

SUNRISE REVIEW

OF

AUDIOLOGISTS AND HEARING AID DISPENSERS

**SUBMITTED BY
THE COLORADO DEPARTMENT OF REGULATORY AGENCIES
OFFICE OF POLICY & RESEARCH**

JUNE 1994

August 31, 1994

The Honorable Vickie Agler, Chair
Joint Legislative Sunrise/Sunset Review Committee
State Capitol Building
Denver, Colorado 80203

Dear Representative Agler:

We have completed our evaluation of the sunrise application for licensure of audiologists and hearing aid dispensers and are pleased to submit this written report which will be the basis for my office's oral testimony before the Sunrise and Sunset Review Committee. The report is submitted pursuant to section 24-34-104.1, Colorado Revised Statutes, 1988 Repl. Vol., (the "Sunrise Act") which provides that the Department of Regulatory Agencies shall conduct an analysis and evaluation of proposed regulation to determine whether the public needs, and would benefit from, the regulation.

The report discusses the question of whether there is a need for the regulation in order to protect the public from potential harm, whether regulation would serve to mitigate the potential harm, and whether the public can be adequately protected by other means in a more cost effective manner.

Sincerely,

Joseph A. Garcia
Executive Director

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INTRODUCTION

The Department of Regulatory Agencies has evaluated the application for regulation of Audiologists and Hearing Aid Dispensers submitted by the Colorado Academy of Audiology in December, 1993. Pursuant to the Colorado Sunrise Act, C.R.S. 24-34-104.1, the applicant must prove the benefit to the public of its proposal for regulation according to the following criteria:

1. Whether the unregulated practice of the occupation or profession clearly harms or endangers the health, safety or welfare of the public, and whether the potential for harm is easily recognizable and not remote or dependent on tenuous argument;
2. Whether the public needs and can reasonably be expected to benefit from an assurance of initial and continuing professional or occupational competence; and
3. Whether the public can be adequately protected by other means in a more cost-effective manner.

The scope of this review was comprehensive in nature. As part of this sunrise review process, the Department of Regulatory Agencies performed a literature search, interviewed Colorado state officials, other state officials, audiologists, hearing aid dealers, and reviewed other state's statutes regarding audiologist and hearing aid dealers licensing regulations. Results of this process are reflected in the recommendations section of this report.

BACKGROUND

This sunrise application is for the licensure of audiologists and hearing aid dispensers. It is important for this review to distinguish between these two groups.

Audiologist

An audiologist is a health professional who specializes in preventing, identifying, assessing and rehabilitating hearing impairment. An audiologist must possess a college degree in audiology or have a speech-language pathology/audiology joint degree. Many audiologists also have graduate level degrees in audiology .

Most of the audiologists in Colorado are either members of the Colorado Academy of Audiology (CAA) or the American Academy of Audiology (AAA). As of November 1, 1993, CAA had 146 members. There are approximately 117 audiologists in Colorado who are not members of CAA.

Nationally, audiologists are affiliated with either the American Academy of Audiology, the American Speech-Language and Hearing Association (ASHA), or both. Some of the 117 audiologists who are not members of CAA are affiliated with ASHA. The number of audiologists who are not members of either CAA or ASHA has not been determined, but this number is believed to be less than five percent of audiologists in Colorado.

ESTIMATED MEMBERSHIP BREAKDOWN FOR ORGANIZATION AFFILIATION OF COLORADO AUDIOLOGISTS*	
TOTAL NUMBER OF AUDIOLOGISTS IN COLORADO =	276
ASHA CERTIFIED AUDIOLOGISTS	263
*NON-ASHA AUDIOLOGISTS	13
CAA AUDIOLOGISTS	146
NON-CAA AUDIOLOGIST BUT ASHA AND/OR AAA MEMBERS	130

*Estimated at five percent variance (Estimates provided by sunrise application per figures from the Colorado Academy of Audiology, 1993).

Audiologists may work in private practice offices, medical or speech and hearing clinics, hospitals or physicians' offices, schools, nursing homes, industrial settings, and in patients' homes. Hearing aid dealers provide most of their services in a private store or office. They may also work in nursing homes, patients' homes, temporary motel service centers, and senior citizen centers.

ESTIMATED MEMBERSHIP BREAKDOWN FOR ORGANIZATION AFFILIATION OF COLORADO HEARING AID DEALERS/DISPENSERS

One does not need to meet specific educational requirements or standards in order to operate as a hearing aid dealer or dispenser. There are two professional organizations in Colorado with whom a hearing aid dealer may become associated. They are the International Hearing Society (IHS) and the Colorado Hearing Aid Society (CHAS) which is a state chapter affiliate of IHS. There are approximately 43 members of IHS in Colorado and 42 members of CHAS. There are an estimated 200 individuals who are not members of either association and who dispense hearing aids to consumers in Colorado. (These estimates were provided by the sunrise applicants who gathered these figures from the Colorado Academy of Audiology, 1993.)

Hearing aid dealers have a narrower scope of practice than audiologists. They test a consumer's range of hearing primarily for selecting and fitting hearing aids. They do not need to have any formal training in test procedures, and their actions are not supervised by any other medical professional.

HISTORY OF REGULATION OF HEARING AID DEALERS IN COLORADO

The Board of Hearing Aid Dealers was created in 1975 in the Division of Registrations in the Department of Regulatory Agencies. A license was required for anyone who fit, dispensed or sold hearing aids. In 1985, the Board was the subject of a sunset review. The review evaluated whether or not consumer protection was needed and whether the board had effectively provided that protection. The report concluded that licensure and continuation of the board was not the appropriate method for regulation because the board had not been effective in protecting hearing aid consumers. The statute that governed the Board of Hearing Aid Dealers was repealed and the Board was discontinued. The alternative that was adopted by the legislature was a strengthening of the Consumer Protection Act.

THE PROPOSAL FOR REGULATION

The applicants believe the appropriate level of regulation is licensure to protect against the unqualified practitioner and the unethical practitioner. Licensure would protect the consumer from an unqualified practitioner by making it illegal for anyone to engage in the practice of audiology without a license, and only allowing persons who possess certain qualifications to be licensed. Sometimes a hearing aid dealer misrepresents himself as being an audiologist, which to the unsuspecting consumer implies a certain amount of education and training. Licensure reduces the threat of the unqualified practitioner by mandating minimum requirements for participation in the occupation along with title protection.

The second hazard that the applicant hopes to prevent is the unethical practitioner from operating in Colorado. This type of practitioner betrays the public trust and may physically, mentally/emotionally, and financially harm the consumer. The applicant contends that licensure would provide enforcement of standards of conduct and professional practices, define the qualifications to practice the profession as well as the scope of practice, and prevent practitioners who have been unable to practice or have been barred from practicing in other licensed states from relocating to Colorado.

OTHER REGULATION

The federal government has minimal regulation and enforcement mechanisms regarding hearing aids. The Federal Trade Commission's "three day right to cancel rule" applies to those hearing aids sold in the consumer's home. The FTC may also take action against hearing aid companies to stop deceptive claims and practices.

Hearing aids are also regulated by the Food and Drug Administration as a medical device. The FDA may inspect the hearing aid at the manufacturing stage and oversees premarket approvals for devices such as cochlear implants (surgically implanted devices). The FDA regulations also govern such things as labeling requirements.

There is a federal regulation entitled "Hearing Conservation Amendment" that addresses the type and quality of hearing testing that must be done in order to comply with Occupational Safety and Health Administration guidelines. OSHA guidelines are designed to prevent noise-induced hearing loss among employees. Occupational Safety and Health Administration guidelines require that workers exposed to high levels of noise at work get annual hearing tests. Simple hearing tests are administered by employers to employees using audiometric technicians. These technicians must be supervised by a physician or audiologist.

Most regulation of hearing health services, however, are promulgated and administered at the state level. Every state except Colorado and Massachusetts requires that hearing aid dispensers be either licensed, registered, certified, or, at a minimum, pay a fee to dispense hearing aids, and forty-three states regulate audiologists in some manner.

CURRENT COLORADO LAW WHICH AFFECTS THE PROFESSION

CONSUMER PROTECTION ACT, C.R.S. 6-1-105, "DECEPTIVE TRADE PRACTICES"

This statute covers areas of general concern to the consumer such as false advertising, "bait and switch" advertising and failure to deliver goods as ordered. § 6-1-105,(dd)(I), C.R.S. specifically deals with individuals who make claims, either orally or in writing, to possess an academic degree or the title associated with said degree, and who do not actually qualify for the credentials. This section is closely associated to § 6-1-105, (dd)(II), C.R.S. which prevents individuals who are not qualified from using designations which signify, or are generally taken to signify qualifications. This section could assist audiologists and speech/language pathologists in challenging individuals who make wrongful claims as to their credentials and training in the areas of audiology and speech/language pathology.

CONSUMER PROTECTION ACT, C.R.S. 6-1-105.5, "HEARING AID DEALERS - DECEPTIVE TRADE PRACTICES"

Section 6-1-105.5, C.R.S. is the statute that specifically relates to deceptive trade practices of hearing aid dealers/dispensers. This includes scope of practice, practices that are considered deceptive, and business practices to prevent these matters. Deceptive trade practices include:

- Failure to provide product;
- Failure to provide receipt with information about the hearing aid and terms of sale;
- Selling "used" hearing aids without disclosure;
- Failure to provide written notice that the services are not medical in nature;
- Failure to receive from a physician, prior to dispensing, or fitting a hearing aid to any person, a written prescription or recommendation that the purchaser does need a hearing aid. The purchaser may waive this requirement if waiver is written in his own handwriting;
- Selling hearing aids to children under 18 without a prior audiological evaluation by a licensed physician and audiologist within six months prior to the fitting;
- Failure to recommend in writing to the purchaser to consult a physician if any of eight warning signs exist;
- Failure to provide a written right of return within 30 days of the sale on the sales contract; and
- Failure to provide a refund, less itemized costs of materials used and a manufacturer's return fee, but such amount may not be more than five percent of the total cost of the hearing aid.

PUBLIC HARM

In the current sunrise application, the applicant submitted case examples to show the public harm that has occurred due to the unregulated practice of audiology and hearing aid dealers. The 1991 Sunrise Review enumerated the number of complaints received by the Board of Hearing Aid Dealers (prior to its repeal), and by the Attorney General's office and various district attorney offices.

As the 1991 Sunrise Review pointed out, the most common complaints by consumers were for refusal to refund during the 30 day rescission period as required by § 6-1-105.5 of the Consumer Protection Act, problems with fitting and repair, contract compliance and fraud issues. The most common complaints expressed by hearing aid dispensers against other hearing aid dispensers were for misleading advertising and aggressive sales tactics.

FROM THE 1991 SUNRISE REVIEW:

The following figures regarding Hearing Aid Dealers show the number of complaints prior to the sunset of this board and after the sunset of this board.

- | | |
|--------------------|--|
| 1976 - 1979 | A. Number of dealers—unknown.
B. Number of complaints—unknown.
C. Disposition of complaints—according to the State Auditor's 1980 sunset review, no license was denied, suspended, or revoked. |
| 1980 - 1985 | A. Number of dealers—240 licensed (average per year).
B. Number of complaints received by board—87.
C. Disposition of complaints—according to the statistics from the Hearing Aid Board, no license was denied, suspended or revoked. |
| 1986 - 1991 | A. Number of dealers—it is estimated by the Colorado Hearing Aid Society that there are 241 dealers (average per year).
B. Number of complaints—based on Attorney General and District Attorney reports, the following data is presented. |

Attorney General Complaints by Year

1986—16
1987—17
1988—21
1989—56
1990—100

District Attorney Complaints (since 1989)

Denver—35
Colorado Springs—25
Pueblo—20
Boulder—2
Greeley—2
Durango—0
Canyon City—1
Grand Junction—0
Jefferson County—36
Adams—2

1994 APPLICATION INFORMATION BREAKDOWN OF 50 EXAMPLES GIVEN BY APPLICANT

	DISPENSERS	AUDIOLOGISTS
FINANCIAL HARM	5	2
MISDIAGNOSIS/FAULTY TESTING	9	6
PHYSICAL HARM	3	0
INAPPROPRIATE FITTING	8	0
FALSE REPRESENTATION	8	0
TOTAL CASES	33	8

THERE WERE NINE CASES THAT WERE EITHER UNCLEAR AS TO WHETHER THEY INVOLVED A DISPENSER OR AN AUDIOLOGIST OR WHETHER THEY INVOLVED SOMEONE OTHER THAN A DISPENSER OR AN AUDIOLOGIST:

- ONE CASE OF FALSE REPRESENTATION INVOLVED AN ACUPUNCTURIST
- ONE CASE OF FALSE REPRESENTATION INVOLVED AN AUDIOMETRIC TECHNICIAN PERFORMING SERVICES OF AN AUDIOLOGIST.
- TWO CASES OF MISDIAGNOSIS INVOLVED UNTRAINED OFFICE STAFF IN A PHYSICIAN'S OFFICE.
- FIVE CASES WHERE IT WAS NOT CLEAR WHO PERFORMED THE SERVICE THAT WAS QUESTIONABLE.

CONCLUSION

The results of this sunset review show that harm to consumers by hearing aid dealers continues to be a problem. The Consumer Protection Act, according to those who enforce the statute and the industry, provides some relief but is generally believed to be insufficient.

Consumer harm by audiologists is less apparent. The strongest argument for regulation of audiologists is the potential for harm. This potential may be even more pronounced than for hearing aid dealers because of the audiologist's scope of practice.

What is less obvious is what response is called for in the present case. Clearly, most law enforcement officials charged with enforcement of the Consumer Protection Act and the involved industries believe that occupation regulation is the answer. This is a conclusion favored by interested parties because regulation by the state often evokes an atmosphere of safety. Unfortunately, there is no real basis for concluding that licensing will accomplish any of the goals of the applicant.

There are other states that report their licensing of audiologists and hearing aid dealers do not provide sufficient benefit to justify the imposition of state regulation. In terms of regulatory theory, it is easy to see how the same victims of unscrupulous hearing aid dealers will continue to be victimized.

There is no convincing rationale that leads one to expect that elderly persons or rural residents will demand to see a dealer's license. Nor should we expect that these unscrupulous dealers, who now face prosecution by the Attorney General or by a District Attorney, will fear the administrative remedies of a licensing board. It is more likely that they will continue to operate as they do now.

There are also problems with using only the Consumer Protection Act to address the issue of dishonest hearing aid dealers. As the Colorado Attorney's General Office found out, even if they successfully prosecute a dishonest hearing aid dealer, they may not be able to collect the judgment. Currently, they have a judgment against a hearing aid dealer for \$250,000.00. However, they are unable to collect it because all of the dealer's assets are in his wife's name.

RECOMMENDATIONS

This review offers two options for consideration based on the evidence reviewed and the analysis of the need for regulation.

Recommendation 1: CONSUMER PROTECTION ACT

1. This review concludes that the remedies of the Consumer Protection Act offer the most effective and reasonable response by the state to the problems experienced by consumers. Notwithstanding the limitations in collection of judgments discussed elsewhere in this report, the remedies provided by the Consumer Protection Act are more applicable to fraudulent business transactions than is competency based licensing.
2. After reviewing the licensing statutes of other states, it was evident that many of the protective provisions found in other states' occupational regulatory schemes were also found in Colorado's Consumer Protection Act. But a law without the resources to enforce it is ineffectual. To provide adequate protection to consumers, though, will require an increase in staffing and funding to the Attorney General earmarked for enforcement of C.R.S. § 6-1-105.5 *et seq.*

AMEND THE CONSUMER PROTECTION ACT TO STRENGTHEN LEGAL RESPONSES:

One of the common fraudulent methods used by unscrupulous hearing aid dealers is to string the buyer along until the 30 day right of rescission trial period has expired and the consumer is stuck with either a defective device or with which the buyer is not satisfied. For example, the hearing aid is delivered to the consumer, but soon after initial receipt the consumer returns it for repair. The hearing aid dealer may then keep that hearing aid for several weeks, all the while stone-walling the consumer who inquires about the status of the repair. In the meantime, the 30 day rescission period elapses and the buyer has lost the opportunity for a complete refund. The current statute does not adequately address this problem.

To correct this oversight in the law, C.R.S. § 6-1-105.5(2)(e)(I) should be amended to read:

(I) The buyer shall have the right to cancel the purchase for any reason within the trial period after receiving the hearing aid by giving or mailing written notice of cancellation to the seller. **THE THIRTY (30) DAY TRIAL PERIOD SHALL BE TOLLED FOR ANY PERIOD IN WHICH THE HEARING AID DEALER HAS TAKEN POSSESSION OR CONTROL OF THE HEARING AID AFTER ITS ORIGINAL DELIVERY.**

The Consumer Protection Act should be further amended to address the problem of hearing aids that are not delivered in a timely manner. A subsection may be added to C.R.S. § 6-1-105.5(2)(e)

(V) THE WRITTEN CONTRACT OR RECEIPT SHALL ALSO CONTAIN, IN PRINT SIZE NO SMALLER THAN TEN (10) POINT TYPE, A NONWAIVABLE STATEMENT THAT THE CONTRACT IS NULL AND VOID AND UNENFORCEABLE IF THE HEARING AID BEING PURCHASED IS NOT DELIVERED TO THE CONSUMER WITHIN THIRTY (30) DAYS OF THE DATE THE WRITTEN CONTRACT IS SIGNED OR THE RECEIPT IS ISSUED. THE STATEMENT SHALL ALSO PROVIDE THAT IN THE EVENT THE HEARING AID IS NOT DELIVERED TO THE CONSUMER WITHIN THIRTY (30) DAYS OF THE DATE THE WRITTEN CONTRACT IS SIGNED OR THE RECEIPT IS ISSUED, THE HEARING AID DEALER SHALL PROMPTLY REFUND ANY AND ALL MONEYS PAID FOR THE PURCHASE OF THE HEARING AID.

In addition to this effort to strengthen enforcement, some incentive to District Attorneys to prosecute under C.R.S. § 6-1-105.5 should be established. The Department of Regulatory Agencies Outfitter Registration Program was aided significantly by C.R.S. § 12-55.5-107.5(2) created in the Outfitter's last sunset review that divided fines collected so that the law enforcement agency receives fifty percent of any fines. C.R.S. § 6-1-112 sets out a \$2,000 maximum dollar civil penalty for violation of the article and a maximum \$10,000 dollar fine for violation of a court order or injunction issued pursuant to the article.

Collection of half of these fines could be a strong incentive for law enforcement agencies to enforce this law and result in an increase in enforcement. This could be easily created by amending C.R.S. § 6-1-105.5 with the addition of a subsection:

- (3) Fines collected pursuant to the article shall be distributed as follows:**
- (a) Fifty percent divided by the court between any federal, state, or local law enforcement agency assisting with prosecution;**
 - (b) Fifty percent to the general fund.**

Recommendation 2: REGISTRATION OF HEARING AID DEALERS

If an occupational regulation program is chosen, this review concludes that a registration program established in DORA's Division of Registration is the most appropriate response. Registration is the usual response to "fly-by-night" operators. The evidence reviewed for this report argues that registration of hearing aid dealers, and not audiologists is the least restrictive state response.

This discussion has addressed the potential short fall of occupational regulation to combat deceptive trade practices. However, registration could provide some consumer protections:

1. All hearing aid dealers in Colorado would be required to register. This would give the state the authority to deny registration to an applicant, revoke, suspend, place on probation a registrant, or issue a letter of admonition to a registrant that has been disciplined or convicted in other states, and to do the same to a registrant based on criminal convictions or consumer protection act violations.
2. Either require hearing aid dealers to furnish either a surety bond worth \$25,000.00 as a condition for registration, [the Outfitter's law, which we have used as a guide in other parts of this report, also requires that registrants furnish a surety bond. C.R.S. § 12-55.5-105(1)(d)], or set up a recovery fund similar to that which is found in the real estate brokers and salespersons statute into which hearing aid dealers must contribute. § 12-61-301, C.R.S.
3. In addition to possibly preventing bad practitioners from legally practicing in Colorado, registration would enable the state to revoke or discipline hearing aid dealers who are convicted under the Consumer Protection Act.

Like strengthening enforcement under the Consumer Protection Act, a registration system would require sufficient resources to be effective, with the cost to be borne by the registrants. The statute could require any receipt or contract written by hearing aid dealers to include their state registration number.

APPENDIX A

SUNRISE CRITERIA

Pursuant to the Colorado Sunrise Act, C.R.S. 24-4-104.1, the applicants must prove the benefit to the public of their proposal for regulation according to the following criteria:

1. Whether the unregulated practice of the occupation or profession clearly harms or endangers the health, safety or welfare of the public, whether the potential for harm is easily recognizable and not remote or dependent on tenuous argument;
2. Whether the public needs, and can be reasonably expected to benefit from, an assurance of initial and continuing professional or occupational competence;
3. Whether the public can be adequately protected by other means in a more cost-effective manner.

APPENDIX B

REVIEW OF STATUTES OF SURROUNDING STATES

IDAHO

1. ***License required***
 - Examination required.
 - Register business entities.
 - Temporary permit issued for one year if supervised.
2. ***Exemptions***
 - Physicians.
 - Audiologists.
3. ***Board of Hearing Aid Dealers and Fitters with five members***
 - Power to discipline.
 - Power to promulgate rules and regulations.

KANSAS

1. ***License or Certificate of registration or endorsement required***
 - Examination required.
 - Temporary license issued for no longer than 16 months.
2. ***Exemptions***
 - Practitioners of the "healing arts" (statutorily defined).
 - Those who fit hearing aids as part of the academic curriculum of an accredited higher education institution.
 - Those who fit hearing aids as part of a program conducted by a public, charitable institution or nonprofit organization (provided organization does not sell hearing aids).
3. ***Board of Examiners in Fitting and Dispensing of Hearing Aids with five members***
 - Power to discipline.
 - Power to promulgate rules and regulations.

MONTANA

1. **License required**
 - Examination required.
 - Trainee license issued for one year if supervised.
2. **Exemptions**
 - Physicians.
 - Those who fit hearing aids as part of the academic curriculum of an accredited higher education institution.
3. **Board of Hearing Aid Dispensers with five members**
 - Power to discipline.
 - Power to promulgate rules.

NEVADA

1. **License required**
 - Examination required.
 - Temporary license issued for one year.
 - Apprenticeship for two years allowed.
2. **Exemptions**
 - Physicians.
 - Those who measure human hearing but do not dispense hearing aids or accessories.
3. **Board of Hearing Aid Specialists with three members**
 - Power to discipline.
 - Promulgate rules and regulations.

NEW MEXICO

1. **License required**
 - Examination required unless:
 - ◆ Licensed by another state with requirements similar or greater than New Mexico's.
 - ◆ An audiologist.
 - ◆ An otorhinolaryngologist with satisfactory experience.
 - ◆ One provides board with evidence that graduate training program or work experience is satisfactory.
 - Temporary trainee permits issued for one year if supervised.
2. **Hearing Aid Advisory Board with five members**

UTAH

1. **Licensing required**
 - Examination required.
 - Hold certification by national organization, or equivalent.
 - Temporary licenses are issued if supervised.
 - Renewal every two years.
 - Must complete continuing education.
2. **Exemptions**
 - Audiologists.
 - Physicians.
3. **Hearing Aid Specialist Licensing Board with five members**
 - Power to discipline hearing aid dealers.

WYOMING

1. **License required**
 - Examination required.
 - Temporary permits issued for one year if supervised.
 - Continuing education required.
2. **Exemptions**
 - Physicians.
 - Audiologists.
3. **Board of Hearing Aid Specialists with five members**
 - Power to discipline.
 - Power to promulgate rules.