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7

8 **BEFORE THE**  
**SPEECH-LANGUAGE PATHOLOGY AND AUDIOLOGY AND HEARING AID**  
**DISPENSERS BOARD**  
9 **DEPARTMENT OF CONSUMER AFFAIRS**  
**STATE OF CALIFORNIA**  
10

11 In the Matter of the Accusation Against:

Case No. 1C-2016-29

12 **JOHN KEELER**

**A C C U S A T I O N**

13 **Miracle Ear**  
14 **22268 Foothill Blvd #1**  
**Hayward CA 94541**

15 **Hearing Aid Dispenser License No. HA 2693**

16 Respondent.  
17

18  
19 Complainant alleges:

20 **PARTIES**

21 1. Paul Sanchez (Complainant) brings this Accusation solely in his official capacity as  
22 the Executive Officer of the Speech-Language Pathology and Audiology and Hearing Aid  
23 Dispensers Board, Department of Consumer Affairs.

24 2. On April 24, 1989, the Speech-Language Pathology and Audiology and Hearing Aid  
25 Dispensers Board issued Hearing Aid Dispenser License Number HA 2693 to John Keeler  
26 (Respondent). The Hearing Aid Dispenser License was in full force and effect at all times  
27 relevant to the charges brought herein and will expire on October 31, 2017, unless renewed.  
28

**JURISDICTION**

1  
2       3.     This Accusation is brought before the Speech-Language Pathology and Audiology  
3 and Hearing Aid Dispensers Board (Board), Department of Consumer Affairs, under the authority  
4 of the following laws. All section references are to the Business and Professions Code unless  
5 otherwise indicated.

6       4.     Section 2531.06 provides that the Board has jurisdiction over the licensing and  
7 regulation of hearing aid dispensers.

8       5.     Section 2533 provides that “[t]he Board may . . . suspend, or revoke, or impose terms  
9 and conditions upon the license of any licensee for any of the following causes:

10           “ . . . .

11           “(f) Incompetence, gross negligence, or repeated negligent acts.

12           “ . . . .

13           “(k) Violation of Section 1689.6 or 1793.02 of the Civil Code.

14           “ . . . .”

15       6.     Section 2538.20 provides, in pertinent part, that “[i]t is unlawful for an individual to  
16 engage in the practice of fitting or selling hearing aids . . . without having first obtained a license  
17 from the board under the provisions of this article [governing hearing aid dispensers].”

18       7.     Section 2538.24 provides that “[e]ach person desiring to obtain a license to engage in  
19 the practice of fitting or selling hearing aids shall make application to the board. The application  
20 shall be made upon a form and shall be made in the manner as is provided by the board and shall  
21 be accompanied by the fee . . . .”

22       8.     Section 2538.28 provides, in pertinent part, that “[a]n applicant who has fulfilled the  
23 requirements of Section 2538.24, and has made application therefor, and who proves to the  
24 satisfaction of the board that he or she will be supervised and trained by a hearing aid dispenser  
25 who is approved by the board may have a temporary license issued to him or her. The temporary  
26 license shall entitle the temporary licensee to fit or sell hearing aids as set forth in regulations of  
27 the board. The supervising dispenser shall be responsible for any acts or omissions committed by  
28 a temporary licensee under his or her supervision that may constitute a violation of this chapter.”

1           9. Section 2538.33 provides, in pertinent part, that “[b]efore engaging in the practice of  
2 fitting or selling hearing aids, each licensee shall notify the board in writing of the address or  
3 addresses where he or she is to engage, or intends to engage, in the practice of fitting or selling  
4 hearing aids, and of any changes in his or her place of business within 30 days of engaging in that  
5 practice.”

6           10. Section 2538.35 provides, in pertinent part, that “[a] licensee shall, upon the  
7 consummation of a sale of a hearing aid, deliver to the purchaser a written receipt, signed by or  
8 on behalf of the licensee, containing all of the following:

9           “ . . . .

10           “(e) The number of the licensee’s license and the name and license number of any  
11 other hearing aid dispenser or temporary licensee who provided any recommendation or  
12 consultation regarding the purchase of the hearing aid.

13           “ . . . .”

14           11. Section 2538.36 provides, in pertinent part, as follows:

15           “(a) Whenever any of the following conditions are found to exist either from  
16 observations by the licensee or on the basis of information furnished by the prospective hearing  
17 aid user, a licensee shall, prior to fitting or selling a hearing aid to any individual, suggest to that  
18 individual in writing that his or her best interests would be served if he or she would consult a  
19 licensed physician specializing in diseases of the ear or if no such licensed physician is available  
20 in the community then to a duly licensed physician:

21           “ . . . .

22           “(6) Significant air-bone gap (when generally acceptable standards have been  
23 established).

24           “ . . . .”

25           12. Section 2538.38 provides, in pertinent part, that “[a] licensee shall, upon the  
26 consummation of a sale of a hearing aid, keep and maintain records in his or her office or place of  
27 business at all times . . . . The records kept shall include . . . [r]esults of test techniques as they  
28 pertain to fitting of the hearing aid.”

1           13. Section 2538.48 provides that “[i]t is unlawful to engage in the practice of fitting or  
2 selling hearing aids in this state without having at the time of so doing a valid, unrevoked, and  
3 unexpired license or temporary license.”

4           14. Section 2538.49 provides, in pertinent part, that “[i]t is unlawful for a licensed  
5 hearing aid dispenser to fit or sell a hearing aid unless he or she first . . . [c]omplies with all  
6 provisions of state laws and regulations relating to the fitting or selling of hearing aids.”

7           15. Civil Code section 1793.02 provides, in pertinent part, as follows:

8           “(a)(1) . . . .

9           “(2)(A) All new and used hearing aids sold in this state shall be accompanied by the retail  
10 seller’s written warranty and shall contain the following language: ‘This hearing aid is warranted  
11 to be specifically fit for the particular needs of you, the buyer. If the hearing aid is not initially fit  
12 for your particular needs, it may be returned to the seller within 45 days of the initial date of  
13 delivery to you. If you return the hearing aid, the seller will either adjust or replace the hearing  
14 aid or promptly refund the total amount paid. This warranty does not affect the protections and  
15 remedies you have under other laws.’

16           “(B) In lieu of the words ‘45 days’ the retail seller may specify any longer period.

17           “(C) On the initial date of delivery, the retail seller shall revise the written warranty to  
18 include the initial date of delivery to the buyer of the hearing aid and expiration date of the  
19 warranty.

20           “(b) The language prescribed in subdivision (a) shall appear on the first page of the  
21 warranty in at least 10-point bold type. The warranty shall be delivered to the buyer at the time of  
22 the sale of the device.

23           “. . . .”

24           16. California Code of Regulations, title 16, section 1399.119 provides as follows:

25           “A trainee-applicant under Section 2538.28 of the Code shall fit or sell hearing aids only  
26 under the direct supervision of the supervising licensed hearing aid dispenser. ‘Direct  
27 supervision’ as used in this section means all of the following:  
28



1 under supervision, as a hearing aid dispenser trainee until February 9, 2016. Ms. Danino worked  
2 at the Miracle Ear Centers in Hayward and Milpitas during this period.

3 22. In a letter to the Board dated February 9, 2016, Respondent terminated his  
4 supervision of Ms. Danino and two other trainees “effective immediately.” The Board advised  
5 Ms. Danino by a letter dated February 12, 2016 that her temporary trainee license had been  
6 suspended on February 9, 2016 because she was no longer under the supervision of a Board-  
7 approved hearing aid dispenser. A copy of this letter was also sent to Respondent at his business  
8 address of record.

9 23. On February 9, 2016, consumer R.F.<sup>1</sup> came to the Hayward location of Miracle Ear to  
10 inquire about hearing aids. Ms. Danino conducted audiometric testing of R.F.’s hearing. Bone  
11 conduction was performed at 500, 1000, and 2000 Hz. There was air-bone gap at 1000 and 2000  
12 Hz and 4000 Hz was not tested. Inadequate masking levels were used. Ms. Danino did not refer  
13 R.F. to a licensed physician for the significant air-bone gap and did not obtain a waiver from R.F.  
14 Respondent did not sign the audiogram of R.F.’s testing.

15 24. Ms. Danino completed a purchase order form selling hearing aids to R.F. and ordered  
16 the hearing aids. The form was signed by Ms. Danino but not dated. It was not countersigned by  
17 Respondent.

18 25. R.F. returned on February 23, 2016 and Ms. Danino fitted R.F. with the hearing aids.  
19 The patient service record for February 23, 2016 states, “Delivery, speech mapping prog 2-mT, 3-  
20 noise, 4-TV,” but there is no evidence that speech mapping, real ear measures, or sound field  
21 testing was performed to determine if the hearing aids were fitted appropriately for R.F.’s hearing  
22 loss.

23 26. The purchase order form was updated to reflect the date of delivery of the hearing  
24 aids and signed again by Ms. Danino but not revised to reflect the expiration date of the Civil  
25 Code section 1793.02 warranty. Serial number stickers from the hearing aids were attached to the  
26 back. Again, Respondent did not countersign the form.

27 <sup>1</sup> The consumer is designated in this document by her initials to protect her privacy.  
28 Respondent knows the name of the consumer and can confirm her identity through discovery.



1 conjunction with additional acts of negligence set out below, in violation of section 2533,  
2 subdivision (f) (incompetence, gross negligence, or repeated negligent acts).

3 **SECOND CAUSE FOR DISCIPLINE**  
4 **(Incompetence; Gross Negligence; Repeated Negligent Acts)**

5 34. Respondent is subject to disciplinary action under section 2538.28 (supervising  
6 dispenser responsible for acts or omissions committed by temporary licensee under his or her  
7 supervision that may constitute a violation of this chapter [sections 2530 through 2539.14]) in that  
8 his trainee failed to conduct bone conduction testing at 4000 Hz when testing R.F.'s hearing,  
9 utilized inadequate masking levels, and failed to refer R.F. to a licensed physician or ask her to  
10 sign a medical waiver in violation of section 2533, subdivision (f) (incompetence, gross  
11 negligence, or repeated negligent acts), and 2538.36, subdivision (a)(6) (licensee shall suggest to  
12 individual in writing that his or her best interests would be served by consulting a licensed  
13 physician when a significant air-bone gap exists), California Code of Regulations, title 16, section  
14 1399.126, subdivisions (a) (defines significant air-bone gap) and (b) (requires air-bone gap  
15 testing).

16 **THIRD CAUSE FOR DISCIPLINE**  
17 **(Gross Negligence)**

18 35. Respondent is subject to disciplinary action under section 2538.28 (supervising  
19 dispenser responsible for acts or omissions committed by temporary licensee under his or her  
20 supervision that may constitute a violation of this chapter [sections 2530 through 2539.14]) in that  
21 his trainee failed to have Respondent sign R.F.'s audiogram and sales documents as required  
22 under section 2538.28 (a temporary licensee may fit or sell hearing aids subject to Board's  
23 regulations) and California Code of Regulations, title 16, section 1399.119, subdivision (c)  
24 (supervising dispenser shall countersign the audiogram and all sales documents prepared and  
25 consummated by a trainee), in violation of section 2533, subdivision (f) (incompetence, gross  
26 negligence, or repeated negligent acts).

1 **FOURTH CAUSE FOR DISCIPLINE**  
2 **(Repeated Negligent Acts)**

3 36. Respondent is subject to disciplinary action under section 2538.28 (supervising  
4 dispenser responsible for acts or omissions committed by temporary licensee under his or her  
5 supervision that may constitute a violation of this chapter [sections 2530 through 2539.14]) in that  
6 his trainee failed to undertake adequate speech mapping, real ear measures, and sound field  
7 testing of R.F. to determine if the hearing aids were fitted appropriately for her hearing loss and  
8 failed to maintain records of the results of test techniques as they pertain to the fitting of R.F.'s  
9 hearing aids as required under section 2538.38 (maintain records of results of test techniques  
10 related to fitting of a hearing aid), which conduct, in conjunction with additional acts of  
11 negligence set out above and below, violates section 2533, subdivision (f) (incompetence, gross  
12 negligence, or repeated negligent acts).

13 **FIFTH CAUSE FOR DISCIPLINE**  
14 **(Gross Negligence; Aiding and Abetting Unlicensed Practice)**

15 37. Respondent is subject to disciplinary action under section 2533, subdivision (f)  
16 (incompetence, gross negligence, or repeated negligent acts) in that, after notifying the Board that  
17 he was terminating his supervision of trainee Eva Danino, he continued to permit her, as an  
18 unlicensed person, to sell and fit hearing aids under his supervision in violation of section  
19 2538.20 (unlawful to fit or sell hearing aids without license) and section 2538.48 (unlawful to fit  
20 or sell hearing aids without a valid license or temporary license).

21 **SIXTH CAUSE FOR DISCIPLINE**  
22 **(Gross Negligence; Violation of Civil Code section 1793.02)**

23 38. Respondent is subject to disciplinary action under section 2533, subdivisions (f)  
24 (incompetence, gross negligence, or repeated negligent acts) and (k) (violation of Civil Code  
25 section 1793.02), for failing to comply with Civil Code section 1793.02, subdivision (a)(2)(A) (if  
26 returned, the seller will adjust or replace the hearing aid or refund the amount paid) by failing to  
27 give a refund to R.F. after two attempts to adjust her hearing aid.

1 **SEVENTH CAUSE FOR DISCIPLINE**  
2 **(Repeated Negligent Acts)**


3 39. Respondent is subject to disciplinary action under section 2538.28 (supervising  
4 dispenser responsible for acts or omissions committed by temporary licensee under his or her  
5 supervision that may constitute a violation of this chapter [sections 2530 through 2539.14]) in that  
6 his trainee failed to notify the Board of her second practice location during the period between  
7 August and October 2016 as required under section 2538.33 (notify Board of all practice  
8 addresses) and 2538.49 (licensee must comply with state laws and regulations related to fitting  
9 and selling hearing aids) which conduct, in conjunction with additional acts of negligence set out  
10 above, violates section 2533, subdivision (f) (incompetence, gross negligence, or repeated  
11 negligent acts).

12 **PRAYER**

13 **WHEREFORE**, Complainant requests that a hearing be held on the matters herein alleged,  
14 and that following the hearing, the Speech-Language Pathology and Audiology and Hearing Aid  
15 Dispensers Board issue a decision:

- 16 1. Revoking or suspending Hearing Aid Dispenser License Number HA 2693, issued to  
17 John Keeler.;
- 18 2. Ordering John Keeler to pay the Speech-Language Pathology and Audiology and  
19 Hearing Aid Dispensers Board the reasonable costs of the investigation and enforcement of this  
20 case, pursuant to Business and Professions Code section 125.3; and,
- 21 3. Taking such other and further action as deemed necessary and proper.

22  
23 DATED: April 7, 2017

24   
25 PAUL SANCHEZ  
26 Executive Officer  
27 Speech-Language Pathology and Audiology and Hearing  
28 Aid Dispensers Board  
Department of Consumer Affairs  
State of California  
*Complainant*

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