

**PROPOSED REGULATION OF THE BOARD
OF HEARING AID SPECIALISTS**

LCB File No. R061-03

July 31, 2003

EXPLANATION – Matter in *italics* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: §§1 and 2, NRS 637A.060 and 637A.100; §§3-23, 25, 27, 28 and 29, NRS 637A.060, 637A.100, 637A.110, 637A.250 and 637A.260; §24, NRS 637A.060, 637A.100, 637A.110, 637A.260, and section 10 of Senate Bill 250 of the 72nd Session of the Nevada Legislature, chapter 508, Statutes of Nevada 2003, at page 3416; §26, NRS 637A.060 and 637A.100.

Section 1. Chapter 637A of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 25, inclusive, of this regulation.

Sec. 2. *“Person” has the meaning ascribed to it in NRS 0.039.*

Sec. 3. *As used in sections 3 to 24, inclusive, of this regulation, unless the context otherwise requires, the words and terms defined in sections 4 to 8, inclusive, of this regulation have the meanings ascribed to them in those sections.*

Sec. 4. *“Complainant” means a person filing a complaint with the Board concerning a licensee.*

Sec. 5. *“Party” includes:*

- 1. The respondent;*
- 2. The attorney, if any, representing the respondent; and*
- 3. The legal counsel for the Board.*

Sec. 6. *“Presiding officer” means:*

- 1. The Chairman of the Board; or*

2. The person appointed to chair a hearing on a formal complaint.

Sec. 7. “Respondent” means the licensee accused in an informal complaint or formal complaint before the Board.

Sec. 8. “Staff” means the staff of the Board.

Sec. 9. 1. A person may file an accusation with the Board concerning the goods or services provided by a licensee or the activities of a licensee.

2. The Board will initially consider any accusation regarding a licensee as an informal complaint.

3. Except as otherwise provided in NRS 233B.120, a petition filed pursuant to NRS 233B.120 may be processed as an informal complaint.

Sec. 10. 1. Upon receipt of an informal complaint filed pursuant to section 9 of this regulation, the staff shall examine the informal complaint to determine whether it:

(a) Has been properly verified; and

(b) Alleges sufficient facts to warrant further proceedings.

2. If the staff determines that the informal complaint has been properly verified and alleges sufficient facts to warrant further proceedings, the staff shall notify the respondent by sending a copy or a summary of the informal complaint by certified mail to the respondent.

3. The notification must set forth the alleged violations of a provision of this chapter or of chapter 637A of NRS arising in the informal complaint and request a response from the respondent for review by the Board before a hearing is set.

4. The transmission of the copy or summary of the informal complaint shall be deemed to be a notice of intended action pursuant to subsection 3 of NRS 233B.127.

Sec. 11. 1. *Upon the receipt of a copy or summary of an informal complaint that has been filed against him pursuant to section 10 of this regulation, the respondent shall submit to the Board a written response to the informal complaint within 15 days after the date on which the informal complaint was served. Service shall be deemed to be complete when a true copy of the document, properly addressed and with postage paid, is deposited with the United States Postal Service.*

2. *A response to an informal complaint must:*

(a) *Respond to the allegations made in the informal complaint; and*

(b) *Be accompanied by all documentation that would be useful to the staff in its review of the allegations made in the informal complaint and the responses made by the respondent to those allegations.*

3. *In addition to any other disciplinary action, if the respondent fails to respond as required pursuant to subsection 1, he shall be deemed to have admitted the allegations in the informal complaint. Based on these admissions, the Board may enter a finding and impose appropriate discipline on the respondent in the same manner as if the allegations had been proven by substantial evidence at a hearing of the Board held on the complaint.*

4. *In cases in which a response is filed as required pursuant to subsection 1, the staff shall review the informal complaint and the responses made thereto, may enlist the aid of a member of the Board or other qualified persons in the review and may take any other reasonable action necessary to further the review.*

Sec. 12. 1. *After the initial review of the informal complaint and the responses made thereto conducted pursuant to section 11 of this regulation, the staff may:*

(a) Investigate the allegations and employ such people as they deem necessary to further the investigations;

(b) Consult with experts in the appropriate fields, including, without limitation, the employment of such persons for the purposes of an investigation or a hearing;

(c) Investigate new leads and allegations that may come to their knowledge in the course of the investigation;

(d) Enlist the aid of a member of the Board or another qualified person in the conduct of the investigation; and

(e) Take any other reasonable action necessary to further the investigation.

2. During an investigation of an informal complaint, the staff, or investigator, if any, may demand that a respondent produce his records or other evidence for inspection or copying, with or without prior notice to the respondent and with or without a subpoena. Unless the requested records are made confidential pursuant to law, the respondent shall not refuse any such request for records.

3. If the respondent initially refuses or fails to cooperate with a request for records in violation of this section, the Board may immediately suspend his license until the respondent complies with the request for records or other evidence.

4. If the respondent continues to refuse or fail to cooperate with a request for records or other evidence in violation of this section after the Board has suspended his license pursuant to subsection 3, the Board may take such further disciplinary action against the respondent as the Board determines necessary.

Sec. 13. 1. *If the staff, or investigator, if any, determines that a specific record or other specific evidence is material to or necessary for an investigation conducted pursuant to section*

12 of this regulation, the staff or investigator may remove the record or evidence and provide a copy of the record or evidence to the owner of that record.

2. If the record or other evidence can be readily copied at the location where the record or evidence is located, the staff or investigator shall make a copy of the record or evidence at that location.

3. If the record or other evidence cannot be readily copied at the location where the record or evidence is located, the staff or investigator may remove the record or evidence from that location to copy the record or evidence.

4. If the staff or investigator removes a record or other evidence to be copied pursuant to subsection 3, the staff or investigator shall provide the person to whom the record or evidence being removed belongs with a receipt for the record or evidence and, not later than 5 business days after the record or evidence is removed, provide a copy of the record or evidence to that person.

Sec. 14. *1. When an investigation of an informal complaint conducted pursuant to section 12 of this regulation is complete, the staff, and investigator, if any, shall determine whether substantial evidence exists to sustain the alleged violation of a statute or regulation set forth in the informal complaint.*

2. If the staff and investigator determine that no allegation of a violation of a statute or regulation set forth in the informal complaint can be sustained, the staff shall notify, in writing, the complainant and the respondent of this determination.

3. If the staff and investigator determine that a violation of a statute or regulation as alleged in the informal complaint can be sustained, the legal counsel of the Board shall:

(a) In compliance with section 9 of Senate Bill No. 250 of the 72nd Session of the Nevada Legislature, chapter 508, Statutes of Nevada 2003, at page 3416, offer mediation, settlement agreements, stipulations of facts and liability or informal hearings; or

(b) Prepare a notice of hearing and a formal complaint.

4. A notice of hearing and a formal complaint must:

(a) Be a plain statement of the facts and applicable provisions of statutes and regulations regarding the alleged acts of the respondent alleged to be in violation of the statutes and regulations governing the practice of fitting and dispensing hearing aids;

(b) Include the date, time and place that the Board will hear the matter, if this information is known at the time when the notice of hearing and a formal complaint is sent to the respondent; and

(c) Be signed by the legal counsel of the Board and, if a member of the Board was active in the investigation, by that member of the Board.

5. The staff shall send a notice of hearing and a formal complaint prepared pursuant to subsection 4 to the respondent by certified mail.

Sec. 15. 1. *A respondent who receives a notice of hearing and a formal complaint pursuant to section 14 of this regulation must file his answer to the notice of hearing and the formal complaint not later than 15 days after the date on which the notice of hearing and the formal complaint were served. Service shall be deemed to be complete when a true copy of the document, properly addressed and with postage paid, is deposited with the United States Postal Service.*

2. An answer to a notice of hearing and a formal complaint filed by a respondent must include a response to each allegation and statement made in the notice of hearing and the formal complaint by either admitting to or denying the allegation or statement.

3. In addition to any other disciplinary action, if the respondent fails to file an answer as required pursuant to subsection 1, he shall be deemed to have admitted each allegation and statement contained in the notice of hearing and the formal complaint. Based on these admissions, the Board may enter a finding and impose appropriate discipline on the respondent in the same manner as if the allegations had been proven by substantial evidence at a hearing of the Board held on the formal complaint.

Sec. 16. *The Board may join two or more formal complaints into one formal complaint if:*

1. The causes of action of each formal complaint are against the same person and deal with substantially the same or similar violations of statutes and regulations; and

2. The joining of the formal complaints will serve the best interests of the Board, complainants and respondent.

Sec. 17. *1. Not later than 10 days after a respondent files an answer to a formal complaint pursuant to section 15 of this regulation, the legal counsel for the Board and the respondent shall exchange:*

(a) A copy of all documents and other evidence that are reasonably available to the party and that the party reasonably anticipates will be used by the party at the hearing; and

(b) A written list of all persons who the party reasonably anticipates will be called to testify at the hearing by the party. The list must include the name and address of each potential witness and a general description of the anticipated subject matter of his testimony.

2. If, after initially providing the documents and list of witnesses pursuant to subsection 1, a party reasonably anticipates that other documents or witnesses will be used in support of his position, or if any of the documents or information previously provided changes, the party shall supplement and update his submission to the other parties.

3. If a party fails to provide documentation or information as required by this section, the presiding officer shall exclude the undisclosed document or the testimony of the witness at the hearing, unless the party seeking to include the document or witness demonstrates to the Board that the evidence or witness was not available upon diligent investigation before the date on which the exchange was required and that the evidence or witness was given or communicated to the other parties immediately after it was obtained.

Sec. 18. Discovery may only be done in accordance with the provisions of sections 3 to 24, inclusive, of this regulation. The Board will not allow for the taking of depositions.

Sec. 19. The presiding officer may order a prehearing conference and may enter such prehearing orders as the presiding officer determines are appropriate for the efficient conduct of the hearing, including, without limitation:

- 1. The exchange of written direct testimony of witnesses;*
- 2. The exclusion of particular testimony or evidence;*
- 3. The admission of particular testimony and other exhibits by agreement of the parties;*
- 4. The advance marking of all exhibits;*
- 5. The exchange by the parties of written prehearing statements or briefs similar to pretrial statements filed in district court; and*

6. Settlement negotiations. Settlement negotiations, and the statements of parties relating thereto, made at a prehearing conference are not admissible in evidence at the hearing unless the parties agree and the agreement is incorporated in a prehearing order.

Sec. 20. 1. A motion concerning any matter before the Board must be made in writing, unless the motion is made during the hearing on that matter. The presiding officer may deny as untimely:

(a) Any motion made during a hearing if the motion could have reasonably been made before the hearing; and

(b) Any motion that is filed on a date that does not provide the opposing parties a reasonable time to respond.

2. A written motion must set forth the nature of the relief sought by and the grounds for the motion.

3. A party may oppose a written motion by filing a written response to the motion with the Board and all the parties to the proceeding to which the motion relates within 10 days after the written motion is filed.

4. If a written response to a motion is filed, the party who made the motion may file and serve a written reply to the response.

5. Except as otherwise provided in this section, the presiding officer shall rule on all written motions on a matter at or before the hearing scheduled on the matter. The presiding officer may rule on a motion without oral argument or may allow oral arguments to be made before ruling on the motion. If the presiding officer allows oral arguments on a written motion to be made, the presiding officer shall set a time and date for hearing the oral arguments.

6. The presiding officer may require the Board to vote to decide a motion.

Sec. 21. 1. *The presiding officer may issue rulings on all preliminary matters, including, without limitation, scheduling matters, protective orders, the admissibility of evidence and other procedural or prehearing matters.*

2. A ruling on a preliminary matter is subject to reconsideration by the entire Board upon the request of a member of the Board or upon the motion of a party.

3. The failure of a party who is adversely affected by a ruling on a preliminary matter to move for reconsideration of the ruling does not constitute:

(a) Consent to the ruling; or

(b) Waiver of any objection previously made to the ruling.

4. For the purposes of this section, a matter is preliminary if it is not dispositive of a contested case or a substantive issue therein.

Sec. 22. 1. *The presiding officer shall call the hearing to order and proceed to take the appearances on behalf of the Board or respondent.*

2. The notice of hearing, any petition, answer, response or written stipulation and, if the hearing concerns a disciplinary proceeding, the complaint or any other responsive pleading become a part of the record without being read into the record, unless a party requests that the document be read into the record.

3. The legal counsel for the Board shall present the evidence for the Board first and, if the Board allows closing arguments, shall present the closing arguments for the Board last.

4. Unless otherwise ordered by the presiding officer, and except as otherwise provided in this section, the order of presentation is as follows:

(a) Opening statement by the legal counsel for the Board.

(b) Opening statement by the respondent or the attorney for the respondent who may choose to make the opening statement at the beginning of the respondent's case.

(c) For each witness offered by the legal counsel for the Board:

(1) Direct examination by the legal counsel for the Board;

(2) Cross-examination by the respondent or the attorney for the respondent;

(3) Redirect examination by the legal counsel for the Board;

(4) Recross examination by the respondent or the attorney for the respondent; and

(5) Examination by the members of the Board.

(d) For each witness offered by the respondent, the same order as for witnesses offered by the legal counsel for the Board.

(e) If applicable, closing arguments by the respondent or the attorney for the respondent.

(f) If applicable, closing arguments by the legal counsel for the Board.

5. A member of the Board may, at any time during the hearing:

(a) Question a witness; and

(b) Request or allow additional evidence, including, additional testimony or documentary evidence.

6. A consolidated hearing before the Board will proceed in the same manner as described in this section with the order of the parties and evidence to be determined in the discretion of the presiding officer.

7. Posthearing briefs may be allowed by the presiding officer or upon a majority vote of the members of the Board. If such briefs are allowed, the Board will establish a time by when such briefs must be submitted.

Sec. 23. 1. Except as otherwise provided in subsection 2, a party may appear at a hearing in person or by an attorney.

2. A party shall attend a hearing on the merits in person unless the presiding officer waives the requirement of the attendance of the party.

3. In addition to any other disciplinary action, if a party who is required to attend a hearing in person fails to do so without having obtained a waiver of the requirement of his attendance pursuant to subsection 2, the Board may:

(a) Determine that his failure to attend the hearing in person shall be deemed:

(1) An admission of all matters and facts contained in the record with respect to the party; and

(2) A waiver of the right to an evidentiary hearing; and

(b) Take action based upon the admission or upon any other evidence, including affidavits, without any further notice or a hearing.

4. If a party retains an attorney to represent him before the Board, the attorney shall so notify the Board not later than 10 days after he is retained. Thereafter:

(a) The attorney shall sign all motions, oppositions, notices, requests and other papers, including requests for subpoenas; and

(b) The Board will serve all notices, motions, orders, decisions, and any other papers or pleadings upon the attorney.

5. An attorney appearing as counsel in any proceeding must be an attorney at law, admitted to practice and in good standing before the highest court of any state. If the attorney is not admitted and entitled to practice before the Supreme Court of Nevada, he must be otherwise authorized to practice law in this state.

Sec. 24. 1. After a hearing on the merits in a disciplinary proceeding, if the Board finds that the respondent is:

(a) Not guilty as charged in the formal complaint, the Board will issue a final order or decision dismissing the charges and notify the respondent that the charges have been dismissed.

(b) Guilty as charged in the formal complaint, the Board will:

(1) Before agreeing on a punishment, consider all relevant factors, including, without limitation:

(I) The danger to the health or safety of the public from the violation;

(II) The economic benefit received by the respondent from the violation;

(III) Any mitigation or aggravation by the respondent of the effects of the violation;

(IV) The extent to which the respondent demonstrates his good faith;

(V) Any previous history of violations by the respondent;

(VI) Whether the respondent knew or, as a competent person, should have known that the action complained of was a violation of law, regulation or a condition of his license;

(VII) Whether the respondent has initiated remedial measures to prevent similar violations;

(VIII) The magnitude of penalties imposed on other licensees for similar violations;

(IX) The proportionality of the penalty in relation to the misconduct; and

(X) If the respondent offered evidence of mitigating factors, all such evidence;

(2) Agree upon punishment that may, in addition to any other sanction authorized pursuant to this chapter or chapter 637A of NRS:

(I) Fulfill certain training or educational requirements; and

(II) In accordance with section 10 of Senate Bill No. 250 of the 72nd Session of the Nevada Legislature, chapter 508, Statutes of Nevada 2003, at page 3416, pay costs incurred by the Board relating to the disciplinary proceedings; and

(3) Issue and serve the final order or decision of the Board on the respondent.

2. A final order or decision by the Board that is adverse to the respondent must:

(a) Be in writing;

(b) Except as otherwise provided in subsection 5 of NRS 233B.121, include findings of fact and conclusions of law; and

(c) Specifically set forth the punishment imposed on the respondent.

3. A final order or decision of the Board in a disciplinary proceeding is effective on the earliest of:

(a) The date on which the final order or decision is personally served on the respondent;

(b) The date on which the final order or decision is posted at the premises of the respondent; or

(c) The third day after the date on which the final order or decision is deposited in the United States mail as certified mail addressed to the address of record of the respondent.

Sec. 25. *The following acts, among others, constitute grounds for initiating disciplinary action against a licensee:*

1. Any violation of this chapter or chapter 637A of NRS.

2. Failure by a licensee to cooperate with the Board during an investigation of an informal complaint, including, without limitation, failing to timely respond to the Board regarding a copy or summary of the informal complaint sent to the licensee by the staff.

3. Failure by a licensee to cooperate with the Board during an investigation of a formal complaint, including, without limitation, failing to timely respond to the Board regarding a copy or summary of the formal complaint sent to the licensee by the staff.

4. Failure to attend a disciplinary hearing without having obtained a waiver of the requirement of his attendance pursuant to subsection 2 of section 23 of this regulation.

5. Conducting business after the license issued to the licensee has lapsed if the license or has not been renewed.

6. Willfully making false reports, records or claims in the licensee's business.

7. Failure to comply with a settlement agreement, an order of the Board or any other disposition of a prior disciplinary action.

8. Advertising the business of the licensee in a manner that is:

(a) False; or

(b) Intended or has a tendency to:

(1) Deceive or mislead the public; or

(2) Create unrealistic expectations in any particular case.

9. Being subject to disciplinary action by which the Board, or any other entity in this state or in another state which has issued a license, certificate, registration or other credential to a licensee in a related field, revokes or suspends the license, certificate, registration or other credential or takes any other disciplinary action against the licensee.

10. Delivering a lesser quantity or quality of hearing aid than the hearing aid for which the licensee bills the customer with the intent to defraud the customer.

Sec. 26. NAC 637A.001 is hereby amended to read as follows:

637A.001 As used in this chapter, unless the context otherwise requires, the words and terms defined in NAC 637A.002 to 637A.007, inclusive, *and section 2 of this regulation* have the meanings ascribed to them in those sections.

Sec. 27. NAC 637A.006 is hereby amended to read as follows:

637A.006 “Licensee” means a person licensed ~~[as a hearing aid specialist]~~ pursuant to the provisions of ~~[this chapter.]~~ *chapter 637A of NRS.*

Sec. 28. NAC 637A.220 is hereby amended to read as follows:

637A.220 1. Except as otherwise provided in ~~[subsection 2 of NAC 637A.407,]~~ *sections 3 to 24, inclusive, of this regulation*, a licensee shall provide information to the Board within 10 days after a request for the information is made by the Board.

2. A licensee shall not represent himself as an audiologist or other medical professional or use any other term to represent himself which is false or misleading.

3. Unless otherwise provided by the Board, a licensee shall provide for the service and repair of each hearing aid he sells or fits.

4. A licensee shall provide to each person who orders or purchases a hearing aid a bill of sale which includes:

(a) The name of the licensee, the address of the principal place of business of the licensee and the number of the license of the licensee.

(b) A description of the make, model and serial number of the hearing aid.

(c) The amount charged for the hearing aid and, if applicable, an itemization of any amount to be deducted from any refund.

(d) The condition of the hearing aid, indicating whether it is new, used or reconditioned.

(e) The name of the person or entity responsible for providing a refund.

5. If a person cancels an order to purchase a hearing aid before taking possession of the hearing aid, a licensee shall refund the amount paid by the person for the hearing aid. The licensee may deduct from the refund an amount not to exceed \$75 per hearing aid for work that was performed to order the hearing aid.

6. A licensee shall provide to each person who purchases a hearing aid a written guarantee that the person may return the hearing aid:

(a) Within 30 days after receipt of the hearing aid; or

(b) If the hearing aid is returned to the manufacturer for service or repair during the 30-day period, within 30 days after the hearing aid is returned to the possession of the person who purchased the hearing aid.

Except as otherwise provided in subsection 8, if the hearing aid and all accessories which accompanied the hearing aid are returned to the licensee in the same condition as they were received, the licensee shall provide the person with a refund within 30 days after the hearing aid is returned.

7. A licensee shall schedule at least one appointment with each person who purchases a hearing aid. The appointment must take place not later than 21 days after the hearing aid is delivered to the person.

8. If a hearing aid is returned to a licensee pursuant to subsection 6, the licensee may charge a fee for fitting the person with the hearing aid if the fee is specified in the original agreement between the licensee and the person. Unless a higher fee is authorized by the Board, the fee must not exceed \$150 per hearing aid or 20 percent of the purchase price of the hearing aid, whichever is less.

9. A violation of the provisions of this section is a ground for disciplinary action.

Sec. 29. NAC 637A.405, 637A.407, 637A.410, 637A.415, 637A.420 and 637A.425 are hereby repealed.

TEXT OF REPEALED SECTIONS

637A.405 Assignment of complaint for investigation. The Secretary of the Board will assign each complaint filed against a licensee to a member of the Board or a person who provides administrative support to the Board. The person assigned by the Secretary will help to conduct any investigation relating to the complaint and will recommend to the Board any action that he considers necessary concerning the complaint. If the person assigned by the Secretary is a member of the Board, he may not vote at a hearing concerning the complaint. The person appointed by the Secretary shall act without prejudice with regard to all other complaints brought before the Board.

637A.407 Conduct of investigation. (NRS 637A.060, 637A.100, 637A.110, 637A.260)

1. During an investigation of a licensee pursuant to NAC 637A.405, any employee, agent or member of the Board involved in the investigation may:

- (a) Enter the site of the investigation.
- (b) Examine any record, document or equipment that may be relevant to the investigation.
- (c) Request that the licensee provide any information which may be relevant to the investigation.

2. If the Board requests information during an investigation, a licensee shall provide the information:

(a) Immediately if the licensee is present at the site of the investigation when the information is requested and the information can be reasonably copied during the visit; or

(b) Within 5 working days after the information is requested if the information cannot be reasonably copied during the visit.

637A.410 Failure of party to appear at hearing.

1. If a party fails to appear at a hearing scheduled by the Board and no continuance has been requested or granted, the Board may hear the evidence of such witnesses as may have appeared and the Board may proceed to consider the matter and dispose of it on the basis of the evidence before it.

2. If, because of accident, sickness, or other reasonable cause, a person fails to appear for a hearing scheduled by the Board or fails to request a continuance thereof, the person may, within a reasonable length of time not to exceed 30 days, apply to the Secretary of the Board to reopen the proceedings and the Board, upon finding such cause sufficient and reasonable, will immediately fix a time and place for a hearing and give the person notice thereof. At the time and place fixed, the person may testify in his own behalf or present such other evidence as may be beneficial to his cause. Witnesses who have previously testified will not be required to appear at the second hearing unless subpoenaed by the Board.

637A.415 Presentation of evidence at hearing.

1. Evidence at a hearing must be presented in the following order:

(a) Opening statements by counsel for the complainant and the defendant;

(b) Presentation of the complainant's case, followed by cross-examination;

(c) Presentation of the defendant's case, followed by cross-examination;

(d) Rebuttal testimony, if any; and

(e) Arguments by respective counsel:

(1) Opening argument by the complainant.

(2) Argument by the defendant.

(3) Closing argument by the complainant.

2. The rule of exclusion of witnesses from a hearing room is available to either party.

637A.420 Decision by Board. The Board, within 30 days of a hearing, will enter its written decision and notify the parties of that decision.

637A.425 Records of hearings.

1. A record of a hearing will be kept either by a mechanical or electronic device.

2. A copy of the record will be made available to any party upon his request and at that party's expense.