
CONSENT

Bill No: AB 435
Author: Mullin (D)
Amended: 3/11/21 in Assembly
Vote: 21

SENATE BUS., PROF. & ECON. DEV. COMMITTEE: 11-0, 6/21/21
AYES: Roth, Archuleta, Bates, Becker, Eggman, Hurtado, Jones, Min, Newman,
Ochoa Bogh, Pan
NO VOTE RECORDED: Melendez, Dodd, Leyva

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

ASSEMBLY FLOOR: 77-0, 4/22/21 (Consent) - See last page for vote

SUBJECT: Hearing aids: locked programming software: notice

SOURCE: Speech Language Pathology and Audiology and Hearing Aid
Dispensers Board

DIGEST: This bill requires a licensed hearing aid dispenser or licensed dispensing audiologist to provide written information to a customer prior to the sale of a hearing aid with proprietary programming software or locked, nonproprietary software about where the device can be serviced.

ANALYSIS:

This bill:

- 1) Establishes the Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board (Board) responsible for licensing and regulating the practice of speech-language pathology, audiology, and hearing aid dispensing in California. (Business and Professions Code (BPC) § 2540 *et seq.*)
- 2) Defines the obligations of retail sellers of assistive devices and provides warranty/right of return provisions for consumers of assistive devices including

exact language to be included in the notice to consumers. (Civil Code (CC) § 1793.02)

- 3) Defines assistive device as any instrument, apparatus, or contrivance, including any component or part thereof or accessory thereto, that it used or intended to be used, to assist an individual with a disability in the mitigation or treatment of an injury or disease or to assist or affect or replace the structure or any function of the body or an individual with a disability, except that this term does not include lenses and ophthalmic goods unless they are sold or dispensed to a blind person and unless they are intended to assist the limited vision of the person so disabled.” (CC 1791 § (o))
- 4) Defines a dispensing audiologist as a person who is authorized to sell hearing aids pursuant to their audiology license. (BPC § 2530.2(1))
- 5) Defines a hearing aid dispenser as a person engaged in the practice of fitting or selling hearing aids to an individual with impaired hearing. (BPC § 2538.14)
- 6) States that it is unlawful for an individual to engage in the practice of fitting or selling hearing aids without having first obtained the appropriate license from the Board. (BPC §§2538.20 and 2539.1)
- 7) Requires hearing aid dispensers and licensed audiologists, upon finalizing the sale of a hearing aid, to provide the purchaser with a signed written receipt containing specified information. (BPC §§ 2538.35 and 2539.4)
- 8) Requires hearing aid dispensers and licensed dispensing audiologists to keep and maintain records in their office or place of business at all times, such as results of test techniques pertaining to fitting of the hearing aid and copies of written receipts provided to consumers, for a seven-year period. (BPC §§ 2538.38 and 2539.10)

This bill:

- 1) Defines “proprietary programming software” as software used to program hearing aids that is supplied by a hearing aid distributor or manufacturer for the exclusive use by affiliated providers. This software is locked and inaccessible to nonaffiliated providers.
- 2) Defines “locked, nonproprietary programming software” as software that any provider can render inaccessible to other hearing aid programmers.

- 3) Requires licensed hearing aid dispensers and licensed dispensing audiologists, upon finalizing the sale of a hearing aid that uses proprietary programming or locked nonproprietary programming software, to provide the purchaser with a written notice in 12-point type or larger stating that the hearing aid being purchased uses proprietary or locked programming software and can only be serviced or programmed at specific facilities or locations.
- 4) Requires the notice to be signed by the purchaser before the sale, and requires the licensee to keep and maintain a copy of the notice in accordance with statutory record-keeping requirements.

Background

Hearing Loss. According to information prepared by the Board, there are three general types of hearing loss, which are distinguished by underlying causes, symptoms, and possible treatments. Sensorineural hearing loss (SNHL) is permanent and typically progressive, and occurs when there is damage to the inner ear (cochlea) or to the nerve pathway from the inner ear to the brain. Both loudness and clarity of sounds are affected. This is the most common type of permanent hearing loss, and typically cannot be medically or surgically corrected. There are a number of causes for SNHL, including aging, genetics, excessive noise exposure, and chemotherapy/pharmaceuticals. Conductive hearing loss occurs when sound is not conducted efficiently through the outer and/or middle ear. In some cases, medical or surgical intervention can be undertaken. The outer ear consists of the pinna, ear lobe, conchal bowl, ear canal, and many other small structures. The middle ear consists of the eardrum, three small bones (ossicles), muscles, and tendons. Conductive loss reduces the loudness of sounds; however, if sounds are loud enough, they are usually clear because the cochlea is not involved. Some causes of conductive hearing loss include middle ear infection, poor eustachian tube function, perforated eardrum, impacted earwax, presence of a foreign body absence or malformation of the outer ear, ear canal, or middle ear, or disease or damage to middle ear structures. Mixed hearing loss occurs from a combination of sensorineural and conductive causes.

Audiology and Hearing Aid Dispensing. Audiologists provide services to individuals with hearing, balance, and related communication disorders. The law defines audiology to include the application of principles, methods, and procedures of measurement, testing, appraisal, prediction, consultation, counseling, and instruction related to auditory, vestibular, and related functions and the modification of communicative disorders involving speech, language, auditory behavior, or other aberrant behavior resulting from auditory dysfunction.

Audiologists may also provide hearing aid recommendation, evaluation procedures, and auditory training. Upon meeting additional licensing requirements, an audiologist may also sell hearing aids, and are referred to as dispensing audiologists.

Hearing aid dispensers provide services to individuals with impaired hearing which include hearing tests for the purposes of fitting, selection, and adaptation of hearing aids. The practice of fitting or selling hearing aids is defined as the selection and adaptation of hearing aids, including direct observation of the ear, testing of hearing in connection with the fitting and selling of hearing aids, taking of ear mold impressions, fitting or sale of hearing aids, and any necessary postfitting counseling.

Only individuals who licensed by the Board may engage in the practice of audiology and hearing aid dispensing.

Hearing Aids. Today's hearing aids operate with the use of a computer chip that primarily amplifies speech and has background noise reduction capabilities for a comfortable listening experience. Digital hearing aids can be fully automated or can have multiple listening programs for different environments. Many hearing aids can be programmed to meet the hearing and communicative needs of the wearer. Analog hearing aids are no longer available from the major manufacturers.

Hearing aids can be custom in the ear, receiver in canal with hearing aid behind the ear, or conventional behind the ear with a custom earmold. These require a type of coupling earmold that can come in various styles. Contralateral routing of signal aids can transmit sound from the poorer to the better ear.

Over-the-counter (OTC) hearing aids are a new category of hearing aids that consumers will soon be able to buy directly, without visiting a hearing health professional. These devices are intended to help adults who believe they have mild-to-moderate hearing loss. Like traditional hearing aids, OTC hearing aids will make sounds louder so that some people with difficulty hearing are better able to listen, communicate, and participate fully in daily activities.

OTC hearing aids will be an alternative to today's FDA-regulated hearing aids, which are currently only available from hearing health professionals, such as audiologists, otolaryngologists (ear, nose, and throat doctors), and hearing aid specialists.

Modern hearing aids rely on digital software programming to optimize the acoustical fit and the individual need of each user. While many hearing aids are produced from a variety of manufacturers that have access to open programming software packages, there are a number of hearing aid brands that require the use of exclusive or “locked” programming software that is only available at specific dispensing outlets and group businesses that sell those brands. If a hearing aid uses such proprietary programming software, only specific brand-affiliated facilities can provide any programming services, as other dispensers do not have access to the proprietary software.

The use of proprietary software can create barriers for consumers trying to obtaining hearing aid software updates or reprogramming, by forcing the user to return to the site where the hearing aids were originally purchased, or requiring them to find another authorized outlet that can use the appropriate locked software. This can be particularly challenging for consumers who relocate in a geographic region with fewer or no Dispensing Audiologists / HADs who are able to service a specific brand, or if a hearing aid manufacturer goes out of business – leaving the user with no recourse to manage their existing devices.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

SUPPORT: (Verified 8/18/21)

Speech Language Pathology and Audiology and Hearing Aid Dispensers Board
(source)

California Academy of Audiology

Disability Rights California

Hearing Healthcare Providers California

Hearing Loss Association of America, East Bay Chapter

OPPOSITION: (Verified 8/18/21)

None received

ARGUMENTS IN SUPPORT: Supporters say that AB 435 addresses an important consumer protection issue by requiring that consumers are adequately informed through written notice if the hearing aids that are purchased use proprietary or locked programming software. According to supporters, consumers can be misled when they unknowingly purchase locked hearing aids which may result in their inability to obtain servicing or reprogramming of the hearing aid

unless they return to the same office or company in which the hearing aid was purchased.

According to the California Academy of Audiology, “without proper warning, consumers are far too often blindsided by the very costly ramifications of this longstanding practice that ultimately benefits proprietary brands at the expense of those consumers dependent upon properly programmed hearing aids.”

Disability Rights California writes that “The deaf and hard of hearing community often depend on assistive technology, such as hearing aids, to navigate their daily life. It is crucial that they have hearing technology that is dependable with a process that is consumer friendly and dependable. Receiving notice and detailed information regarding the locations where the hearing aids can be serviced is crucial to the community. In some cases the deaf individual can be a young child or an older adult, and protecting those communities by ensuring that they will receive adequate service for their hearing aids is important.”

ASSEMBLY FLOOR: 77-0, 4/22/21

AYES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Berman, Bigelow, Bloom, Boerner Horvath, Bonta, Burke, Calderon, Carrillo, Cervantes, Chau, Chen, Chiu, Choi, Cooley, Cooper, Cunningham, Megan Dahle, Daly, Davies, Flora, Fong, Frazier, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Gray, Grayson, Irwin, Jones-Sawyer, Kalra, Kiley, Lackey, Lee, Levine, Low, Maienschein, Mathis, Mayes, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Nguyen, O'Donnell, Patterson, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Seyarto, Smith, Stone, Ting, Valladares, Villapudua, Voepel, Waldron, Ward, Akilah Weber, Wicks, Wood, Rendon

NO VOTE RECORDED: Holden, Reyes

Prepared by: Sarah Mason / B., P. & E.D. /
8/18/21 14:06:58

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