

COLORADO DEPARTMENT OF REGULATORY AGENCIES
OFFICE OF POLICY AND RESEARCH

OCCUPATIONAL THERAPISTS

1995 SUNRISE REVIEW



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1995-1996 Members***

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June 30, 1995

The Honorable Richard Mutzebaugh, Chair
Joint Legislative Sunrise/Sunset Review Committee
State Capitol Building
Denver, Colorado 80203

Dear Senator Mutzebaugh:

We have completed our evaluation of the sunrise application for licensure of **occupational therapists** and are pleased to submit this written report which will be the basis for my office's oral testimony before the Sunrise and Sunset Review Committee. The report is submitted pursuant to section 24-34-104.1, Colorado Revised Statutes, 1988 Repl. Vol., (the "Sunrise Act") which provides that the Department of Regulatory Agencies shall conduct an analysis and evaluation of proposed regulation to determine whether the public needs, and would benefit from, the regulation.

The report discusses the question of whether there is a need for the regulation in order to protect the public from potential harm, whether regulation would serve to mitigate the potential harm and, whether the public can be adequately protected by other means in a more cost effective manner.

Sincerely,

Joseph A. Garcia
Executive Director

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INTRODUCTION

The Department of Regulatory Agencies (the Department) has evaluated the proposal for state licensure of occupational therapists submitted by the Occupational Therapy Association of Colorado (OTAC). The OTAC asserts that licensing occupational therapists will protect the public by establishing reasonable and acceptable standards of practice that require occupational therapists to comply and maintain credentials, and allow for discipline or restrictions of practice of those occupational therapists participating in unethical or dangerous practice. In addition, licensure will provide a place within Colorado for consumers to make complaints.

In both 1987 and 1990, OTAC submitted an application for licensure of occupational therapists. The Department recommended against licensure in 1987. During the preparation of the 1990 sunrise report, the Department established the Therapeutic/Rehabilitative Occupations Task Force. The task force was charged with examining issues of public harm and other practice matters of therapeutic and rehabilitative occupations to determine whether or not regulation was needed. As a result of the task force's meetings and the lack of documentable public harm, the Department recommended not to license occupational therapists. In both 1987 and 1990, the Joint Legislative Sunrise Sunset Review Committee held hearings during the legislative interims and also made no attempt to license occupational therapists.

The Department reevaluated its positions on the previous two applications, and considered OTAC's concerns and the public benefits of the proposal. The following statutory criteria were used in determining the Department's recommendation:

- I. Whether the unregulated practice of the occupation or profession clearly harms or endangers the health, safety or welfare of the public, whether the potential for harm is easily recognizable and not remote or dependent on tenuous argument;
- II Whether the public needs and can be reasonably expected to benefit from, an assurance of initial and continuing professional or occupational competence; and
- III. Whether the public can be adequately protected by other means in a more cost-effective manner.

Methodology

Background material for this report was excerpted from the 1987 and 1990 *Sunrise Review of Occupational Therapists*, prepared by the Department. In addition, the Department contacted and interviewed the applicant, occupational therapists in private practice, occupational therapists employed in hospitals, and administrators of occupational services in home health agencies and nursing homes. Occupational therapists' licensure laws in other states were surveyed and interviews with administrators of those programs were conducted. In order to determine the number and types of complaints filed against occupational therapists in Colorado, the Department contacted the American Occupational Therapy Association, the American Occupational Therapy Certification Board, the Occupational Therapy Association of Colorado, and the Colorado Department of Public Health and Environment.

THE PROPOSAL FOR REGULATION

Request for Licensure

The OTAC requests that the state license occupational therapists. The OTAC does not specify whether or not they prefer for licensure to be administered by a governing board but most occupational licensing in Colorado is regulated by boards.

Other licensure programs in the Department consist of a board with approximately seven members who meet six to 12 times a year. Some boards meet more frequently. The Department estimates the implementation cost of a new licensure program to be between \$40,000 and \$45,000. The American Occupational Therapy Certification Board (AOTCB) provides a certification exam used by all 49 states that currently license, register or certify occupational therapists. Therefore, the Department assumes that the licensing authority would not have to develop its own exam.

Definition of Occupational Therapist

Occupational therapists provide health and rehabilitation services to persons of all ages who are physically, psychologically, or developmentally disabled, including individuals suffering from strokes, heart disease, arthritis, diabetes, serious burns, spinal cord injuries, head injuries and psychiatric disorders. Occupational therapists use evaluation and treatment to tailor the rehabilitation process for each individual patient in order to restore or improve impaired functions. The goal of the therapy is to assist these patients in achieving a maximum level of independent living by developing the capacities that remain after disease, accident, or deformity.

Work Setting and Supervision

Occupational therapists and occupational therapy assistants provide care to patients. Occupational therapists work closely with other members of the rehabilitation health care team, such as doctors, nurses and physical therapists. Their functions range from diagnosis to treatment, including the design and construction of various special and self-help devices. Although no formally recognized areas of specialization exist for occupational therapists, individuals may tend to work with certain types of disabilities and age groups. Certified occupational therapy assistants work under the supervision of occupational therapists and participate in the treatment and rehabilitation of patients.

Approximately 37 percent of Colorado's occupational therapists work in a hospital setting. These therapists work with inpatients who have suffered illness or injury from a stroke, spinal cord injury, head injury, gun shot wound, or a car accident. Outpatient care is also provided in the hospital setting for the same types of conditions. Other settings in which occupational therapists may work include the following: free standing rehabilitation clinics, private practices, home health agencies, private and public schools, nursing homes and other long-term care facilities, university and community colleges, and job sites. Most of these facilities are required by federal regulations to hire certified occupational therapists.

The following chart shows the dispersement of occupational therapists in each work setting for Colorado:

Work Setting In Colorado	Percent of Occupational Therapist Employed
Hospital / Clinic	36.8%
Public school	18.6%
Private practice	7.7%
Nursing homes	6.4%
Outpatient clinic	3.7%
Home health	3.6%
University	3.4%
Community mental health	1.1%
Private industry	.8%
HMO's	.4%
Other, <i>includes early intervention, orthopedics, equestrian, traveling companies, correctional facilities</i>	17.5%

Number of Practitioners

The American Occupational Therapy Association (AOTA) reports that, per capita, Colorado ranks third among the states in the number of certified occupational therapists with 1270 occupational therapists currently certified. Five hundred fifty of these therapists are also members of the OTAC.

The Colorado Department of Labor and Employment estimates that in 1994, 1,134 occupational therapists and 172 occupational therapy assistants were employed in Colorado

Private Certification

The AOTCB certifies occupational therapists who have graduated from an accredited four-year Bachelor's of Science program in occupational therapy or graduated with a Master's of Science degree in occupational therapy. Candidates for AOTCB certification must also complete two three-month internships or affiliations approved by a university program and pass the national certification exam. Once certified by the AOTCB occupational therapists are eligible for membership in the AOTA. AOTA estimates that 80 percent of the 46,600 occupational therapists are members.

The AOTCB also certifies occupational therapy assistants, who have an Associate's Degree of Science from an accredited occupational therapy program, completed 12 weeks of supervised training, and successfully passed the AOTCB certification examination.

Education and Training

Colorado State University offers both undergraduate and graduate level programs for occupational therapists. Individuals who wish to become certified occupational therapy assistants may attend Arapaho Community College, Morgan Community College or Pueblo Community College.

Third Party Reimbursement

The applicants are concerned that with the advent of managed care regulations requiring that health services be provided by "licensed individuals," occupational therapists will not be able to continue to be reimbursed for services. Currently, occupational therapy is recognized as a medical necessity and reimbursable service by: Medicare, Medicaid, public schools, vocational rehabilitation services, Champus, Blue Cross, and the federal employees' health benefits program. Licensure alone does not insure that an occupation will be eligible for third party reimbursement.

OTHER REGULATION

Rules, Regulations, Standards and Statutes

Federal. Under the Medicare “Conditions for Participation,” all facilities and home health agencies collecting reimbursement from Medicare must employ only occupational therapists and occupational therapy assistance who meet the requirements for national certification. Facilities collecting from Medicaid must also meet this provision. In addition, any private practice that participates in Medicare must also meet these same requirements.

Colorado. While Colorado does not license occupational therapists, there are other state statutes that may address concerns for public safety and welfare. The Colorado Department of Education’s (DOE) regulations require that occupational therapists working in public schools be nationally certified and obtain a “special services license” issued by the DOE. Occupational therapists may work in schools without this license if they are hired on an emergency basis.

Section 18-6.5-101, et seq., Colorado Revised Statutes, may address the issues of therapists committing crimes against patients. This chapter provides for enhanced penalties for persons who commit crimes, such as criminal negligence, assault or theft, against the elderly, at-risk adults and at-risk juveniles. Section 18-6.5-102, C.R.S., defines at-risk adults and juveniles as persons who are: impaired because of the loss or permanent loss of use of a hand or foot, or blindness; unable to walk, see, hear or speak; unable to breathe without mechanical assistance; developmentally disabled; or mentally ill.

PUBLIC HARM

Potential Harm from Occupational Therapists

Occupational therapists provide rehabilitation and health services directly to patients usually at a physicians request. The following examples illustrate potential harm that a patient is exposed to when receiving occupational therapy treatment.

- Occupational therapists fabricate splints for post-surgical treatment. Improper design of the splint may result in torn ligaments and tissue. Such an occurrence may result in additional surgery and most certainly would result in pain to the patient.
- Occupational therapists perform certain physical manipulations to affect muscle tone in cases of stroke or head injury. Improper evaluation and incompetent treatment could result in torn muscle tissue and, ultimately, permanent disruption of the function of the limb.
- Occupational therapists perform manipulative treatments upon patients who have injury to the spinal cord. Improper treatment of the finger in an attempt to improve the patient's ability to grasp could result in further loss of function in the patient.
- Occupational therapists develop programs for patients to enhance post-surgical function in the home. In the case of a hip replacement, an improper program could result in hip dislocation, pain, and loss of function in that extremity.
- Occupational therapists may prescribe a prosthesis and train the patient in proper use of the device after amputation. Incompetent prescription and advice may result in financial loss and loss of function.

The applicant supplied 19 incidents which could cause potential harm to the public. Of the 19 examples, 11 allegedly occurred in Colorado. Of the 11, two were reported to and investigated by the AOTCB, one involved insurance fraud, four involved improper supervision of aides or students, and four concerned unethical or harmful practice. Due to the fact that many of these incidents were collected either by anonymous letters or word of mouth and were not investigated, the Department has no way of confirming their validity. Since these incidents have not been verified, determining to what extent the public was harmed is difficult. Only the complaints filed with the AOTCB were investigated.

The AOTCB received six complaints against occupational therapists in Colorado from 1987 to the present: three complaints in 1992, one complaint in 1993, and two complaints in 1994. Of these six complaints, three were dismissed as not valid, one resulted in a reprimand, one resulted in censure and one is still under investigation. The complaint currently being investigated addresses the prior felony conviction of an individual requesting certification. The AOTCB's policy is to investigate the circumstances of the felony conviction prior to issuing certification. The complaint resulting in a reprimand concerned documentation problems, and the complaint that resulted in censure (public reprimand in a newsletter) concerned inaccuracy in evaluating treatment. Two of the dismissed complaints concerned employment disputes, and the third dismissed complaint involved inappropriate documentation.

On average, the AOTCB receives more complaints against occupational therapists in Colorado than against occupational therapists in surrounding states. For example, the AOTCB has received no complaints against therapists in Utah or Wyoming, one complaint each against therapists in Nebraska and New Mexico, five complaints against therapists in Oklahoma and thirteen complaints against therapists in California.

Other States

Thirty-nine states and the District of Columbia have licensure laws concerning occupational therapists. Three states register occupational therapists while five states have implemented a certification program. Two states provide trademark protection for occupational therapists. Colorado is the only state which does not provide some type of oversight.

The Department contacted the occupational therapy governing boards in Arizona, Idaho, Kansas, Nebraska, Nevada and Utah to determine the number and types of complaints those states receive. Most states received very few complaints. Of the complaints received, most concerned insurance fraud and incompetence. The findings are further discussed below.

Arizona. Created by the legislature in 1990, Arizona's program began issuing licenses in 1992. Approximately, 1,000 therapists practice in Arizona. The administrator of the program stated that he receives about one complaint a month which is usually a misunderstanding on the patient's behalf. He stated that the board has had one formal complaint involving the incompetence of a therapist, one formal complaint concerning a stolen license, and the board shut down three unlicensed practices. He stated that there is ongoing activity concerning incompetents and over billing.

Idaho. Idaho's licensure program has been in existence since 1987. The board has never received a formal complaint against an occupational therapist.

Kansas. Since the onset of Kansas' registration program for occupational therapists in 1987, the board has received three complaints. All three complaints are against one therapist concerning the quality of care and illegal billing. These complaints are still under investigation.

Nebraska. Nebraska's program has received only two complaints since its inception in 1988. These complaints concerned fraud, unprofessional conduct and gross negligence.

Nevada. Nevada's licensure program was implemented in 1993. The start-up cost for the program was \$40,000. At that time, the state issued cease and desist letters to unlicensed therapists. In 1994 the licensing authority received one formal complaint which was ruled invalid. Two complaints have been filed thus far in 1995. These complaints concerned nursing homes that billed patients for services not received. The administrator of the program stated that licensure has reduced the number of therapists in Nevada by eliminating foreign trained therapists. She also reported that in her experience, she has not seen harm to the public but rather issues concerning insurance fraud and incompetence. There are 150 therapists licensed in Nevada.

Utah. Utah's program has been in existence since 1977. There has been one complaint against a therapist concerning billing practices. The complaint was ruled invalid. In a recent sunset review of the program, the administrator of the licensure program recommended sunseting the program because, in his opinion, there was no public health or safety risk.

CONCLUSION

state statutes, incidents of harm, and the 1987 and 1990 Department's sunrise reports, the Department recommends that the practice of occupational therapy not be licensed. The applicants have not shown that the unlicensed practice of occupational therapy clearly harms the health, safety and welfare of the public. In addition, licensure does not assure that the public will be more protected than they currently are by Colorado statute, federal law, and the existing private credentials of occupational therapists.

Discussion

Pursuant to Section 24-4-104.1, Colorado Revised Statutes, the applicants must prove the benefit to the public of their proposal for regulation according to specific criteria. Summarized below is the Department's evaluation and findings according to each of the criteria.

1. Whether the unregulated practice of the occupation or profession clearly harms or endangers the health, safety or welfare of the public, whether the potential for harm is easily recognizable and not remote or dependent on tenuous argument;

The department could not substantiate all reported incidents of harm to the public by occupational therapists. Complaints filed with the OTAC are difficult to verify since these complaints are accepted anonymously and by word of mouth. The OTAC does not investigate complaints. The AOTCB investigated three complaints concerning therapists in Colorado since 1987. None of the complaints concerned direct harm to a patient.

The claim that Colorado is a "dumping ground" for incompetent occupational therapists is not reflected in the number of complaints received by the AOTCB or in the number of certified occupational therapists versus the number of occupational therapists employed in the state.

After reviewing
current federal and

2. Whether the public needs and can be reasonably expected to benefit from, an assurance of initial and continuing professional or occupational competence;

Licensure does not eliminate unscrupulous occupational therapists from practicing. Complaints filed in regulated states concern fraud, incorrect documentation and in some cases sexual misconduct and theft. All of these types of complaints can be prosecuted under current civil and criminal law.

The department conducted phone interviews with various occupational therapy clinics, hospitals, and private practices. All settings claim to employ only certified occupational therapists. In order to participate in either Medicare or Medicaid, these facilities are required to hire only certified occupational therapists. In these cases, additional state regulations requiring certification would not benefit the public.

3. Whether the public can be adequately protected by other means in a more cost-effective manner.

Approximately 80 percent of all occupational therapists in the US are members of the AOTA. The AOTA publishes guidelines for practice and maintains a committee on standards and ethics. Registered occupational therapists are certified by the AOTCB. Occupational therapists must meet educational guidelines and pass a national certification exam in order to be registered. All 49 states that either license or register occupational therapists use the national certification exam. The AOTCB does accept complaints against certified occupational therapists and investigates those complaints. The AOTCB may suspend, or revoke a license, or censure or reprimand the therapist.

The types of complaints reported to the AOTCB do not demonstrate insurmountable public harm. Therapists who intentionally bill insurance companies or Medicare inappropriately may be prosecuted under insurance and Medicare fraud statutes. Complaints filed in other states concerning crimes against individuals, such as sexual assault, and theft, are currently prohibited, and in fact, carry enhanced penalties for those persons who commit such crimes against the elderly and at-risk individuals. If the threat of an extended jail sentence does not deter a therapist from committing such crimes, it is unlikely that the threat of losing a license would.

