FINAL REPORT OF THE

FINDINGS AND RECOMMENDATIONS

BY THE

NEBRASKA BOARD OF HEALTH

ON THE PROPOSAL OF

MEDICAL NUTRITION THERAPY

TO THE

DIRECTOR OF HEALTH

AND THE

NEBRASKA LEGISLATURE

JANUARY 23, 1995

Recommendations of the Full Board of Health on the Proposal

(November 21, 1994)

I. Testimony from Interested Parties

A. Comments by the Vice-Chairperson of the 407 Committee of the Board

Chairperson Arthur Weaver asked Patricia Kuehl, the vice-chairperson of the 407 Committee of the Board, to summarize the work of her committee. Patricia Kuehl stated that the 407 Committee members took action on each of the four criteria, and voted against the proposal on three of the four criteria. Board member Kuehl stated that these votes meant that the 407 Committee recommended against approval of the proposal. Board member Kuehl stated that in the judgment of the 407 Committee members, the applicant group had not demonstrated that there is significant harm to the public inherent in the current situation of medical nutrition therapy or that the public would significantly benefit from the proposal.

Chairperson Weaver then asked if there were persons who wished to speak in support of the proposal. Annetta Richards came forward and stated that the applicant group submitted the current proposal to license medical nutrition therapists in order to provide the public with improved access to affordable medical nutrition therapy services. This testifier stated that by licensing those who provide these services, the current proposal will eliminate an important barrier to third-party reimbursement, and thereby, pave the way for increased public access to these services. This testifier informed the Board that third-party payors have indicated that because the members of her profession

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are not licensed they are not eligible for reimbursement. This testifier added that access to this care is especially critical in rural areas of Nebraska, and that without the proposal, this situation will continue to deteriorate.

This testifier also informed the Board members that the proposal would establish a process by which the credentials of those educated and trained in the area of medical nutrition therapy in schools other than those which educate and train RDs would be reviewed in order to determine their eligibility for licensure. This testifier stated that this was added to the proposal to ensure that the proposal would not be overly restrictive.

Board member Margaret Allington asked Annetta Richards whether referrals from physicians for nutritional care of the elderly is something that occurs frequently. Annetta Richards responded that such referrals occur quite frequently. Board member Allington then asked how frequently such care occurs outside of an institutional context. Annetta Richards responded that RDs do provide such care in cooperation with home health agencies, but that this care is not reimbursed, and consequently occurs less frequently than that which occurs in an institutional setting.

Board member Chris Caudill then commented that there is an increasing need for prescribed nutritional care to be provided outside of hospital settings, and that those who provide this care need to be reimbursed for their services. Board member Caudill added policymakers need to find some way to facilitate the growth

of these services outside of institutional settings.

II. Recommendations of the Full Board

The Board members then voted on a motion by Board member Richard Fitzgerald and seconded by Patricia Kuehl that the Board members endorse the action taken by their 407 Committee which was to recommend against approval of the proposal. Voting aye were Allington, Cullen, Fitzgerald, Foote, Gerrard, Kellough, Kuehl, McQuillan, Polzien, Tempero, and Wempe. Voting nay was Caudill. Abstaining were Balters and Weaver. By this action the Board of Health recommended against approval of the proposal.

Recommendations of the 407 Committee

of the Board of Health to the Full Board of Health

(November 9, 1994)

I. Testimony from Interested Parties

A. Comments by the Chairperson of the Technical Committee

Board member Patricia Kuehl, vice-chairperson of the 407 Committee, asked Board member and technical committee chairperson Michael Cullen, M.D., to provide the 407 Committee members with an overview of the work of the technical committee. Chairperson Cullen stated that the technical committee met five times during the review process, and that a majority of the committee members concluded that the applicant group had not demonstrated that there is a need for the proposal, or that the public would benefit from the proposal. Chairperson Cullen also stated that the technical committee was concerned about the impact that the proposal might have on the ability of some unlicensed practitioners such as weight-loss counselors and employees of health food stores to earn a living.

B. Testimony from the Applicant Group

Vice-chairperson Kuehl then asked the applicant group whether they wished to present testimony to the 407 Committee. Annetta Richards, R.D., C.N., the applicant group representative on the technical committee came forward to present testimony. This testifier stated that the applicants' proposal offers the public cost-effective access to medical nutrition therapy, and that harm to the public is occurring because access to medical nutrition therapy is limited by inconsistent reimbursement for these health

care services. This testifier informed the 407 Committee members that those who need medical nutrition therapy the most are those who cannot pay for these services themselves, and that the result of this situation is that greater usage of more expensive therapies are required, adding more costs to an already overburdened health care system.

Applicant group representative Richards went on to state that medical nutrition therapy when applied appropriately can improve the quality of life and life expectancy; decrease or replace the need for more expensive treatments; speed recovery from trauma, injury, illness, or surgery; decrease the length of hospital stay; prevent the progression of disease; and restore health. This testifier stated that those who provide these services must be licensed in order for the public to reap the full benefits of medical nutrition therapy, and that this is because of current federal legislative language for coverage of medical services. This testifier stated that the applicant group recognizes that licensure alone will not guarantee third-party reimbursement for their services, but added that lack of licensure is a significant barrier to this reimbursement, and that without it, there is no chance for this reimbursement to occur.

This testifier informed the 407 Committee members that access to medical nutrition therapy is a critical problem in the rural areas of Nebraska, and that this situation can only deteriorate if practitioners cannot enlarge their practices to meet the needs of patients and clients in those areas. This testifier stated that this cannot be accomplished unless the reimbursement situation is

changed so that clients who cannot pay for these services themselves can get access to them.

This testifier stated that the applicant group has no intention of putting people out of work or damaging the careers of other health care providers, and that the applicant group has amended the proposal to include numerous exemptions, and a process by which those providers trained and educated in nutrition programs other than those which train and educate RDs would be given an opportunity to become licensed if they meet minimum standards. This testifier informed the 407 Committee members that her group has proposed the creation of an alternative practice committee to review the credentials of those trained differently than RDs, and that this group would be composed of persons with a wide-range of backgrounds, including consumers.

407 Committee member Kellough asked the applicants how many persons would be on the proposed alternative practice committee. Annetta Richards responded that such a committee would probably resemble a technical committee both in size and in composition, being composed of a mix of consumers and health care professionals. Committee member Kellough asked the applicants whether this body would have "final say" in determining who qualifies and who does not. Annetta Richards responded by stating that this group would not have final say, but would function in an advisory capacity to the Board of Examiners in Medical Nutrition Therapy. Committee member Kellough then asked the applicants to describe the composition of their proposed board of examiners. Annetta Richards responded that this board would be the same board

that currently exists, and that this board is composed of four persons, and that these persons of which three are RDs and one a consumer.

407 Committee member Duane Polzien, O.D., asked the applicants to inform the committee regarding how many RDs there are in Nebraska, and how many schools in Nebraska have programs in the area of dietetics and nutrition. Annetta Richards responded that there are approximately 450 RDs in Nebraska, and that UN-K and UN-L have programs in dietetics and nutrition. Committee member Polzien then asked the applicants to discuss the types of settings wherein RDs provide their services. Annetta Richards responded that most RDs currently work in a hospital setting, but that there are RDs employed by long-term care facilities, and intermediate care facilities.

407 Committee member Kuehl asked the applicants to discuss the differences between medical nutrition therapy and general nutrition. Annetta Richards responded that general nutrition refers to such activities as wellness, nutrition education, and lifestyle counseling, whereas medical nutrition therapy comprises such activities as assessing a patient's overall nutritional condition, using diet to treat serious illness or injury, and monitoring a patient's progress during treatment.

407 Committee member Kuehl asked the applicants to discuss how the proposal would affect the activities of other health professionals. Annetta Richards responded by identifying the professions and activities that the proposal has exempted. The full list of these professions and activities is described on

pages 10 through 13 of the technical committee report.

407 Committee member Polzien informed the committee members that optometrists occasionally do advise their patients regarding diet and nutrition, and that the proposal does need to include optometrists on the list of exempted professions. Annetta Richards responded that the applicant group will review their list of exemptions once more prior to drafting their bill to be sure that all currently licensed professions who use nutrition to treat their patients are included on the list of exemptions.

407 Committee member Kuehl asked the applicants why they did not provide more data from other states that have licensure regarding any impacts licensure might have had on the reimbursement situation of their profession in those states. Annetta Richards responded that the applicant group attempted to get such information from Iowa and Kansas, but that this information is not yet available. Committee member Kuehl then asked why the applicants did not look at other states that have licensure for such information. Annetta Richards responded that the technical committee specifically requested that they get information from Iowa and Kansas because they are contiguous states, and that extrapolations from their experiences with licensure would be more valid than extrapolations from the experiences of states outside of our area. Annetta Richards added that she believes that licensure would eventually pave the way for direct reimbursement, but that it would take a long time, and that the applicant group realizes that lack of licensure is not the only reason why direct reimbursement has not been forthcoming for

their services.

407 Committee member Kellough asked the applicants exactly which of their services and functions should be reimbursed. Annetta Richards responded that those activities comprising nutritional assessment and treatment of illness using nutrition would be the types of activities for which the applicants feel they should be reimbursed.

407 Committee member Polzien asked whether or not the services of an RD could be reimbursed through a physician in situations wherein a physician has referred a patient to a particular RD for nutritional therapy. Annetta Richards responded that she was not aware of any specific instances in which this has occurred.

C. Testimony from Opponents of the Proposal

Vice-chairperson Kuehl asked if there were persons who wished to speak in opposition to the proposal. Susan Schriever, a nutritional counselor, came forward to present opponent testimony. Susan Schriever stated that there is no need for licensure for the applicant group, and submitted copies of an advertisement for a dietetic position at a local hospital to make the point that the public clearly recognizes the profession in question.
This testifier went on to state that the current proposal would not resolve the applicant groups' concerns about reimbursement since the reasons for their problems getting reimbursed have nothing to do with licensure. This testifier informed the committee members that the source of the reimbursement problem in this area is that third-party payors have been reluctant to

reimburse for anything in the area of preventive care, regardless of whether or not such care arises from the services of a licensed practitioner. This testifier stated that even the physician she works with is not reimbursed for the preventive care that occurs as part of his practice. This testifier stated that reimbursement in the area of preventive care will occur when the insurance industry learns that preventive care can make a significant contribution to the health and well-being of the public, and added that when this occurs, reimbursement for preventive care will be provided for the services of all qualified practitioners, regardless of whether or not they are licensed.

This testifier added that helping health professionals get reimbursed for their services is not the purpose of state regulation, and added that achieving direct reimbursement for medical nutrition therapy might not be in the public interest due to the likelihood that it would lead to increased costs for these services. This testifier stated that one way or another these costs would be passed on to the public.

D. Testimony from Other Interested Parties

Vice-chairperson Kuehl asked if there were any other persons who wished to speak on the issues raised by the proposal. Randall Bradley, a naturopathic physician, came forward to present testimony. This testifier stated that he was opposed to the original proposal, but now feels that he can support the current amended version of the proposal because this amended version includes a provision which allows persons who have extensive training and education in the area of diet and nutrition but who

are not RDs to get licensed.

This testifier went on to state that he has reservations about the mechanism by which the credentials of persons trained alternatively to RDs would be reviewed. This testifier informed the 407 Committee members that the proposed advisory committee discussed on page 10 of the report of the technical committee would need specific legislative guidelines to avoid arbitrary and unfair decisions, and unless revised in this manner, would probably be declared an unconstitutional delegation of legislative authority.

This testifier went on to state that a better approach would be to recognize from the onset that clinical nutrition is a diverse field of endeavor with many different types of appropriate credentials. This testifier added that the proposal needs to define those credentials that are required to effectively and safely practice in this area rather than leave it up to some poorly-defined advisory committee to decide.

This testifier stated that the applicant group has made a great deal of progress in the area of respect for freedom of choice since their original proposal, and that this had enabled him to support it.

II. Discussion of Issues Raised by the 407 Committee Members

The 407 Committee members decided to organize their discussion in terms of the four criteria of the credentialing review statute. Criterion One states, "Unregulated practice can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is easily recognizable and not remote or

dependent upon tenuous argument."

The 407 Committee members asked the chairperson of the technical committee, Dr. Michael Cullen, for his comments on the issue of harm to the public inherent in the current situation. Chairperson Cullen responded by stating that the technical committee members felt that harm to the public was not clearly demonstrated by the applicants' proposal. The chairperson also stated that the committee members were also concerned that the proposal would only license those who choose to do medical nutrition therapy. This situation might actually compound any access to care problems that might exist in rural areas of the state because RDs practicing in rural areas might chose not to get licensed to practice medical nutrition therapy due to not have enough clients who need medical nutrition therapy to justify the cost of a license.

407 Committee member Kellough then moved and 407 Committee member Fitzgerald seconded that the proposal does not satisfy the first criterion. Voting aye were Polzien, Kellough, Foote, Fitzgerald, and Kuehl. There were no nay votes or abstentions. By this vote the 407 Committee members decided that the proposal does not satisfy the first criterion.

The 407 Committee members then discussed issues pertinent to the second criterion. Criterion Two states, "Regulation of the profession does not impose significant new economic hardship on the public, significantly diminish the supply of qualified practitioners, or otherwise create barriers to service that are not consistent with the public welfare and interest."

407 Committee member Foote asked the applicants to estimate how

many RDs would choose to get licensed. Sally Semm, R.D., C.N., current president of the Nebraska Dietetic Association, responded by stating that her estimate is that at least half of the approximately 450 RDs in Nebraska would choose to get licensed soon after the passage of the act. This testifier added that many more RDs will choose to be licensed than are currently certified because relatively few RDs perceive certification as being a meaningful credential. 407 Committee member Kuehl asked the applicants what incentive there would be for an RD who does not currently do medical nutrition therapy to get licensed. Sally Semm responded that persons who do not currently do medical nutrition therapy might want to provide these services sometime in the future. This testifier also stated that pride in being a member of a licensed profession would be a motivating factor for some persons to get licensed.

407 Committee member Polzien asked the applicants whether a practitioner such as Randall Bradley would be allowed to sit for the examination in medical nutrition therapy. Sally Semm responded that her group would not have a problem allowing him to sit for the exam if he has the knowledge base to qualify. Annetta Richards, another applicant testifier, stated that the alternative practice committee would review the credentials of practitioners such as Randall Bradley and make a recommendation to the Board of Examiners as to whether they can sit for the examination.

The 407 Committee members asked technical committee Chairperson Cullen to comment on issues pertinent to the second criterion. Chairperson Cullen responded by stating that some members of the technical committee were concerned about the possible impact of the

proposal on such enterprises as health food stores and weight-loss centers, adding that the proposal was not clear as to how these persons would know when they are violating the proposed scope of practice.

407 Committee member Kellough moved and 407 Committee member Foote seconded that the proposal does satisfy the second criterion. Voting aye were Fitzgerald, Foote, and Kellough. Voting nay were Polzien and Kuehl. There were no abstentions. By this vote the 407 Committee members decided that the proposal does satisfy the second criterion.

The 407 Committee members then discussed issues pertinent to the third criterion. Criterion Three states, "The public needs and can reasonably be expected to benefit from, assurance of initial and continuing professional ability by the state."

The 407 Committee members asked technical committee Chairperson Cullen to comment on these issues. Chairperson Cullen stated that the technical committee didn't perceive that the proposal would improve access to medical nutrition therapy, and didn't believe that third-party payors would be likely to change their reimbursement policies on reimbursement even if the applicant group were licensed. Chairperson Cullen went on to state that the technical committee had asked the applicant group for information from the neighboring states of Iowa and Kansas regarding any benefits that licensure might have brought in those states pertinent to reimbursement, but stated that the applicants told the committee that such evidence was not available. Chairperson Cullen informed the 407 Committee members that he has seen no indication that insurance companies are moving towards providing reimbursement in any area of preventive care.

Chairperson Cullen stated that for the most part the care provided

by the members of the applicant group is hospital- based care, and that there have been no complaints from the public regarding this care.

407 Committee member Fitzgerald moved and 407 Committee member Polzien seconded that the proposal does not satisfy the third criterion. Voting aye were Polzien, Kellough, Fitzgerald, and Kuehl. Voting nay was Foote. There were no abstentions. By this vote the 407 Committee members decided that the proposal does not satisfy the third criterion.

The 407 Committee members then discussed issues pertinent to the fourth criterion. Criterion Four states, "The public cannot be effectively protected by other means in a more cost-effective manner."

The 407 Committee members asked technical committee Chairperson Cullen to comment on these issues. Chairperson Cullen stated that the technical committee members did not perceive that the applicant group had demonstrated that there is a problem or problems in the area of medical nutrition therapy, and therefore that there is no need for the proposal. Regarding the access to care issue, for example, chairperson Cullen stated that the technical committee members did not believe that the proposal could address this issue in any case.

Vice-chairperson Kuehl then recognized Jan Wadell, R.D., C.N., President-elect of the Nebraska Dietetic Association, for comments. Jan Wadell stated that the applicant group needs licensure because licensure is what it takes for a health care profession to become a part of the "managed care team." This testifier added that RDs may not always be a hospital-based profession, and that under health care reform, RDs would have more opportunities to become private practitioners, and that this would heighten the need for third-party

reimbursement for RDs. This testifier felt that licensure is an essential prerequisite for third-party reimbursement.

407 Committee member Fitzgerald moved and 407 Committee member Polzien seconded that the proposal does not satisfy the fourth criterion. Voting aye were Polzien, Kellough, Fitzgerald, Foote, and Kuehl. There were no nay votes or abstentions. By this vote the 407 Committee members decided that the proposal does not satisfy the fourth criterion. By virtue of their votes on the criteria, the 407 Committee members decided not to recommend approval of the applicants' proposal.