

**OPINION  
76-117**

February 17, 1976            (OPINION)

Mr. Ronald D. Johnson, Chairman  
North Dakota Board of Examiners  
in Speech Pathology and Audiology  
P.O. Box 6001  
Fargo, ND 58102

Dear Mr. Johnson:

In your letter of November 24, 1975, you set forth the following:

As Chairman of the North Dakota Board of Examiners in Speech Pathology and Audiology, I am writing to you concerning two questions which have arisen from questions brought to the Board. The Board has discussed these and felt that a legal opinion from your office was needed before any action could be taken. The first question is regarding the use of industrial audiometric technicians in the State of North Dakota. This appears to be addressed in the Licensure Law for Speech Pathologists and Audiologists according to Chapter 43-37 in the North Dakota Century Code. It appears apparent from the law that the use of industrial audiometric technicians is not allowed.

The 1975 Session of the North Dakota Legislative Assembly enacted the audiologist and speech pathologist regulatory law now codified as Chapter 43-37 of the North Dakota Century Code, proclaiming in Section 43-37-01:

POLICY. - It is declared to be a policy of the state of North Dakota that, in order to safeguard the public health, safety, and welfare, to protect the public from being misled by incompetent, unscrupulous, and unauthorized persons and from unprofessional conduct on the part of such persons, and to obtain the highest possible quality audiology and speech pathology services to the communicatively handicapped people of the state, it is necessary to provide regulatory authority over persons offering audiology and speech pathology services to the public.

North Dakota Century Code Section 43-37-03 provides:

LICENSE REQUIRED - EXCEPTIONS. - No person shall practice or represent himself as an audiologist or speech pathologist in this state unless he is licensed in accordance with the provisions of this chapter. However, nothing in this chapter shall be construed to prevent or restrict:

1. A physician or surgeon from engaging in the practice of medicine in this state;
2. A hearing aid dealer from engaging in testing of hearing and other practices and procedures used solely for the

fitting and selling of hearing aids in this state as provided in chapter 43-33;

3. Any person licensed in this state by any other law from engaging in the profession or occupation for which he is licensed;
4. A person who holds a valid and current credential as a speech or hearing specialist, issued by the department of public instruction, or a person employed as an audiologist or speech pathologist by the government of the United States, if such person performs speech pathology or audiology services solely within the confines or under the jurisdiction of the governmental or state educational organization by which he is employed. However, such person may, without obtaining a license under this chapter, consult with or disseminate his research findings and other scientific information to speech pathologists or audiologists outside the jurisdiction of the organization by which he is employed;
5. The activities and services of a person pursuing a course of study leading to a degree in speech pathology or audiology at a college or university if such activities and services constitute a part of a supervised course of study and such person is designated audiology or speech pathology intern, audiology or speech pathology trainee, or by any other such titles clearly indicating the training status appropriate to his level of training;
6. The activities and services of persons fulfilling the clinical experience requirement of section 43-37-04, if such activities and services constitute a part of the experience required for the section's fulfillment;
7. Any person not a resident of this state from practicing in this state as long as he is able to present to the board proof of a bona fide practice in this state, so long as he meets the requirements of this chapter and is licensed under this chapter;
8. The performance of audiology or speech pathology services in this state by any person not a resident of this state who is not licensed under this chapter:
  - a. If such services are performed for no more than five days in any calendar year and in cooperation with an audiologist or speech pathologist licensed under this chapter, and if such person meets the qualifications and requirements for application for licensure described in subsections 1, 2, and 3 of section 43-37-04; or
  - b. Who is the holder of a certificate of clinical competence in audiology or speech pathology or is licensed by another state whose licensure requirements are at least equivalent to those established by this

chapter, may offer audiology or speech pathology services in this state for no more than thirty days in any calendar year, if such services are performed in cooperation with an audiologist or speech pathologist licensed under this chapter.

9. Any person holding a valid credential as a teacher of the hearing-impaired issued by the Council on Education of the Deaf from engaging in the practice of habilitation and rehabilitation of hearing-impaired persons; or
10. No speech pathologist or audiologist licensed pursuant to this chapter shall receive any remuneration of any kind from the sale of any type of hearing aid unless he is licensed as provided in chapter 43-33.

We conclude from the foregoing that no person can practice or represent himself as an audiologist in North Dakota unless he is licensed in accordance with the provisions of Chapter 43-37, or is covered by one of the enumerated exceptions found in Chapter 43-37.

We believe that persons who refer to themselves as "industrial audiometric technicians" are representing themselves as audiologists. Unless those persons are licensed as audiologists pursuant to Chapter 43-37 or are exempted from licensure requirement by a subsection of Section 43-37-03, they may not practice or represent themselves as audiologists in the state of North Dakota. Clarification of the meaning of the phrase "practice or represents himself as an audiologist" is provided by North Dakota Century Code Section 43-37-02 which provides in part:

DEFINITION. - As used in this chapter unless the context or subject matter otherwise requires:

\* \* \*

3. "Audiologist" means an individual who practices audiology and who represents himself to the public by any title or description of services incorporating the words audiologist, hearing clinician, hearing therapist, or similar title or description of service. No person may use the term audiologist in referring to himself unless he meets all the requirements of this chapter pertaining to audiology.
4. "Audiology" means the application of the principles, methods, and procedures of measurements, testing, evaluation, prediction, consultation, counseling instruction, habilitation or rehabilitation related to hearing and disorders of hearing including vestibular testing, for the purpose of evaluating, identifying, preventing, ameliorating, or modifying such disorders and conditions in individuals or groups of individuals.
5. "Habilitation" and "rehabilitation" include, but are not limited to, hearing aid evaluation and recommendation, auditory training, and speech reading.

\* \* \*

In the context of your first question, we believe that the above language needs no amplification or clarification. However, we are of the opinion that, in the above-cited subsection 4, the lack of punctuation between the words "counseling" and "instruction" is clearly a clerical error, that there was intended a comma between those words, and as a matter for statutory construction the subsection should be treated as if there is a comma so located.

You next set forth the following:

The second question is in regard to whether the hearing aid dealers are able to do hearing testing in the State of North Dakota. It appears according to Chapter 43-33 which is the Hearing Aid Dealers and Fitters Licensure Law and in Chapter 43-37 that the hearing aid dealers may do hearing testing only for the sole purpose of fitting and selling hearing aids. However, it also appears that the initial diagnostic hearing tests to determine if a hearing aid is needed by an individual will have to be done by an audiologist.

As previously noted, North Dakota Century Code Section 43-37-03 provides in part:

LICENSE REQUIRED - EXCEPTIONS. - No person shall practice or represent himself as an audiologist or speech pathologist in this state unless he is licensed in accordance with the provisions of this chapter. However, nothing in this chapter shall be construed to prevent or restrict:

\* \* \*

2. A hearing aid dealer from engaging in testing of hearing and other practices and procedures used solely for the fitting and selling of hearing aids in this state as provided in chapter 43-33;

\* \* \*

North Dakota Century Code Section 43-33-02 provides in part:

LICENSE REQUIRED TO SELL OR FIT HEARING AIDS.

1. No person shall engage in the sale of or practice of fitting hearing aids or display a sign or in any other way advertise or represent himself as a person who practices the fitting and sale of hearing aids after July 1, 1969, unless he holds an unsuspended, unrevoked license issued by the department as provided in this chapter. The license required by this chapter shall be conspicuously posted in his office or place of business. Duplicate licenses shall be issued by the department to valid license holders operating more than one office without additional payment. A license under this chapter shall confer upon the holder the right to select and sell hearing aids.

\* \* \*

North Dakota Century Code Section 43-33-01 provides in part:

DEFINITIONS. - As used in this chapter, unless the context requires otherwise:

\* \* \*

6. "Practice of fitting and dealing in hearing aids" shall mean the measurement of human hearing by means of audiometer or by any means solely for the purpose of making selections, adaptations, or sale of hearing aids. The term also includes the making of impressions for ear molds. A dealer, at the request of a physician or member of related professions, may make audiograms for the professional's use in consultation with the hard-of-hearing.

\* \* \*

Although there is a slight variation in the phraseology, we believe the definition of "practice of fitting and dealing in hearing aids" contained in Section 43-33-01(6) is the definition that was intended to and does apply to the phrase "sale of or practice of fitting hearing aids" as used in Section 43-33-02(1) and is further the definition of that which licensed hearing aid dealers and fitters may do according to the exception contained in Section 43-37-03(2).

In view of the foregoing, we are of the opinion that hearing aid dealers and fitters may engage in the measurement and testing of human hearing solely for the purpose of making selections, adaptations, or sale of hearing aids; or for the purpose of making audiograms requested by physicians and members of related professions. We believe that clarification of the purposes for which testing may be done by a hearing aid dealer and fitter is provided by North Dakota Century Code Section 43-33-09 which provides in part:

SCOPE OF EXAMINATION. - The qualifying examination (for hearing aid dealers and fitters) provided in Section 43-33-07 shall consist of:

\* \* \*

2. Practical tests of proficiency in the following techniques as they pertain to the fitting of hearing aids:

\* \* \*

- d. Recording and evaluation of audiograms and speech audiometry to determine the proper selection and adaptation of a hearing aid.

\* \* \*

Before someone can be properly fitted with a hearing aid, it must be first determined that the person has a hearing problem which is

subject to alleviation by a hearing aid, and then the proper selection and adaptation of a hearing aid must be determined. A hearing aid dealer and fitter by law may only do the latter, he may not do the former but may make audiograms for a medical doctor or related professional to do the former.

We would further note that North Dakota Century Code Section 43-33-12(4)(1) provides as grounds for suspension or revocation of a hearing aid dealer and fitter license:

Sale of a hearing aid to a person where the need for a hearing aid has not been established after adequate and proper audiometric testing.

Therefore, we are of the opinion that a hearing aid dealer and fitter may not sell and fit a hearing aid or test a person for the sole purpose of selling and fitting a hearing aid, unless the need for a hearing aid has been first determined by proper audiometric testing conducted by or evaluated by a medical doctor or person authorized to practice audiology.

In Chapter 43-37, dealing with audiologists and speech pathologists, an audiologist is defined as a person who practices audiology. Audiology is the application of certain enumerated principles, methods and procedures "for the purpose of evaluating, identifying, presenting, ameliorating, or modifying such (hearing) disorders and conditions in individuals or groups of individuals." It is clear that it is the function of the audiologist and of medical doctors and others authorized by Chapter 43-37 to practice audiology to deal with the total problem of diagnosing hearing problems and to deal with and recommend the procedures appropriate to the hearing difficulty. Those authorized to practice audiology are specifically authorized to deal with questions of hearing aid evaluation and recommendation. In keeping with delineation between the diagnostic stage of determining the hearing difficulty and the appropriateness of a hearing aid in its alleviation, and the stage of fitting and selling an appropriate aid, North Dakota Century Code Section 43-37-03 (10) provides:

No speech pathologist or audiologist licensed pursuant to this chapter shall receive any remuneration of any kind from the sale of any type of hearing aid unless he is licensed as provided in chapter 43-33.

In specific answer to your second question, we are of the opinion that licensure as a hearing aid dealer and fitter authorizes such licensee to do hearing testing for the sole purpose of fitting and selling hearing aids; that such hearing testing and selling of hearing aids may be engaged in only after the need for a hearing aid has been determined by evaluation of diagnostic hearing tests, which evaluation for such purpose the hearing aid dealer and fitter by law cannot make.

Sincerely,

ALLEN I. OLSON

Attorney General