

Statement of Need and Reasonableness

4695.0300, Subpart 1. B.

The existing subpart states that persons licensed by the Minnesota Department of Health (MDH or the health-related licensing boards shall submit information on their race or ethnicity. (Emphasis added.)

This data, has not been collected, nor used in recent years. Further, Minn. Rules 4695.0400 allows the Commissioner of Health to conduct surveys to collect information needed for decision making pertaining to health manpower. Replies to these surveys are voluntary. The existing subpart is thus redundant with a less intrusive means of collecting the same information.

It is necessary to repeal this subpart because the rule itself is not needed, and it is reasonable to remove a regulatory burden which is no longer justified.

Re: Proposed Rules for Evaluating the Cost Effectiveness and Economic Impact of the Regulation of Human Service Occupations.

With the enactment in 1976 of Minn. Stat. Chapter 214 the Legislature provided a statement of public policy regarding the regulation of occupations in Minnesota. The Legislature determined that regulation should not be imposed on an occupation unless required for the safety and well being of the citizens of the state.

The responsibility for evaluating the need for regulation of human service occupations is given to the Commissioner of Health. Minn. Stat. 214.13 provides that the Commissioner of Health develop rules and procedures for determining the need to regulate human service occupations not already regulated. Minn. Stat. 214.14 establishes a human services occupations advisory council to advise the Commissioner of Health on matters relating to the regulation of such occupations. The advisory council is to base its advice and recommendations on the legislative policy and review factors stated in Minn. Stat. 214.001, and the administrative rules promulgated by the Department of Health under the authority of that statute. After receiving the advice of department staff and the advisory council, the commissioner decides whether regulation is needed, and if so, the appropriate mode of regulation to be implemented or recommended to the legislature for implementation.

The Legislature also directed that three review factors be considered when evaluating whether an occupation should be regulated:

- o whether the unregulated practice of an occupation may harm the public;
- o whether specialized skills or training are required to benefit the public;
- o and whether the citizens may be effectively protected by other means.

Recognizing that regulation increases the cost of a product or service in direct proportion to the stringency of the regulatory mechanism, the 1984 legislature

added overall cost effectiveness and economic impact to the review factors described above (see Minn. Stat. 214.001, Subp. 2). By requiring the commissioner of health to consider whether the overall economic impact of a proposed regulatory mode will be positive, the legislature is attempting to ensure that the solution will not cause greater harm, especially economic harm, than the problem it is intended to solve.

For example, licensing initially raises entry costs by imposing at least a fee and usually also training requirements. The supply of providers is reduced, due to the smaller number who meet the requirements imposed. The cost of the service increases as consumers bid for the services of fewer providers. Under these conditions, after licensing is imposed there will be an income gain distributed to members of the profession (Maurizi). After time, economic theory predicts that there will be an increase in entrants again, but other factors (such as increasing fees, training requirements or altering examination pass rates) could keep the supply of new entrants restricted, compared with supply in the absence of regulation, keeping incomes or fees for services higher (Maurizi). The public will incur these costs, and may not receive sufficient benefits to justify the increased costs.

Further, little is known about the ultimate financial impact of regulations on the private sector, although the term "compliance cost" has been coined to describe it. One researcher observed in a paper that "every dollar spent in the administrative operation of a regulatory program has a multiplier effect in the private sector in the sense that regulations induce expenditures for compliance." (Federal Regulation of Health Occupations, February, 1982.)

In order to integrate this new factor into the existing review process, the department of health needs to adopt rules to define the terms used in statute, and to specify the kind of information the department will require of applicant groups in making a determination of the overall economic impact. These rules must be adopted prior to the Minnesota Department of Health acting on the applications of occupational groups which are seeking regulation through the review process provided by Minn. Stat. 214.00.

Statutory authority Minn. Stat. 214.13, Subd. 1.

Rule by rule justification

Minn. Rule 4695.0800, Subp. 5.

Note: Existing Subp. 5. will remain unchanged and will be renumbered as Subp. 6.

Subp. 5. In order to evaluate the cost effectiveness and economic impact of regulating an occupation it is necessary to require information about the impact of regulation on the cost of service delivery, and the impact on other actors in the relevant markets. Only by consideration of these indicators can the Commissioner assess whether the cost effectiveness and economic impact of the regulation of an occupation is positive for the citizens of the state.

4695.0800 Subp. 5.A.

It is necessary to define the phrase "positive cost effectiveness and economic impact" to facilitate understanding and application of these rules. The defini-

tion contained in this part of the rules is consistent with Minn. Stat. 214.001 in that it requires the public benefit received from the regulation to be greater than the benefit to be received by the regulated occupation.

A regulated occupation may enjoy benefits which might not benefit the public. For example, regulation of an occupation may result in a reduced supply of providers because of the inability of some existing providers to meet entry requirements established by regulations. Informally trained providers may no longer be able to practice their occupation as the result of such regulation. Regulation of an occupation often relies on academic credentials which are less frequently possessed by the poor, minorities, women, and the elderly, having a discriminatory effect. A reduction of the supply of providers may lead to an increase in the cost of the services provided and the creation of shortages and maldistribution in supply of practitioners. (Hogan, Monheit, White, Gaumer.)

The regulation of an occupation may facilitate access to third-party and governmental reimbursement sources. Such access benefits the occupation being regulated in facilitating access to direct reimbursement for services provided, and also may benefit the public by providing access to alternative providers if less costly than existing providers. On the other hand, if regulation of the occupation results in a reduced supply of practitioners, the cost of service may be increased and the public benefit may be less than the costs incurred.

Third party payors often do not reimburse the services of unregulated providers. If, after regulation, the providers' services were reimbursed, any increased costs of providing this new benefit would be reflected in reduced benefits elsewhere, premium increases, or in the case of government, increased budget expenditures. The price of regulated services to these third party payors may be increased over the unregulated price for the reasons described above.

A further problem with third party reimbursement has been the historical practice of passing on any increases in costs. Because the costs were generally spread over a large group, there was little incentive for the third party payor to negotiate with providers over price, or set limits on the amounts of reimbursement. The dramatic increase in health care costs during the last two decades has resulted in greater cost consciousness on the part of third party payors and their customers. Nonetheless, any increased costs are still spread among policy holders and taxpayers.

Therefore, it is reasonable to define the phrase "positive cost effectiveness and economic impact" in the manner proposed.

It is also necessary to define the terms cost effectiveness, economic impact, costs and benefits to facilitate understanding and application of these rules. These definitions are consistent with Minn. Stat. 214.001 in that their use will facilitate a determination regarding the positive cost effectiveness and economic impact of a decision to regulate an occupation. These definitions will also provide applicant groups which are seeking to have their occupations regulated with an understanding of these terms as they will be used during the review of an occupation.

It is reasonable to define cost effectiveness in terms of traditional cost benefit analysis. Occupations requesting to be regulated are requesting a benefit from the state (public). It is important to determine what benefit, if any, accrues to the public from a decision to regulate an occupation. A cost benefit analysis is a reasonable way of making this determination. (Hogan, Gaumer)

4695.0800 Subp. 5.A. (2)

It is reasonable to define economic impact in terms of the effect on the price and supply of services and practitioners in the direct and indirect markets. Research indicates that regulation of an occupation may affect the supply of practitioners within a state, may increase the costs of goods and services provided by the regulated occupation, may create entry requirements that have a tendency to discriminate against the poor, the aged, women, and minorities, as well as inhibit important innovations in the methods of organizing and delivering services. (Hogan)

4695.0800 Subp. 5.A. (3)

It is reasonable to define costs in this manner because "cost" means more than monetary outlay. Costs mean the amount of money expended for educational requirements, training requirements, and social costs. Social costs mean the non-monetary value placed on restricting a person's access to the occupation of his or her choice because of regulatory requirements; the possibility of creating shortages and maldistribution in supply of practitioners, thereby reducing public accessibility; and restricting the mobility and activities of practices and practitioners. It is reasonable to define costs in this manner because certain information will be required to do a cost benefit analysis, and the public and applicant groups need to know the kind of information that will be asked in order to complete a cost benefit analysis.

4695.0800 Subp. 5.A. (4)

Cost effectiveness, as defined earlier, includes benefits as well as costs. It is therefore necessary to define benefits. The benefits given in this subpart are, with one exception, those traditionally offered as benefits of occupational regulation. (Gaumer, Hogan)

Access to similar, but lower cost providers is not usually thought of as a benefit to regulation. However, this may occur when a professional group is permitted to practice in an area previously limited to an already regulated provider group. An example is the use of nurse midwives to assist in routine deliveries, rather than restricting the practice to licensed physicians. The benefits identified are therefore a reasonable list upon which to make a determination of cost effectiveness.

4695.0800 Subp. 5.B. (1)

There is ample evidence that the regulation of an occupation will increase the cost of the goods and services produced or provided by that occupation. (Maurizi, Hogan, Monheit, White, Gaumer.) It is reasonable and necessary to evaluate the impact of regulation on the cost of the goods and services produced or provided by the occupation requesting regulation. Occupations seeking to be

regulated are seeking a benefit from the state, particularly if the result of the review of the need for regulation is the implementation of a program of registration or licensure. In such programs, occupations receive either exclusive right to title or to title and practice to the exclusion of all others. The benefits of regulation should be granted only where justified by consumer protection, and only to the extent that the benefits to the public outweigh any costs. Consumer protection is protection of the public's health, safety or welfare as these relate to consumption of the service provided by the occupational group. Regulation is warranted only in instances where there is recognizable and not remote harm to the public from unregulated practice; where the practice of an occupation requires specialized skill or training and where the public needs and will benefit by assurances of initial and continuing occupational ability; when the citizens of the state can not be effectively protected by other means and if the regulation yields benefits that are greater than the costs, (as defined in this statement of need and reasonableness) associated with it.

4695.0800 Subp. 5. B. (2)

It is reasonable and necessary to determine the potential impact the regulation will have on the supply of practitioners of the occupations. Research indicates that regulation such as registration or licensure tends to reduce the supply of practitioners. (Hogan)

4695.0800, Subp. 5. B. (3)

It is reasonable and necessary to determine whether existing providers will be precluded from the practice of the occupation once a regulatory scheme has been adopted. All things being equal, a reduction in supply of practitioners will reduce access to the services provided, and increase the cost. (Maurizi, Hogan, White, Gaumer.)

4695.0800 Subp. 5. B. (4)

Occupational regulation may impede innovation in human service delivery in relation to its restrictiveness on the practice of the regulated occupation. If practice is limited to individuals with a certain kind of training, delivery of the service by newly emerging lower cost practitioners with different training will be precluded. Subject to concerns about quality of care, analysis of requests for occupational regulation should seek to avoid the creation of programs which could stifle innovations in human services delivery. It is therefore reasonable to require information on the impact of regulation or innovation.

4695.0800 Subp. 5. B. (5)

Occupational regulation usually include education, training and experiential requirements. Experiential requirements are those which relate to actual practice of the occupation. The postulated benefit of these requirements is quality assurance. Quality assurance is usually measured as the success or failure of patient (consumer) outcomes. Quality assurance means that the public has come to expect some minimum level of competency in service delivery. In attempting to establish quality assurance, occupations develop competency control systems

to eliminate or reduce errors in judgment, obsolete practices, and undisciplined, careless practice. Quality assurance, therefore, can be a benefit of regulation. However, evidence indicates that the current regulatory systems have not eliminated professional judgment errors, obsolete practices, and undisciplined and careless practice. (Gaumer) Under Part 4695.0800, Subp. 3. of the existing rules a determination will be made regarding the need for education and training requirements to enter and to continue practice of the occupation.

The purpose of this rule is to determine potential additional costs incurred by practitioners due to education, training or experiential requirements. To make such a determination consideration will be given to the following questions: Will these costs be significant enough to have the effect of restricting entry to the occupation? Will such requirements prohibit current practitioners from further practice once the regulation program is in place?

Additionally, what will be the impact of such requirements on the applicable educational, and training programs or experiential requirements? Will these programs be able to meet the additional demand created by the regulation? Are funding and adequate facilities available? What is the economic impact of the regulation on these types of programs as well as on the existing and potential practitioners?

Given that education, training and experiential costs are likely to be part of any occupational regulations established, it is necessary and reasonable to require groups requesting regulation to provide information and analysis of potential costs.

4695.0800 Subp. 5. B. (6)

It is reasonable and necessary to determine what, if any, improvement in quality of care or service can be expected to result from such regulation. Since there may well be an increase in costs to the public as a result of the regulation, it is important to determine what benefits, if any, the public receives in return for the increased costs.

4695.0800 Subp. 5. B. (7)

It is reasonable and necessary to determine whether the services provided by the occupation seeking to become regulated can be considered a substitute for similar services provided by existing regulated occupations. If it can be demonstrated that the services provided can be considered as substitutes, then it is reasonable to consider comparative costs. For example, if the substitute services could be provided for 80% of the cost of existing providers, the public would appear to benefit from the regulation, at least with respect to cost.

As part of this effort, it will also be reasonable to review the experience of other states following the regulation of the occupation in question. For example, if in these states a determination had been made initially that regulation of the occupation in question would provide public access to less expensive providers, a review of actual expenses should be made. Such a review would include whether the differences in costs have continued since the regulation became effective or whether costs have become very similar.

4695.0800 Subp. 5. B. (8)

It is reasonable and necessary to determine whether the services provided will supplement rather than be a substitute for services provided by existing regulated occupations. If the services are supplemental or "add-ons", costs to the public may increase as a result of the regulation. For example, if the services provided by the occupation seeking to be regulated will not be a less expensive substitute but are additional services which will increase the cost of health care services, regulation may not be justifiable. While the public may benefit from the access to additional providers, it may also be required to absorb significant costs related to or associated with this benefit and in that context regulation may not be cost effective. As an example, an occupation requesting to be regulated by the state claims that the goods and services it can provide are less expensive than those provided by a currently regulated occupation. For example, nurse practitioners or physician assistants have assumed many tasks traditionally performed by physicians. Practice act restrictions, however, may make such occupations dependent upon the regulated occupation - in this case physicians and the services provided (including the cost) become "add-ons" rather than substitutes.

4695.0800 Subp. 5. B. (9)

It is reasonable and necessary to determine the impact, if any, on expenditures by government and private third party payors resulting from a decision to regulate an occupation. If those expenditures will increase as a result of the regulation how will they be paid for? increased taxes? increased insurance premiums? other?

4695.0800 Subp. 5. B. (10)

It is reasonable and necessary to determine whether the regulation of an occupation will facilitate access to direct reimbursement from governmental assistance programs. As noted earlier, the facilitation of access to government assistance programs reimbursement sources may have implications, possibly significant, for program budgets. If the impact will be that of increasing budget costs, that must be known prior to the granting of the requested benefit of state regulation since any additional costs will be borne by the public.

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