

RULEMAKING NOTICE FORM

Notice Number 2017-105 Rule Number He-W 531.06(g)

<p>1. Agency Name & Address: NH Dept. of Health & Human Services Office of Medicaid Business and Policy 129 Pleasant Street Concord, NH 03301</p>	<p>2. RSA Authority: <u>RSA 161:4-a,X</u></p> <p>3. Federal Authority: <u>45 CFR §92.207(b) implementing §1557 of the Affordable Care Act</u></p> <p>4. Type of Action:</p> <p>Adoption _____</p> <p>Amendment <u>X</u></p> <p>Repeal _____</p> <p>Readoption _____</p> <p>Readoption w/amendment _____</p>
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5. Short Title: **Medicaid Physician Services – Non-Covered Services**

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

He-W 531 describes the requirements and services available under the NH Medicaid program for physician services. He-W 531.06 describes non-covered services. This proposal amends the rule, by deleting paragraph (g), to remove the categorical prohibition of coverage of gender reassignment surgery.

The U.S. Department of Health and Human Services Office of Civil Rights issued a federal regulation implementing Section 1557 of the Affordable Care Act (ACA) codified in 45 CFR Part 92. The federal regulation is effective as of 7/18/16. The federal regulation prohibits all health care entities receiving federal financial assistance from discriminating, including discriminating on the basis of gender identity. 45 CFR §92.207(b) prohibits categorical or automatic exclusions or limitations on coverage for all health services related to gender transition and prohibits limiting coverage or denying claims related to gender transition if such denial or limitation results in discrimination. The federal regulation does allow for an individual medical necessity determination for a particular requested service and allows for a determination of whether a requested service meets coverage requirements. The federal regulation requires health care entities to assure compliance and ties enforcement to the ability of the Centers for Medicare and Medicaid Services (CMS) to terminate or suspend federal financial assistance 45 CFR §92.302. Accordingly, this proposal to amend He-W 531 to remove the gender reassignment surgery prohibition would allow Medicaid recipients to receive gender reassignment surgery as allowed under the covered services section of the rule.

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

The proposed rule affects Medicaid recipients and it affects enrolled NH Medicaid providers of physician services.

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>Federal Reg./RSA</u>
He-W 531.06(g) [deleted]	45 CFR 92.207(b)

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

Name: **Michael Holt** Title: **Rules Coordinator**
Address: **Dept. of Health and Human Services** Phone #: **271-9234**
Administrative Rules Unit Fax#: **271-5590**
129 Pleasant St. E-mail: michael.holt@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, August 31, 2017**

Fax E-mail Other format (specify):

9. Public hearing scheduled for:

Date and Time: **Thursday, August 24, 2017 at 11:00 AM**

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

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

FIS # 17:097, dated 7/19/17

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

When compared to the existing rule, the proposed rule may increase costs to the state general fund, benefit state citizens to the extent that they request and are deemed eligible for gender reassignment surgery covered by Medicaid, and benefit independently-owned businesses to the extent that those businesses are NH Medicaid-enrolled physicians or hospital providers who perform gender reassignment surgeries.

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

Section 1557 of the federal Patient Protection and Affordable Care Act, codified in 45 CFR Part 92, prohibits all health care entities receiving federal financial assistance from discriminating, including discriminating on the basis of gender identity. 45 CFR 92.9207(b) prohibits categorical or automatic exclusions or limitations on coverage for all health services related to gender transition and prohibits limiting coverage or denying claims related to gender transition if such denial or limitation results in discrimination.

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

A. To State general or State special funds:

By amending the current rule to remove the categorical prohibition on coverage of gender reassignment surgery, the proposed rule may increase general fund expenditures by an indeterminable amount. Any Medicaid services provided would be paid for with 50% state general fund dollars and 50% federal dollars for those in Medicaid fee-for-service for Medicaid Care Management. The Department notes that NH Medicaid claims for the past five years identify 102 unique individuals who have claims of a diagnosis of gender identity disorder, out of a total Medicaid enrollment of approximately 187,000. The Department is unable to determine how many of these individuals would pursue gender reassignment surgery, or for how many such surgery would be deemed medically necessary.

B. To State citizens and political subdivisions:

State citizens may benefit to the extent that they request and are deemed eligible for gender reassignment surgery for which Medicaid coverage was previously unavailable.

C. To Independently owned businesses:

Independently-owned businesses may benefit to the extent that they are NH Medicaid enrolled physicians or hospital providers who perform gender reassignment surgeries.

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.

Amend He-W 531.06, effective 3/29/14 (Document #10561), by deleting paragraph (g) and renumbering subsequent paragraphs, cited as follows:

CHAPTER He-W 500 MEDICAL ASSISTANCE

PART He-W 531 PHYSICIAN SERVICES

He-W 531.06 Non-Covered Services.

| ~~(g) Sex change operations shall be non-covered.~~

Appendix B

RULE	STATE OR FEDERAL STATUTE THE RULE IMPLEMENTS
He-W 531.06(g) [deleted]	45 CFR 92.207(b)