

INTERIM RULEMAKING NOTICE FORM

Proposed Interim Rule Number **2016-31** Rule Number **He-W 520.01 (various) & He-W 520.06**

<p>1. Agency Name & Address: NH Dept. of Health & Human Services Office of Medicaid Business and Policy 129 Pleasant Street, Brown Building Concord, NH 03301</p> <p>5. Filing Date: October 7, 2016</p>	<p>2. RSA Authority: <u>RSA 161:4-a, X</u></p> <p>3. Federal Authority: <u>42 CFR Parts 455 and 457</u></p> <p>4. Type of Action:</p> <table style="width: 100%;"><tr><td style="padding-left: 20px;">Adoption</td><td style="text-align: right;"><u>X</u></td></tr><tr><td style="padding-left: 20px;">Amendment</td><td style="text-align: right;"><u>X</u></td></tr><tr><td style="padding-left: 20px;">Repeal</td><td style="text-align: right;"><u> </u></td></tr><tr><td style="padding-left: 20px;">Readoption</td><td style="text-align: right;"><u> </u></td></tr><tr><td style="padding-left: 20px;">Readoption w/amendment</td><td style="text-align: right;"><u> </u></td></tr></table>	Adoption	<u>X</u>	Amendment	<u>X</u>	Repeal	<u> </u>	Readoption	<u> </u>	Readoption w/amendment	<u> </u>
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6. Short Title: **Medicaid General Program Information and Provider Requirements**

7. Contact person for copies and questions including requests to accommodate persons with disabilities:

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TTY/TDD Access: Relay NH 1-800-735-2964 or dial 711 (in NH)

The proposed rules may be viewed and downloaded at:
<http://www.dhhs.nh.gov/oos/aru/comment.htm>

8. Summary explaining the effect of the rule:

Section 6401(b) of the Affordable Care Act amended Section 1902 of the Social Security Act to require states to comply with procedures established by the Secretary for screening providers and suppliers. The Centers for Medicare and Medicaid Services (CMS) implemented these requirements with federal regulations at 42 CFR Part 455, Subpart E. A key component of these requirements is a fingerprint related criminal background check for certain Medicaid providers and those individuals with a 5% or greater ownership interest in those Medicaid providers. Such providers include providers of home health services and durable medical equipment services, as well as providers who are elevated to high risk as required under 42 CFR 455.450(e)(1).

In April 2016, the Department submitted a compliance plan to CMS to allow time for the Department to implement this federal requirement, including amending He-W 520 to require the use of a fingerprint based criminal background check. The Department is proposing interim rulemaking, for review at the October 20 JLCAR meeting, in order to adhere both to the compliance plan submitted to CMS and the new federal regulations.

Changes to He-W 520 are as follows:

- The rule part title has been changed to reflect that the rule describes requirements on Medicaid providers.
- Definitions have been added to explain new terminology used in the rule.
- Section He-W 520.06, Provider Requirements, has been added to describe the fingerprint related criminal background check required by the federal regulations. This section describes which providers are subject to the requirements and the consequences for failing to comply or for being found to have been convicted of certain offenses.

9. Listing of people, enterprises, and government agencies affected by the rule:

The rule will affect providers of home health services and durable medical equipment services, those individuals with a 5% or greater ownership interest in these Medicaid providers, as well as providers who are elevated to high risk as required under 42 CFR 455.450(e)(1). This pool of providers is further limited to those providers who submitted their Medicaid application on or after August 1, 2015, who are either currently enrolled or whose applications are still open, and providers who submit a Medicaid application after November 1, 2016.

Of the currently enrolled providers who submitted their application on or after August 1, 2015, two providers are affected by this rule. These two providers involve 6 individuals with an ownership interest who will need to be fingerprinted. It is not known how many providers who submitted an application on or after August 1, 2015 whose applications are still open will be impacted. However, the Department projects that these requirements will affect an estimated 6 providers per year, but it cannot be estimated how many individuals with an ownership interest will be impacted.

10. Specific section or sections of state statute or federal statute or regulation which the rule is intended to implement.

RULE	STATE OR FEDERAL STATUTE THE RULE IMPLEMENTS
He-W 520.01 (b), (d), (e), (j), (m), and (n)	42 CFR 433, Subpart C; Section 1920A of the SSA; 42 USC 1396a(a)(10); 42 USC 1396d(a); 42 CFR 455; 42 CFR 457
He-W 520.06	42 U.S.C. 1395cc(j)(2); 42 CFR 433.139; 42 CFR 424; 42 CFR Part 455; RSA 161:4-a,X; 42 U.S.C. 1396a(a)(77); 42 U.S.C. 1396a(kk) ; RSA 126-A:5, VIII

11. Summary of the effect upon the state if the rule were not adopted:

If the rule were not adopted, any provider subject to these requirements would either be terminated or not be allowed to become a NH Medicaid provider. NH Medicaid currently has two providers in which the owners must be fingerprinted and background checks reviewed. Also, the Department may be subject to federal sanctions for non-compliance with the Federal regulation.

12. Proposed date of review by the Joint Legislative Committee on Administrative Rules:

October 20, 2016

13. The fiscal impact statement prepared by the Legislative Budget Assistant:

16:205 , dated 10/06/16

1. Comparison of the costs of the proposed rule(s) to the existing rule(s):

When compared to the existing rule 520.01, the proposed 520.01 will have no difference in cost. Not applicable with respect to proposed 520.06, as this is a new rule.

2. Cite the Federal mandate. Identify the impact on state funds:

Section 1902 of the Social Security Act, as amended by Section 6401(b) of the Affordable Care Act, requires states to comply with procedures established by the federal Department of Health and Human Services for screening providers and suppliers of Medicaid services. The Centers for Medicare and Medicaid Services (CMS) implemented these requirements with federal regulations at 42 CFR part 455, Subpart E. The federal rules require a fingerprint-related criminal background check for certain Medicaid providers and individuals with a five percent or greater ownership interest in those Medicaid providers.

3. Cost and benefits of the proposed rule(s):

A. To State general or State special funds:

To the extent that fingerprinting required by the rules is performed by the Department of Safety, the proposed 520.06 may result in a small benefit to the criminal records check account established by RSA 106-B:7, II, in which fingerprinting and criminal record check-related fees are deposited.

B. To State citizens and political subdivisions:

None.

C. To independently owned businesses:

The proposed 520.06 will affect (1) providers who submitted their application after August 1, 2015, who are either currently enrolled or whose applications are still open, and (2) providers who submit an application after November 1, 2016. Of the currently enrolled providers who submitted their application on or after August 1, 2015, two will be required to have fingerprinting done in order to remain a Medicaid provider. The two providers involve six individuals who will need to be fingerprinted. The cost for fingerprinting is determined by the provider; in NH, most fingerprinting is done by the Department of Safety and costs \$49.75, for a total cost to the current provider network of \$298.50. While it is unknown how many providers will be subject to these requirements in future years, the Department of Health and Human Services estimates a total of six providers per year will be affected. The Department is unable to estimate the number of individuals with an ownership impact who will be subject to the requirement.

CHAPTER He-W 500 MEDICAL ASSISTANCE

PART He-W 520 GENERAL PROGRAM INFORMATION AND PROVIDER REQUIREMENTS

Amend He-W 520.01, effective 7/17/15 (Document #10887), by inserting new paragraphs (b), (d), (e), (j), (m), and (n), and renumbering subsequent paragraphs, cited and to read as follows:

He-W 520.01 Definitions.

(b) “Direct ownership interest” means the possession of equity of 5% or greater in capital, stock, or profits of the provider or provider applicant.

(d) “High risk provider or high risk provider applicant” means an individual or entity which meets one of the criteria in He-W 520.06(c).

(e) “Indirect ownership interest” means an ownership interest of 5% or greater in an entity that has a direct ownership interest in the provider or provider applicant.

(j) “Provider applicant” means an individual or entity who is undergoing the provider enrollment or re-enrollment process to become a New Hampshire medicaid provider.

(m) “Revalidation” means the process through which the provider verifies the accuracy of, and updates if necessary, its current provider enrollment information.

(n) “Termination” means that the department revoked a provider’s medicaid billing privileges and the provider exhausted all applicable appeal rights or the timeline for an appeal expired and the revocation of the billing privileges is not temporary.

Adopt He-W 520.06 to read as follows:

He-W 520.06 Provider Requirements.

(a) NH medicaid providers and provider applicants shall meet the provider participation requirements contained in He-W 530 through He-W 577, as applicable, for providers of the type of services they will be providing, as well as requirements in He-W 520.06.

(b) The following individuals and entities shall be subject to a risk determination described in (c) below:

- (1) NH medicaid providers enrolled as of November 1, 2016 who submitted their provider enrollment application to the department’s fiscal agent on or after August 1, 2015 through October 31, 2016;
- (2) NH medicaid provider applicants;
- (3) NH medicaid providers who are applying to enroll a new practice location(s);
- (4) NH medicaid providers who are re-enrolling; and
- (5) NH medicaid providers being revalidated in accordance with 42 CFR 455.414.

(c) Individuals and entities in (b) above who meet either of the following criteria shall be determined to be high risk providers or high risk provider applicants:

(1) The individual or entity, with the exception of those who are undergoing revalidation in accordance with 42 CFR 455.414, provides home health services or durable medical equipment services; or

(2) The individual's or entity's risk level was adjusted to high by the department as required by 42 CFR 455.450(e)(1) because any of the following occurred:

a. The department imposed a payment suspension on the individual or entity based on credible allegation of fraud, waste, or abuse;

b. The individual or entity has an existing medicaid overpayment;

c. The individual or entity was excluded from participation in a federally funded program by the office of inspector general or another state's medicaid program within the 10 years preceding the date of application or date of revalidation; or

d. In accordance with 42 CFR 455.450(e)(2), NH medicaid or the Centers for Medicare and Medicaid Services (CMS) in the previous 6 months lifted a temporary moratorium for the particular provider type and a provider that was prevented from enrolling based on the moratorium applies for enrollment as a provider within 6 months from the date the moratorium was lifted.

(d) The following individuals and entities shall be subject to a state and federal criminal background check, including fingerprinting, in accordance with this section:

(1) Persons with a direct or indirect ownership interest in a high risk provider or high risk provider applicant described in (c)(1) above; and

(2) High risk providers or high risk provider applicants described in (c)(2) above.

(e) Those who meet the criteria in (d) above shall not be subject to an additional criminal background check, including fingerprinting, if, within the previous 36 months, they have undergone a criminal background check as required by:

(1) A Medicare administrative contractor;

(2) NH medicaid;

(3) Any other state's medicaid agency, and the department is able to access the information from the other state's medicaid agency; or

(4) Any other state's children's health insurance program (CHIP), and the department is able to access the information from the other state's CHIP.

(f) Those who meet the criteria in (d) above, and who are not excluded in (e) above, shall be notified in writing of the following by the department:

(1) That a state and federal criminal background check, including fingerprinting, is required;

(2) Where the criminal background check, including fingerprinting, can be conducted as specified in (h)(1) below; and

(3) The deadline by which the criminal background check, including fingerprinting, shall be conducted as specified in (g) below.

(g) The deadline for undergoing a criminal background check, including fingerprinting, shall be 30 days from the date of the notification in (f) above.

(h) Those who meet the criteria in (d) above, and who are not excluded in (e) above, shall undergo a state and federal criminal background check by:

(1) Having a complete set of electronic fingerprints taken by any location maintained by the NH state police criminal records unit that has electronic fingerprinting capability, or by any other in or out of state law enforcement agency that conducts fingerprinting electronically; and

(2) Submitting to the location in (1) above a completed, notarized Form #DSSP 417, "New Hampshire Health and Human Services Criminal History Record Information Authorization," which authorizes the release of the individual's criminal history record, if any, to the department.

(i) Those who meet the criteria in (d) above shall be terminated from, or denied enrollment in, the NH medicaid program if:

(1) The individual fails to get fingerprinted by the deadline in (g) above, as applicable; or

(2) The results of the criminal background check indicate that the individual has been convicted of any of the following federal or state felony offenses within the 10 years preceding the date of application or date of revalidation of enrollment:

a. Felony crimes against persons, such as murder, sexual assault, assault, interference with freedom, destruction of property, unauthorized entries, robbery and theft, fraud and corruption, and other similar crimes for which the individual was convicted, including guilty pleas;

b. Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud, and other similar crimes for which the individual was convicted, including guilty pleas; or

c. Any felony that placed the medicaid program or its recipients at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.

(j) An individual or entity being terminated from, or denied enrollment in, the NH medicaid program in accordance with (i) above shall receive a written notice from the department of the denial or termination.

(k) The notice in (j) above shall contain:

(1) The reason for, and legal basis of, the denial or termination; and

- (2) Information that an appeal of the denial or termination may be requested, in accordance with He-C 200, within 30 calendar days of the date on the notice of the denial or termination.
- (1) Appeals of the results of the criminal background check shall be made in accordance with the department of safety rules at Saf-C 5703.12.

APPENDIX B

RULE	STATE OR FEDERAL STATUTE THE RULE IMPLEMENTS
He-W 520.01 (b), (d), (e), (j), (m), and (n)	42 CFR 433, Subpart C; Section 1920A of the SSA; 42 USC 1396a(a)(10); 42 USC 1396d(a); 42 CFR 455; 42 CFR 457
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