

OPINION NO. 80-085**Syllabus:**

1. The making of impressions for earmolds does not constitute the practice of dealing in or fitting of hearing aids, under the terms of R.C. 4747.01(B), unless such impressions are made for the purpose of selling hearing aids.
2. R.C. Chapter 4747 does not require that the University of Akron, the faculty of the Speech and Hearing Clinic of the Department of Speech Pathology and Audiology at the University of Akron, or the students enrolled in the clinic obtain licenses or permits to make impressions for earmolds if such impressions are not made for the purpose of selling hearing aids.

To: Paul L. Barenfield, Secretary, Ohio Hearing Aid Dealers and Fitters Licensing Board, Columbus, Ohio

By: William J. Brown, Attorney General, December 17, 1980

I have before me your request for my opinion concerning application of the provisions of R.C. Chapter 4747, which provides for the licensure and regulation of hearing aid dealers and fitters.

As I understand the situation with which you are concerned, the Speech and Hearing Clinic of the Department of Speech Pathology and Audiology at the University of Akron delivers therapeutic services to members of the public while providing practical experience to students enrolled in its program. Such services may include the measurement of human hearing to determine a client's fitness as a candidate for a hearing aid, although neither the Department nor the University dispenses hearing aids.

You have been advised that the faculty of the Speech and Hearing Clinic proposes to expand the training capabilities of its students by including within the scope of their clinical requirements "the making of impressions for earmolds." The students' activities are to be supervised by Department staff members who are not currently licensed as hearing aid dealers or fitters. Although the clients served in the clinic would pay a fee for the earmolds, any such fee would be paid directly to the University to offset the expenses of operation, rather than to any individual. Specifically, your request poses the following questions:

- (1) Does the University of Akron require a corporate license if, in connection with the clinical requirements of the Speech and Hearing Clinic, students engage in the making of impressions for earmolds for which a fee is paid by clients served at the clinic?
- (2) Do members of the faculty who supervise the making of impressions for earmolds require individual licenses under the provisions of R.C. Chapter 4747?
- (3) Do students engaged in the making of impressions for earmolds require trainee permits?
- (4) Would the due process and equal protection rights of those of whom licensure is required be violated if the University of Akron and/or its students are determined to be exempt from licensure?

R.C. Chapter 4747 prohibits the practice of dealing in or fitting of hearing aids without a license. Specifically, R.C. 4747.02 provides:

No person, firm, partnership, association, or corporation shall, on or after July 1, 1970, engage in the sale, practice of dealing in or fitting of hearing aids, advertise or assume such practice, or engage in training to become a licensed hearing aid dealer or fitter without first being licensed as provided in this chapter.

The practice of dealing in or fitting of hearing aids is defined by R.C. 4747.01(B) as follows:

"Practice of dealing in" or "fitting of" hearing aids means the sale of a hearing aid, and the measurement and testing of human hearing by means of an audiometer or by any other means for the purpose of selecting, adapting, and selling a hearing aid to any person, and includes the making of impressions for earmolds. (Emphasis added.)

In R.C. 4747.01(B) the legislature listed the activities that it determined constituted the practice of dealing in or fitting of hearing aids—namely, "the sale of a hearing aid," and "the measurement and testing of human hearing. . . for the purpose of selecting, adapting, and selling a hearing aid." It specified that the making of impressions for earmolds is included within this practice.

As I understand it, the making of an impression for an earmold is a method of customizing a standard mold to accommodate the shape of a particular ear. Whether the legislature intended that this practice, absent an attempt to sell a hearing aid, be deemed to constitute the practice of dealing in or fitting of hearing aids is the first issue to be addressed.

In considering R.C. 4747.01(A), it is appropriate to apply a strict construction. As stated in the first branch of the syllabus of State ex rel. Moore Oil Co. v. Dauben, 99 Ohio St. 406, 124 N.E. 232 (1919):

Statutes or ordinances of a penal nature, or which restrain the exercise of any trade or occupation or the conduct of any lawful business, or which impose restrictions upon the use, management, control or alienation of private property, will be strictly construed and their scope cannot be extended to include limitations not therein clearly prescribed; exemptions from such restrictive provisions are for like reasons liberally construed.

See also R.C. 1.11 (remedial laws shall be liberally construed). While I am mindful of many remedial provisions in R.C. Chapter 4747, the rule of strict construction specifically applies to those provisions or words which define an offense and prescribe punishment. Cleveland, C.C. & St. L. Ry. Co. v. Wells, 65 Ohio St. 313, 62 N.E. 332 (1901); State v. Saionz, 23 Ohio App. 2d 79, 261 N.E. 2d 135 (1969); Shultz v. Cambridge, 38 Ohio St. 659 (1883).

In the case of R.C. Chapter 4747, the legislature has determined that it shall be a crime to engage in the practice of dealing in or fitting of hearing aids without a license. See R.C. 4747.99. As a result, the provisions defining that offense should be accorded strict but reasonable construction.

In my opinion, the legislature intended the definition found at R.C. 4747.01(B) to mean that, among the activities deemed to constitute the practice of dealing in or fitting of hearing aids, the making of impressions for earmolds is to be included if done for the purpose of selling, or selecting, adapting and selling, a hearing aid. Under the terms of R.C. 4747.08, therefore, the making of impressions for earmolds would constitute the practice of dealing in or fitting of hearing aids only if the objective for making such impressions were to effect the sale of hearing aids.

This construction is consistent with R.C. 4747.15, which provides for certain exemptions from the licensing requirements of R.C. Chapter 4747. That section reads, in relevant part:

The licensing provisions of this chapter do not apply to any person engaged in the practice of measuring human hearing for the purpose of selection of hearing aids provided that such selection does not result in an actual sale of a hearing aid by such person. . . .
(Emphasis added.)

Thus, the measuring of human hearing for the purpose of selection of hearing aids, while described in the definition at R.C. 4747.01(B), is exempted by this provision if no actual sale results.

I conclude, therefore, that, unless for the purpose of selling a hearing aid, the making of impressions for earmolds does not fall within the definition of "[p]ractice of dealing in" or "fitting of" hearing aids at R.C. 4747.01(B) and is not an activity subject to licensure under the provisions of R.C. Chapter 4747.

In response to your first question, it is my opinion that since the University of Akron is not engaged in the practice of making impressions for earmolds for the purpose of selling hearing aids, it need not obtain a corporate license under the provisions of R.C. Chapter 4747.

My conclusion with respect to your second and third questions is the same. In view of the foregoing analysis, it is also clear that neither the faculty nor students participating in the clinical program described by your correspondence need obtain licenses or permits to make impressions for earmolds, unless such impressions are made for the purpose of selling hearing aids.

Regarding your fourth question concerning the constitutionality of any exemption created by R.C. Chapter 4747, please be advised that it is inappropriate for this office to opine upon the constitutionality of state statutes. 1980 Op. Att'y Gen. No. 80-002. The power to pass upon the constitutionality of state statutes is vested solely in the judicial branch of state government. State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, 114 N.E. 55 (1916). I should point out, however, that a regularly enacted statute is presumed to be constitutional and is entitled to the benefit of every presumption in favor of its constitutionality. 1977 Op. Att'y Gen. No. 77-047.

In summary, it is my opinion, and you are advised, that:

1. The making of impressions for earmolds does not constitute the practice of dealing in or fitting of hearing aids, under the terms of R.C. 4747.01(B), unless such impressions are made for the purpose of selling hearing aids.
2. R.C. Chapter 4747 does not require that the University of Akron, the faculty of the Speech and Hearing Clinic of the Department of Speech Pathology and Audiology at the University of Akron, or the students enrolled in the clinic obtain licenses or permits to make impressions for earmolds if such impressions are not made for the purpose of selling hearing aids.