

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 1

AUDIOLOGISTS - "Certified hearing aid audiologist" must meet requirements of Board of Speech Pathologists and Audiologists;

HEARING AID DISPENSERS, BOARD OF - "Certified hearing aid audiologist" rule invalid;

LICENSES, PROFESSIONAL AND OCCUPATIONAL - "Certified hearing aid audiologists" rule invalid;

SPEECH PATHOLOGISTS AND AUDIOLOGISTS, BOARD OF - Definition of "audiologists";

ADMINISTRATIVE RULES OF MONTANA - Section 8.20.406; MONTANA CODE ANNOTATED - Title 37, chapters 15, 16; sections 37-15-101, 37-15-102(5), 37-15-103, 37-16-411(7);

MONTANA LAWS OF 1975 - Chapter 543.

- HELD: 1. By enacting a licensure act for audiologists and defining the term "audiologist" to include similar terms, the Legislature intended that anyone using the term "audiologist" in whatever manner as a professional title or description of services must be licensed by the Board of Speech Pathologists and Audiologists.
2. An administrative rule by the Board of Hearing Aid Dispensers in direct conflict with this statute and purporting to authorize "certified hearing aid audiologists" is invalid.

13 January 1987

Patti Dubray, Chairman
Board of Speech Pathologists
and Audiologists
Division of Business Regulation
Department of Commerce
1424 Ninth Avenue
Helena MT 59620-0407

Dear Ms. Dubray:

On behalf of the Board of Speech Pathologists and Audiologists of the State of Montana, you have requested my opinion on the following questions:

1. Is the use of the term "certified hearing aid audiologist" by persons not properly licensed as audiologists by the Board of Speech Pathologists and Audiologists a

OPINIONS OF THE ATTORNEY GENERAL

violation of the statute which prohibits persons from practicing or representing themselves as audiologists unless licensed under Title 37, chapter 15, Montana Code Annotated?

2. Is section 8.20.406, ARM, adopted by the Board of Hearing Aid Dispensers and purporting to authorize "certified hearing aid audiologists" a valid extension of legislative authority?

I have concluded that only a person licensed by the Board of Speech Pathologists and Audiologists may use the term "audiologist" in his professional title or description of services. Consequently, the rule adopted by the Board of Hearing Aid Dispensers recognizing the title of "certified hearing aid audiologists" is invalid.

In 1975 the Montana Legislature established a procedure for the professional licensing of audiologists and established the Board of Speech Pathologists and Audiologists. 1975 Mont. Laws, ch. 543. It is now codified, together with later amendments, in chapter 15 of Title 37, Montana Code Annotated. The stated purpose of the legislation is to "provide regulation authority over persons offering speech pathology or audiology services to the public." § 37-15-101, MCA. The definition of "audiologist," which appeared in the original act and has remained unchanged, is now found at section 37-15-102(5), MCA:

"Audiologist" means a person who practices audiology and who presents himself to the public by any title or description of services incorporating the words "audiologist", "hearing clinician", "hearing therapist", or any similar title or description of services.

The clear intent of the Legislature was that anyone who holds himself out to the public as an audiologist must be licensed as provided in Title 37, chapter 15, MCA.

The Board of Hearing Aid Dispensers exists pursuant to Title 37, chapter 16, MCA. In 1976, a year after the Legislature had acted as outlined above, the Board of Hearing Aid Dispensers adopted an administrative rule which is now section 8.20.406, ARM:

CERTIFIED HEARING AID AUDIOLOGIST. (1) The use of the title "Certified Hearing Aid Audiologist" shall be used only by those

OPINIONS OF THE ATTORNEY GENERAL

persons who have been certified as such by the National Hearing Aid Society. Any such uncertified use of the title shall constitute cause for suspension or revocation of license as "misleading, deceptive, or untruthful," advertising within the intent and meaning of section 37-16-411(7), MCA.

While this rule purported to be restrictive, it actually had the effect of sanctioning the use of the title "certified hearing aid audiologist" for those who obtained the certification of the National Hearing Aid Society. Nowhere in the law establishing the Board of Hearing Aid Dispensers does the term "certified hearing aid audiologist" exist.

The rule is in direct conflict with the licensure statute for audiologists. Within the limitations of human language, the Legislature could not have made it more clear that it intended that anyone using the term "audiologist" in any manner must be licensed and meet the qualifications set forth in the Act. § 37-15-102(5), MCA. Faced with such a direct conflict, the regulation must give way to the statute. See McPhail v. Board of Psychologists, 640 P.2d 906 (Mont. 1982); Board of Barbers v. Big Sky College, 626 P.2d 1269 (Mont. 1981); Bell v. Dept. of Licensing, 594 P.2d 331 (Mont. 1979).

Section 37-15-103, MCA, provides that "[n]othing in this chapter shall prevent a person licensed in this state under any other law from engaging in the profession or business for which he is licensed." An argument can be made that this language would exempt anyone licensed under the Hearing Aid Dispensers Act as a "certified hearing aid audiologist" from the licensure requirements of the Board of Speech Pathologists and Audiologists.

However, I find that the exemption does not apply where, as here, the initial licensure is defective by reason of the licensing board's lack of authority and the direct conflict with another statute. It is obvious that the exemption statute contemplates that the original licensure be without legal defect. Otherwise the exemption statute would become a grant of total power to each licensing board. That was surely not the intent of the Legislature.

THEREFORE, IT IS MY OPINION:

1. By enacting a licensure act for audiologists and defining the term "audiologist" to include similar terms, the Legislature intended that

OPINIONS OF THE ATTORNEY GENERAL

anyone using the term "audiologist" in whatever manner as a professional title or description of services must be licensed by the Board of Speech Pathologists and Audiologists.

2. An administrative rule by the Board of Hearing Aid Dispensers in direct conflict with this statute and purporting to authorize "certified hearing aid audiologists" is invalid.

Very truly yours,

MIKE GREELY
Attorney General