Office of Inspector General, Surveillance and Integrity Review Section

Proposed Amendment to Rules Governing Use of Random Sample Extrapolation in Monetary Recovery, *Minnesota Rules*, Part 9505.2220; Revisor’s ID 4567

OAH Docket number 71-9029-35836

**EXHIBIT I-1:**
WRITTEN COMMENTS ON THE PROPOSED RULE THAT DO NOT INCLUDE A REQUEST FOR HEARING
I am responding to a email about rule change for MN Rules Part 9505-2220

I have pasted the part of the rule that I understand to be change at the bottom of this email.

I'd like to say that I disagree with this only because of something that happened with Blue Cross Blue Shield a couple of years ago. I and many other providers had a signed contract with them and they were paying us and then randomly decided they overpaid us (all providers across the states, randomly) and randomly expected that we would just pay them back with no notice and no information to us to have conversation.

As a mental health provider we assume that insurance companies who are paying us, know what they are paying us and we get paid and we pay our bills. To just randomly decide to take money back is NOT OK!! If you discover that there is over payment going on it is important to discover the error and work to resolve the error so that it does not continue moving forward and maybe to split the cost of figure out a fair resolution. But to just randomly decide to take back money is not fair to us who are doing the hard work of working with clients, getting paid what we are getting paid and then paying our bills.

A random sample to find our if overpayment is taking place is good and then communication needs to take place. To NOT COMMUNICATE and to take that out of the language is not right. Communication has to take place so we can work together.

It's like if you randomly decided to just change this rule. We have laws and rules in place to work together to solve problems and to fix things that are broken. To not communicate is not good. It removes the right of people to communicate and to resolve matters fairly and responsibly.

Thank you!

"The Department’s Surveillance and Integrity Review Section (SIRS) uses random sample extrapolation to identify and recover overpaid Minnesota Health Care Programs (MHCP) funds. The current language in the rule part governing this method
is unclear, relies on a 40-year-old text book and requires SIRS to issue a notice to a provider of its sampling method before drawing the sample. Collectively, these issues render the rule part inefficient and lacking in technical precision. The Department is amending the rule to remove the reliance on the textbook, clarify the sampling extrapolation methodologies that are acceptable, and remove the requirement that the provider be notified of the sampling method before the sample is drawn."

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December 21, 2020

This rule part establishes how the department identifies and recovers overpaid MCHP funds from a department-enrolled vendor. Accordingly, it is critical for the department to clearly establish for the regulated party—enrolled vendors—and the public how the department will accomplish its goal of rooting out fraud, waste, and abuse.

My comments represent my views alone and are made to support the department in its important mission.

**Part 9505.2220:**

**Subpart 1a:** The department’s definitions, while helpful, introduce additional terms that should be defined. For example, references to population value, interval estimate, population parameter, and random sampling method are undefined. While a statistician may know what these terms mean, that does not automatically mean that a department vendor knows what the terms mean, and, consequently, the vendor lacks the necessary knowledge to comply with the rule part or to have proper notice of the statistical methods that the department uses to identify and recover overpaid MHCP funds.

Furthermore, failing to define a term makes a rule impermissibly vague (In the Matter of the Proposed Rules of the Department of Health Related to the Collection of Administrative Billing Data, RD3359; In the Matter of Proposed Permanent Rules Governing Water Quality Standards, RD3321; Proposed Permanent Rules Relating to the Mississippi River Corridor Critical Area, RD4240).

There are two other problems in the definitions section. First, the term department is used elsewhere in the rule part but is not defined, nor is the term defined in part 9505.2165. It is standard and recommended practice in law to define key terms such as department or commissioner, especially when another department is mentioned in the rule (for example, the US Department of Health and Human Services).

Second, the phrase “generally accepted amongst statisticians” is too vague. How does one know what is generally accepted? The term is defective because it fails to provide reasonable notice of how the regulatory standard applies. Furthermore, terms similar to generally such as usually, typically, or normally do not constitute proper rule language and are consistently deemed defective because the terms fail to give reasonable notice for a regulated party to properly comply. The department must be more specific with its proposed phrase, define it, or strike it.

**Subpart 3:** Again, the department uses a vague phrase with “generally accepted statistical standards and practices.” And no guidance is given in the SONAR about what this term means. Even if guidance were given, the SONAR is not law. Rather, the law must specifically state the department’s intentions to make the department’s intent clear to all affected parties.

Another issue with this subpart is the reference to guidance from CMS. The department does not specifically mention in the SONAR what this guidance is. But more important, if the department
plans to rely on guidance from another source such as CMS, the department needs to incorporate that guidance by reference according to Minnesota Statutes, section 14.07, subdivision 4. Whenever an agency seeks to issue guidelines that will be applied as rules, the guidelines must be adopted as rules, and to give due notice, the document that the agency is incorporating by reference must be stated.

Even if some of the more-serious issues in subparts 1a and 3 are not deemed legal defects, there is much benefit to everyone if the department makes the changes to provide greater clarity and to accomplish the department’s goal as stated in its SONAR:

“The proposed amendment to Rule 9505.2220 will allow SIRS to efficiently recover MHCP funds paid as a result of fraud, abuse or error. The proposed amendment will also allow the Department to provide more detailed guidance to the state and federal contractors who regularly use statistical sampling to determine overpaid MHCP funds in their investigations.”

Suggested drafting changes:

1.16: time period (removes redundant phrase)

1.17: which that (proper use of relative pronoun for a restrictive clause)

1.22: amongst among (standard, proper English)

2.18-2.19: The sampling plan and extrapolation shall be chosen and performed The department must choose and perform the sampling plan and extrapolation (removes passive voice and insert actor and removes improper “shall be”)

2.22-2.23: shall must (proper use of mandatory terms)

3.3: The vendor shall be required to must pay (proper use of mandatory terms, considerably shortens sentence)

Rulemaking and writing law are difficult. My comments are meant solely to help the department adopt clear and reasonable rules.

Respectfully,

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