

Legislative Reference Library  
645 State Office Building  
100 Constitution Avenue  
St. Paul, Minnesota 55155  
June 26, 2009

Re: In The Matter of the Proposed Rules of the Minnesota Department of Human Services of Rules Governing Medical Assistance (MA): Provider Services, Hearing Aid Services, Minnesota Rules, part 9505.0287; Governor's Tracking #AR 462

Dear Librarian:

The Minnesota Department of Human Services intends to adopt rules governing Medical Assistance (MA): Provider Services, Hearing Aid Services, Minnesota Rules, part 9505.0287. We are publishing a Dual Notice of Intent to Adopt Rules Without a Public Hearing Unless 25 or More Persons Request a Hearing and Notice of Hearing If 25 or More Requests for Hearing are Received in the July 6, 2009 issue of the *State Register*.

The department has prepared a Statement of Need and Reasonableness. As required by Minnesota Statutes, sections 14.131 and 14.23, the department is sending the Library a copy of the Statement of Need and Reasonableness.

If you have questions, please contact me at 651-431-3612.

Yours very truly,

A handwritten signature in cursive script that reads "Marsha West".

Marsha West  
Rulemaker

Enclosure: Statement of Need and Reasonableness

## **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, HEARING AID SERVICES,  
MINNESOTA RULES, PART 9505.0287.**

**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.

Minnesota Rules, parts 9505.0170-9505.0475 (informally known as "Rule 47") govern the administration of the medical assistance (MA) program, establish the services and providers that are eligible to receive medical assistance payments, and establish the conditions a provider must meet to receive payment. Minnesota rules, parts 9505.0235-9505.0420 set forth the specific health services that are eligible for payment under the medical assistance program.

The proposed amendments to Minnesota Rules, part 9505.0287 affect medical assistance (MA) provider services. Specifically, the department wishes to amend Minnesota Rules, part 9505.0287 entitled "Hearing aid services."

A rule part relating to hearing services was first promulgated by the Minnesota Department of Human Services (hereinafter "the department") in 1987 in part 9505.0365 which governed prosthetic and orthotic devices and hearing services. In 1992, the department separated hearing services into its own separate rule part, Minnesota Rules,

part 9505.0287. Part 9505.0287 allowed, for the first time, select audiologic service providers to sell hearing instruments. This part has not been amended since 1992.

Minnesota Rules, part 9505.0287, entitled “Hearing Aid Services” needs to be amended to expand the definition of “hearing aid services provider” which is found in Minnesota Rules, part 9505.0287, subpart 1, item E. As Minnesota Rules, part 9505.0287 is currently written; it requires payments to be made to a hearing aid services provider who is defined as a natural person such as a dispenser of hearing instruments, an audiologist, or an otolaryngologist. This rule puts hearing aid dispensers, audiologists, and otolaryngologists who are employees in clinics and outpatient hospital settings in a position to be treated by the department as a provider in private practice, when they are not—they are employed by the facilities they work for. This rule change would allow providers who employ hearing aid dispensers, audiologists, and otolaryngologists to bill for their employee’s services directly.

A request for comments was published in the *State Register* on Tuesday, January 20, 2009 (33 SR 1275). No comments were received during the 60 day comment period.

The Minnesota Management & Budget (formerly the Department of Finance) reviewed the rules and the statement of need and reasonableness in April 2009 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 hearing aid services.

In accordance with Minnesota Statutes, section 14.128 (See Laws of Minnesota 2009, Chapter 152, section 1), the department has determined that a local government will not be required to adopt or amend an ordinance or other regulation to comply with the changes the department proposes to Minnesota Rules, part 9505.0287, Hearing Aid Services. The department is the only government unit affected by the rule change because the department is the only government unit in the state that administers the medical assistance program.

On June 26, 2009, a copy of the dual notice, rules, and statement of need and reasonableness, were sent to the following chairs and ranking minority party members of the legislative policy and budget committees in accordance with Minnesota Statutes, section 14.116: Senator John Marty, Chair and Senator Paul E. Koering, Ranking Minority Party Member of the Senate Health, Housing and Family Security Committee; Senator Linda Berglin, Chair and Senator Michelle L. Fischbach, Ranking Minority Party of the Senate Health and Human Services Budget Division Committee; Representative Paul Thissen, Chair and Representative and Representative Jim Abeler, Ranking Minority Party of the House Health Care and Human Services Policy and Oversight Committee;

and Representative Thomas Huntley, Chair and Representative Matt Dean, Ranking Minority Party Member of the Health Care and Human Services Finance Division Committee.

On June 26, 2009, a copy of the statement of need and reasonableness, was sent to the Legislative Reference Library in accordance with Minnesota Statutes, sections 14.131 and 14.23.

On July 1, 2009, a copy of the Dual Notice and the rules were mailed to everyone on the department's rulemaking mailing list in accordance with Minnesota Rules, part 1400.2080, subpart 6.

The department plans on publishing the Dual Notice in the *State Register* on Monday, July 6, 2009. If the department receives 25 or more requests for a hearing, a hearing will be held on Friday, August 21, 2009. If a hearing is held, the department plans to call Patricia Wagstrom-Purcell, Policy Consultant, for the Health Services and Medical Management Division of the Minnesota Department of Human Services as a witness.

## **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 the department, audiologists, dispensers of hearing aids, otolaryngologists, and providers who employ audiologists, dispensers of hearing aids, and otolaryngologists.

The proposed amendments will benefit the department, audiologists, dispensers of hearing aids, otolaryngologist, and providers who employ audiologists, dispensers of hearing aids, and otolaryngologists. As Minnesota Rules, part 9505.0287 is presently written, it requires payments to be made to a hearing aid services provider who is defined as a natural person such as a dispenser of hearing instruments, an audiologist, or an otolaryngologist. To comply with the rule, the department has to enroll hearing aid dispensers, otolaryngologists, and audiologists who are employees in clinics and outpatient hospital settings as “providers in private practice”. Since the department sends the payment directly to the hearing aid dispenser, audiologist, or otolaryngologist performing the service, the department also has to send them a 1099 tax form. This creates an unnecessary tax liability for these audiologists, dispensers of hearing aids, or otolaryngologists that they should not have to deal with since they are actually employees of a provider and not providers in private practice. By expanding the definition of “hearing aid services provider” which is found in Minnesota Rules, part 9505.0287, subpart 1, item E to include not only natural persons such as dispensers of hearing instruments, audiologists, and otolaryngologists in private practice but providers who employ dispensers, otolaryngologists, and audiologists, this would allow providers who employ these health care professional to bill for their employee’s services directly.

**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 payment process for hearing aid dispensers, otolaryngologists, and audiologists who are employees in clinics and outpatient hospital settings since their employer could bill for their services directly. There are no expected costs increases related to amending these rules. 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 hearing aid services providers.

**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 did not consider any other alternative methods for amending the rule language since these rules do not fall under any of the exempt exceptions under Minnesota statutes and cannot be included in the yearly obsolete rules report since these rules are not obsolete.

**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 hearing aid dispensers, audiologists, or otolaryngologists or providers who employ these health care professionals.

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 9505.0287 is presently written, it requires payments to be made to a hearing aid services provider who is defined as a natural person such as a dispenser of hearing instruments, otolaryngologist, or an audiologist. To comply with the rule, the department has to enroll hearing aid dispensers, otolaryngologists, and audiologists who are employees in clinics and outpatient hospital settings as “providers in private practice”. Since the department sends the payment directly to the hearing aid dispenser, otolaryngologist, or audiologist performing the service, the department also has to send them a 1099 tax form. This creates an unnecessary tax liability for these audiologists, otolaryngologists, and dispensers of hearing aids that they should not have to deal with since they are actually employees of a provider and not providers in private practice. By expanding the definition of “hearing aid services provider” which is found in Minnesota Rules, part 9505.0287, subpart 1, item E to include not only natural persons such as dispensers of hearing instruments, otolaryngologists, and audiologists in private practice but providers who employ dispensers, otolaryngologists, and audiologists, this would allow providers who employ these health care professionals to bill for their employee’s services directly.

**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 is no difference between the proposed rule and the existing federal regulations.

**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 payment requirements for hearing aid services.

As Minnesota Rule, part 9505.0287 is presently written, it requires payments to be made to a hearing aid services provider who is defined as a natural person such as a dispenser of hearing instruments, otolaryngologists, or an audiologist. To comply with the rule, the department has to enroll hearing aid dispensers, otolaryngologists, and audiologists who are employees in clinics and outpatient hospital settings as “providers in private practice”. Since the department sends the payment directly to the hearing aid dispenser, otolaryngologists, or audiologist performing the service, the department also has to send them a 1099 tax form. This creates an unnecessary tax liability for these audiologists, otolaryngologists, and dispensers of hearing aids that they should not have to deal with since they are actually employees of a provider and not providers in private practice.

Additionally, by expanding the definition of “hearing aid services provider” which is found in Minnesota Rules, part 9505.0287, subpart 1, item E to include not only natural persons such as dispensers of hearing instruments, otolaryngologists, and audiologists in private practice but providers who employ dispensers and audiologists, this would allow providers who employ these health care professionals to bill for their employee’s services directly. This rule amendment would eliminate the administrative burden placed on the department since, to be in compliance with the rule, the department must enroll hearing aid dispensers, otolaryngologists, and audiologists who are employees in clinics and outpatient hospital settings as “providers in private practice”. Additionally, audiologists, otolaryngologists, and hearing aid dispensers who are employees of providers would be relieved of an unnecessary tax liability since the department would no longer have to send them a 1099 tax form because the provider could bill the department for their employee’s services.

**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 Academy of Audiology
- 2) The Minnesota Hearing Instrument Dispenser Advisory Council
- 3) The Minnesota Academy of Otolaryngology
- 4) The Vice President of Advocacy for Care Providers of Minnesota
- 5) Minnesota Disability Law Center
- 6) The Chair of the Minnesota State Bar Association’s Health Law Section
- 7) 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 9505.0287, subpart 1, item E. “Hearing aid service provider”.** Part 9505.0287, subpart 1, item E. defines the term “hearing aid service provider” for this rule part. In the original 1992 statement of need and reasonableness (hereinafter 1992 SONAR) that promulgated this rule part, it stated that item E was , “...necessary to define ‘hearing aid services provider’ to clarify who may receive medical assistance payment for providing hearing instruments to medical assistance recipients” However, this item does not specifically name audiologists as a hearing aid service provider. The department



proposes to revise and divide this item into subitems to provide clarity to this item. The department has left some of this definition in tact, but has rearranged this item for clarity.

**Part 9505.0287, subpart 1, item E, subitem 1. “Hearing aid service provider”.** This new subitem identifies the first type of hearing aid service provider, a hearing aid dispenser. The department has struck out the word “permit” and replaced it with the word “certificate” because Minnesota Statutes, Chapter 153A which regulates hearing instrument dispensing now uses the terminology “certificate” not “permit”. Specifically, Minnesota Statutes, section 153A.14 outlines the requirements for applying for and retaining a certificate to dispense hearing aids. Additionally, the department wants to add the language “...as specified in Minnesota Statutes, chapter 153A” to this subitem. The department feels that the reference to the statutes that governs hearing instrument dispensing adds clarity to the rule.

**Part 9505.0287, subpart 1, item E, subitem 2. “Hearing aid service provider”.** This new subitem identifies a second type of hearing aid service provider, an audiologist. In the 1992 SONAR, it stated that item E was supposed to state that, “...a hearing aid service provider is either someone (not an audiologist or an otolaryngologist) registered with the Health Department, or an audiologist or otolaryngologist.” However, item E does not specifically include audiologist or otolaryngologists. Instead, the rule states that, “...and, when applicable, meets the specific state licensure and registration requirements of the commissioner of health for the hearing aid services the person provides.” To clarify the meaning of the rule, the department proposes to replace this phrase with the word “audiologist”.

**Part 9505.0287, subpart 1, item E, subitem 3. “Hearing aid service provider”.** This new subitem identifies a third type of hearing aid service provider, an otolaryngologist. In the 1992 SONAR, it stated that item E was supposed to state that, “...a hearing aid service provider is either someone (not an audiologist or an otolaryngologist) registered with the Health Department, or an audiologist or otolaryngologist.” However, item E does not specifically include audiologist or otolaryngologists. Instead, the rule states that, “...and, when applicable, meets the specific state licensure and registration requirements of the commissioner of health for the hearing aid services the person provides.” To clarify the meaning of the rule, the department proposes to replace this phrase with the word “otolaryngologist.”

**Part 9505.0287, subpart 1, item E, subitem 4. “Hearing aid service provider”.** This new subitem identifies a fourth type of hearing aid service provider, a provider, as specified in Minnesota Rules, part 9505.0175, subpart 38, who employs dispensers of hearing instruments, audiologists, or otolaryngologists. As Minnesota Rule, part 9505.0287 is presently written, it requires payments to be made to a hearing aid services

provider who is defined as a natural person such as a dispenser of hearing instruments, an otolaryngologist, or an audiologist. To comply with the rule, the department has to enroll hearing aid dispensers, otolaryngologists, and audiologists who are employees in clinics and outpatient hospital settings as “providers in private practice”. Since the department sends the payment directly to the hearing aid dispenser, otolaryngologist, or audiologist performing the service, the department also has to send them a 1099 tax form. This creates an unnecessary tax liability for these health care professionals that they should not have to deal with since they are actually employees of a provider and not providers in private practice.

The department needs to expand the definition of “hearing aid services provider” which is found in Minnesota Rules, part 9505.0287, subpart 1, item E to include not only natural persons such as dispensers of hearing instruments, otolaryngologists, and audiologists in private practice but providers who employ these health care professionals.

Minnesota Rules, part 9505.0175 provides definitions to terms used in Minnesota Rules, parts 9505.0170 to 9505.0475. Minnesota Rules, part 9505.0175, subpart 38 defines a provider as, “...a vendor as specified in Minnesota Statutes, section 256B.02, subdivision 7 that has signed an agreement approved by the department for the provision of health services to a recipient.” Minnesota Statutes, section 256B.02, subdivision 7(a) defines the term “vendor of medical care” as:

“...any person or persons furnishing, within the scope of the vendor's respective license, any or all of the following goods or services: medical, surgical, hospital, ambulatory surgical center services, optical, visual, dental and nursing services; drugs and medical supplies; appliances; laboratory, diagnostic, and therapeutic services; nursing home and convalescent care; screening and health assessment services provided by public health nurses as defined in section 145A.02, subdivision 18; health care services provided at the residence of the patient if the services are performed by a public health nurse and the nurse indicates in a statement submitted under oath that the services were actually provided; and such other medical services or supplies provided or prescribed by persons authorized by state law to give such services and supplies. **The term includes, but is not limited to, directors and officers of corporations or members of partnerships who, either individually or jointly with another or others, have the legal control, supervision, or responsibility of submitting claims for reimbursement to the medical assistance program.**”

Thus the definition of “provider” set forth in Minnesota Rules, part 9505.0175, subpart 38 seems to encompass not only natural persons who provide medical care, but business entities such as partnerships or corporations. By adding the language, “a provider, as specified in Minnesota Rules, part 9505.0175, subpart 38, who employs dispensers of hearing instruments, audiologists, or otolaryngologists,” this would allow providers who employ hearing aid dispensers, audiologists, and otolaryngologists to bill for their employee’s services directly.