IN THE MATTER OF THE PROPOSED ADOPTADOPTION OF AMENDMENTS TO PERMANENT RULES GOVERNING THE DETERMINATION OF PAYMENT RATES FOR INTERMEDIATE CARE FACILITIES FOR PERSONS WITH MENTAL RETARDATION OR A RELATED CONDITION, PARTS 9553.0010 TO 9553.0080

STATEMENT OF NEED AND REASONABLENESS

Legislative Authority

Minnesota Rules, parts 9553.0010 to 9553.0080 (Rule 53) establish procedures for determining rates for all intermediate care facilities for persons with mental retardation participating in the medical assistance program, except intermediate care facilities in state owned hospitals as defined in Minnesota Statutes, section 246.50, subdivision 5. These rules took effect on December 16, 1985. They were developed to implement Minnesota Statutes, section 256B.501, subdivisions 1 to 3.

The rule parts were promulgated according to the requirements of federal statutes 42 USC 1396 (a) (13) (A) and federal regulations 42 CFR Part 447.

Background Information

A. Amendments related to training and habilitation services.

Minnesota Statutes, section 256B.501, subdivisions 1 to 3 specify that the commissioner of human services shall establish by rule, procedures for determining rates for care of residents of ICF/MRs. When parts 9553.0010 to 9553.0080 were originally promulgated, the costs of training and habilitation services were not included as part of the procedure for determining rates for care of residents of ICF/MRs because Developmental Achievement Centers (DACs) were billing Medicaid directly at that time.

Between October 1, 1984, and October 1, 1985, the Health Care Financing Agency (HCFA) conducted a review of Minnesota's training and habilitation agencies to determine if the State administered the Medicaid portion of this program in accordance with the federal regulations outlined in the Code of Federal Regulations. As a result of this review, HCFA required that Developmental Achievement Centers (DACs) stop billing Medicaid directly for services provided to residents of intermediate care facilities for persons with mental retardation (ICFs/MR). HCFA pointed out that the Medical Assistance (MA) program does not recognize training and habilitation agencies as Medicaid providers independent from ICF/MR providers. Accordingly, training and habilitation services provided to ICF/MR residents are MA reimburseable only when the ICF/MR provides the service or contracts with a licensed agency to provide the service (42 CFR 442.417). In both cases the ICF/MR is the Medicaid provider and must bill and be reimbursed for the training and habilitation services.

In written recommendations resulting from the review which were issued by HCFA in June of 1985, it was recommended that, "the state cease treating DACs as independent Title XIX providers and leave the billing to ICFs/MR." However, Minnesota's philosophy of service delivery insists on separate

payment to and legal identification of residential and day service providers, thereby preventing the state from channeling funds for training and habilitation services to the ICF/MR providers who would then pay the day service provider.

To address HCFA's concerns and yet maintain separate payment for training and habilitation services, a system was developed whereby the ICF/MR completes an Assignment of Payment Form to sign the DAC portion of the ICF/MR payment over to the state agency. Federal regulations allow ICFs/MR to complete an Assignment of Payment Form under 42 CFR 447.10(e). The state agency reassigns the DAC portion of the ICF/MR payment to the DAC directly for services authorized and contracted for by the ICF/MR but provided by the DAC. The ICF/MR must, therefore, authorize all training and habilitation services provided to residents before direct payment to the DAC can take place. Authorization of costs by the ICF/MR is also required in part 9525.1290, subpart 1, item E.

The vendor of training and habilitation services and the ICF/MR service provider also sign a Two Party Agreement in which both parties agree to comply with the requirements of the Code of Federal Regulations 42 CFR 442.417, 442,463, 442.464, 42 CFR, part 440 and 42 CFR, part 447 regarding the provision of and billing for training and habilitation services to ICF/MR residents. The Assignment of Payment in combination with the Two Party Agreement is necessary to insure that Minnesota's model of service delivery meets the requirements for federal reimbursement. The fact that ICFs/MR verify the accuracy and legitimacy of charges on bills submitted to the Department for MA reimbursement of training and habilitation services to the ICF/MR residents is a result of the state's laws and procedures which require the legal separation of those services and payment mechanisms, and the federal requirements obliging ICFs/MR to provide both in order to remain certified. It is the logical outcome of applying federal regulations to Minnesota's service system. Requiring a sign-off allows federal financial participation for training and habilitation services but in no way changes the responsibility of the ICF/MR to ensure these services are provided in accordance with the Individual Service Plan.

After HCFA-Baltimore reviewed Minnesota's use of the Two Party Agreement and Assignment of Payment Mechanism, HCFA stated in a letter to Commissioner Levine dated February 5, 1986, that direct payment to DACs of Title XIX dollars could occur but that DACs could not bill Medicaid directly for the training and habilitation services they furnish to ICF/MR residents. HCFA also stated that while direct payment to DACs is legal in accordance with 42 CFR 447.10, it did not relieve the ICFs/MR from ensuring that the DACs are providing the required services.

Since training and habilitation service costs are a component of the ICF/MR payment rate, the proposed amendments add procedures for reimbursement of training and habilitation services to the rules governing the determination of payment rates for ICF's/MR. These amendments also incorporate changes which reflect the intent of Minnesota Statutes, sections 252.40 to 252.47, the 1987 legislation pertaining to the provision of training and habilitation services.

B. Other Proposed Amendments

1. Part 9553.0030

A number of non-profit ICF/MR providers depend on large amounts of federal monies to fund other programs besides ICF/MR operations. One of the stipulations of receiving such federal monies is that they must allocate central office costs according to a federally approved cost allocation plan. In cases where the non-profit organization operates both ICF/MRs and other federal programs, they must allocate costs in accordance with two different cost allocation methods. This has resulted in increased administrative costs and in some cases, costs being unreimburseable due to gaps in the two allocation methods. Input from non-profit providers concerning this issue has resulted in a proposed amendment to part 9553.0030 to allow the federally approved cost allocation plan to be used by the state's Medical Assistance Program and the federal government.

2. Part 9553.0040

Compliance with the 1985 Life Safety Code frequently requires modifications to the facility's physical plant or the purchase of additional depreciable equipment. A new part (9553.0061) was previously added to Rule 53 to provide for adjustments to the special operating cost payment rate for actions taken to comply with the 1985 Life Safety Code. In order to properly instruct providers on where to classify and record these costs on their annual cost reports, the Department proposes to amend part 9553.0040 to properly categorize costs incurred from these Life Safety compliance actions and to insure uniform cost reporting. Hence, the special operating cost category (part 9553.0040, subpart 6) has been expanded to accommodate the cost of Life Safety Code adjustments.

3. Part 9553.0050

The Department must reduce the number of persons with developmental disabilities in the regional treatment centers to meet the requirements of the Negotiated Settlement under Welsch vs Gardebring and to meet the Department's F.Y. 88-89 budget objectives as approved by the 1987 legislature. Because the persons with developmental disabilities who reside in Regional Treatment Centers typically have more severe handicaps than persons served in the community, a major strategy planned by the Department to achieve the Regional Treatment Center population reductions is to convert existing community ICFs/MR so that the facilities can serve persons with more severe handicaps.

Historically, Minnesota and other states moved the most capable people back to their home communities first, leaving people with more severe handicaps in inappropriate settings far from their homes.

While it has been well documented that virtually all persons with developmental disabilities, even those with high levels of physical or behavioral disabilities, can be served in ordinary homes if given adequate supports, it is equally true that an extensive network of ICFs/MR has developed in Minnesota. Until the resources are available to do individualized residential placements for all persons with developmental

disabilities, with size of residence not determined by existing buildings, the Department will work with counties and community ICFs/MR to assist with physical plant and/or staffing modifications so that small ICFs/MR can assist with meeting the needs of all persons, even those with more severe disabilities, so these persons can live in settings that are more normal than those in which they currently reside.

To achieve the required reductions, more programs are needed to serve persons with physical handicaps and/or severe behavior disorders. Serving these persons in the community requires specialized staff training, program consultation, special equipment, and some modifications to the facilities. Although these persons may be ambulatory and not need accessible, barrier-free facilities (that is class B facilities), they are usually not capable of evacuating a facility in an emergency situation due to their unwillingness or inability to respond to alarms or other emergency detection equipment. Community facilities that serve these persons must be either licensed as a Class B facility or as a facility that meets the standards for impractical evacuation capability as provided in the Code of Federal Regulations, title 42 section 442.508, as amended through October 1, 1986. These amendments allow a facility to change both its life safety code status and its program to serve persons who require special programs, but do not require barrier-free facilities.

4. Part 9553.0075

Rule 53 provides for an interim payment rate for facilities converting more than 50 percent of its licensed beds from Class A beds to Class B beds (part 9553.0075, subpart 1). Such conversions facilitate the legally mandated movement of residents out of state hospitals and into the community under the Negotiated Settlement in Welsch vs Gardebring. One of the provisions of subpart 1 establishes the effective date for the new interim payment rate as the date the converted beds are occupied by the new residents.

As a result of input from providers, it is evident that there are sometimes problems encountered in the movement of residents who require the Class B beds which are beyond the control of the provider. As a result, an amendment to the rule has been proposed which would make the effective date of interim payment rates less restrictive.

Amendment Process

The Department published a "Notice of Intent to Solicit Outside Opinion" in the State Register, on June 15, 1987, and another on September 28, 1987. Advisory committee meetings were held on July 20, 1987, and October 2, 1987, to review the proposed amendments. A list of the advisory committee members is contained in Exhibit A.

Statement of Need and Reasonableness for Specific Rule Provisions

The specific provisions of parts 9553.0010 to 9553.0080 which are to be amended are affirmatively presented by the Department in the following narrative in accordance with the provisions of the Minnesota Administrative Procedures Act, Minnesota Statutes, chapter 14 and the rules of the Attorney General's Office.

Part 9553.0020, subp. 46a

This subpart defines training and habilitation costs. This definition is necessary to establish the meaning of this term which is used in the proposed amendment to part 9553.0035, subp. 16. It is reasonable to specify that only the costs for training and habilitation services which are offered by vendors who meet state licensing standards, which are necessary as specified in the client's individual service plan, and which are consistent with state law be considered costs for purposes of Medical Assistance reimbursement because these are the mechanisms the state has developed to monitor quality and insure appropriate service provision in order to fulfill the state's responsibility to protect the health, safety and well being of its citizens with mental retardation.

Part 9553.0030, subp. 4, item F

This subpart deals with the allocation of central, affiliated, or corporate office costs to individual ICF/MR facilities. Item F is a new provision which gives governmental or non-profit organizations that have a federally approved cost allocation plan the option of allocating central office costs to their facilities based on their federal cost allocation plan.

A number of ICF/MR facilities depend on large amounts of federal dollars to run their operations. These facilities are required to have a cost allocation plan in place which has been approved by a federal agency. It is necessary to make this addition to the rule to allow facilities to allocate Rule 53 costs based on their federal cost allocation plan. This will eliminate the increased administrative costs involved in maintaining two cost allocation systems and help to prevent the possibility of some costs being unrecoverable due to the use of multiple cost allocation methods.

It is reasonable to exclude for-profit facilities from this provision since these organizations may have unrelated business operations which involve federally approved cost allocation plans.

Part 9553.0035, subp. 16

This subpart establishes a procedure for paying training and habilitation services costs as a pass-through for the ICF/MR. It stipulates that medical assistance shall not pay more than the county pays for comparable training and habilitation services provided at that site and funded primarily with county funds.

It is necessary to make this addition to the rule to reflect the federal requirement that training and habilitation services costs be paid through the ICF/MR as outlined in the Background Information section of this Statement of Need and Reasonableness. This amendment also complies with the federal requirements (42 CFR 447.253(g)) of statewide uniformity in procedures for rate setting for the ICF/MR.

It is reasonable to stipulate that medical assistance will not pay more than the county for comparable services because Minnesota Statutes, section 256B.501 mandates that the medical assistance rate paid should cover only "costs that must be incurred in the care of residents in efficiently and economically operated facilities". If a service can be provided at a given rate for clients receiving county funds, then comparable services can also be provided at the same rate for clients receiving medical assistance. The rate paid for the "comparable service" would be a site specific rate for vendors who differentiate their rates by site. In response to public comments received on the proposed amendment, the phrase, "at each site" was added to make it clear that "comparable services" was meant to apply to services provided at the same service site.

It is reasonable to stipulate that the county funded rate be set in accordance with Minnesota Statutes 252.40 to 252.47 because these are the statutes that specify the procedures the county is to follow in setting training and habilitation services rates.

The pass-through for training and habilitation services is paid separately to the vendor of training and habilitation services by the commissioner in accordance with the Two Party Agreement authorized in Code of Federal Regulations, title 42, section 442.417 and in accordance with the Assignment of Payment authorized by the Code of Federal Regulations title 42 section 447.10 (e). The Assignment of Payment is signed by the provider and the Two Party Agreement is signed by the provider and the vendor of training and habilitation services. Minnesota law insists on separate payment to and legal identification of residential and day service providers, thereby preventing the state from channeling funds for training and habilitation services to the ICF/MR providers who would then pay the day service provider. The Two Party Agreements in combination with the Assignment of Payment is necessary to insure that Minnesota's model of service delivery meets the requirements for federal reimbursement. The fact that ICFs/MR verify the accuracy and legitimacy of charges on bills submitted to the Department for MA reimbursement of training and habilitation services provided to the ICF/MR residents is a result of the state's laws which require the legal separation of those services and payment mechanisms, and of the federal requirement obliging ICFs/MR to provide both in order to remain certified. It is the logical outcome of applying federal regulations to Minnesota's service system.

It is necessary to specify that since the costs of training and habilitation services are to be paid separately, they should not be included in the computation of the total payment rate which is paid directly to the ICF/MR provider because inclusion of these costs in the computation of the total payment rate would result in double payment of training and habilitation services costs.

Part 9553.0040, subp 6, items F and G

Part 9553.0040 defines the cost categories to be used in the reporting of ICF/MR costs. Subpart 6 deals specifically with the special operating costs. These are costs which are typically incurred during the rate period itself as opposed to the cost report period used to determine the prospective rate. This amendment adds two new costs to the special operating cost category. They are (1) training and habilitation services costs and (2) physical plant modifications or additional depreciable equipment costs allowed under the Life Safety Code adjustment. Details concerning these costs are outlined in other provisions of the rule, specifically parts 9553.0035, subpart 16 and 9553.0061. It is necessary to specify a cost category for these costs so that they can be properly reported on the annual cost report. It is reasonable to include the costs related to the Life Safety Code adjustment in this subpart because these costs are to be specially reimbursed apart from costs of a similar nature. Therefore, including these costs in the special operating cost category seems appropriate.

Part 9553.0050, subp. 3

The amendments to this subpart are designed to clarify the one-time rate adjustment process. By adding a new provision, the amendments also will help the Department to reduce the number of persons with developmental disabilities in the regional treatment centers as required in the Negotiated Agreement under Welsch vs Gardebring and meet the Department's F.Y. 88-89 budget objectives as approved by the 1987 legislature. Because the persons with developmental disabilities who currently reside in Regional Treatment Centers typically have more severe handicaps than persons served in community facilities, a major strategy planned by the Department to achieve the Regional Treatment Center population reductions is to convert existing community ICFs/MR so that the facilities can serve persons with more severe handicaps. Although part 9553.0075 provides for conversion of community ICFs/MR from class A to class B, these conversions are limited in number due to the structural limitations of many facilities. Therefore, use of part 9553.0075 will not provide sufficient community placements to serve all of the persons with developmental disabilities from regional treatment centers who must be placed in the community during the biennium.

To achieve the required reductions, more community-based programs are needed to serve persons with physical handicaps and/or severe behavior disorders. Serving these persons requires specialized staff training, program consultation, special equipment and some modifications to the facilities. Although these persons may be ambulatory and do not need accessible, barrier-free facilities (that is class B facilities), they are usually not capable of evacuating a facility in an emergency situation due to their unwillingness or inability to respond to alarms or other emergency detection equipment. Community facilities that serve these persons must either be licensed as a Class B facility or as a facility that meets the standards for impractical evacuation capability as provided in the Code of Federal Regulations, title 42 section 442.508, as amended through October 1, 1986.

These amendments allow a facility to change both its life safety code status and change its program to serve persons who require special programs, but do not require barrier-free facilities. The Department does have another rule, parts 9510.1020 to 9510.1140, which allows for increased reimbursement for persons with special needs on an individual basis. However, the rule does not provide reimbursement for a systematic change in the facility's population and program as a whole as allowed under this proposed amendment.

These amendments are reasonable because they provide a method for systematically changing a facility's program to serve more severely handicapped persons. It is reasonable to allow a facility to systematically change its program because changing the program is less costly than developing new ICFs/MR to serve persons with more severe handicaps. The costs allowed are reasonable because they are costs directly related to serving persons with more severe handicaps.

Items A and B. It is necessary to reformat item A and create a new item B to clarify the eligibility factors and to add a new provision specifying that a Class A facility planning to substantially modify its facility to serve more severely handicapped persons is eligible for a one-time payment rate adjustment if the facility can meet the requirements in item B. It is reasonable to allow a one-time adjustment for this purpose to encourage facilities to make the changes needed to serve these persons. It is reasonable to require that the facility be substantially modified in order to receive a one-time adjustment because the provider should be able to make minor modifications without a one-time adjustment, especially given the availability of the special needs rate exception payment under parts 9510.1020 to 9510.1140. In addition, it is reasonable to encourage substantial modifications because the Department needs more licensed beds that may be used to serve these persons.

The first method of qualifying for a one-time adjustment has been deleted because it was found to be too restrictive. Instead of looking at whether the facility's program staff complement is equal to or greater than the program staff complement included in the facility's total payment rates during the rate year covering the date of the finding and the immediately prior rate year to determine if the facility qualifies for a one-time rate adjustment, the Department has defined additional staff as the staff in excess of the number included in the facility's total payment rate covering the date of the finding of deficiency or need. This definition ensures that the facility cannot receive a one-time adjustment to cover the cost of staff already included in the rate but does not preclude them from receiving a one-time adjustment to cover the cost of the additional staff not previously included in the rate. It is reasonable to limit the one-time adjustment in this way, rather than to tie eligibility to the actual staff complement at the time of the finding, so that a facility is not disqualified from receiving a one-time rate adjustment due to a temporary decrease in staff. Limiting the comparison to only the rate year covering the date of the finding of deficiency or need is a reasonable way to simplify the determination of eligibility. In addition, eliminating reference to the immediately prior rate year removes the possibility that a facility could be negatively affected by past behavior undertaken under different circumstances. The other methods of qualifying for a one-time

adjustment (item A, subitems 2 and 3) have not been changed. They have simply been reformatted.

Item C (now D) first sentence. It is necessary to change this sentence because what once was item A is now two items. This change simply clarifies that both items apply. Other editing changes have also been made in the following items:

Item B (now C); Item C (now D); Item D (now E); Item E (now F); Item F (now G); and Item G (now H)

New item D, subitem 1. Because the facility modifications necessary to enable a provider to serve persons who require a facility that meets the standards for impractical evacuation capability result in costs not previously covered under the one-time adjustment it is necessary to amend subitem 1 to include the additional costs.

Units a to e. It is reasonable to allow the cost of these items because they are necessary costs of modifying a facility and program so that it may serve more severely handicapped persons. The costs allowed under this provision are similar to the costs allowed in part 9510.1090 (Establishing Special Needs Rate Exception Payment). Because this rule part essentially provides for a facility-wide adjustment similar to the individualized special needs rate exception payment it is reasonable to include similar costs in this provision. It is necessary to limit the costs allowable under the one-time adjustment to these costs so that the facility does not use the one-time adjustment to pay for costs that are either unallowable or more appropriately reimbursed under other rule provisions.

Limit on equipment costs. It is reasonable to limit the amount of equipment costs allowed under the one-time adjustment because the rule contains other provisions for the reimbursement of major equipment purchases. In addition, it is necessary to limit the costs allowed under a one-time adjustment so that the Department is able to stay within its budget. The one-time adjustment allows the facility to be reimbursed for certain costs more rapidly than is possible under other rule provisions. This exception is meant to assist facilities to handle costs that are in excess of the normal costs of running this type of facility and that are not included within their existing rates. It is not meant to replace the prospective reimbursement system set up in the other rule parts.

Exception to the limit on equipment costs. This provision was added to the amendments in response to comments received from the advisory committee at the October 2, 1987, meeting. The advisory committee members pointed out that in some cases the cost of the equipment necessary to modify the facility might exceed $1500 but might still be reasonable. They suggested that the commissioner be allowed to review the need for the equipment and determine if an exception should be made. The Department agrees that there may be times when it would be appropriate to approve equipment costs of over $1500 and therefore added this provision. It is reasonable for the Commissioner's determination to be final to avoid needless expenditure of time and public funds on a matter where the

Commissioner has the authority to make the final decision under Minnesota Statues section 256B.501.

Part 9553.0075, subp 1

This subpart deals with the determination of an interim payment rate for facilities converting more than 50 percent of its licensed beds from Class A to Class B beds. This amendment alters the criteria for determining the effective date of the interim payment rate from the date on which all of the converted beds are occupied to the date on which 60 percent of the converted beds are occupied.

The requirement that all converted beds be occupied has proven to be too restrictive. As a part of the process of moving residents, the ICF/MR providers must deal with both the counties and the Regional Treatment Centers. Problems have occurred which are beyond the control of the provider. It is not reasonable to expect the providers to shoulder the financial burden in these cases. Therefore, it is reasonable to require that only 60 percent as the transition point of the converted beds be occupied before the interim rate takes effect.

The Department wants the movement of residents to be a planned operation, but one which takes into account some unforeseen difficulties. It is reasonable to use 60 percent as the transition point because it shows that a substantial effort has been made in the movement of residents. It is important to have a rapid transition so that the Interim/Settle-up period reflects the cost base for future rate years.

Conclusion

The foregoing statements demonstrate the need for and the reasonableness of the proposed amendments to parts 9553.0010 to 9553.0080. To a great extent, the need for the amendments is prescribed expressly by state statute, federal requirements, and the inherent responsibility of the Minnesota Department of Human Services to exercise prudent management of public funds.

11/16/87
DATE

Julie Brunner
for SANDRA S. GARDEBRING
Commissioner

EXHIBIT

RULE 53 (PARTS 9553.0010 TO 9553.0080)

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