

RULEMAKING NOTICE FORM

Notice Number	2016-106	Rule Number	He-W 895
1. Agency Name & Address: Dept. of Health and Human Services Office of Medicaid Business and Policy 129 Pleasant St., Brown Bldg. Concord, NH 03301	2. RSA Authority: <u> RSA 167:13, III(b) </u> 3. Federal Authority: <u> 42 USC 1396p(b)(3) </u> 4. Type of Action: Adoption _____ Amendment _____ Repeal _____ Readoption _____ Readoption w/amendment <u> X </u>		

5. Short Title: **Expiring Rules Related to Undue Hardship for Recovery of Assistance**

6. (a) Summary of what the rule says and of any proposed amendments:

He-W 695 is scheduled to expire August 1, 2016, but is subject to extension pursuant to RSA 541-A:14-a. The Department of Health and Human Services (Department) is proposing to readopt with amendments and renumber as He-W 695 as He-W 895 in He-W 800, the chapter where all rules associated with medical assistance are now located.

He-W 695 established the criteria for a determination of undue hardship and when the Department will waive its claim for recovery of medical assistance granted against a deceased Medicaid recipient’s estate where estate recovery would result in an undue hardship. The proposed amendments to:

- **He-W 895.02(l) add ‘person, organization, or’ to the definition of ‘uncompensated care’;**
- **He-W 895.03(b) update a cross reference to He-W 895.04;**
- **He-W 895.04 change ‘and’ to ‘or’ in the introduction to make clear that the criteria are alternatives;**
- **He-W 895.04(f)(2) update a cross reference to He-W 820.01(s)(3);**
- **He-W 895.06(a)&(c) add the word “calendar” to the rule to better clarify when a request for and a determination of undue hardship must be made;**
- **He-W 895.06(e) replace the term “hearing” with the specific term ‘appeal’ in order to align the rule with Department terminology;**
- **He-W 895.07(a) add the terminology ‘reasonable and’ to align with the probate statute referring to the priority of charges corrects the citation that probate priority statute; and**
- **He-W 895.08(a)&(b) replace the word “hearing” with ‘appeal’ to align the rule with Department terminology.**

6. (b) Brief description of the groups affected:

Those affected by the rules are individuals from who the Department has sought recovery for medical assistance, but who now will be granted a waiver under circumstances where a determination of undue hardship has been made.

6. (c) Specific section or sections of state statute or federal statute or regulation which the rule is intended to implement:

<u>Rule</u>	<u>RSA/ Federal Citation</u>
He-W 895.01 - .06 (formerly He-W 695.01-.06)	RSA 167:13-16; 42 USC 1396p
He-W 895.07 (formerly He-W 695.07)	RSA 167:13-16; RSA 554:19, 42 USC 1396p
He-W 895.08 (formerly He-W 695.08)	RSA 167: 13-16; 42 USC 1396p

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

Name: **Catherine Bernhard** Title: **Rules Coordinator**
Address: **Dept. of Health & Human Services** Phone #: **271-9374**
Administrative Rules Unit Fax#: **271-5590**
129 Pleasant Street E-mail: **catherine.bernhard@dhhs.state.nh.us**
Concord, NH 03301

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. Deadline for submission of materials in writing or, if practicable for the agency, in the electronic format specified: **Thursday, July 28, 2016**

Fax

E-mail

Other format (specify):

9. Public hearing scheduled for:

Date and Time: **Thursday, July 21, 2016 at 12:30 p.m.**

Place: **DHHS, Brown Bldg., 288, 129 Pleasant St., Concord, NH 03301**

10. Fiscal Impact Statement (Prepared by Legislative Budget Assistant)

FIS # **16:116**, dated **6/22/16**

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

There is no difference in cost when comparing the proposed rule to the existing rule.

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

There is a federal mandate to offer undue hardship pursuant to 42 USC 1396p(b)(3). There is no cost or benefit to the state resulting from the proposed rule, so the federal mandate will not affect state funds.

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

A. To State general or State special funds:

None.

B. To State citizens and political subdivisions:

None.

C. To Independently owned businesses:

None.

11. Statement Relative to Part I, Article 28-a of the N.H. Constitution:

The proposal does not create a new program or responsibility, expand or modify an existing program or responsibility, or mandate any fees, duties or expenditures on the political subdivisions of the state, and therefore do not violate Part I, Article 28-a of the N.H. Constitution.

Readopt with amendment and renumber He-W 695, effective 8-1-08 (Document #9225), as He-W 895, and hold He-W 695 in reserve, so that He-W 895 reads as follows:

PART He-W ~~68~~95 UNDUE HARDSHIP

He-W ~~86~~95.01 Purpose. The purpose of these rules is to establish criteria for:

- (a) The determination of undue hardship pursuant to 42 USC 1396p(b)(3); and
- (b) The waiver of the state's claim for recovery of medical assistance granted against a deceased Medicaid recipient's estate where estate recovery would result in an undue hardship.

He-W ~~86~~95.02 Definitions.

(a) "Applicant" means the individual who submits the written request that the department waive its right to recover for medical assistance provided to the deceased Medicaid recipient.

(b) "Cost effective" means the amount of public assistance recovered exceeds the total cost to the department of pursuing the recovery by \$500.00 or more.

(c) "Department" means the department of health and human services.

(d) "Estate" means all assets and liabilities of a Medicaid recipient subject to the jurisdiction of the probate court, including but not limited to all property, real or personal, in a revocable trust as contemplated by RSA 167:14-a, V and property held by the recipient during his or her lifetime in either joint tenancy, tenancy in common, or life estate as contemplated at RSA 167:14-a, VI.

(e) "Heir" means those persons, including the surviving spouse, who might be entitled to some or all of the estate of the Medicaid recipient under the statutes of succession.

(f) "Income producing property" means real property, either residential, commercial or industrial upon which money is made, such as rental property.

(g) "Medicaid recipient" means an individual who receives or received Medicaid benefits.

(h) "Medical institution" means any nursing facility as defined at 42 USC §1396r(a), long term care facility for the mentally retarded as defined at 42 USC §1396d(d), or medical institution as defined at 42 CFR §435.1009.

(i) "Medical professional" means any doctor, physician's assistant, nurse, nurse practitioner, licensed nursing assistant or certified nursing assistant who regularly provided treatment to the deceased Medicaid recipient prior to the deceased Medicaid recipient's admission to the medical institution.

(j) "Primary residence" means the applicant's or heir's domicile.

(k) "Probate court" means the court having jurisdiction over the administration of estates as provided by RSA 547:3.

(l) "Uncompensated care" means care provided to the deceased Medicaid recipient gratuitously, without compensation from the department or any other person, organization, or agency and for which the applicant has not filed a claim against the estate for reimbursement under any theory of law or equity.

(m) "Undue hardship" for purposes of He-W 695, means circumstances described in these rules that would make application of the department's right to recovery unfair and which, if verified as provided in these rules, would result in the department's waiving its right to recover for medical assistance correctly paid on behalf of the deceased Medicaid recipient.

He-W ~~68~~95.03 Waiver of Recovery.

(a) The administrator or executor of the estate, the surviving joint tenant or remainderman of a life estate shall receive written notice of the right to request a waiver of recovery under these rules, including criteria for determining undue hardship and the procedure for requesting such a waiver concurrent with the notification of the department's claim.

(b) Recovery of medical assistance pursuant to RSA 167:14 shall be waived if recovery will result in undue hardship to the heir as determined under He-W ~~68~~95.04 or if the department determines that it is not cost effective to recover the assistance paid.

He-W ~~68~~95.04 Criteria for Determination of Undue Hardship. The department shall waive recovery on the basis of undue hardship as provided in (a), (b), (c), (d), (e) ~~and~~ (f) below:

(a) Where the estate includes real property on which a business or farm is located and:

- (1) The business or farm has been in operation at the primary residence of the heir for at least 12 months preceding the death of the decedent;
- (2) The business or farm produces more than 50% of the heir's livelihood; and
- (3) The recovery of the claim would directly result in the loss of the livelihood of the heir;

(b) Where the estate includes income-producing property and:

- (1) The heir has used his/her own personal resources for the past 12 months to maintain the income-producing property;
- (2) The property produces more than 50% of the heir's livelihood; and
- (3) The recovery of the claim would directly result in the loss of the livelihood of the heir;

(c) Where the estate includes only personal property and recovery by the department would directly result in the heir becoming eligible for public assistance;

(d) Where the estate includes the home of the Medicaid recipient upon which the department placed a lien or upon which the department had authority to place a lien but didn't due to insufficient time, and:

- (1) The applicant is an adult child of the deceased Medicaid recipient; or
- (2) The applicant is the grandchild of a deceased Medicaid recipient who died on or after January 1, 2008 and who can establish that the deceased Medicaid recipient had guardianship over the applicant while the applicant was a minor or that the deceased Medicaid recipient served as *in-loco parentis* to the applicant while he or she was a minor;

- (3) The applicant resided in the home of the deceased Medicaid recipient for a period of at least 2 years immediately before the date of the deceased Medicaid recipient's admission to the medical institution;
 - (4) The applicant establishes that he or she provided uncompensated care daily to the deceased Medicaid recipient for at least 2 years immediately before the date of the deceased Medicaid recipient's admission to the medical institution which permitted the deceased Medicaid recipient to reside at home rather than in a medical institution, including but not limited to any or all of the following activities:
 - a. Bathing;
 - b. Dressing;
 - c. Administering medication;
 - d. Shopping;
 - e. Cooking;
 - f. Feeding;
 - g. House cleaning;
 - h. Money management;
 - i. Driving; or
 - j. Other care specific to the condition of the deceased Medicaid recipient; and
 - (5) The applicant is lawfully residing in the home of the deceased Medicaid recipient and has lawfully resided in such home on a continuous basis since the date of the deceased Medicaid recipient's admission to the medical institution;
- (e) Where the estate includes the home of the Medicaid recipient and:
- (1) The applicant is a sibling of the deceased Medicaid recipient;
 - (2) The applicant resided in the home of the deceased Medicaid recipient for a period of at least one year immediately before the date of the deceased Medicaid recipient's admission to the medical institution; and
 - (3) The applicant is lawfully residing in the home of the deceased Medicaid recipient and has lawfully resided in such home on a continuous basis since the date of the deceased Medicaid recipient's admission to the medical institution; or
- (f) Where the estate includes the home of the Medicaid recipient which she or he held either in life estate or in joint tenancy and:

(1) The applicant can demonstrate that he or she is either the remainderman under the life estate or the surviving joint tenant; and

(2) The applicant can demonstrate that he or she paid value for the remainder interest or joint interest either when the interest was created or to cure a transfer of asset penalty contemplated at He-W [6820.01](#)(~~ts~~)(3).

He-W [6895.05](#) Request for Undue Hardship.

(a) A request for an undue hardship waiver shall be in writing and include the following information:

(1) The deceased Medicaid recipient's name;

(2) The deceased Medicaid recipient's last street address;

(3) The applicant's name;

(4) The applicant's relationship to the deceased Medicaid recipient; and

(5) The reason(s) for the undue hardship waiver request as described in He-W [6895.04](#).

(b) Relevant documentation shall be attached to support the undue hardship waiver request including, but not limited to, the following:

(1) Mortgage note;

(2) Real property deed;

(3) IRS forms, including business, personal or farm deduction forms;

(4) Proof of residency such as a copy of the heir's driver's license or W-2;

(5) Canceled checks relating to the income producing property or business;

(6) City or town tax assessor bills;

(7) A copy of the deceased Medicaid recipients' death certificate;

(8) Estate paperwork filed with probate court;

(9) An affidavit from the applicant describing the kind and quality of care provided the deceased Medicaid recipient including dates the care was provided, if applicable; and

(10) Affidavits from at least 2 medical professionals who cared for the deceased Medicaid recipient prior to admission to the medical institution stating that the applicant provided the kind and quality of care necessary to maintain the Medicaid recipient at home rather than in a medical institution for at least 2 years immediately before the Medicaid recipient's admission to the medical institution.

He-W [6895.06](#) Undue Hardship Request Review.

(a) A request for a hardship waiver shall be filed with the department within 30 calendar days from the Medicaid recipient's death or within 30 calendar days from the date of the filing of the department's claim with the probate court, whichever is later.

(b) The request shall contain a written statement of the circumstances constituting the hardship and supporting documentation as described in He-W 6895.05.

(c) Determinations of the existence of undue hardship shall be made within 90 calendar days from the date of the hardship waiver request.

(d) A written notice of decision shall be sent to the person making the request.

(e) All denial notices shall include a statement informing the applicant that he/she may appeal the department's decision and instructions for how to request an administrative appealhearing.

He-W 8695.07 Reduction from Claim Against Non-Probate Assets.

(a) Surviving joint tenants or remainderman of life estates shall be eligible for a dollar-for-dollar reduction in the amount of the department's claim for medical assistance correctly paid on behalf of a deceased Medicaid recipient when he or she can demonstrate that he or she advanced their personal funds to provide for a shortfall in the deceased Medicaid recipient's expenses reasonable and necessary for burial as contemplated at RSA 554:19, II(b).

(b) Satisfactory documentation of personal funds advanced shall be cancelled checks and billing statements from the entity providing the disposition services such as a funeral home, crematory or monument company.

(c) No reduction shall be granted for expenses that are not necessary for burial as contemplated at RSA 554:19, II including but not limited to flowers, music, post-prandial meals, travel expenses to or from funeral services, telephone or postage expenses.

He-W 6895.08 Administrative Hearings.

(a) A decision pursuant to He-W 6895.06 shall be final unless within 30 calendar days of the date of the decision, a request is submitted for an administrative hearingappeal pursuant to He-C 200.

(b) If the department's administrative hearingappeal process finds in favor of the applicant, then the department shall withdraw its claim for recovery from probate court.

APPENDIX

<u>Rule</u>	<u>RSA/ Federal Citation</u>
He-W 895.01-He-W 895.06 (formerly He-W 695.01-.06)	RSA 167:13-16; 42 USC 1396p
He-W 895.07 (formerly He-W 695.07)	RSA 167:13-16; RSA 554:19; 42 USC 1396p
He-W 895.08 (formerly He-W 695.08)	RSA 167:13-16; 42 USC 1396p