



AUDIOLOGY PRACTICE COMMITTEE MEETING MINUTES

June 12, 2013

Department of Consumer Affairs
2005 Evergreen Street
"Hearing Room"
Sacramento, CA

Committee Members Present

Alison Grimes, Chair, Audiologist
Marcia Raggio, Audiologist
Amnon Shalev, Hearing Aid Dispenser
Jaime Lee, Public Member

Staff Present

Annemarie Del Mugnaio, Executive Officer
Clair Yazigi, Legal Counsel
Breanne Humphreys, Program Manager

Board Members Present

Deane Manning, Hearing Aid Dispenser
Carol Murphy, Speech-Language Pathologist
Patti Solomon Rice, Speech-Language Pathologist

Committee Members Absent

Rodney Diaz, Otolaryngologist

Guests Present

Cindy Beyer, HearUSA
Jami Tanihana, HearUSA
Tricia Hunter, HHP CA
Linda Pippert, Alpha Vista Services, CSHA
Meghan Giffin, Alpha Vista Services
Jean Jackson, EBS Healthcare
Dennis Van Vliet, Audiologist

I. Call to Order

Chairperson Grimes called the meeting to order at 4:18 p.m.

II. Introductions

Those present introduced themselves.

Chairperson Grimes appointed Mr. Shalev to the Audiology Practice Committee.

III. Discussion Regarding Professionals Providing Treatment for Tinnitus & the Federal Provisions for Regulating Tinnitus Devices

Ms. Del Mugnaio referenced a letter sent by Randall Bartlett requesting the Board to examine whether tinnitus devices are covered under the Song-Beverly Consumer Warranty Act (SBCWA).

Ms. Yazigi referenced an email exchange between herself and Ms. Del Mugnaio and requested the Committee to review the email to consider whether the Committee would like to waive the attorney-client privilege of the email and make the communication public.

M/S/C: Grimes/Shalev

The Committee waived the attorney-client privilege of the email communication between Ms. Yazigi and Ms. Del Mugnaio regarding the regulation or lack thereof, of tinnitus devices.

Chairperson Grimes summarized the content of the email as follows:

- There is no regulatory oversight of tinnitus device dispensers.
- Tinnitus devices fall within the protections of the SBCWA.
- One would not need to be licensed as a hearing aid dispenser or a dispensing audiologist in order to dispense a tinnitus only device.
- Consumers must be afforded the 30-day right of return under SBCWA.

Mr. Shalev commented that a non-licensed person is not authorized to take an ear impression.

Members of the Committee disagreed with that assertion and stated that non-licensed persons may take an ear impression for making devices such as custom ear plugs, etc.

Ms. Lee inquired whether tinnitus is deemed a disease or disability as the SBCWA would apply to assistive devices intended to treat a disease or assist with a disability.

Ms. Yazigi stated that Civil Code Section 1791(p) addresses “assistive devices” as any instrument that assists in the mitigation or treatment of a disability, disease or an injury.

Ms. Yazigi stated that the inquiring licensee seems to be concerned about the 30-day return period of tinnitus devices and professes that a consumer must wear a tinnitus device for a much longer period of time to determine whether the device is providing a benefit in the treatment of tinnitus.

Ms. Del Mugnaio explained that the Board does not regulate or enforce the SBCWA beyond that which applies to hearing aids.

Ms. Yazigi stated that the Board has the option of seeking to expand its authority to include regulation of tinnitus devices. She commented there are several layers to the discussion such as addressing hearing aid dispensers who dispense a tinnitus device that is not a hearing aid as only audiologists and physicians may diagnose and provide tinnitus therapy.

Ms. Yazigi inquired whether a tinnitus device would be covered under BPC 2538.10(d) as a device to aid with, or compensate for, impaired hearing.

The Committee did not reach agreement on whether a tinnitus device aids with impaired hearing.

Chairperson Grimes recommended that a letter be sent to the licensee explaining the Committee's discussion and outlining that: licensed audiologists may provide counseling and treatment of tinnitus; a device that is a hearing aid with a tinnitus component is regulated by the Board and is subject to the provisions of SBCWA; and, a device that is not a hearing aid but a tinnitus masker only, is not regulated by the Board but may be subject to the warranty provisions of the SBCWA.

M/S/C: Grimes/Raggio

The Committee voted to recommend to the full Board that staff prepare a letter to the inquiring licensee explaining the Board's position that licensed audiologists may provide counseling and treatment of tinnitus; a device that is a hearing aid with a tinnitus component is regulated by the Board and is subject to the provisions of SBCWA; and, a device that is not a hearing aid but a tinnitus masker only, is not regulated by the Board but may be subject to the warranty provisions of the SBCWA.

IV. Review of Legal Opinion Regarding Audiologists Participation in the AARP/HearUSA Hearing Aid Program

Chairperson Grimes requested that Ms. Del Mugnaio provide background to the discussion item.

Ms. Del Mugnaio reported that back on January 19, 2009, a legal memorandum was issued to the Board by the Department regarding a referral program sponsored by AARP/Hear USA where licensed audiologists paid an application fee to be paneled providers for AARP/Hear USA members and be included on a referral list. Ms. Del Mugnaio explained that the paneled providers must agree to offer discounted rates on hearing aid devices and services. She stated that the legal memorandum was issued based on a request by the California Academy of Audiology (CAA) to examine the program and determine whether an audiologist's participation in the referral program was lawful. Ms. Del Mugnaio reported that the 2009 legal memorandum concluded that it was unlawful for a licensed audiologist to participate in the AARP/Hear USA program as the program, at that time, violated Business and Professions Code Section 650, and was deemed unlawful based on the audiologist payment to be included on a referral list.

Ms. Del Mugnaio stated that the Department received a request from Andrew Kugler, of Mayer Brown LLP representing AARP/HearUSA on December 10, 2012, requesting a review of an amended AARP/HearUSA program, which among other changes, removed the participation fee so that any licensee would be free to participate as long as they honored the discounted rates for hearing aids and services, and that the program does not refer members to any specific licensee or network of licensees.

Ms. Del Mugnaio stated that Ms. Yazigi prepared a response to Mr. Kugler on March 19, 2013 and concluded that based on the facts set forth in the correspondence of December 10, 2012, HearUSA's updated program proposal does not appear to violate BPC 650 as being an unlaw fee for referral.

Ms. Cindy Beyer of HearUSA addressed the Board and explained the changes to the HearUSA/AARP program.

Ms. Del Mugnaio stated that the Board does not endorse or approve any independent business plan and that the reason a letter was issued regarding the HearUSA/AARP program was to address a legal inquiry made by CAA to the Department in 2009.

Ms. Yazigi stated that the Board has options in terms of how it adopts her letter and legal conclusion:

- The Board may adopt Ms. Yazigi's legal conclusion.
- The Board may not adopt Ms. Yazigi's legal conclusion.
- The Board has the option to not act or make any formal Board decision.

The Committee requested Ms. Yazigi to explain her analysis of the HearUSA/AARP program.

Ms. Yazigi summarized her legal analysis as follows:

- HearUSA is a network administrator of the AARP program and offers discounted services and products, such as hearing aid devices and services, to its members, the senior population.
- The 2009 plan charged audiologists and hearing aid dispensers an annual fee and a credential fee to be included on a national directory of providers who would offer such discounted services.
- Since the providers paid a third-party, HearUSA, to be included on a referral list, the plan violated BPC 650 as an unlawful fee for referral.
- Based on the new plan as described in the 2012 letter, HearUSA has removed the fee requirement and opened the national directory to any licensee in good-standing.
- The benefit of discounted rate on hearing aid devices and services would be passed directly to the members and no monies would be retained by HearUSA/AARP.
- The legal analysis determines whether the plan has a direct benefit to HearUSA/AARP in terms of attracting members to its organization based on the discounts offered.
- A review of case law provided an analysis of health care plans where discounted services were offered to select members.

- The legal conclusion was that the discounted hearing aid devices and services offered by HearUSA to AARP members does not appear to unilaterally attract members to the plan, as AARP members are offered a multitude of discounts and services.

Ms. Raggio pointed out that HearUSA has been operating in California for years, however, the plans were not the HearUSA/AARP plan that is being discussed at the meeting.

Ms. Del Mugnaio stated that the Committee should consider recommending to the Board one of the three options as described by Ms. Yazigi, whether to adopt the conclusion as prepared by Ms. Yazigi, not adopt the conclusion, or do take no action on the matter.

Ms. Lee stated that the Board needs to be aware that if it chooses to adopt the conclusion of Ms. Yazigi, it needs to be on record that the conclusion reached is based specifically on the set of facts as outlined by HearUSA/AARP in the December 2012 letter.

Ms. Yazigi stated that her letter is a public document by virtue of it being discussed by the Committee during the meeting.

The Committee discussed the options.

M/S/C: Lee/Grimes

Abstention: Shalev

The Committee recommended to the full Board that it adopt Ms. Yazigi's legal conclusion regarding the HearUSA/AARP program and directed staff to field questions from licensees regarding the legal merit of participating in the HearUSA/AARP program.

V. Develop Proposed Regulatory Amendments for Audiology Aide Supervision Standards and Practice Limitations (California Code of Regulations 1399.154-1399.154.4)

Chairperson Grimes agreed to work with Ms. Raggio and gather input separately from Ms. Bingea to develop supervision standards and practice limitations for audiology aides.

Ms. Del Mugnaio mentioned that the dispensing of hearing aids by audiology aides who are not licensed hearing aid dispensers should be addressed in the practice limitations.

Ms. Del Mugnaio stated that she has addressed the practice restriction regarding aides dispensing hearing aids in the proposed regulatory text.

Chairperson Grimes adjourned the meeting at 6:00 p.m.