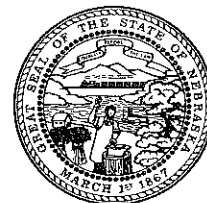


STATE OF NEBRASKA

DEPARTMENT OF HEALTH
Mark B. Horton, M.D., M.S.P.H.
Director



E. Benjamin Nelson
Governor

MEMORANDUM

TO: Senator Don Wesely, Chairman
Legislature's Health & Human Services Committee

FROM: Mark B. Horton, M.D., M.S.P.H. *MBS H*
Director of Health

DATE: January 28, 1993

SUBJECT: The Report of the Director of Health on the Mental Health
Practitioner Proposal

The Department recommends approval of the mental health practitioner proposal provided that outstanding issues defined in the text of this report are satisfactorily addressed in any legislative bill that would enact the proposal.

Brief History

The current proposal was developed by the Mental Health Task Force at the request of the previous Director of Health, Dr. Gregg Wright. Dr. Wright charged the task force members with identifying ways in which unqualified and incompetent practitioners can be prevented from offering mental health services; and with finding ways of streamlining the regulatory process for mental health in Nebraska. After much deliberation, the task force members submitted a report to the Director outlining a concept for an omnibus credentialing process for the regulation of mental health professions in Nebraska. This report was the conceptual foundation for the current Mental Health Practitioner proposal. This proposal was also developed by the task force at the request of the Director. The Director's attention was drawn to these two issues by credentialing reviews of Marriage and Family Therapy proposals in 1987 and 1988. The information generated by these reviews made it clear that there is a need for changes in the way in which we regulate the mental health professions in Nebraska.

Has harm to the public occurred in Nebraska in the area of mental health counseling?

The Department believes that sufficient evidence of harm to the public from unqualified mental health practitioners has been generated by the credentialing review process to justify the creation of more effective regulation in the area of mental health services in Nebraska. The evidence indicating harm comes from a wide variety of sources, including testimony

from the general public. During the course of the review, concern was expressed by some interested parties regarding the lack of "hard data" to demonstrate harm to the public. These commentators felt that the evidence presented was purely anecdotal in nature, and that this alone is not a sufficient basis to justify making changes in the way we regulate mental health providers. However, meaningful statistical information on this issue is lacking, and that those who make policy in this area are limited to using the available evidence. Some of this evidence is quite good. I was particularly impressed by the "Prime Time" video (Spring, 1992) that described the activities of unqualified and unscrupulous providers, and the testimony at the technical committee hearing from members of the public who stated that they had been harmed by inappropriate mental health therapy. This testimony informs us that many people have been harmed by unqualified providers, and that the current regulatory environment does not provide them with an opportunity for recourse. Also, I believe that this testimony represents only a small proportion of those whose lives have been harmed by inappropriate care in the area of mental health counseling. It takes an uncommon amount of courage to come forward in a public setting and reveal intimate details of one's pain, suffering, and humiliation at the hands of an incompetent therapist. For every person who does come forth, I am convinced there are many more who suffer in silence.

How well has the current regulatory system in Nebraska dealt with these problems?

Current mechanisms for regulating mental health practice in Nebraska have not been effective in dealing with unqualified and unscrupulous providers. This is because the current regulatory system cannot provide for effective control over scope of practice. Most mental health statutes in Nebraska provide only for title protection. Some mental health professions such as Psychology have licensure, while others such as Marriage and Family Therapy possess no credentialing at all. Even those professions that have licensure cannot prevent unscrupulous members of their profession who have lost their licenses from simply adopting a different title and continuing to do whatever they were doing before. The Board of Psychology, for example, can take away an erring psychologist's license. However, the practitioner in question can simply call himself/herself some other kind of therapist, and continue to do most of the things that a psychologist does. No action can be taken against this person as long as he/she does not use another protected title. This is because most of the functions that comprise the scope of practice of Psychology are not the exclusive domain of Psychology, but are also part of the domain of Social Work, Professional Counseling, Marriage and Family Therapy, and other smaller mental health professions. The fact that there is a shared scope of practice among these professions makes it almost impossible to solve the problems of unqualified practice in the area of mental health by licensing each profession separately, since unscrupulous providers can always invent a new title that is not currently covered by such credentialing mechanisms, and thereby create a new practice that is outside the bounds of any of currently licensed mental health profession.

Credentialing each mental health profession separately would serve the purpose of promoting better quality of services within each profession, but would not serve the public's need for protection from unqualified providers who operate outside the bounds of these credentialed professions. Clearly there is a need to develop a regulatory mechanism that can control the entire scope of what mental health practitioners do, regardless of professional boundaries. Only then can we begin to address the problem of unqualified and unscrupulous providers in the area of mental health services.

Some people argue that the best way to deal with problems with some providers of mental health services is to improve public education so that the consumer is more aware of the qualifications of providers of mental health services. This is precisely what the current regulatory system for mental health professions in Nebraska was designed to do. This system created title protection for some mental health professions in an effort to help the public make better choices of practitioners than they would otherwise make in a totally unregulated environment. The goal of this system of regulation is to protect the public from harm without restricting freedom of choice. The current certification statutes for Social Work and Professional Counseling are the principal components of this system of regulation.

The evidence that has been generated by the 407 review makes it clear that this system of regulation, which has been in effect for over five years, has not adequately protected the public from harm. The courageous testimony provided by Hal and Jubi Maggiore at the 407 public hearing indicates to me that the current system has not done enough to help consumers avoid being exploited by unscrupulous providers. The current system has not provided consumers with the ability to distinguish qualified providers from unqualified providers. I do not believe that most consumers possess sufficient knowledge of the world of mental health care to be capable of selecting an appropriate practitioner without the additional protection offered by better regulatory legislation. Nebraska needs a new comprehensive mental health statute that provides greater assurance that those who provide mental health services are qualified to do so.

A ruling by the Eleventh Federal Circuit Court of Appeals in Florida casts doubt about the long-term future of certification as a "stand-alone" method of regulating mental health professions. In 1990 this court ruled that Florida's certification statute for Psychology was unconstitutional because the title protection provision of this statute constitutes a violation of first amendment liberties. The court reasoned that if the law does not restrict who can provide the services that comprise a given profession, then the law cannot restrict who can use of the professional title that describes those professional services. The court felt that restricting the freedom of a given practitioner to describe to potential clients the very services the law allows him/her to provide is not a proper way to use a state's regulatory power. Although this ruling does not currently apply to Report Nebraska, it shows that certification as a stand-alone method by which states regulate health professions may soon be untenable. This ruling is

another reason why Nebraska needs to explore alternative ways of regulating such mental health professions as Social Work and Professional Counseling which currently are regulated by certification laws.

What needs to be done to deal with the harm to the public identified in the current situation of mental health counseling in Nebraska?

The only way to provide for public protection is to create a legal environment wherein a common scope of practice is defined and enforced via an omnibus licensing statute under which legal action could be taken against unqualified providers. The current Mental Health Practitioner Proposal provides for this. The Department endorses this proposed solution to the problem of unqualified practice in the area of mental health.

The Mental Health Proposal undoubtedly will impose some restrictions on the freedom of choice of the consumer. However, the consumer would still have a wide range of choice in the selection of a practitioner. Consumers will still be able to select practitioners from such professions as Social Work, Professional Counseling, and Marriage and Family Therapy, as well as the professions of Psychology, Medicine, Nursing, and pastoral counseling.

In what ways does the proposal need to be improved or clarified?

There are outstanding issues and questions that the applicant group needs to address before the Department of Health can support the its proposal in the Legislature. These outstanding issues and questions include:

Is this a proposal that covers only independent practice? If so, how does the proposal define "independent practice"?

Does the proposal define independent practice to mean unsupervised practice? If so, the applicants need to clarify what would comprise supervised practice as opposed to unsupervised practice. Would there be an exemption for practitioners who work for state agencies and local governmental agencies? Would there be exemptions for unsupervised practitioners working in any other types of health care institutions? If so, what types of health care institutions?

Or does independent practice mean noninstitutional practice? If so, a definition of what is meant by institutional settings as opposed to noninstitutional settings is needed.

Or would the proposal apply to practitioners who work outside of governmental agencies, regardless of whether they work under supervision or whether they work for an institution?

My recommendation regarding this issue is that any bill embodying the concept put forth in the proposal exempt those practitioners who are licensed or certified by agencies of state government other than the Department of Health.

How should bachelors-level CSWs be regulated under this proposal?

Concern has been raised about the impact of the proposal on the availability of mental health services in remote rural areas of Nebraska. Some members of the Board of Health stated that the proposal might actually diminish the availability of services in some rural communities because, in at least some instances, the only practitioners available to provide mental health services in these communities are bachelors-level social workers, and they would probably be put out of practice because they don't meet the standards of the proposal. Other interested parties have stated that the option of grandfathering any bachelors-level people would conflict with the purpose of the proposal which is to raise standards of care in mental health in Nebraska.

This dilemma reprises the age-old conflict between access to care versus quality of care. How can we balance the need to ensure access to mental health services in remote rural areas with the goal of upgrading the quality of these mental health services? I recommend that bachelors-level CSWs be allowed to continue to practice as they do now, but that the administration of their certification be under the authority of the omnibus board.

Should the state certify Marriage and Family Therapy?

The Department recommends that the legislative act that would enact the omnibus licensing proposal should be developed in conjunction with a provision calling for the specialty certification of marriage and family therapists in Nebraska. The record of previous credentialing reviews of Marriage and Family Therapy proposals shows that the principal obstacles to the credentialing of Nebraska's marriage and family therapists was their lack of an exclusive scope of practice, and that as a profession, they were too small in number to support their own board of examiners. The current omnibus proposal removes these obstacles to the certification of this profession by providing for a common board of examiners and a common scope of practice for all professions regulated under the proposal.

The Department believes that creating a specialty certification for Marriage and Family Therapy is in the public interest. Specialty certification for Marriage and Family Therapy within the context of the omnibus proposal would assist the public in selecting an appropriate provider from among the available licensed mental health practitioners.

This certification should be administered by the omnibus board, and the costs of administering this credential should be covered by the funds available to this board, as would also be the case with the costs of administering the specialty certifications for Social Work and Professional Counseling.

Is there a need for a licensing examination for Mental Health Practitioners, and if so, how will the cost be paid?

There is a need to develop a special licensing examination for Mental Health Practitioners. Some candidates for licensure will not be members of groups that possess an examination of their own. Such groups as social workers and professional counselors already possess examinations, and it is my recommendation that these practitioners should not have to take the special licensing examination if their certifying examinations meet the standards for licensure. This is something that could be determined by the omnibus board, and I recommend that the board be given the authority to make such determination.

One option that could be used to finance the development of the special licensing examination would be to borrow the money from current boards of examiners, and then at a later date raise fees on mental health practitioners to repay the loan. One option that I do not recommend is to request that the legislature approve paying for these costs through general funds. It is not likely that the legislature would look kindly upon such a request given the state's current financial difficulties.

How do we control the size of the proposed Board of Mental Health Practitioners and yet fairly represent member professions?

Concern has been expressed by some interested parties regarding the ability of the proposed omnibus board to adequately represent the various groups that would be regulated by the proposal. Other interested parties have expressed concern that a board that attempts to represent all member groups equally (at the same time) runs the risk of becoming large, unwieldy, and expensive to operate. We need to explore several options for dealing with these divergent concerns. One option is to appoint a board composed entirely of public members. The advantage of this approach is that it ensures control of the size of the board, and would be less likely to engender tensions between the various mental health professions over who is controlling the board. A disadvantage of this approach is that, at least to begin with, the member professions might be uncomfortable with having their board governed by persons that they perceive as being less familiar than they are with the issues surrounding mental health.

Another option would be to appoint a board composed of a set number of members from each group regulated by the board, set the maximum number of members that would sit on the board at any one point in time, and then apply the "rotating membership" concept whereby a formula would be developed to determine when each of the representatives of the various professions and groups would serve on the board. This approach would guarantee that the board would not continue to grow in size, and would ensure fairness in representation. However, this formula might

make those professions at the bottom of the rotation somewhat uncomfortable due to the fact that the representatives of those professions at the top of the rotation would be "running the show."

Whatever option is chosen, the board should be limited to a maximum of seven members regardless of which option or model is chosen in order to control costs of administration.

The development of committees to administer specialty certifications of the various member groups would be necessary in order to administer the specialty certifications. Such committees must operate under the authority of the full omnibus board. These committees should have the authority to make decisions regarding the certification programs they would administer, subject to review by the full omnibus board. The full board should be guided in its reviews of committee actions by the requirements of the proposed statute that would govern the omnibus process.

Whatever structure is chosen, the actual discipline of unlicensed providers is going to be difficult and time-consuming. Those whose responsibility it would be to enforce the statute, namely, county attorneys and state courts are already burdened by heavy case loads. Exactly how high a priority mental health issues would receive from these law enforcement people is uncertain. Perhaps this is the time for the Legislature to explore ways in which the licensing boards could be used to assist in matters pertaining to the discipline of unregulated providers.

Concluding Remarks

The current proposal is one of the most important concepts on the subject of mental health regulation to arise in many years. This omnibus proposal is unique in the nation in that it would provide state regulators with the machinery to take action against unqualified and unscrupulous mental health practitioners. No other state has attempted anything this ambitious in the area of mental health regulation. This pioneering proposal if passed by the legislature would place Nebraska in the forefront of the struggle to prevent harm to the public from inappropriate mental health services. The Department enthusiastically supports the concept comprising this proposal.

