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SEP 29 1994

State of Minnesota

Department of Human Services

Human Services Building
444 Lafayette Road N
St. Paul, Minnesota 55155

September 28, 1994

Ms. Maryanne Hruby
Executive Director, LCRAR
55 State Office Building
St. Paul, Minnesota 55155

Dear Ms. Hruby:

Pursuant to Minnesota Statutes, section 14.131, enclosed is a statement of need and reasonableness relating to the Surveillance and Integrity Review Program, Minnesota Rules, parts 9505.2160 to 9505.2245.

If you have any questions on the statement of need and reasonableness, please do not hesitate to contact me at 296-2794.

Sincerely,

Robert Klukas

Robert Klukas
Rules Division

Encl.

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDMENTS TO DEPARTMENT OF HUMAN SERVICES RULES GOVERNING THE SURVEILLANCE AND INTEGRITY REVIEW PROGRAM, MINNESOTA RULES, PARTS 9505.2160 TO 9505.2245

MINNESOTA DEPARTMENT OF HUMAN SERVICES

STATEMENT OF NEED AND REASONABLENESS

INTRODUCTION

Minnesota Rules, parts 9505.2160 to 9505.2245 (informally called Rule 64) govern the Department's surveillance and integrity review program (SIRS). Rule 64 sets out review standards and procedures used by the Department to: (1) monitor compliance with medical assistance (MA), general assistance medical care (GAMC), consolidated chemical dependency treatment, MinnesotaCare, and catastrophic health expense protection program requirements; (2) identify fraud, theft, or abuse by providers or recipients of health services; (3) establish administrative and legal sanctions in cases of fraud, theft, or abuse; and (4) investigate and monitor compliance with federal and state laws and regulations related to the MA program. Rule 64 also establishes standards applicable to the health service and financial records of providers. It also applies to home and community-based services under a waiver from the federal government, or any other health service program administered by the Department, as noted in part 9505.2160, subpart 1.

42 Code of Federal Regulations 456.3 requires the Department to effect a statewide surveillance and utilization control program (SURS). 42 CFR, 455 sets forth requirements for the SURS program, known in Minnesota as the "SIRS" program. Pertaining to the MA program, Minnesota Statutes, section 256B.04, subdivision 10 requires the Department to promulgate rules to identify and investigate, "suspected medical assistance fraud, theft, abuse, presentment of false or duplicate claims, presentment of claims for services not medically necessary, of false statement or representation of material facts by a vendor of medical care, and for the imposition of sanctions against a vendor of medical care."

Furthermore, Minnesota Statutes, section 256B.04, subdivision 2 requires the Department to make rules to carry out and enforce the MA program, while Minnesota Statutes, section 256B.04, subdivision 4 requires the Department to cooperate with the federal government to qualify for federal aid in connection with the MA program.

Likewise, Minnesota Statutes, section 256D.03 subdivision 7, paragraph (b) requires the Department to promulgate rules for GAMC that set standards for "surveillance, and utilization

review procedures that conform to those established for the medical assistance program pursuant to chapter 256B."

Minnesota Statutes, section 256B.064, subdivision 1d allows the Department to seek recovery of investigative costs from any vendor of health services "who willfully submits a claim for reimbursement for services the vendor knows, or reasonably should have known, is a false representation and which results in the payment of public funds for which the vendor is ineligible."

Other relevant statutes are:

- Minnesota Statutes, section 62E.54, subdivision 1, paragraph (d) (catastrophic health expense protection program);

- Minnesota Statutes, section 256.9352, subdivision 2; MinnesotaCare, Minnesota Statutes, section 256.9353, subdivision 1 which defines "covered health services" as those reimbursed under chapter 256B, the MA chapter; and Minnesota Statutes, section 256.9351, subdivision 3 which defines "eligible providers" as those providing covered health services to MA recipients under MA rules; and

- Minnesota Statutes, chapter 254B, chemical dependency services to persons, including those eligible for MA and general assistance medical care. Because some persons receiving chemical dependency treatment are MA and GAMC recipients, SIRS procedures and standards applicable to these two assistance programs apply to them and their providers.

Under a waiver from the federal government, home and community-based services are available to certain MA recipients. Minnesota Statutes, section 256B.04, subdivision 2 requires the Department to administer the MA program uniformly throughout the state. Having a SURS program is a requirement to obtain federal financial participation, according to Minnesota Statutes, section 256B.04, subdivision 4 and 42 CFR 455.13 and 456.3. Using the same standards and procedures of utilization and surveillance review and control for persons who receive home and community-based services under a waiver is consistent with the cited federal regulations and with Minnesota Statutes, section 256B.04, subdivision 2.

HISTORY

The Department adopted rules relating to the SIRS program in September, 1981. The rule was renumbered some years later as

parts 9505.1750 to 9505.2150, and then amended and renumbered again in 1991 as parts 9505.2160 to 9505.2245.

Amendment is required at this time to comply with federal regulations and state law and to update Code of Federal Regulation cites within the rule.

On March 8, 1993 at 17 State Register 2159 the Department published a Notice of Solicitation of Outside Information or Opinions. Subsequently, a Rule Advisory Committee was convened in order to gather public comment on proposed rule drafts. The committee consisted of representatives from the Minnesota Alliance for Health Care Consumers, legal advocates, the Minnesota Hospital Association, medical associations, the Minnesota Association of Homes for the Aging, other health service providers, the National Association of Social Workers and the Minnesota Pharmacists' Association. See Attachment A.

The Advisory Committee met 3 times: On June 16, 1993; July 12, 1993; and August 16, 1993. Proposed rule amendments are based on the advice and opinions expressed by the committee, the decisions of the Department, and the requirements of laws and regulations.

SMALL BUSINESS CONSIDERATIONS

The Department has reviewed Minnesota Statutes, section 14.115 governing small business considerations in rulemaking. It requires the Department to consider specific methods for reducing the impact of the rule on small business if amendments may affect small business. However, the statute also provides that it does not apply to "service businesses regulated by government bodies, for standards and costs, such as nursing homes, long-term care facilities, hospitals, providers of medical care (emphasis added)" according to Minnesota Statutes, section 14.115, subdivision 7, clause (3). Because the proposed rule language comes within the exemption of Minnesota Statutes, section 14.115, subdivision 7, clause (3), it is the Department's position that Minnesota Statutes, section 14.115 is not applicable.

FISCAL COSTS ASSOCIATED WITH PROPOSED LANGUAGE

The Department believes the proposed rule amendments are fiscally neutral and will not affect either local or state spending in either of the two fiscal years following their adoption. Nevertheless, the Department has prepared a "Fiscal Impact" document for the rule, explaining the lack of fiscal ramifications of this rule.
Because the Department's Fiscal Impact document anticipates that the fiscal costs associated with the proposed rule language will not require the state or local public bodies to expend added

public money in either of the two years immediately following adoption of the rule amendments, Minnesota Statutes, section 14.11, subdivision 1 is not applicable.

Further, because the proposed amendments do not establish or modify fees, Minnesota Statutes, section 16A.128 is not applicable.

AGRICULTURAL LAND

Because the proposed rule language does not have a direct and substantial adverse impact on agricultural land in Minnesota, Minnesota Statutes, section 14.11, subdivision 2 is not applicable.

SPECIFIC RULE PROVISIONS

The amendments to parts 9505.2160 to 9505.2245 are affirmatively presented by the Department in the following narrative in accordance with the provisions of the Minnesota Administrative Procedure Act, Minnesota Statutes, chapter 14 and the rules of the Attorney General.

GENERAL NOTE

Throughout this rule, the Department proposes to include vendors in the list of those who come within the scope of this rule. All providers are vendors, but not all vendors are providers. The present rule, which generally uses the term "provider", does not adequately reflect the authority and responsibility of the department to oversee payments to all vendors, not just those vendors who are providers. The term "vendor" is defined in this rule according to Minnesota Statutes, section 256B.02, subdivision 7. Providers, already within the scope of this rule, are not the only entities providing health services. As discussed in part 9505.2165, proposed subpart 16a, vendors that are not providers contract with providers to dispense goods and health services to recipients. For example, a personal care provider will contract with individual personal care assistants to provide health services. Personal care assistants are considered vendors. It is also reasonable to substitute the term "vendor" for "provider" when appropriate, because the definition of "vendor" subsumes and includes the term "provider". It is reasonable to use more inclusive terms to avoid unnecessary words and make the rule more clear. Substitution of the term "vendor" is not meant to imply in any way that the particular provision no longer applies to providers.

It is necessary to allow the Department to review the practices and procedures of vendors as it reviews providers, and it is reasonable to include vendors in the rules that also apply to

providers, with the exception of those parts covering payment to providers, because as subcontractors, those vendors that are not also providers are not directly paid by the Department but are paid by providers.

Where the term "vendor" is substituted for the term 'provider" in parts of this rule, this General Note discussion provides the background necessity and reasoning for the substitution.

9505.2160 SCOPE AND APPLICABILITY.

In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this statement of need and reasonableness (SNR).

Subpart 1. Scope. It is reasonable and necessary to delete "children's health plan" because it was replaced when the Health Right Act was enacted in 1992, see Minnesota Statutes, sections 256.9351 to 256.9361. It is reasonable and necessary to add "MinnesotaCare" to part 9505.2160 in order to inform interested persons of the expanded scope of the rule and to make the rule consistent with recent changes to Minnesota Statutes. The program was subsequently renamed "MinnesotaCare".

It is reasonable and necessary to add "prepaid medical assistance programs", in order to inform readers of the scope of the rule and to make the rule consistent with statutes. The prepaid medical assistance plan provisions, Minnesota Statutes, section 256B.031, were enacted in 1987.

It is necessary to add the cite to Minnesota Statutes, chapter 152, regarding prohibited drugs, since controlled substances are available by prescription and, therefore, providers prescribing, dispensing or administering the controlled substances and recipients receiving or taking the controlled substance are subject to the medical assistance rules. It is reasonable to add the cite in order to inform the reader of all statutes that must be read in conjunction with this rule.

9505.2165 DEFINITIONS.

Subpart 2. Abuse. In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

Item A. In subitems (6), (10) and (17), it is necessary to change "covered services" to "covered health services" in order to be consistent with the term "health services," defined at part 9505.2165, subpart 5. It is reasonable to use the same terminology throughout this rule.

New subitem (18) is reasonable and necessary to make clear that the provider agreement contains the terms upon which the state will reimburse the provider and the terms upon which a provider will be subject to sanctions pursuant to parts 9505.2160 to 9505.2245.

Item B, Subitem (2). It is necessary that medical assistance payments not be spent on care that is unnecessary. This subitem deems the receipt of duplicate or comparable services for the same condition from multiple providers as unnecessary, except in certain circumstances. It is reasonable to include comparable services with duplicate services because small variations in the nature of the services for the same condition do not cause the services to be substantially different. It is required by Minnesota Statutes, section 256B.04, subdivision 12 that the Department place limits on the frequency with which the same or comparable services may be covered by medical assistance for an individual recipient.

Subitem (11) is necessary to make clear that each individual health service is considered in determining that health services have been obtained by false pretenses. It is reasonable that the plural of health services should be used as clarification that each provision of a health service is considered in making the determination required by the rule.

New subitem (12). Repeatedly obtaining health services that are potentially harmful to the recipient can result in unnecessary costs to the program. At times recipients, who do not have a primary care provider or who do not inform their primary care provider or other providers of the health services they are seeking, obtain health services from a number of providers for a variety of health problems. The lack of a provider managing the recipient's care or lack of communication between the providers is potentially harmful to the recipient and may result in care that is medically unnecessary and create unnecessary costs to the program. Therefore, it is necessary and reasonable to list "repeatedly obtaining health services that are potentially harmful to the recipient", as an abusive or inappropriate practice, subject to sanctions in order to protect the integrity of the program.

New subitem (13) is necessary to include persons who repeatedly obtain health services for self-inflicted injuries or trauma as one of the categories of recipients who will be restricted to the care of one health provider to avoid unnecessary costs and provide better care to the recipient. It is reasonable to include this class of recipients in the group who will be restricted, because the full extent of the self injurious behavior needs to be known to the provider. If one provider cares for the recipient, that provider is aware of the full extent of the self injurious behavior and can better care for

the recipient and limit the cost of repeated or duplicate treatments, than could numerous providers who might see the recipient only occasionally. By application of the sanctions in part 9505.2210, subpart 2, item B, the recipient's use of the programs can be monitored and restricted, therefore it is appropriate to list repeatedly obtaining health services for self-inflicted injuries or trauma as a basis for sanctions.

New subitem (14) is necessary for cost containment. Minnesota Statutes, section 256.04, subdivision 15 requires the department to safeguard against unnecessary or inappropriate use of medical assistance services and against excess payments. Emergency rooms are equipped with the medical technology and staff necessary to immediately diagnose and treat persons with certain conditions. The provision of such technology and staffing which results in higher costs to be met through higher MA payments is medically necessary and appropriate for these persons whose condition meets the definition set forth in part 9505.0175, subpart 11. Non-emergency care is appropriate for persons who are not in an emergency situation. Thus subitem 14 is reasonable as it safeguards against the provision of unnecessary or inappropriate use of services and against excess payments.

New subitem (15) is necessary to prevent unnecessary costs to the program since repeatedly utilizing medical transportation to obtain health services from providers located outside the local trade area is needlessly costly. The addition of subitem 15 is reasonable because in order for a health service to be covered by the program it must be medically necessary and must be the most cost effective health service available which meets the medical needs of the recipient according to part 9505.0210. Transportation to a provider outside the local trade area when a provider is available inside the local trade area is not medically necessary and is not the most cost effective health service available for the medical need of the recipient. According to part 9505.0315, subpart 7, transportation outside the recipient's local trade area will be covered if it is ordered by a physician. The Department is not limiting the recipient's free choice of provider, since the Department is not refusing to pay for the service provided outside the local trade area, it is only limiting the payment of transportation costs.

Subpart 2a. Electronically stored data. Pursuant to Minnesota Statutes, section 256B.064, subdivision 1a, the Department may impose sanctions against providers and vendors for fraud, theft, or abuse, a pattern of false or duplicate claims, or refusal to grant the Department access to examine "all records necessary to disclose the extent of services provided to program recipients." It is necessary and reasonable to examine all records to determine whether a provider or vendor has committed fraud, theft, or abuse of the system or whether a provider or vendor has submitted false or duplicative claims.

No longer are paper files the only method of storing data. Storing data electronically in a typewriter, word processor, computer, computer system, computer network, magnetic tape, or computer disk, is a common practice. The data must be accessible to the Department in order to properly carry out the mandate of Minnesota Statutes, section 256B.064, subdivision 1a. Because the data storage technologies vary and have changed over time, it is necessary to include pre-existing electronically stored data in the data available for review. The inclusion of pre-existing electronically stored data insures that a provider or vendor retains data records for Department review, even if the provider's data storage systems change. The term "pre-existing" is used within the Department to refer to any data systems which were used by a vendor prior to the data system currently in use. The term "existing" is used within the Department to refer to a data system currently in use by a vendor. It is necessary and reasonable to define "electronically stored data", because medical data are part of a health service record and must be reviewed by the Department.

Subpart 4. Fraud. Current language in subpart 4 defines fraud as MA fraud as defined in state law. The Department proposes to amend this subpart to add other elements of fraud: A felony listed in the federal statutes, subject to the exceptions listed in the federal regulations and other related offenses as defined by the statutes listed. Updating the definition of fraud is necessary in order to comply with Minnesota Statutes, section 256B.064, subdivision 1a, which allows the Department to seek monetary recovery and impose sanctions against providers and vendors for fraud. It is necessary and reasonable to meet the requirements of federal laws and regulations that govern fraud in the programs listed in part 9505.2160, subpart 1.

A provider or vendor who prescribes or orders services, equipment or supplies by committing a type of felony listed in 42 U.S.C. section 1320a-7b(b)(3)(D), will not be reimbursed under Medicare or a State health care program. This is necessary to administer regulations, effective July 29, 1991, promulgated to implement section 14 of the Medicare and Medicaid Patient and Program Protection Act of 1987, Public Law 100-93. The regulations, found at 42 CFR 1001.952, list various payment practices which, although potentially capable of inducing referrals of business under the MA program, will be protected from criminal prosecution or civil sanctions. This list sets forth business and payment practices that are given "safe harbor" from what otherwise are considered criminal acts subject to the criminal penalties under the United States Code.

Subpart 6. Health service record. As discussed above in new subpart 2a, health service records are often stored electronically and contain the type of information that the Department desires to review. Therefore, it is necessary to

include such data here, and reasonable to provide notice to those keeping or receiving health service records that access to the data must be granted to the Department.

Subpart 6a. Medically necessary or medical necessity. Part 9505.2165 defines words or phrases used in Rule 64 and is organized alphabetically. A definition for "investigative costs" is being proposed. Because this new definition alphabetically comes before "medically necessary or medical necessity," it is necessary to repeal subpart 6a, and reasonable to renumber it as new subpart 6d.

Subpart 6b. Pattern. It is necessary and reasonable to repeal this subpart in order to allow for the new definition of "investigative costs" at subpart 6c. The content of subpart 6b is now alphabetically found at new subpart 6f.

Subpart 6c. Investigative costs. Minnesota Statutes, section 256B.064, subdivision 1d provides that the Commissioner, "may seek recovery of investigative costs from any vendor of medical care or services who willfully submits a claim for reimbursement for services the vendor knows, or reasonably should have known, is a false representation and which results in the payment of public funds for which the vendor is ineligible."

Therefore, it is necessary to include in this rule that the Department may recover investigative costs pursuant to Minnesota Statutes, section 256B.064, subdivision 1d, and reasonable to define what is meant by "investigative costs." The costs in items A through F are reasonable because they reflect the expenses the Department actually incurs during the investigation of a claim.

Subpart 6d. Medically necessary or medical necessity. This is simply a renumbering of current subpart 6a.

Subpart 6e. Ownership or control interest. This subpart is necessary to meet the federal requirements contained in the cited sections of the Code of Federal Regulations for a state fraud detection and investigation program designed to protect the integrity of the Medicaid program. It is reasonable to rely on the federal definition, because the state is required to meet the federal requirement and the definition adequately describes the ownership and control of a provider of services.

Subpart 6f. Pattern. This is simply a renumbering of current subpart 6b.

Subpart 7. Primary care case manager. It is necessary to substitute the phrase "nurse practitioner or physician assistant practicing within the scope of their practice" for the phrase "who is employed by or under contract with the Department of

Human Services" because the proposed phrase more succinctly describes persons who may be a primary case manager and clarifies the intent of the rule. The phrase "health care services" is being amended to "health services," because part 9505.2165, subpart 5 "defines health services", not "health care services". It is reasonable and necessary to use the same phrase throughout the rule for consistency and clarity.

Subpart 8. Program. This subpart is amended in the same way and for the same reasons discussed in part 9505.2160, subpart 1.

Subpart 9. Provider. Current language provides that a provider has the meaning in part 9505.0175, subpart 38; that is, a vendor as specified in Minnesota Statutes, section 256B.02, subdivision 7 who has signed an agreement to provide health services to recipients. Minnesota Statutes, section 256B.02, subdivision 7 provides that vendors are licensed. Personal care providers, who provide health services, are not licensed and therefore do not come within the first category of the statutory definition of "vendor of medical care" definition of. However, it is necessary to include them in this rule's definition, and reasonable to do so as they currently provide services, as "persons authorized by state law to give such services and supplies", according to Minnesota Statutes, section 256B.02, subdivision 7. It is reasonable to include a personal care provider in the definition of "provider", because they provide services to a recipient for a fee.

Subpart 10a. Responsible party. It is necessary to define "responsible party" because this term has a precise meaning in this rule. It is necessary and reasonable to rely on the statutory definition of the term because Minnesota Statutes, section 256B is part of the enabling legislation for this rule.

Subpart 11. Restriction.
Item B. It is necessary to delete the phrase "to only health services which have been prior authorized", because the phrase is unnecessary. The phrase is unnecessary because the program only covers authorized health care services. It is necessary and reasonable to substitute the phrase "in the eligibility verification system" for the phrase "the recipient's medical identification card or other forms of program identification under part 9505.0145, subpart 4", because the eligibility verification system has replaced the use of medical identification cards. It is reasonable to use rule language which describes the identification system which is currently being used.

Subpart 12. Suspending participation or suspension. The change from "by a program" to "though programs funds" is simply a clarification and does not change the meaning of this subpart.

Subpart 14. Terminating participation or termination. The change from "by a program" to "through program funds" is simply a clarification and does not change the meaning of this subpart.

Subpart 16a. Vendor of medical care or vendor. As discussed in the General Note, vendors as subcontractors of providers, also come within the scope of this rule. Therefore, it is necessary to include a definition of vendor. It is reasonable to use the definition of vendor found in Minnesota Statutes, section 256B.02, subdivision 7, with the addition of "personal care assistant" for the reason noted at part 9505.2165, subpart 9.

9505.2175 HEALTH SERVICE RECORDS.

In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

Subpart 1. Documentation requirement. The Department proposes a new subpart to this part, subpart 7, covering personal care attendant services. Therefore, it is necessary and reasonable to amend subpart 1 so as to cite the correct number of subparts. This change is simply to update this subpart.

Subpart 7. Requirements for personal care provider service records. Because personal care providers and personal care assistants provide services specifically covered but reimbursed at one rate according to the amount of time spent providing the services, it is necessary to require them to keep health service records which provide evidence of the nature, length, and reason for the services. The records required in items A through H are similar to those records required for pharmacists, medical transporters, providers of medical supplies and equipment, and persons providing rehabilitative and therapeutic services. Requiring similar records for different services is reasonable because it enables the Department to have a single administrative standard, avoids confusion, and thereby is cost efficient. It is necessary and reasonable to list the Department's expectations regarding an adequate personal care provider service record to inform those providing personal care health services of what is required to comply with the rule. The requirements of this subpart were reviewed by the advisory committee for the rule and were accepted without comment.

9505.2180 FINANCIAL RECORDS.

In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

Subpart 1. Financial records required of vendors. Pursuant to Minnesota Statutes, section 256B.064, subdivision 1a, the

Department may impose sanctions against vendors if vendors, among other things: 1) commit fraud, theft or abuse in connection with providing health services; 2) repeatedly present false or duplicate claims or claims for services that are not medically necessary; or 3) repeatedly make false statements of material facts to receive greater compensation than that to which they are legally entitled. In order to determine whether vendors have done such things, it is necessary to access their health service records, and also their financial records. It is reasonable to specify which types of data may be accessed by the Department while reviewing financial records, including written or electronically stored data.

Item G. It is reasonable to delete the phrase "as defined in the Code of Federal Regulations, title 42, section 455.101", because the term "ownership or control interest" as defined at part 9505.2165, subpart 6e.

Item H. It is necessary and reasonable to substitute "Minnesota Statutes, Chapter 13" for "Minnesota Government Data Practices Act", because it is easier for an interested person to find a referenced chapter in Minnesota Statutes, than it is to use the title of a statute to look up the reference number and then find the chapter in Minnesota Statutes.

9505.2185 ACCESS TO RECORDS.
In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

9505.2190 RETENTION OF RECORDS.
In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

Subpart 1. Retention required; general. It is necessary and reasonable to clarify that vendors must retain all health services records for which payment was received or billed, to encourage compliance with the rule. It does not make sense to refer to "a health service and financial record," when all such records must be retained.

9505.2195 COPYING RECORDS.

In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR. The language in this part was changed to be more generalized to include and apply to all vendors.

9505.2200 IDENTIFICATION AND INVESTIGATION OF SUSPECTED FRAUD AND ABUSE.

In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

Subpart 2. Contacts to obtain information.
Item D. Item D refers to part 9505.0185, which currently refers to the "professional services advisory committee." When part 9505.0185 was adopted, Minnesota Statutes, sections 256B.04, subdivision 15 and 256B.064, subdivision 1a required the Department to determine whether services are "reasonable and necessary" in consultation with a professional services advisory group appointed by the commissioner. Since that time, Minnesota Statutes, section 256B.04 was amended and no longer specifies professional services advisory committees. Current Minnesota Statutes, section 256B.064, subdivision 1a states that the commissioner may seek pecuniary damages against providers for, among other things, claims for services not medically necessary, which determination "may be made by the commissioner in consultation with a peer advisory task force appointed by the commissioner...." Minnesota Statutes, section 256B.064, subdivision 1a requires this "peer advisory task force" to sunset as provided in Minnesota Statutes, section 15.059, subdivision 5 (June 30, 1993).

42 CFR 431.12 requires Minnesota to "provide for a medical care advisory committee" to advise the Department "about health and medical care services." The Department refers to persons under contract to give such advice about specific MA service coverage as "consultants." The definition of "consultant" at part 9505.5005, subpart 3 provides that consultants advise the Department on prior authorization requests and policies concerning health services. Part 9505.0185 is the MA rule which sets forth the duties, responsibilities and method of appointment of persons who advise the Commissioner about health services. The Department is preparing a proposed revision of part 9505.0185 which will replace the "professional service advisory committee" with consultants, therefore, it is necessary to revise the language of part 9505.0185 to refer to "consultants" rather than "a professional service advisory committee." It is reasonable to reflect current practice, which is to contract with consultants regarding prior authorization of and coverage decisions on specific services and it is also reasonable to have consistency among rules affecting the MA program.

Subpart 3. Activities included in department's investigation. The only proposed change in this subpart is the deletion of the reference to part 9505.2160. This change is necessary and reasonable because there are no items "identified in part

9505.2160, subpart 1", and the activities listed in the rest of the sentence provide adequate information about which activities the department may investigate. The proposed change does not change the meaning of this subpart.

Subpart 5. Postinvestigation actions.
Item A. The Department proposes to group current rule language requiring the Department to take one or more specific actions after completing a determination under new item A. This is necessary because of the addition of proposed new item B, which allows the Department to seek recovery of investigative costs pursuant to state law. The renumbering of the items and subitems does not change the meaning of this subpart. It is reasonable to separate out required postinvestigation actions from permissive postinvestigative actions.

Item B. Proposed new item B allowing the Department to seek recovery of investigative costs under Minnesota Statutes, section 256B.064, subdivision 1a is necessary to allow the Department to utilize its statutory authority. It is reasonable to add it to subpart 5 because recovering investigative costs is an allowed postinvestigation action.

9505.2205 COMMISSIONER TO DECIDE IMPOSITION OF SANCTION.

In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

9505.2210 IMPOSITION OF ADMINISTRATIVE SANCTIONS.

In this part, except where noted in subpart 2, item B, the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

Subpart 2. Nature of administrative sanction. The proposed reorganization of this subpart allows the Department to differentiate between sanctions that apply to all vendors and those that only apply to vendors who are providers. This change is necessitated by the general substitution of the term "vendor" for provider or the inclusion of vendor along with provider in some parts.

Item A, Subitem (1). This proposed amendment requires a referral to the appropriate licensing board for vendors receiving a sanction. It is necessary and reasonable to refer a vendor receiving a sanction to the appropriate licensing board so that the licensing board may determine whether the vendor violated a condition of licensure.

New subitem (2). This proposed subitem continues former subitem (4) without substantive change. It may be necessary for the

Department to suspend or terminate a vendor who requires sanctions.

New subitem (3). This sanction relates to the addition to part 9505.2165, subpart 4, item C, regarding the provisions of 42 CFR, sections 1001.1001 and 1002.210. It is reasonable and necessary to have the rule comply with the relevant requirements of the Code of Federal Regulations to obtain federal financial participation as required under Minnesota Statutes, section 256B.04, Subdivision 4.

New subitem (4). This is simply a renumbering of former subitem (5).

New subitem (5). This is simply a renumbering of former subitem (6).

New subitem (6). This is simply a renumbering of former subitem (8).

Item B. The actions applicable to providers in item B are in addition to the administrative sanctions applicable to vendors in item A. It is reasonable and necessary to list those sanctions that only apply to providers separately from the sanctions that apply to all vendors to have consistency of treatment of sanctions among all the persons or organizations providing health services.

New subitem (1). This is simply a renumbering of former item A, subitem (2).

New subitem (2). This is simply a renumbering of former item A, subitem (3).

New subitem (3). This is simply a renumbering of former item A, subitem (7).

Item C. This is the same as current item B and is not amended.

9505.2215 MONETARY RECOVERY.

In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

9505.2220 USE OF RANDOM SAMPLE EXTRAPOLATION IN MONETARY RECOVERY.

In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

9505.2225 SUSPENSION OF PROVIDER OR VENDOR CONVICTED OF CRIME RELATED TO MEDICARE OR MEDICAL ASSISTANCE.

In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

9505.2230 NOTICE OF AGENCY ACTION.

In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

Subpart 1. Required written notice. This subpart is changed to reflect current agency practice regarding mailing of notices governing monetary recoveries or administrative sanctions. Only for recipients is the notice sent by first class mail; for providers and vendors, the Department sends notices by certified mail. Therefore, it is necessary to update the rule to follow current agency practice and it is reasonable to so inform providers, vendors, and recipients.

Item A. Current language provides for the content of notices. However, because federal regulations require additional specifications for notices in all cases of suspension or termination, current language has been grouped under new item A, allowing for the additional specifications to be grouped under new item B. There is no change to the language in new item A.

Item B. 42 CFR 1001.212 requires that notices governing suspension or termination include additional language not covered in item A. It is necessary and reasonable to follow the requirements of federal regulations, and reasonable to use federal language according to Minnesota Statutes, section 256B.04, subdivision 4.

9505.2235 SUSPENSION OR TERMINATION OF VENDOR PARTICIPATION.

In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

Subpart 2. Reinstatement of vendor and provider. Because the Code of Federal Regulations cite is outmoded, it is necessary and reasonable to cite to the correct section to give interested persons current information.

Subpart 3. Prohibited submission of vendor's claims. It is reasonable and necessary to substitute the term "provider" for the phrase, "clinic, group, corporation, or other professional association" because "provider" is a term which includes the

entities which are no longer named and other entities covered by the rule which were not identified.

9505.2236 RESTRICTION OF PROVIDER OR VENDOR PARTICIPATION.

In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

Subpart 2. Reinstatement of restricted provider. It is necessary and reasonable to update the rule by substituting the correct Code of Federal Regulations cite for an outmoded cite. It is reasonable to give interested persons the correct cite to enhance compliance with the rule.

Subpart 3. Prohibited submission of restricted vendor's claims. It is reasonable and necessary to substitute the term "provider" for the phrase, "clinic, group, corporation, or other professional association" because "provider" is a term which includes the entities which are no longer named and other entities covered by the rule which were not identified. It is also reasonable to substitute the phrase, "furnishing the health service or submitting a charge or claim" for the word "participation" because the proposed phrase specifically states which activities the vendor is restricted from. It is reasonable to advise interested persons, such as providers, which activities are included in the term "participation" so that interested persons can better comply with the rule.

9505.2240 NOTICE TO THIRD PARTIES ABOUT DEPARTMENT ACTIONS FOLLOWING INVESTIGATION.

In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

Subpart 1. Notice about providers. It is necessary to amend the citations to proposed part 9505.2210, subpart 2, item A, because the Department proposes to expand part 9505.2210. This amendment is reasonable because it insures that the citations within the rule are correct.

Item C. It is necessary to add new item C because 42 CFR 1002.215(b)(1) requires that, if the Department approves the provider's or vendor's request for reinstatement, it must give written notice to the provider or vendor and "to all others who were informed of the exclusion". It is necessary and reasonable to have the rule in compliance with federal requirements according to Minnesota Statutes, section 256B.04, subdivision 4.

9505.2245 APPEAL OF DEPARTMENT ACTION.

In this part the term "vendor" has been substituted for the term "provider" for the reasons stated in the General Note section of this SNR.

Subpart 1. Provider's and vendor's right to appeal. The correction of the state law cite is necessary and reasonable in order to correct a grammatical error.

Item C. Minnesota Statutes, section 256B.064, subdivision 2 provides that the Department shall determine the monetary recovery and the sanction it will impose for the conduct in Minnesota Statutes, section 256B.064, subdivision 1a regarding: fraud, theft, or abuse; making false statements of facts to receive larger compensation; repeatedly making false or duplicate claims or claims for unnecessary services; suspension or termination of a Medicare vendor; and refusal to allow the Department access to health service and financial records. Minnesota Statutes, section 256B.064, subdivision 2 also states that except in the case of a conviction for conduct described in Minnesota Statutes, section 256B.064, subdivision 1a, neither a monetary recovery nor a sanction can be sought by the Department without prior notice and an opportunity for a contested case hearing, "provided that the commissioner may suspend or reduce payment to a vendor of medical care, except a nursing home or convalescent care facility, prior to the hearing if in the commissioner's opinion that action is necessary to protect the public welfare and the interests of the program."

It is necessary and reasonable to paraphrase the language of Minnesota Statutes, section 256B.064, subdivision 2 governing appeals, because this provision limits potential abuse by vendors, protects the integrity of the program, and complies with statute.

EXPERT WITNESSES

If this rule is heard in public hearing, the Department does not intend to have outside expert witnesses testify on its behalf.

Dated: September 7, 1994

for MARIA R. GOMEZ
Commissioner