DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF THE PROPOSED AMENDMENTS OF RULES OF THE DEPARTMENT OF HUMAN SERVICES GOVERNING MEDICAL ASSISTANCE (MA): PROVIDER SERVICES, MINNESOTA RULES, PART 9505.0391.

STATEMENT OF NEED AND REASONABLENESS

INTRODUCTION

This statement of need and reasonableness is prepared pursuant to Minnesota Statutes, sections 14.131 and 14.23 (2004). It summarizes the arguments supporting the amendments of the rules governing medical assistance (MA): provider services.

ALTERNATIVE FORMAT

This information is available in other forms to people with disabilities by contacting us at (651) 431-3600 (voice) or toll free at (800) 657-3510. TDD users can call the Minnesota Relay at 711 or (800) 627-3529. For the Speech-to-Speech Relay, call (877) 627-3848.

BACKGROUND

Medical assistance (MA) is the largest of Minnesota's three publicly funded health care programs, providing coverage for a monthly average of 483,000 low-income senior citizens, children and families, and people with disabilities in state fiscal year 2005.

The federal Centers for Medicare and Medicaid Services administers Medicaid nationwide. In Minnesota, the Minnesota Department of Human Services (hereinafter "the department") oversees the program, and eligibility of potential clients is administered by the counties and by the department. MA is funded jointly with state and federal funds. Many people who are eligible for MA are also eligible for Medicare.

The proposed amendments to Minnesota Rules, part 9505.0391 affect medical assistance (MA) provider services. Specifically, the department wishes to amend Minnesota Rules, part 9505.0391 entitled "Therapists eligible to enroll as providers."

Minnesota Rules, part 9505.0391 was first added to rule standards governing medical assistance in 1991. This part established the standards to enroll therapists who may receive medical assistance payments for providing rehabilitative and therapeutic services. This part has not been amended since 1992.

The requirements of Minnesota Rule, part 9505.0391 were primarily enacted to prevent duplicate billing of therapeutic services and to ensure that medical assistance was the payor of last resort when the client was also eligible for Medicare. Now, the department has a process in the medical assistance claims processing system that prevents duplicate billing from occurring. Additionally, the rules require that physical or occupational therapists must be certified by Medicare so that if clients are eligible for both Medicare and medical assistance, that Medicare is billed for the service. However, in 1998, the U.S. Department of Health and Human Service's Health Care Financing Administration (hereinafter "HCFA") changed the Code of Federal Regulations for Medicare with regard to the certification of physical and occupational therapists to a simplified carrier enrollment process. Currently, Minnesota Rules, part 9505.0391 uses the word "certify" instead of "enroll". The department wants to amend Minnesota Rules, part 9505.0391 so that the rule language reflects the same terminology as the current Code of Federal Regulations.

The Minnesota Department of Finance reviewed the rules and the statement of need and reasonableness in April 2008 and determined that there would be no fiscal impact to local governments from the proposed rule change.

In accordance with Minnesota Statutes, section 14.127, the department also determined that the cost of complying with the proposed rule changes in the first year after the rule takes effect would not exceed $25,000 for businesses. Nothing in the proposed rule changes would shift or create additional expenses for current and potential providers of physical and occupational therapy services, audiologists, or speech-language pathologists.

A Dual Notice was published in the Monday, May 19, 2008 issue of the *State Register* announcing that a hearing is scheduled for Friday, July 11, 2008 if 25 or more requests for a hearing are received. If 25 or more requests for a hearing are received and a hearing is held, the department does not intent to have any nonagency witnesses testify. A draft statement of need and reasonableness (SONAR) for these rules was made available for these rules since February 2008 via the department's public website or by notifying the department's contact person for these rules. The final version of the SONAR was made available on May 14, 2008 via the department's public website or by notifying the department's contact person.

STATUTORY AUTHORITY

The commissioner of the Minnesota Department of Human Services is authorized by Minnesota Statutes, section 256B.04, subdivision 2 to, "Make uniform rules, not inconsistent with law, for carrying out and enforcing the provisions hereof in an efficient, economical, and impartial manner, and to the end that the medical assistance system may be administered uniformly throughout the state, having regard for varying costs of medical care in different parts of the state and the conditions in each case, and in all things to carry out the spirit and purpose of this program, which rules shall be

furnished immediately to all county agencies, and shall be binding on such county agencies."

REGULATORY ANALYSIS

The department is required to exert reasonable efforts to ascertain who is likely to be affected by these rules; the department must also describe those efforts. Accordingly, the department must provide the following information in this statement of need and reasonableness pursuant to Minnesota Statutes, sections 14.131 and 14.23 and Minnesota Rules, part 1400.2070:

1.) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule

The classes of persons affected by the rule are current and potential providers of physical and occupational therapy services, audiologists, speech-language pathologists and the department.

The proposed amendments will benefit all current and potential providers of physical and occupational therapy services, audiologists, speech-language pathologists and the department. As Minnesota Rule, part 9505.0391 is presently written, it prevents the department from enrolling physical and occupational therapists, audiologists, and speech-language pathologists as providers when they are employed by physician clinics and other such facilities. When it was enacted, this rule provision was intended to prevent duplicate billings for therapy services. Now, the department has a process in the medical assistance claims processing system that prevents duplicate billing from occurring and the rule language serves as an unnecessary barrier to the enrollment of qualified physical and occupational therapists, audiologists, and speech-language pathologists.

Additionally, if the department changes Minnesota Rules, part 9505.0391 to allow physical and occupational therapists, audiologists, and speech-language pathologists that are employed by physician's clinics and other such facilities to enroll with the department, the physical and occupational therapists', audiologists', or speech-language pathologists' identification number would be used on the claim form to indicate the "treating provider" and the department would have a better idea of who is actually providing the service. This would provide the department with better tracking and accountability. Presently, the identification number for the physician who is responsible for the plan of care is entered on the claim form and this may not accurately reflect who provided the service.

2.) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

The proposed amendments simplify the enrollment process for physical and occupational therapists, audiologists, and speech-language pathologists. There are no expected costs increases related to enrollment process for physical and occupational therapists, audiologists, and speech-language pathologists. The proposed amendments will not affect state revenues.

3.) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

The department determined that amending the existing rule was the least costly and intrusive method to change, update, and maintain procedures for the enrollment of physical and occupational therapists, audiologists, and speech-language pathologists.

4.) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

The department considered the alternative to be:

1.) Include Minnesota Rule, part 9505.0391 in the yearly obsolete rules report which would allow the department to only remove language that was obsolete.

The department rejected this option for the following reasons:

1.) The department needs to update Minnesota Rule, part 9505.0391 to reflect the new carrier enrollment process.

2.) The obsolete rules report is only done once a year and the department would like this rule changed more expeditiously.

5.) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;

The proposed amendments will not result in additional costs to physical and occupational therapists, audiologists, and speech-language pathologists.

The department is the only government unit affected because the department is the only government unit in the state that administers the medical assistance program.

6.) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;

The consequences of not adopting the proposed amendments are:

As Minnesota Rule, part 9505.0391 is presently written, it prevents the department from enrolling physical and occupational therapists, speech-language pathologists, and audiologists as providers when they are employed by physician clinics and other such facilities. When it was enacted, this rule provision was intended to prevent duplicate billings for therapy services. Now, the department has a process in the medical assistance claims processing system that prevents duplicate billing from occurring and the rule language serves as an unnecessary barrier to the enrollment of qualified physical and occupational therapists, audiologists, and speech-language pathologists.

7.) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

There are no differences between the proposed amendments and existing federal regulations. The rules were drafted in an attempt to incorporate the current Code of Federal Regulations terminology that states that physical and occupational therapists must enroll with Medicare.

8.) describe how the agency, in developing the rules, considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002.

The proposed rule amendments are designed to eliminate the rigid procedures for enrolling physical and occupational therapists, audiologists, and speech-language pathologists in the current rule that act as an unnecessary barrier to enrollment of qualified physical and occupational therapists, audiologists, and speech-language pathologists. Also, as stated above, if the department changes Minnesota Rules, part 9505.0391 to allow physical and occupational therapists, audiologists, and speech-language pathologists that are employed by physician's clinics and other such facilities to enroll with the department, the physical and occupational therapists', audiologists', and speech-language pathologists' identification number would be used on the claim form and the department would have a better idea of who is actually providing the service.

9.) a description of the department's efforts to provide additional notification under section 14.14, subdivision 1a, to persons or classes of persons who may be affected by the proposed rule or must explain why these efforts were not made.

The department's additional notice plan seeks to notify all persons and organizations who may be interested in the proposed rules that the department is able to identify through reasonable means. The department will notify those who have registered with the department to receive rulemaking notices. The department also intends to notify:

1) The Minnesota Occupational Therapy Association (MOTA)

2) The Minnesota Speech-Language Hearing Association (MSHA)

3) The Minnesota Chapter of American Physical Therapy Association (MNAPTA)

4) The Minnesota Academy of Audiology

5) The Vice President of Advocacy for Care Providers of Minnesota

6) Minnesota Disability Law Center

7) The Chair of the Minnesota State Bar Association's Health Law Section

8) All county directors and tribal chairpersons

9) All others who request notification

The department will also send a copy of all notices to be published in the State Register to all persons on the mailing list we compile. Along with the notice of hearing, the department will include a statement that a copy of the proposed rules will be sent to anyone who contacts the department for that purpose. Notice of the proposed rules and the statement of need and reasonableness will also be published on the department's Internet web site.

PROPOSED RULE CHANGES

Part 9505.0391. Therapists eligible to enroll as providers. The language, "…and maintains an office at the therapist's or pathologist's own expense" is removed from the first sentence because the department currently has a system in place to prevent double

billing and to accurately track which therapist, pathologist, or audiologist actually performed the therapeutic service.

The 1991 statement of need and reasonableness, (hereinafter "SONAR") states that:

> "A person who is self-employed as a physical therapist, occupational therapist, an audiologist, or a speech-language pathologist is eligible to enroll as a provider. The same person may also be an employee of a provider. Thus, it is necessary to clarify the therapist's standing as an enrolled provider while functioning as an employee of a provider. Only enrolled providers are eligible to receive medical assistance payment for health services to recipients. If a providers' employee furnishes the health services, the provider is the entity that submits the billing and receives the medical assistance payment. See part 9505.0450 for billing procedures applicable to all providers. Minnesota Statutes, section 256B.04, subdivision 15 prohibits duplicate payments for the same service. Thus, it is reasonable to prohibit payment on a fee for service basis to a therapist who is functioning as a providers' employee because this prohibition is administratively efficient and prevents duplicate billings and thus possible duplicate payments for the same service to the same recipient."

Therefore, the 1991 SONAR indicates that this language was included in the rule to prevent duplicate billing for the same service for the same client. However, the department's current medical assistance claims processing system now has a process built into it that looks at the recipient's identification number, the date of service, the procedure billed, and place of service to determine if the service that is billed has already been paid to the same or a different provider. Therefore, this new process in the medical assistance claims processing system prevents duplicate billing from happening so this rule part language is obsolete.

Additionally, if the department changes Minnesota Rules, part 9505.0391 to allow physical and occupational therapists, audiologists, and speech-language pathologists who are employed by physician's clinics and other such facilities to enroll directly with the department, the therapist's, audiologist's, or pathologist's identification number would be used on the claim form indicating the "treating provider" and the department would have a better idea of which therapist, audiologist, or pathologist actually provided the service. This would allow the department to better track the therapist, audiologist, or pathologist services for accountability.

In the sentence, "Additionally, a physical therapist or occupational therapist must be certified by Medicare." the word "certify" is changed to "enroll". According to the 1991 SONAR, this requirement is in the rule to maximize federal financial participation in the Medicare program when a client is eligible for both Medicare and medical assistance. However, Medicare no longer certifies physical and occupational therapists. In 1998, HCFA revised their policy to replace "Conditions for Coverage: Outpatient Physical Therapy Services Furnished by Physical Therapists in Independent Practice" (42

C.F.R. §486.150), which required survey and certification, with a simplified criteria for physical therapists in private practice that would use a carrier enrollment process.[1] At the same time, coverage of outpatient occupational therapy services were codified in 42 C.F.R. §410.59 with requirements that paralleled the 42 C.F.R. §410.60 requirements for outpatient physical therapy. Additionally, the Medicare Benefits Policy Manual (that is published by the U.S. Department of Health and Human Service's Centers for Medicare and Medicaid Services) has incorporated the provisions of 42 C.F.R. §410.60 and 42 C.F.R. §410.59 into their manual and use the terminology "enroll" not "certify". Therefore, to be consistent with the correct terminology, the department recommends changing the word from "certify" to "enroll".[2]

The last sentence of the paragraph to Minnesota Rule, part 9505.0391 ("However, a service provided by an independently enrolled therapist or pathologist is not eligible for medical assistance payment under the therapist's or pathologist's provider number on a fee for service basis if the service was provided:") is removed because this sentence introduces two conditions (items A and B) in which a therapist or pathologist would not be eligible for a medical assistance payment that are being removed from the rule.

Part 9505.0391, subpart A. Part 9505.0391, subpart A states that a therapist or pathologist is not eligible for a medical assistance payment if they were employed by another provider. However, as explained above, this language was included in the rule to prevent duplicate billing for the same service for the same client from occurring. However, the department now has a system that prevents duplicate billing from happening so this rule part language is obsolete.

Part 9505.0391, subpart B. Part 9505.0391, subpart B states that a therapist or pathologist is not eligible for a medical assistance payment if the services were provided by another therapist or pathologist employed by the independently enrolled therapist

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[1] On page 58868 of the Federal Register/Vol. 63, No. 211/ Monday, November 2, 1998 the new carrier enrollment process is explained as well as the justification for the changes to the rule. 42 C.F.R. 486.150 was officially removed from the Code of Federal Regulations in 2004. (**See** Federal Register/Vo. 69, No. 150/Thursday, August 5, 2004, page 47580.)

[2] Speech-language pathologists are not included in this language because speech-language pathologists may not enroll and submit claims directly to Medicare. The services of speech-language pathologists may be billed by providers such as rehabilitation agencies, HHAs, CORFs, hospices, outpatient departments of hospitals, and suppliers such as physicians, NPPS, physical and occupational therapists in private practice. (**See** Medicare Benefits Policy Manual, Section 230.3 Practice of Speech Language Pathology, Section B. Qualified Speech-Language Pathologist Defined) Audiologist do not enroll in Medicare either.

unless the employee was a speech-language pathologists or an audiologist completing a clinical fellowship year. The language, "by another therapist or pathologist employed by the independently enrolled therapist…" is removed because according to the 1991 SONAR, this language was added to prevent duplicate billing from occurring. However, as explained above, the department now has a system in place that prevents duplicate billing from occurring. Additionally, the language, "…unless the employee is a speech-language pathologist or an audiologist completing a clinical fellowship year." is removed because this language is already in the rule under Minnesota Rules, part 9505.0390, subpart 3, item B and Minnesota Rules, part 9505.0390, subpart 4, item B and is redundant.