

VOLUME NO. 37

OPINION NO. 60

AUDIOLOGISTS - May not dispense hearing aids without license as part of program which sells hearing aids; CHARITABLE OR NONPROFIT ORGANIZATION - May not sell hearing aids without a license; DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING - Organization selling hearing aids must obtain license from the department; HANDICAPPED - Program for physically, mentally, and communicatively handicapped may not sell hearing aids without a license; HEARING AIDS - May not be sold, or dispensed under a program which sells them, without a license; LICENSES - Neither a charitable organization nor its employees may sell hearing aids without a license; REVISED CODES OF MONTANA, 1947 - Sections 66-3007, 66-3009, 66-3009(2), 82-4203.1(5).

- HELD: 1. A charitable or nonprofit organization primarily supported by voluntary contributions, or any audiologist or other employee of such organization may dispense free hearing aids without a license from the Department of Professional and Occupational Licensing, but neither the organization nor its employees may sell hearing aids without a license.
2. A charitable or nonprofit organization selling or dispensing hearing aids as part of a program for the physically, mentally, and communicatively handicapped is subject to the rules applying to any other charitable or nonprofit organization.

2 September 1977

Mr. Ed Carney, Director
Department of Professional and
Occupational Licensing
LaLonde Building
Helena, Montana 59601

Dear Mr. Carney:

You have requested my opinion on the following questions:

1. May a charitable or nonprofit organization, primarily supported by voluntary contributions, dispense or sell hearing aids without a license issued by the Department of Professional and Occupational Licensing?
2. May a charitable or nonprofit organization, primarily supported by voluntary contributions, dispense or sell hearing aids without a license as part of a program for the physically, mentally, and communicatively handicapped?
3. May a licensed audiologist, as an employee of a charitable or nonprofit organization, primarily supported by charitable contributions, dispense or sell hearing aids without a license?

The Montana statutes contain a general prohibition against selling, dispensing, or fitting hearing aids without a

license issued by the Department of Professional and Occupational Licensing. Section 66-3007, R.C.M. 1947, provides:

A person may not engage in the sale or practice of dispensing and fitting hearing aids or display a sign or in any way advertise or hold himself out as a person who practices the dispensing and fitting of hearing aids unless he holds a current regular or temporary license issued by the department.

There is an exception to the general licensing requirement. Persons who fit hearing aids under the auspices of certain programs are exempt from the licensing requirement, provided those programs do not also sell hearing aids. Section 66-3009(2), R.C.M. 1947, provides:

This act does not apply to a person while he is engaged in the practice of fitting hearing aids if his practice is part of the academic curriculum of an accredited institution of higher education, or part of a program conducted by a public agency or by a charitable or nonprofit organization which is primarily supported by voluntary contributions, unless they sell hearing aids.

In any of the three situations suggested by your questions, if the charitable or nonprofit organization sells hearing aids, there is no section 66-3009 exemption and the licensing requirement of section 66-3007 applies. This is true whether or not the hearing aids are sold at a profit, since a "sale" is a "contract whereby property is transferred from one person to another for a consideration of value..." Black's Law Dictionary, 4th ed. If the organization dispenses hearing aids at no cost, there is no "selling," and the licensing requirement does not apply. A charitable or nonprofit organization, primarily supported by voluntary contributions, may dispense free hearing aids without a license, but it may not sell hearing aids without a license. This is true whether or not the organization is conducting a program for the physically, mentally, and communicatively handicapped since the statutes provide no exceptions for such programs.

Your final question concerns the possibility of audiologists dispensing hearing aids without a license as part of a program conducted by a nonprofit organization. Again, if the hearing aids are dispensed at no charge, the audiologist

does not need a license. But if any charge is made for the instruments, the audiologist must obtain a license from the Department of Professional and Occupational Licensing.

The Board of Speech Pathologists and Audiologists has adopted rules constituting a code of ethics for audiologists and speech pathologists. Among its provisions are two governing the dispensing of products. Montana Administrative Code, section 40-3.101(6)-5101010(8)(a) provides in relevant part:

(iv) He may dispense products associated with his professional practice, but not for the purpose of supplementing his income or the income of his employer; neither he nor his employer may receive profits from his patient, other than payment for professional services rendered.

(v) Fees for professional services and fees for products dispensed shall be separately itemized for the patient. The supplier's charge to the licensed speech pathologist and/or audiologist for all products shall be the maximum charge allowable to the patient.

These rules describe a minimum standard of conduct which an audiologist or speech pathologist may not breach without acting unethically. If it is otherwise legal to do so, an audiologist may ethically dispense hearing aids at cost. But section 66-3007, R.C.M. 1947, makes it illegal to sell hearing aids without a license. Administrative rules cannot authorize what a statute forbids. "Rules made by agencies... shall conform and be pursuant to statutory authority." Section 82-4203.1(5), R.C.M. 1947.

THEREFORE, IT IS MY OPINION:

1. A charitable or nonprofit organization primarily supported by voluntary contributions, or any audiologist or other employee of such organization may dispense free hearing aids without a license from the Department of Professional and Occupational Licensing, but neither the organization nor its employees may sell hearing aids without a license.

2. A charitable or nonprofit organization selling or dispensing hearing aids as part of a program for the physically, mentally, and communicatively handicapped is subject to the rules applying to any other charitable or nonprofit organization.

Very truly yours,

MIKE GREELY
Attorney General