



**Dora**  
Department of Regulatory Agencies

**Office of Policy, Research and Regulatory Reform**

# **2012 Sunset Review: Occupational Therapy Practice Act**

October 15, 2012





**Executive Director's Office**

Barbara J. Kelley  
Executive Director

John W. Hickenlooper  
Governor

October 15, 2012

Members of the Colorado General Assembly  
c/o the Office of Legislative Legal Services  
State Capitol Building  
Denver, Colorado 80203

Dear Members of the General Assembly:

The mission of the Department of Regulatory Agencies (DORA) is consumer protection. As a part of the Executive Director's Office within DORA, the Office of Policy, Research and Regulatory Reform seeks to fulfill its statutorily mandated responsibility to conduct sunset reviews with a focus on protecting the health, safety and welfare of all Coloradans.

DORA has completed the evaluation of the regulation of occupational therapists. I am pleased to submit this written report, which will be the basis for my office's oral testimony before the 2013 legislative committee of reference. The report is submitted pursuant to section 24-34-104(8)(a), of the Colorado Revised Statutes (C.R.S.), which states in part:

The department of regulatory agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section...

The department of regulatory agencies shall submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination....

The report discusses the question of whether there is a need for the regulation provided under Article 40.5 of Title 12, C.R.S. The report also discusses the effectiveness of the Division of Professions and Occupations' staff in carrying out the intent of the statutes and makes recommendations for statutory changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Barbara J. Kelley  
Executive Director





John W. Hickenlooper.  
Governor

Barbara J. Kelley  
Executive Director

## **2012 Sunset Review: Occupational Therapy Practice Act**

### **Summary**

#### ***What Is Regulated?***

The Occupational Therapy Practice Act (OTPA) provides regulatory oversight of occupational therapists. Occupational therapists address the physical, cognitive, psychosocial, sensory and other aspects of performance in a variety of contexts to support engagement in everyday life activities that affect health, well-being and quality of life.

#### ***Why Is It Regulated?***

The purpose of the OTPA is to provide protection to consumers by requiring occupational therapists to register (and meet certain statutory requirements) with the Division of Professions and Occupations (Division) within the Department of Regulatory Agencies (DORA).

#### ***Who Is Regulated?***

In fiscal year 10-11, there were 2,497 registered occupational therapists in Colorado.

#### ***How Is It Regulated?***

The OTPA is enforced by the Director of the Division, in what is commonly referred to as a director model program. The Director is responsible for, among other duties, registering occupational therapists and imposing discipline when violations occur. To register as an occupational therapist, a person must complete an accredited educational program, complete at least 24 weeks of supervised fieldwork and pass an approved, nationally recognized examination.

#### ***What Does It Cost?***

In fiscal year 10-11, the total expenditures for the oversight of occupational therapists were \$67,338. There were 0.4 full-time equivalent employees associated with this regulatory oversight.

#### ***What Disciplinary Activity Is There?***

In fiscal years 08-09 through 10-11, there were a total of seven disciplinary actions imposed on registered occupational therapists by the Director, all of which were stipulations.

## Key Recommendations

### **Sunset the OTPA and restore title protection provisions to the Consumer Protection Act.**

An important function of Colorado's sunset process is to eliminate unneeded regulation. In 2006, the DORA conducted a sunrise review to determine whether regulation of occupational therapists was necessary to protect the public. That sunrise review found no evidence of public harm and recommended against regulation. Regardless, the General Assembly enacted the OTPA in 2008. After three years of regulation under the OTPA, there is still no evidence that occupational therapists have significantly harmed the public or engaged in incompetent practice. However, at the time of the 2006 sunrise review, the Consumer Protection Act contained provisions outlining the qualifications of those who could use certain occupational therapist-related titles. Arguably, these title protection provisions may have afforded some public protection. Therefore, the General Assembly should repeal the OTPA and restore to the Consumer Protection Act, those occupational therapist-related provisions that existed prior to the enactment of the OTPA.

## Major Contacts Made During This Review

American Physical Therapy Association – Colorado Chapter  
Colorado Division of Professions and Occupations  
Occupational Therapy Association of Colorado

### What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether or not they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are Prepared by:  
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## Background

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### Introduction

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria<sup>1</sup> and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups and professional associations.

Sunset reviews are based on the following statutory criteria:

- Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;
- Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

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<sup>1</sup> Criteria may be found at § 24-34-104, C.R.S.

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## **Types of Regulation**

Consistent, flexible and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

### Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection – only those individuals who are properly licensed may use a particular title(s) – and practice exclusivity – only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

### Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

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While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

### Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements – typically non-practice related items, such as insurance or the use of a disclosure form – and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

### Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency – depending upon the prescribed preconditions for use of the protected title(s) – and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

### Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

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Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

### **Sunset Process**

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review via DORA's website at: [www.askdora.colorado.gov](http://www.askdora.colorado.gov).

The regulatory functions of the Director of DORA's Division of Professions and Occupations (Director and Division, respectively), formerly the Division of Registrations, as enumerated in Article 40.5 of Title 12, Colorado Revised Statutes (C.R.S.), shall terminate on July 1, 2013, unless continued by the General Assembly. During the year prior to this date, it is the duty of DORA to conduct an analysis and evaluation of the administration of the registration of occupational therapists pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed regulation of occupational therapists should be continued for the protection of the public and to evaluate the performance of the Director. During this review, the Director must demonstrate that the regulation serves to protect the public health, safety or welfare, and that the regulation is the least restrictive regulation consistent with protecting the public. DORA's findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

### **Methodology**

As part of this review, DORA staff interviewed Division staff, reviewed Division records including complaint and disciplinary actions, interviewed officials with state and national professional associations, interviewed health care providers, reviewed Colorado statutes and rules and reviewed the laws of other states.

### **Profile of the Profession**

Occupational therapy addresses the physical, cognitive, psychosocial, sensory and other aspects of performance in a variety of contexts to support engagement in everyday life activities that affect health, well-being and quality of life.<sup>2</sup>

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<sup>2</sup> § 12-40.5-102(1)(b), C.R.S.

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The definition of “occupational therapy,” as put forward by the Colorado legislature at section 12-40.5-103(9), C.R.S., states in part:

“Occupational therapy” means the therapeutic use of everyday life activities with individuals or groups for the purpose of participation in roles and situations in home, school, workplace, community, and other settings.

Occupational therapists may work with clients ranging from newborns born with disabilities, to senior citizens who are recovering from stroke, illness or other physical problems. Occupational therapists work with clients who may be mentally, physically, developmentally or emotionally impaired and occupational therapists help such individuals to develop, recover or maintain daily living and work skills.

In occupational therapy, “occupational” means whatever the particular client needs to do in terms of activities of daily living.

Activities of daily living can include everything from dressing, cooking and eating to improving visual acuity or compensating for short-term memory loss. Occupational therapists develop individualized treatment plans for their patients that include exercises designed to assist the patient to function in the world. Such treatments may include physical exercises, such as strength and dexterity improvement, as well as exercises designed to improve hand-eye coordination, decision-making, abstract reasoning, problem solving, perceptual skills, memory, sequencing and coordination.

In Colorado, registered occupational therapists must meet educational requirements, pass an examination developed by the National Board for Certification in Occupational Therapy and successfully complete a minimum period of supervised fieldwork of at least 24 weeks.

There are approximately 2,500 registered occupational therapists in Colorado. Practitioners may be found in general or specialty hospitals, private practice, rehabilitation centers and home health agencies among other settings.

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## Legal Framework

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### ***History of Regulation***

The Colorado Department of Regulatory Agencies (DORA) conducted a sunrise review of occupational therapists and occupational therapy assistants in 2006. That review concluded that although the profession of occupational therapy was an important component of patient care, there was no need for governmental intervention in the marketplace. All of the evidence analyzed in the sunrise review revealed that harm to the public by unregulated occupational therapists was due to fraudulent activity. None of the harm was attributed to the incompetence of an occupational therapist.

Regardless, the Colorado General Assembly imposed a registration requirement on occupational therapists in 2008. Senate Bill 08-152 established a regulatory regime of registration for occupational therapists within DORA's Division of Registrations, now the Division of Professions and Occupations (Division) and required practitioners to be registered beginning January 1, 2009.

As a result, anyone wishing to practice as an occupational therapist in Colorado is required to provide proof to the Division that he or she has successfully:

- Completed an accredited educational program;
- Completed at least 24 weeks of supervised fieldwork; and
- Passed an approved, nationally recognized examination.

### ***Summary of Statute***

Occupational therapy is defined as the therapeutic use of everyday life activities with individuals or groups for the purpose of participation in roles and situations in home, school, workplace, community and other settings.<sup>3</sup>

The titles "occupational therapist registered," "registered occupational therapist," "occupational therapist," "doctorate of occupational therapy" and the abbreviations "O.T.," "O.T.D.," "O.T.R.," or any other generally accepted terms, letters, or figures that indicate that an individual is an occupational therapist are all protected by statute and limited to use by those individuals who are registered to practice occupational therapy in Colorado.<sup>4</sup>

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<sup>3</sup> § 12-40.5-103(9), C.R.S.

<sup>4</sup> § 12-40.5-104, C.R.S.

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Occupational therapy assistants are required by statute to practice only under the supervision of a registered occupational therapist. The statute provides that the frequency, level, and nature of supervision shall be determined by the supervising occupational therapist with input from the occupational therapy assistant and is to be based on a variety of factors, including a particular client's required level of care, the treatment plan and the experience and pertinent skills of the occupational therapy assistant.<sup>5</sup>

The authority for oversight and implementation of the Occupational Therapy Practice Act (OTPA) is vested in the Director of the Division (Director), rather than a board.

The OTPA contains a rather standard list of grounds for discipline. A registration may be revoked, suspended, denied, or renewal refused or a cease and desist order issued to a registrant for such infractions as engaging in a sexual act with a person receiving services while the therapeutic relationship exists, falsifying information on the application, or failing to notify the Director of the suspension or revocation of the person's past or currently held license.<sup>6</sup>

Practicing occupational therapy or offering or attempting to practice occupational therapy without an active registration is a Class 2 misdemeanor and is punishable according to certain provisions of the criminal code.

Final actions of the Director may be appealed to the Colorado Court of Appeals.

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<sup>5</sup> § 12-40.5-107, C.R.S.

<sup>6</sup> § 12-40.5-110, C.R.S.

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## Program Description and Administration

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The Occupational Therapy Practice Act (OTPA) vests the authority to regulate occupational therapists in the Director of the Division of Professions and Occupations (Director and Division, respectively), formerly the Division of Registrations, within the Colorado Department of Regulatory Agencies (DORA). There is no occupational therapy regulatory board. Rather, the Director oversees the program with support from Division staff. This type of regulatory program is often referred to as a director model program.

At the time of this writing, the full-time equivalent (FTE) employees assigned to the program are 0.38. The breakdown is as follows:

General Professional VII	0.05
General Professional VI	0.05
Technician IV	0.05
Administrative Assistant III	0.03
Administrative Assistant III	0.20

Table 1 below illustrates, for the three fiscal years since the inception of regulation of occupational therapists, the Division's overall expenditures.

**Table 1  
Agency Fiscal Information**

Fiscal Year	Total Program Expenditure	FTE
08-09	\$110,312	0.90
09-10	\$83,952	0.70
10-11	\$67,338	0.40

The FTE listed in Table 1 does not include staffing in the centralized offices of the Division. Centralized offices include the Director's Office, Office of Investigations, Office of Examination Services, Office of Expedited Settlement, Office of Licensing and Office of Support Services. However, the cost of those FTE is reflected in the Total Program Expenditures. The Division pays for those FTE through a cost allocation methodology developed by the Division and DORA's Executive Director's Office.

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### **Registration**

Colorado has a mandatory practice act, meaning that all individuals wishing to practice as an occupational therapist must register with the Director and meet statutory requirements.

Table 2 illustrates the number of new and active occupational therapist registrations in Colorado for the three fiscal years indicated.

**Table 2  
Registration Information**

Fiscal Year	New Registrations Issued			Renewal	Reinstatement	Active Registrations as of June 30th
	Examination	Endorsement	Total New Registrations			
08-09	1,857	325	2,182	N/A	N/A	2,182
09-10	112	171	283	N/A	N/A	2,465
10-11	70	197	267	2,277	12	2,497

Per the 2006 sunrise review, in the first year of regulation, it was estimated that there would be 2,040 registrations issued, with 215 registrations issued in the years following.<sup>7</sup>

Table 2 shows that in the first year of regulation, 2,182 registrations were issued, with 283 and 267 registrations in the next two years, respectively.

Endorsement refers to a process through which an occupational therapist licensed or registered in another state may register in Colorado if the licensing or registration requirements of the other state are substantially equivalent to Colorado’s standards. Endorsement is an important process that facilitates professional mobility.

Occupational therapists renew their registrations on January 31 of odd-numbered years, and they pay fees that support the cost of the regulatory program. In fiscal year 10-11, the fee for a new registration was \$60. That same year, the fee for reinstatement was \$119, and it was \$104 to renew a registration.

### **Complaints/Disciplinary Actions**

One of the important functions of a regulatory program is to receive complaints against practitioners and investigate those complaints to determine if the practitioner violated Colorado’s OTPA. Anyone—a hospital, a medical practitioner or other health care provider, or a client—may file a complaint against a registered occupational therapist.

<sup>7</sup> SB 08-152, State and Local Revised Fiscal Impact Note.

Table 3 illustrates the number and nature of complaints filed against registered occupational therapists during the three-year period indicated.

**Table 3  
Complaint Information**

Nature of Complaints	FY 08-09	FY 09-10	FY 10-11
Practicing w/o a Registration	0	3	11
Standard of Practice	0	0	0
Fee Dispute	0	0	0
Scope of Practice	0	0	0
Sexual Misconduct	1	0	0
Substance Abuse	0	0	0
Theft	0	0	0
Felony Conviction	0	0	0
Has otherwise violated any provision of the OTPA or rule of the Director	0	1	1
<b>TOTAL</b>	<b>1</b>	<b>4</b>	<b>12</b>

Table 3 reveals two noteworthy facts. First, very few complaints have been filed against occupational therapists. Second, the vast majority of complaints (82 percent) that have been filed have alleged practicing occupational therapy without a registration, as opposed to competency-related issues.

Table 4 illustrates the total number of final agency actions taken against occupational therapists. Final agency actions represent the outcome of complaints made to the Director. A practitioner's registration may be revoked, the most stringent final agency action, or the complaint may be dismissed if there is no evidence of a violation of the OTPA.

**Table 4  
Final Agency Actions**

Type of Action	FY 08-09	FY 09-10	FY 10-11
Revocations	0	0	0
Suspensions	0	0	0
Revocation/Suspensions held in abeyance or stayed or stayed suspended	0	0	0
Stipulations	1	2	4
Letters of Admonition	0	0	0
Other - Cease and Desist	0	0	0
<b>TOTAL DISCIPLINARY ACTIONS</b>	<b>1</b>	<b>2</b>	<b>4</b>
Dismiss	4	1	2
Confidential Letter of Concern	0	2	0
<b>TOTAL DISMISSALS</b>	<b>4</b>	<b>3</b>	<b>2</b>

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## Analysis and Recommendations

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### ***Recommendation 1 – Sunset the Occupational Therapy Practice Act and restore title protection provisions to the Consumer Protection Act.***

An important function of Colorado’s sunset review process is to eliminate unneeded regulation. In section 24-34-104(1)(a), Colorado Revised Statutes, the General Assembly references a “substantial increase in numbers of agencies, growth of programs, and proliferation of rules and regulations.” Later in that same section, the General Assembly further finds that regulatory agencies “tend to become unnecessarily restrictive.” Given the significant market impacts of regulation, Colorado’s sunset review process was created to provide oversight and protect consumers from unneeded regulation.

Indeed, the first sunset criterion asks whether regulation is necessary to protect the public health, safety and welfare.<sup>8</sup> The most obvious way to determine this is to examine complaint and disciplinary data.

Table 3 of this sunset report reveals that in the three years since regulation was first imposed on occupational therapists in 2008, a total of 17 complaints were filed with the Director of the Division of Professions and Occupations (Director). More telling, however, is the nature of those complaints—14, or 82 percent—alleged that the individual involved was practicing without being registered by the Director. None of the complaints alleged incompetent practice.

The only complaint of substance involved an allegation of sexual misconduct. However, even then, the sexual contact was found to have been consensual.

The data in Table 4 of this sunset report reveal that only 7 of the 17 complaints resulted in any kind of disciplinary action, and all actions consisted of voluntary stipulations. Six of these stipulations related to the allegations of practicing without being registered. In those cases, the individuals were properly qualified to register, but had simply failed to do so. As a result, the Director placed them on probation for six months after registering.

The final stipulation related back to the allegation of sexual misconduct. Because the sexual contact was consensual, the Director placed the registrant on probation.

Thus, after three years of regulation, there is no evidence of significant or recurring harm to the public or of incompetent practice.

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<sup>8</sup> § 24-34-104(9)(b)(I), C.R.S.

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Some could argue that all of this simply demonstrates that the Occupational Therapy Practice Act (OTPA) has established the proper level of regulation. This line of reasoning suggests that the requirements for entry have been established at an appropriate level so as to ensure that only competent people are being registered, thus the lack of complaints.

However, the Department of Regulatory Agencies (DORA) conducted a sunrise review of occupational therapists in 2006. At that time, the Consumer Protection Act protected certain occupational therapy-related titles and reserved their use to those who satisfied certain, statutorily enumerated qualifications.

During that review, DORA's own research found no evidence of harm to the public. Further, between 1987 and 2006, a span of 19 years, the National Board for Certification in Occupational Therapy, Inc. (NBCOT), a national organization that offers private credentials to occupational therapists, received only 20 complaints involving Colorado-based occupational therapists and three involving Colorado-based occupational therapy assistants. Only two of those cases resulted in NBCOT action—one censure and one reprimand.<sup>9</sup>

Thus, a credible argument cannot be made that the OTPA imposes the appropriate level of regulation because there is no evidence that the public was being harmed before the OTPA was enacted.

Prior to the imposition of regulation, the Consumer Protection Act may have granted some level of public protection because it spelled out who could hold themselves out as occupational therapists. Given the lack of harm during this period, it is reasonable to conclude that this was sufficient to protect the public.

Therefore, the General Assembly should repeal the OTPA and restore to the Consumer Protection Act, those occupational therapist-related provisions that existed prior to the enactment of the OTPA in 2008.

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<sup>9</sup> *2006 Sunrise Review: Occupational Therapists and Occupational Therapy Assistants*, Colorado Department of Regulatory Agencies (2006), p. 22.