
Sunrise Analysis of a Proposal to Regulate Professional Mental Health Counselors and Professional Rehabilitation Counselors

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

Report No. 99-21
August 1999

THE AUDITOR
STATE OF HAWAII

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Foreword

The Hawaii Regulatory Licensing Reform Act, Chapter 26H, Hawaii Revised Statutes, contains a “sunrise” provision requiring that measures proposing to regulate professions or vocations be referred to the State Auditor for analysis prior to enactment.

This report evaluates the regulation of professional mental health counselors and professional rehabilitation counselors that was proposed in Senate Bill No. 2341, introduced in the Regular Session of 1998. The Legislature requested this study in Senate Concurrent Resolution No. 25, House Draft 1 and House Concurrent Resolution No. 53, House Draft 1 of the 1998 session. The study presents our findings on whether the proposed regulation complies with policies in the licensing reform law and whether there is a reasonable need to regulate professional mental health counselors and professional rehabilitation counselors to protect the health, safety, or welfare of the public.

We acknowledge the cooperation of the Department of Commerce and Consumer Affairs, the Department of Health, the Department of Human Services, the Department of Labor and Industrial Relations, and other organizations and individuals knowledgeable about the occupations whom we contacted during the course of our analysis.

Marion M. Higa
State Auditor

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Chapter 1

Introduction

This report responds to a “sunrise” provision of the Hawaii Regulatory Licensing Reform Act—Chapter 26H, Hawaii Revised Statutes (HRS). The sunrise provision requires that legislative bills which, if enacted, would regulate previously unregulated professions or vocations, be referred to the State Auditor for analysis prior to enactment. The Auditor is to assess whether the proposed regulation is necessary to protect the health, safety, or welfare of consumers and is consistent with other regulatory policies stated in the law. Also, the Auditor is to set forth the probable effects of the proposed regulation and assess alternative forms of regulation.

This report analyzes the proposed regulation of professional mental health counselors and professional rehabilitation counselors set forth in Senate Bill (S.B.) No. 2341 introduced in the Regular Session of 1998. The Legislature specifically requested this analysis in both Senate Concurrent Resolution No. 25, House Draft 1 and House Concurrent Resolution No. 53, House Draft 1 of the 1998 session.

Background on Mental Health Counselors and Rehabilitation Counselors

Mental health counseling and *rehabilitation counseling* are two specialties within the field of counseling. Each of the two specialties—and the counseling profession as a whole—are connected with private organizations whose activities may include promoting the profession’s interests, advocating legislation, accrediting educational programs, and awarding professional credentials.

The number of mental health counselors and rehabilitation counselors in Hawaii is uncertain. The extent and type of governmental regulation of mental health counselors and rehabilitation counselors varies in states across the nation; Hawaii does not currently regulate either specialty.

Activities and education

Emphasizing prevention, mental health counselors work with individuals and groups to promote mental health. They may help people deal with emotional problems, addictions, substance abuse, stress, educational decisions, career concerns, and family, parenting, and marital problems.

Mental health counselors work closely with other mental health specialists, including psychiatrists, psychologists, clinical social workers, psychiatric nurses, and school counselors.

Rehabilitation counselors help people deal with personal, social, and vocational effects of their disabilities which may result from birth defects, disease, accidents, or life's stresses.

The rehabilitation counselor confers with the disabled person, and may also confer with the person's family and with physicians, psychologists, occupational therapists, and employers. Through counseling, rehabilitation counselors seek to help disabled people achieve their personal, social, career, and independent-living goals.

Mental health counselors and rehabilitation counselors may also help employers in offering employee assistance programs that provide mental health services and substance abuse services, and may advise companies on complying with relevant laws.

Clinical mental health counselors usually have a master's degree in mental health counseling, in another area of counseling, or in psychology or social work.

The education of rehabilitation counselors varies; some have a master's degree, others do not.

Professional organizations

Various privately run professional organizations exist for mental health counselors and rehabilitation counselors. The American Counseling Association is an "umbrella" national organization that represents a wide variety of counselors and promotes their professional interests. The Hawaii Counseling Association is an independent affiliate of the national association.

Mental health counselors who have a master's degree and meet other requirements may obtain certification from the National Board for Certified Counselors. The board awards the credential of *national certified counselor* as its "general practice" credential. The board also awards specialty credentials, including *certified clinical mental health counselor*. Both credentials require passing a board examination: the National Counselor Examination for Licensure and Certification and the National Clinical Mental Health Counselor Examination, respectively. These examinations are also used by many states in regulating mental health counselors. Another organization, the Council for Accreditation of Counseling and Related Educational Programs, accredits training and educational programs for mental health counselors.

Both the American Rehabilitation Counseling Association (part of the American Counseling Association) and the National Rehabilitation Counseling Association (part of the National Rehabilitation Association) represent and promote the interests of rehabilitation counselors. The Council on Rehabilitation Education sets accreditation standards for

counselors' training and education. Rehabilitation counselors who have a master's degree and meet other requirements may seek certification from the Commission on Rehabilitation Counselor Certification, which awards the credential of *certified rehabilitation counselor*. The requirements include passing the commission's National Certified Rehabilitation Counselor Examination, which is also used by some states in regulating rehabilitation counselors.

Counselors in Hawaii

The resolutions requesting this sunrise analysis estimated that there are about 400 mental health counselors in the state who would be eligible for licensure. The resolutions also estimated that there are about 150 providers of rehabilitation services with job titles including "rehabilitation counselor," "rehabilitation specialist," and "vocational consultant."

We were unable to find accurate information on the number of mental health counselors and rehabilitation counselors in Hawaii. One reason is that the two occupations are not regulated under these occupational titles by the State, so no roster of regulated persons exists. Another reason is that many people provide mental-health-counseling-type services or rehabilitation-counseling-type services under different titles, such as social worker, psychologist, or vocational rehabilitation specialist. Whether these individuals should also be considered mental health counselors or rehabilitation counselors is unclear.

The National Board for Certified Counselors estimates that about 78 persons in Hawaii hold the credential of national certified counselor; about five of these also hold the credential of certified clinical mental health counselor. According to board information, probably some people working as mental health counselors in the state do not have board credentials but have other credentials, such as a master's degree in social work. The Commission for Rehabilitation Counselor Certification reports that about 120 persons in Hawaii hold the credential of certified rehabilitation counselor.

Several state agencies employ or contract with people whose services appear to involve mental health counseling or rehabilitation counseling. For example, the Department of Health is one of these agencies:

- The department's Adult Mental Health Division employs over 100 social workers who specialize in mental health. The division also employs three vocational rehabilitation specialists who help mentally ill persons adjust into their communities.
- The Child and Adolescent Mental Health Division employs about 60 social workers who perform case management services in the area of mental health.

- The Developmental Disabilities Division employs two staff members—a clinical psychologist and a psychological technician—who primarily assess clients and refer them to other social agencies for services.

The Department of Human Services, through its vocational rehabilitation division, employs over 60 vocational rehabilitation specialists at various levels including administrative and management positions. Also, the Department of Labor and Industrial Relations, through its Disability Compensation Division, employs a vocational rehabilitation specialist who administers the rehabilitation program. Workers' compensation insurers contract with 29 certified rehabilitation providers to provide services for eligible claimants.

Regulation in Hawaii and other states

While Hawaii does not regulate the specialties known as mental health counselor and rehabilitation counselor per se, the State does regulate certain practitioners who may provide similar services, including psychologists, social workers, and marriage and family therapists.

In other states, mental health counselors and rehabilitation counselors are usually not regulated separately from other counselors. No state regulates mental health counselors separately from other counselors, and only three states regulate rehabilitation counselors separately from other counselors (through licensing in Louisiana, certification in Kentucky, and registration in Minnesota).

However, 35 states regulate counselors in general as a broad occupational group that may include mental health counselors and other types of counselors. State laws differ widely. For example, states vary in their definition of counseling; also, some states regulate only the clinical counseling level while others regulate all levels. Moreover, the form of regulation varies. It may involve regulating who can *practice* counseling, or who can use a particular *title* such as “professional counselor,” or it may involve simple *registration* of practitioners. Most laws regulating counselors cover a broad spectrum of counseling services.

Proposal to Regulate Professional Mental Health Counselors and Professional Rehabilitation Counselors

The regulatory proposal that we were asked to analyze, S.B. No. 2341 of the 1998 legislative session, would establish a “licensing” program within the Department of Commerce and Consumer Affairs for professional mental health counselors and professional rehabilitation counselors. The stated purpose of the bill is “to set standards of qualifications regarding education and experience for persons who seek to represent themselves to the public as licensed professional mental health counselors or licensed professional rehabilitation counselors.”

“Licensing” normally describes a regulatory program that bars persons from practicing a profession unless they are authorized to do so by the State. However, what this bill would regulate does not fit the normal definition of licensure. S.B. No. 2341 would establish a “certification,” or “title protection,” program, which simply prohibits persons from using a particular professional title or description without the State’s authorization. The “prohibited acts” section of the bill states:

Except as [otherwise provided in the law], no person shall use the title licensed professional mental health counselor or professional rehabilitation counselor or describe oneself as a licensed professional mental health counselor or professional rehabilitation counselor without first having secured a license...[from the State].

Purpose of the bill

The preamble to S.B. No. 2341 comments that “in general, people who seek out mental health and rehabilitation counseling are at a vulnerable time in their lives and need protection from unskilled, untrained, and ill-prepared individuals.” Currently, says the preamble, clients who wish to make a formal complaint do not know where to go and the Department of Commerce and Consumer Affairs has no jurisdiction because counselors are not regulated by “licensure.”

The preamble also says that “licensure” is needed to assure quality service, and that with the concept of managed care becoming a reality, the lack of “licensed” professionals in mental health and rehabilitation counseling will limit the public’s choice and will limit the number of people who will be able to use these services.

Key definitions

S.B. No. 2341 defines counseling as

the application of scientific principles and procedures in therapeutic counseling, guidance, and human development to provide assistance in understanding and solving a mental, emotional, physical, social, moral, educational, spiritual, or career development and adjustment problem that a client may have.

Mental health counseling is defined as

the rendering of a therapeutic counseling service that integrates a developmental, wellness, and multicultural model of human behavior involving certain methods and techniques of appraisal, including but not limited to consulting, counseling, and referral.

The bill defines a professional mental health counselor as an individual who engages in the practice of professional mental health counseling without supervision.

Rehabilitation counseling is defined as

a systematic process which assists persons with physical, mental, developmental, cognitive, and emotional disabilities to achieve their personal, career, and independent living goals in the most integrated setting possible through the application of the counseling process. The counseling process involves communication, goal setting, and beneficial growth or change through self-advocacy, psychological, vocational, social, and behavioral interventions. The specific techniques and modalities used in this rehabilitation counseling process may include, but are not limited to: assessment and appraisal; diagnosis and treatment planning; career counseling; individual and group counseling; treatment interventions focused on facilitating adjustment to the medical and psychosocial impact of disability; case management referral and service coordination; program evaluation and research; interventions to remove environmental, employment and attitudinal barriers; consultation services among multiple parties and regulatory systems; job analysis, job development, and placement services including assistance with employment and job accommodations; and the provision of consultation about, and access to, rehabilitation technology.

The bill defines a professional rehabilitation counselor as an individual who engages in the practice of professional rehabilitation counseling without supervision.

“Licensing” program

Under S.B. No. 2341, the director of commerce and consumer affairs would be responsible for examining “license” applicants and issuing “licenses” to successful applicants. Such “licenses” would give them permission to use the title or description of licensed professional mental health counselor or professional rehabilitation counselor. The director would also be responsible for disciplining “licensees” for violations of the law.

There would be no “licensing” board. The director would be required to appoint an advisory committee consisting of “licensed” professional mental health counselors and professional rehabilitation counselors and members of the public, to assist with implementation of the law and the rules adopted by the director.

Program costs

Fees assessed on applicants and “licensees” would defray ongoing program operating costs. The bill would appropriate \$43,000 from the State’s general fund to begin the “licensing” program.

“Licensing” requirements

The bill would establish “licensing” requirements for the two occupations.

To represent oneself as a “licensed professional mental health counselor,” a person would have to meet the following educational and clinical experience requirements:

- Hold a master’s or doctoral degree from an accredited institution in counseling or in an allied health field related to the practice of mental health counseling which includes or is supplemented by graduate level course work of at least 48 semester hours or 72 quarter hours in the areas of human growth, social and cultural foundations, helping relationships, group work, career and lifestyle development, appraisal, research and program evaluation, and professional orientation and ethics;
- Complete at least two academic terms of practicum experience in a counseling setting;
- Complete 1,000 hours of direct counseling work; and
- Pass the National Counselor Examination for Licensure and Certification.

However, any person who is a professional member of the American Counseling Association or who is a nationally certified counselor prior to the effective date of the proposed law would be considered to have met these education and experience requirements.

To represent oneself as a “professional rehabilitation counselor,” a person would have to meet the following education and clinical experience requirements:

- Hold a master’s degree in rehabilitation counseling from a program accredited by the Council on Rehabilitation Education at the time the degree was granted and a 600-hour (semester

system) or 480-hour (quarter system) internship supervised by an on-site certified rehabilitation counselor or a faculty member who is a certified rehabilitation counselor; or

- Hold a master’s degree in counseling from a college or university accredited by a recognized regional accrediting body at the time the degree was granted and 60 months of employment experience in rehabilitation counseling of which at least 12 months were under the supervision of a certified rehabilitation counselor; and
- Pass the National Certified Rehabilitation Counselor Examination.

However, anyone who is a certified rehabilitation counselor prior to the effective date of the proposed law would be considered to have met these education and experience requirements.

Exempted occupations

The bill contains several exemptions from “licensure”:

- Any person working within the scope of practice of another profession that overlaps with the practice of mental health counseling or rehabilitation counseling, so long as the person does not purport to be a professional mental health counselor or a professional rehabilitation counselor;
- Students enrolled in accredited educational institutions in a recognized program of study leading toward a graduate degree in mental health counseling or rehabilitation counseling or other professional field, so long as the student’s activities are part of a prescribed course of study supervised by the educational institution and the student is identified by an appropriate title such as “mental health counseling trainee”; and
- Persons who use the title “mental health counselor intern” or “rehabilitation counselor intern” to obtain clinical experience required for licensure.

The bill states that qualified members of other licensed professions—such as social workers, psychologists, or physicians—would not be prevented from providing or advertising that they provide assistance or treatment to individuals, couples, or families consistent with the accepted standards of their profession, so long as they do not use titles or descriptions implying that they are a professional mental health counselor or professional rehabilitation counselor.

Objectives of the Analysis

1. Determine whether regulation of professional mental health counselors and professional rehabilitation counselors is warranted.
2. Assess the probable effects of regulation.
3. Assess the appropriateness of alternative forms of regulation.
4. Make recommendations based on our findings.

Scope and Methodology

To assess the need to regulate professional mental health counselors and professional rehabilitation counselors as proposed in S.B. No. 2341, we applied the regulation criteria set forth in Section 26H-2, HRS, of the Hawaii Regulatory Licensing Reform Act.

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

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

- The State should regulate professions and vocations only where reasonably necessary to protect consumers;
- Regulation should protect the health, safety, and welfare of consumers and not the profession;
- Evidence of abuses by providers of the service should be given great weight in determining whether a reasonable need for regulation exists;
- Regulation should be avoided if it artificially increases the costs of goods and services to the consumer unless the cost is exceeded by the potential danger to the consumer;
- Regulation should be eliminated when it has no further benefits to consumers;

- Regulation should not unreasonably restrict qualified persons from entering the profession; and
- Aggregate fees for regulation and licensure must not be less than the full costs of administering the program.

We were also guided by the 1994 edition of *Questions A Legislator Should Ask* by Benjamin Shimberg and Doug Roederer (published by the Council on Licensure, Enforcement and Regulation, a national organization). The primary guiding principle for legislators, according to this publication, is whether the unregulated profession presents a clear and present danger to the public's health, safety, and welfare. If it does, regulation may be necessary; if not, regulation is unnecessary and wastes taxpayers' money.

We also 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.

We also assessed the specific regulatory proposal—S.B. No. 2341—as to whether:

- The scope of practice to be regulated is clearly defined and enforceable;
- The licensing requirements are constitutional and legal (for example, no residency or citizenship requirements);
- Licensing requirements, such as experience or continuing education, are directly related to preventing harm;
- Provisions are not unduly restrictive and do not violate federal competition laws;

- Prohibited practices are directly related to protecting the public; and
- Disciplinary provisions are appropriate.

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

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

In examining the type of regulation being proposed, we determined whether it was one of three approaches to occupational regulation:

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

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

Registration. A registration law 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 considering whether regulation of professional mental health counselors and professional rehabilitation counselors is warranted and whether the approach proposed in S.B. No. 2341 is appropriate, we also considered the appropriateness of other regulatory alternatives. We assessed the cost impact on the proposed regulatory agency and the regulated group.

We reviewed literature on mental health counselors and rehabilitation counselors, including information from other states. We contacted staff of the Department of Commerce and Consumer Affairs, officials of other consumer protection agencies in Hawaii, and agencies that employ counselors to obtain information on occupational qualifications, complaints, other evidence of harm to consumers, and other pertinent information.

We obtained information from local and national organizations of counselors. We also reviewed a recent utilization report for mental health services and identified costs related to insurance reimbursements for these services.

Our work was performed from July 1998 through June 1999 in accordance with generally accepted government auditing standards.

Chapter 2

Regulation of Professional Mental Health Counselors and Professional Rehabilitation Counselors Is Not Warranted

This chapter presents the findings of our analysis of the proposed regulation of professional mental health counselors and professional rehabilitation counselors set forth in Senate Bill (S.B.) No. 2341 of the 1998 Regular Session. We concluded that the bill should not be enacted.

Summary of Findings

1. Regulation of professional mental health counselors and professional rehabilitation counselors is not warranted. These occupations pose little risk of serious harm to consumers. Some consumer protections already exist and regulation would benefit practitioners more than consumers.
2. S.B. No. 2341 contains many flaws. The bill is confusing and would be difficult to implement if enacted. It attempts to set precise licensing standards in a field that lacks consensus on how to ensure competency.

Regulation Is Not Warranted

Chapter 26H, HRS, states that professions and vocations should be regulated only when necessary to protect the health, safety, and welfare of consumers. In assessing the need for regulation, evidence of abuses and harm must be given great weight and the benefits and costs of regulation to consumers must be considered.

An article published in 1994 by the Council on Licensure, Enforcement and Regulation (CLEAR), a national organization, suggested the following potential threats to the public from counseling and psychotherapy in general: (1) incorrect diagnosis or lack of documentation of the need for treatment; (2) incorrect application of a technique or method; (3) damages due to the violation of confidentiality; (4) damages due to inhumane treatment; (5) unethical entanglement of relationships; and (6) financial irresponsibility or fraud.¹

However, we found that the practice of mental health counseling and the practice of rehabilitation counseling do not pose a risk of serious harm to consumers. Furthermore, some other protections for consumers already exist, and regulation does not address the potential harm that may exist,

which consists primarily of unethical and fraudulent behavior. We also found that regulation would have few benefits for consumers, would have significant costs, and would primarily benefit practitioners.

Little evidence of consumer harm in Hawaii

We reviewed literature including reports from other states, interviewed knowledgeable persons, and obtained other information. In so doing, we found little potential for serious harm from unregulated practices of mental health counseling or rehabilitation counseling. State agencies that we contacted have received minimal consumer complaints against mental health counselors, rehabilitation counselors, or persons performing related work under different titles. Consumer harm from these practitioners does not appear to be a major issue in Hawaii.

The Vocational Rehabilitation and Services for the Blind Division of the Department of Human Services, which employs over 60 vocational rehabilitation specialists, reports annually to the U.S. Department of Education on complaints about its program (including complaints about program staff). From 1993 through 1994, no complaints were filed. From 1996 through 1997, complaints were minimal; one dealt with eligibility for services and others with the nature and contents of the client's rehabilitation plan. Few complaints concerned the delivery and quality of services.

The Disability Compensation Division of the Department of Labor and Industrial Relations administers the workers' compensation rehabilitation program. Workers' compensation insurers contract with about 30 private certified providers for rehabilitation services. Staff reports showed about 24 complaints a year; the majority were found to be without merit. Of approximately six complaints substantiated each year, the majority involved violation of workers' compensation laws or rules, or minor infractions of the counselors' code of ethics. Complaints were often resolved by efforts to insure quality service when clients were being transferred between counselors.

At the Department of Commerce and Consumer Affairs, under both the department's Office of Consumer Protection and the Compliance Resolution Fund, complaints received about counseling-type activities did not appear to involve incompetence of mental health counselors or rehabilitation counselors. The Office of Consumer Protection reported three complaints about counseling during the past five years involving billing disputes and failure to perform due to a counselor's business closing. The Compliance Resolution Fund reported that from 1995 through 1997, a majority of the 42 total complaints about counseling-type activities were against psychologists, primarily for unlicensed practice. Of course, the fund reports complaints only against regulated professions. Mental health counselors and rehabilitation counselors are not currently regulated per se.

Little harm noted in our previous reports

Our present finding of limited evidence of harm from mental health counseling and rehabilitation counseling echoes six of our previous reports that have analyzed the desirability of regulating similar occupations. These reports, as noted below, included two on social workers (1988, 1991); two on professional counselors (1988, 1992); one on marriage and family therapists (1995); and one on occupational therapists (1997):

Report No. 88-16	<i>Sunrise Analysis Update of a Proposal to Regulate Social Workers</i>
Report No. 88-17	<i>Sunrise Analysis of a Proposal to Regulate Professional Counselors</i>
Report No. 91-16	<i>Sunset Evaluation Report: Social Workers</i>
Report No. 92-23	<i>Sunrise Analysis of a Proposal to Regulate Professional Counselors</i>
Report No. 95-26	<i>Sunrise Analysis of a Proposal to Regulate Marriage and Family Therapists</i>
Report No. 97-15	<i>Analysis of a Proposal to Expand the Regulation of Occupational Therapists</i>

In all six reports, we found very limited evidence of consumer harm.

Some existing protections are in place

In our past reports on similar occupations, we pointed to existing consumer protections other than regulation—such as supervision and monitoring of counselors by their employers—as reasons not to regulate. Similarly, some protections already exist for customers of mental health counselors and rehabilitation counselors. The majority of these consumers obtain services through organizations that oversee the counselors. Some of these organizations include schools, workplaces, managed care systems, state agencies, and physicians.

Hospitals and other health care facilities must comply with standards for behavioral health care adopted by the Joint Commission on Accreditation of Healthcare Organizations. The standards address patient care and services and organization functions vital to service quality.

The federal Rehabilitation Act and state administrative rules require that under workers' compensation, contracted rehabilitation providers be certified. Providers must be qualified and the client's rehabilitation plan

must contain treatment goals and recourse for complaints. Contracted providers must have a master's or doctorate degree or be certified by the Commission on Rehabilitation Counselor Certification. Punitive action in response to significant or repeated violations is possible. Complaints about the type and appropriateness of rehabilitation services can be addressed by revising the person's rehabilitation plan.

Consumers dissatisfied with treatment services have recourse through client rights and appeal procedures. Other routes for consumer redress include the civil court system.

Competency is not the issue

Regulation is supposed to focus on ensuring the basic competency of the practitioner. However, our previous reports on counseling-related professions have concluded that potential harm results not from a lack of competency (in terms of qualifications, knowledge, and skills), but from unethical actions, fraud, sexual abuse, and financial irresponsibility.

Such complaints can be pursued through the civil courts, existing consumer protection agencies, and national counselor organizations that award the credentials of professional mental health counselor and professional rehabilitation counselor. Such harm is difficult to prevent through regulation, which focuses on verifying the practitioner's technical competency, not his or her character.

Regulatory proposal seems geared to practitioners and not consumers

The regulation proposed in S.B. No. 2341 seems to respond more to the interests of practitioners than the needs of consumers. Regulation is unlikely to ensure the counselor's competency and the costs of regulation will be passed on to consumers. Practitioners who advocate regulation seem to be motivated by personal financial considerations rather than the interests of consumers.

Competency is difficult to assess

Even if the competencies of mental health counselors and rehabilitation counselors were a significant problem, competency would be difficult to assess.

The previously mentioned CLEAR article examined the question of whether competence in counseling and psychotherapy can be identified and assured. While optimistic that adequate examinations can be developed to test competency, the article stated that "at this time the pieces that are needed to regulate counseling and psychotherapy are not in place, perhaps not even in existence." The reasons given were disagreements within the field as to appropriate practices and effective methods, lack of a clear relationship between treatment and outcome,

and difficulty defining a desirable outcome.² Furthermore, psychotherapy has been described as “an amorphous and vaguely defined process with wide variations in theory and technique.”³

The CLEAR article also suggests that personal and interpersonal qualities of the therapist—such as warmth and empathy—are key to minimal competence. The article therefore emphasizes clinical examinations involving actual therapy sessions. However, we maintain that clinical examinations can be difficult to administer objectively and uniformly.

We believe that the capacity of regulatory authorities to assess and assure the competency of counselors has not been clearly demonstrated.

Regulation costs are passed on to consumers

When occupations are regulated, administrative costs are eventually passed on to consumers through fees paid for services.

Our 1992 report on professional counselors included an estimate that a new regulatory program would cost \$126,000 for the first year for personnel and equipment and \$94,000 in each subsequent fiscal year for personnel and wages—and rising as other costs increase.

Our 1995 report on marriage and family therapists showed possible general fund appropriations of \$5,000 to start up a new regulatory program and prepare its implementation, possibly an additional general fund appropriation of \$45,000 to develop an examination, and later an additional \$97,555 a year to sustain the program through fees assessed on license applicants and licensees. Each practitioner in the first group of about 75 marriage and family therapists to be licensed might be assessed an initial application/license fee of \$2,600. License renewal fees would be in the same range, but slightly lower if the pool of licensees increased slightly.

The bill proposing regulation of mental health counselors and rehabilitation counselors, S.B. No. 2341, would appropriate \$43,000 from the state general fund for FY1998-99 for the purpose of implementing regulation. Subsequently, the regulatory program would be supported through “licensing” fees. The fees paid by mental health counselors and rehabilitation counselors would depend on the numbers of persons “licensed” who would bear a share of program costs. The number of mental health counselors and rehabilitation counselors who would be “licensed” is not clear, although one estimate is 400 and 150 respectively.

Charging fees sufficient to cover the State's costs of regulating these occupations could raise the costs of services to consumers and unnecessarily restrict entry into the occupations.

Financial considerations motivate practitioners

Testimony during the 1998 legislative session indicated that financial and employment considerations motivated practitioners to seek "licensure." As health insurance coverage does not apply to unlicensed providers, mental health counselors and rehabilitation counselors will benefit from "licensure" by becoming qualified providers and thus receive insurance reimbursements. According to one testifier, the State's Med-QUEST plan currently pays 20 to 30 percent less for the services of a master's degree level professional (unlicensed) than for a Ph.D. professional (licensed).

Counselors believe that "licensure" will afford them better employment opportunities. Some counselors cannot find employment except in the Department of Education due to their unlicensed (and therefore unreimbursable) status. With "licensure," practitioners say that jobs currently taken by other licensed professionals (social workers and psychologists) will become available to them. During the 1998 legislative session, counselors testified that they were discriminated against financially due to their lack of licensure. They said that social workers are required to be licensed and therefore receive reimbursement. However, we note that mental health counselors and rehabilitation counselors currently are not excluded from employment due to their lack of licensure.

In addition to concerns about insurance reimbursements and employment restrictions, supporters of S.B. No. 2341 noted that consumers lack access to lower-cost services. Supporters said that "licensing" mental health and rehabilitation counselors at the master's degree level will make available more quality, cost-effective services. Consumers cannot currently access this lower costing care due to health provider groups, including the Med-QUEST health plan, limiting their mental health providers to only licensed professionals. However, we found that health plan providers are not precluded from using lower costing master's degree counselors under the supervision of a physician or psychologist, who are licensed and reimbursable mental health providers.

The Bill Proposing Regulation Has Many Flaws

Senate Bill No. 2341 of 1998 proposing regulation is flawed. As explained above, the bill seeks to regulate an occupation that should not be regulated. Furthermore, specific provisions of the bill are confusing or inappropriate. We believe that some of the problems in the bill reflect confusion within the counseling field itself. Below, we describe some key deficiencies of the bill.

Definition of mental health counseling is unclear

For regulation to be effective, an occupation and its scope of practice must be delineated so that the State can readily determine who falls under regulation and who does not. However, the definition of professional mental health counseling in S.B. No. 2341 is not clear enough to be enforceable. The bill defines mental health counseling as

the rendering of a therapeutic counseling service that integrates a developmental, wellness, and multicultural model of human behavior involving certain methods and techniques of appraisal, including but not limited to consulting, counseling, and referral.

The words “wellness and multicultural model of human behavior” and “certain methods and techniques” are too broad and vague for regulatory purposes. The definition reflects a fundamental obstacle to regulating mental health counselors: namely, that the occupation lacks unique skills that are measurable, enforceable, and necessary to prevent consumer harm. As we concluded in our previous reports on similar occupations, the practice cannot be described with any precision.

Certain terms and names are not used appropriately

S.B. No. 2341 uses some key terms and names in a confusing manner.

First, in several key provisions the bill uses the title “licensed professional mental health counselor” followed immediately by the title “professional rehabilitation counselor,” omitting the word “licensed.” The preamble to the bill suggests that its intent was to make “licensed” part of both occupations’ titles, and we have chosen to interpret the bill this way. But the matter is not entirely clear.

Second, the bill uses the term “licensing” inappropriately. Normally, “licensing” refers to a regulatory program that prohibits persons from practicing a profession without state authorization. However, S.B. No. 2341 uses the term “licensing” while actually proposing another type of regulation that is often called “certification” or “title protection.” Specifically, the “prohibited acts” section of the bill would *not* bar people from practicing mental health counseling or rehabilitation counseling without state authorization. It would simply bar people from titling or describing themselves as licensed professional mental health counselors or licensed professional rehabilitation counselors without state authorization to do so.

Third, by including the word “professional” in the protected title, the bill could mislead the public into believing that the word “professional” by itself means higher prestige, standards, or skills. The State does not use “professional” in regulating other occupations, including some that provide counseling services (such as psychologists, social workers, and marriage and family therapists).

Fourth, the bill is confusing in defining professional mental health counselors and professional rehabilitation counselors as persons practicing professional mental health counseling and professional rehabilitation counseling (respectively) without supervision. These definitions are perplexing, for several reasons:

- The bill does not define “professional.” In a circular way, it simply repeats “professional” within the definition.
- The bill does not define “supervision,” only “clinical supervision.”
- Even if “supervision” were clearly defined, the purpose of inserting “without supervision” in the definition is unclear. The intent may have been to exclude counselors who *do* receive supervision from regulation, but if so, the bill does not state this explicitly.

Fifth, the bill is unclear in requiring the Department of Commerce and Consumer Affairs “to administer the Certified Rehabilitation Counselor Examination for Professional Mental Health Counselors and the National Certified Rehabilitation Counselor Examination for Professional Rehabilitation Counselors in compliance with each regulatory board’s standards.” The unclear language is as follows:

- While the first of the two examination titles was probably intended to refer to the required examination for mental health counselors, it actually names an examination for rehabilitation counselors.
- Capitalizing “professional mental health counselors” and “professional rehabilitation counselors” implies that these words are part of the examination titles, which was probably not the intent of the bill.
- The provision does not identify the relevant “regulatory boards.” Furthermore, if the intent was to refer to the private national organizations that administered the examinations, “regulatory boards” is not the correct description, as this term normally applies to governmental, not private, agencies.

Approach to exemptions is questionable

S.B. No. 2341 takes a questionable approach to exemptions.

The bill exempts certain persons from the requirement of “licensure” as a professional mental health counselor or professional rehabilitation counselor. One exemption is for persons doing work within their own profession that overlaps with the practice of mental health counseling or

rehabilitation counseling, so long as they do not purport to be a “professional mental health counselor” or “professional rehabilitation counselor.” Another exemption is for students who are working toward a graduate degree in mental health or rehabilitation counseling or a related field, so long as they have an appropriate title indicating their training status, such as “mental health counseling trainee.” The final exemption is for persons who use the title “mental health counselor intern” or “rehabilitation counselor intern” for the purpose of obtaining clinical experience to meet the “licensing” requirements.

These provisions could be interpreted as exempting persons from the “licensure” requirement who fall into any of the previously described three groups, so long as they do not describe themselves as licensed professional mental health counselors or licensed professional rehabilitation counselors. Under this interpretation, the provisions are unnecessary, since the “prohibited acts” section of the bill already makes it clear that *anyone*—not just persons in overlapping professions, students, and interns—is free to engage in either of the two types of counseling without a “license” so long as the person does not describe himself or herself as a licensed professional mental health counselor or a licensed professional rehabilitation counselor. Therefore, the exemption provisions add nothing to the bill.

Under another interpretation, the first exemption (for overlapping professions) is confusing because it appears to protect the titles “professional mental health counselor” and “professional rehabilitation counselor” rather than the titles “licensed professional mental health counselor” and “licensed professional rehabilitation counselor.” This inconsistency of titles could lead to questionable exemptions.

Also unnecessary or confusing, for similar reasons, is a provision stating that nothing in the bill should be construed to prevent qualified members of other licensed professions, such as social workers and psychologists, from assisting or treating clients—or advertising that they do so—so long as they do not use titles or descriptions indicating that they are professional mental health counselors or professional rehabilitation counselors.

Some basic licensing provisions are questionable

We found that the bill’s basic licensing requirements for professional rehabilitation counselors are unclear and can be interpreted in two mutually exclusive ways. Under one interpretation, “license” applicants can choose from two alternatives for obtaining the necessary educational and practical experience, but all applicants must also pass the National Certified Rehabilitation Counselor Examination. Under another possible interpretation, applicants would still choose from the two education and experience alternatives, but under one of these no “licensing” examination would be required. The first interpretation makes more sense, but again the matter is not entirely clear in the bill.

Furthermore, the bill attempts to set education, experience, and examination requirements (for example, master's degree, course work, hours of experience, specific organizations' examinations) with far more precision than seems justified by available knowledge about the field of counseling. During our study, we found disagreement as to the background necessary for basic competency in counseling. For example, the master's degree is viewed by some as unnecessary and by others as not enough. Some employers do not require the master's degree. Consumers evidently have not suffered harm as a result of being treated by counselors who do not have a master's degree.

Also, the bill's "grandfathering" provisions are weak. If S.B. No. 2341 were enacted, any person who, before the effective date of the new law, was a professional member of the American Counseling Association or was a national certified counselor would be considered to have met the law's educational and clinical experience requirements for mental health counselors. Any person who, before the effective date of the law, was a certified rehabilitation counselor would be considered to have met the law's educational and clinical experience requirements for rehabilitation counselors.

We oppose such "grandfather" provisions because they make it easier for one group of applicants to become "licensed" than another, in effect protecting the grandfathered group from competition from others who may want to enter the profession (or, in this case, to use a certain title). Furthermore, the provision for mental health counselors, by including membership in a professional association as a justification for grandfathering, is inconsistent with the provision for rehabilitation counselors, which does not include professional membership.

Finally, the basic "licensing" requirements for rehabilitation counselors refer to a specific national accrediting body for the occupation, while the requirements for mental health counselors do not.

Conclusion

The occupations of mental health counselor and rehabilitation counselor do not pose significant harm to the consumer and do not require regulation. The few reports of harm that we found were related not to incompetence or lack of skills, but rather to unethical conduct, which regulation is unlikely to control. Regulation would benefit counselors more than consumers.

We also found that S.B. No. 2341 proposing regulation has many flaws, including many confusing provisions and an attempt to set very specific "licensing" requirements in a field that lacks consensus on how to ensure counselor competency.

Our position against regulation of mental health counselors and rehabilitation counselors is consistent with several of our previous reports on related occupations. For example, we previously recommended against regulating social workers, professional counselors, marriage and family therapists, and occupational therapists. Nevertheless, Hawaii now regulates social workers, marriage and family therapists, occupational therapists, and psychologists. Some might argue that mental health counselors and rehabilitation counselors should be regulated to achieve consistency in policy.

However, we believe the consistency argument should not be decisive. This is because the Hawaii Regulatory Licensing Reform Act—Chapter 26H, Hawaii Revised Statutes—requires us to consider other policy questions, such as whether the proposed regulation of a particular occupation is necessary to protect the public and whether regulation would benefit consumers. Applying these well-established principles, we found that regulation of professional mental health counseling and professional rehabilitation counseling is not warranted.

Recommendation

Senate Bill No. 2341 should not be enacted.

Notes

Chapter 2

1. Jim C. Fortune and David E. Hutchins, "Can Competence in Counseling and Psychotherapy Be Identified and Assured?" Resource Brief 94-2, The Council on Licensure, Enforcement and Regulation, Lexington, Kentucky, 1994, p. 3.
2. Fortune and Hutchins, p. 5.
3. Daniel B. Hogan, *The Regulation of Psychotherapists, Volume I, A Study in the Philosophy and Practice of Professional Regulation*, Cambridge, Massachusetts, Ballinger Publishing Company, 1979, p. 11.

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 August 2, 1999. A copy of the transmittal letter is included as Attachment 1. The department elected not to submit a response to the draft report.

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MARION M. HIGA
State Auditor

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August 2, 1999

COPY

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

Dear Ms. Matayoshi:

Enclosed for your information are three copies, numbered 6 to 8 of our draft report, *Sunrise Analysis of a Proposal to Regulate Professional Mental Health Counselors and Professional Rehabilitation Counselors*. We ask that you telephone us by Wednesday, August 4, 1999, 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 Wednesday, August 11, 1999.

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

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

Sincerely,

Marion M. Higa
State Auditor

Enclosures