

RULEMAKING NOTICE FORM

Notice Number 2020-57

Rule Number He-E 802

1. Agency Name & Address:
**Dept. of Health & Human Services
Division of Long Term Supports and Services
Bureau of Elderly & Adult Services
105 Pleasant Street, Main Building
Concord, NH 03301**

2. RSA Authority: **RSA 161:4-a, IX and
RSA 151-E:12**

3. Federal Authority: **42 USC 1396a and 1396r; 42 CFR
483.132**

4. Type of Action:

Adoption	<u> X </u>
Amendment	<u> </u>
Repeal	<u> </u>
Readoption	<u> </u>
Readoption w/amendment	<u> </u>

5. Short Title: **Nursing Facility Services**

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

He-E 802 describes the Medicaid coverage of nursing facility services, including provider participation requirements, clinical eligibility requirements, covered and non-covered services, resident rights, and resident transfer and discharge requirements. He-E 802 was an interim rule and expired on September 16, 2019.

The Department of Health and Human Services (Department) is proposing to adopt He-E 802. The proposed changes to this rule, as compared to the expired rule, include:

- **Updating the rule for better clarity, program integrity, and consistency with other Departmental rules;**
- **Updating the definitions by:**
 - **Adding the definitions of “Division of Long Term Supports and Services”, “institution for individuals with intellectual disabilities or persons with related conditions”, and “skilled medical professional”;**
 - **Clarifying the definitions of “activities of daily living (ADLs)”, “institution for mental disease (IMD)”, “nursing facility”, and “swing bed”; and**
 - **Removing the definition of “intermediate care facility for the mentally retarded (ICF/MR)”;**
- **Updating the rule to clarify that eligibility for atypical services shall not begin prior to the completion of an assessment;**
- **Updating the rule to allow for a skilled medical professional to make the clinical eligibility determination of an applicant;**
- **Clarifying the request for redetermination after a clinical denial process;**
- **Updating the rule to add that behavioral health services in accordance with 42 CFR 483.40 shall be covered nursing facility services;**

- Updating the rule to require nursing facilities to contact the Department when a discharge to the community is planned to ensure targeted transitional case management pursuant to RSA 151-E:17;
- Updating the rule to include a new section He-E 802.18 on specialized rate requests establishing a formal process to request a specialized rate;
- Updating the rule to address changes to state and federal law; and
- Updating the rule by making minor substantive and editorial changes throughout.

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

Groups affected by this rule include nursing facilities, providers, and the individuals that are residing in those facilities.

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

RULE	STATUTE/FEDERAL REGULATION
He-E 802.01	RSA 161:4-a, IX and RSA 151
He-E 802.02	42 USC 1396r and RSA 151:2
He-E 802.03	RSA 151-E:3
He-E 802.04	42 USC 1396r; 42 CFR 483.132; RSA 151-E
He-E 802.05	RSA 151-E:3
He-E 802.06	RSA 151-E:3
He-E 802.07	42 USC 1396a and 1396r
He-E 802.08	42 USC 1396r
He-E 802.09	RSA 161:4-a, IX, 42 USC 1396r and RSA 161:4-a, IX
He-E 802.10	42 CFR 483.10(i)(F)
He-E 802.11	42 USC 1396r and RSA 151:21
He-E 802.12	42 USC 1396r
He-E 802.13	42 USC 1396r
He-E 802.14	42 USC 1396r and RSA 151:21
He-E 802.15	42 USC 1396r; 42 CFR 447.40; RSA 151:25
He-E 802.16	42 USC 1396r and RSA 151:26
He-E 802.17	42 USC 1396r and RSA 151:26
He-E 802.18	RSA 541-A:19-b
He-E 802.19	RSA 541-A:19-b

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

Name:	Allyson Zinno	Title:	Administrative Rules Coordinator
Address:	Dept. of Health and Human Services Administrative Rules Unit 129 Pleasant Street, 2nd Floor Concord, NH 03301	Phone #:	(603) 271-9604
		Fax#:	(603) 271-5590
		E-mail:	allyson.zinno@dhhs.nh.gov

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: **Wednesday, August 5, 2020**

Fax

E-mail

Other format (specify):

9. Public hearing scheduled for:

Date and Time: **Wednesday, July 29, 2020 at 2:00pm.**

Place: **[DHHS Brown Bldg., Auditorium, 129 Pleasant St., Concord, NH](#)**

This meeting can also be accessed via zoom using the below information:

Join Zoom Meeting: <https://nh-dhhs.zoom.us/j/2744551778?pwd=RnJxZFVPMlIQ3pqQW5FZ09YR2xidz09>

Meeting ID: **274 455 1778**

Password: **866326**

One tap mobile: **+13126266799,,2744551778#,,1#,866326# US (Chicago)**

+16465588656,,2744551778#,,1#,866326# US (New York)

Dial by your location: **+1 312 626 6799 US (Chicago)**

+1 646 558 8656 US (New York)

+1 301 715 8592 US (Germantown)

+1 346 248 7799 US (Houston)

+1 669 900 9128 US (San Jose)

+1 253 215 8782 US (Tacoma)

The following email address will be monitored during the meeting if there is any public access or technical problem during the meeting: allyson.zinno@dhhs.nh.gov.

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

FIS # 20:052, dated June 11, 2020

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

Not applicable; the existing interim rule expired in September 2019.

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

No federal mandate, no impact on state funds.

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

The proposed rule describes Medicaid coverage of nursing facility services, including provider participation requirements, clinical eligibility requirements, covered and non-covered services, resident rights, and resident transfer and discharge requirements. There may be costs and benefits for nursing facilities related to each of these elements. Sections A-C below describe the fiscal impacts of the rule as they compare to the previous rule that expired September 16, 2019.

A. To State general or State special funds:

Expenses associated with the proposed rules are paid for with a combination of federal Medicaid funds, state general funds, and other sources, such as county funds. Because the general fund appropriation is established in each budget by the NH state legislature, any increase or decrease in service utilization as a result of these rules must fall within the budgeted appropriation. Hence, only with a new appropriation would there be any impact on general fund expenditures.

B. To State citizens and political subdivisions:

There will be no impact to political subdivisions in the current FY 2020/21 budget. Any impact in later years will be determined by the cap on county costs established in each biennial budget.

The proposed rule clarifies that coverage is for generic or over-the-counter products. This rule may result in an indeterminable cost for state citizens who must pay for other products not covered by the rule.

C. To independently owned businesses:

The proposed rule may result in an indeterminable cost to nursing facilities related to a requirement that they contact the Department of Health and Human Services for targeted case management services. In addition, the proposed rule outlines new requirements for nursing facilities to submit a request for a specialized rate outside of rate setting calculated in accordance with He-E 806. The rule language requires nursing facilities to submit requests pursuant to the Department's "specialized rate request" form and describes the process once a request is submitted. This requirement could increase administrative costs to nursing facilities, but the Department expects the impact to be minimal.

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

The proposed rule modifies an existing program or responsibility, but does not mandate any fees, duties or expenditures on the political subdivisions of the state, and therefore does not violate Part I, Article 28-a of the N.H. Constitution.

CHAPTER He-E 800 MEDICAL ASSISTANCE

Adopt He-E 802, previously effective 3-20-19 (Document #12741, Interim), and expired 9-16-19, to read as follows:

PART He-E 802 NURSING FACILITY SERVICES

He-E 802.01 Definitions.

(a) “Activities of daily living (ADLs)” means the primary activities necessary to carry out daily self-care activities such as grooming, toileting, eating, dressing, getting into or out of a bed or chair, walking, bathing, and continence.

(b) “Atypical services” means services provided by a nursing facility, or a distinct part of a nursing facility, which possesses the physical characteristics and appropriate staffing for, and devotes its services exclusively to, highly specialized care.

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(c) “Bed-hold” means the right of an individual to resume nursing facility residency after he or she has been away from the facility due to hospitalization or therapeutic leave.

(d) “Bureau” means the bureau of elderly and adult services (BEAS) within the NH department of health and human services that administers programs that serve elderly and disabled adults.

(e) “Centers for Medicare and Medicaid Services (CMS)” means the federal agency within the U.S. Department of Health and Human Services that administers the Medicare and Medicaid programs.

(f) “Cognitive rehabilitation” means a program for brain-injured individuals that is designed to improve physical and cognitive abilities, decrease the disabling effects, and support behavioral stability, and social reintegration.

(g) “Coma management” means a program provided for brain-injured individuals in order to increase their level of physical ability, maintain optimal health and nutrition, and, where possible, increase cognitive awareness.

(h) “Department” means the New Hampshire department of health and human services.

(i) “Discharge” means “discharge” as defined in RSA 151:19, I-a.

(j) “Division of Long Term Supports and Services” means a division within the NH department of health and human services that administers long-term care and home and community based programs that serves chronically ill and disabled persons.

(k) “Extensive specialized care” means specific therapies for the treatment of an individual experiencing an acute episode of behavioral symptoms that necessitates supervision by trained mental health professionals that is directed toward improving the resident’s problematic behavioral symptoms.

(l) “Institution for individuals with intellectual disabilities or persons with related conditions” means “institution for individuals with intellectual disabilities or persons with related conditions” as defined in 42 CFR 435.1010.

(m) “Institution for mental diseases (IMD)” means “institution for mental diseases” as defined in 42 CFR 435.1010.

(n) “Legal representative” means one of the following individuals, duly appointed or designated in the manner required by law to act on behalf of another individual, and who is acting within the scope of his/her authority:

- (1) An attorney;
- (2) A guardian or conservator;
- (3) An agent acting under a power of attorney;
- (4) An authorized representative acting on behalf of an applicant in some or all of the aspects of initial and continuing eligibility in accordance with He-W 603.01; or
- (5) A representative acting on behalf of another individual pursuant to RSA 161-I, Personal Care Services.

(o) “Licensed practitioner” means:

- (1) Medical doctor;
- (2) Physician’s assistant;
- (3) Advanced practice registered nurse (APRN);
- (4) Doctor of osteopathy;
- (5) Doctor of naturopathic medicine; or
- (6) Anyone else with diagnostic and prescriptive powers licensed by the appropriate New Hampshire licensing board.

(p) “Long-term care” means those health-related services provided in a nursing facility that are above the level of room and board, but below the level of skilled care.

(q) “Medical monitoring and nursing care” means clinical monitoring, provided on a daily basis by a licensed nurse, of disease processes that are currently being treated, including both stable and unstable conditions, in order to assess or supervise a chronic health problem, or assess episodes of acute illness, which might include monitoring of the effects of medication, or both.

(r) “Medication administration” means provision of one or more doses of medication to a resident by a person qualified by law or rule to administer medication.

(s) “Minimum data set (MDS)” means a current version, as specified by CMS, of a minimum set of screening and assessment elements, including common definitions and coding categories that form the foundation of the comprehensive assessment provided to all residents of facilities certified to participate in Medicare or Medicaid.

(t) “Nursing facility (NF)” means an institution or a distinct part of an institution that is:

- (1) Participating in the Medicaid program;
- (2) Meeting the requirements of Section 1919 of the Social Security Act, 42 USC 1396r;
- (3) Not primarily an IMD or an institution for individuals with intellectual disabilities or persons with related conditions; and

(4) Providing one or more of the following:

- a. Skilled nursing care and related services for residents who require medical or nursing care;
- b. Rehabilitative services for the rehabilitation of injured, disabled or sick individuals; or
- c. Health-related care and services to individuals who, because of their mental or physical condition, require care and services that are above the level of room and board, and that can be made available to them only through an institution.

(u) “Rehabilitative services” means nursing interventions that:

- (1) Promote the resident’s ability to adapt and adjust to living as independently and safely as possible;
- (2) Actively focus on achieving and maintaining optimal physical, mental and psychosocial functioning; and
- (3) Include nursing interventions as set forth in the current version of the MDS.

(v) “Reserved bed day” means a 24-hour period, midnight to midnight, when the resident of a nursing facility is not present during the midnight census at the conclusion of the day, and that is chargeable to medicaid.

(w) “Resident” means a person residing in a nursing facility.

(x) “Self-administration” means an act whereby an individual administers his or her own medications.

(y) “Skilled medical professional” means “skilled professional medical personnel” as defined in RSA 151-E:3.

(z) “Skilled nursing care” means those health related services, above the level of room and board, which meet the criteria used by the Medicare program for skilled nursing care, per 42 USC 1395i3.

(aa) “Swing-bed” means a bed within a hospital or critical access hospital participating in Medicare that is approved by CMS at a skilled level of care.

(ab) “Therapeutic leave” means one or more days when the resident is absent from the nursing facility for reasons stipulated in the resident’s plan of care, but not for purposes of hospitalization or transfer to another facility.

(ac) “Transfer” means “transfer” as defined in RSA 151:19, VII.

He-E 802.02 Provider Participation.

(a) All NFs, and all hospitals containing swing beds, shall:

- (1) Be licensed pursuant to RSA 151 and He-P 803;
- (2) Be enrolled as New Hampshire medicaid providers; and
- (3) Meet the Medicare certification criteria for skilled nursing care.

(b) All NFs shall inform the bureau via a “Change of Status/Transfer/Discharge Form”, incorporated by reference in He-E 802.19(a), of any change in the resident’s status, including:

- (1) Source of reimbursement;
- (2) Death of the resident;
- (3) Transfer to a different facility; and
- (4) Transition to a community setting.

(c) The “Change of Status” form in (b) above shall be submitted within 5 business days of the change, except that a transition to a community setting shall require notification no later than 14 days prior to the discharge date from the facility.

He-E 802.03 Eligibility.

(a) An individual shall be eligible to receive NF services if he or she:

- (1) Submits a signed and dated application, as defined in He-W 601.01(p) to the department;
- (2) Has been determined financially eligible as either categorically needy or medically needy;
- (3) Meets the clinical eligibility requirements for nursing facility care in RSA 151-E:3, I(a), namely, the person requires 24-hour care for one or more of the following purposes, as determined by registered nurses appropriately trained to use an assessment instrument and employed by the department, or a designee acting on behalf of the department:
 - a. Medical monitoring and nursing care when the skills of a licensed medical professional are needed to provide safe and effective services;
 - b. Restorative nursing or rehabilitative care with patient-specific goals;
 - c. Medication administration by oral, topical, intravenous, intramuscular, or subcutaneous injection, or intravenous feeding for treatment of recent or unstable conditions requiring medical or nursing intervention; or
 - d. Assistance with 2 or more ADLs; and
- (4) Has chosen, or whose representative has chosen, by signing the application in (1) above, NF services.

(b) An individual who requires review in accordance with He-M 1302 shall be reviewed in accordance with He-M 1302 prior to an eligibility determination being made pursuant to this rule.

He-E 802.04 Eligibility Criteria for Atypical Services.

(a) Services in a skilled nursing care or atypical services unit shall be available to individuals who meet the clinical eligibility requirements in He-E 802.03 and this section, and whose clinical assessment required by He-E 802.05(a)(1)b. includes documentation of the individual’s rehabilitative potential and goals.

(b) Eligibility for atypical services shall not begin prior to the date of the completed nursing assessment instrument pursuant to He-E 802.05(a) below.

(c) Eligibility for short-term skilled nursing care or rehabilitative services shall be determined in accordance with the following criteria:

- (1) The individual requires daily skilled nursing care or rehabilitative services, or both; and
- (2) The individual has or is one or more of the following:
 - a. An acquired, non-degenerative brain injury resulting in residual deficits and disability;
 - b. An injury which occurred within one year of the date of admission to the skilled nursing care or rehabilitation unit, or in the alternative, has an injury older than one year of such admission which is expected to show significant improvement with treatment based on the assessment in (a) above; or
 - c. Ventilator-dependent or has other specific needs that require extensive nursing or rehabilitative services 24 hours per day.

(d) Eligibility for atypical non-behavioral long-term care services shall be determined in accordance with the following criteria:

- (1) The individual requires daily nursing care or rehabilitative services, or both;
- (2) The individual requires one of the covered services listed in He-E 802.09; and
- (3) The individual has or is one or more of the following:
 - a. An acquired, non-degenerative brain injury resulting in residual deficits and disability;
 - b. An injury which occurred within one year of the date of admission to the non-behavioral unit, or in the alternative, has an injury older than one year of such admission which will show significant improvement with treatment based on the assessment in (a) above; or
 - c. Ventilator-dependent or has other specific needs that require extensive nursing or rehabilitative services 24 hour per day.

(e) Eligibility for atypical behavioral long-term care services shall be determined in accordance with the following criteria:

- (1) The individual meets one or both of the following criteria:
 - a. Has had a psychiatric evaluation completed by a psychiatrist within 30 days prior to admission to the behavioral unit, and the evaluation indicates:
 1. Evidence of current behavioral symptoms; or
 2. Evidence of current and severe manifestations of behavioral problems that interfere with daily living situations; or
 - b. Has been diagnosed with one or more diseases that:
 1. Have an impact on the individual's ability to perform ADLs, cognitive status, mood or behavior status, medical treatments, nursing monitoring or risk of death; and

2. Consist of conditions that are addressed in the current plan of care developed by the NF currently treating the individual or a prospective NF; and
- (2) Based on the MDS completed upon admission in accordance with 42 CFR 483.20, has:
- a. A combined score that is less than or equal to 2 on the questions relative to:
 1. Ability to understand others;
 2. Short-term memory; and
 3. Cognitive skills for decision making; and
 - b. An ADL score that is less than or equal to 10.
- (f) The following shall apply to eligibility for and authorization for placement in a swing bed:
- (1) The bureau shall authorize placement in a swing bed on either a temporary basis or a pending placement basis when there is no NF bed available;
 - (2) For a temporary placement in a short-term care swing bed:
 - a. The individual shall meet the eligibility criteria in (b) above; and
 - b. The bureau shall determine, in consultation with the hospital in which the individual is currently placed, that such temporary placement is appropriate;
 - (3) For a pending placement in a short-term care swing bed, the individual shall meet the eligibility criteria in (b) above; and
 - (4) For a pending placement in a long-term care swing bed, the individual shall meet the eligibility criteria in (c) or (d) above.

He-E 802.05 Clinical Eligibility Determination for NF Services.

- (a) The department shall make the clinical eligibility determination of the applicant as follows:
- (1) A skilled medical professional appropriately trained to use the assessment instrument and employed by the department or designated by the department shall:
 - a. Conduct an on-site, face-to-face visit with the applicant;
 - b. Perform a clinical assessment of the applicant; and
 - c. Develop a list of identified needs for the applicant; and
 - (2) The applicant shall sign the following:
 - a. A consent for receiving NF services, as applicable;
 - b. An authorization for release of information, as applicable; and
 - c. An authorization for release of protected health information, as applicable.
- (b) Pursuant to RSA 151-E:3, IV, if the department is unable to determine an applicant clinically eligible based on the assessment in (a) above, the department shall send notice to the applicant and the applicant's licensed practitioner(s), as applicable, requesting additional clinical information within 30

calendar days of the notice and stating that the failure to submit the requested information will impede processing of the application and delay service delivery.

(c) Within the 30 day period in (b) above, if the requested information is not received within 20 calendar days, the department shall send a second notice to the applicable licensed practitioner(s) with a copy to the applicant requesting the information.

(d) Upon request from the treating licensed practitioner or applicant, the department shall extend the deadline in (b) above for a maximum of 30 days if the practitioner or applicant states that he or she has documentation that supports eligibility and will provide it within that time period.

(e) If the information required by (b) above is not received by the date specified in the notice, or as extended by the department in accordance with (d) above, clinical eligibility shall be denied pursuant to RSA 541-A:29.

(f) The applicant shall be determined clinically eligible if it is determined that the applicant meets the financial eligibility requirements described in He-W 600 and the clinical eligibility requirements of He-E 802.03 and 802.04.

(g) Upon a determination of eligibility, the applicant or his or her representative and the NF shall be sent an approval notice, including:

- (1) The type of services approved, based on criteria described in He-E 802.04;
- (2) The name of the facility where the individual will be receiving care; and
- (3) The eligibility start date and, if applicable, the service end date.

(h) Upon a determination of ineligibility, because the applicant does not meet the eligibility requirements of He-E 802.03 and 802.04 or because required information is not received pursuant to (e) above, the applicant or his or her representative and the NF shall be sent a notice of denial, including:

- (1) A statement regarding the reason and legal basis for the denial;
- (2) Information concerning the applicant's right of appeal pursuant to He-C 200, including the requirement that the applicant has 30 calendar days from the date of the notice of denial to file such an appeal; and
- (3) An explanation that an applicant who is denied services and who chooses to appeal this denial pursuant to He-C 200 shall not be entitled to medicaid payments for NF services pending the appeal hearing decision.

(i) If an administrative appeal is requested and the result is a reversal of the bureau's decision, retroactive payment shall be made to the NF or, if the individual is occupying a swing bed, to the hospital where the swing bed is located.

He-E 802.06 Request for Clinical Redetermination After Clinical Denial. An applicant or participant may reapply at any time following a denial, termination of services, or change in level or frequency of services, and eligibility shall be determined in accordance with He-E 802.03, 802.04, and 802.05.

He-E 802.07 Utilization Review.

(a) The bureau shall conduct utilization reviews for continued placement as described in this section.

(b) For individuals approved to receive short-term skilled nursing care or rehabilitative services, the following shall apply:

- (1) The initial authorization shall be for up to 30 days;
- (2) The individual shall be eligible for up to 2 additional 30-day authorization periods, based on a utilization review conducted by the bureau;
- (3) The NF shall submit to the bureau a completed “Utilization Review Form”, incorporated by reference in He-E 802.19(b), and any supporting documentation no later than 14 days prior to the end of the current authorization period; and
- (4) The bureau shall determine continued placement authorization if, based on the documentation in (3) above, the eligibility criteria in He-E 802.04(b) are met.

(c) For individuals approved to receive atypical non-behavioral long-term care services, the following shall apply:

- (1) The initial authorization shall be for one year;
- (2) The individual shall be eligible for additional one-year authorization periods, based on a utilization review conducted by the bureau;
- (3) The NF shall submit to the bureau a completed assessment pursuant to He-E 802.05(a)(1)b. and any supporting documentation no later than 14 days prior to the end of the current authorization period; and
- (4) The bureau shall determine continued placement authorization if, based on the documentation in (3) above, the eligibility criteria in He-E 802.04(c) are met.

(d) For individuals approved to receive atypical behavioral long-term care services, the following shall apply:

- (1) The initial authorization shall be for 6 months;
- (2) The individual shall be eligible for an additional 6-month authorization period for a total of one year, after which additional authorization periods shall be for one year, based on a utilization review conducted by the bureau;
- (3) The NF shall submit to the bureau, no later than 14 days prior to the end of the current authorization period, a completed “Utilization Review Form”, incorporated by reference in He-E 802.19(b), and the following supporting documentation:
 - a. A psychological evaluation;
 - b. A behavioral plan;
 - c. The bureau’s “Memory and Behavior Checklist”, incorporated by reference in He-E 802.19(c); and
 - d. A behavior summary which:
 1. Includes the same information as the bureau’s “Behavior Summary Report”, incorporated by reference in He-E 802.19(d); and
 2. Describes the recommended transition plan from the behavioral unit;

- (4) The supporting documentation in (3) above shall have been completed no earlier than 30 days prior to its submission;
 - (5) After one year, in addition to the documentation in (3) above, the facility shall also submit to the bureau a completed assessment pursuant to He-E 802.05(a)(1)b.; and
 - (6) The bureau shall determine continued placement authorization if, based on the documentation in (3)-(5) above, the eligibility criteria in He-E 802.04(d) are met.
- (e) For individuals authorized for placement in a swing bed, the following shall apply:
- (1) For residents with a temporary placement, the requirements in (b) above shall apply; and
 - (2) For residents with a pending placement, the following shall apply:
 - a. The initial authorization shall be for 30 days;
 - b. The individual shall be eligible for additional 30-day authorization periods, based on a utilization review conducted by the bureau;
 - c. The NF shall submit to the bureau a completed "Utilization Review Form", incorporated by reference in He-E 802.19(b), and any supporting documentation no later than 14 days prior to the end of the current authorization period unless otherwise directed; and
 - d. The bureau shall determine continued placement authorization if, based on the documentation in c. above, the eligibility criteria in He-E 802.04(e) are met.
- (f) If the NF fails to submit timely utilization review documentation and supporting documentation in accordance with this section, the authorization for services and the payment for services provided shall end.
- (g) When, as a result of utilization review, the medical condition of a resident in a specific placement no longer meets the criteria specified in He-E 802.04 for the specific placement, a notice of the determination and the right to request an appeal shall be sent to the resident and the NF, pursuant to He-E 802.05(h).

He-E 802.08 Covered Services.

- (a) Pursuant to 42 CFR 483, the following services shall be covered NF services:
- (1) Nursing services in accordance with 42 CFR 483.35, including:
 - a. Services provided to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care; and
 - b. Services provided on a 24-hour basis in accordance with resident care plans;
 - (2) Food and nutrition services in accordance with 42 CFR 483.60, including:
 - a. Providing each resident with a nourishing, palatable, well-balanced diet that meets the daily nutritional and special dietary needs of each resident;

- b. Employing a qualified dietician either full-time, part-time, or on a consultant basis;
and
 - c. Providing therapeutic diets, as prescribed by the attending physician;
- (3) Activities program services in accordance with 42 CFR 483.24(c)(2), including an ongoing program of activities directed by a qualified professional and designed to meet, in accordance with the residents' assessments, the interests and the physical, mental, and psychosocial well-being of each resident;
- (4) Medically related social services, in accordance with 42 CFR 483.40, including:
- a. Services provided to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident; and
 - b. Employing a qualified social worker if the NF has more than 120 beds;
- (5) A non-private room;
- (6) The provision of routine personal generic or over the counter (OTC) hygiene items and services as required to meet the needs of residents, including, but not limited to the following:
- a. Hygiene supplies;
 - b. Comb;
 - c. Brush;
 - d. Bath soap;
 - e.. Disinfecting soaps or specialized cleansing agents when indicated to treat special skin problems or to fight infection;
 - f. Razor, and shaving cream;
 - g. Toothbrush, toothpaste, and dental floss;
 - h. Denture adhesive, denture cleaner;
 - i. Lotion;
 - j. Tissues, cotton balls, cotton swabs;
 - k. Deodorant;
 - l. Incontinence care and supplies;
 - m. Sanitary napkins and related supplies;
 - n. Towels, washcloths, hospital gowns;
 - o. Drugs;

p. Hair and nail hygiene services;

q. Bathing assistance; and

r. Basic personal laundry;

(7) Specialized rehabilitative services in accordance with 42 CFR 483.65, including, but not limited to, physical therapy, speech-language pathology, occupational therapy, respiratory therapy including oxygen, laboratory, radiology, mental health services, and those ancillary services listed in He-E 806.06, and provided by the NF or obtained by the NF from a qualified outside provider;

(8) Dental services in accordance with 42 CFR 483.55, including:

a. Providing or obtaining from an outside providers routine dental services to the extent covered by the New Hampshire medicaid state plan pursuant to He-W 566;

b. Providing or obtaining from an outside providers emergency dental services; and

c. Assistance with:

1. Making dental appointments;

2. Arranging for transportation to and from the dentist's office; and

3. Prompt referrals to a dentist for lost or damaged dentures;

(9) Pharmacy services in accordance with 42 CFR 483.45 including:

a. Following procedures that assure the accurate acquiring, receiving, dispensing, and administering of all drugs and biologicals to meet the needs of each resident;

b. Medical supplies, FDA approved pharmaceutical items, and FDA approved non-legend drugs, that is, drugs prescribed by a licensed practitioner that are normally purchased OTC, which are stocked at nursing stations or on the floor in gross supply and distributed individually in small quantities to meet the needs of each resident, and;

c. Pharmacy service consultation of a licensed pharmacist;

(10) Physician services in accordance with 42 CFR 483.30;

(11) Specialized services in accordance with 42 CFR 483.120 for residents with an intellectual disability or mental illness; and

(12) Behavioral health services in accordance with 42 CFR 483.40.

(b) The services in (a) above shall be covered to the extent that they are required in each resident's care plan.

He-E 802.09 Covered Atypical Services.

(a) The following shall be covered in an atypical non-behavioral long-term care unit:

(1) Coma management services;

(2) Cognitive rehabilitation service shall be available and continue for as long as progressive, significant and measurable improvement is documented by the NF and verified by the bureau in accordance with He-E 802.07;

(3) Care, treatment, and management of residents who are ventilator-dependent;

(4) Care, treatment, and management of residents who require nursing intervention to provide enteral nutrition services; and

(5) Care, treatment, and management of residents who require nursing interventions of a highly specialized nature.

(b) An atypical behavioral long-term care unit shall provide extensive specialized care in behavioral approaches which meet the needs addressed in the resident's behavior modification plan.

He-E 802.10 Non-Covered Services.

(a) Pursuant to 42 CFR 483.10(f)(11)(ii)(A)-(L), the following items and services shall not be covered:

(1) Utilities to include telephone, internet, and cable;

(2) Television and radio for personal use;

(3) Personal comfort items, including smoking materials, lotions and novelties, and confections;

(4) Cosmetic and grooming items and services in excess of those covered under He-E 802.08(a)(6);

(5) Personal clothing;

(6) Personal reading materials;

(7) Gifts purchased on behalf of a resident;

(8) Flowers and plants;

(9) Social events and entertainment offered outside the scope of the activities program, provided under He-E 802.08(a)(3);

(10) Non-covered special care services such as privately hired nurses or aides;

(11) Private room, except when therapeutically required, for example, isolation for infection control;

(12) Specially prepared or alternative food requested instead of the food generally prepared by the facility, as required by He-E 802.08(a)(2); and

(13) Barber and beauty services.

He-E 802.11 Residents' Rights.

(a) Prior to or upon the resident's admission to the NF, and annually thereafter, the NF shall inform the resident and his or her legal representative both orally and in writing, and in a language that the resident understands, of his or her rights, including the rights of residents in the event of a proposed transfer or

discharge from the NF, in accordance to 42 CFR 483.10 and RSA 151:26, and of all rules and regulations governing resident conduct and responsibilities during the resident's stay in the NF.

(b) Receipt of the information in (a) above, and any amendments to it, shall be acknowledged in writing by the resident or his or her legal representative.

(c) A NF shall establish and maintain identical policies and practices for all residents, regardless of the payment source, regarding transfers, discharges, and the provision of services.

He-E 802.12 Planning and Implementation of Care.

(a) The NF shall develop and implement a plan of care in accordance with 42 CFR 483.10 (C). The plan of care shall be part of the NF's permanent resident record. The resident has the right to participate in the development and implementation of his or her plan of care.

(b) The plan of care shall be updated at least every 90 days by the physician and other personnel involved in the care of the resident.

(c) The NF shall include the following information in the resident's plan of care:

(1) The resident's:

- a. Full name;
- b. Address;
- c. Gender;
- d. Date of birth;
- e. Identification number;
- f. Admission date; and
- g. Any other pertinent identifying information;

(2) Diagnosis, symptoms, complaints and complications indicating the need for admission or continuing care;

(3) The resident's life history, significant relationships, and personal preferences;

(4) A description of the resident's functional level;

(5) Written objectives and approaches by responsible personnel, including the dates when goals are achieved;

(6) Orders for:

- a. Medications;
- b. Treatments;
- c. Restorative and rehabilitative services;
- d Therapies;
- e. Diet;

- f. Activities;
 - g. Social services; and
 - h. Special procedures designed to meet these objectives;
- (7) Progress notes that shall be written at least every 90 days;
 - (8) Plans for continuing care, including provisions for review and necessary modifications of the plan;
 - (9) Discharge planning initiated within 7 days of admission; and
 - (10) When discharge to the community is planned, the NF shall contact the department to ensure targeted transitional case management assignment pursuant to RSA 151-E:17.

He-E 802.13 Room Changes Within the Facility.

(a) The resident shall reside and receive services in the NF with reasonable accommodation of individual needs and preferences, including choice of room and roommate, pursuant to 42 CFR 483.10(e), except when the health or safety of the resident or other residents would be endangered.

(b) A resident may refuse a transfer to another room within the NF if the purpose of the transfer is one of the following:

- (1) To relocate a resident of a skilled NF from the distinct part of the NF that is skilled care to a part of the NF that is not skilled care;
- (2) To relocate a resident of a NF from the distinct part of the NF that is not skilled care to a part of the NF that is a skilled NF; or
- (3) Solely for the convenience of staff pursuant to 42 CFR 483.10(e)(7) iii.

(c) A NF shall provide a resident with written notification before the resident's room location is changed or before the resident's roommate is changed.

He-E 802.14 Personal Accounts Belonging to Residents.

(a) A resident shall handle his or her own personal funds unless a legal representative has been appointed in accordance with state law.

(b) The NF shall not require residents to deposit their personal funds with the NF, but when the resident and his or her legal representative chooses to do this, the NF shall manage the resident's personal funds in accordance with 42 CFR 483.10, RSA 151:24, and He-E 806.39.

(c) The resident's personal funds shall not be used to pay or supplement payment for any item or service already included in or coverable by medicaid reimbursement to the NF.

(d) In the event of a resident's death, the money in the resident's personal account shall remain in his or her estate in accordance with RSA 151-A:15.

He-E 802.15 Temporary Absence from the Nursing Facility.

(a) A NF shall establish and follow a written policy regarding bed-hold periods which is consistent with RSA 151:25 and which indicates that when a NF has not received payment for a period of temporary absence or when the absence is longer than 10 days:

- (1) The resident shall have the option to return to the NF to the next available bed; and
 - (2) If more than one person has a right of readmission, vacancies shall be allocated on a first request made, first request honored basis, and without regard to the source of payment.
- (b) If a resident leaves the NF for any reason, and there is reason to believe that the resident might be absent during the next midnight census, then the following shall apply:
- (1) The NF shall provide to the resident and his or her legal representative the NF's written policy regarding bed-hold periods;
 - (2) The NF shall document the notification in the resident's record, along with the resident's and legal representative's written agreement to pay, or rejection of the option to pay, for the bed-hold period;
 - (3) The NF shall not charge an amount in excess of the medicaid rate to hold a bed for a resident who is on medicaid; and
 - (4) If a NF refuses to readmit a resident following an absence for medical treatment or therapeutic leave then a transfer or discharge will have been deemed to have occurred and the NF shall follow the transfer discharge requirements found in He-E 802.16.
- (c) When a resident leaves the NF for medical treatment, the NF shall communicate with the hospital or facility providing the medical treatment to the extent reasonably necessary in order to plan for the resident's safe and orderly transition back to the NF.
- (d) When a resident is absent from a NF due to therapeutic leave, the NF may bill for reserved bed days pursuant to 42 CFR 447.40, subject to the following conditions:
- (1) Such days shall be specified in the resident's plan of care;
 - (2) The plan of care shall describe provisions for continuity of care while the resident is out of the NF;
 - (3) Such days shall not be for hospitalization or for transferring to another facility;
 - (4) The NF may not bill for more than 30 reserved bed days per resident per state fiscal year; and
 - (5) When a recipient is on reserved bed day status, the department shall not pay separately for any services covered as part of the NF's rate pursuant to He-E 806.

He-E 802.16 Transfer or Discharge of Residents.

- (a) The NF shall not transfer or discharge a resident except as allowed in accordance with 42 CFR 483.10, RSA 151:21, V, and RSA 151:26.
- (b) Transfer or discharge of a resident shall be preceded by written notice in accordance with RSA 151:26, II, relative to what shall be included in the notice and to whom the notice shall be sent, including the long-term care ombudsman's office.
- (c) Written notice shall also include information regarding the resident's right to an administrative hearing pursuant to He-C 200, including:

- (1) A statement that the hearing is required to be requested in writing by the resident or his or her representative within 30 days of receiving the notice;
 - (2) A statement indicating that if a request for a hearing is filed within 20 days of receipt of the notice:
 - a. The resident shall be allowed to remain in the NF until a final decision is made by the administrative appeals unit, except as may be allowable under the provisions of RSA 151:26, II(b); and
 - b. That if the resident receives medicaid, payments to the NF shall continue while the appeal is pending; and
 - (3) With regard to transfers or discharges involving less than 30 days notice, a statement informing the resident of his or her right to an expedited hearing, as described in He-E 802.17(d).
- (d) No resident shall be transferred or discharged with less than 30 days' notice from the date the notice of transfer or discharge is received by the resident except as allowed by RSA 151:26, II(b).
- (e) When the written notice is delivered to the resident, NF staff shall:
- (1) Communicate orally to the resident, in a language he or she understands, all information contained in the written notice, or, if the resident is hearing-impaired or cannot communicate orally due to a disability, consult with the bureau on how to make reasonable accommodation for communicating with the resident;
 - (2) Offer to help the resident contact a family member, legal representative, the office of the state long term care ombudsman, or any of the organizations identified in the notice; and
 - (3) Document the date and time of the notification, and offer of assistance in the resident's record.
- (f) At the time of notice, the NF shall provide the resident with written material that describes residents' rights, including the rights of a resident in the event of a proposed transfer or discharge from the facility, and for residents who are 60 years or older, contact information of the provider(s) of legal services under Title VII of the Older Americans Act.
- (g) The NF shall document delivery of the notice to the resident by:
- (1) Requesting the signature of the resident on a dated statement of receipt, if the resident is able and willing to sign a receipt;
 - (2) Recording the date of delivery to the resident in the resident's record; and
 - (3) Recording whether and when the notice was mailed to the resident's legal representative or family members.
- (h) If less than 30 days notice of a transfer or discharge is given as allowed by RSA 151:26, II(b), the facility, in addition to all other requirements in this section, shall:
- (1) Provide verbal notice to the resident and his legal representative and to family members in accordance with any instructions or limitations given by the resident;

- (2) As soon as possible, follow the verbal notice with written notice to the above-mentioned parties; and
 - (3) Document the date and time of the notification in the resident's record.
- (i) The NF shall make, and document in the resident's record, reasonable efforts to work with the resident, the resident's legal representative, or the resident's family to resolve any payment problem prior to transfer or discharge.
 - (j) No resident shall be transferred or discharged unless there is a written transfer or discharge plan, which includes the following:
 - (1) The circumstances surrounding the discharge or transfer, including alternative interventions initiated by the NF before the facility proposed the discharge or transfer;
 - (2) All efforts made to locate the resident to the setting of his or her choice, and if the resident's wishes could not be accommodated, the reasons why;
 - (3) The location of the new setting and, if a facility, confirmation that the facility has accepted the resident;
 - (4) A comprehensive description of the medical, social, and rehabilitative needs of the resident and how the resident's needs will be met in the new setting;
 - (5) Documentation of consultation with the resident, family, or other interested parties, if and to the extent that this has been reasonably possible; and
 - (6) Documentation of consultation with the resident's personal physician or APRN regarding the transfer or discharge.
 - (k) A copy of the transfer or discharge plan shall be provided to:
 - (1) The resident and his or her legal representative; and
 - (2) The office of the state long term care ombudsman.

He-E 802.17 Appealing Transfers or Discharges.

- (a) Any resident being transferred or discharged, including any resident who asserts that his or her bed-hold right or right to readmission under He-E 802.15 has been denied, may appeal the transfer or discharge in accordance with the provisions contained in these rules and in He-C 200.
- (b) The request for an appeal shall be submitted within 30 days after the resident receives written notice of a proposed transfer or discharge, in compliance with He-E 802.17, or within 30 days of the date the resident learns of the right to appeal if the NF fails to provide the required written notice.
- (c) If a resident requests a hearing within 20 days after receiving the notice from the NF, the resident's transfer or discharge shall be suspended until after the hearing decision is issued, and the resident shall not be transferred or discharged from the NF except as allowed under the provisions of He-E 802.16(d).
- (d) In the event of a transfer or discharge with less than 30 days-notice under the provisions of He-E 802.16(d), a resident may request an expedited hearing, subject to the following conditions:
 - (1) The request for an expedited hearing shall be made within 10 calendar days of the notice of transfer or discharge;

- (2) An expedited hearing shall be held within 5 working days of the request for hearing; and
- (3) The hearing decision shall be issued:
 - a. Within 3 working days of the hearing if the resident has been moved out of the NF and the resident requested an expedited hearing; or
 - b. Within 15 working days of the hearing in all other cases.

(e) A hearing may be requested by a resident, his or her legal representative or anyone acting on behalf of a resident, including a NF, the department, a family member or a friend.

(f) Any employee or agent of the NF or the department who becomes aware that a resident has expressed a desire to have his or her transfer or discharge reviewed shall assist the resident in writing and submit his or her request for a hearing, or shall submit the request on behalf of the resident if the resident is not able to do so.

(g) The request for a hearing shall be submitted in writing, with a copy of the NF's notice of transfer or discharge, to:

NH Department of Health and Human Services
Administrative Appeals Unit
105 Pleasant Street
Concord, NH 03301

(h) The resident and the NF shall be considered parties to any appeal filed by a resident contesting a transfer or discharge pursuant to He-C 200.

(i) When feasible, all hearings shall be conducted at the NF where the resident is located.

(j) The resident and his or her legal representative shall:

(1) Upon an oral or written request, be given access to all records pertaining to the resident, including current clinical records, within 24 hours, excluding weekends and holidays; and

(2) After receipt of his or her records for inspection, be allowed to purchase at a cost not to exceed 25 cents per page, photocopies of the records or any portions of them upon request and after providing advance notice of 2 working days to the NF.

(k) A NF seeking to transfer or discharge a resident shall have the burden of proving by clear and convincing evidence, as described in He-C 203.14, that the transfer complies with the requirements of He-E 802.16.

(l) The following actions shall be taken following the administrative appeal unit's decision:

(1) If the decision upholds the discharge or transfer, the resident shall be relocated;

(2) If the decision does not uphold the discharge or transfer, the resident shall not be relocated;

(3) If the decision to transfer or discharge a resident who has been transferred or discharged pursuant to the provisions of He-E 802.16 is not upheld, the resident shall be readmitted to the NF's first available bed; and

(4) If the decision to transfer or discharge a resident is upheld, the NF shall adhere to the discharge plan.

He-E 802.18 Specialized Rate Requests.

(a) General NF rate setting shall be calculated in accordance with He-E 806, and requests for specialized rate setting shall be conducted pursuant to this section.

(b) Each NF presenting a case for consideration, whether for in state or for out of state placement, for a specialized rate, shall complete and submit a “Specialized Rate Request Form” (September 2020) to the department.

(c) The specialized rate request shall be reviewed by a specialized medical professional employed or contracted by the department for clinical appropriateness pursuant to He-E 802.05 above.

(d) The approved specialized rate shall be subject to a periodic utilization review in 30 days, 6 months, or annual increments.

(e) Approved rates shall be communicated to the receiving facility by the department.

He-E 802.19 Required Forms.

(a) Each NF informing the department under He-E 802.02(b) shall complete and submit Form 3820, “Change of Status/Transfer/Discharge Form” (September 2020).

(b) Each NF notifying the department under He-E 802.07(b)(3), (d)(3), and (e)(2)c. shall complete and submit Form 277, “Utilization Review Form” (September 2020).

(c) Each NF notifying the department under He-E 802.07(d)(3)c. shall complete and submit Form 3825, “Memory and Behavior Checklist” (September 2020).

(d) Each NF notifying the department under He-E 802.07(d)(3)d. shall submit a behavior summary which includes the same information as the bureau’s Form 3830, “Behavior Summary Report” (September 2020).

(e) Each NF requesting a specialized rate setting shall complete and submit Form “Specialized Rate Request” (September 2020) to the department.

APPENDIX

RULE	STATUTE/FEDERAL REGULATION
He-E 802.01	RSA 161:4-a, IX and RSA 151
He-E 802.02	42 USC 1396r and RSA 151:2
He-E 802.03	RSA 151-E:3
He-E 802.04	42 USC 1396r; 42 CFR 483.132; RSA 151-E
He-E 802.05	RSA 151-E:3
He-E 802.06	RSA 151-E:3
He-E 802.07	42 USC 1396a and 1396r
He-E 802.08	42 USC 1396r
He-E 802.09	RSA 161:4-a, IX, 42 USC 1396r and RSA 161:4-a, IX
He-E 802.10	42 CFR 483.10(i)(F)
He-E 802.11	42 USC 1396r and RSA 151:21
He-E 802.12	42 USC 1396r
He-E 802.13	42 USC 1396r
He-E 802.14	42 USC 1396r and RSA 151:21
He-E 802.15	42 USC 1396r; 42 CFR 447.40; RSA 151:25
He-E 802.16	42 USC 1396r and RSA 151:26
He-E 802.17	42 USC 1396r and RSA 151:26
He-E 802.18	RSA 541-A:19-b
He-E 802.19	RSA 541-A:19-b