

Effective 7-9-2012

**BEFORE THE MINNESOTA
DEPARTMENT OF HEALTH
HEALTH OCCUPATIONS PROGRAM**

**In the Matter of
Mitchell D. Marcus
Hearing Instrument Dispenser**

**STIPULATION AND
CONSENT ORDER**

IT IS HEREBY STIPULATED AND AGREED by Mitchell D. Marcus (hereinafter "Practitioner"), and the Minnesota Department of Health (hereinafter "MDH"), and that without trial or adjudication of any issue or fact or law herein;

This Stipulation and Consent Order (hereinafter "Stipulation"), investigative reports, and related documents shall constitute the entire record herein upon which this Stipulation is based and shall be filed with MDH. This Stipulation is public data pursuant to the Minnesota Government Data Practices Act, Minnesota Statutes, Chapter 13 (hereinafter "MGDPA"). All other data comprising the record shall not be considered a part of this Stipulation and shall maintain the data classifications to which they are entitled under the MGDPA.

I. LEGAL AUTHORITY

1. Pursuant to Minnesota Statutes, section 153A.14, subdivision 4a, paragraph (b), in part, a certified dispenser is responsible for all actions or omissions of a trainee in connection with the dispensing of hearing instruments. Until taking and passing the practical examination testing the techniques described in subdivision 2h, paragraph (a), clause (2), trainees must be directly supervised in all areas described in subdivision 4b, and the activities tested by the practical examination. Thereafter, trainees may dispense hearing instruments under indirect supervision until expiration of the trainee period.

2. Pursuant to Minnesota Statutes, section 153A.14, subdivision 6, hearing instruments must be dispensed in compliance with state requirements and with the requirements of the United States Food and Drug Administration.

3. Pursuant to Minnesota Statutes, section 153A.15, subdivision 1(10), MDH may take enforcement action against a practitioner for failing to comply with the requirements of Chapter 153A as an employer, supervisor or trainee.

4. Pursuant to Minnesota Statutes, section 153A.15, subdivision 1(19), MDH may take enforcement action against a practitioner for violating any of the provisions of sections 148.5195, subdivision 3, clause (20); 148.5197; 148.5198; and 153A.13 to 153A.18.

5. MDH has statutory authority to discipline hearing instrument dispensing practitioners under Minnesota Statutes, section 153A.15. The types of disciplinary action MDH may impose include one or more of the following: deny the application for certification, revoke or suspend the certificate, impose for each violation a civil penalty that deprives the dispenser of any economic advantage gained by the violation and that reimburses MDH for the costs of the investigation and proceedings, censure or reprimand the dispenser, revoke or suspend the right to supervise or be a trainee, impose a civil penalty not to exceed \$10,000 for each separate violation or any other action reasonably justified by the individual case. Pursuant to Minnesota Statutes, Section 13.41, disciplinary actions are public data.

Practitioner and MDH hereby agree as follows:

II. FACTS

This agreement is based on the following facts:

1. Mitchell D. Marcus (hereinafter "Practitioner") was approved as a hearing instrument dispenser effective May 11, 1994. Practitioner has renewed his certificate annually since November 1, 1994.

a. In Practitioner's November 1, 1997 renewal application, he listed "Your Hometown Hearing Center" in the space for the business name and "Montevideo" for the city. In the space after the question, "My current supervision/manager is" Practitioner wrote, "Self."

b. In Practitioner's 2000 and 2003 renewal applications, Practitioner listed "Prinsburg" as the business location.

c. In Practitioner's 2002, 2004 and 2007 renewal applications, he listed "Willmar" as the business location.

d. Practitioner's listed "Your Hometown Hearing Aid Center" as the name of his business on all renewal applications through the 2007 renewal application.

e. On September 16, 2008, the Department received Practitioner's 2008 certification renewal application. Practitioner checked, "yes" to the question, "Since the date of your last renewal, have you ever worked for, or had an ownership interested in, a hearing aid dispensing company which ceased operations?" Practitioner listed, "Your Hometown Hearing Center, Inc., 3/17/08."

2. Effective August 19, 2009, the Department entered into a disciplinary settlement agreement with a certified hearing instrument dispenser (formerly Trainee A) related to dispensing hearing instruments in an incompetent manner based in part on poor training and lack of direct supervision during his trainee status under Practitioner's supervision.

3. By letter dated October 6, 2009, the Department requested Practitioner submit information and documents concerning all trainees authorized to dispense under his supervision, including training records, locations where trainees were employed, dispensing records such as audiograms and purchase agreements, and a description of training methodology.

a. Between December 17, 2009 and May 26, 2011, MDH received Practitioner's response and requested documentation about his supervision of trainees. Practitioner provided copies of the trainees' work schedules, audiograms and related hearing tests, purchase agreements and client case histories. Practitioner provided the address of his dispensing business locations and the location where each trainee was employed to dispense hearing instruments. Practitioner also verified he was the approved supervisor for five hearing instrument dispenser trainees employed between the periods February 1998 through March 2007.

b. Practitioner stated he employed two trainees in the late 1990's and that the two trainees were employed under his direct supervision at all times and they did not test or fit hearing instruments.

c. Practitioner provided the audiograms, hearing tests, hearing instrument recommendations, and purchase agreements representing dispensing activities Trainees A, B, and C performed under Practitioner's direct and indirect supervision; and at his business locations in Glenwood, Montevideo, Marshall and Willmar, Minnesota.

d. Practitioner provided the dates and times he supervised each trainee, directly and indirectly.

e. Practitioner stated it was his understanding if he were available by phone, fax, or email for consultation, it was considered proper supervision.

f. Practitioner stated he approached other dispensers in the geographic area and was informed his approach to supervision was consistent and acceptable to the Department.

g. Practitioner stated there were no instances in which Trainee C performed duties in which he should have been supervised but was not.

h. Practitioner used a combination of training methods, including:

- Independent study (including text books, continuing education seminars with manufacturers, and videos);
- Shadow Practitioner's testing and fitting until the trainee demonstrated aptitude;
- Test relatives and friends and when they demonstrate comfort with testing techniques, Practitioner transitioned the training to do most of their own testing;
- Hands-on training with Practitioner to demonstrate otoscopy and ear mold impressions;
- Monthly meetings and progress reviews.

i. Staff review of credentialing and examination records verified the Department approved Practitioner as the hearing instrument dispensing supervisor for Trainee A, B and C. Trainee A was approved effective April 5, 2004 and expired April 30, 2005; Trainee B was approved effective October 17, 2005 and expired October 31, 2006; and Trainee C was approved October 21, 2006. Trainee C was initially given an expiration date of December 31, 2007. Practitioner notified the Department on March 28, 2007 stating he ceased supervision of Trainee C effective February 28, 2007.

j. On each of the trainees' written applications, Practitioner signed a statement which stated, "I have read and will comply with the requirements of Minnesota Statutes § 153A.14, subdivision 4a, 4b and 4d. I understand that the trainee must be under direct supervision until passing the practical examination at which time the trainee may be under indirect supervision until they are certified . . . I shall be responsible for all actions and omissions

of the above-named applicant in connection with the dispensing of hearing instruments . . . I understand that I am responsible as supervisor for the trainee until the Minnesota Department of Health receives my written and signed statement that I wish to cease supervision of the trainee or until expiration of twelve months.”

4. On July 26, 2007 and on May 19, 2010, the Department convened the Competency Review Committee (CRC) of the Hearing Instrument Dispenser Certification Advisory Council and presented redacted copies of the client case histories, audiograms and related hearing tests, and purchase agreements evidencing the dispensing practices of Trainees A, B and C. CRC members reviewed Trainee A, B and C dispensing records and concluded the Trainees were not competent in hearing instrument dispensing, with or without supervision. Trainees A, B and C consistently failed to comply with one or more of the hearing testing protocols required by Minnesota Statutes, section 153A.14, subdivision 4b, including the U.S. Food and Drug Administration warning regarding potential medical conditions and the Trainees were not directly supervised as required by law.

III. ORDER

Under this Stipulation, and without any further notice of proceedings, the Division Director hereby ORDERS:

1. Upon the effective date of the Stipulation, Practitioner’s certification to dispense hearing instruments is conditioned as follows:

a. Practitioner should pay a civil penalty of \$2,248.00 which deprives Practitioner of any economic advantaged gained by the violation, plus an additional \$3,330.00 which reimburses MDH for the costs of the investigations and proceedings to date.

b. Practitioner may pay the total \$5,581.00 civil penalty in monthly installments. If Practitioner chooses to make installments, he must notify MDH in writing about his intentions, including how many installments he intends to make, in what amount, and over which time period. Practitioner must send this information to: Catherine Dittberner Lloyd, PO Box 64882, Saint Paul, MN 55164-0882, within 30 days of receipt of this document.

c. Each payment will be made by check payable to "State of Minnesota, Treasurer" and mailed to Catherine Dittberner Lloyd, PO Box 64882, Saint Paul, MN 55164-0882, or any address specified by MDH. Each payment is due by the last day of each month; however, Practitioner may prepay at any time.

d. The penalty may be referred to the Minnesota Collection Enterprise (MCE), part of the Minnesota Department of Revenue, or other source for collection, if Practitioner misses a monthly payment by 14 calendar days after the established deadline. When this Stipulation for a penalty becomes public and MDH refers the matter to MCE, MCE is authorized by Minnesota Statutes, section 6D.17, to obtain a judgment against Practitioner without further notice or additional proceedings.

e. Practitioner's right to supervise hearing instrument dispenser trainees, or otherwise provide training to hearing instrument dispenser trainees is revoked for one year following the effective date of this Stipulation.

f. Practitioner shall successfully complete six continuing education (CE) course hours, pre-approved by MDH, as follows:

- i. Four CE course hours related to the techniques and methods of hearing instrument dispensing as defined by Minnesota Statutes, section 153A.14, subdivision 4b, hearing testing protocol.

- ii. Two CE course hours related to ethics in hearing instrument dispensing.
- iii. The CE course hours required by this section shall be in addition to the continuing education requirements of Minnesota Statutes, sections 153A.14, subdivision 2i.
- iv. The CE course hours must be approved by the International Hearing Society, the American Speech-Language-Hearing Association, or the American Academy of Audiology.
- v. Practitioner shall submit evidence of completion of the CE course hours identified in paragraphs (i) and (ii) above, on forms provided by MDH.

2. Once all conditions as set forth in paragraph 1.a through 1.c above of this Stipulation have been met, Practitioner may petition the Commissioner for an unconditional certificate to dispense hearing instruments.

3. In the event the Division Director in her discretion does not approve this settlement or a lesser remedy than specified herein, this Stipulation shall be of no evidentiary value and shall not be relied upon or used for any purpose by either party. If this should occur and thereafter an administrated contested case is initiated pursuant to Minnesota Statutes, Chapter 14 and Minnesota Statutes, Section 153a.15, Practitioner agrees to assert no claim that the Division Director was disqualified due to the review and consideration of this Stipulation or any records relating hereto.

4. This Stipulation shall not in any way or manner limit or affect the authority of MDH to proceed against Practitioner by initiating a contested-case hearing or by other appropriate means on the basis of any, conduct, or omission of Practitioner, justifying action which occurred after or

before the date of this Stipulation and which is not directly related to the specific facts and circumstances as set forth herein.

5. This Stipulation shall not in any way or manner limit or affect the authority of MDH to proceed against Practitioner by initiating a contested-case hearing or by other appropriate means on the basis of any act, conduct, or omission of Practitioner, justifying action which occurred after or before the date of the Stipulation and which is not directly related to the specific facts and circumstances as set forth herein.

6. This Stipulation contains the entire agreement between MDH and the Practitioner, there being no other agreement of any kind, verbal or otherwise, which varies this Stipulation. Practitioner understands that this agreement is subject to the Division Director's approval. If the Division Director either approves the Stipulation or makes changes acceptable to the Practitioner, the Division Director will issue the Stipulation. Upon this Stipulation and all other evidence made available to the Division Director, once the Division Director has approved it, the Division Director may issue the Stipulation to Practitioner at any time without further notice.

7. A copy of the Stipulation, when issued by the Division Director, shall be served by first class mail on Practitioner, at Practitioner's attorney's office at Careen H. Martin, Nilan, Johnson Lewis, PA, 400 One Financial Plaza, 120 South Sixth Street, Minneapolis, MN 55402. Service via first class mail shall be considered as personal service upon Practitioner, at which time this Stipulation shall become effective. Any appropriate federal or state court shall, upon application of the Division Director, enter an order of enforcement of any or all of the terms of this Stipulation.


IV. CONSENT

Practitioner hereby acknowledges that he has read, understood, and agreed to this Stipulation and has freely and voluntarily signed it.

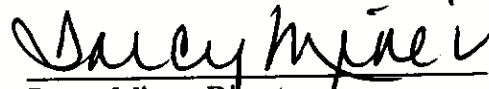
Dated: June 23rd, 2012


Mitchell D. Marcus

Dated: June 26, 2012


Tom Hiendlmayr, J.D., Director
Health Occupations Program

Upon consideration of this Stipulation and all the files, records, and proceedings herein by the Division Director, IT IS HEREBY ORDERED THAT THE TERMS OF THE Stipulation are adopted and implemented by the Division Director on this 2nd day of July, 2012.


Darcy Miner, Director
Compliance Monitoring Division