession. The department also disagreed with our recommendation to improve the program's website by adding a clear link to the program's fees, saying it believes applicants already have clear and direct access to application forms, which include fee information.

Sunset Evaluation: Respiratory Therapists

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

Submitted by

THE AUDITOR
STATE OF HAWAI'I

Report No. 15-08
June 2015

Foreword

This “sunset” report on respiratory therapists was prepared in response to a provision in the *Hawai‘i Regulatory Licensing Reform Act*, Chapter 26H, Hawai‘i Revised Statutes (HRS), which requires the Auditor to perform an evaluation of the regulatory program under Chapter 466D, HRS, scheduled for repeal on June 30, 2016.

The report presents our findings and recommendations on whether the State’s continued oversight of respiratory therapists complies with policies in the licensing reform law and whether the public interest requires that the regulatory program be reenacted, modified, or permitted to expire. We also evaluated the effectiveness and efficiency of the respiratory therapist regulatory program and made recommendations to improve its policies, procedures, and practices.

We wish to express our appreciation for the cooperation and assistance extended by staff of the Department of Commerce and Consumer Affairs and other organizations and individuals whom we contacted during the course of our evaluation.

Jan K. Yamane
Acting State Auditor

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Chapter 1

Introduction

The *Hawai‘i Regulatory Licensing Reform Act*, Chapter 26H, Hawai‘i Revised Statutes (HRS), establishes policies for regulating certain professions and vocations and schedules the repeal of newly enacted occupational regulatory programs. Under Section 26H-5, HRS (the “sunset” law), the Auditor must evaluate each board, commission, and regulatory program prior to its repeal date. The Auditor must also determine whether the program complies with the State’s policies for regulating professions and vocations set forth in Section 26H-2, HRS, and whether public interest requires that the law establishing the regulatory program should be reenacted, modified, or permitted to expire.

If the Auditor finds that the law establishing a regulatory program should be modified, the Auditor must include in the report draft legislation to improve the policies, procedures, and practices of that program. Even if the Auditor finds that the law establishing a regulatory program should not be reenacted, the Auditor must still evaluate the effectiveness and efficiency of the program and make appropriate recommendations to improve the program’s policies, procedures, and practices.

We evaluated the regulation of respiratory therapists under Chapter 466D, HRS, which is scheduled for repeal on June 30, 2016.

Background on Respiratory Therapists

Respiratory therapy began with aromatherapy and the practice of inhaling medicine and vapors in Egypt, China, India, and the Middle East around 6000 B.C. From there, the practice spread to Europe and the Americas. A tracheostomy¹ procedure is depicted on a sculptured slab from Egypt in 3000 B.C.; and there is mention of inhalational treatment for asthma in China in 2600 B.C. Ether (an inhaled general anesthetic) was discovered in 1275 but not used until 1842, when it was administered to remove two cysts from a patient. In 1783, oxygen therapy was first reportedly used as a remedy, and the first laryngectomy² was performed in 1873. In 1917, a rubber nasal catheter and nasal prongs were used to administer oxygen to World War I pulmonary edema patients.

¹ A surgical procedure that creates an opening through the neck into the windpipe. A tube is usually placed through this opening to provide an airway to remove secretions from the lungs.

² A surgical procedure that removes the larynx (vocal cord area that produces sound and lets air travel from the lungs to the mouth).

Within the past 100 years, respiratory therapy has significantly evolved, and the profession of respiratory care was officially established in the 1940s. During the early years of the profession, respiratory therapists were referred to as “oxygen technicians” or “oxygen orderlies,” and most of their activities involved moving oxygen cylinders and administering oxygen via nasal catheters, masks, or oxygen tents. Today, respiratory therapists provide care for patients with heart and lung problems. They perform diagnostic tests for lung capacity, administer breathing treatments, record patients’ progress, and consult with physicians and surgeons on continuing care. Most respiratory therapists work in hospitals.

Professional organizations, accrediting body, and credentialing agency

The primary professional association for respiratory therapists is the American Association for Respiratory Care (AARC), which started in the 1940s and has about 52,000 members worldwide. The association’s membership consists mainly of respiratory therapists, who are health practitioners with two to four years’ college-level training and who assist physicians in caring for patients with lung disorders and other breathing conditions. The association leads national and international professional associations for respiratory care by promoting professional excellence, advancing the science and practice of respiratory care, and serving as an advocate for patients, their families, the public, and the profession.

AARC’s local affiliate is the Hawai‘i Society for Respiratory Care (HSRC), which has about 190 members. HSRC is a volunteer-based, non-profit professional organization committed to supporting respiratory care practitioners and the pulmonary health of the people of Hawai‘i and the Pacific Islands.

The accrediting body for respiratory therapists is the Commission on Accreditation for Respiratory Care (CoARC), an independent accrediting body of respiratory care programs. CoARC accredits degree-granting programs in respiratory care that have met or exceeded its minimum accreditation standards.

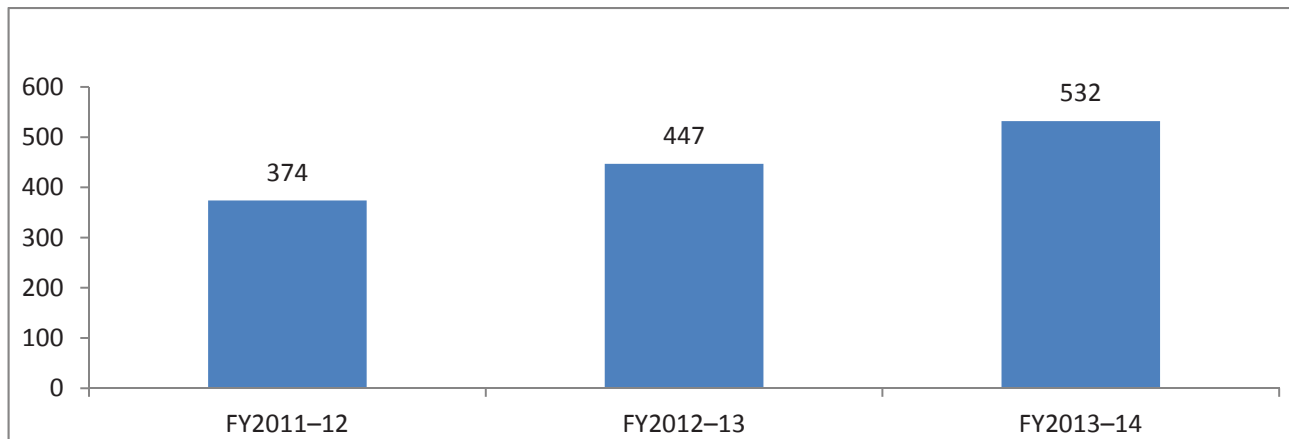
Respiratory therapists are credentialed by the National Board for Respiratory Care (NBRC). Respiratory therapists can earn professional certification after completing an accredited respiratory care program and passing the NBRC exam. The two most common certifications sought are the Certified Respiratory Therapist certification, which indicates mastery of essential knowledge, skills, and abilities as an entry-level therapist; and the Registered Respiratory Therapist certification, which signifies a more advanced level of knowledge.

Number of licensed respiratory therapists in Hawai‘i

In FY2013–FY2014, the Department of Commerce and Consumer Affairs (DCCA) reported there are 532 actively licensed respiratory therapists in Hawai‘i. Exhibit 1.1 shows the total number of licensed respiratory therapists in Hawai‘i each year since the program’s inception in 2011.

Exhibit 1.1

Number of Licensed Respiratory Therapists in Hawai‘i, FY2011–FY2014



Source: Department of Commerce and Consumer Affairs and Office of the Auditor

Education

Respiratory therapists must have at least an associate’s degree from an accredited respiratory care program, where they receive classroom and practical training on how to treat patients and operate medical equipment. Some respiratory therapists have baccalaureate degrees. Kapi‘olani Community College’s Respiratory Care Practitioner Program is the only accredited respiratory care training program in Hawai‘i.

Regulation in other states

Respiratory therapists are licensed in every state except Alaska. Although licensing requirements vary, respiratory therapists must be certified by the NBRC before applying for any state licensure.

Regulatory Program in Hawai‘i

In 2010, the Legislature asserted a need to regulate regulatory therapists to protect the public from the unqualified practice of respiratory care and from unprofessional conduct by persons licensed to practice respiratory care. The Legislature also stated that the practice of respiratory care in Hawai‘i affects the public’s health, safety, and welfare. Consequently, the Legislature established a respiratory therapist program within DCCA through Act 178, Session Laws of Hawai‘i 2010, codified as Chapter 466D, HRS (*Respiratory Therapists*), on July 1, 2011.

Chapter 466D, HRS— Respiratory Therapists

Chapter 466D, HRS, defines the practice of respiratory care as providing assessment, therapy, management, rehabilitation, support services for diagnostic evaluation, education, and care for patients with deficiencies and abnormalities that affect the pulmonary system. This includes:

- Administering pharmacological, diagnostic, and therapeutic care related to respiratory care procedures necessary for treatment, disease prevention, rehabilitative, or diagnostic regimens prescribed by a physician;
- Observing and monitoring signs, symptoms, reactions, and physical responses to respiratory care treatment and diagnostic testing;
- Using, for diagnostic or therapeutic purposes, medical gases, excluding general anesthesia; aerosols, humidification, environmental control systems, or invasive and non-invasive modalities; pharmacological care related to respiratory care procedures; mechanical or physiological support for ventilation, including maintenance of natural airways and insertion and maintenance of artificial airways; cardiopulmonary resuscitation; and respiratory protocol and evaluation or diagnostic and testing techniques required for implementation of respiratory care protocols; and
- Transcribing and implementing written, verbal, and telecommunicated orders of a physician pertaining to the practice of respiratory care.

Powers and duties of the director

Chapter 466D, HRS, authorizes the director of the Department of Commerce and Consumer Affairs to grant or refuse respiratory therapist licenses; adopt and amend administrative rules for the program; administer, coordinate, and enforce the program's regulatory law; prepare and administer respiratory therapist examinations and establish criteria for successfully passing the exam; and discipline licensed respiratory therapists. The director also has the power and duty to appoint an advisory committee composed of practicing respiratory therapists to assist with implementing the respiratory therapist regulatory law.

Licensing requirements

To be licensed as a respiratory therapist in Hawai'i, an individual must successfully complete a respiratory therapy training program at an accredited education institution approved by CoARC; pass the NBRC's Certified Respiratory Therapist Examination within 90 days of submitting an application; and pay the licensing fee. Licenses must be

renewed every three years (triennially). The director may issue licenses by endorsement for applicants who hold a valid license from another state whose licensure requirements meets or exceeds Hawai'i's.

Exemptions

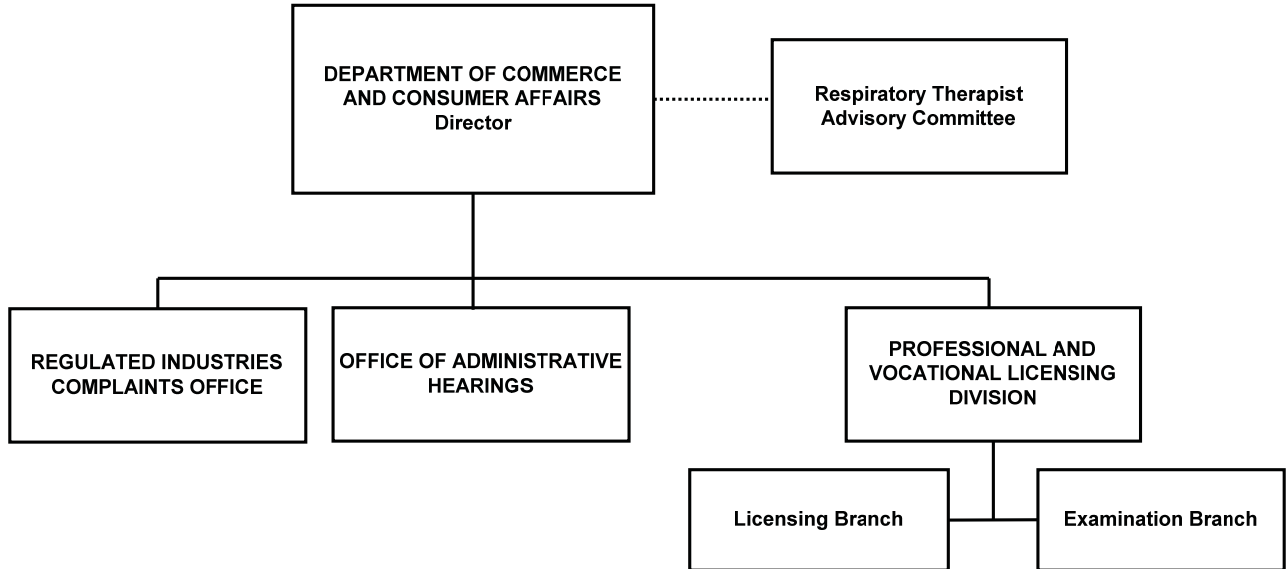
Chapter 466D, HRS, is not intended to restrict the practice of other licensed or credentialed healthcare practitioners practicing within their own recognized scopes of practice. The chapter does not apply to anyone who is:

- Working within the scope of practice or duties of another licensed profession that overlaps with the practice of respiratory care;
- Working as, or training to become, a sleep technologist;
- Enrolled as a student in an accredited respiratory therapy program;
- Employed by a durable medical equipment provider who engages in the delivery, assembly, setup, testing, and demonstration of oxygen and aerosol equipment upon the order of a physician;
- Rendering services in an emergency or in the domestic administration of family remedies; or
- Employed by a federal, state, or county government agency in a respiratory therapist position.

Respiratory therapist program

To implement Chapter 466D, HRS, DCCA established a respiratory therapist program within its Professional and Vocational Licensing Division (PVL). The program has no regulatory board; the DCCA director of grants licenses and makes disciplinary decisions. The program is administered by a PVL executive officer, who is assisted by PVL's Licensing Branch, its Examination Branch, and a Respiratory Therapist Advisory Committee. The department's Regulated Industries Complaints Office (RICO) receives, investigates, and prosecutes possible license violations, including reports of unlicensed activity. The department's Office of Administrative Hearings is responsible for conducting hearings and issuing recommendations or final decisions. Exhibit 1.2 illustrates the program's organizational structure.

Exhibit 1.2
Respiratory Therapist Program Organizational Structure



Source: Office of the Auditor

Program costs

Section 466D-6, HRS, requires that administrative fees be used to defray costs incurred by DCCA to operate the respiratory therapist program. Exhibit 1.3 shows the program's revenues and expenditures since its inception.

Exhibit 1.3**Respiratory Therapist Program Revenues and Expenditures, FY2011–FY2014**

	<u>FY2010–11</u>	<u>FY2011–12</u>	<u>FY2012–13</u>	<u>FY2013–14</u>	<u>Total</u>
Revenues					
Start-up appropriation	\$137,000	\$-	\$-	\$-	\$137,000
Licensure fees (applications, licenses, renewals)	-	67,504	9,339	48,554	125,397
Special assessment fee*	-	113,392	19,152	7,600	140,144
Subtotal	137,000	180,896	28,491	56,154	402,541
Expenditures					
Personnel	39,494	35,551	30,921	34,555	140,521
Operating	15,300	15,300	15,300	15,300	61,200
Repayment of start-up appropriation	-	113,392	19,152	4,456	137,000
Subtotal	54,794	164,243	65,373	54,311	338,721
Program balance (deficit)	\$82,206	\$16,653	(\$36,882)	\$1,843	\$68,820

*Special assessment fee was collected from licensees until the program's start-up appropriation was repaid to the department's special fund.

Source: Department of Commerce and Consumer Affairs and Office of the Auditor

Prior Reports

We issued two sunrise analyses regarding respiratory therapists prior to their regulation, in 1986 and 1995. Both reports concluded that regulation of respiratory therapists was not necessary to protect the health, safety, or welfare of consumers in Hawai'i at the time.

Our 1986 *Sunrise Analysis of a Proposal to Regulate the Practice of Respiratory Care*, Report No. 86-10, concluded that regulating respiratory therapists was not reasonably necessary to protect the health, safety, or welfare of consumers. We reported that the potential for harm through improper use of equipment or the performance of respiratory care procedures was minimal because respiratory therapists worked under direct medical supervision and were employed by knowledgeable health care providers. In addition, we concluded that licensing respiratory therapists would increase the cost of health care, reduce the flexibility of health care providers to use qualified personnel in delivering health care services, and have other adverse consequences including restricting entry into the occupation.

Our 1995 *Sunrise Analysis of a Proposal to Regulate Respiratory Care Practitioners*, Report No. 95-31, also concluded that regulating respiratory therapists was not reasonably necessary to protect consumers' health, safety, or welfare. We again found that regulation would be duplicative and costly and concluded that the practice of respiratory therapy had not changed significantly enough since 1986 to warrant a different recommendation.

Objectives of the Evaluation

1. Assess whether the program regulating respiratory therapists complies with policies under Section 26H-2, HRS.
2. Assess whether the public interest requires that Chapter 466D, HRS (*Respiratory Therapists*), be reenacted, modified, or permitted to expire.
3. Evaluate the efficiency and effectiveness of the regulatory program.
4. Make recommendations as appropriate.

Scope and Methodology

To assess the need to continue regulating respiratory therapists, we applied the criteria for regulation set forth in Section 26H-2, HRS, of the *Hawai'i Regulatory Licensing Reform Act*, namely, that:

1. Regulation should be undertaken only where reasonably necessary to protect the health, safety, or welfare of consumers of the services; the purpose of regulation should be to protect the public and not the regulated profession or vocation;
2. Full licensure or other restrictions on certain professions or vocations should be retained or adopted when the health, safety, or welfare of the consumer may be jeopardized by the nature of the service offered by the provider;
3. Evidence of abuses by providers of the service is to be accorded great weight in determining whether regulation is desirable;
4. Regulations that artificially increase the costs of goods and services to the consumer should be avoided except in those cases where the cost is exceeded by the potential danger to the consumer;
5. Regulation should be eliminated whenever it has no further benefits to consumers;

6. Regulation must not unreasonably restrict entry into professions and vocations by all qualified persons; and
7. Fees imposed for the regulatory program must not be less than the full cost of administering the program.

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.

We also scrutinized the language of the existing regulatory statute, Chapter 466D, HRS, for appropriateness, including the licensing requirements.

When examining the law, we also assessed whether the regulatory approach is one of the following:

- *Licensing.* Gives persons who meet certain qualifications the legal right to deliver services, that is, to practice the profession;
- *Certification.* Restricts the use of certain titles 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; or
- *Registration.* Involves practitioners signing up with the State so that a roster or registry will exist to inform the public of the nature of practitioners' services and to enable the State to track them. Registration may be mandatory or voluntary.

We also assessed the effectiveness and efficiency of the regulatory program, including implementation of the license application process.

We reviewed occupational literature on respiratory therapists and their regulation, including relevant federal regulations, regulation in other states, and Hawai'i statutes and rules. We inquired about complaints filed at DCCA's RICO and its Office of Consumer Protection and the Hawai'i Better Business Bureau to determine harm to consumers. We reviewed files and other documentation pertaining to regulatory operations at the department's licensing division.

We obtained information from organizations of respiratory therapists. We also interviewed DCCA staff, practitioners of and instructors in respiratory therapy, a medical director of a respiratory care unit, and patient organizations affected by respiratory therapists.

Our work was performed from December 2014 through April 2015 in accordance with the Office of the Auditor's *Manual of Guides*. Those standards require that we plan and perform our work to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our objectives. We believe that the evidence we obtained provides a reasonable basis for our findings and conclusions based on our objectives.

Chapter 2

Regulation of Respiratory Therapists Benefits Consumers But Program Could Be Improved

We issued two sunrise analyses regarding respiratory therapists prior to regulation, in 1986 and 1995. Both reports concluded that regulation of respiratory therapists was not necessary to protect the health, safety, or welfare of consumers in Hawai‘i. This sunset review, however, concludes that the licensing program for respiratory therapists should continue and not be eliminated because benefits to consumers exist.

Sunrise analyses are conducted prior to regulation. They are meant to determine whether the State should regulate a specific profession or vocation by examining whether consumers’ health, safety, or welfare is jeopardized by the nature of services provided—enough to warrant state intervention. Both sunrise and sunset evaluations are governed by criteria from Section 26H-2, Hawai‘i Revised Statutes (HRS); however, the focus of the criteria differs for each type of analysis.

In a sunrise analysis, we recommend enacting the proposed regulation only if it is *demonstrably necessary* to protect the public’s health, safety, or welfare; it is not enough that the proposed regulation may have *some* benefits to consumers. This is a very high bar. In a sunset review, however—where regulation is already under way—we recommend deregulation only if we find that regulation has *no further benefits* to consumers, as required under Section 26H-2, HRS. The bar in this case is considerably lower.

Since our 1995 sunrise analysis nearly 20 years ago, respiratory therapists’ scope of practice and responsibilities for patient care has also changed. As required by law, respiratory therapists practice under the auspices of “qualified medical direction”—meaning within ready access to a licensed physician who specializes in the management of acute and chronic respiratory disorders and is responsible for the quality, safety, and appropriateness of the respiratory services provided. However, in practical terms, we found respiratory therapists frequently conduct their work in highly autonomous settings. Respiratory therapists also now perform procedures that have a significant potential for causing harm. Furthermore, the need for respiratory therapists to be trained in an accredited respiratory therapist training program warrants their continued licensure.

This sunset review also looked at the department’s respiratory therapist regulatory program, where we concluded that some changes could be made to improve the program for licensees.

Summary of Findings

1. Regulation of respiratory therapists complies with statutory criteria and continues to provide benefits to consumers. Changes in scope of practice and semi-autonomous work settings warrant continued regulation.
2. The public interest warrants reenactment of Chapter 466D, HRS (*Respiratory Therapists*).
3. The Department of Commerce and Consumer Affairs can improve the respiratory therapist program.

Regulation of Respiratory Therapists Complies With Statutory Criteria and Continues to Benefit Consumers

When determining whether regulation of a specific occupation or vocation is desirable, state law provides that regulation should be undertaken only where reasonably necessary to protect the health, safety, or welfare of consumers. The strictest level of regulation (licensure) is only necessary where consumers' health, safety, or welfare may be jeopardized by the nature of the services offered by providers; and evidence of abuses by providers is to be accorded great weight in making these decisions. The law mandates eliminating regulation when it has no further benefits to consumers.

While we did not find any documented evidence of abuses by respiratory therapists in Hawai'i, their continued regulation is warranted to protect consumers' health and safety, which may be jeopardized by the misapplication of the physically invasive procedures they perform. State licensure provides a minimum threshold of practitioner care and therefore benefits consumers. We also found that regulation of respiratory therapists meets other statutory criteria and that they are regulated in all states except Alaska.

Regulation is warranted because respiratory therapists perform physically invasive and potentially hazardous procedures on patients

In addition to state law, a Council on Licensure, Enforcement and Regulation publication, *Questions a Legislator Should Ask*, says that the primary guiding principle for legislators should be whether or not a profession, if unregulated, presents a clear and present danger to the public's health, safety, and welfare. If the answer is no, regulation is unnecessary and wastes taxpayers' money.

The ability to breathe is, arguably, the most important thing in life. The American Lung Association's slogan expresses it aptly: "If you can't breathe, nothing else matters." We found that the health and safety of consumers may be jeopardized by the nature of services that respiratory therapists provide. Respiratory therapists perform medically complex,

physically invasive, and potentially hazardous procedures. They also perform procedures that require specialized training. Invasive procedures include arterial punctures—for analysis of blood oxygen level, carbon dioxide levels, and pH levels, which can cause bruising at the puncture site and even damage to the artery—and intubation of patients' airways, which can cause harm if a tube is inserted into the right main stem bronchus and not recognized immediately. Unqualified, poorly trained, or incompetent respiratory therapists could cause injuries to patients including permanent disability, coma, or even death.

Exhibits 2.1 through 2.4 illustrate some of the invasive and hazardous procedures performed by respiratory therapists. Exhibit 2.1 shows a respiratory therapist monitoring and assessing a flexible plastic tube in the windpipe.

Exhibit 2.1
Photo of Intubation Procedure



Respiratory therapists monitor and assess the flexible plastic tube placement in the trachea (windpipe).

Source: Office of the Auditor

Exhibit 2.2 illustrates a respiratory therapist monitoring and maintaining the airway, assessing and minimizing bronchial secretions, and maintaining the site surrounding a tracheostomy.

Exhibit 2.2
Photo of Tracheostomy Care



Respiratory therapist monitors and maintains the airway, assesses and minimizes bronchial secretions, and maintains the site surrounding a tracheostomy.

Source: Office of the Auditor

Exhibit 2.3 shows a respiratory therapist demonstrating the usage of a hand ventilator to provide oxygen.

Exhibit 2.3
Photo of Respiratory Therapist Using a Hand Ventilator



Respiratory therapist using a hand ventilator (also known as bag valve mask or manual resuscitator) to provide oxygen.

Source: Office of the Auditor

Exhibit 2.4 illustrates a respiratory therapist using an in-line suction catheter device to remove airway secretions.

Exhibit 2.4
Photo of Respiratory Therapist Performing In-Line Suction



Respiratory therapist using in-line suction catheter to remove airway secretions.

Source: Office of the Auditor

State licensure provides a minimum threshold of practitioner care

Most respiratory therapists work in hospital environments; and although they are required by law to have “ready access” to a licensed physician, they function with a high degree of autonomy. The potential for substandard practitioners to commit harm is therefore greater than in a highly supervised environment. By requiring that respiratory therapists study under an accredited respiratory therapy training program and pass a national exam, state licensure provides consumers with a minimum threshold of practitioner competency—preventing unqualified, poorly trained, and incompetent individuals from rendering the complex cardiopulmonary services and procedures required of respiratory therapists.

Other statutory regulatory criteria have been met

On balance, we found that benefits to consumers' health and safety warrant the regulation of respiratory therapists. We also found that Hawai'i's other statutory criteria for regulation have been met. Specifically, regulation has not artificially increased the cost of respiratory therapy services or unreasonably restricted entry into the field for qualified practitioners, and fees appear to cover the full cost of administering the regulatory program.

Regulation has not artificially increased the cost of respiratory therapy services

Section 26H-2, HRS, stipulates that professional regulations that artificially increase the costs of goods and services to the consumer should be avoided unless the cost is exceeded by the potential danger to consumers. We found that respiratory therapists do not independently bill for their services; only their employer (for example, hospital, home care agency, etc.) is responsible for billing. Respiratory therapy services are rendered within a hospital's cost of doing business; they are not itemized and are therefore not directly passed on to patients (consumers). Whether a respiratory therapist provides greater or fewer services to a patient in a given setting does not impact the Medicare or Medicaid reimbursement their employer receives.

Regulation has not unreasonably restricted entry into the field for qualified practitioners

Section 26H-2, HRS, also requires that regulation must not unreasonably restrict entry into the profession or vocation by all qualified persons. According to practitioners whom we interviewed, the licensing of respiratory therapists has not restricted entry into the field for qualified practitioners. Rather, they told us, it has engendered an accredited education program in Hawai'i and established an acceptable standard of practice and an expected competency level.

We found that when the respiratory therapist program started in July 2011, licensure applicants paid a relatively high triennial fee of \$589, which may have barred entry into the profession for some low-income individuals. However, this initial fee included a \$304 special assessment for program startup costs, which was discontinued in FY2013–FY2014, when \$137,000 in seed moneys was recouped. Licensure applicants now pay \$285 for their first license and \$235 every three years thereafter to renew their license. We conclude that although the respiratory therapist program's licensure fees are relatively high, they do not appear to have unreasonably restricted qualified individuals from entering the field.

Fees appear to cover the full cost of administering the regulatory program

Section 26H-2, HRS, also requires that fees cover the full cost of administering a regulatory program. We found that although the respiratory therapist program's financials have fluctuated from year to year (as shown in Exhibit 1.3), overall the program appears to be breaking even. However, we note that the financial information we received from the department included actual revenues but only estimated expenditures—Professional and Vocational Licensing Division (PVL) executive officers typically have multiple programs to administer and do not keep timesheets to record time spent per program. Because of this, we were unable to perform an accurate assessment of revenues and expenditures for the respiratory therapist program. We also note that the department told us it does not routinely review its programs to determine whether fees should be adjusted; according to the licensing administrator, as long as a program “is running without a problem,” fees are not reviewed.

Every state except Alaska regulates respiratory therapists

We also found that all states except Alaska regulate respiratory therapists. Although practitioners must fulfill their individual states' requirements to practice, 49 states subject respiratory therapists to the highest level of state regulation possible, licensure. Most respiratory therapist renewal periods are biennial; Hawai'i and the U.S. Territory of Puerto Rico have triennial renewal periods.

Chapter 466D, HRS, Should Be Reenacted

Continued regulation of respiratory therapists under Chapter 466D, HRS (*Respiratory Therapists*), is warranted because key statutory criteria have been fulfilled. Specifically, regulation of respiratory therapists is reasonably necessary to protect the health and safety of consumers. Licensure, the strictest form of state regulation, is consistent with other health-related occupations (such as doctors, nurses, and others) and is warranted because consumers' health and safety may be jeopardized by the nature of services—some of them invasive and potentially hazardous—offered by respiratory therapists. Furthermore, the cost of respiratory therapy services to consumers has not been increased by the regulation of respiratory therapists, has not unreasonably restricted entry into the profession by qualified persons; and fees appear to be covering the cost of the regulatory program. We conclude that regulation of respiratory therapists has benefits to consumers and should continue. In addition, every state except Alaska regulates respiratory therapists. Section 26H-4, HRS, should therefore be amended to rescind the repeal of Chapter 466D, HRS.

Department Should Improve the Respiratory Therapist Program

The *Hawai‘i Regulatory Licensing Reform Act*, Chapter 26H, HRS, requires us to evaluate each board, commission, and regulatory program subject to repeal prior to its repeal date. In addition to assessing whether the regulatory program as established complies with Section 26H-2, HRS, and whether public interest requires that the law establishing the regulatory program be reenacted, modified, or permitted to expire, we must also evaluate the effectiveness and efficiency of the regulatory program and make recommendations to improve its policies, procedures, and practices.

We found that the Department of Commerce and Consumer Affairs could make several improvements to the respiratory therapist program’s operations. Specifically, it should better document its review of applicants’ qualifications, adopt administrative rules for the program and consider adding program fees to existing administrative rules, improve the program’s website, correct a technical error on the respiratory therapist license application, and amend the Regulated Industries Complaints Office (RICO) form to include respiratory therapists.

Little evidence of review of license by endorsement applicants’ qualifications

The respiratory therapists law allows DCCA to issue licenses to applicants who hold current and unencumbered licenses in other states whose licensure requirements are equivalent to or higher than Hawai‘i’s. For example, Hawai‘i requires that in addition to passing a national exam, all applicants must have completed a respiratory therapy training program at an accredited educational institution approved by the Committee on Accreditation for Respiratory Care or its predecessor agencies. This method of licensing is known as *licensure by endorsement*.

We inquired with the department as to how it determines that another state’s requirements are equivalent to or higher than Hawai‘i’s. Frequently, the department develops a list of approved states for occupations that recognize licensure by endorsement. For respiratory therapists, however, the department has no such list. Since requirements for licensure vary somewhat across the country and DCCA has not performed a uniform analysis to determine which states have equivalent or higher licensure requirements, the department must conduct equivalency reviews for each out-of-state candidate.

We examined four license by endorsement applicant files to determine how equivalency or higher is determined and documented. Applicants who apply for a license by endorsement must complete an additional “Verification of License” form and the department must conduct an equivalency review. However, three of these files did not contain the

additional form or evidence of an equivalency review. The fourth file, while it contained that form, was also missing a required out-of-state board's seal. Nevertheless, these applicants were all granted licenses.

In the absence of a qualified list or individual review, it is possible the department has been issuing licenses to practitioners who may not have graduated from an accredited respiratory therapist training program, for instance. The omission may be allowing unqualified or poorly trained individuals to render the complex cardiopulmonary services and procedures required of respiratory therapists in Hawai'i.

License application has an overly broad question

State law allows the department to deny licenses to applicants who have a prior criminal conviction; however, it must be related to the profession or vocation. Specifically, a prior conviction must bear "a rational relationship to the duties and responsibilities of a job, occupation, trade, vocation, [or] profession" in order for an applicant to be denied a license.

We reviewed the license application for respiratory therapists and found that the form asks, "Have you ever been convicted of any crime in any jurisdiction that has not been annulled or expunged?" We find this question, as currently posed, is too broad and should be reworded to elicit information only on prior convictions related to respiratory therapy.

Program could be more transparent

The State has a policy of open and transparent government and has expressed a commitment to share information with the public. Hawai'i Administrative Rules (HAR) and state websites are two methods by which the State makes its processes and procedures known, ensuring uniformity and transparency in its dealings as well as clearly disseminating information to interested stakeholders. We found that DCCA has not adopted rules for the respiratory therapist program, could make the program's fees more accessible both in rules and on its website, and could make other improvements to its website.

Program has not adopted administrative rules

Administrative rulemaking is one of the methods by which state agencies carry out their tasks. The purpose of rules is to implement laws, such as those relating to the respiratory therapist program, and to establish operating procedures for state agencies. Generally, statutes provide a skeleton or superstructure for a program, and agencies are required to "fill in the details" to implement a program on a daily basis. Statutes usually do not spell out conditions in great detail, so agencies must make determinations in order to apply statutory requirements to varying classes of people. Clearly, agencies should not be allowed to apply differing standards among similarly situated members of the public.

We found that although the respiratory therapy program has been in existence since July 1, 2011, the department has yet to adopt administrative rules for the program. The department does have draft administrative rules; however, these have never been finalized because, according to the PVL administrator, “there has been no problem with [implementing] the [respiratory therapists] law.” We conclude that the department is in no rush to finalize the rules and does not have any plans to do so.

The department also administers Chapter 16-53, HAR (*Fees Relating to Boards and Commissions*), which contains a compilation of fees for various regulatory programs that DCCA administers, from “activity providers and activity desks” to “veterinary medicine,” and spells out all fees for each named program including application, examination, registration/certification/licensure, renewal, inactive, restoration, and Compliance Resolution Fund fees. However, although the respiratory therapist program is almost four years old, the department has neither adopted rules specific to the program nor amended Chapter 16-53 to include the respiratory therapist program’s fees.

Furthermore, lack of administrative rules has serious implications should an applicant or licensee challenge a decision made by the respiratory therapist program, whether it is ostensibly made pursuant to those rules or not. In the absence of rules, the program lacks sufficient transparency to applicants and other stakeholders. Several of the practitioners with whom we spoke expressed their wish that the department would adopt administrative rules for the program.

Program’s website could be improved

The department’s Professional and Vocational Licensing Division has a website for the respiratory therapist program. The site contains hyperlinks for requesting an application, verifying if a person is licensed, requesting prior complaints history on a licensee, and filing a complaint on a licensee. It also lists options to inquire about licensing requirements, check on the status of an application, and inquire about license maintenance requirements. We found that the program’s hyperlinks could be streamlined and its website improved by adding explanatory information.

First, the options to inquire about licensing requirements, check the status of an application, and inquire about license maintenance requirements are not hyperlinked; this information is only available by calling a telephone number listed on the site.

Second, nowhere on the site is the word “fees” mentioned. To find out what the program’s fees are, one must click on “Request an application” and from there choose the second of four available choices, titled

“Requirements, Information & Application.” Within that link, which leads to a fillable PDF form, fees are listed at the bottom of page two. This series of layers is not intuitive and is needlessly complicated. The department could simplify matters considerably for applicants by providing a direct link to “fees” from the program’s main webpage.

Finally, we were confused by some of the information on the “Verify if a person is licensed” webpage. At this site, interested persons can verify whether or not a respiratory therapist holds a valid Hawai‘i license. Publicly available information includes licensees’ name, license ID, expiration date, and several other categories. It also includes the categories “Active/inactive” and “Status.” It is possible for a licensee to be listed as “Active” as well as “Forfeited; needs to restore.” We inquired with the department and learned that this designation is used for applicants who have not paid their renewal fee. Under Section 466D-10, HRS, applicants have a year in which to renew their license or it becomes forfeited (hence the “Needs to restore”). To the uninformed, the appellation “active” as well as “forfeited” seems contradictory. It would be helpful if the department included an explanation of the range of statuses and what particular descriptors mean on the program’s webpage.

***Technical errors
should be corrected***

DCCA’s Licensing Branch processes respiratory therapist license applications and RICO accepts complaints regarding respiratory therapists. We found that the license application has an incorrect statutory reference and the complaint form does not list respiratory therapists.

License application has an incorrect statutory reference

Those who seek licensure as respiratory therapists in Hawai‘i must complete the department’s “Application for License – Respiratory Therapist” (Form RT-01). Page two of that application contains a section titled “Affidavit of applicant.” We found that this section includes a reference to Section 457-12, HRS, which relates to the discipline, grounds, proceedings, and hearings for *nurses* rather than respiratory therapists. The reference should be changed to Section 466D-11, HRS (grounds for refusal to renew, reinstate, or restore a license and for revocation, suspension, denial, or condition of a license for respiratory therapists).

RICO’s complaint form does not list respiratory therapists

Anyone wishing to make a complaint against a respiratory therapist can file with the department’s Regulated Industries Complaints Office by completing a “Healthcare Provider Complaint Form.” We found that the instructions for that form, which are dated January 2, 2015, list 21

categories of health care professions over which RICO has jurisdiction; however, it does not list respiratory therapists as one of those professions. The respiratory therapist program has been in existence since July 2011, nearly four years.

Conclusion

Respiratory therapists should continue to be regulated and licensed in Hawai'i to protect the health and safety of consumers. Changes in the profession mean they now perform physically invasive and potentially hazardous procedures, oftentimes with minimal supervision by a physician. Consequently, Chapter 466D, HRS, should be reenacted. In addition, the Department of Commerce and Consumers Affairs can improve the respiratory therapist program's operation by documenting its review of out-of-state applicants' qualifications, narrowing a question on the license application, and increasing the program's transparency by adopting administrative rules and improving the program's website. In addition, two technical errors on the license application and healthcare complaints forms should be corrected.

Recommendations

1. The Legislature should continue to regulate respiratory therapists by repealing Section 26H-4(b), HRS, thereby reenacting Chapter 466D, HRS (*Respiratory Therapists*).
2. The Department of Commerce and Consumer Affairs should:
 - a. Establish and employ a method for determining whether a regulatory program is breaking even, as is required under Section 26H-2(7), HRS;
 - b. Ensure that evidence of review of applicants' out-of-state qualifications is appropriately documented;
 - c. Amend the respiratory therapist license application form by:
 - i. Requesting information concerning only prior convictions that are related to the respiratory care profession; and
 - ii. Replacing the incorrect reference to Section 457-12, HRS, with Section 466D-11, HRS.

- d. Adopt administrative rules for the respiratory therapist program;
- e. Add the respiratory therapist program's fees to Chapter 16-53, HAR (*Fees Relating to Boards and Commissions*);
- f. Improve the respiratory therapist program's website by adding clear links to:
 - i. The program's fees; and
 - ii. An explanation of what the various categories of licensee statuses mean; and
- g. Amend the RICO complaint form to include respiratory therapists.

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Response of the Affected Agency

Comments on Agency Response

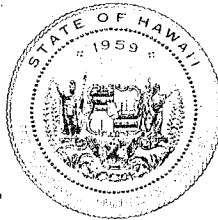
We transmitted a draft of this report to the Department of Commerce and Consumer Affairs on May 19, 2015. A copy of the transmittal letter is included as Attachment 1. The department's response, dated June 2, 2015, is included as Attachment 2.

The department agreed with most of our recommendations and supports the continued regulation of respiratory therapists. The department reported it is in the process of evaluating the fees and fee structure for each of its regulatory boards and programs; is working to improve documentation of applicants' out-of-state respiratory therapist qualifications; is amending the respiratory therapy application form; is working toward finalizing administrative rules for the respiratory therapist program and adding the program's fees to Chapter 16-53, HAR; will improve the program's website to describe what an inactive or active license is based on an individual's status; and has asked RICO to amend its complaint form.

The department said it strongly disagreed with our recommendation to request information concerning only prior convictions related to respiratory care, stating it is in the interest of public protection to consider convictions outside the profession. We reiterate that Section 466D-11, HRS, allows denial of a license only where a prior conviction is "directly related to the qualifications, functions, or duties of the practice of respiratory care."

The department also disagreed with our recommendation to improve the program's website by adding a clear link to the program's fees, saying it believes applicants already have clear and direct access to application forms, which include fee information. We stand by our observation that these fees are not located in an obvious place for those unfamiliar with DCCA's forms and website.

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



JAN K. YAMANE
Acting State Auditor

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

May 19, 2015

COPY

The Honorable Catherine Awakuni Colon
Director
Department of Commerce and Consumer Affairs
335 Merchant Street
Honolulu, Hawai'i 96813

Dear : Ms. Awakuni Colon:

Enclosed for your information are three copies, numbered 6 to 8, of our confidential draft report, *Sunset Evaluation: Respiratory Therapists*. We ask that you telephone us by Thursday, May 21, 2015 on whether or not you intend to comment on our recommendations. Please distribute the copies to the members of the board. If you wish your comments to be included in the report, please submit your hard copy response to our office no later than 4:30 p.m., Thursday, June 18, 2015.

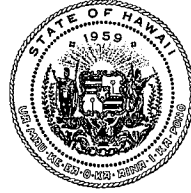
The Governor, and presiding officers of the two houses of the Legislature have also been provided copies of this confidential draft report.

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,

Jan K. Yamane
Acting State Auditor

Enclosures



DAVID Y. IGE
GOVERNOR
SHAN S. TSUTSUI
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
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CATHERINE P. AWAKUNI COLÓN
DIRECTOR

JO ANN M. UCHIDA TAKEUCHI
DEPUTY DIRECTOR

June 2, 2015

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**OFC. OF THE AUDITOR
STATE OF HAWAII**

The Honorable Jan Yamane
Acting State Auditor
Office of the Auditor
465 S. King Street, Room 500
Honolulu, Hawaii 96813-2917

Dear Ms. Yamane:

The Department of Commerce and Consumer Affairs ("Department") would like to thank you for the evaluation conducted by your office regarding the licensure of respiratory therapists. The Department also appreciates the opportunity to respond to the recommendations contained in the report, which are as follows:

1. The Legislature should continue to regulate respiratory therapists by repealing Section 26H-4(b), HRS, thereby reenacting Chapter 466D, HRS (*Respiratory Therapists*).

We defer to the Legislature on this matter, but the Department supports the continued regulation of respiratory therapists.

2. The Department of Commerce and Consumer Affairs should:
 - a. Establish and employ a method of determining whether a regulatory program is breaking even, as is required under Section 26H-2(7), HRS; and

The Professional & Vocational Licensing Division is in the process of evaluating the fees and fee structure for each regulated board and program in compliance with Section 26H-2(7), HRS, and to ensure the sustainability of all of its licensing areas.

- b. Ensure that evidence of review of applicants' out-of-state qualifications is appropriately documented; and

The Department agrees with this recommendation. We are working to improve proper documentation.

- c. Amend the respiratory therapist license application form by:

- i. Requesting information concerning only prior convictions that are related to the respiratory care profession; and

The Department strongly disagrees with this recommendation. In the interest of public protection, consideration of prior convictions outside the profession is essential.

- ii. Replacing the incorrect reference to Section 457-12, HRS with Section 466D-11, HRS; and

The Department agrees with this recommendation. It is currently being addressed.

- d. Adopt administrative rules for the respiratory therapist program;

The Department agrees with this recommendation and will work toward finalizing the administrative rules for the respiratory therapist program.

- e. Add the respiratory therapist program's fees to Chapter 16-53, HAR (*Fees Relating to Boards and Commissions*);

Revisions to the fees and fee structures in Chapter 16-53, HAR, for each licensing area are in progress and will include the appropriate fees for the respiratory therapist program.

- f. Improve the respiratory therapist program's website by adding clear links to:

- i. The program's fees; and

The Department disagrees with this recommendation as it believes that applicants for all licensing areas have clear and direct access to the application forms, which appropriately include fee information.

- ii. An explanation of what the various categories of licensee statuses mean; and

The Department agrees with this recommendation and will take the necessary steps to ensure the information on the webpage appropriately

The Honorable Jan Yamane
June 2, 2015
Page 3

describes what an active or inactive license is, based on an individual's status.

- g. Amend the RICO complaint form to include respiratory therapists.

The Department agrees with this recommendation. The Regulated Industries Complaints Office has been contacted to address the oversight.

Sincerely,



Catherine P. Awakuni Colón
Director

c: Celia Suzuki
Licensing Administrator

May Ferrer
Executive Officer