**ADMINISTRATIVE RULES SUBCOMMITTEE**
**OF THE**
**ARKANSAS LEGISLATIVE COUNCIL**

**Wednesday, November 13, 2019**
**9:00 a.m.**
**Room A, MAC**
**Little Rock, Arkansas**

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**A. Call to Order.**

**B. Reports of the Executive Subcommittee.**

**C. Reports on Administrative Directives Pursuant to Act 1258 of 2015, for the quarter ending September 30, 2019.**

**1. Division of Community Correction (Mr. Solomon Graves)**

**2. Division of Correction (Mr. Solomon Graves)**

**3. Arkansas Parole Board (Mr. Solomon Graves)**

**D. Rules Filed Pursuant to Ark. Code Ann. § 10-3-309.**

**1. <u>DEPARTMENT OF PARKS, HERITAGE & TOURISM, CAPITOL ZONING DISTRICT COMMISSION</u> (Mr. Boyd Maher)**

**a. <u>SUBJECT</u>: 2019 Transformation Act Language**

**<u>DESCRIPTION</u>:** The proposed language by the Capitol Zoning District Commission incorporates changes to the agency's organizational structure and appeal process as set forth in the Transformation and Efficiencies Act of 2019.

**<u>PUBLIC COMMENT</u>:** The public comment period expired on September 18, 2019. A public hearing was held on September 19, 2019. The agency received no comments.

The proposed effective date is pending legislative review and approval.

**FINANCIAL IMPACT:** The agency states that the amended rule has no financial impact.

**LEGAL AUTHORIZATION:** Pursuant to Arkansas Code Annotated § 22-3-307(a), the Capitol Zoning District Commission ("Commission") shall have the power and authority to prescribe such rules concerning procedure before it and concerning the exercise of its functions and duties as it shall deem proper. Section 5549 of Act 910 of 2019, created the Department of Parks, Heritage, and Tourism ("Department") as a cabinet-level department and transferred the administrative functions of the Commission to the Department. Section 5549 further provided that each division of the Department shall be under the direction, control, and supervision of the Secretary of the Department. Act 910 of 2019 additionally amended Ark. Code Ann. § 22-3-303(e)(1) to state that the Commission is authorized to employ a director in consultation with the Secretary and amended Ark. Code Ann. § 22-3-310(a)(1)(A) to provide that any person aggrieved by any rule, decision, or order of the Commission may appeal the action to the Secretary. *See* Act 910 of 2019, §§ 5680, 5681.

**2. DEPARTMENT OF EDUCATION, DIVISION OF ELEMENTARY AND SECONDARY EDUCATION (Mr. Taylor Dugan)**

**a. SUBJECT: DESE Rules Governing the School Worker Defense Program and the School Worker Defense Program Advisory Board**

**DESCRIPTION:** The proposed amendments to these rules include the addition of the definition of "costs" to clarify what is covered under the program. "Costs" are court filing fees, photocopying costs, mailing and postage fees, service of process fees, transcript request fees, expert testimony, and reasonable mileage for court appearances and depositions. Mileage reimbursement is based on the current rate set by the Arkansas Department of Finance and Administration. Amendments to the rules also require backup documentation when submitting invoices to the School Worker Defense Program. Also, changes were made to the rules to include Act 557 of 2019.

Following the public comment period, a definition for "Backup Documentation" was added, and the term "attorney's fees" was added to Section 5.02.3.

**PUBLIC COMMENT:** A public hearing was held on August 22, 2019. The public comment period expired on August 23, 2019. The Division provided the following summary of the sole public comment that it received and its response thereto:

**Commenter Name:** Mike Mertens, Assistant Executive Director, Arkansas Association of Educational Administrators (07/19/2019) **Comment:** Recommendation: Under the Definitions section, or in 7.02, provide a definition or examples describing what "back-up information" is. Rationale: In 7.02, the term "back-up information' is added as required documentation. This is in addition to an itemized invoice that is in existing language. What would back-up information, other than an itemized invoice, look like? **Division Response:** Definition added for clarification. "Backup Documentation" means documentation included to justify the amount invoiced. Examples may include timesheets, receipts, supplier invoices. Non-substantive change made.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) Is there a reason that Section 5.02.3 omitted "attorney's fees," when they are referenced in Section 5.02 and Act 557 of 2019, § 3, on which the section appears premised? **RESPONSE:** Omission was not intentional and "attorney's fees" has been added. Non-substantive change made.

(2) What "backup documentation" does the Division contemplate being filed in addition to the itemized invoice, as referenced in Section 7.02.1? **RESPONSE:** Definition added for clarification. "Backup Documentation" means documentation included to justify the amount invoiced. Examples may include timesheets, receipts, supplier invoices. Non-substantive change made.

The proposed effective date is November 25, 2019.

**FINANCIAL IMPACT:** The agency states that the amended rules have no financial impact. The agency further states that the program has $390,000 per year to use to administer the program and that the amendments to the rules will help to clarify what the program will pay for.

**LEGAL AUTHORIZATION:** The proposed changes to the rules include those made in light of Act 557 of 2019, sponsored by Senator Joyce Elliott, which concerned corporal punishment and prohibited the use of corporal punishment on a child with a disability. Pursuant to Arkansas Code Annotated § 6-17-1113(e)(2), the Division of Elementary and Secondary Education ("Division") shall adopt appropriate rules necessary to carry out the purposes of the statute, which concerns the establishment of the School Worker Defense Program. The Division may further promulgate rules as necessary for the proper administration of Ark. Code Ann. § 6-17-1118 to establish the School Worker Defense Program Advisory Board. *See* Ark. Code Ann. § 6-17-1118(e)(1).

**3. DIVISION OF ENVIRONMENTAL QUALITY (Mr. Micheal Grappe)**

**a. SUBJECT: Repeal of Regulation No. 14: Regulations and Administrative Procedures for the Waste Tire Program**

**DESCRIPTION:** The Division of Environmental Quality ("Division"), by and through the Arkansas Pollution Control and Ecology Commission ("Commission"), proposes to repeal Regulation No. 14: Regulations and Administrative Procedures for the Waste Tire Program because it is obsolete. Regulation No. 14 has been superseded by Regulation No. 36 (Tire Accountability Program), the new program created by Act 317 of 2017, the Used Tire Recycling and Accountability Act, Ark. Code Ann. § 8-9-401 et seq. The permanent Regulation No. 36 became effective on August 13, 2018.

**PUBLIC COMMENT:** A public hearing was held on January 9, 2019. The public comment period expired on January 25, 2019. The agency received no public comments.

The proposed effective date is pending legislative review and approval.

**FINANCIAL IMPACT:** The agency states that the repealed rule has no financial impact. It explains that the rule to be repealed has been replaced by the Commission's Regulation No. 36: Tire Accountability Program ("TAP") because of Act 317 of 2017, the Used Tire Recycling and Accountability Act, Ark. Code Ann. § 8-9-401 et seq, and that the new TAP is funded by tire fees that are

required to be collected under Act 317 and are collected as special revenue.

**LEGAL AUTHORIZATION:** Act 317 of 2017, sponsored by Representative Lanny Fite, transferred the waste tire program of Regulation No. 14 to the Used Tire Recycling and Accountability Program. Regulation No. 36, which governs the superseding program, was promulgated pursuant to Arkansas Code Annotated § 8-9-414(a), as amended by Act 317; received legislative review and approval in July 2018; and, per the agency, became effective on August 13, 2018. Accordingly, the Division, by and through the Commission, now seeks to repeal Regulation No. 14. The Commission has the power and duty to promulgate rules implementing the substantive statutes charged to the Division for administration. *See* Ark. Code Ann § 8-1-203(b)(1)(A).

**4. DEPARTMENT OF HUMAN SERVICES, DIVISION OF AGING, ADULT & BEHAVIORAL HEALTH SERVICES (Mr. Isaac Linam, Ms. Patricia Gann)**

**a. SUBJECT: Repeal of Standards for Community Mental Health Centers and Clinics and the Accreditation Policy for Community Mental Health Centers and Clinics**

**DESCRIPTION:** The Department of Human Services, Division of Aging, Adult & Behavioral Health Services, seeks to repeal its Standards for Community Mental Health Centers and Clinics and the Accreditation Policy for Community Mental Health Centers and Clinics.

*Statement of Necessity*
The minimum standards of performance in the delivery of services and the requirements of the Standards for Community Mental Health Centers and Clinics will be contained within the language of contracts awarded to community mental health centers and clinics. These contracts will fully outline current requirements and standards. Repealing the Standards for Community Mental Health Centers and Clinics and the Accreditation Policy for Community Mental Health Centers and Clinics ensures that the contract terms take precedence.

*Summary*
This promulgation repeals the Standards for Community Mental Health Centers and Clinics and the Accreditation Policy for Community Mental Health Centers and Clinics completely. The minimum standards of performance in the delivery of services and the requirements that deem a provider a Community Mental Health Center will be included in contracts.

**PUBLIC COMMENT:** No public hearing was held. The public comment period expired on October 5, 2019. The Department received no public comments.

The proposed effective date is December 1, 2019.

**FINANCIAL IMPACT:** The agency states that the repealed rules have no financial impact.

**LEGAL AUTHORIZATION:** Pursuant to Arkansas Code Annotated § 20-76-201(1), the Department of Human Services ("Department") shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. The Department shall also make rules and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76, Public Assistance Generally, of the Arkansas Code. *See* Ark. Code Ann. § 20-76-201(12).

When asked to elaborate further on the agency's legal authority to repeal these rules, DHS provided the following response:

Before 2017, these mental health funds were distributed to specific entities designated by the Legislature in special language. For example, section 12 of Act 93 of 2016 lists the specific entities entitled to receive these funds, sections 13 through 15 of the Act outline various requirements relative to the funding, and section 16 directs DHS to adopt "minimum standards of performance." In years past, DHS legal staff advised that these "minimum standards" constituted agency statements of general applicability and future effect that implemented law, and therefore were required under the Administrative Procedure Act to be promulgated. And because these funds were directed by the Legislature to be given to these entities regardless of the specific services provided by the entities, these transfers constituted grants,

as that term is defined by state procurement law at Arkansas Code Annotated § 19-11-203(15)(A).

But now, the Legislature has eliminated the special language that formerly specified which entities could receive these funds. In the absence of any statutory designation, DHS is now awarding these funds through a competitive procurement. Because the resulting agreements are for the procurement of specific services, they are contracts and not grants under § 19-11-203(15)(A) & (B). And since they are contracts and not grants, Arkansas Code Annotated § 25-10-126 no longer applies to these funds and these rules are now moot.

**5. <u>DEPARTMENT OF HUMAN SERVICES, DIVISION OF COUNTY OPERATIONS</u> (Mr. Isaac Linam, Ms. Mary Franklin)**

**a. <u>SUBJECT</u>: Medical Services Policy Manual Sections E-600 and E-630, Achieving a Better Life Experience (ABLE) Program**

**<u>DESCRIPTION</u>:**

*Statement of Necessity*
Acts 2019, No. 59, prohibits an agency from recovering ABLE account proceeds upon the death of a designated beneficiary. Medical Services Policy Manual, Section E-600 Achieving a Better Life Experience (ABLE) Program, is being updated to incorporate the changes of Act 59. Medical Services Policy Manual, Section E-630 Contributions, is being updated to move the information on the exclusion limit to the Appendix R because it is for reference.

*Rule Summary*
In the Medical Services Policy Manual, Section E-600 Achieving a Better Life Experience (ABLE) Program, the statement that funds in ABLE accounts are subject to estate recovery to reimburse the State for Medicaid benefits has been removed. In turn, a statement that an ABLE account is not subject to estate recovery upon the death of a designated beneficiary has been added. The ABLE account can be transferred to the estate of the designated beneficiary or an account for another individual.

In addition, Medical Services Policy Manual, Section E-630 Contributions, is being updated to remove the statement of the annual exclusion limit for contributions and refers to Appendix R for the annual exclusion limit.

**PUBLIC COMMENT:** No public hearing was held. The public comment period expired on October 5, 2019. The Department received no public comments.

The proposed effective date is December 1, 2019.

**FINANCIAL IMPACT:** The agency states that the amended rule has no financial impact.

**LEGAL AUTHORIZATION:** Pursuant to Arkansas Code Annotated § 20-76-201(1), the Department of Human Services ("Department") shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. The Department shall also make rules and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76, Public Assistance Generally, of the Arkansas Code. *See* Ark. Code Ann. § 20-76-201(12). Additionally, Ark. Code Ann. § 20-77-107(a)(1) specifically authorizes the Department to "establish and maintain an indigent medical care program." The Department and its various divisions are further authorized to promulgate rules, as necessary to conform to federal statutes, rules, and regulations as may now or in the future affect programs administered or funded by or through the Department or its various divisions, as necessary to receive any federal funds that may now or in the future be available to the Department or its various divisions. *See* Ark. Code Ann. § 25-10-129(b).

Per the agency, these rule changes are being made pursuant to Act 59 of 2019, sponsored by Representative Julie Mayberry, which amended the Achieving a Better Life Experience Program Act, authorized the transfer of ABLE account assets following the death of a designated beneficiary, and prohibited the state from seeking payment from the ABLE account.

**6. DEPARTMENT OF HUMAN SERVICES, DIVISION OF MEDICAL SERVICES (Mr. Isaac Linam, Ms. Elizabeth Pitman)**

**a. SUBJECT: ARKIDS-3-18 (ARKIDS-B); EPSDT-1-18 (Early and Periodic Screening, Diagnosis, and Treatment) Services**

**DESCRIPTION:**

*Statement of Necessity*
The Arkansas Medicaid State Plan states "Medical Screens are provided based on the recommendations of the American Academy of Pediatrics." These additions are based on those recommendations.

*Rule Summary*
Effective January 1, 2020, Arkansas Medicaid will revise the Child Health Services/Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Manual and the ARKids First B Manual to:

- Add one (1) well-child visit for thirty (30) months, seven (7) years, and nine (9) years old to the periodicity schedule to comply with the recommendations of the American Academy of Pediatrics, as required by the Arkansas Medicaid State Plan.
- Add specific details concerning well-child screens based on the *Bright Futures Guidelines* of the American Academy of Pediatrics, as required by the Arkansas Medicaid State Plan.

**PUBLIC COMMENT:** No public hearing was held. The public comment period expired on September 17, 2019. The Department received no public comments.

Per the agency, this rule does not need CMS approval.

Kathryn Henry, an attorney with the Bureau of Legislative Research, asked the following question:

Your statement of necessity indicates that, "The Arkansas Medicaid State Plan states 'Medical Screens are provided based on the recommendations of the American Academy of Pediatrics.'" It also states that the additions in this rule are based on those recommendations. Did the American Academy of Pediatrics recently change its recommendations, or are you making these rule changes to comport with older recommendations? **RESPONSE:**

We're implementing recommendations that were updated in February 2017.

The proposed effective date is January 1, 2020.

**FINANCIAL IMPACT:** The agency states that the amended rules have a financial impact.

The cost to implement the federal rule or regulation is $1,641,886.00 for the current fiscal year ($473,027.00 in general revenue and $1,168,859.00 in federal funds) and $3,283,773.00 for the next fiscal year ($933,577.00 in general revenue and $2,350,196.00 in federal funds).

The total estimated cost by fiscal year to state, county, or municipal government to implement the rule is $473,027.00 for the current fiscal year and $933,577.00 for the next fiscal year.

The agency further states that there is a new or increased cost or obligation of at least one hundred thousand dollars ($100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined. Accordingly, the agency provided the following written findings:

*(1) a statement of the rule's basis and purpose*
Adding an additional well-child screening should help prevent developmental delays or disability, keep immunizations up to date, and help decrease expenditure costs if issues are detected and treated early.

*(2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute*
To detect developmental delay and disability early.

*(3) a description of the factual evidence that:*
*(a) justifies the agency's need for the proposed rule; and*
*(b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs*
Early detection of any developmental problems or delays helps decrease expenditures in the long run.

*(4) a list of costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule*
No less costly alternatives are proposed at this time.

*(5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule*
No alternatives are proposed at this time.

*(6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and*
Existing rules have not contributed to the problem.

*(7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether*
*(a) the rule is achieving the statutory objectives;*
*(b) the benefits of the rule continue to justify its costs; and*
*(c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.*
The agency monitors state and federal rules and policies for opportunities to reduce and control cost.

**LEGAL AUTHORIZATION:** Pursuant to Arkansas Code Annotated § 20-76-201(1), the Department of Human Services ("Department") shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. The Department shall also make rules and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76, Public Assistance Generally, of the Arkansas Code. *See* Ark. Code Ann. § 20-76-201(12). Additionally, Ark. Code Ann. § 20-77-107(a)(1) specifically authorizes the Department to "establish and maintain an indigent medical care program." The Department and its various divisions are further authorized to promulgate rules, as necessary to conform to federal statutes, rules,

and regulations as may now or in the future affect programs administered or funded by or through the Department or its various divisions, as necessary to receive any federal funds that may now or in the future be available to the Department or its various divisions. *See* Ark. Code Ann. § 25-10-129(b).

Per the agency, these rule revisions are further being implemented to comply with 42 U.S.C. §§ 1396a(a)(43), 1396d(a)(xvii)(4)(B), 1396d(r), and 42 CFR §§ 441.50-441.62.

**b.** **SUBJECT: Primary Case Manager—SPA #18-0013**

**DESCRIPTION:**

*Statement of Necessity*
When DHS submitted SPA #18-0013 for changes to the PCMH (Patient-Centered Medical Home) program in 2018, the Centers for Medicare and Medicaid Services (CMS) required that we complete a new preprint (template) for the PCCM (Primary Care Case Manager) program. Although there was no new change to the PCCM program, CMS stated that they would not approve PCMH until the new PCCM preprint was submitted. The public notice period for the promulgation of PCMH was already completed when we were informed of this, so the PCCM is promulgated separately.

*Rule Summary*
There are no changes to the PCCM grogram. The formatting of the PCCM Medicaid State Plan changed, but the information and program remains the same. The PCCM portion was submitted to CMS on January 7, 2019, and was approved along with the PCMH on February 28, 2019. Although there are no programmatic changes to the PCCM program, the formatting has changed and is thus being promulgated.

**PUBLIC COMMENT:** No public hearing was held. The public comment period expired on September 17, 2019. The Department received no comments.

The proposed effective date is December 1, 2019.

**FINANCIAL IMPACT:** The agency states that the amended rule has no financial impact.

**LEGAL AUTHORIZATION:** Pursuant to Arkansas Code Annotated § 20-76-201(1), the Department of Human Services ("Department") shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. The Department shall also make rules and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76, Public Assistance Generally, of the Arkansas Code. *See* Ark. Code Ann. § 20-76-201(12). Additionally, Ark. Code Ann. § 20-77-107(a)(1) specifically authorizes the Department to "establish and maintain an indigent medical care program." The Department and its various divisions are further authorized to promulgate rules, as necessary to conform to federal statutes, rules, and regulations as may now or in the future affect programs administered or funded by or through the Department or its various divisions, as necessary to receive any federal funds that may now or in the future be available to the Department or its various divisions. *See* Ark. Code Ann. § 25-10-129(b).

**c. SUBJECT: ARKIDS-4-18, Domiciliary Care-1-18, Section I-5-18, Section III-4-18, and State Plan Amendment #2019-001**

**DESCRIPTION:**

*Statement of Necessity*
A Domiciliary Care claims report dated 12/5/18 indicated that Medicaid does not have any active providers currently enrolled. Because this optional program is not routinely used through Medicaid, the Division of Medical Services (DMS) has determined that it should be removed from the Arkansas Medicaid State Plan and all corresponding rules, regulations and policy rescinded as of 12/1/19.

*Rule Summary*
The rules revisions will be as follows:

- Removes the optional Domiciliary Care service from the Arkansas Medicaid State Plan
- Removes the optional Domiciliary Care service from Sections I and III of all Arkansas Medicaid Manuals (these sections appear in every Arkansas Medicaid manual)
- Removes the optional Domiciliary Care service from the ARKids Manual
- Repeals the Domiciliary Care Manual in its entirety

- Updates program names

*Revisions Made Since Initial Filing*
As a result of conversations with CMS, the Department removed from the State Plan Amendment pages that concerned co-payments for Medicaid services for the working disabled. A separate promulgation of those pages will be pursued at a later date.

**PUBLIC COMMENT:** No public hearing was held. The public comment period expired on September 16, 2019. The Department received no public comments.

Per the agency, CMS approval is required for the State Plan Amendment. That approval has been requested and is currently pending.

The proposed effective date is December 1, 2019.

**FINANCIAL IMPACT:** The agency states that the amended and repealed rules have no financial impact.

**LEGAL AUTHORIZATION:** Pursuant to Arkansas Code Annotated § 20-76-201(1), the Department of Human Services ("Department") shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. The Department shall also make rules and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76, Public Assistance Generally, of the Arkansas Code. *See* Ark. Code Ann. § 20-76-201(12). Additionally, Ark. Code Ann. § 20-77-107(a)(1) specifically authorizes the Department to "establish and maintain an indigent medical care program." The Department and its various divisions are further authorized to promulgate rules, as necessary to conform to federal statutes, rules, and regulations as may now or in the future affect programs administered or funded by or through the Department or its various divisions, as necessary to receive any federal funds that may now or in the future be available to the Department or its various divisions. *See* Ark. Code Ann. § 25-10-129(b).

**7. <u>DEPARTMENT OF HUMAN SERVICES, DIVISION OF PROVIDER SERVICES AND QUALITY ASSURANCE</u> (Mr. Isaac Linam, Mr. Jerry Sharum)**

**a. <u>SUBJECT</u>: OLTC Rules and Regulations for Conducting Criminal Record Checks for Employees of Long Term Care Facilities**

**<u>DESCRIPTION</u>:** Section 304 of the Rules and Regulations for Conducting Criminal Record Checks for Employees of Long Term Care Facilities is being revised to strike language stating that DHS will provide long term care facilities with envelopes for mailing purposes relating to the completion of criminal records checks for applicants and clarifies that the long term care facility must provide those envelopes to applicants. In addition, Section 304 is being revised to remove the statement concerning the use of form ASP-122. Department of Medical Services Form 736 is being updated to add privacy language, delete a residency question, and revise the instructions for completing a criminal background check.

*Revisions Made After the Public Comment Period*
Revisions made by DHS after the public comment period included removal of "and regulations" from the title of the rule and replacement of the term "regulations" with "requirements related to background checks" on form DMS-736 under "instructions for completing the fingerprint card" and "reason fingerprinted."

**<u>PUBLIC COMMENT</u>:** No public hearing was held. The public comment period expired on October 11, 2019. The Department received no public comments.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following question:

Within the title of the rules, it appears that the term "regulations" has remained. I just wanted to make mention of Act 315 of 2019, § 3204(b)(3), which concerns the uniform use of the term "rule" and requires governmental entities to ensure the use of the term "rule" upon promulgation of any rule after the effective date of the Act, which was July 24, 2019. Is there a reason that DHS OLTC has retained the term "regulation" for the time being?
**RESPONSE:** DHS will revise the promulgation to repeal the references to "regulation." In addition, if this rule becomes

effective December 1 as intended, DHS will utilize the procedure provided in Acts 2019, No. 893, to remove the term "regulation" from the entire manual by January 1, 2020.

The proposed effective date is December 1, 2019.

**FINANCIAL IMPACT:** The agency states that the amended rule has a financial impact. It estimates that the total cost to any private individual, entity, and business subject to the amended rule for the current fiscal year is $28,016.32 and $28,016.32 for the next fiscal year and that assisted living facilities, residential care facilities, skilled nursing, immediate care facilities for individuals with intellectual disabilities, human development centers, the Arkansas Health Center, adult day cares, and adult day health cares will be affected, as these providers will pay the costs of the envelopes used for mailing the fingerprint cards for the criminal record checks. The agency further estimates that implementation of the rule will result in a savings to state government of $28,016.32 for the current fiscal year and $28,016.32 for the next fiscal year, as DHS will no longer pay for the cost of the envelopes used for fingerprinting.

**LEGAL AUTHORIZATION:** The Department of Human Services ("Department") shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. *See* Ark. Code Ann. § 20-76-201(1). The Department shall also make rules and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76 of the Arkansas Code, concerning Public Assistance Generally, and that are not inconsistent therewith. *See* Ark. Code Ann. § 20-76-201(12). Further authority for the rulemaking can be found in Ark. Code Ann. § 20-10-203, which provides that the Office of Long-Term Care is designated as the unit of state government primarily responsible for the inspection, regulation, and licensure of long-term care facilities and the regulation and licensure of long-term care facility administrators and that the Office may promulgate such rules not inconsistent with Title 20, Chapter 10 of the Arkansas Code, concerning Long-Term Care Facilities and Services, as it shall deem necessary or desirable to properly and efficiently carry out the purposes and intent of the chapter. *See* Ark. Code Ann. § 20-10-203(a), (b).

**8. ARKANSAS INSURANCE DEPARTMENT (Mr. Booth Rand)**

**a. SUBJECT: Multiple-Employer Welfare Benefit Plans**

**DESCRIPTION:** The proposed Rule implements Ark. Code Ann. § 23-92-101(c)(3), which requires the Insurance Commissioner ("Commissioner") to issue a rule licensing self-funded multiple employer benefit plans ("MEWAs"). According to the agency, the purpose of this rule is to set licensing and operations requirements for self-funded multiple-employer welfare plans, which are essentially health plans composed of combined businesses, which desire to self-insure or self-assume health care costs. The proposed rule is necessary because Ark. Code Ann. § 23-92-101 requires the Insurance Commissioner to issue a rule to establish their licensing requirements. The agency provided the following summary, including the background and purpose of the rule and key provisions.

*Background & Purpose of Rule* –

A brief background is necessary to explain what a MEWA is and why there have been requests from health insurance brokers and employer associations to us to implement their licensing. A MEWA is simply a group health insurance plan formed by separate employers which are not under common ownership or control. A MEWA is formed by employers to combine multiple businesses together into one health plan allowing the employers to defray or spread out health care costs among a larger pool of total employees and separate businesses making contributions or premiums.

A MEWA may be a fully-insured, meaning that a licensed insurer pays the health claims and benefits of the MEWA in exchange for a negotiated premium amount. A MEWA may, on the other hand be self-funded, meaning that the health claims and benefits are paid from the assets of the MEWA itself. For fully-insured MEWAs, because AID already regulates the solvency and market conduct actions of the insurer responsible for payment of the claims, there is less of a need for regulation for these types. Regardless of how a MEWA decides to assume risk for its health benefits, in terms of composition, a MEWA may be a collection of employers, not commonly owned, or a MEWA may be sponsored through a bona fide association of member employers. A self-funded MEWA is not subject to the State's Guaranty Fund laws which functions to pay claims for consumers and medical providers in the event of an insolvency; however, the insurer in a

fully-insured MEWA, is subject to the Guaranty Fund laws in the event of an insolvency of that insurer.

MEWAs are regulated by the Federal Department of Labor ("DOL") and the states of domicile of the MEWA. After 1986, DOL deferred to state insurance regulators to establish their financial solvency requirements, as well as benefit requirements, as long as such benefit requirements are equal to or better than what ERISA requires (Employee Retirement Income Act of 1974, as amended). Currently, in Arkansas, AID requires fully-insured MEWAs to simply register with us under several forms. *See* § 20 of the Proposed Rule. For self-funded MEWAs, in the absence of a rule settling its licensing requirements, self-funded MEWAs are required to obtain from AID a certificate of authority imposing the same startup and capital requirements of a state-wide operating health insurer or HMO---a requirement entirely cost prohibitive to employers or employer associations. This proposed rule now provides a new licensing pathway for self-funded MEWAs.

The proposed rule sets out the requirements of forming a self-funded MEWA in Arkansas, and these requirements are largely centered on applying financial and risk protection measures to insure that the MEWA operates on a solvent basis and is able to pay contracted benefits for its members and medical providers on a timely basis.

*Key Provisions in the Rule* –

- For greater business implementation and access, a minimum of only two employers is needed to form a MEWA---in compliance with Act 919 of 2019. The Commissioner may modify the proposed numerical minimums of total employees and minimum premium contribution amounts;
- For financial protection, requires a MEWA to maintain cash reserves of 20% of projected contributions (premium);
- For financial protection, requires a MEWA to submit an independent actuarial opinion certifying that contributions are reasonable and cash reserves, assets and liabilities are actuarially adequate to cover claims;
- For financial protection, requires a MEWA to maintain stop loss coverage with an Arkansas licensed insurer at 125% of aggregate and specific claims;
- For financial protection, mandates financial reporting requirements of the MEWA to AID for review including annual statements after each fiscal year end;
- For financial protection, requires a fidelity bond upon owners and directors to protect against malfeasance;

- For consumer protection, restricts MEWAs from discriminating on employees due to health factors;
- For consumer and medical provider protection, requires the MEWA to cover State required medical coverage mandates in the same manner as any fully-insured large, group health plan;
- For consumer protection, provides adequate notice requirements to employees or beneficiaries of the plan of its benefits and beneficiary rights, including caution that is not subject to the guaranty fund law.

**PUBLIC COMMENT:** The public comment period expired on September 24, 2019, and a public hearing was held on the same date. The Arkansas Insurance Department provided the following summary of comments and its responses thereto:

AID received three (3) public comments in response to proposed Rule 119, all in favor of proposed Rule 119: (1) a September 24, 2019 written comment from Arkansas Blue Cross and Blue Shield ("ABCBS"); (2) a September 23, 2019 written comment from the organization, "Opportunity Solutions Project" ("OSP"); and (3) a September 20, 2019 written comment from BXS Insurance. AID received no oral comments during the September 24, 2019 hearing. The ABCBS letter simply provides a general history of past and current MEWA regulation on both the state and federal levels and applauds the Department's financial and regulatory requirements proposed. The BXS letter is in favor of the proposed rule due to the absence of any AID regulation addressing the formation and operations of self-funded MEWA or association plans in this State.

The OSP written comment however provides additional suggested edits and language changes to the proposed Rule, and AID will address those in italics below:

1. OSP suggested removing language in the proposed rule requiring "same trade" or "common trade" requirements to be consistent with Arkansas Act 919 of 2019. **RESPONSE:** *We agree, and removed those restrictions in Sections 6 and 7.*

2. Reserve flexibility. OSP requests that cash reserves be permitted to only be in place by year 2 in the MEWA operations, and to permit use of letters of credit instead of cash until the end of the second year.
**RESPONSE:** *We disagree. Because these organizations are not subject to guaranty fund protection, to insure effective financial*

*regulation and adequate protection to medical providers and plan members immediately, we insist upon cash reserves being in place at the time the license is issued.*

3. Realistic Annual Audit Turnarounds. OSP requests that the Rule requirement in Section 14 for annual audited financial statements to be filed within 90 days from close of year, be instead within 5 months from the close of the year.
**RESPONSE:** *We are keeping the 90 day requirement, however, we edited Section 14 to permit the Commissioner to give an extension to an organization for good cause, if it needs more time, as well as for the actuarial information too.*

4. Removing Violation of Privacy. OSP suggests Section 6(b)(5)(B)(iii) be amended to prevent disclosure of trustee addresses over privacy concerns to personal information.
**RESPONSE:** *We do not believe a name and address per se of a business owner or trust is personal information protected under state or federal privacy laws in business applications for licenses. AID suggests that the trust designate a PO Box or, as OSP suggests, use address of the trust itself.*

5. OSP suggests amending or clarifying Section 7(a)(15) in which participating employees are provided a somewhat confusing notice that "individuals covered by the plan are only partially insured."
**RESPONSE:** *AID agrees, and we amended this to say, "that the multiple-employer welfare arrangement is insured from stop-loss insurance."*

6. OSP suggests clarifying Section 11(a) to avoid the interpretation that a self-funded MEWA is prohibited under this Rule from purchasing fully-insured coverages.
**RESPONSE:** *We agree and have explained in Section 11, Nothing however in this restriction shall preclude or limit a multiple-employer welfare arrangement, or its members, from purchasing any fully-insured excepted benefits, including but not limited to those plans, policies or benefits listed in Section Four (4) of this Rule.*

7. OSP stated that Section 6(b)(5)(B)(i) is unclear about what is meant by "type of administration," and subparagraph (b) was unclear.
**RESPONSE:** *AID believes for type of administration, this is intended to mean, fully-insured or self-funded. AID believes that*

*identity of organization refers to the trust or association sponsoring the plan.*

8. OSP suggests removing or reducing the 2 years in existence or seasoning requirement for an association sponsored MEWA.
**RESPONSE:** *This 2 year requirement is intended to be consistent with the fully-insured Association 2 year seasoning requirements in Ark. Code Ann. § 23-86-106(2)(A). We believe it's fair to require the same requirements as the fully-insured market abides by for associations, especially more so for these particular organizations to reduce anti-selection issues. The Department has already agreed to remove the common trade or industry limitation and believes removing a seasoning requirement potentially increases anti-selection.*

9. OSP suggested Section 12 may require duplicative notices.
**RESPONSE:** *We amended this to say – "Unless such notice is otherwise provided to a participating employee or former employee pursuant to another provision of this Rule..."*

**AID made additional edits or corrections post-hearing, in response to BLR questions.**
*Section 13(b) on prima facie evidence was removed due to lack of authority.*
*Section 14(d) was removed as duplicative and incorrectly a reference to a Texas statutory provision.*
*Section 21 on Trade Practice Violations, AID changed the modal auxiliary, "shall" to "may" constitute a trade practice violation.*

Additionally, Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses:

**QUESTION 1:** Section 10 of the rule identifies annual application and reporting fees of $1000 and $500.
**(a)** Are these fees authorized under Ark. Code Ann. § 23-92-101(c)(3)(B)(iv) or is the agency relying on different fee authority? If relying on other authority, could you please point me to that statute?
**RESPONSE:** See 23-92-101, that's cited in the proposed rule, go down to 3(B)(iv), Commissioner shall adopt rules with criteria, etc. …"FEES"
**(b)** How did the agency calculate the amount of the fees?

**RESPONSE:** Same as Texas, used in other States, Oklahoma. We copied their rule(s) here.

**QUESTION 2:** In Section 11, the revised version of the rule states that a MEWA shall comply with all laws or rules, as are mandated upon fully-insured large group health benefit plans.
(a) What does this encompass?
(b) Does this encompass financial requirements imposed on large group plans?
(c) What about statutory or regulatory mandates involving pre-existing conditions or other coverage-related mandates?
**RESPONSE:** We do not impose financial requirements on large groups. We do on the insurers which insure them for solvency, but these are self-funded, under different controls. We are requiring them to provide the state mandated medical benefits and laws applicable to fully insured large groups have to comply with. State mandated medical benefits and medical provider laws applicable to fully insured large groups, this would include any state mandated benefit, prior authorization laws, and credentialing, medical provider mandates. Whether it has to cover pre-x or EHB, as large group, those are federal requirements.

**QUESTION 3:** Section 13(b) states: "whenever it shall be necessary in any legal proceeding to prove the existence of a MEWA, a certified copy of the MEWA's certificate of authority shall be prima facie evidence of the existence of the MEWA."
(a) What is the authority for the agency to determine that this constitutes prima facie evidence in any legal proceeding?
(b) What venues does the agency anticipate that the certified copy shall be prima facie evidence? (Federal Courts, Circuit Courts, District Courts, Administrative Hearings, etc.)
(c) If there is a section which authorizes the agency to make this determination as to any legal proceeding or statutory authority that defines it as such, please point me to it.
**RESPONSE:** Copied from Texas. We will remove 13(b).

**QUESTION 4:** Section 14 (a)(2) requires an annual actuarial opinion and sets forth requirements on who is qualified to give such an opinion and what they must opine upon. How is this actuarial opinion in 14(a)(2) different from the actuarial review which the Commissioner may require under Section 14(d)?
**RESPONSE:** That is in reference to an additional actuarial opinion. Section 14(d) needs to be removed. We will remove.

**QUESTION 5:** The credentials of a person to conduct who can issue an actuarial opinion is defined in 14(a)(2). What would the credentials of a person need to be to do an actuarial review?
**RESPONSE:** Actuaries that are credentialed or licensed through the Society of Actuaries an American Academy, which this subdivision references.

**QUESTION 6:** Does "Insurance Code, Article 3.95-8(a)(2)" as cited in Section 14(d) refer to the Texas Insurance Code?
**RESPONSE:** Yes, mistake. Will remove.

**QUESTION 7:** Section 21 states, "Violations of this Rule shall constitute an unfair or deceptive act under Ark. Code Ann. § 23-66-206."
(a) 23-66-206 defines a set of offenses which constitute "unfair methods of competition and unfair or deceptive acts or practices in the business of insurance." It lists out approximately 15 things. There are conceivably violations of this rule (i.e. failure to submit a financial statement in a timely manner), which may not qualify as unfair or deceptive acts under the statute. Could you please resolve this for me?
(b) Did the agency mean "may" rather than "shall?"
(c) Did the agency mean "shall be investigated as" rather than "shall?"
**RESPONSE:** We are saying by rule that violations of that rule fall into an unfair practice like those listed, and not that they are actually one of those listed. I see your point but we have this in quite a few rules. It's basically saying violating this rule is equivalent to one of those practices. We agree, it probably should instead be "may."

The proposed effective date is January 1, 2020.

**FINANCIAL IMPACT:** The agency states that this rule has no financial impact, but states that the estimated costs by fiscal year to any private individual, entity and business subject to the proposed rule is unknown at this time. According to the agency, the entities subject to this rule are employer associations which are forming combined health plan benefits. The formation and licensing of these entities will require compliance resource costs, which are difficult to estimate. There is a $1000 application fee and a $500 annual report review fee, which the agency believes are reasonable fees, given the time staff has to dedicate to review such

applications, and that these fees are consistent with fees imposed in other states regulating multiple-employer plans.

**LEGAL AUTHORIZATION:** Pursuant to § 23-92-101(c)(3), as amended by Act 919 of 2019 sponsored by Representative McCollum, the Insurance Commissioner has authority to "adopt rules regulating multiple employer trusts and multiple employer welfare arrangements that are not fully insured." *See* Ark Code Ann. § 23-92-101(c)(3)(A). Furthermore, the rules concerning these entities should include information and procedures concerning: the criteria and application for obtaining a certificate of authority from the State Insurance Department to conduct business in Arkansas that are not inconsistent with 29 C.F.R. § 2510, as it existed on January 1, 2019; the benefits to be offered that are not inconsistent with similarly situated single employer plans; financial requirements consistent with sound actuarial principles; fees; insolvency procedures; examinations; filing of forms and rates, written disclosures and other consumer protections; reporting requirements; excess or stop loss insurance; and other factors the commissioner deems necessary for the effective regulation of multiple employer welfare trusts and multiple employer welfare arrangements that are not fully insured, if the requirements are not inconsistent with 29 C.F.R. § 2510, as it existed on January 1, 2019. *See* Ark. Code Ann. § 23-92-101(c)(3)(B).

## 9. ARKANSAS STATE MEDICAL BOARD (Mr. Kevin O'Dwyer)

### a. SUBJECT: Rule 34 – Requirements of Licensed Physicians in Completing Death Certificates

**DESCRIPTION:** This proposed rule makes changes necessary pursuant to Act 975 of 2019, extending time to complete death certificates to three (3) days from two (2) days and requiring an electronic process.

**PUBLIC COMMENT:** A public hearing was held on October 3, 2019. The public comment period expired on October 3, 2019. The Arkansas State Medical Board reported that it had received no public comments.

Suba Desikan, an attorney at the Bureau of Legislative Research, asked the following questions. In lieu of submitting answers to the questions, the Board made changes to the rule:

**QUESTION 1:** Section (D)(i) references "department." Does "department" refer to the Department of Health? Since the board is under the Department of Health after the transformation, would the board have authority to grant the waiver?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule wherein it was clarified that the Health Department would grant waivers.]

**QUESTION 2:** D(i)(B) references a "division." Is there a division of the Board or Department of Health which provides training or technical assistance on the online system? Could you please clarify that in the rule?
**RESPONSE:** The Arkansas State Medical Board submitted a revised version of the rule wherein "Division" was replaced with "Department of Health."]

The proposed effective date is pending legislative review and approval.

**FINANCIAL IMPACT:** The board states that the proposed rules have no financial impact.

**LEGAL AUTHORIZATION:** Act 975 of 2019, which was sponsored by Representative Mark Perry, amended the death certificate registration process for the signature of the medical certificate of death. Pursuant to the Act, the Arkansas State Medical Board is charged with enforcing subdivision (c)(1) of this section concerning the time period in which medical certification shall be executed. *See* Ark. Code Ann. § 20-18-601(c)(2)(A) as amended by Act 975 of 2019.

**b. SUBJECT: Rule 43 – Genetic Counselor Licensure**

**DESCRIPTION:** Act 686 of 2019 created the Arkansas Genetic Counselor Licensure Act. Pursuant to the Act, this rule adds new regulation regarding the licensure of genetic counselors.

**PUBLIC COMMENT:** A public hearing was held on October 3, 2019. The public comment period expired on October 3, 2019.

The Arkansas State Medical Board reported that no public comments were received.

Suba Desikan, an attorney with the Bureau of Legislative Research asked the following questions. In lieu of submitting answers to the questions, the Board made changes to the rule:

(1) In Section A of the Rule, it states "this **subchapter** shall be known and cited as the "Arkansas Genetic Counselor Licensure **Act**." The **Rule** is entitled "Genetic Counselor Licensure." This rule is not the Act and does not appear to have subchapters. Could you please clarify/rectify this discrepancy?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule changing "subchapter" to "rule."]

(2) Section B(4)(d) of the rule mirrors the statutory language in Ark. Code Ann. § 17-95-1102(1)(D)(iv), except for the substitution of "to" instead of "or," which is used in (B)(4)(d). Is this a typographical error? If not, could you please explain why the Board chose this language?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule.]

(3) Section B(5) of the rule mirrors the statutory language in Ark. Code Ann. § 17-95-1102(1)(E)(iv), except for the substitution of "Predisposition AL" where the statute used the word "predispositional." Is this a typographical error? If not, could you please explain why the Board chose this language?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule changing "predisposition AL" to "predispositional."]

(4) Section B defines the meaning of "genetic counseling" and sections B(1) through B(6) define what that includes. Section B(7), B(8) and B(9) are definitions of licensed genetic counselor and supervision. Is the Board comfortable with the placement of these rules in this section? Do these need to be in a separate section, especially since they don't define what genetic counseling includes?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule.]

(5) Sections B(7) , C, D(6), G(4)(B), I(1)(f) and other sections throughout the Rule reference a subchapter, but this is a rule which

does not appear to have subchapters. Is the agency comfortable with using the word "subchapter" in these Rules? Can you please clarify/rectify this issue?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule changing "subchapter" to "rule."]

(6) Section B(8) of the rule mirrors the statutory language in Ark. Code Ann. § 17-95-1102(3)(B), except for the substitution of "supervises" and "provide" where the statute used the word "supervised" and "provides." Are these typographical errors? If not, could you please explain why the Board chose this language?
**RESPONSE**: [The Arkansas State Medical Board submitted a revised version of the rule wherein the language used in the rule mirrors the language of the statue.]

(7) In section (D)(1) of the Rules (which appears to mirror the statutory language in Ark. Code Ann. § 17-95-1104), you state that ASMB shall develop appropriate rules necessary to regulate genetic counselors. Does the Board believe the instant rule it has submitted **are** the rules contemplated by the statute? Or will there be other rules which will be promulgated for that purpose?
**RESPONSE**: [The Arkansas State Medical Board submitted a revised version of the rule wherein the language contemplating rulemaking was stricken.]

(8) Section D(5)(a) contemplates a fee for database access, but does not specify the fee amount or give any methodology for how the fee amount will be calculated. Could you please clarify this issue?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule wherein the language contemplating a fee was stricken.]

(9) Section F(2) contemplates an application fee, but does not specify the fee amount or give any methodology for how the fee amount will be calculated. Could you please clarify this issue?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule wherein the application fee was specified as $90.00.]

(10) Section F(4) states that the issuance of a license by reciprocity shall be at the sole discretion of the Arkansas State Medical Board, but does not specify what would be required to gain

licensure. Under what circumstances would the Board issue a license by reciprocity?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule wherein the requirements for issuance of a license by reciprocity are specified.]

(11) In Section (G), the title of Ark. Code Ann. §17-95-1107 is mistyped as "removal" rather than "renewal." Was that the Board's intention?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule changing "removal" to "renewal."]

(12) Section H for the most part mirrors Ark. Code Ann. § 17-95-1108. However, there is one area where it does not and therefore lends itself to a different interpretation. In the statute, the clauses of Ark. Code Ann. § 17-95-1108 (a)(1)(A) through a(1)(C) are an independent set of three and joined by the words "and." This means all three requirements must be met to grant the temporary license. In the Rule, Section (H)(1) and (H)(2) are not connected by the word "and," which could lead to the interpretation that these are independent clauses. Could you please clarify this in the rule?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule wherein the language in the rule is consistent with the language in the statute.]

(13) Section (H)(2) contemplates a fee, but does not specify the fee amount or give any methodology for how the fee amount will be calculated. Could you please clarify this issue?
**RESPONSE**: [The Arkansas State Medical Board submitted a revised version of the rule wherein the application fee was specified as $50.00.]

(14) Section (H)(5) of the rule does not clarify what type of application. I suspect you meant application of renewal of a temporary license, but it is unclear. Could you please clarify?
**RESPONSE**: [The Arkansas State Medical Board submitted a revised version of the rule.]

(15) Sections (H)(3) through (H)(8) are not conditions for an applicant to receive a temporary license, but rather define other aspects of a temporary license. Did you mean for these to be their own section of H? Another way to clarify might be to put all of H(1) –(2) in its own section of H called (H)(1), as it is written in the statute. Please explain or revise.

**RESPONSE**: [The Arkansas State Medical Board submitted a revised version of the rule.]

(16) Section (H)(6)(a) mirrors the Ark. Code Ann. § 17-95-1108, but omits the word "of." I suspect this is a typographical error. Please clarify.
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule, where in the word "of" was added.]

(17) In Section (I), the title of Ark. Code Ann. § 17-95-1109 is mistyped as "consure" rather than "censure." Was that the Board's intention?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule, wherein the word "consure" was changed to "censure."]

(18) Section I(3) states that the Board may restore a license or remove a probation on a license based upon the decision of the Board? Under what circumstances would the Board exercise this discretion?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule, wherein restoration of a license or removal of probation would be done after a hearing.]

(19) Section (J)(1) omits the word "licensed" before genetic counselor, which does not mirror Ark. Code Ann. § 17-95-1110(a). Is the Board comfortable with that?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule, wherein the language of the rule mirrors the language of the statute.]

(20) Section (J)(2) mirrors Ark. Code Ann. §17-95-1110(b), but the word "individual" is replaced by "license" and it is unclear what it means. Could you please clarify?
**RESPONSE: [**The Arkansas State Medical Board submitted a revised version of the rule, wherein the language of the rule mirrors the language of the statute.]

The proposed effective date is upon legislative review and approval.

**FINANCIAL IMPACT:** The Board stated that this rule has no financial impact.

**LEGAL AUTHORIZATION:** Act 686 of 2019, sponsored by Senator Greg Leding, created the Arkansas Genetic Counselor Licensure Act. The Act authorized the Arkansas State Medical Board to develop appropriate rules necessary to regulate genetic counselors. *See* Ark. Code Ann. § 17-95-1140(1), as amended by Act 686 of 2019.

**10. DEPARTMENT OF THE MILITARY (Mr. Scott Stanger)**

**a. SUBJECT: Arkansas National Guard Tuition Waiver Program**

**DESCRIPTION:** This rule implements Act 471 of the 91st General Assembly, Act 535 of the 92nd General Assembly and establishes rules for the eligibility of Guardsmen; defines the purpose of the Arkansas National Guard Tuition Waiver Program; defines necessary responsibilities of the program; and sets forth entitlement criteria. This amendment adds that the cost of mandatory fees charged by an institution of higher education that the soldier or airman is attending may be paid for with available funds allocated by the Division of Higher Education for the tuition-free program. Payment of mandatory fees, if any, will not exceed the actual cost of mandatory fees.

**PUBLIC COMMENT:** A public hearing was held on September 12, 2019. The public comment period expired on October 2, 2019. The agency received no public comments.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) Section 1-2, *Entitlements*, refers to "§ 6-61-112" as allowing all eligible Guardsmen to attend a state-supported institution of higher education tuition-free; however, that statute appears to concern a student or a student's spouse called into military service and compensation for monetary loss for ceasing attendance. Should the reference be to Ark. Code Ann. § 6-60-214? **RESPONSE:** Yes, it should refer to Section 6-60-214 not 6-61-112.

(2) In Section 1-2, *Entitlements*, should "cost of a Guardsmen's mandatory fees" be "cost of a Guardsman's mandatory fees"? **RESPONSE:** Yes, it should read Guardsman.

(3) In several places, the rules refer to the "Department" of Higher Education. Should those references be to the "Division" of Higher Education pursuant to Act 910 of 2019? **RESPONSE:** Yes, it should refer to Division of Higher Education instead of the old term.

(4) Ark. Code Ann. § 6-60-214(h)(1), as amended by Act 910 of 2019, § 5529, requires that "[t]he Adjutant General, in coordination with the Division of Higher Education" promulgate rules for the implementation of the tuition-free program for soldiers and airmen of the Arkansas National Guard. Were these rules promulgated in coordination with the Division of Higher Education? **RESPONSE:** Yes, we worked directly with Jonathan Coleman, Financial Aid Manager, Division of Higher Education, and others within the Department. We will continue to work with the Division of Higher Education throughout this process.

(5) Within the rules, the term "regulation" has remained. I just wanted to make mention of Act 315 of 2019, § 3204(b)(3), which concerns the uniform use of the term "rule" and requires governmental entities to ensure the use of the term "rule" upon promulgation of any rule after the effective date of the Act, which was July 24, 2019. **RESPONSE:** Yes, we will replace regulation with rule in the body of the document. We need to retain the naming convention of "regulation" in the title as the military only has regulations and not rules.

The proposed effective date is January 1, 2020.

**FINANCIAL IMPACT:** The agency states that the amended rules have no financial impact.

**LEGAL AUTHORIZATION:** The proposed changes include those to implement Act 535 of 2019, sponsored by Representative Douglas House, which concerned tuition benefits for soldiers and airmen of the Arkansas National Guard and allowed for the payment of mandatory fees for soldiers and airmen whose tuition at an institution of higher education is free. Pursuant to Arkansas Code Annotated § 6-60-214(h)(1), the Adjutant General, in coordination with the Division of Higher Education, shall promulgate rules for the implementation of the statute, which concerns tuition benefits for soldiers and airmen of the Arkansas National Guard, including without limitation rules for the eligibility of soldiers and airmen. Further authority for the

rulemaking can be found in Ark. Code Ann. § 6-60-211(b)(1), which provides that the Adjutant General of Arkansas shall establish and publish rules for the eligibility and implementation of tuition assistance programs sponsored by the armed services. *See also* Ark. Code Ann. § 12-61-106(o) (providing that, for the purpose of effectively carrying out the terms of the code, the Adjutant General shall have the power to prescribe such rules as he or she may from time to time deem necessary).

**11. <u>DEPARTMENT OF CORRECTIONS, ARKANSAS SENTENCING COMMISSION</u> (Ms. Lindsay Wallace)**

**a. <u>SUBJECT</u>: Arkansas Sentencing Standards Seriousness Reference Table**

**<u>DESCRIPTION</u>:** This amendment adds rankings of offenses which were created or redefined during the 92nd General Assembly, to the Seriousness Reference Table of the Arkansas Sentencing Standards. It also adds some infrequently used offenses which were inadvertently omitted from the Table during previous ranking sessions.

Pursuant to Ark. Code Ann. § 16-90-803, the Arkansas Sentencing Standards Seriousness Reference Table ("the Table") represents the vertical axis of the Sentencing Standards Grid. The horizontal axis of the Grid is represented by the offender's prior criminal history score. Seriousness of offenses are ranked from levels one through ten, with ten being the most serious. The seriousness ranking of an offense determines the percentage of an offender's sentence which must be served before becoming eligible for transfer to community supervision. With the exception of a statutory override, offenses ranked in levels one through six must serve one-third of the sentence less goodtime and offenses ranked in levels seven through ten must serve one-half less goodtime before transfer eligibility. For example, a seventy-two month sentence with optimal meritorious good-time credits will make the offender eligible for transfer in twelve months if he or she is required to serve one-third of his or her sentence, or eighteen months if he or she is required to serve one-half of his or her sentence.

**<u>PUBLIC COMMENT</u>:** A public hearing was held on September 30, 2019, where no public comments were received. The public

comment period expired on September 25, 2019. The Arkansas Sentencing Commission of the Arkansas Department of Corrections ("Commission") reported that it received no public comments.

The proposed effective date is January 1, 2020.

**FINANCIAL IMPACT:** The Commission indicated that there is no financial impact.

**LEGAL AUTHORIZATION:** The Arkansas Sentencing Commission is authorized to make appropriate and necessary revisions to the sentencing standards. *See* Ark. Code Ann. §§ 16-90-802(a) and 16-90-802(d)(2)(A). Any revision of the standards shall be in compliance with provisions applicable to rulemaking contained in the Administrative Procedure Act, § 25-15-201 *et seq*. *See* Ark. Code Ann. § 16-90-802(d)(2)(B) and (d)(2)(C). Any revisions by the Commission shall be within the statutory parameters set for the various crime classes. *See* Ark. Code Ann. § 16-90-802(d)(2)(D).

**E. Adjournment.**