ADMINISTRATIVE RULES SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL

Wednesday, December 18, 2019
9:00 a.m.
Room A, MAC
Little Rock, Arkansas

A. Call to Order.

B. Reports of the Executive Subcommittee.

C. Letters Submitted Pursuant to Act 893 of 2019.

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

1. <u>DEPARTMENT OF AGRICULTURE, ARKANSAS LIVESTOCK & POULTRY COMMISSION</u> (Mr. Patrick Fisk, Mr. Wade Hodge)

a. <u>SUBJECT</u>: Disbursement of State Funds for Fairs and Livestock Shows

<u>DESCRIPTION</u>: The proposed amendments clarify disbursement of state funds to fairs and livestock shows for fair premiums and construction. The rule is promulgated by the Arkansas Livestock & Poultry Commission ("Commission").

The funds covered by the rule fall into two separate categories: 1) funds used exclusively for construction, and 2) premium funds, which may be used only for the purpose of paying awards on approved entry classifications.

As provided in A.C.A. 2-36-101 & 201 et seq., the rule outlines a points system to "grade" the fairs. The law provides that the system will be developed by the Commission in cooperation with an ad hoc advisory committee consisting of representatives of the USDA, the University of Arkansas Cooperative Extension Service, the Department of Career Education Office of Agricultural Science and Technology, and the Arkansas Fair Managers Association. This advisory committee recommended the proposed amendments.

The proposed amendments:

• Add a "Definitions" section
• Amend the date for fairs and livestock shows to apply for funds
• Clarify the requirements for receiving state funds
• Clarify disbursing of surplus construction funds

The advisory committee agreed to keep the current points system and entry classifications, with minor changes. New language was added to allow for the disbursement of surplus construction funds. This change was prompted by the increased appropriation for construction funds made by the General Assembly earlier this year from $847,200 to $1,046,000. The $847,200 has always been divided equally among the fairs, and will continue to be so. The new rule provision states that individual fairs may make specific proposals for a portion of the newly appropriated $198,800.00 for use of those funds. A committee selected by the Department of Agriculture will make the funding decisions.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on October 12, 2019. The Commission provided the following summary of the comments that it received and its responses thereto:

Chelsy Kimbrough
Comment: I have one issue with Definition E about Pureblood. The Definition provided is incorrect. If an animal only has one purebred parent then it is not a pureblood. Pureblood and purebred are essentially the same thing. The below definition I copied from the Beef Performance Glossary UA Extension Factsheet.

Purebred – An animal of known ancestry within a recognized breed that is eligible for registry in the official herd book of that breed.
Response: The Commission approved to add a new definition to include "Purebred" as suggested by public comment: "Purebred – An animal of known ancestry within a recognized breed that is eligible for registry in the official herd book of that breed."

James Skelton
Comment: VI(E) – The new change states there are only 500 points available for attending the State Fair Convention. This has always been 600 points.
Response: The Commission approved to change the language to allow "up to six members" which will allow the fair to obtain 600 premium points for their fair.

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

(1) I just wanted to make sure that I correctly understand the financial impact statement for these rules. The Commission is of the opinion that the amended rule has a financial impact and estimates that the total estimated cost by fiscal year to fair and livestock show association boards is unknown for both the current and next fiscal years. Is this correct? If yes, can you please provide an explanation as to why you expect there to be a cost and why it is unknown? **RESPONSE:** Act 730 of 2019, Appropriation for the Department of Agriculture Capital Improvement Projects, increased the appropriation for construction funds from $847,200 to $1,046,000. In past years, the $847,200 has been divided equally among the fairs, and will continue to be so. The new provisions in the rule state that individual fairs may make specific proposals for the use of the additional $198,800. A committee selected by the Agriculture Department will make the funding decisions. So, there could be additional monies expended by the Department if this appropriation is funded, but we do not know for sure how much of that money will be available to be distributed to the local fairs, and we do not know what proposals for use of that money we will receive from the fairs.

(2) Section II – It appears that the Commission is changing the deadline for the application for funds being submitted from "no later than May 30" to being "postmarked no later than March 1" and that applications postmarked after April 1 will not be considered; however, Ark. Code Ann. § 2-36-207(a) appears to require that county and district livestock show or fair associations seeking funds "shall file an application during the month of June next preceding the fiscal year" with the Commission and that only applications received before June 30 will be considered. *See also* Section VI.N. of the proposed rules also referencing the new dates. Can you reconcile this inconsistency for me? **RESPONSE:** As stated in our cover letter, this issue has been addressed in both sections to comply with the law. Thanks for catching this for us.

After revisions were made to the rule post-public comment, Ms. Miller-Rice asked the following questions:

(1) It appears that there may be a typo in section I.F. Should "heard" be "herd"? **RESPONSE:** "Heard" should be "herd."

(2) In your changes to Sections II and VI.N., it is now proposed that applications "postmarked" after June 30, or not postmarked by June 30, will forfeit all premiums, or not receive any state premium funds; however, Ark. Code Ann. § 2-36-207(c) states that "[o]nly those applications received before the close of business on June 30 shall be considered by the commission in making allocation of funds appropriated for that purpose for the following fiscal year." Is there a reason the Commission used the postmarked date as its deadline rather than the date

received? **REASON:** The Commission didn't want to penalize anyone because of something getting lost in the mail.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the amended rule has a financial impact. It estimates that the total estimated cost by fiscal year to fair and livestock show association boards is unknown for both the current and next fiscal years. The agency provided the following explanation for why the cost is unknown: Act 730 of 2019, Appropriation for the Department of Agriculture Capital Improvement Projects, increased the appropriation for construction funds from $847,200 to $1,046,000. In past years, the $847,200 has been divided equally among the fairs, and will continue to be so. The new provisions in the rule state that individual fairs may make specific proposals for the use of the additional $198,800. A committee selected by the Agriculture Department will make the funding decisions. So, there could be additional monies expended by the Department if this appropriation is funded, but we do not know for sure how much of that money will be available to be distributed to the local fairs, and we do not know what proposals for use of that money we will receive from the fairs.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 2-36-201, the Arkansas Livestock and Poultry Commission shall be empowered and authorized to administer the provisions of Title 2, Chapter 36, Subchapter 2 of the Arkansas Code, concerning funding generally as it relates to livestock show and fair associations, and adopt rules as it may deem necessary. Further authority for the rulemaking can be found in Ark. Code Ann. § 2-33-107, which provides that the Commission shall have the authority to "[c]ooperate with the state, district, and county livestock show associations in the promotion and development of the livestock and poultry industry of this state" and that the Commission "shall have the authority to make, modify, and enforce such rules and orders, not inconsistent with law, as it shall from time to time deem necessary to effectively carry out the functions performable by it." Ark. Code Ann. § 2-33-107(b)(5), (c).

2. DEPARTMENT OF COMMERCE, STATE INSURANCE DEPARTMENT (Ms. Amanda Rose)

a. SUBJECT: Rule 8 – Corporate Governance Annual Disclosure

DESCRIPTION: Arkansas recently enacted the Corporate Governance Annual Disclosure Act, effective July 24, 2019. This incorporates a new standard regarding corporate governance and reporting for insurance

companies in Arkansas. The Corporate Governance Annual Disclosure Act provides the Arkansas Insurance Department ("AID") with an annual summary of an insurer's or insurance group's corporate governance structure, policies, and practices to permit the Insurance Commissioner to gain and maintain an understanding of the insurer's corporate framework. This new provision does not attempt to impose additional corporate governance rules, standards, or procedures on insurance companies. The filing is intended to provide information to assist in fulfilling existing AID oversight responsibilities. The new Act, and this corresponding Rule, will provide important information to AID regarding how an insurer manages itself and, in particular, how it identifies, assesses, and mitigates risks.

PUBLIC COMMENT: A public hearing was held on November 13, 2019. The public comment period expired on November 13, 2019. The Arkansas Insurance Department provided the following summary of comments received and its responses thereto:

1. On October 11, 2019, an e-mail was received from Sherie L. Edwards, an attorney for SVMIC insurance company regarding whether the requirement of filing the Corporate Governance Annual Disclosure applied to all companies licensed in Arkansas or only to Arkansas domestic insurers.

There was some correspondence back and forth between me and Ms. Edwards with the final e-mail from me citing the provision of the Corporate Governance Annual Disclosure Act, specifically Ark. Code Ann. § 23-63-2002(b)(3) that limits the scope of the requirement to Arkansas domestic insurers.

2. Following a meeting at the Department on November 6, 2019, Mr. T. Ark Monroe, III of the Mitchell Williams law firm submitted correspondence dated December 12, 2019. Mr. Monroe states his client's request that the Corporate Governance Annual Disclosure Act be amended in the next regular legislative session to provide an exemption to single-state/lower premium insurers in Arkansas.

Mr. Monroe accepts that we cannot change the scope/application of the law using the rule promulgation process; however, he makes this public comment to request that we revisit the law during the next session.

3. During the public hearing, Bill Booker testified on behalf of Citizens Fidelity Insurance Company. Mr. Booker stated on the record that he looked forward to working with our Department in complying with this new Rule.

The proposed effective date is January 1, 2020.

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

LEGAL AUTHORIZATION: Act 521 of 2019, which was sponsored by Senator Rapert, enacted the Insurance Department's General Omnibus. Section 16 of Act 521 added subchapter 20 (entitled Corporate Governance Annual Disclosure Act), to Arkansas Code Title 23, Chapter 63. *See* Act 521 of 2019, § 16. The primary purpose of this Act was to "provide the Insurance Commissioner a summary of the corporate governance structure, policies, and practices of an insurer or insurance group to allow the commissioner an opportunity to gain and maintain a better understanding of the corporate governance framework of an insurer operating in this State." *See* Ark. Code Ann. § 23-63-2002(a)(1), as amended by Act 521 of 2019. The Insurance Commissioner has authority to promulgate rules necessary to implement this subchapter. *See* Ark. Code Ann. § 23-63-2010(a), as amended by Act 521 of 2019.

b. SUBJECT: Amended Rule 25 – Annual Financial Reporting

DESCRIPTION: The State Insurance Department proposes changes to Rule 25 on Annual Financial Reporting. Per the agency, the only substantive change to the rule is the addition of an Internal Audit Function in Section 15. Other changes in the markup are "cleanup" in nature, as this rule has not been updated in 10 years.

PUBLIC COMMENT: A public hearing was held on November 13, 2019. The public comment period expired on November 13, 2019. The Arkansas Insurance Department received no comments.

Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following question:

QUESTION: The agency cited Ark. Code Ann. §23-63-216 as authority for this proposed rule. Could you please point me to the specific provisions of Ark. Code Ann. §23-63-216 that grant authority? **RESPONSE:** We probably should not cite Ark. Code Ann. § 23-63-216 as authority for rule-making. That is the provision of our law that sets out the requirements of financial reporting for insurers. We will have to rely on Ark. Code Ann. § 23-61-108.

The proposed effective date of the rule is January 1, 2020.

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

LEGAL AUTHORIZATION: The Insurance Commissioner, in consultation with the Secretary of the Department of Commerce, has authority to make reasonable rules necessary for or as an aid to the effectuation of any provision of the Arkansas Insurance Code and, to promulgate rules necessary for the effective regulation of the business of insurance or as required for this state to be in compliance with federal laws. *See* Ark. Code Ann. §§ 23-61-108(a)(1) and (b)(1), as amended by Act 910 of 2019. The Commissioner may also to adopt rules for the purpose of modifying, amending, or revising any publication promulgated by the National Association of Insurance Commissioners or other authors, or any published amendments, modifications, or revisions to any such publications, if the commissioner determines that such an action is in the best interest of the public. *See* Ark. Code Ann. § 23-61-108(e), as amended by Act 910 of 2019. The new language proposed in the Internal Audit Function section of this rule mirrors the language in the NAIC Annual Financial Reporting Model Regulation.

3. DEPARTMENT OF COMMERCE, STATE SECURITIES DEPARTMENT (Mr. David Smith)

a. SUBJECT: Amendments to the Money Services Rules

DESCRIPTION: The State Securities Department proposes amendments to its Money Services Rule to clarify and simplify the licensing process for money services. The amended rules make changes in surety bond and net worth requirements with other clarifying provisions *and* address matters necessary in the orderly administration of laws concerning the regulation of money services activity in Arkansas. A summary of the proposed changes is outlined below:

Rule 102. Definitions. Rule 102(4) amends the definition of audited financial statements to incorporate changes authorized by Act 111 of 2019 and Rule 102(11) defines the Nationwide Multistate Licensing System, an automated licensing system used by applicants and licensees.

Rules 202 and 402. Amendments made to clarify the use of the automated licensing system in the application process.

Rule 204. Surety Bond. A new tiered surety bond requirement as authorized by Act 111 of 2019 replaces the existing requirement.

Rules 205 and 403. Amendments made to the disclosure period for applicants for disclosing actions by other state and federal authorities.

Rules 206 and 404. Renewal of a License. The process set out in Rules 206(c) and 404(c) is not needed. Under Ark. Code Ann. §§ 23-55-206(d) and 404(d)(1), the Commissioner has the authority to grant an extension of the renewal date for good cause.

Rule 207. Net Worth. Rule 207 is a new addition to the Rules to incorporate the tiered net worth requirement authorized by Act 111 of 2019, which amended the Money Services Act.

Rule 603. Report of Material Change. Rule 603 is amended to reflect the filing periods for reports in calendar year instead of fiscal years as defined by Ark. Code Ann. § 23-55-603(b).

Rule 1006. Transition Year. Rule 1006 is deleted to remove an obsolete provision.

PUBLIC COMMENT: A public hearing was held on November 15, 2019. The public comment period expired on November 15, 2019. The Arkansas Securities Department received no public comments.

The proposed effective date of this rule is February 1, 2020.

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

LEGAL AUTHORIZATION: Act 111 of 2019, which was sponsored by Senator Rapert, amended certain provisions of the Uniform Money Services Act. *See* Ark Code Ann. 23-55-101 *et seq.*, as amended by Act 111 of 2019. The Securities Commissioner may make, amend and rescind any rules, forms, and orders that the Commissioner deems necessary or appropriate to carry out this chapter, upon making findings that the action is: (1) necessary or appropriate in the public interest or for the protection of consumers; and (2) consistent with the purposes fairly intended by the policy and the provisions of this chapter. *See* Ark. Code Ann. § 23-55-104. Additionally, pursuant to changes made by Act 111 of 2019, the Commissioner may set by rule, required bond amounts (*See* Ark Code Ann. 23-55-204(a)(3) as amended by Act 111 of 2019) and net worth amounts (*See* Ark Code Ann. 23-55-207(b)(2) as amended by Act 111 of 2019).

4. DEPARTMENT OF EDUCATION, DIVISION OF ELEMENTARY AND SECONDARY EDUCATION (Ms. Courtney Salas-Ford, items a, e; Ms. Jennifer Dedman, item b; Ms. Mary Claire Hyatt, item c; Ms. Lori Freno, item d)

a. SUBJECT: DESE Rules Governing Test Security, Testing Violations, and Alleged Testing Improprieties

DESCRIPTION: The Division of Elementary and Secondary Education ("Division") proposes the following changes to its Rules Governing Test Security, Testing Violations, and Alleged Testing Improprieties:

- Change the definition of "District Test Coordinator (DTC)" to align with the DESE Rules Governing the Arkansas Educational Support and Accountability Act and provide greater flexibility as to who may serve in this role. The amendment would enable districts to appoint a non-licensed employee or individual contracted by the district to serve as the DTC if under the supervision of an educator as defined in the AESAA rules;
- Clarify the requirements and procedures for reporting and processing alleged test improprieties, irregularities, violations, or breaches of security;
- Set forth the four stages (levels) of violations that are reported; and
- Replace Arkansas Department of Education with the Division of Elementary and Secondary Education.

PUBLIC COMMENT: A public hearing was held on September 26, 2019. The public comment period expired on October 19, 2019. The Division provided the following summary of the comments that it received and it responses thereto:

Lucas Harder, ASBA
Comment:
1.02: There is an unnecessary "and" between 6-17-410 and 25-15-201.

2.04: I would recommend changing this to be "individuals, public schools, or public school districts" to match the terms used in the definitions at 3.03 and 3.04.

3.0~~1~~7.~~9~~7: The striking of 3.01 in this section makes this read "in Section of these rules." Either "3.01" should be replaced with "3.07" and/or "3.09" so that it reads "in Section 3.07 of these rules" or "Section" should be removed and "of" should not be added so that it reads "in these rules."

3.0~~1~~7.~~10~~8: Same comment as in 3.0~~1~~7.~~9~~7.

3.09.4: There is an unnecessary "to" at "which they to do not."

5.08: Given that it does not appear to matter what method is used to submit the violation report so long as the report is submitted in writing, I would recommend changing this to read "Violation reports must be submitted in writing to the Office of Student Assessment to the attention of the Assessment Director."

7.01.2: "Division of Elementary and Secondary Education" could be shortened to just "Division" here as it was previously shortened in the rules.
Response: Corrections made.

Harvie Nichols, Guy Fenter Education Service Cooperative
Comment:
Section.3.09.3 The rule does not allow for not testing on designated dates in cases of emergency. I would suggest that the rule adds language unless permission to not test is granted by ADE. There may be cases where testing can't occur such as power failures, failure to have internet access, emergencies such as safety matters. The district should be able to make an emergency request to avoid this being a penalty.

Section 6.01 Why throughout the rules do we refer to test violations and alleged improprieties? Should alleged be included in all aspects?

Section 7.01 A time limit for State Board decision making should be established when they take an appeal under advisement.
Response: Procedures to follow in case of an emergency are included in Division training and if followed, would not result in a violation. Correction made regarding use of "alleged." No changes made regarding time limit.

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

(1) Section 3.01 – Does the District Test Coordinator differ from the test administrator referenced in Ark. Code Ann. § 6-15-2907(i)(2)(A)(i) and test proctor referenced in Ark. Code Ann. § 6-15-2907(i)(2)(A)(ii)?
RESPONSE: Yes, those are three different roles. The District Test Coordinator is responsible for oversight of all district testing activities and personnel. A test administrator is someone who actually gives the test to the students, reads instructions, etc., and must be licensed. A test proctor is in the room with a test administrator to assist in monitoring students but is not required to be licensed.

(2) Section 3.04.1.2 – What was the rationale for the language in Section 3.04.1.2? Is this to coincide with the definition for "Public school district" set forth in the DESE Rules Governing the Arkansas Educational Support

and Accountability Act (AESAA)? **RESPONSE:** Yes, the rationale was to align with the definition in AESAA and ensure districts who were under state control (not governed by an elected board) were not excluded from following testing procedures.

(3) Sections 3.07.7 and 3.07.8 – In which section is the conduct referred to set forth? It appears that the section number, 3.01, has been stricken from both sections, but not replaced. **RESPONSE:** 3.01 should have been replaced with 3.07. I will correct.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The proposed changes include those made in light of Act 930 of 2017, sponsored by Senator Jane English, which amended provisions of the Arkansas Code concerning the public school state accountability system. Pursuant to Arkansas Code Annotated § 6-15-2905(2), the State Board of Education shall promulgate rules to implement the comprehensive accountability system for Arkansas public schools and school districts and the Arkansas Educational Support and Accountability Act, Ark. Code Ann. §§ 6-15-2901 through 6-15-2918.

b. SUBJECT: DESE Rules Governing Public School Choice and Repeals

DESCRIPTION: The purpose of the Division of Elementary and Secondary Education Rules Governing Public School Choice is to set forth the process and procedures necessary to administer the Public School Choice Act of 2015 and the Opportunity School Choice Act.

The rules to be repealed, the Rules Governing the Public School Choice Act of 2015 and the Rules Governing Opportunity School Choice, have been combined into a single, new rule, along with the protections for students of military families, which were added to both school choice laws by Act 171 of 2019. The Public School Choice rules accomplish this by defining key terms and setting forth the details of applying for school choice transfers and appealing denials of school choice transfer requests. The rules also set forth the limitations of each type of school choice and the new special requirements and flexibility for military families.

The revisions to the rules were necessary to implement the requirements of Act 171 of 2019, which amended the law to provide flexibility for military families, and Act 754 of 2019, which substantially amended the law to provide Opportunity School Choice as an option for students

seeking to transfer from a school in need of Level 5–intensive support under Ark. Code Ann. §§ 6-15-2913 or 6-15-2915 or a public school with a rating of "F" under Ark. Code Ann. §§ 6-15-2105 and 6-15-2106.

Following the public comment period, changes were made in response to comments received concerning the system of numbering the chapters, to add the statute defining "sibling," to set forth a numbering system for exhibits submitted by respondents in an Opportunity School Choice hearing, and other small clarifications and corrections. A section was also added at Chapter 2, Section 2–3.03.2.6 following public comment to clarify that nothing in that section should be construed to require a student to transfer before the end of the school year. None of the changes were substantive.

PUBLIC COMMENT: A public hearing was held on September 26, 2019. The public comment period expired on October 19, 2019. The Division provided the following summary of the comments that it received and its responses thereto:

Lucas Harder, Arkansas School Boards Association
Comment (1): For ease of citing to these rules, I would recommend changing the sectional numbering system to mirror that of the Educator Licensure Rules so that you have the number of the chapter, a hyphen, and then the section numbers (1-1.00, 2-1.00, 3-1.00, etc.).
Response: The change was made.

Comment (2): 1-1.02: As the definition of "sibling" is not included under the cited statutes, I would recommend adding 6-1-106 to the list.
Response: The change was made.

Comment (3): 2-3.03.1: I believe that this is supposed to be referencing section 4.00 of Chapter 2 instead of Chapter 3 as Chapter 3 is the Opportunity School Choice.
Response: The change was made.

Comment (4): 2-6.05: Since this is a mandated labeling method for the appellee, then I would recommend also including labeling instructions for the districts so that there is no confusion.
Response: The change was made.

Comment (5): 3-1.01.1: As "eligible district" is defined at 1-2.02, there is no need to include "which has been classified by the State Board of Education as a public school or school district in need of Level 5–intensive support."
Response: Comment considered. No change made.

Comment (6): 3-1.01.2: As "eligible school" is defined at 1-2.03, there is no need to include "which has a rating of 'F' under Ark. Code Ann. §§ 6-15-2105 and 6-15-2106."
Response: Comment considered. No change made.

Harvie Nichols, Guy Fenter Education Service Cooperative
Comment (1): Chapter 2, Section 4.01.6 – This section needs to be expanded to set timelines and procedures for allowing a district appeal of the Division.
Response: Comment considered. No change made. No timelines are mandated by statute, but the State Board hears appeals at the next available State Board meeting. The timelines for publishing agendas are set pursuant to the FOIA.

Comment (2): Chapter 2, Section 5.01.1 – The requirement that the appeal must be postmarked is good. In the past there have been appeals based on email messages. The new requirements coupled with 5.01.2 provides a clear mechanism for appeal.
Response: Comment considered. No change made.

Comment (3): Chapter 2, Section 6.08 – Language should be added requiring that the State Board take action within a set amount of time after taking the matter under advisement.
Response: Comment considered. No change made. The section requires the State Board to announce its decision in an open hearing and immediately after hearing all arguments and evidence. The State Board appreciates the gravity of timing in school choice appeals and is advised of issues of timing and the State Board operating procedures when it takes a matter under advisement. The State Board may hear the matter at the next regular Board meeting or may choose to call a special meeting to address the matter.

Comment (4): Chapter 3, Section 1.05.4 – I do not currently have access to the Acts that required the rule development but would note that the level of enrollment for lack of capacity for this program is set at 95% by grade level. This is inconsistent with School Choice language that sets capacity at 90%. There is also no language regarding capacity of programs for which the student may be eligible. I understand that the language may be set in law but consistency would be good.
Response: Comment considered. No change made. You are correct that the definition of capacity is different for Public School Choice and Opportunity School Choice. Under Public School Choice, lack of capacity is defined as having reached at least ninety percent (90%) of the maximum authorized student population in a program, class, grade level, or school building by statute. *See* Ark. Code Ann. § 6-18-1903(d)(2)(B). The definition of capacity under Opportunity School Choice was not

determined in statute. Rather, Ark. Code Ann. § 6-18-227 mandated that the Division promulgate rules to govern the use of school capacity under this law. *See* Ark. Code Ann. § 6-18-227(d)(4). The Division set capacity for Opportunity School Choice at 95% in its rules. Although our records do not exhaustively list all prior versions of the rule, there has been no change to that percentage in the rule since at least 2013.

Comment (5): Chapter 3, Section 1.09 – Regarding the transfer of funds for federal programs, there is no explanation of how this would be calculated. For example, how is the amount of eligible funding determined? If a student generates funds for the district but those funds are used to support certain programs by the resident district for which the student is not eligible, what federal funds must be transferred? For example, a district receives 6B funds for a student identified under IDEA as needing speech therapy services but the district uses local funds to pay for speech therapy, then does the resident district transfer funds?
Response: Comment considered. No change made. The funds and calculations are not governed by this rule, but are instead governed by the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act. Districts are required to comply with federal law in the use of these funds.

Comment (6): Chapter 3, Section 4.02 – This requires notice be sent by certified mail which is different than the requirements under School Choice Rules.
Response: Comment considered. No change made. The requirement that the appeal be sent by certified mail was contained in the 2013 Opportunity School Choice Rules and no change has been made to this requirement.

Comment (7): Section 4.06.8 – Again timelines should be developed to require that the State Board take action within a limited amount of time when they take an appeal under advisement.
Response: Comment considered. No change made. The State Board appreciates the gravity of timing in school choice appeals and is advised of issues of timing and the State Board operating procedures when it takes a matter under advisement. The State Board may hear the matter at the next regular Board meeting or may choose to call a special meeting to address the matter.

Comment (8): Chapter 3, Section 1.10.1 – A cap on transportation costs is greatly appreciated. The amount is also appreciated. There however is no explanation of how the resident district will incur the cost of transportation of the transferred students. Does the receiving district just automatically bill $400 per student or is the cost calculated using some formula similar to the way athletic transportation is calculated?

Response: Comment considered. No change made. This matter is handled by agreement between the resident and nonresident districts. Ark. Code Ann. § 6-18-227(c)(l)(A) provides that the receiving district may transport students to and from the transferring district with the costs to be borne by the transferring district up to $400, except as provided in the following section 1.10.2. The receiving district may decline to transport the student at its discretion and that duty would then fall to the transferring district. The law is silent as to the obligation of either district above $400 per student per school year.

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

(1) Chapter 2, Sections 2.03.1 and 2.03.2 – Both sections refer to "Section 5.03"; should this be "2.03"? **RESPONSE:** Yes. Change was made.

(2) Chapter 2, Section 3.03.1 – Should the reference to "Chapter 3" be to "Chapter 2"? **RESPONSE:** Yes. Change was made.

(3) Chapter 2, Section 3.03.2.4 – The rule provides that the student shall retain priority "until July 1" and be reconsidered when the district is no longer at the numerical net maximum limit. Arkansas Code Annotated § 6-18-1906(b)(3) appears to provide that the student shall retain priority for transfer until the "first year in which the district is no longer subject" to the numerical net maximum limit. Is there a reason the rule limits that priority until July 1? **RESPONSE:** After reviewing Act 754 of 2019 along with Ark. Code Ann. §§ 6-18-1905 and 6-18-1906, we think Ark. Code Ann. § 6-18-1905(d)(2)(E) can be read with Ark. Code Ann. § 6-18-1906(b)(3) as follows: the priority for the first school year in which the district is no longer subject to the 3% net maximum limit (6-18-1906) ends on July 1 of the following school year (6-18-1905). If a student receives a letter denying their request to transfer on July 1, 2019, that student retains priority until July 1, 2020, which is the end of the next school choice cycle.

(4) Chapter 2, Section 4.00 – The section contains several references to "subchapter." Should the reference be to "the Public School Choice Act of 2015"? **RESPONSE:** Yes. Change was made.

(5) Chapter 3, Section 1.01.1 – Should the reference to "school or" be deleted to reflect the changes made by Act 754, § 1, such that it reads "classified . . . as a public school district"? **RESPONSE:** Yes. Change was made.

(6) Chapter 3, Section 1.02 – Should the term "first" be deleted to reflect the changes made by Act 754, § 1, such that it reads "no later than May 1

of the year before the student intends to transfer"? **RESPONSE:** Yes. Change was made.

(7) Chapter 3, Section 1.04 – In the fourth line, should the terms "school or" be deleted before the two references to "school district" as this refers to level 5–intensive support and to reflect changes made by Act 754, § 1? **RESPONSE:** Yes. Change was made.

(8) Chapter 3, Section 1.10.2 – Similarly, should "school or" be deleted before the two references to "school district" in the first two lines as the reference is to level 5–intensive support and to reflect changes made in Act 754, § 1? **RESPONSE:** Yes. Change was made.

The proposed effective date is January 1, 2020.

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

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-18-227(m), the State Board of Education ("State Board") shall adopt any rules necessary for the implementation of the statute, which concerns the Arkansas Opportunity Public School Choice Act.[1] Likewise, the State Board may promulgate rules to implement the Public School Choice Act of 2015, Ark. Code Ann. §§ 6-18-1901 through 6-18-1908. *See* Ark. Code Ann. § 6-18-1907(a). The proposed rule incorporates changes made in light of Act 171 of 2019, sponsored by Representative Brian S. Evans, which amended the deadline by which a student who has a parent or guardian who resides on a military base may apply for a transfer under the Public School Choice Act and the Arkansas Opportunity Public School Choice Act. Additional changes were made in light of Act 754 of 2019, sponsored by Representative Mark Lowery, which amended provisions of the Arkansas Code concerning public school choice.

c. SUBJECT: DESE Rules Governing Class Size and Teaching Load

DESCRIPTION: Amendments to the Rules Governing Class Size and Teaching Load are necessary as a result of Act 979 of 2019. Changes to the rules include the following:

- The title of the Rules is changed to reflect the new name of the agency;
- Section 1.02 (now 1.01) is changed to reflect the current regulatory authority;
- Section 2.01 is added to define elementary model;

[1] Act 754 of 2019, § 1, amended the title of the statute, Ark. Code Ann. § 6-18-227.

- Sections 4.01 and 4.02 are changed to clarify that teaching load applies to students in grades Five through Twelve (5-12), rather than teachers in grades Five through Twelve (5-12); and
- Section 4.02 is changed to clarify that the teaching load exception applies only to the elementary model.

Following the public comment period, the title was changed to add the words "rules governing" that were accidentally stricken.

PUBLIC COMMENT: A public hearing was held on September 26, 2019. The public comment period expired on October 19, 2019. The Division provided the following summary of the comments that it received and its responses thereto:

Lucas Harder, Arkansas School Boards Association (10/3/19)
Comment (1): "Rules Governing" is on the wrong side of the introduction of the transition to the Division so that it was included in the language indicated as being struck.
Response: Comment considered. Non-substantive change made.

Comment (2): Section 3.01.1 – I would recommend adding "at least" before "a one half-time instructional aide."
Response: Comment considered. No change made.

Harvie Nichols, Guy Fenter Education Service Cooperative
Comment (1): Act 243 of 2018[, § 33] was enacted to correct an unintended consequence of previous legislation that expanded to teachers in grades five or six the opportunity to teach more than 150 students for additional compensation. It has been reported that the problem arose in situations where a teacher was teaching all the core academic subjects to the same group of students assigned to them. Apparently, the student software system when listing all the academic subjects indicated that the teacher was teaching more than 150 students and potentially created issues with teacher compensation.

While the difficulty in defining "elementary model" is acknowledged, it is my opinion that the current proposed definition in 2.01 needs to be more clearly defined. Perhaps an example could be listed that shows that in cases where a 5th or 6th grade teacher teaches all the core subjects to the same group of students assigned to them for the majority of the day that no violation of the 150 student limit exists.
Response: Comment considered. The term "elementary model" is being added to the Rules to clarify which grades are exempt from the teaching load calculation method as stated in Section 4.02. The definition includes the language "educational model consistent with instructional grouping and scheduling used ..." No change made.

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

(1) Section 2.01 – Why is the term "elementary model" being included in the rules? **RESPONSE:** The term is being used to clarify which grades are exempt from the teaching load calculation method as stated in Section 4.02.

(2) Section 4.00 – Is the Division comfortable continuing to set out the maximum number of students in grades five through 12 (5-12) that a teacher is permitted to teach per day in the Class Size and Teaching Load rules, as opposed to the Standards of Accreditation, as directed in Ark. Code Ann. § 6-17-812(a)(4), as amended by Act 979 of 2019? **RESPONSE:** Yes. The Class Size and Teaching Load Rules are incorporated into the Standards at Section 1-A.6 in Appendix A. Violation of the Class Size and Teaching Load Rules is a probationary violation of the Standards.

(3) Section 4.01 – It appears that the exception for courses lending to large group instruction was removed from Ark. Code Ann. § 6-17-812 by Act 979 of 2019; however, it is still present in the rules. Can you reconcile this for me? **RESPONSE:** Although the language related to large group instruction was removed by Act 979 of 2019, the law allows the Division (Department) to set the maximum number of students in grades 5-12 that a teacher is permitted to teach without receiving additional compensation. There is no requirement that the maximum number be the same for each class or each grade.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The proposed changes include those made in light of Act 979 of 2019, sponsored by Representative Jana Della Rosa, which required the Department of Education to establish in the Standards for Accreditation of Arkansas Public Schools and School Districts the maximum number of students that a teacher in grades five through twelve (5-12) is permitted to teach per school day. Pursuant to Arkansas Code Annotated § 6-17-812(e)(1), the Division of Elementary and Secondary Education shall promulgate rules to implement the statute, concerning compensation for teaching more than the maximum number of students permitted. The rules promulgated by the Division shall include without limitation the manner in which students in grades five (5) and six

(6) are to be counted for the purposes of the statute. *See* Ark. Code Ann. § 6-17-812(e)(2).

d. SUBJECT: DESE Rules Governing the Regulatory Basis of Accounting

DESCRIPTION: The Division of Elementary and Secondary Education proposes changes to its Rules Governing the Regulatory Basis of Accounting. Act 867 of 2019 eliminated "alternative basis" as an option for school district financial audits, thus requiring that all districts use the "regulatory basis." Prior to the passage of Act 867, the fact that Arkansas law *allowed* the alternative-basis option–regardless of whether any district used it–meant that under federal law, EDGAR 200.520(b), Arkansas school districts could not be considered low-risk auditees. (In a low-risk audit, fewer documents are reviewed.) As a result of Act 867's elimination of the alternative-basis option, school districts that meet the other criteria set forth in federal law can be considered low-risk auditees. These rules are amended to eliminate the alternative-basis option consistent with Act 867.

PUBLIC COMMENT: A public hearing was held on September 26, 2019. The public comment period expired on October 19, 2019. The Division received no comments.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The State Board of Education shall promulgate rules necessary to administer the regulatory basis provided in Arkansas Code Annotated § 10-4-413(c), concerning audits of schools and the regulatory basis of accounting *See* Ark. Code Ann. § 10-4-413(c)(5). The proposed changes include those made in light of Act 867 of 2019, sponsored by Representative Bruce Cozart, which amended Arkansas law concerning audits of schools.

e. SUBJECT: DESE Rules Governing the Arkansas Educational Support and Accountability Act (AESAA)

DESCRIPTION: The proposed amendments to the Rules Governing the Arkansas Educational Support and Accountability Act:

- Change the definition of "District Test Coordinator (DTC)" to provide greater flexibility as to who may serve in this role. The amendment would enable districts to appoint a non-licensed employee or individual

contracted by the district to serve as the DTC if under the supervision of an educator as defined in these rules;

- Specify that the Division will provide level 3 – coordinated support and level 4 – directed support, respectively, to school districts in which forty percent (40%) and fifty percent (50%) or more of the district's students score "in need of support" on the state's prior year summative assessment for reading, as required by Act 1082 of 2019;
- Require a literacy plan to be included as part of a school-level improvement plan, pursuant to Act 83 of 2019;
- Require a district support plan to direct the use of Enhanced Student Achievement funding (formerly NSL funding) for strategies to close gaps in academic achievement when applicable, as required by Act 631 of 2019;
- Require a literacy plan to be included as part of a district support plan when forty percent (40%) or more of the district's students score "in need of support" on the state's prior year summative assessment for reading, pursuant to Act 1082 of 2019; and
- Replace Arkansas Department of Education with the Division of Elementary and Secondary Education.

PUBLIC COMMENT: A public hearing was held on September 26, 2019. The public comment period expired on October 19, 2019. The Division provided the following summary of the comment that it received and its response thereto:

Lucas Harder, ASBA
Comment:
1.02: I would recommend adding Act 754 of 2019 to the list of references to account for the recommended changes to 8.13 and 8.13.1 below.

2.01.2: "Lake View School District" appears to be missing italicization.

4.04.1: There appears to be a comma missing between "secondary" and "higher."

6.04: "Beginning with the 2018-2019 school year" can be removed as we are past that school year and it is removed in 8.02.1.

8.13: "Of 2004" should be removed in accordance with Act 754 of 2019.

8.13.1: "Of 2004" should be removed in accordance with Act 754 of 2019.
Response: Corrections made.

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

Section 8.11.2.1.2.3 – It appears that this section is premised on Ark. Code Ann. § 6-15-2916(2)(B)(iii). What is the rationale for the change in language from that used in the statute? **RESPONSE:** The rationale is that the proposed wording in the rule expands and explains more specifically what is necessary to "operate a public school district," as stated in the statute. "School district systems" are defined as the "operations and procedures that occur within a public school district" so the proposed wording just clarifies that operating a school district includes all six of the systems listed.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The State Board of Education shall promulgate rules to implement the comprehensive accountability system for Arkansas public schools and school districts and the Arkansas Educational Support and Accountability Act, Ark. Code Ann. §§ 6-15-2901 through 6-15-2918. *See* Ark. Code Ann. § 6-15-2905(2). The proposed changes include those made in light of Act 83 of 2019, sponsored by Senator Jane English, which required school-level improvement, professional development, curriculum, and graduate studies plans to be in accordance with the science of reading; Act 631 of 2019, sponsored by Senator Jane English, which amended provisions of the Arkansas Code concerning public school accountability; Act 754 of 2019, sponsored by Representative Mark Lowery, which amended provisions of the Arkansas Code concerning public school choice; Act 1082 of 2019, sponsored by Senator Alan Clark, which required the Department of Education to provide certain levels of support to certain public school districts based on reading scores and amended the purposes on which national school lunch state categorical funds may be spent; and Act 1083 of 2019, sponsored by Senator Alan Clark, which amended the name of national school lunch state categorical funding.

5. <u>DEPARTMENT OF ENERGY AND ENVIRONMENT, DIVISION OF ENVIRONMENTAL QUALITY</u>(Mr. Micheal Grappe, Mr. Allan Gates, Mr. Jordan Wimpy)

a. <u>SUBJECT</u>: APC&EC Reg. No. 2, Regulation Establishing Water Quality Standards for Surface Waters of the State of Arkansas (Vulcan Construction Materials, L.L.C.)

<u>DESCRIPTION</u>: Vulcan Construction Materials, LLC ("Vulcan") owns and operates the Black Rock Quarry, a limestone quarry facility in Lawrence County, Arkansas, pursuant to NPDES Permit No. AR0046922. The Black Rock Quarry facility discharges groundwater and stormwater pumped from the quarry pit to Outfall 001 into a farm stock pond (at the request of the landowner), thence by an overflow weir to the UT, thence to Brushy Creek, and thence to Stennitt Creek.

Because Vulcan's permit contains, or will contain, final discharge effluent limits for total dissolved solids (TDS) and sulfate (SO_4) based on Arkansas water quality standards ("WQS") and ecoregion values for an Unnamed Tributary, Brushy Creek and Stennitt Creek, Vulcan evaluated alternatives through a Use Attainability Analysis ("UAA"), which included field studies to evaluate the physical, chemical and biological characteristics of the affected stream segments, toxicity testing, an engineering analysis of alternatives for discharge and treatment, evaluation of five separate methods for potential criteria development, and an analysis of designated uses for the UT, Brushy Creek and Stennitt Creek.

Based on the UAA, Vulcan is requesting the following amendments to APC&EC Regulation No. 2:

- Establish site-specific TDS and sulfate water quality criteria for the UT from Vulcan's Outfall 001 to the confluence with Brushy Creek, as follows:
    - TDS - 725 mg/L
    - Sulfate - 260 mg/L

- Establish site-specific TDS and sulfate water quality criteria for Brushy Creek from the confluence with the UT to the confluence with Stennitt Creek, as follows:
    - TDS - 549 mg/L
    - Sulfate - 126 mg/L

- Establish a site-specific sulfate water quality criterion for Stennitt Creek from the confluence with Brushy Creek to the confluence with the Spring River, as follows:

    - Sulfate - 43.3 mg/L

- Remove the designated, but not existing, domestic drinking water use for the UT from Vulcan's Outfall 001 to its confluence with Brushy Creek, and for a segment of Brushy Creek from its confluence with the UT to its confluence with Stennitt Creek.

Vulcan's proposed modifications to APC&EC Regulation No. 2 are supported by the following:

- The site-specific TDS and sulfate criteria requested by Vulcan reflect current conditions and allow Vulcan's Black Rock Quarry facility to operate as designed while protecting the aquatic life use, primary and secondary contact recreation use, and industrial and agriculture water designated uses for the UT, Brushy Creek and Stennitt Creek.

- Sulfate concentrations measured instream indicate that sulfate concentrations exceed 22.7 mg/L in the UT and Brushy Creek, which represents a "significant modification" of the water quality as compared to the Ozark Highlands ecoregion value for sulfate (17 mg/L).

- Mass balance calculations carried out for 7Q10 flow conditions, using TDS concentrations at Outfall 001 (95^{th} percentile) and upstream concentrations from recent monitoring, indicate potential exceedance of the DWS criteria for TDS (500 mg/L) in the UT and Brushy Creek.

- The DWS use for the UT and Brushy Creek is not an existing or attainable use, and the Arkansas Department of Health has no current or future plans for using them as public water supplies.

- Water quality in the UT, Brushy Creek, and Stennitt Creek supports aquatic life uses based on ADEQ's assessment methodology.

- Vulcan's existing discharge supports the aquatic life uses, industrial and agricultural water supply uses, as well as primary and secondary contact recreation uses.

- Evaluation of TDS and sulfate in the Vulcan discharge indicates that the dissolved minerals will not reach concentrations that will cause acute or chronic toxicity.

- The proposed criteria are based on the preferred methodology , *i.e.* based on the reference macroinvertebrate community tolerance values from published field studies using EPA methodology and using a conservative assumption regarding the relationship between conductivity and dissolved minerals in the receiving streams.

- The recommended criteria are consistent with existing effluent and instream concentrations, which support fish and benthic macroinvertebrate communities.

- There is no current economically feasible treatment technology for the removal of minerals to meet the current criteria.

- 40 C.F.R. 131.11(b)(1)(ii) authorizes states to adopt water quality standards that are "modified to reflect site-specific conditions."

- The basis for removal of the designated use and the establishment of site specific criteria is set forth in 40 C.F.R. 131.10(g).

PUBLIC COMMENT: A public hearing was held in Walnut Ridge, Arkansas, on August 29, 2019. The public comment period expired on September 11, 2019.

Vulcan provided the following summary of the sole comment that was received and its response thereto:

On May 20, 2019, Vulcan filed a Petition to Initiate Third-Party Rulemaking to Amend APCEC Rule No. 2. The Arkansas Pollution Control & Ecology Commission granted Vulcan's Petition on June 28, 2019. Notice of the proposed rulemaking was published in the Arkansas Democrat-Gazette on July 14 and 21, 2019. A public hearing was held on August 29, 2019, in Walnut Ridge, Arkansas, and the public comment period ended on September 11, 2019. There were no oral comments and no members of the public attended the public hearing.

There was only one written comment filed during the public comment period, a letter from the Arkansas Department of Health ("ADH") dated September 3, 2019. The issues raised in the letter and Vulcan's responses to the issues appear below.

1. The Unnamed Tributary and Brushy Creek are tributaries of the Spring River in the watershed of the Northeast Arkansas Public Water Authority. ADH has consistently maintained that the domestic water supply use designation is appropriate and necessary for all streams within public supply watersheds.

Vulcan acknowledges ADH's policy and does not disagree with the policy as a general proposition. But Vulcan respectfully submits that strict application of the policy to the factual circumstances involved in this rulemaking would be inappropriate because the Unnamed Tributary's contribution to the flow of the Spring River is so small that it cannot realistically affect water quality at the Northeast Arkansas Public Water Authority intake.

2. Mineral pollution contributed to the Spring River by the Unnamed Tributary will have a direct effect on water quality of the water supply for the Northeast Arkansas Public Water Authority.

First, Vulcan acknowledges that the discharge from the Unnamed Tributary flows directly through Brushy Creek and Stennitt Creek to the Spring River. As a consequence, it is technically accurate to say that water quality in the Unnamed Tributary directly affects water quality in the Spring River. The effect is so small, however, that it is insignificant. The discharge from the Unnamed Tributary is less than 0.1% of the flow of the Spring River at the confluence with Stennitt Creek. Even if concentrations of minerals in the Unnamed Tributary increased or decreased dramatically, the effect on the Spring River would be undetectable. See Attachment 1 to this Response to Comments.

Second, the comment's use of the future tense, "will have a direct effect," suggests that a new discharge is proposed. That is not the case. Vulcan's Black Rock Quarry has been discharging essentially the same volumes of stormwater with essentially the same concentrations of minerals through the Unnamed Tributary for decades. No new discharge is proposed; only a continuation of the longstanding quarry stormwater discharge.

3. Dissolved chlorides can have deleterious effects upon plumbing corrosion rates even when concentrations are below secondary drinking water standards. This complicates drinking water systems' efforts to minimize consumer exposure to lead and copper and can also increase drinking water treatment costs.

Vulcan is not proposing any change in water quality criteria for chlorides. Water quality samples collected for the UAA showed chloride concentrations in the Unnamed Tributary and Brushy Creek immediately downstream of the UT well below the ecoregion value of 13 mg/L:

Chloride Values from UAA Samples (2015-2016)

	Maximum	*Minimum*	*Average*
Sample Station UT-0A	*10 mg/L*	*<0.1 mg/L*	*5 mg/L*
Sample Station BC-1A	*10 mg/L*	*<0.1 mg/L*	*3.6 mg/L*

4. ADH requests that all documents in the rulemaking be revised to reflect ADH's opposition to the removal of the domestic water supply designated use from UT and Brushy Creek.

Vulcan acknowledges ADH's opposition. ADH's comment and this response document that fact. But the documents previously filed in the administrative record of the rulemaking cannot be altered.

5. ADH asks that the 2009 ADH letter included as Attachment A in the Final UAA Appendix A be removed because the public water intake described in that letter as planned now exists and is operational.

Vulcan acknowledges that the public water intake mentioned in the 2009 letter is now operational, but it cannot alter documents previously filed in the administrative record. ADH's comment and this response fully document that the public water intake in question is no longer merely proposed.

6. ADH did not oppose the removal of the drinking water designated use from Stennitt Creek in 1999 because there was no downstream drinking water supply in the watershed at that time, and because the revised standard for TDS in the 1999 rulemaking was less than the secondary drinking water standard. ADH now opposes the 1999 removal of the designated drinking water use from Stennitt Creek because there is a downstream public water intake. ADH asks that all documents and exhibits in the rulemaking be revised to reflect ADH's opposition to the removal of the domestic water supply designated use for the Unnamed Tributary, Brushy Creek, and Stennitt Creek.

ADH's opposition is noted but Vulcan cannot alter documents previously filed in the administrative record of this rulemaking.

Attachment 1 to Vulcan Response to Comment

Unnamed Tributary's Contribution to Flow in Downstream Waterbodies

Name of Waterbody	Flow*	UT's % of Flow
Unnamed Tributary at Outfall	0.59 cfs	100%
Brushy Creek below confluence with Unnamed Tributary	1.26 cfs	47%
Brushy Creek above confluence with Stennitt Creek	2.11 cfs	28%
Stennitt Creek below confluence with Brushy Creek	3.98 cfs	15%
Spring River below confluence with Stennitt Creek	721.98 cfs	0.08%

	Sulfate	TDS
If UT increases 3 x the Max:	260 mg/L→780 mg/L	725 mg/L→2,175 mg/L
Impact on Spring River:	4.02 mg/L→4.45 mg/L	220.3 mg/L→221.5 mg/L

	Sulfate	TDS
If UT decreases to ecoregion values:	260 mg/L→22.7 mg/L	725 mg/L→240 mg/L
Impact on Spring River:	4.02 mg/L→3.82 mg/L	220.3 mg/L→219.9 mg/L

*Flow data based on harmonic mean flows as calculated in Mass Budget in Vulcan Revised UAA, Figure 10.3 at p. 10-20

The Division provided the following summary of the sole comment received and its response thereto:

On June 28, 2019, the Arkansas Pollution Control and Ecology Commission by Minute Order 19-08 granted the petition filed by Vulcan Construction Materials, LLC – Black Rock Quarry ("Vulcan") to initiate rulemaking to amend APC&EC Regulation No. 2, Regulation Establishing Water Quality Standards for Surface Waters of the State of Arkansas. A public hearing was held on August 19, 2019, in Lawrence County, Arkansas. No public comments were made at the public hearing. The public comment period ended on September 11, 2019. The Arkansas Department of Health submitted a written comment.

Commenter: Arkansas Department of Health
Arkansas Department of Health (ADH) objected to the removal of the domestic supply designated use for both the unnamed tributary and Brushy Creek as proposed because these creeks are tributaries of the Spring River in the watershed of Northeast Arkansas Public Water Authority

(NEPWA), a source of drinking water to almost 4000 Arkansans. ADH stated that the domestic water supply use designation is appropriate and necessary for all streams within the watershed of a public water supply.

ADH cited to 40 C.F.R. § 131.10(b) which states, "In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards for downstream waters."

ADH noted that the drinking water designated use was removed for Stennitt Creek in 1999. ADH stated that it did not oppose the increase because no drinking water intake was located downstream on the Spring River and the proposed revised standard did not exceed the secondary maximum contaminant level.

Response: DEQ acknowledges ADH's position on retaining the domestic water supply use in the unnamed tributary and Brushy Creek. The unnamed tributary flows into Brushy Creek, which flows into Stennitt Creek. Stennitt Creek does not have a domestic water supply designated use from the mouth of Brushy Creek to the confluence with the Spring River. The domestic water supply designated use on Stennitt Creek was removed before NEPWA began using water from the Spring River.

DEQ acknowledges the considerations outlined in 40 C.F.R. § 131.10(b). DEQ has considered the attainment and maintenance of the water quality standards for the segment of the Spring River where NEPWA has a drinking water intake. DEQ has concluded that the domestic water supply designated use is being maintained in that segment of the Spring River. The Use Attainability Analysis submitted by Vulcan states, "[the Mass Balance Results for 7Q10 Conditions] show that discharges from Outfall 001 have minimal impact on TDS and sulfate concentrations in the Spring River. Discharges from Outfall 001 will not cause exceedances of [domestic water supply] criteria in the Spring River for 7Q10 conditions."

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: This amendment to Regulation No. 2, Water Quality Standards, stems from a third-party rulemaking request made to the Arkansas Pollution Control and Ecology Commission ("Commission") by Vulcan Construction Materials, LLC. Arkansas Code Annotated § 8-4-202(c)(1) bestows upon any person the right to petition the Commission for the issuance, amendment, or repeal of any rule. *See also* Ark. Code Ann. § 8-4-102(6) (defining "person" as "any state agency,

municipality, governmental subdivision of the state or the United States, public or private corporation, individual, partnership, association, or other entity"). Pursuant to Ark. Code Ann. § 8-4-202(a), the Commission is given and charged with the power and duty to adopt, modify, or repeal, after notice and public hearings, rules implementing or effectuating the powers and duties of the Commission and the Division of Environmental Quality. The Commission is further given and charged with the power and duty to promulgate rules, including water quality standards. *See* Ark. Code Ann. § 8-4-201(b)(1)(A). *See also* Ark. Code Ann. § 8-4-202(b)(3).

6. STATE BOARD OF FINANCE (Mr. Paul Louthian)

a. SUBJECT: Arkansas State Treasury Investment Policy

DESCRIPTION: The proposed amendments to the Arkansas State Treasury Investment Policy address five topics. The Treasury's investment portfolio has historically limited purchases of corporate debt to 30% of the total portfolio in the aggregate, and 5% of the total portfolio to a single debt issuer. Prior to this proposed rule change, there were two exceptions to those percentage limits: one for commercial paper with a maturity of less than eight days and a second for investments made in the State Treasury Money Management Trust. Those two exceptions are eliminated by this rule change. The third substantive change limits the Treasury's holdings of second-tier commercial paper to 5% of the total portfolio. The fourth change removes the Treasury's authority to purchase "private placement" commercial paper. The fifth and final change removes the 10% cap on the Treasury's ability to place collateralized certificates of deposit in local banks.

PUBLIC COMMENT: A public hearing was held on October 28, 2019. The public comment period expired on October 23, 2019. The State Board of Finance received no public comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the amended rule has a financial impact. Specifically, there will be no additional cost, but it may impact yield in the Treasury's investment portfolio.

LEGAL AUTHORIZATION: Pursuant to Ark. Code Ann. § 19-3-704, the State Board of Finance has authority to establish, maintain and enforce all policies and procedures concerning the management and investment of funds in the State Treasury and the State Treasury Money Management Trust including without limitation, an investment policy. *See* Ark. Code Ann. § 19-3-704(a)(4).

b. **SUBJECT: Arkansas State Treasury Money Management Trust Policy**

DESCRIPTION: The proposed amendments to the Arkansas State Treasury Money Management Trust (STMMT) address four topics. The Treasury's investment portfolio has historically limited purchases of corporate debt to 30% of the total portfolio in the aggregate, and 5% of the total portfolio for a single debt issuer. Prior to this proposed rule change, corporate debt investments under eight days were not included in those calculations. That exception is eliminated by this proposed rule change. The second substantive change limits the Treasury's holdings of second-tier commercial paper to 5% of the total portfolio. Third, the proposed rule change removes the Treasury's authority to purchase "private placement" commercial paper. Finally, this proposed rule change removes the 10% cap of the Treasury's ability to place collateralized certificates of deposit in local banks.

PUBLIC COMMENT: A public hearing was held on October 28, 2019. The public comment period ended on October 23, 2019. The State Board of Finance received no comments.

The proposed effective date of this rule is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the amended rule has a financial impact. Specifically, there will be no additional cost, but it may impact yield in the STMMT investment portfolio.

LEGAL AUTHORIZATION: Pursuant to Ark. Code Ann. § 19-3-704, the State Board of Finance has authority to establish, maintain, and enforce all policies and procedures concerning the management and investment of funds in the State Treasury and the State Treasury Money Management Trust. *See* Ark. Code Ann. § 19-3-704(a).

7. **DEPARTMENT OF HUMAN SERVICES, DIVISION OF AGING, ADULT, & BEHAVIORAL HEALTH SERVICES (DAABHS) (Ms. Patricia Gann, item a; Mr. Mark White, item b)**

a. **SUBJECT: Certification in Deaf Mental Health**

DESCRIPTION:

Statement of Necessity

Act 644 of 2019 creates a Bill of Rights for persons in need of mental health services who are also deaf or hard of hearing and requires the Division of Aging, Adult, and Behavioral Health Services (DAABHS) to establish a certification process to ensure that persons in need of mental health services receive culturally affirmative and linguistically appropriate treatment services. The establishment of a certification will increase the capacity of the mental health professionals in Arkansas to respond more appropriately to the varying needs of deaf and hard of hearing Arkansans.

Summary
Effective January 1, 2020, DAABHS is promulgating a new rule, Certification in Deaf Mental Health, to implement Acts 2019, No. 644. This new rule outlines the qualifications and process to become a Certified Mental Health Professional. The new rule sets requirements concerning the following:

- Education and experience
- Training for initial certification and recertification
- Application process and application review process
- Compliance with state and federal laws, rules, and regulations
- Conformance to professionally recognized behavioral health rehabilitative treatment models
- Provider renewal
- Noncompliance with requirements
- Appeal process

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired November 3, 2019. The agency indicated that it received no public comments.

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses:

QUESTION #1: Is there statutory authority for the definitions of "aural communication" and "communication assessment" in Section I.D?
RESPONSE: Acts 2019, No. 644, § 20-47-1005(5) provides that DAABHS shall, "[e]stablish a certification process for mental health professionals who meet all standards and guidelines, as determined by the division, to provide culturally affirmative mental health services and linguistically appropriate mental health services to clients." DHS interprets this provision to allow DAABHS discretion to determine the standards and guidelines, and these definitions are included as an exercise of that discretion.

QUESTION #2: Where do the Section I.D definitions of Advanced Practice Nurse, Independently Licensed Clinician, and Non-independently

Licensed Clinician come from? **RESPONSE:** These definitions are derived from pages 5 and 6 of the Outpatient Behavioral Health Services Medicaid Provider Manual, which can be found here: https://medicaid.mmis.arkansas.gov/Provider/Docs/obhs.aspx.

QUESTION #3: Does the sign language proficiency requirement in Section II.C refer to proficiency in American Sign Language or is it intended to include proficiency in any "communication method" as the proposed rules define that term? **RESPONSE:** Consistent with Act 644, the requirement includes proficiency in any "communication method" as is defined in the rule.

The proposed effective date is January 1, 2020.

FINANCIAL IMPACT: The agency stated that this new rule has no financial impact.

LEGAL AUTHORIZATION: This new rule implements Act 644 of 2019, sponsored by Representative Charlene Fite, which created the Mental Health for Individuals who are Deaf or Hard of Hearing Bill of Rights. The Act, codified at Ark. Code Ann. § 20-47-1005(1), requires the Division of Aging, Adult, and Behavioral Health Services to establish and maintain "culturally affirmative . . . and linguistically appropriate mental health services" for clients with hearing impairments. Ark. Code Ann. § 20-47-1005(5), also created by the Act, requires the Division to establish a mental health professional certification process to provide such services.

b. SUBJECT: Rule Establishing Reasonable Charges for Costs of Treatment

DESCRIPTION: Effective January 1, 2020, the Rule Establishing Reasonable Charges for Costs of Treatment will be amended as follows:

> In compliance with Acts 2019, No. 567, the proposed amendment expands the permissible criteria for waiver or postponement of a charge to include when a patient has a court-appointed attorney because the court has found them to be indigent.

Additionally, the proposed amendment repeals waiver language regarding patients who plead or are found guilty. This language was formerly found at Ark. Code Ann. § 5-2-305(j)(3)(B)(ii), but the language was repealed by Section 5 of Acts 2017, No. 472.

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired November 14, 2019. The agency indicated that it did not receive any comments.

The proposed effective date is January 1, 2020.

FINANCIAL IMPACT: Per the agency, this rule will have no financial impact. The amendments to the rule are not expected to result in any substantive change to the number of Arkansas State Hospital patients who are charged for services.

LEGAL AUTHORIZATION: These rules implement Act 567 of 2019, sponsored by Representative Justin Gonzales, which concerned the cost of mental health examinations of criminal defendants. The Act created a new section in the Arkansas Code that allows an "entity that provides treatment or other mental health services" to charge for services rendered. *See* Act 567, § 1(a) (2019) (*to be codified at* Ark. Code Ann. § 5-2-331(a)). This section requires the Division of Aging, Adult, and Behavioral Health Services and the Department of Human Services to promulgate rules establishing reasonable charges "for the cost of treatment or other mental health services[.]" *See* Act 567, § 1(c)(1) (2019) (*to be codified at* Ark. Code Ann. § 5-2-331(c)(1)). Such rules must provide for waiver or postponement of charges if a court has found the patient is indigent and qualifies for an attorney. *See* Act 567, § 1(c)(2)(C) (2019) (*to be codified at* Ark. Code Ann. § 5-2-331(c)(2)(C)).

8. DEPARTMENT OF HUMAN SERVICES, DIVISION OF CHILD CARE & EARLY CHILDHOOD EDUCATION (DCCECE) (Mr. David Griffin)

a. SUBJECT: Division of Child Care and Early Childhood Education Minimum Licensing Requirements

DESCRIPTION: To comply with Act 530 of 2019 and other Arkansas laws concerning mandated reporters of suspected child maltreatment, the following requirement has been added to the minimum licensing requirements for Child Care Centers, Child Care Family Homes, Registered Child Care Family Homes, and Out-of-School Time Facilities:

- Adds language providing that owners, operators, staff, therapists, and volunteers are mandated reporters of suspected child maltreatment and are required to call the Child Maltreatment Hotline if they have reason to suspect child maltreatment;
- Pursuant to Act 530, requires these same individuals to notify law enforcement if they have a good faith belief that there is a serious and imminent threat to the health or safety of a student, employee, or the

public, based on a threat made by an individual regarding violence in, or targeted at, a school (child care center) that has been communicated to the person in the course of their professional duties.

To comply with the Child Care Development and Block Grant Act of 2014, the following changes have been made to the minimum licensing requirements for Child Care Centers, Child Care Family Homes, Registered Child Care Family Homes, and Out-of-School Time Facilities:

- To support the development of an automated background check processing system, a conversion to a fully electronic system for processing background checks, including the payment process, is required.
- There will be requirements for orientation with specific health and safety topic requirements for Child Care Family Homes and Registered Child Care Family Homes in an online program provided at no cost and a time frame of within three (3) months of employment to complete the orientation.
- Additional orientation topics will be required for Child Care Centers and Out-of-School Time Facilities and a time frame of within three (3) months of employment to complete the orientation will be added.
- The 15 hours of required job-specific training will include child development training.
- Infant/Child CPR training will be required.
- The facilities must maintain a Statewide Disaster Plan.
- An emergency plan and procedure are required and must address the needs of children with disabilities and children with chronic medical conditions.
- Updates have been implemented regarding the requirements for the submission of the following for owners, operators, prospective and current employees, volunteers, therapists, student observers, administrative staff, and members of a board of directors of a facility:
  - State child maltreatment background checks
  - Arkansas State Police criminal background checks
  - FBI criminal records checks
  - National Sexual Offender Registry checks

PUBLIC COMMENT: A public hearing was held on October 16, 2019. The public comment period expired on November 3, 2019. The Arkansas Department of Human Services provided the following summary of the comments it received and its responses thereto:

COMMENTER'S NAME: Martha Hill, on behalf of CHMS Providers Association

Comment #1: Concerning the background checks for personnel working in child care centers, while the CHMS Providers Association and its

members believe that safety and security of both children and staff in child care centers are of the upmost importance at all times and that in no case should the safety of children and staff be compromised in any way, practically our experience shows that, once submitted, background checks for prospective personnel have taken up to six months to receive an "all clear" on a prospective hire. The delay in receipt of the clear background check has substantially affected the hiring of critical staff for the operation of centers. In fact, prospective staff have sought other employment, because of the delay in receipt of background checks by our centers. Additionally, we understand that the length of time of obtaining a "clear" background check has delayed Medicaid transportation hiring.

While we acknowledge that background checks are of the upmost importance and are one of several necessitated background investigations needed for hiring of prospective personnel for our centers, we urge that the Arkansas Department of Human Services make this delay known to other state and local agencies that conduct these critical checks. We have suggestions regarding this background check issue. We urge DHS staff to contact the CHMS Providers Association regarding this important issue.

Response: DHS is building an automated system that will speed up the process. This will involve the use of fingerprint scanners and will result in a turnaround of about three days.

Comment #2: On page 4 of the proposed rules, there appears to be an inconsistency between paragraph C and F with regard to background checks and therapists. Please insure that this provision is consistent with other rules promulgated by the Arkansas Department of Human Services. **Response:** The language in 1.F. referring to therapists is being moved to 1.C. and 1.F. is being repealed.

Comment #3: On page 12, please add a reference to the citation for the State Disaster Plan in the rules. **Response:** Language has been updated with a hyperlink to the Arkansas Comprehensive Emergency Management Plan issued by the Arkansas Division of Emergency Management.

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses:

QUESTION #1: Act 530 of 2019 requires mandated reporters to notify law enforcement if they have a good-faith belief that there is a serious and imminent threat to the public. Is there statutory authority for extending this duty to cover threats to child care facility employees and students? **RESPONSE:** Ark. Code Ann. § 6-18-110(a) (Act 530 of 2019) provides that mandated reporters notify law enforcement if he or she has a good faith belief that there is a serious and imminent threat to the public based

on a threat made by an individual regarding violence in or targeted at a school that has been communicated to the person in the course of his or her professional duties. The manual is simply stating in plain language whom could be threatened.

QUESTION #2: Do the 5-year residency provisions in the background check sections of the proposed rules apply to individuals who have lived outside of Arkansas at any point during the preceding five years, or do they only apply to individuals who have not lived in Arkansas at all during the preceding five years? **RESPONSE:** The five-year provisions would apply to both of the situations described above as the checks are made in each state of residence and each state resided in during the preceding five years. *E.g.* Ark. Code Ann. § 9-28-409(a).

QUESTION #3: The proposed rules require Arkansas Child Maltreatment Central Registry checks every two years, while federal law only requires checks every five years. Is there statutory or other authority for the proposed two-year timeframe? Why do the proposed rules require Arkansas Child Maltreatment Central Registry checks every two years but only require other background checks every five years? **RESPONSE:** The applicable check requirements, including Ark. Code Ann. § 9-28-409 and federal law, allow discretion by stating "not less than once during each 5-year period" or "at a minimum every five (5) years. *See e.g.* 128 Stat. 1992(d)(2)(b) and ACA 9-28-409(b)(4). Further, certain provisions in law specify checks every two years. *See e.g.* Ark. Code Ann. § 9-28-409(a)(4) and (b)(4). Thus, the agency maintains discretion to conduct checks periodically but at a minimum of every five years, or, is required to conduct checks every two years. Specifically, the agency has determined that Child Maltreatment Registry checks every two years are a best practice as certain persons can be placed on the Registry but escape prosecution that would positively result on a criminal background check.

QUESTION #4: The proposed rules prohibit prospective employees from working until their Arkansas State Police criminal records checks return as satisfactory, but the rules then allow those employees to work with supervision pending completion of the rest of the background check requirements. Is there statutory authority for these provisions? Why is work ability specifically contingent upon the Arkansas State Police criminal records check rather than one of the other background checks? **Response:** Please see Ark. Code Ann. §9-28-409(d)(2) and 45 C.F.R. § 98.43(d)(4) providing for work pending completion of checks. The Arkansas State Police check is the first check returned prior to receipt of any other check results. DHS chose to specify such in the rule.

QUESTION #5: The proposed rules require training on all health and safety topics listed in the Child Care Development and Block Grant Act of

2014 except "the handling and storage of hazardous materials and the appropriate disposal of biocontaminants." *See* 42 U.S.C. § 9858c(c)(2)(I)(i)(viii). Was this omission intentional, and, if so, why was this topic omitted? **RESPONSE:** [The Division provided updated copies of the manuals incorporating this non-substantive change.]

The proposed effective date is January 1, 2020.

FINANCIAL IMPACT: The agency stated that this rule has a financial impact.

The total estimated cost by fiscal year to any private individual, entity, and business subject to the proposed rule is $60,000 for the current fiscal year and $60,000 for the next fiscal year. This figure represents the estimated cost of running out-of-state background checks on individuals who have not lived in Arkansas for the previous 5 years. Such background checks are mandated by the federal Child Care Development and Block Grant Act of 2014, which went into effect in September of 2019. The cost estimate for conducting these background checks is based on 15% of total background check requests falling in this category, with an average cost of $25 per individual. The cost for these background checks will be paid by the applicant or prospective employer and will not involve a cost to the agency.

The agency stated that there will be no cost to state, county, or municipal government to implement this rule.

LEGAL AUTHORIZATION: The Division of Child Care and Early Childhood Education has general authority to promulgate rules governing childcare facility licensing and operation. *See* Ark. Code Ann. § 20-78-206(a)(1)(A). It is required to promulgate rules that promote children's "health, safety, and welfare" and that ensure childcare workers are "capable, qualified, and healthy[.]" *See* Ark. Code Ann. § 20-78-206(b)(1), (3). It also has authority to promulgate rules to enforce the Arkansas Child Maltreatment Act, which includes mandated reporting provisions and establishment of the Child Abuse Hotline. *See* Ark. Code Ann. §§ 12-18-105, -301, -402.

Some of the proposed amendments to the rules implement Act 530 of 2019, sponsored by Representative Carol Dalby, which required mandated reporters to notify law enforcement of certain threats to school safety.

Other revisions implement the federal Child Care Development and Block Grant Act of 2014, which introduces new training and background check requirements for childcare staff members in states that receive federal childcare funding. *See* 42 U.S.C. § 9858f(b). The Department of Human

Services has general authority to promulgate rules as necessary to conform its programs to federal law and receive federal funding. *See* Ark. Code Ann. § 25-10-129(b). The Division is specifically authorized to promulgate rules addressing federal background check and criminal record check requirements for current and prospective childcare facility operators, staff, and employees. *See* Ark. Code Ann. § 20-78-215(a)(2).

9. <u>DEPARTMENT OF HUMAN SERVICES, DIVISION OF CHILDREN & FAMILY SERVICES (DCFS)</u> (Ms. Christin Harper)

a. <u>SUBJECT</u>: Permanency Efforts for Children in Foster Care

<u>DESCRIPTION</u>:

Statement of Necessity
This rule revision packet will allow the Division of Children and Family Services (DCFS) to update its policy based on Acts 2019, Nos. 317, 541, 558, and 984, thereby furthering the Division's efforts to move children in foster care to permanency safely and swiftly.

Summary
Effective January 1, 2020, the DCFS Policy and Procedure Manual is being revised as follows:

- Policy VI-A: Out-of-Home Placement Criteria; Policy VI-B: Consideration of Relatives and Fictive Kin for Children in Foster Care; and related procedures
  - Establishes the conditions and protocols for trial home placement of a juvenile with a non-custodial parent as allowed by Act 541 of the 92nd General Assembly, Regular Session
- Policy VI-C: Maintaining Family Ties in Out-of-Home Placements
  - Reflects that if the court orders supervised visitation, the parents shall receive a minimum of four (4) hours of supervised visitation per week unless otherwise ordered (i.e. if the court determines that the visitation is not in the best interest of the juvenile or would impose an extreme hardship on one of the parties), per Act 558 of the 92nd General Assembly, Regular Session
- Policy VI-G: Case Review Judicial Hearings for Children in Out-of-Home Placements
  - Updates policy to note that the court shall consider all evidence of an effort made by the parent, guardian, or custodian to remedy the conditions that led to the removal of a juvenile, regardless of when the effort was made, and give the evidence the appropriate weight and consideration in relation to authorizing a permanency plan for the juvenile, per Act 984 of the 92nd General Assembly, Regular Session.

- Amends the order of preference for permanency goals to include authorizing a plan to obtain a guardianship or adoption with a fit and willing relative per Act 984 of the 92nd General Assembly, Regular Session

- Policy VIII-M: Resumption of Services Post-Termination and Reinstatement of Parental Rights
  - Allows the three (3) year waiting period for resumption of services to a parent post-termination of parental rights to be waived if it is in the best interest of the child, per Act 317 of the 92nd General Assembly, Regular Session

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired November 3, 2019. The agency indicated that it received no public comments.

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses:

QUESTION #1: Page 1 of the proposed revisions to Policy VI-B states that "parents are presumed to be the most appropriate caregiver for a child unless evidence to the contrary is presented." Is there statutory authority for this statement? **RESPONSE:** That statement reflects a policy of DCFS in administering § 9-28-101 et seq. Given that the statement reflects DCFS's policy in administering § 9-28-101 et seq. and it is "of general applicability and future effect that implements" DCFS policy, § 9-28-103(b), which grants DCFS rulemaking authority to administer § 9-28-101 et seq., constitutes the statutory authority for the statement.

QUESTION #2: Other than the general grant of rulemaking authority in Ark. Code Ann. § 9-28-103(b), is DCFS aware of any statutory authority allowing it to promulgate rules implementing the Arkansas Juvenile Code? **RESPONSE:** DCFS believes that § 9-28-103(b) provides the statutory authority for this rule.

The proposed effective date is January 1, 2020.

FINANCIAL IMPACT: According to the agency, these rules will not have a financial impact.

LEGAL AUTHORIZATION: The proposed rules implement Acts 317, 541, 558, and 984 of 2019. Act 317, sponsored by Senator Alan Clark, amends the law concerning the resumption of services for certain parents. Act 541, sponsored by Representative LeAnne Burch, amends the law concerning trial home placements. Act 558, sponsored by Senator Clark, amends the requirements for unsupervised visitation. Act 984, also

sponsored by Senator Clark, amends the law regarding permanency goals that are authorized by a court at a permanency planning hearing.

The Division of Children and Family Services has general authority and responsibility to "[e]nsure child placements support the goal of permanency for children when the division is responsible for the placement and care of a child" and must "[e]nsure the health, safety, and well-being of children" for whom it is responsible. *See* Ark. Code Ann. § 9-28-103(a)(6)-(7). It may promulgate rules as needed for it to carry out these duties. *See* Ark. Code Ann. § 9-28-103(b). In addition, the Division has the responsibility to administer the provisions of Ark. Code Ann. §§ 9-28-101 to -120. *See* Ark. Code Ann. § 9-28-103. Act 541 amends Ark. Code Ann. § 9-28-108, which is part of this subchapter.

b. <u>SUBJECT</u>: Referrals of Infants Born With and Affected by Fetal Alcohol Spectrum Disorder or Prenatal Drug Exposure

<u>DESCRIPTION</u>:

Statement of Necessity
These rules are being proposed to comply with Acts 2019, No. 598 and make other necessary revisions regarding staff roles and response to referrals of infants born with and affected by a Fetal Alcohol Spectrum Disorder or prenatal drug exposure.

Summary
Effective January 1, 2020, the Division of Children and Family Services Policy & Procedure Manual is being revised as follows:

- To create a new DCFS policy, Policy II-F: Substance Exposed Infant Referrals and Assessments, outlining requirements related to acceptance of and response to substance exposed infants as per Acts 2019, No. 598;
- To amend Policy II-C: Child Abuse Hotline for Child Maltreatment Reports and related Procedure II-C6: Referrals on Children Born with Fetal Alcohol Spectrum Disorder (FASD) by striking information pertaining to referrals of and response to infants born with and affected by FASD from Policy II-C and Procedure II-C6, as this information is now included in new Policy II-F: Substance Exposed Infant Referrals and Assessments, and for technical corrections;
- To revise Policy II-J: Early Intervention Referrals and Services and related procedures to update section regarding possible referral to early intervention services for infants born with and affected by a Fetal Alcohol Spectrum Disorder, maternal substance abuse resulting in prenatal drug exposure to an illegal or legal substance, or withdrawal symptoms

resulting from prenatal drug exposure to an illegal or legal substance as per Acts 2019, No. 598, and to note staff responsible for such referrals;

- To make technical revisions to update numbering of Section II: Referrals to Assess Family Strengths and Needs of the DCFS Policy & Procedure Manual as applicable based on insertion of new Policy II-F: Substance Exposed Infant Referrals and Assessments into Section II;
- To revise the Division's existing plan of safe care form so that it may apply to all types of prenatal substance exposure referrals per Acts 2019, No. 598 and more clearly outline considerations for a plan of safe care:
  - CFS-101: Prenatal Substance Exposure Plan of Safe Care

PUBLIC COMMENT: A public hearing was held on this rule on October 16, 2019. The public comment period expired on November 3, 2019. The agency provided the following summary of the comments it received and its responses thereto:

COMMENTER'S NAME: Arkansas Chapter of the American Academy of Pediatrics
Comment: Thanks for the opportunity to provide feedback on the rules for Act 598 of 2019. We appreciated your presentation to the Arkansas Chapter of the American Academy of Pediatrics membership through the monthly webinar a few weeks ago; it helped clarify the ins and outs of related federal and state laws, proposed rules, and impact on pediatricians.

In general, the ARAAP is supportive of the rules that have been outlined for identifying infants affected by legal substances as they are inclusive of methods recommended by the national AAP. We appreciate the array of services that can be offered to caregivers, including substance use disorder treatment, as part of the plan of safe care for children without requiring a child maltreatment investigation.
We do encourage DCFS to continue to reach out to providers and facilities across the state to share additional/final information about this new law (as well as the important context you provided on differences between Garrett's Law and the other pieces of CARA/CAPTA) and the full array of assessments and services that are available to families who are impacted. We recommend continued sharing via the AAP as well as the Family Practice association, Community Health Centers, the AR Hospital Association, AFMC, medical education institutions, home visiting professionals, and others.

Agency Response: The Division of Children and Family Services (DCFS) appreciates both the opportunity it had to present to the Arkansas Chapter of the American Academy of Pediatrics (ARAAP) regarding this rule as well as the ARAAP's subsequent comments above. DCFS will continue to reach out to providers across the state to share information

about the rule, the associated law, and related services available to families who are affected. DCFS outreach to this effect will include the ARAAP, the Arkansas Family Practice Association, the Arkansas Foundation for Medical Care, the Arkansas Home Visiting Network, and the Arkansas Hospital Association, among others.

COMMENTER'S NAME: Dr. Karen Farst, Arkansas Children's Hospital
Comment #1: Hey, Christin, it's Karen Farst. I think that we have had questions, but just from a granular standpoint as far as how the "affected by" term is going to be interpreted, so is it correct that that has to be tied to some kind of physical effect in the baby?

Agency Response: Correct. And so, right now how we define "affected by" in the rule, bear with me, either:

"1) An infant exhibits a condition or conditions associated with the mother's use of alcohol during pregnancy or a healthcare provider has an articulated concern that the infant suffers from a fetal alcohol spectrum disorder;

"2) An adverse effect or effects in physical appearance or functioning that are either diagnosed or otherwise observed and are a result of the mother's use of a legal or illegal substance during pregnancy;

or

3) An infant exhibits withdrawal symptoms in physical appearance or functioning as a result of the mother's use of a legal or illegal substance during pregnancy." And we can define in this rule that "Infant" means any child thirty days or less. So that's our current definition in the proposed rule of "affected by".

Comment #2: Thanks. And these are going to be called to the hotline and then sent to DR, is that correct?

Agency Response: Correct. So healthcare providers involved in the delivery or care of infants will be the only people who would call. The legal side of this is -- what's interesting about this is that it kind of creates an umbrella for your prenatal substance exposed -- prenatally substance exposed infants. So this does include what we've historically referred to as Garrett's Law. Now, nothing is changing in terms of how we respond to or handle Garrett's Law, but what this particular rule is opening up is that the FASD involves the legal substances. And for those, healthcare providers only can call those in and are sent to the child welfare agency, but yes, it is

your differential response staff who are calling those in -- or excuse me, responding to those going out and developing a plan of safe care.

Comment #3: And so the healthcare provider called and said, "I have got a concern about this Mom, I think she uses drugs, but I can't link it to a healthcare affecting the baby." Wouldn't you think the hotline operator would try to, you know, figure out if it fit something else, like failure to protect or threat of harm, or would they just say, "I'm sorry, that doesn't meet this definition, so we will just -- we won't accept it"?

Agency Response: I mean, I think, you know, oftentimes, the hotline operators will try to ask some follow-up questions. I don't know -- I can't say that they will try and ask questions to try to get it to fit some other allegations. And that's certainly more followup than we would do with Gary Glisson at the hotline, kind of figure those pieces out.

Comment #4: Thank you. And Christin, when you guys have something like this that's here, I just don't know how this all came out. What type of, like, public awareness is there that there's a new mandated law for healthcare providers to report this -- -- is this through the Hospital Association or is everybody just kind of expected to keep on -- keep up with it?

Response: So I can't actually speak to how Garrett's Law, how that was messaged when that came out. That was before my time. So they -- it's probably going to be caught between this rock and a hard place, because the law, of course, has been in effect since July 24th, but it takes a little bit longer for the rules to catch up, so we have not done just a whole lot of messaging at this point, because the rule itself hasn't been finalized and we knew there was still room for us to adjust this definition of "affected by". But I think once we get to that point, then, you know, I don't know if we are going to do a lot of road shows or anything like that, but certainly include the Hospital Association, AAP, for example, just to make them aware. But I think really at this point, it's going to be a fairly -- fairly limited in terms of that.

COMMENTER'S NAME: Anna Strong, Executive Director of the Arkansas Chapter of the American Academy of Pediatrics
Comment: This is Anna. And I also just mentioned that Family Practice Association is another really important part of reaching folks across the state, because pediatricians only care for about half of a kid's life, that's all.

Agency Response: Thank you.

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following answers:

QUESTION #1: Where does the definition of "affected by" in Policy II-F come from? **RESPONSE:** As allowed under federal Program Instruction ACYF-CB-PI-17-02, states have flexibility to define the phrase, "infants born and identified as being affected by substance abuse or withdrawal symptoms resulting from prenatal drug exposure." As such, the Division of Children and Family Services reviewed other state child welfare agency policies regarding "infants born and identified as being affected by substance abuse or withdrawal symptoms resulting from prenatal drug exposure" and then took some of those examples to draft a definition of "affected by" for Arkansas with input from the DHS Office of Chief Counsel, the Arkansas State Police, and pediatricians specializing in child abuse cases.

QUESTION #2: Is there specific statutory authority for the 5-calendar-day timeframe for face-to-face contact? **RESPONSE:** DCFS believes that [Ark. Code Ann.] § 12-18-105 provides the statutory authority for this rule.

QUESTION #3: What happens when a Child Abuse Hotline worker refers a prenatal substance exposure referral to DCFS? Does the referral go directly to the Differential Response Team Supervisor or is there an interim step? **RESPONSE:** There is an interim step. The hotline operator assigns to a centralized inbox in the CHRIS system that is managed by Central Office staff in Little Rock who then assign it out to the appropriate DR Supervisor in the field.

QUESTION #4: What, if anything, are the steps in Procedure II-F3 based on? Are they adapted from other DCFS procedures? **RESPONSE:** Yes, these are adapted from DCFS procedures regarding due diligence related to child maltreatment investigation and Differential Response initiations. Since prenatal substance exposure referrals and assessments do not qualify as maltreatment under the Child Maltreatment Act definitions, the agency decided to limit the number of due diligence activities within this policy since the agency does not have the same level of jurisdiction with these referrals as with investigative and DR referrals.

The proposed effective date is January 1, 2020.

FINANCIAL IMPACT: Per the agency, this rule will not have a financial impact.

LEGAL AUTHORIZATION: To receive federal child abuse prevention funding, states must require provider referrals of substance-affected

infants and must develop safe care plans for those infants. 42 U.S.C. § 5106a(b)(2)(B)(ii)-(iii). The Department of Human Services has the authority to promulgate rules as necessary to comply with federal law and receive federal funding for "programs administered by and funded through the department or its various divisions[.]" Ark. Code Ann. § 25-10-129(b).

Act 598 of 2019, sponsored by Representative Sonia Eubanks Barker, amended the Arkansas Child Maltreatment Act concerning referrals on children born with and affected by Fetal Alcohol Spectrum Disorder (FASD) or prenatal drug exposure. The Department has authority to "promulgate rules to implement" the Child Maltreatment Act. *See* Ark. Code Ann. § 12-18-105. Act 598, as codified at Ark. Code Ann. 12-18-310(c), specifically requires the Department to develop plans of safe care for infants born with and affected by FASD or prenatal drug exposure. The Division of Children and Family Services has the responsibility to "[i]nvestigate reports of child maltreatment" and to "[p]rovide services, when appropriate, designed to allow a maltreated child to safely remain in his or her home[,]" and it may promulgate rules as necessary to perform this duty. *See* Ark. Code Ann. § 9-28-103.

c. <u>SUBJECT</u>: Subsidized Guardianship

<u>DESCRIPTION</u>:

Statement of Necessity
This promulgation is necessary to comply with Acts 2019, No. 968, which provided that, in determining eligibility for a guardianship subsidy, the necessary degree of relationship is satisfied by a relative or fictive kin. In addition, this revision is necessary to make other updates regarding staff roles and administration of the Subsidized Guardianship Program.

Summary
Effective January 1, 2020, the Division of Children and Family Services Policy & Procedure Manual is being revised as follows:

- To update policy to reflect the expansion of the definition of relative to include fictive kin for the purposes of determining eligibility for a guardianship subsidy as per Acts 2019, No. 968;
- To include the requirement to name a resident agent to accept service as per Ark. Code Ann. § 28-65-203 in the event the guardian resides out of state;
- To clarify that any subsidy agreement and associated payments extended past the age of 18 due to a mental or physical handicap will take effect on the date the new subsidy agreement reflecting the extension is signed;

- To clarify staff roles in documenting information regarding subsidized guardianship cases and filing of annual report;
- To revise subsidized guardianship forms to reflect that fictive kin are eligible for subsidized guardianships and for other clarification and formatting purposes.
  - CFS-435-A: Subsidized Guardianship Program Application and Checklist
  - CFS-435-B: Notification of Subsidized Guardianship Program Denial
  - CFS-435-C: Subsidized Guardianship Special Subsidy Request
  - CFS-435-D: Recommendations for Finalization of Guardianship
  - CFS-435-F: Subsidized Guardianship Agreement
  - CFS-435-G: Annual Progress Report and Subsidized Guardianship Agreement Review
  - CFS-435-H: Notification of Modification or Termination of Subsidized Guardianship Agreement

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired on November 3, 2019. The agency indicated that it received no public comments.

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses:

QUESTION #1: Is the resident agent required to accept service of any lawsuit, pleading, or legal notice, or only those related to the guardianship (as required by Ark. Code Ann. § 28-65-203(f))? **RESPONSE:** We revised the language of the rule to reflect the statutory language.

QUESTION #2: Is there statutory authority for the subsidy onset date provision on page 3 of Policy VIII-L? **RESPONSE:** DHS has statutory authority for this provision under A.C.A. §§ 9-8-203 and 9-8-206.

QUESTION #3: If Procedure VIII-L1 is implemented when guardianship is the goal, why does section (D)(1) suggest that a case history memorandum indicate the reason a guardianship has been ruled out? **RESPONSE:** We've removed the questioned language.

The proposed effective date is January 1, 2020.

FINANCIAL IMPACT: Per the agency, these rules will have no financial impact.

LEGAL AUTHORIZATION: The Department of Human Services has general authority to promulgate rules to implement the Arkansas Subsidized Guardianship Program. *See* Ark. Code Ann. § 9-8-203.

Additionally, the Division of Children and Family Services has the responsibility to "[e]nsure child placements support the goal of permanency for children" for whom the Division is responsible, and it "may promulgate rules necessary" to accomplish this duty. *See* Ark. Code Ann. § 9-28-103(a)(6), (b).

Act 968 of 2019, sponsored by Representative LeAnne Burch, amended the Arkansas Subsidized Guardianship Act concerning guardianship subsidies authorized by the Department. Some of the proposed rules implement Act 968. The proposed revisions also implement an existing state law requirement that, in order to be qualified as a guardian in Arkansas, an out-of-state resident must appoint "a resident agent to accept service of process in any action or suit with respect to the guardianship." *See* Ark. Code Ann. § 28-65-203(f)(1).

d. <u>SUBJECT</u>: Ensuring Child Safety and Confidentiality

<u>DESCRIPTION</u>: Effective January 1, 2020, the Division of Children and Family Services Policy & Procedures Manual is being revised as follows:

- Policy I: Confidentiality
  - To add a child welfare ombudsman to the list of individuals and entities who may have access to protective services records per Acts 2019, No. 945;
  - To reflect existing normal age appropriate standards and practice as related to children in foster care;
  - To better align policy with applicable law (Ark. Code Ann. § 9-28-407);
  - To make technical corrections related to organization and format.
- Procedure II-C1: Child Abuse Hotline Acceptance and Assignment of Maltreatment Reports
  - To create procedure regarding secondary reviews of child maltreatment reports per Acts 2019, No. 802.
- Procedure II-C3: County Office Secondary Review Requests from DCFS Central Office and Requests for Clearance of Other Reports from Child Abuse Hotline
  - To create procedure regarding secondary reviews of child maltreatment reports per Acts 2019, No. 802.
- Procedure II-K: Information Disclosure on Pending Investigations and True Findings Pending Due Process
  - To rescind due to information already being provided in other DCFS policy.
- Policy II-D: Investigation of Child Maltreatment Reports and related procedures
  - To clarify conditions under which a priority 1 maltreatment report may be initiated within seventy-two (72) hours and clarify when

assessments may be needed on children of an alleged offender not named in the report per Acts 2019, No. 881;

- To create policy and procedures for administrative closures pursuant to Acts 2019, No. 802;
- To update policy and procedure to reflect that a determination of risk to vulnerable populations will be completed prior to placement of a name in the Child Maltreatment Central Registry, Acts 2019, No. 802.
- To clarify the Department will assume custody of every child who is taken into custody and will assess the health and safety of each child to determine if custody is no longer required per Acts 2019, No. 531;
- To update staff responsibilities to reflect current practice regarding accessing interpreter services;
- To make technical revisions related to organization and format.

- Procedure IX-A6: Preliminary Administrative Hearings
  - To update procedure to mirror language in Acts 2019, No. 802, regarding vulnerable populations at risk of maltreatment (versus harm).
- Policy XIII-A and related procedures: Child Maltreatment Central Registry
  - To update policy and procedure to reflect that a determination of risk to vulnerable populations will be completed prior to placement of a name in the Child Maltreatment Central Registry per Acts 2019, No. 802, and risk of maltreatment to vulnerable populations as a consideration for name removal of adults from the Central Registry;
  - To update Departmental staff roles involved with the Child Maltreatment Central Registry Review Team;
  - To strike obsolete references and information already provided for in other DCFS policy and procedure in an effort to streamline guidance to staff;
  - To make technical formatting revisions.
- Procedure XIV-A7: Notices that Offender's Name will be Placed in the Child Maltreatment Central Registry
  - To make technical correction only.
- Appendix I: Glossary
  - To amend the definition of mandated reporter per Acts 2019, No. 531.
- CFS-223-T5: Child Maltreatment True But Exempted Investigative Determination Notice to Alleged Juvenile Offender 14-17 Years of Age
  - To create form for child maltreatment allegations determined to be true but exempted for alleged juvenile offenders based on a determination that the offender does not pose a risk to a vulnerable population per Acts 2019, No. 802.
- CFS-224-T5: Child Maltreatment True But Exempted Investigative Determination Notice to Legal Parent(s)/Guardian(s) or Alleged Juvenile Offender 14-17 Years of Age
  - To create form for child maltreatment allegations determined to be true but exempted for alleged juvenile offenders based on a determination

that the offender does not pose a risk to a vulnerable population per Acts 2019, No. 802.

- CFS-232-T2: Child Maltreatment True Investigative Determination Notice to Alleged Adult Offender
  - To add the checkbox option for "True but Exempted" based on a determination that the offender does not pose a risk to a vulnerable population per Acts 2019, No. 802.
- CFS-316: Request for Child Maltreatment Central Registry Check
  - To make technical corrections.
- CFS-328C: Child Maltreatment Central Registry Review Team Decision Letter to Requestor
  - To add clarifying statement about the role of the Child Maltreatment Central Registry Review Team.

PUBLIC COMMENT: The agency did not hold a public hearing on this rule. The public comment period expired November 11, 2019. The agency indicated that it received no public comments.

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following answers:

QUESTION #1: Is there statutory authority for the new "age-appropriate publications" exception in Policy I-E? If not, where did that exception come from? **RESPONSE:** DCFS believes that § 9-28-103(b) provides the statutory authority for this rule.

QUESTION #2: The changes to Policy II-D's "Investigation Components" section (on page 4 of the markup) appear to make investigative interviews with a victim's siblings or other children under the alleged offender's care mandatory. Is there statutory authority for this? **RESPONSE:** DCFS believes that § 12-18-105 provides the statutory authority for this rule. In addition, § 12-18-606 provides, "If the alleged offender is a family member, fictive kin, or lives in the home with the alleged victim, an investigation under this chapter shall seek to ascertain…the names and conditions of other children in the home."

QUESTION #3: Ark. Code Ann. § 12-18-1001 includes designated DHS employees in the list of people who may take a child into protective custody. Why does revised Procedure II-D11 omit this? **RESPONSE:** The procedure begins with the clause "The FSW Investigator will" and the instructions that follow are how the FSW will take protective custody. The roles outlined in item B of this procedure were meant to make our staff aware of anyone outside the Department who may take a hold because the assumption is that staff reading the procedure are designated DHS employees. That said, I can see how it would be confusing so I am fine with adding "a designated employee of the Department of Human

Services" to item B as well. I think it would also behoove as to revise the initial opening clause to read, "The FSW Investigator or On-Call Worker will:"

QUESTION #4: Is there statutory authority behind the malicious reporting criteria in (E)(3)(a) of Procedure II-D14's Administrative Closures section? **RESPONSE:** DCFS believes that § 12-18-105 provides the statutory authority for this rule.

QUESTION #5: What is the "risk assessment tool rating" listed as a factor in Procedure II-D14's "Exempted No Risk Determinations" section? **RESPONSE:** This is currently a mechanism within the Division's Statewide Automated Child Welfare Information System (SACWIS, known as the Children's Reporting Information System (CHRIS) in Arkansas). Depending on the information completed in the earlier sections of the CHRIS Health and Safety Assessment Screens, the risk assessment rating is generated from that.

QUESTION #6: Ark. Code Ann. § 12-18-705(c)(7) requires notice of a true determination to include the name of the person making the notification, their title/position, and their current contact information. Is that what is intended to go in the "From" section on Forms CFS-223-T5 and CFS-224-T5? **RESPONSE:** Yes.

QUESTION #7: The proposed forms impose a $10 charge for copies of child maltreatment records. Form CFS-316 indicates that this fee may be waived for 501(c)(3) nonprofits. However, Ark. Code Ann. § 12-18-909(b)(2)(B) provides that nonprofits and indigent persons shall not be charged for child maltreatment records. Does the exception on Form CFS-316 apply to the other proposed forms as well, and does DCFS policy reflect the exception for indigent persons? **RESPONSE:** DCFS policy does reflect the exception for indigent persons. See current DCFS Procedure XIII-A5 (but will become DCFS Procedure XIII-A2 due to other changes in this section). Happy to add this term/additional exception to the CFS-316 as well.

The proposed effective date is January 1, 2020.

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

LEGAL AUTHORIZATION: These revisions implement Act 531 of 2019, sponsored by Representative Charlene Fite, which concerned mandated reporters, protective custody, and investigative determinations; Act 802 of 2019, sponsored by Senator Alan Clark, which repealed portions of the Child Maltreatment Act and amended the law concerning

child maltreatment investigations and placement of a name on the Child Maltreatment Central Registry; Act 881 of 2019, sponsored by Senator Clark, which amended the law concerning child maltreatment investigation timeframes and clarified the requirements for a child maltreatment investigation; and Act 945 of 2019, also sponsored by Senator Clark, which created the Child Welfare Ombudsman division within the Arkansas Child Abuse/Rape/Domestic Violence Commission.

The Division of Children and Family Services has the responsibility to "[i]nvestigate reports of child maltreatment[,]" and it has the authority to promulgate rules necessary to administer this duty. *See* Ark. Code Ann. § 9-28-103(a)(3), (b). The Department of Human Services has authority to promulgate rules implementing the Arkansas Child Maltreatment Act. *See* Ark. Code Ann. § 12-18-105. The Child Maltreatment Act requires the Department to notify alleged offenders of child maltreatment investigations and to provide notice if a report is found to be true. Ark. Code Ann. § 12-18-703. It also specifically authorizes the Department to create procedures governing certain areas. These include establishing a secondary review process for the Child Abuse Hotline; investigating reports accepted by the Hotline; administrative closure of maltreatment reports; and assessing an offender's risk level to determine whether the offender poses a risk of maltreatment to any vulnerable population. *See* Ark. Code Ann. §§ 12-18-303(e)(2)(A), -(303)(B)(i), -(601)(a)(1), -(601)(b)(2), -702(c).

10. DEPARTMENT OF HUMAN SERVICES, DIVISION OF MEDICAL SERVICES (DMS) (Ms. Janet Mann)

a. SUBJECT: Hospital 3-19 Spinal Muscular Atrophy Newborn Screening

DESCRIPTION:

Statement of Necessity
Act 2019, No. 58 amended Ark. Code Ann. § 20-15-302 to add spinal muscular atrophy to the list of metabolic diseases for which all newborn infants in the state must be tested. In addition, Act 58 created a new subchapter in the Arkansas Code that requires health benefit plans, including Arkansas Medicaid, to provide coverage for newborn screening for spinal muscular atrophy. The revision in this promulgation of the Medicaid hospital provider manual, section 272.450, procedure code S3620, provides that Arkansas Medicaid will cover the metabolic diseases listed in Ark. Code Ann. § 20-15-302 in the Newborn Metabolic Screening panel. This promulgation implements Act 58.

Summary
Effective January 1, 2020, section 272.450, procedure code S3620, of the Medicaid hospital provider manual will be updated to remove current language that states "all newborn infants shall be tested for phenylketonuria, hypothyroidism, galactosemia, cystic fibrosis, and sickle-cell anemia" as required by Ark. Code Ann. § 20-15-302 and replace these references to specific diseases with a statement providing that all newborns will be tested for "certain metabolic diseases" as required by Ark. Code Ann. § 20-15-302.

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired on November 4, 2019. The agency received no comments on the proposed rule.

The proposed effective date is January 1, 2020.

FINANCIAL IMPACT: The agency stated that the amended rule has a financial impact.

The agency estimates that the additional cost to implement the rule is $112,535 for the current fiscal year ($32,421 in general revenue and $80,114 in federal funds) and $225,070 for the next fiscal year ($63,987 in general revenue and $161,083 in federal funds).

The total estimated cost by fiscal year to state, county, and municipal government to implement the rule is $32,421 for the current fiscal year and $63,987 for the next fiscal year.

The agency stated that there is a new or increased cost or obligation of at least $100,000 to a private individual, private business, state government, county government, municipal government, or two or more of those entities combined. Accordingly, the agency provided the following written findings:
(1) a statement of the rule's basis and purpose
To comply with Act 58 of the 92nd General Assembly, which requires newborn screenings to include screenings for Spinal Muscular Atrophy.

(2) the problem the agency seeks to address with this proposed rule, including a statement of whether a rule is required by statute
To catch this genetic mutation early. Rule required by statute.

(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 provided by these screenings helps the state with medical costs in the long run.

(4) a list of less 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
There are no alternatives to the screening 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 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
Newborn screening did not include this test prior to Act 58.

(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 costs.

LEGAL AUTHORIZATION: The proposed revisions are made in light of Act 58 of 2019, sponsored by Representative Julie Mayberry, which required newborn screening for spinal muscular atrophy and mandated that insurance policies cover newborn screening for spinal muscular atrophy. The Act, as codified at Ark. Code Ann. § 23-79-1801(1)(A)(ii), requires all health benefit plans offered, issued, or renewed in the state, including Arkansas Medicaid, to provide spinal muscular atrophy screening by January 1, 2020. The Department of Human Services has the authority to maintain the Arkansas Medicaid program. *See* Ark. Code Ann. § 20-77-107.

11. DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH SERVICES (DYS) (Ms. Kara Benca)

a. SUBJECT: Division of Youth Services Operations Manual

DESCRIPTION:

Statement of Necessity
Acts 2019, Nos. 365, 1029, 1057, and 1089 require the Division of Youth Services (DYS) to update the existing DYS Operations Manual by establishing procedures for releasing information on a youth that has left a DYS facility without authorization, creating an anti-bullying policy, prohibiting state agencies from consenting to or approving the termination of pregnancy for an individual in the custody or guardianship of the state, and implementing a dyslexia screening and a reading assessment.

Summary
Effective January 1, 2020, the DYS Operations Manual will have the following additions:

- To implement Acts 2019, No. 365, the Facility Operations Section will be updated to add Section 7231, Absent Without Leave (AWOL) Youths, a section that clarifies when and what information DYS must release on a youth that has left a DYS facility without authorization. In addition, this section provides procedures that must be followed, including notification procedures, in the event that a youth is AWOL.
- To implement Acts 2019, No. 1029, the Facility Operations Section will be updated to add Section 7270, Anti-Bullying, an anti-bullying policy that requires DYS to institute notice procedures, reporting requirements, and investigation procedures when an incident of bullying is discovered.
- To implement Acts 2019, No. 1057, the Facility Services Section will be updated to include Section 7311, Termination of Pregnancy, a policy that prohibits DYS from consenting to or approving the termination of pregnancy for a youth in custody except to save the life of the youth or as required by federal law. In addition, this section provides that the pregnant youth, her family, or a third party are responsible for costs related to the termination of the pregnancy except as required by federal law.
- To implement Acts 2019, No. 1089, the Juvenile Services Section will be updated to include Section 7406, Dyslexia Screening and Reading Intervention Services, a policy that requires DYS to implement dyslexia screening and a reading assessment to newly committed youths as well as youth currently committed to a DYS facility. In addition, this section requires DYS to provide interventions and remedial services.

PUBLIC COMMENT: The agency did not hold a public hearing on this rule. The public comment period expired on November 10, 2019. The agency indicated that it received no public comments on this rule.

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following answers:

QUESTION #1: Does the proposed definition of "cyberbullying" in § 7270.1(2)(A), like Ark. Code Ann. § 6-18-514, include communication by means of a landline telephone? **RESPONSE:** [DHS revised § 7270.1(2)(A) to, per the agency, more closely match Ark. Code Ann. § 6-18-514, and thus cover all types of telephones.]

QUESTION #2: The statutory definition of "harassment" applies to any constitutionally or statutorily protected status, *see* Ark. Code Ann. § 6-18-514(b)(4), while the proposed definition in § 7270.1(3) only includes any statutorily protected status. Is there a reason for this difference? **RESPONSE:** [DHS revised § 7270.1(3) to include both "constitutionally" and "statutorily" protected status in definition.]

QUESTION #3: Section 7270.2(e) requires an investigation within five days. Is this five school days, per Ark. Code Ann. § 6-18-514(d)(2)(B)(i), or does it include weekends and holidays? **RESPONSE:** Ark. Code Ann. § 6-18-514(d)(2)(B)(i) requires an investigation as soon as possible but not later than five school days if the alleged incident occurs during school hours per the preceding Ark. Code Ann. § 6-18-514(d). DHS in its rulemaking discretion has chosen to require the investigation within five days, including weekends and holidays, which ensures that the investigation would begin within five school days.

QUESTION #4: What is the statutory authority for the "imminent risk" provision in § 7270.2(i)? **RESPONSE:** The term is not part of the Anti-bullying act, Act 1029 of 2019, but is used in other sections of the Arkansas Code. "Imminent risk" has statutory precedence in the criminal code in Title 5, Subtitle 3 involving offenses to families, dependents, etc…. The definitions of Ark. Code Ann. § 5-28-101 includes (4) "Endangered person," and as to certain persons includes "to be in a situation or condition that poses an imminent risk of death or serious bodily harm." Oddly, (6) of the same section "states 'Imminent danger to health or safety' means a situation in which death or severe bodily injury could reasonably be expected to occur without intervention." It is not clear why the legislature chose to define imminent danger as opposed to imminent risk. Likewise, Ark. Code Ann. §§ 9-20-103 Domestic Relations, Adult Maltreatment, and 12-12-1703 utilize the same terminology and definitions with "imminent risk" found within those definitions as applicable.

QUESTION #5: Is there statutory authority for the employee discipline provision in § 7270.2(m)? **RESPONSE:** There is no direct statutory language, but DHS in its discretionary rulemaking authority believes this

is a best practice to ensure compliance with Act 1090 of 2019 (see Ark. Code Ann. §§ 6-13-629, 6-17-711, and 6-18-514), and is consistent with other DHS employee discipline rules and policies. The legislative finding behind Act 1090 is to "strengthen standards and procedures for prevention, reporting, investigation of and the response to incidents of bullying" as Arkansas ranks number one in the nation for the percentage of teenagers bullied, which accounts for rising suicide rates. As such, enforcement of the reporting standards among the reporting staff is essential to achieving the legislative mandate.

QUESTION #6: Where do the procedures listed in § 7231.2 come from? Are they adapted from other agency procedures? **RESPONSE:** AWOL youth is terminology used in agency procedures and recognized in law. In particular, to comply with Act 365 of 2019 (ACA 9-28-215), the rule defines AWOL youths to locate the absent youth while balance public safety against privacy concerns.

QUESTION #7: Why has DYS chosen to require Level II dyslexia screening after a juvenile fails an initial screening? **RESPONSE:** It is the policy and procedure of DHS to conduct an initial dyslexia screening during intake of a youth. For those that fail the initial intake screening, DHS made the internal decision to utilize the Level II dyslexia assessment method for further testing the youth.

QUESTION #8: Is the level of proficiency referred to in § 7406.2(a)(2) the same as that mentioned in § 7406.2(a)(1)? **RESPONSE:** Yes.

The proposed effective date is January 1, 2020.

FINANCIAL IMPACT: The agency indicated that these rules have a financial impact. It estimates the total cost to state, county, and municipal government to implement these rules at $450 for the current fiscal year and $450 for the next fiscal year. The agency stated that this is the estimated cost to print posters and place them in facilities as specified in the policy. Per the agency, there is no anticipated cost to any private individual, entity, or business subject to the proposed rules.

LEGAL AUTHORIZATION: These amendments implement Acts 365, 1029, 1057, and 1089 of 2019.

Act 365, sponsored by Representative Charlene Fite, clarifies when the Division of Youth Services (DYS) may release information about a juvenile who is in DYS custody to the general public. Ark. Code Ann. § 9-28-215(b)(3), as amended by the Act, gives DYS the authority to promulgate rules "detailing the factors to be considered in determining when identifying and descriptive information may be released" about an

AWOL juvenile. DYS also has general authority to promulgate rules necessary for the administration of its duties under that subchapter of the Arkansas Code, including its responsibility to exercise "exclusive care, physical custody, and control" over juveniles committed to DYS youth services centers. *See* Ark. Code Ann. §§ 9-28-203(d)(1), -207(a).

Act 1029, sponsored by Representative Jimmy Gazaway, amends the state anti-bullying policy investigation and reporting requirements for public education facilities. In its residential facilities, DYS must provide education that conforms to Department of Education guidelines. *See* Ark. Code Ann. §§ 9-28-203(a)(10), -205(c)(1)(A). It may promulgate rules necessary to accomplish this duty. *See* Ark. Code Ann. §§ 9-28-203(d)(1), -205(e).

Act 1057, sponsored by Representative Jim Dotson, prohibits state agencies from consenting to or approving termination of a pregnancy for a woman in state custody and from authorizing expenditure of state funds to pay for a pregnancy termination. State agencies, including DYS and the Department of Human Services, have authority to promulgate rules as needed to comply with the Act. *See* Act 1057, § 1(e)(1) (2019).

Act 1089, sponsored by Senator Joyce Elliott, requires DYS to provide certain services related to dyslexia, including initial screening, dyslexia intervention, and remedial reading instruction, to youth in DYS custody. The Act, as codified at Ark. Code Ann. § 9-31-503, gives DYS the authority to promulgate rules implementing its requirements.

12. <u>DEPARTMENT OF LABOR AND LICENSING, DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING BOARDS AND COMMISSIONS, APPRAISER LICENSING AND CERTIFICATION BOARD</u> (Ms. Diana Piechocki)

a. <u>SUBJECT</u>: Reduction in Requirements and Clean-Up 19-0003

<u>DESCRIPTION</u>: The proposed revisions to the Department of Labor and Licensing, Appraiser Licensing and Certification Board Rules move the General Examination and Experience Criteria to Section III. Currently, they are not all contained in the same section and are difficult to locate. The primary revision made reduces the requirements to become a Licensed or Certified Appraiser.

Pages 21 through 23 detail the General Examination and Experience criteria required. Pages 23 through 27 itemize the General, Examination, Qualifying Education, and Experience required for a State Licensed Appraiser credential. These revisions remove the requirement for college-

level education, reduce the number of experience hours required from 2,000 hours in no fewer than twelve months to 1,000 hours in no fewer than six months.

Pages 27 through 33 explain the General, Examination, Qualifying Education, and Experience required for a Certified Residential Appraiser credential. These revisions include six different options to fulfill the previous requirement of a Bachelor's degree or higher. Also, there is a reduction in the number of experience hours required from 2,500 hours in no fewer than twenty-four months to 1,500 in no fewer than twelve months.

Pages 33 through 39 clean up some of the language to obtain a Certified General Appraiser Credential as well as reduce the minimum time limit for the experience hours required. The number of hours remains the same. However, they may now be obtained in no fewer than 18 months rather than 30 months.

These changes will meet the minimum appraiser qualification criteria as promulgated by the Appraiser Qualifications Board of the Appraisal Foundation as required by Ark. Code Ann. § 17-14-203(6)(C).

For consistency, pages 39 through 41 revise the section to become a State Registered appraiser in the same format as licensed and certified appraisers.

PUBLIC COMMENT: A public hearing was held on October 16, 2019. The public comment period expired on October 21, 2019. The Board provided the following summary of public comments and its responses thereto:

Comment 1:
Name of Commenter: George Betts
Summary of the Comment: The commenter believes that a college degree should be a requirement to become a certified appraiser. He also comments that there should not be a reduction in the number of experience hours required.
Response to the Comment: The Board appreciates your comments and concerns. We discussed the college degree requirement and reduction in experience hours required when drafting the revisions to our Rules. In considering these changes, the Board voted to approve the proposed revisions to be equivalent to the minimum requirements as adopted by the Appraiser Qualifications Board of the Appraisal Foundation. We will pay close attention to any increase in complaints due to these proposed changes.

Comment 2*:*
Name of Commenter: Jonathan Cole
Summary of the Comment: The commenter agrees with eliminating the college education requirement for state licensed and certified residential appraisers. However, he disagrees with reducing the experience hours required.
Response to the Comment: The Board appreciates your comments and concerns. We discussed the reduction in experience hours required when drafting the revisions to our Rules. In considering these changes, the Board voted to approve the proposed revisions to be equivalent to the minimum requirements as adopted by the Appraiser Qualifications Board of the Appraisal Foundation. We will pay close attention to any increase in complaints due to these proposed changes.

Comment 3:
Name of Commenter: Amanda Anderson
Summary of the Comment: In favor of the proposed changes.
Response to the Comment: Thank you for your comments.

Comment 4:
Name of Commenter: Randy Moser
Summary of the Comment: In favor of the proposed changes.
Response to the Comment: Thank you for your comments.

Comment 5:
Name of Commenter: Angela Hartwig
Summary of the Comments: In favor of the proposed changes.
Response to the Comment: Thank you for your comments.

Comment 6:
Name of Commenter: Toby Rudolph
Summary of the Comments: In favor of the proposed changes.
Response to the Comment: Thank you for your comments.

The proposed effective date is December 30, 2019.

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

LEGAL AUTHORIZATION: The Arkansas Appraiser Licensing and Certification Board was created by Act 541 of 1991, codified as Ark. Code Ann. § 17-14-201 *et. seq.* The Board is authorized to "establish, maintain, report and periodically update meaningful qualification standards for state-licensed, registered apprentice, and state-certified appraisers practicing in the State of Arkansas, including testing, experience, and educational requirements. *See* Ark. Code Ann. § 17-14-202(a). The Board is granted

specific authority to "establish by rule the minimum examination, education, experience, and continuing education requirements for state-registered, state-licensed, registered apprentice, and state-certified appraisers." *See* Ark. Code Ann. § 17-14-203(6)(A). Standards used to establish criteria for each type of licensure are outlined in Ark. Code Ann. 17-14-203(6) and (11).

13. <u>DEPARTMENT OF PARKS, HERITAGE, AND TOURISM, DIVISION OF HERITAGE</u> (Mr. Jim Andrews, Mr. David Bell, item a; Mr. Scott Kaufman, item b)

a. <u>SUBJECT</u>: Guidelines for Museum Hours of Operation

<u>DESCRIPTION</u>: These guidelines set forth the minimum days/times that DAH's American Alliance of Museum accredited museums and their exhibits will be open to the public: Tuesday – Friday, 10am to 4:30pm and extended weekday and weekend hours at the discretion of the DAH Director. All sites may be closed on state holidays. DAH non-accredited museums and heritage sites will be open to the public during the hours designated by the DAH Director.

<u>PUBLIC COMMENT</u>: No public hearing was held in this matter. The public comment period expired on October 31, 2019. The Arkansas Department of Parks, Heritage, & Tourism, Division of Arkansas Heritage received no public comments.

Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following question and received the following response thereto:

QUESTION: The Division states that this is a new rule. Do you have any other existing rules? If so, where would this rule fit in that framework? **RESPONSE:** Yes, it is a new rule in that the Division of Arkansas Heritage (DAH) seeks to align the operating hours of its museums accredited by American Alliance of Museums (AAM) with AAM guidelines. These accredited museums are currently the Old Statehouse Museum and the Historic Arkansas Museum. A third DAH museum, the Mosaic Templars Cultural Center, is nearing AAM accreditation and would be subject to similar operating hours under AAM guidelines. As shown in the proposed rule, current AAM operating hour guidelines are for museums to be open to the public, at a minimum, Tuesday – Friday from 10:00 am to 4:30 pm with extended weekday and weekend hours set per the discretion of the DAH Director. Any non-accredited museums would have hours set by the DAH Director. Museum offices, in all cases, will be open during regular state government business hours.

In my review of all rules filed with the SOS office, there was a rule setting the hours for the Old Statehouse Museum effective June 30, 1980 (Rule 012.01.80-001), which set open hours for the public at Monday through Saturday 9:00 am until 5:00 pm and Sundays from 1:00 pm until 5:00 pm. I have found no other rules pertaining to public hours of any other museum at DAH. The new rule will ensure consistent and minimum open hours among the DAH museums.

The proposed effective date is January 1, 2020.

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

LEGAL AUTHORIZATION: Act 1001 of 1975 created the Department of Arkansas Heritage[2] to be responsive to the cultural needs of the people of the State and to encourage greater participation of the public in the cultural affairs of the State. *See* Ark. Code Ann. § 25-3-101(a). The legislative intent was that the act be liberally construed. *See* Ark. Code Ann. § 25-3-101(c). Pursuant to Act 902 of 2019, funds were appropriated to the Department for grants/aid and other heritage programs, payable from the Arkansas Department of Arkansas Heritage Fund Account and funded by the conservation tax levied by Amendment 75.

b. SUBJECT: Rules Governing the Arkansas Major Historic Rehabilitation Income Tax Credit Act

DESCRIPTION: This rule provides requirements for claiming an Arkansas income tax credit for rehabilitation of certain properties in Arkansas. The minimum level of qualified rehabilitation expense is 1.5 million dollars. A qualified applicant may seek an Arkansas income tax credit equal to 25% of the qualified rehabilitation expenses. Pursuant to Act 855 of 2019, the income tax credit may be claimed beginning July 1, 2020 through June 30, 2025.

PUBLIC COMMENT: No public hearing was held in this matter. The public comment period expired on October 31, 2019. The Arkansas Department of Parks, Heritage, & Tourism, Division of Arkansas Heritage received no public comments.

The proposed effective date is January 1, 2020.

[2] Act 910 of 2019, sponsored by Representative Andy Davis, changed the name of the Department to the Division of Arkansas Heritage and reorganized it under the cabinet-level Department of Parks, Heritage and Tourism, effective July 1, 2019.

FINANCIAL IMPACT: The agency stated that the proposed rule has a financial impact. Specifically, the cost to any private individual, entity or business that applies for the tax credit will likely vary. Applicants may be assessed a processing fee by the Division of Arkansas Heritage. Pursuant to Ark. Code Ann. § 26-51-2605(a)(2), the processing fee cannot exceed one percent (1%) of the amount of the income tax credit sought. Fee amounts are specified in Subpart XIII of the proposed rules.

LEGAL AUTHORIZATION: This proposed rule implements Act 855 of 2019, sponsored by Representative Andy Davis, which created the Arkansas Major Historic Rehabilitation Income Tax Credit. The Department of Arkansas Heritage, in accordance with the Act, shall promulgate rules that include criteria for prioritizing of rehabilitation applications. *See* Ark. Code Ann. § 26-51-2606(a), as amended by Act 855 of 2019. In addition, the Department may charge fees for processing tax credit applications and for requests to record transfers of interests in the tax credit to other holders. Fees shall not exceed the lesser of one percent (1%) of the amount of the tax credit applied for or seventy-five hundredths percent (0.75%) of the amount of tax credit transferred. Processing fees shall be considered cash funds by the Department and utilized for administration of the program. *See* Ark. Code Ann. § 26-51-2605, as amended by Act 855 of 2019.

14. ARKANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM (Ms. Laura Gilson, Mr. Duncan Baird)

a. SUBJECT: DROP Provisions

DESCRIPTION: The Arkansas Public Employees' Retirement System proposes changes to its DROP Provisions. An APERS member who is in the APERS Deferred Retirement Option Plan ("DROP") is required to separate from service after seven (7) years from entry in the DROP plan. This rule amendment is necessary to comply with Act 624 of 2019, which allows an exception to the "separation from service" requirement for a member who participates in the DROP, if the "separation from service" requirement would prevent that member from taking or holding office as a popularly elected official. That member will not forfeit their DROP balance if they separate from service as provided under § 24-4-520 *after* that member leaves elected office. The employer of the popularly elected official shall continue to make the same employer contributions to APERS on behalf of the popularly elected official as it would have been required to make for a rehired retiree.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on November 12, 2019. The System did not receive any comments.

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

Within the proposed changes, it appears that the term "regulations" and "regulation" have 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 APERS has retained the term "regulation" for the time being? **RESPONSE:** The APERS Board of Trustees unanimously consented to globally change the word "regulation" to the word "rule" in APERS Rule 214.

The proposed effective date is December 31, 2019.

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

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 24-4-105(b)(1), the Board of Trustees of the Arkansas Public Employees' Retirement System shall make all rules as it shall deem necessary from time to time in the transaction of its business and in administering the Arkansas Public Employees' Retirement System. The proposed revisions include those made in light of Act 624 of 2019, sponsored by Senator Bill Sample, which amended the law regarding the Arkansas Public Employees' Retirement System.

15. COMMISSION FOR ARKANSAS PUBLIC SCHOOL ACADEMIC FACILITIES AND TRANSPORTATION (Ms. Lori Freno)

a. SUBJECT: CAPSAFT Rules Governing the Academic Facilities Distress Program

DESCRIPTION: The proposed rules by the Commission for Arkansas Public School Academic Facilities and Transportation ("CAPSAFT") incorporate provisions of Act 933 of 2019 concerning actions that may be taken by the Division of Public School Academic Facilities and Transportation, with the approval of the CAPSAFT, upon CAPSAFT classification of a public school district as being in facilities distress. The proposed amendments also update outdated language, contain clarifications, and make technical edits.

Following public comment, non-substantive changes were made to edit language and make language of the rules consistent with law.

PUBLIC COMMENT: A public hearing was held on October 24, 2019. The public comment period expired on November 1, 2019. The Commission provided the following summary of the comments that it received and its responses thereto:

Lucas Harder, Arkansas School Boards Association (10/28/19)
Comment (1): Section 3.0~~3~~.2 – This should be changed to "Commissioner of Elementary and Secondary Education" to match the changes from Act 910.
Response: Comments considered. Non-substantive change made.

Comment (2): 3.0~~1~~.4 – I would recommend moving this up and retaining it as 3.01 so that the definitions are in alphabetical order.
Response: The previous Section 3.01 was changed to remove "academic" from "academic facilities distress status." The reason is because throughout Ark. Code Ann. § 6-21- 811, the term "facilities distress status" (without academic) is used. This required a reorganization of definitions to keep them in alphabetical order.

Comment (3): 6.01 – There is an unnecessary repeat of "to fulfill" here.
Response: Comment considered. Non-substantive change made.

Comment (4): 8.00 – There is an extra "I" in "Facilities."
Response: Comment considered. Non-substantive change made.

Comment (5): 8.10.2 – There appears to be a missing "the issues" from between "corrected" and "that."
Response: Comment considered. Non-substantive change made.

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

(1) Section 4.02 – I noticed that most "identified"s had been changed to "classified"s, but the two in this section had not. **RESPONSE:** Section 4.02 refers to schools/school districts "identified" by the Division as being in academic facilities distress. The sections containing "classified" refer to schools/school districts "classified" by *the Commission* as being in academic facilities distress. (Emphasis in original.) The Division "identifies," and the Commission then "classifies." This section is based on Ark. Code Ann. § 6-21-811(b). Once the Division identifies, a school district may appeal, after which the Commission may classify.

(2) Section 5.02.2 – I notice that the language in this section appears to differ slightly from the language in Ark. Code Ann. § 6-21-811(i), on which it appears premised. Section 6-21-811(i) appears to require that the Division certify that the public school or school district has (1) corrected all criteria for being classified as in facilities distress and (2) complied with all Division recommendations and requirements for removal from facilities distress status. Section 5.02.2 of the rules, rather than referencing the second certification by the Division required by the statute, appears to address the Commission's determination, which is also addressed later in Section 8.10.2, seemingly premised on Ark. Code Ann. § 6-21-811(g)(10)(A)(ii) (as renumbered by Act 933 of 2019, § 2). Was this the Commission's intention? **RESPONSE:** You are correct. Will change Section 5.02.

(3) Section 8.08 – "Requires" or "Require"? **RESPONSE:** You are correct. Will change to "require."

(4) Section 8.10.2 – Is "all issues" missing before "that caused," as referenced in Ark. Code Ann. § 6-21-811(g)(10)(A)(ii) (renumbered by Act 933, § 2)? **RESPONSE:** You are correct; "all issues" will be added.

(5) Section 9.01 – Should the "and" be an "or," as provided in Ark. Code Ann. § 6-21-811(g)(14)(B) (renumbered by Act 933, § 2), on which the section appears premised? **RESPONSE:** You are correct; "and" will be changed to "or."

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-21-114(e)(2)(A), the Commission for Arkansas Public School Academic Facilities and Transportation ("Commission") may adopt, amend, and rescind rules as necessary or desirable for the administration of the Arkansas Public School Academic Facilities Program and any other related program. Further authority for the rulemaking can be found in Ark. Code Ann. § 6-21-804(b), which provides that the Commission shall promulgate rules necessary to administer the Arkansas Public School Academic Facilities Program, all its component and related programs, and the provisions of the Arkansas Public School Academic Facilities Program Act ("Act"), Ark. Code Ann. §§ 6-21-801 through 6-21-816, which shall promote the intent and purposes of the Act and assure the prudent and resourceful expenditure of state funds with regard to public school academic facilities throughout the state. *See also* Ark. Code Ann. § 6-21-

811 (concerning the Academic Facilities Distress Program, a provision within the Act).

The proposed changes include revisions made in light of Act 933 of 2019, sponsored by Senator Jane English, which concerned the Arkansas Public School Academic Facilities Program Act and amended provisions of the Arkansas Code with respect to public school academic facilities.

b. SUBJECT: CAPSAFT Rules Governing the Facilities Master Plan

DESCRIPTION: These proposed rules incorporate Act 933 of 2019, § 1, which provides that school districts must use the state-funded Computerized Management Maintenance System (also known as CMMS or "School Dude") to enter and track all reactive and preventative maintenance work, to enter preventative maintenance schedules for facility systems, to document completed reactive and preventative maintenance work, and to schedule state-mandated inspections. Previously, the law was not clear as to the scope to which school districts must use the system. They also require that school districts provide additional information in their master plan to afford the Division of Public School Academic Facilities and Transportation a better overall picture of the state of district facilities.

Sections 3.20.4, 3.27, and 4.03.7.2 also were added to incorporate provisions of Ark. Code Ann. § 12-13-117 concerning the installation and use of a temporary door barricade device or security lockdown device for security purposes, as well as a recommendation of the Arkansas School Safety Commission that school districts submit any such projects to the Division. These sections also clarify that consistent with the Safety Commission's recommendation, the Division does not take a position on whether school districts should employ these devices; rather, that remains a local school district decision.

Following the public comment period, one non-substantive editorial change was made to Section 3.20.

PUBLIC COMMENT: A public hearing was held on October 24, 2019. The public comment period expired on November 1, 2019. The Commission provided the following summary of the sole public comment that it received and its response thereto:

Commenter: Lucas Harder, Arkansas School Boards Association (10/28/19)
Comment: Section 3.20.2. The "or" at the end should be moved down to the end of 3.20.3.
Response: Comment considered. Non-substantive change made.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-21-114(e)(2)(A), the Commission for Arkansas Public School Academic Facilities and Transportation ("Commission") may adopt, amend, and rescind rules as necessary or desirable for the administration of the Arkansas Public School Academic Facilities Program and any other related program. Further authority for the rulemaking can be found in Ark. Code Ann. § 6-21-804(b), which provides that the Commission shall promulgate rules necessary to administer the Arkansas Public School Academic Facilities Program, all its component and related programs, and the provisions of the Arkansas Public School Academic Facilities Program Act ("Act"), Ark. Code Ann. §§ 6-21-801 through 6-21-816, which shall promote the intent and purposes of the Act and assure the prudent and resourceful expenditure of state funds with regard to public school academic facilities throughout the state. *See also* Ark. Code Ann. §§ 6-21-805 through 6-21-807 (concerning the Academic Facilities Master Plan Program, provisions within the Act).

The proposed changes include revisions made in light of Act 933 of 2019, sponsored by Senator Jane English, which concerned the Arkansas Public School Academic Facilities Program Act and amended provisions of the Arkansas Code with respect to public school academic facilities.

c. SUBJECT: CAPSAFT Rules Governing the Academic Facilities Partnership Program

DESCRIPTION: These proposed rules incorporate Act 1080 of 2019, which established a new Academic Facilities Wealth Index beginning with the 2021-2023 Partnership Program funding cycle. They also incorporate recommendations by the Governor's Arkansas School Safety Commission, *see* Section 3.37.1(ii), that allow for certain school safety projects to be eligible for Partnership Program funding.

The proposed rules also incorporate a change to the Project Cost Funding Factor as recommended by the Advisory Committee on Public School Academic Facilities, which Committee was charged in Act 801 of 2017 with analyzing, among other things, "the current and long-term viability of the Academic Facilities Partnership Program" and "rules governing academic facilities programs." The Committee recommended to raise the Funding Factor from $175 to $200 per sq. ft. to take into consideration rising construction costs.

Also, the proposed rules incorporate the reprioritization of the different types of Partnership Program project. The reprioritization already was established in the current Partnership Program rules; the change in the proposed rules merely carries out the reprioritization already promulgated. Other editorial and clarifying changes were made.

The proposed rules also modify appendices to the Partnership Program rules. A separate summary is provided to note the reasons for the changes to Appendix A, the Arkansas Public School Academic Facilities Manual. [NOTE: This summary, provided in a chart format, can be located on the paperclip for today's Administrative Rules Subcommittee meeting.] Appendix B in the current rules, which is the Program of Requirements, is repealed as redundant because it already is contained in the Facilities Manual. Appendix C, which will become Appendix B, the Project Agreement, likewise contains clarifying and editorial amendments, as well as provisions regarding grants received by school districts from FEMA or ADEM, the correction of calculation errors by a school district or the Division, and the timing of project completion.

Following the public comment period, non-substantive changes were made to the proposed Partnership Program Rules, as well as Appendices A and C. In the rules, among other editorial and clarifying changes, modifications were made to the definition of "Academic Facilities Wealth Index" to make it consistent with the language in Act 1080 of 2019. Concerning Appendix A, antiquated language concerning cassette tapes was removed, and language concerning a performing arts stage was removed from an inappropriate section of the manual. Concerning Appendix C, the Academic Facilities Project Agreement, proposed language was removed that expressly authorized amendment to the Project Agreement if the Division discovered that it erred in calculating qualified project cost or state financial participation, clarifying changes were made, and formatting changes were made.

PUBLIC COMMENT: A public hearing was held on October 24, 2019. The public comment period expired on November 1, 2019. The Commission provided the following summary of the comments that it received and its responses thereto:

Leslie Dyess, Facilities Consultant (10/8/19)
Comment: Please focus your attention to page 4 of the Partnership Project Agreement (Appendix C). Somewhere along the way this document has lost its formatting and it is a mess. I'm attaching a mark-up of what I believe was intended for your consideration. [Mark-up was not provided with the comment summary.] I would also recommend that all

references to the "AR Facility Manual" be replaced with its proper name of "AR Public School Academic Facility Manual."
Response: Comment considered. Non-substantive changes made.

Karen Walters, Superintendent of the Bryant School District (10/22/19)
Comment: The proposed revisions include three new conditions for which the Project Agreement may be amended by the Commission. One such condition would allow the Commission to amend the Project Agreement "(4) should it be discovered that the Division calculations resulted in excess Qualified Cost or State Financial Participation." We ask that the Commission reconsider this proposed revision. Such a condition would allow the Commission to reduce the state's financial participation amount at any time if an error is discovered in the Division's calculations. In many instances, school districts ask their school boards and communities to pass millages based upon the original calculations in the Project Agreement. Additionally, school districts enter into project management and construction contracts based upon the Project Agreement. This proposed revision leaves open the possibility that a school district's community could pass a millage and sign binding construction contracts based on the calculations in the Project Agreement only to have the Commission unilaterally modify the Project Agreement at a later date.
Response: Comment considered. The language at issue has been removed from the Project Agreement. Non-substantive change made.

Bryan Duffie, Superintendent of the Jacksonville North Pulaski School District (10/25/19)
Comment (1): I do not agree with penalizing school districts if the Division finds an error after the multiple levels of verification have been completed on partnership project applications. This item does not give a time limit to find the error or enforce reduced funding for school district projects. Once funding is awarded, school districts develop millage increase or millage extension requests on total local estimated costs and the amount of state share of the cost. If the Division pulls funding several months later due to a Division error, then the completion of the school project is in jeopardy and the community will not be very accepting of this result. Potential legal ramifications could result as well based on the situation.
Response: Comment considered. See Division Response to Karen Walters's 10/22/19 Comment.

Doug Quinn, Director of Student/Support Services, Bauxite School District (10/28/19)

Comment (1): The Bauxite School District is in support of the Cost Factor that increases the maximum cost factor from $175/SF to $200/SF.
Response: Comment considered. This $200 increase was recommended by the Advisory Committee on Public School Academic Facilities. No changes made.

Comment (2): There is a need for change or clarification in the Facility Manual. The Facility Manual should be the reference guide for projects. Two inserts in the project manual, in Section 4000 for Site Selection and Section 6000 for Health Centers, reference governing statutes. The Facility Manual should detail and list the statutory requirements, not refer the user to the statutes without listing the requirements.
Response: Comment considered. Reference to the law appropriately guides reader to appropriate legal requirements; there is no requirement to restate law when it is clear. No changes made.

Comment (3): The Partnerships Program Project Agreement, Four-Year Project Completion, final pay requirements would be acceptable for warm, safe, and dry (systems) projects. However, for space/growth projects and warm, safe, and dry (space replacement) projects, final pay requests often require significant time for the contractor or construction manager to develop due to the large scope of the projects. We would suggest clarifying language that states an official Certificate of Occupancy, rather than final pay request, must be obtained within four years of space/growth projects or warm, safe, and dry (space replacement) projects.
Response: Comment considered. Non-substantive change made.

Comment (4): Bauxite School District strongly disagrees with the following rules. The Partnership Program Project Agreement, Section I(4) which states the Project Agreement can be amended if it "should be discovered that the Division calculations resulted in Excess Qualified Cost or State Financial Participation." The Division has over one year to review Partnership Program project applications to determine scope, applicability of rules, and Qualified Cost and State Financial Participation. To ensure thorough, complete, and correct reviews, the Division has implemented numerous review processes with multiple levels of review throughout the organization. These processes were developed because the State Financial Participation is critical information for the school district to obtain its local financing for funded Partnership Program projects, oftentimes including a millage increase to be approved by the district's voters. As a result of the Division's rigorous review processes, the Division makes very few mistakes in the computation of Qualifying Cost or State Financial Participation. However, it would be catastrophic for a district to have the State Financial Participation reduced after the district's

financing plan has been developed, particularly in those projects involving millage elections. In those very rare occurrences of Division miscalculations that would reduce State Financial Participation, the Division and Commission must accept the responsibility for those errors without penalty to the districts.
Response: Comment considered. See Division Response to Karen Walters's 10/22/19 Comment.

Jared Cleveland, Deputy Superintendent of Springdale School District (10/28/19)
Comment (1): Springdale Schools strongly disagrees with the Partnership Program Project Agreement, Section I(4), which states the Project Agreement can be amended if it "should be discovered that the Division calculations resulted in Excess Qualified Cost or State Financial Participation." The Division has over one year to review Partnership Program project applications to determine scope, applicability of rules, and Qualified Cost and State Financial Participation. To ensure thorough, complete, and correct reviews, the Division has implemented numerous review processes with multiple levels of review throughout the organization. These processes were developed because the State Financial Participation is critical information for the school district to obtain its local financing for funded Partnership Program projects, oftentimes including a millage increase to be approved by the district's voters. As a result of the Division's rigorous review processes, the Division makes very few mistakes in the computation of Qualifying Cost or State Financial Participation. However, it would be catastrophic for a district to have the State Financial Participation reduced after the district's financing plan has been developed, particularly in those projects involving millage elections. In those very rare occurrences of Division miscalculations that would reduce State Financial Participation , the Division and Commission must accept the responsibility for those errors without penalty to the districts.
Response: Comment considered. See Division Response to Karen Walters's 10/22/19 Comment.

Comment (2): NEED CHANGE OR CLARIFICATION of the Facility Manual – The Facility Manual should be the reference guide for projects. Two inserts in the project manual, in Section 4000 for Site Selection and Section 6000 for Health Centers, reference governing statutes. The Facility Manual should detail and list the statutory requirements, not refer the user to the statutes without listing the requirements.
Response: See Division Response to Doug Quinn's 10/28/19 Comment (2).

Comment (3): Partnership Program Project Agreement, Four-Year Project Completion – Final pay requests requirement would be acceptable for warm, safe, and dry (systems) projects. However, for space/growth

projects and warm, safe, and dry (space replacement) projects, final pay requests often require significant time for the contractor or construction manager to develop due to large scope of the projects. Suggest clarifying language that states an official Certificate of Occupancy, rather than final pay request, must be obtained within four years for space/growth projects or warm, safe, and dry (space replacement) projects.
Response: Comment considered. See Division Response to Doug Quinn's 10/28/19 Comment (3).

Charles Stein, Facilities Consultant (10/28/19)
Comment (1): There are typographical errors in Section 3.03.2 of the draft rules that calculate the average wealth index value using the difference of the current method and the wealth index computed for 2023-2025. In 3.03.2(6), the reference in the second line should be 3.03.2(4), and the reference in the third line should be 3.03.1. In 3.03.2(8), the second reference should be 3.03.2(7), not 3.03.2(6). If this is not corrected from (6) to (7), the computation adds the total difference to the current formula, resulting in the wealth index values for 2021-2023 and 2023-2025 being the same.
Response: Comments considered. Non-substantive changes made consistent with Act 1080. Also, see Division's Response to Rebecca Miller-Rice's Comment (2). [Set forth separately below.]

Comment (2): Section 3.03.1(7) and Section 3.03.2(11) are redundant and apply to both sections. Suggest removing from current positions and inserting as Section 3.03.3.
Response: Comment considered. Suggested change is stylistic. No changes made.

Comment (3): I support the increase of the maximum project cost funding factor in Section 3.26(i)(a) and (ii)(a) and 6.03(i) and (ii) to $200 per square foot.
Response: Comment considered. See Division Response to Doug Quinn's 10/28/19 Comment (1).

Comment (4): Section 3.31. Need to define or more clearly describe "contour."
Response: Comment considered. Non-substantive change made; word "contour" removed and language added to provide clear definition of requirement.

Comment (5): In section 3.37.1(ii), the last sentence regarding building authority approvals is not clear as to intent. Suggest deleting or adding clarifying language for intent. All new construction projects must receive construction approval from the proper state review agencies. If this sentence implies the project applications must have construction reviews

as part of the application, the project application including schematic drawings would be required to be detailed construction documents. This section would then conflict with Section 3.31.1 that states schematic drawings do not have to be prepared by an architect.
Response: Comment considered. Non-substantive changes made.

Comment (6): Section 4000 Site Selection and Design. Insert states, "School Districts shall comply with the site selection requirements of ..." The Facility Manual should provide the requirements for school districts, not direct them to pertinent statutes. Delete this wording and insert requirements.
Response: Comment considered. See Division Response to Doug Quinn's 10/28/19 Comment (2).

Comment (7): Section 6000. Notes for spaces E-AD-15, M-AD-15, and H-AD-16 include reference to ACA 6-20-2517(b). Like Comment (6) above, the Facility Manual should provide the requirements, not direct the user to look up requirements in code. If requirement is that Health Centers should contain an office with a door, state that requirement instead of directing users to another reference.
Response: Comment considered.

Comment (8): Strongly disagree with Section I(4), which states the Project Agreement can be amended if it "should be discovered that the Division calculations resulted in Excess Qualified Cost or State Financial Participation." The Division has over one year to review Partnership Program project applications to determine scope, applicability of rules, and Qualified Cost and State Financial Participation. To ensure thorough, complete, and correct reviews, the Division has implemented numerous review processes with multiple levels of review throughout the organization. These processes were developed because the State Financial Participation is critical information for the school district to obtain its local financing for funded Partnership Program projects, oftentimes including a millage increase to be approved by the district's voters. As a result of the Division's rigorous review processes, the Division makes very few mistakes in the computation of Qualifying Cost or State Financial Participation. However, it would be catastrophic for a district to have the State Financial Participation reduced after the district's financing plan has been developed, particularly in those projects involving millage elections. In those very rare occurrences of Division miscalculations that would reduce State Financial Participation, the Division and Commission must accept the responsibility for those errors without penalty to the districts.
Response: Comment considered. See Division Response to Karen Walters's 10/22/19 Comment.

Comment (9): Second paragraph of Section I inserts new definition of four-year completion requirement. Final pay requests requirement would be acceptable for warm, safe, and dry (systems) projects. However, for space/growth projects and warm, safe, and dry (space replacement) projects, final pay requests often require significant time for the contractor or construction manager to develop due to large scope of the projects. Suggest clarifying language that states an official Certificate of Occupancy, rather than final pay request, must be obtained within four years for space/growth projects or warm, safe, and dry (space replacement) projects.
Response: Comment considered. See Division Response to Doug Quinn's 10/28/19 Comment (3).

Charles Stein, Facilities Consultant (10/29/19)
Comment: The Partnership Program Rules change proposes an increase in the maximum cost factor from $175/SF to $200/SF. This is a good and necessary change, since many new school projects in the state experience actual costs well in excess of $200/SF. However, with the concurrent promulgation of Safety and Security features in Appendix A of the Arkansas School Facility Manual, I suggest an increase in the maximum cost factor to $225/SF.
Response: Comment considered. Requirements do not add substantial cost to the facility. See also Division Response to Doug Quinn's 10/28/19 Comment (1).

Lucas Harder, Arkansas School Boards Association (10/30/19)
Comment (1): Section 3.03.1(6) – There is a "one" missing from between "from" and "hundred."
Response: Comment considered. Non-substantive change made.

Comment (2): Section 3.03.2(10) – There is a "one" missing from between "from" and "hundred."
Response: Comment considered. Non-substantive change made.

Comment (3): Section 3.33 – There is an unnecessary "monies" here.
Response: Comment considered. Non-substantive change made.

Comment (4): Section 3.35.1 – There is a missing comma between "dining" and "and."
Response: Comment considered. Non-substantive change made.

Comment (5): Section 4.02 – There is a comma missing from between "special education" and the "or" before "student dining areas."
Response: Comment considered. Non-substantive change made.

Comment (6): Section 5.05.4(XIII) – I believe that "Arkansas Department of Education" should be changed to "Division of Elementary and Secondary Education."
Response: Comment considered. New rules governing consolidation and annexation have not yet been promulgated that reflect the name change from the Arkansas Department of Education to the Division of Elementary and Secondary Education. No changes made.

Comment (7): Section 9.03 – I would recommend changing "Arkansas Department of Education" to "Division of Elementary and Secondary Education" in alignment with Act 910.
Response: Comment considered. Non-substantive change made to Section 9.03, as well as to Section 9.01 (for the same reason).

David Kellogg, Assistant Superintendent of the Prairie Grove School District (10/30/19)
Comment (l): Partnership Program Project Agreement – Strongly disagree with Section I(4) which states the Project Agreement can be amended if it "should be discovered that the Division calculations resulted in Excess Qualified Cost or State Financial Participation." However, it would be catastrophic for a district to have the State Financial Participation reduced after the district's financing plan has been developed, particularly in those projects involving millage elections.
Response: Comment considered. See Division Response to Karen Walters's 10/22/19 Comment.

Comment (2): The Facility Manual should be the reference guide for projects. Two inserts in the project manual, in Section 4000 for Site Selection and Section 6000 for Health Centers, reference governing statutes. The Facility Manual should detail and list the statutory requirements, not refer the user to the statutes without listing the requirements.
Response: Comment considered. See Division Response to Doug Quinn's 10/28/19 Comment (2).

Comment (3): Partnership Program Project Agreement, Four-Year Project Completion – Final pay requests requirement would be acceptable for warm, safe, and dry (systems) projects. However, for space/growth projects and warm, safe, and dry (space replacement) projects, final pay request often require significant time for the contractors or construction manager to develop due to large scope of the projects. Suggest clarifying language that states an official Certificate of Occupancy, rather than final pay request, must be obtained within four years for space/growth projects or warm, safe, and dry (space replacement) projects.
Response: Comment considered. See Division Response to Doug Quinn's 10/28/19 Comment (3).

Comment (4): Increasing the Square Footage cost factor from $175/SF to $200/SF. $200/SF may not cover actual cost. Consider a greater increase.
Response: Comment considered. See Division Response to Doug Quinn's 10/28/19 Comment (1).

John Tackett, Superintendent of the Lonoke School District (10/30/19)
Comment: School districts cannot build facilities with the proposition that approved and funded projects can be funded at amounts lower than those reflected on final agreements. We cannot go to voters and ask for money simply because there has been a miscalculation by the Division. Once both parties sign the agreement, it should remain in force throughout the duration of the project.
Response: Comment considered. See Division Response to Karen Walters's 10/22/19 Comment.

Mike Skelton, Superintendent of the Benton School District (10/30/19)
Comment (1): SUPPORT – Cost Factor – Increase of maximum cost factor from $175/SF to $200/SF.
Response: Comment considered. See Division Response to Doug Quinn's 10/28/19 Comment (1).

Comment (2): NEED CHANGE OR CLARIFICATION – Facility Manual – The Facility Manual should be the reference guide for projects. Two inserts in the project manual, in Section 4000 for Site Selection and Section 6000 for Health Centers, reference governing statutes. The Facility Manual should detail and list the statutory requirements, not refer the user to the statutes without listing the requirements.
Response: Comment considered. See Division Response to Doug Quinn's 10/28/19 Comment (2).

Comment (3): NEED CHANGE OR CLARIFICATION – Partnership Program Project Agreement, Four-Year Project Completion – Final pay requests requirement would be acceptable for warm, safe, and dry (systems) projects. However, for space/growth projects and warm, safe, and dry (space replacement) projects, final pay requests often require significant time for the contractor or construction manager to develop due to large scope of the projects. Suggest clarifying language that states an official Certificate of Occupancy, rather than final pay request, must be obtained within four years for space/growth projects or warm, safe, and dry (space replacement) projects.
Response: Comment considered. See Division Response to Doug Quinn's 10/28/19 Comment (3).

Comment (4): STRONGLY DISAGREE – Partnership Program Project Agreement – Strongly disagree with Section I(4) which states the Project

Agreement can be amended if it "should be discovered that the Division calculations resulted in Excess Qualified Cost or State Financial Participation." The Division has over one year to review Partnership Program project applications to determine scope, applicability of rules, and Qualified Cost and State Financial Participation. To ensure thorough, complete, and correct reviews, the Division has implemented numerous review processes with multiple levels of review throughout the organization. These processes were developed because the State Financial Participation is critical information for the school district to obtain its local financing for funded Partnership Program projects, oftentimes including a millage increase to be approved by the district's voters. As a result of the Division's rigorous review processes, the Division makes very few mistakes in the computation of Qualifying Cost or State Financial Participation. However, it would be catastrophic for a district to have the State Financial Participation reduced after the district's financing plan has been developed, particularly in those projects involving millage elections. In those very rare occurrences of Division miscalculations that would reduce State Financial Participation , the Division and Commission must accept the responsibility for those errors without penalty to the districts.
Response: Comment considered. See Division response to Karen Walters's 10/22/19 Comment.

Brenda Poole, Superintendent of the Brinkley School District (10/31/19)
Comment (1): The Brinkley School District is in support of the increase in maximum cost factors from $175/SF to $200/SF and safety systems protection for warm, safe, and dry systems projects. Two hundred dollars a square foot is more realistic with the construction cost in our area.
Response: Comment considered. See Division Response to Doug Quinn's 10/28/19 Comment (1).

Comment (2): Under the partnership program rules – Appendix C (Project Agreement), if the Division discovers an error that led to a district receiving excess funds or excess qualified cost, then decides to lower the cost of the fund after a district has secured their millage or in the middle of a project, this could cause significant financial harm to our construction projects. We are a small district that plans to seek a millage increase in the 21-23 partnership cycle. Our patrons will want to know the closest estimate possible to the actual cost for new schools when I approach them with the numbers. It is imperative for the credibility and integrity of the District that I communicate our needs and costs as accurately as possible upfront. To drive my point home, when the legislators decided to phase in the partnership money for gaining districts over the next two cycles, Brinkley lost big. Because of the conditions of our facilities, we cannot afford to wait until the 23-25 cycle to take advantage of the 67%; as a result, we are losing approximately 25% of much-needed partnership

funding. Therefore, we cannot take the risk of losing any funding once projects begin. Brinkley School District is against any wording of the rules that would allow funds to be withdrawn from districts after districts have secured their millage.
Response: Comment considered. See Division Response to Karen Walters's 10/22/19 Comment.

Tripp Walter, Arkansas Public School Resource Center (10/31/19)
Comment (1): Section 3.26(iii): The proposed language should indicate that there will be a direct offset from the state financial participation amount for the grant amount received by the district for a tornado shelter or other designated reinforced area to the extent that such amounts have been actually received, and only for grant amounts received that are specifically for the tornado shelter or other reinforced area.
Response: Comment considered. Non-substantive change made for clarity.

Comment (2): Section 3.31: First, the term "contour" is neither defined in these Rules nor State law. A definition of this term must be provided as well as an opportunity to make comments on the definition. Second, the word "For" in the seventh line should not be deleted.
Response: Comment considered. Concerning use of the word "contour," see Division Response to Charles Stein's 10/28/19 Comment (4). Word "for" has been reinserted. Non-substantive change made.

Comment (3): Section 3.31.1: This language appears to impose additional requirements on the district beyond those contained in Section 3.31.
Response: Comment considered. Section 3.31.1 contains a clarifying statement. This language is not offered as a possible amendment; it already existed in the rules. No changes made.

Comment(4): Section 3.37.1(ii): With this new category of safety system projects being deemed eligible for consideration for partnership funding as Warm, Safe, and Dry (Systems) projects, how will funding for Warm, Safe, and Dry (Systems) be adjusted or increased to provide for proper funding of the other authorized types of new construction projects?
Response: This is not a comment and thus requires no response. Nonetheless, all projects will be prioritized based on Section 5.05.

Comment (5): Section 4.08.1(vii): The language in the second sentence seems to imply that the information presented by the Division may be tentative and cannot be safely relied upon by the district, which would appear to go beyond the scope and intent of Ark. Code Ann. § 6-20-2515.
Response: This language is not offered as a possible amendment; it already exists in the rules. It is self-explanatory. No changes made.

Comment (6): The APSRC also adopts in full the comments submitted by Dr. Charles C. Stein.
Response: No response required. See Division Responses to Charles Stein's comments.

Chad Davidson, Facilities Consultant (10/31/19)
Comment (1): Appendix A, Section 4000. Working with local power companies in our area, we do not have any control in regards to the type of power install in regards to overhead versus underground. I just don't feel this is an item that can be controlled. (Comment refers to language noting that utility services should be placed underground, where possible, and overhead lines, if required, should be placed away from play areas and playgrounds).
Response: Comment considered. This is recommendation, not a requirement. No change made.

Comment (2): Concerning the POR Form, I would like to request that the HEALTH CENTER CONSULTATION ROOM be added to the required spaces. I have been informed on the last couple of jobs that this is a requirement to provide but it's not listed in either the required spaces or the support spaces. My understanding is that this office is required to satisfy privacy requirements. It is typically that all rooms have been listed individually so I think it's confusing to list a secondary room within a room. Adjust SF requirements accordingly.
Response: Comment considered. The POR requirements for the Health Center has been increased from 250 to 360 square feet to accommodate the requirements of Ark. Code Ann. § 6-20-2517.

Comment (3): Concerning Secretarial Area H-AD-2, Transaction Desk, I would like to recommend this image be revised to indicate a location for wheelchair person approach. The F2 high countertop is graphically shown the full width of the counter.
Response: Comment considered. The template contained in H-AD-2 is merely a guideline (see Section 6000 Introduction). ADA compliance is a design issue. No changes made.

Comment (4): Landscape and Irrigation. Can you please clarify if this is a recommendation/suggestion or a requirement? My assumption is that this is a recommendation/suggestion when it's in a bubble as shown. My concern is that Irrigation should not be a requirement and the school districts should have the option of providing temporary watering for the purpose of plant establishment. It is commonplace that school districts shut off the irrigation system after plant establishment and no longer use it. If native drought tolerant plants are used, an ongoing irrigation system should not be needed.

Response: Comment considered. If there is a bubble around it and it is on the right side, it is a recommendation. No changes made.

Comment (5): 7400 Electrical – Standards #4, 10, and 15. Request evaluation to reduce number of power receptacles in classrooms. #4. Individual computers are typically no longer set up in classrooms due to student using devices which store in a charging cart. (This cart does not require additional power requirements due to the design of cycle charging). I would suggest a reduction from 8 to 6. #10. Request to eliminate the requirement of key-type switches, could possibly revise to locate switches in adjacent custodial or service type room. The keys are typically lost and appear to be trending out of use. #15. Charging carts are manufactured to charge on a cycle charging a smaller number of devices at a time therefore the dedication of a circuit is not required for the charging cart to properly operate.
Response: Comment considered. Many school districts do not use charging carts. School districts may request a variance from the Division. No changes made.

Comment (6): 7500 Technology Systems – Request elimination of a requirement for in classroom student workstations. In classroom stations are not being provided in classrooms as mobile device carts are available to provide multiple devices to multiple students at the classroom. Also, request to eliminate the requirement of cassette.
Response: Comments considered. See Division Response immediately above. Concerning cassettes, that language has been removed. Non-substantive change made.

Chad Davidson, Facilities Consultant (11/1/19)
Comment (1): Partnership Program Agreement: on page 2, section 1, 1st paragraph, items 3 and 4: allow the Commission to amend the Agreement should inaccurate information be discovered or should it be discovered that the Division's calculations resulted in excess Qualified Cost or State Financial Participation. Modifying an agreement, after both parties have signed it, which is essentially a contract, is not good business practice. This is a practice that would not work with any other contract, especially one that establishes financial state share and the conditions upon which it is distributed. Considering that districts will be utilizing a planned amount of local share funding towards the funding of the Partnership project, changing that amount, after the fact, would create financial issues for most districts across the state. One side of a contract shouldn't enter that contract expecting the financial contributions from one side to be continually moving. This could also create further issues once construction contracts are signed. This one action could potentially create so many other legal actions. This post-signature agreement recalculation also appears to be open-ended. At a bare minimum, were this to be

adopted, an end date should be in place. However, once again, this change is not a good idea, as the state has a minimum of 14 months to review the project and all application elements (March 1 of even year application deadline until May 1 of odd year list publication date), plus the 60 day deadline for agreement execution (both party signatures). How much longer after the agreement is signed should the Division be allowed to re-calculate any state shares? Isn't 14 months enough (or perhaps 16, with agreement execution time, plus, for some districts, another 4 months of Early Review application review time)?
Response: Comment considered. See Division Response to Karen Walters's 10/22/19 Comment.

Comment (2): This comment is in regards to the 120-day and 75-day Early Review deadlines, which are actually set in statute first, then set in the Partnership rules. 120 days in advance of the March 1 Partnership application deadline (so approximately 10/31) is entirely too early for a district to be expected to prepare a full application, especially considering that the master planning web tool, where applications can be created, isn't typically open until mid-September. 1.5 months of application preparation for districts, 120 days ahead of the actual deadline, with 75 days of review time for the DPSAFT, seems to be quite excessive. A more reasonable timeline would be a 90 day Early Review deadline, with a 45 to 60 day DPSAFT review. This would allow a district sufficient time to prepare an adequate application, rather than rushing through one. This would only slightly reduce the time for DPSAFT review, but give the districts so much more needed time. I am aware that these comments can have no adequate answer, as these rules changes were created in statute. Expect no rules change from these comments. These comments just need to be stated. It is my hope and intention with these comments that this could all lead to a future statute change, then a subsequent Partnership rules change.
Response: Comment considered. Commenter correctly recognizes that the 120 and 75-day review deadlines are set forth in law. *See* Ark. Code Ann. § 6-20-2515(a). No changes made.

Leslie Dyess, Facilities Consultant (11/1/19)
Comment (1): Partnership Program Agreement: on page 2, section 1, 1st paragraph, items 3 and 4 allow the Commission to amend the Agreement should it be discovered that the District submitted inaccurate information on the project application or should it be discovered that the Division's calculations resulted in excess Qualified Cost or State Financial Participation. I feel that for both of the circumstances identified above there should be a limitation on the amount of time that this option is available to the Commission. As its currently written funds can be withdrawn indefinitely. Under both circumstances identified the errors/omissions discovered would surely have been committed without malicious intent and therefore it is unreasonably burdensome to allow such

an option after plans are approved and bids have been taken. This action could have serious financial repercussions for the District if it is pursued after bids are taken and contracts are signed.
Response: Comment considered. See Division Response to Karen Walters's 10/22/19 Comment.

Comment (2): Facility Manual: Chapter 6000, Section 6309 High Performing Arts, includes a new note #3 which places restrictions on the design of a stage. Chapter 6 Program Space Guidelines are not meant to establish a design standard; per Chapter 1, page 3. For this reason I don't feel that it's reasonable to include a note 3 on this faceplate.
Response: Comment considered. Non-substantive changes made.

Comment (3): Health Center Office – This space is being required by the Division for new construction projects, but it is still not included on the POR. Wouldn't now not be the best time to do so?
Response: Comment considered. See Division Response to Chad Davidson's 10/31/19 Comment (2).

Janet Schwanhausser, Deputy Superintendent and CFO of the Bentonville School District (11/1/19)
Comment (1): CAPSAFT RULES GOVERNING THE ACADEMIC FACILITIES PARTNERSHIP PROGRAM, APPENDIX C, SECTION I(4) – "*The Commission also may exercise its option to amend the Agreement under any of the following conditions: . . . (4) should it be discovered that the Division calculations resulted in excess Qualified Cost or State Financial Participation.*" Once Bentonville Schools determines a new school facility is needed, solidifying a plan for funding the construction of that facility is the first and highest priority. Construction of a new facility is arguably the most expensive project a District will pursue. New costs from other projects related to personnel, instruction, transportation, etc. are typically a tiny fraction of the cost of construction. For this reason, the funding plan must be solid. Whether the funds come from an increased millage approved by voters, second lien bonds, savings, or Facilities Partnership Funds, certainty in funding is a necessity before the project begins. This certainty typically takes months or years to establish. If the Commission were to modify an award after the Project Agreement were in place, the impact could devastate the District. Costs related to new construction are too large to be absorbed into the operating budget. Losing even a small portion of Facilities Partnership funding would be sufficient to bring a construction project to a halt. The District would find itself with a half-completed building, attempting to explain to voters (who may have approved a tax increase for that building) how a State calculation error resulted in their child not being able to attend an adequate school facility. The Commission holds the responsibility to accurately calculate the proportion of Facilities Partnership funding for

projects. The ability to revise agreements after-the-fact effectively transfers that responsibility to the Districts. The result is that Districts will be forced to develop funding plans that do not consider Facilities Partnership funds, leading to delayed projects or missed projects. The addition of this rule works against the State's responsibility to provide adequate school facilities for all.
Response: Comment considered. See Division Response to Karen Walters's 10/22/19 Comment.

Comment (2): CAPSAFT RULES GOVERNING THE ACADEMIC FACILITIES
PARTNERSHIP PROGRAM, APPENDIX A, PART 1, PROGRAM OF REQUIREMENTS: HEALTH CENTER – Please add "Health Center Consultation Room" to the required spaces. This space is not listed in either the required spaces or support spaces but is necessary to meet privacy requirements. If the intent is to include this in the square footage of the Health Center, we request that the convention of listing all rooms separately be followed in this situation as it is in the remainder of the POR. The square footage of the Health Center could be adjusted accordingly.
Response: Comment considered. See Division Response to Chad Davidson's 10/31/ 19 Comment (2).

Comment (3): CAPSAFT RULES GOVERNING THE ACADEMIC FACILITIES
PARTNERSHIP PROGRAM, APPENDIX A, PART 1, PROGRAM OF REQUIREMENTS: TRANSACTION DESK – We request image for Secretarial Area H-AD-2 be modified to indicate a location for wheelchair person approach. The current image indicates the F2 high countertop spans the entire width of the secretarial area.
Response: Comment considered. See Division Response to Chad Davidson's 10/31/19 Comment (3).

Comment (4): CAPSAFT RULES GOVERNING THE ACADEMIC FACILITIES PARTNERSHIP PROGRAM, APPENDIX A, PART 2, ELECTRICAL STANDARDS – #10 We request to eliminate the requirement of key-type switches, even if that would require relocation of switches in adjacent custodial or service type rooms. The keys are typically lost and appear to be trending out of use. #15 Charging carts are manufactured to charge on a cycle, charging a smaller number of devices at a time. Dedication of a circuit is not required for the charging cart to properly operate.
Response: Comment considered. See Division Response to Chad Davidson's 10/31/19 Comment (5).

Comment (5): CAPSAFT RULES GOVERNING THE ACADEMIC FACILITIES PARTNERSHIP PROGRAM, APPENDIX A, PART 2, TECHNOLOGY SYSTEMS – #1 We request elimination of a requirement for in-classroom student workstations. In-classroom stations are not being provided in classrooms, as mobile device carts are available to provide multiple devices to multiple students in the classroom. #8 We request elimination of the requirement of cassette in the gymnasium sound system.
Response: Comment considered. See Division Response to Chad Davidson's 10/31/19 Comment (6).

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

(1) In the Financial Impact Statement, it was estimated that costs for increasing a Health Center space could include $19,250 using a project cost factor of $175 per sq. ft. and $13,377 using a project cost factor of $200 per sq. ft. Is that correct? Would the costs not be higher using a project cost factor of $200 per sq. ft.? **RESPONSE:** You are correct. I had the two flipped. I have prepared a revised Financial Impact Statement, which I will file with BLR. No changes made to proposed rules.

(2) Section 3.03.2(6) – It appears that this section is premised on Ark. Code Ann. § 6-20-2502(1)(B)(vi), as amended by Act 1080 of 2019, § 1. If that is correct, should the reference to "3.03.2" be to "3.03.2(4) and 3.03.2(5)" and the reference to "3.02.1" be to "3.03.1(4)" to coincide with the statute? **RESPONSE:** You are correct. These non-substantive changes have been made to bring the rules in compliance with the Act.

(3) Section 3.03.2(9) – It appears that this section is premised on Ark. Code Ann. § 6-20-2502(1)(C)(i); however, the statutory section references the "percentage derived from the computation under subdivision (1)(A)(iv)." Section 3.03.2 of the rules appears to align with subsection (1)(B) of the statute. Would subsection (1)(C)(i) apply then to 3.03.2, or would it apply solely to Section 3.03.1 of the Rules that appears to align with subsection (1)(A) of the statute? **RESPONSE:** Ark. Code Ann. § 6-20-2502(1)(C)(i) and 1(C)(ii) apply to both the 2023-2025 Partnership Program funding cycle (see "fiscal years 2024-25" at (1)(A)) and the 2021-2023 Partnership Program funding cycle (see "fiscal years 2022-2023" at (1)(B)). Consequently, these provisions must appear in Sections 3.03.1 and 3.03.2., as those sections are relevant to both wealth indices. No changes made.

(4) Section 3.03.2(10) – Along the same lines as question (3), is this provision applicable to Section 3.03.2 of the rules or only Section 3.03.1? **RESPONSE:** Same response as above.

(5) Appendix A – I see that changes were made to the Public School Academic Facility Manual based on Act 858 of 2019, which provides that the Commission shall, in consultation with the Department of Transportation, promulgate rules necessary to implement Ark. Code Ann. § 6-21-809(b)(3)(B), as amended by the Act.

(a) Are these manual changes being made to comply with the Act or will separate rules be promulgated? **RESPONSE:** The Department of Transportation is taking the lead on promulgating rules required by Act 858 of 2019. The Facilities Manual directs school districts to comply with the Act.

(b) If these changes to the manual are the Commission's effort to comply with the Act, was the Department of Transportation consulted? **RESPONSE:** Yes, the Division and Department of Transportation have consulted.

The proposed effective date is December 30, 2019.

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

Because the agency is proposing a more costly rule, it has provided the following statements in response to the questions posed on its Financial Impact Statement:

(a) How the additional benefits of the more costly rule justify its additional cost:
The lesser cost option would be to not raise the project cost factor from $175 to $200, to not increase Health Center space required at new school buildings from 250 to 360 sq. ft., and to not add a provision for funding school safety and security projects. The first change was made based upon the recommendation of the Advisory Committee on Public School Academic Facilities (see Act 801 of 2017); the second was based upon a recommendation of the Public School Health Services Advisory Committee; and the third was based upon a recommendation of the Arkansas School Safety Commission.

(b) The reason for adoption of the more costly rule:
Committee recommendations.

(c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain:

The proposed rules are intended to enhance student health care provided in schools and to increase the safety of students, teachers, and staff. The increased project cost factor is intended to bring the maximum allowed more in line with rising construction costs as determined by the Advisory Committee.

(d) Whether the reason is within the scope of the agency's statutory authority, and if so, please explain:
Yes. The Commission for Arkansas Public School Academic Facilities and Transportation is authorized to make this change pursuant to its rulemaking authority under Ark. Code Ann. § 6-20-2512.

With respect to the additional cost of the state rule, the agency explains:

One can estimate based upon prior years' Partnership Program expenditures that raising the project cost factor *could* increase the State's annual contribution to Partnership Program projects by approximately $6.7 million annually. One could also estimate that increasing a Health Center space from 250 to 360 sq. ft. could cost the State approximately $13,377 (using a project cost factor of $175 per sq. ft.) or $19,250 (using a cost factor of $200 per sq. ft.) for each new school constructed. There is no reasonable way to gauge the potential cost increase for possible school safety/security projects, as this project category has not been available to school districts in the past. There will be no additional cost to the State during the current or upcoming fiscal year, however, because these changes will not take effect until the 2021-2023 Partnership Program project funding cycle. The rules that are currently in place will continue to apply through the 2019-2021 project funding cycle.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-20-2512, the Commission for Arkansas Public School Academic Facilities and Transportation shall promulgate rules necessary to administer the Arkansas Public School Academic Facilities Funding Act ("Act"), Ark. Code Ann. §§ 6-20-2501 through 6-20-2518, which shall promote the intent and purposes of the Act and assure the prudent and resourceful expenditure of state funds with regard to public school academic facilities throughout the state. *See also* Ark. Code Ann. § 6-20-2507 (establishing the Academic Facilities Partnership Program). The proposed revisions include those made in light of Act 1080 of 2019, sponsored by Senator Blake Johnson, which concerned the Academic Facilities Wealth Index and revised the method by which the Academic Facilities Wealth Index is calculated; Act 858 of 2019, sponsored by Representative Julie Mayberry, which concerned the Arkansas Public School Academic Facility Manual and revised design and construction standards regarding the site selection for a public school district facility to include a traffic impact analysis; and Act 801 of 2017, sponsored by

Representative Bruce Cozart, which amended provisions of the Arkansas Code concerning the Advisory Committee on Public School Academic Facilities.

16. <u>DEPARTMENT OF TRANSFORMATION AND SHARED SERVICES, OFFICE OF STATE PROCUREMENT</u> (Ms. Ann Purvis)

a. <u>SUBJECT</u>: Changes to Rules Under the AR Procurement Law

<u>DESCRIPTION</u>: Due to legislation passed during the 92nd General Assembly, as well as other rule changes deemed necessary, the following rules are being amended:

- R1:19-11-203 is being amended to provide guidance on the definitions of "commodities" and "services." Additionally, R2:19-11-203 through R7:19-11-203 have been renumbered.
- R2:19-11-203(g) is being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R3:19-11-203 is being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R6:19-11-217 is being added to provide guidance on how agencies should manage the roster of expiring contracts.
- R1:19-11-218 is being amended to provide guidance for written delegation orders pursuant to changes introduced in Act 420 of 2019, and R1:19-11-218(A) and (C) are being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R1:19-11-219 is being added to provide guidance on attorney reviews of contracts.
- R1:19-11-220(b) and (c) are being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R1:19-11-221(2) to (4) are being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R1:19-11-223 is being amended concerning approvals and denials of requests for exemption from mandatory state contracts. R2:19-11-223 has been added to provide guidance for mandatory state contracts. Both rules are being promulgated due to changes introduced in Act 421 of 2019.
- R1:19-11-224(1)(B) is being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R6:19-11-229 is being added to provide guidance on solicitation conferences. Consequently, R7:19-11-229 through R14:19-11-229 have been renumbered. Pursuant to statutory changes introduced in Act 419 of 2019, R8:19-11-229 is being amended to provide guidance on time discounts, R11:19-11-229 is being amended to provide guidance on

training certification for negotiations, and R8:19-11-229 is being amended to provide greater clarity on grounds for rejecting bids.

- R2:19-11-230 is being amended to provide guidance for weighting cost in competitive sealed proposals. R5:19-11-230 is being amended to provide guidance for use of past performance in evaluations, and use of private evaluators. R7:19-11-230 is being amended to provide guidance on seeking clarifications from offerors.
- R1:19-11-233 is being amended to align with changes introduced in Act 419 of 2019 concerning non-critical emergencies, and to remove language related to reporting requirements that were modified by Act 417 of 2019.
- R1:19-11-238 is being added to provide guidance on contract term lengths pursuant to the statutory changes of Act 418 of 2019.
- R1:19-11-244 is being amended to provide definitions and otherwise align with changes introduced in Act 420 of 2019.
- R1:19-11-249 is being amended to align with changes introduced in Act 421 of 2019.
- R2:19-11-249 is being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R1:19-11-251 is being amended to remove references to review thresholds and contract designations that have been removed by reporting requirement modifications of Act 417 of 2019.
- Due to reporting requirement modifications of Act 417 of 2019, R1:19-11-265 and R2:19-11-265 are being amended to provide guidance and definitions. R4:19-11-265 and R5:19-11-265 are being repealed. The rules are consequently being renumbered.
- R1:19-11-267 is being amended to reflect the changes and contract amounts introduced in Act 418 of 2019.
- R1:19-11-268 is being repealed due to the changes introduced in Act 418 of 2019.
- R1:19-11-[273] through R3:19-11-[273] have been added to provide guidance on the use of solicitation conferences.
- R1:19-11-[275] through R3:19-11-[275] have been added to provide guidance on the use of requests for information.
- R1:19-11-1006 is being repealed due to the repeal of its statutory counterpart in Act 417 of 2019.
- R1:19-11-1010 and R1:19-11-1013 are being repealed due to the repeal of their statutory counterparts in Act 418 of 2019.
- R2:19-11-1012 is being amended due to reporting requirement modifications of Act 417 of 2019.

PUBLIC COMMENT: A public hearing was held on November 15, 2019. The public comment period expired on November 15, 2019. The Office of State Procurement provided the following summary of the public comments it received:

OSP has received one comment, on November 8, 2019, that was in support of the adoption of the rule changes being promulgated and has received no comments against the adoption of the rule changes being promulgated. OSP held a public comment hearing November 15, 2019 at 9:00 AM. One question was received during the public comment hearing: Should R2:19-11-1012 reference the Department of Finance and Administration or the Department of Transformation and Shared Services, regarding the filing of contracts which are critical emergency procurements or exempted?

OSP revised the proposed rules based on the comment it received at the public hearing.

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses thereto:

QUESTION #1: Is there statutory authority for the definitions of "consulting services," "employment agreement," "personal services," and "professional services" in R1:19-11-203? **RESPONSE:** Yes. Thank you for the opportunity to explain. The State Procurement Director is statutorily required to procure or supervise the procurement of all commodities and services within the limits of the Arkansas Procurement Law *subchapter* and rules promulgated under the authority of that *subchapter*. *See* Ark. Code Ann. § 19-11-217(c)(1). The Arkansas Procurement Law subchapter specifically defines "services" as including: (i) consulting services; (ii) personal services; and (iii) professional services (*see* Ark. Code Ann. § 19-11-203(27)(C)) but does not define those component terms. In furtherance of his statutory duties, the State Procurement Director needs to establish a uniform understanding among procurement officials regarding the meaning of these terms so they can consistently apply Arkansas Procurement Law. Because statutory definitions of these important terms are not provided in the Arkansas Procurement Law subchapter, they are being promulgated under that subchapter to provide a uniform standard clarifying which contracts fall within these different subsets of contracts for "services" as defined in the Arkansas Procurement Law subchapter. Without a rule or a statutory provision in Arkansas Procurement Law providing a uniform definition of these terms, there is bound to be varying agency interpretations of the meaning of those terms and discrepant application of the law in deciding which contracts are contracts for "services" as defined in the Arkansas Procurement Law subchapter.

QUESTION #2: Where do the definitions of "included in" and "incident to" in R1:19-11-203(f) come from? **RESPONSE:** Act 417 of 2019 changed the statutory definition of "services" by adding new verbiage

regarding the labor, time, or effort of a contractor for the development of "software and other intangible property other than technical support *incidental to* the procurement of proprietary software," Ark. Code Ann. § 19-11-203(27)(B)(v) (emphasis added), and regarding labor, time, or effort by a contractor "that does not produce tangible commodities." Ark. Code Ann. § 19-11-203(27)(A).

The definitions of "included in" and "incident to" in R1:19-11-203(f) come from the need to: (i) align with the Arkansas Uniform Commercial Code (as explained below); and (ii) clearly distinguish between: (a) contracts to pay contractors for furnishing "labor, time, or effort" that may result in the production of tangible commodities, but where payment is predominantly for furnishing "labor, time, or effort" and not actually conditioned on delivering commodities (in which case the contracts should be categorized as contracts for services); and (b) contracts to pay contractors for tangible commodities where the compensation is predominantly for delivery of tangible commodities and any "labor, time, or effort" furnished by the contractor in the production or sale of the commodities is merely incidental thereto or included therein (in which case the contracts should be categorized as contracts for commodities).

Under the Arkansas UCC, in circumstances where a contract calls for a combination of services and goods, the majority test for determining whether a contract is a contract for the sale of goods (and therefore subject to UCC Article 2) or a contract for services "is whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom). *See Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974). *See also Heating & Air Specialists, Inc. v. Jones,* 180 F.3d 923, 932 (8th Cir. 1999) ("Although the parties' franchise agreement is a mixed contract for the sale of goods and services, the transaction at issue is fundamentally an exchange of goods. The Uniform Commercial Code ... governs such transactions [under Arkansas law]."); *B & B Hardware, Inc. v. Fastenal Co.*, 688 F.3d 917, 921 (8th Cir. 2012) (holding that even where there is a "mixed" contract for the sale of goods and services, the UCC governs where the agreement is fundamentally one for the sale of goods). This is a widely accepted distinction at law that is often referred to as the "primary purpose law." Since both Arkansas Procurement Law and the Arkansas UCC apply to contracts for the sale of commodities (*see* Ark. Code Ann. § 19-11-203(4)(A)(i)), it is advisable that they be defined harmoniously and to reach the same result in order to avoid confusion as to the applicable law or result.

The proposed definitions of "included in" and "incident to" are consistent with both the Arkansas UCC and Arkansas Procurement Law. *See* Ark.

Code Ann. § 19-11-203(27)(B)(v) ("The furnishing of labor, time, or effort by a contractor for the generation, customization, configuration, or development of software and other intangible property other than technical support incidental to the procurement of proprietary software."). They will help procurement professionals by providing a rule for distinguishing between: (1) contracts to pay for services that may result in the production of tangible commodities (service contracts); and (2) contracts to pay for the production of tangible commodities that may require a contractor to furnish some labor, time, or effort that are merely incidental to or included in the production or sale of those tangible commodities (contracts for commodities).

QUESTION #3: Is the attorney certification provision in R1:19-11-219 required by statute? **RESPONSE:** Ark. Code Ann. § 19-11-219(c) states "The director shall adopt rules to implement this section, including without limitation rules to" before going into designated contracts and requirements for attorneys who may review contracts. The rule requiring attorneys to certify they have reviewed the contract comes from the need to clarify what the attorneys who may review are reviewing in the designated contracts. As further explained below, the four items listed in the rule seek to ensure the contract remains in compliance with state law. An earlier draft of the rule provided, in relevant part, as follows:

Where the standard terms and conditions that have already been approved by OSP are not used, or they have been used but substantively amended, the reviewing attorney shall confirm, in a writing…"

OSP is seeking confirmation in writing that contracts which modify the standard terms and conditions complies with state law as discussed below.

QUESTION #4: Where does the list of certification requirements in R1:19-11-219(a)-(d) come from? **RESPONSE:** R1:19-11-219(a) comes from the doctrine of sovereign immunity. *See* Ark. Const. art. 5, § 20; *Bd. of Trustees of Univ. of Ark. v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616 (2018). R1:19-11-219(b) comes from the doctrine of sovereign immunity. R1:19-11-219(c) comes from the Arkansas Freedom of Information Act of 1967 (*see* Ark. Code Ann. § 25-19-101 et al.). R1:19-11-219(d) comes from Ark. Code Ann. § 19-4-1206(b)(3)(B) ("It shall be the responsibility and duty of each disbursing officer or agent to certify that the services have been performed or the goods received.").

QUESTION #5: Is there statutory authority for the definition of "substantial savings" in R2:19-11-223? **RESPONSE:** Ark. Code Ann. § 19-11-223(d)(5)(B) states "The director shall adopt rules to include any necessary conditions, reporting, or document retention standards related to the director's duty to promote mandatory state contract use under this

subsection." Ark. Code Ann. § 19-11-223(b)(2)(A) states, "Except as provided in § 19-11-233, the director may approve an exemption from a mandatory state contract awarded under this section only if the state agency demonstrates that substantial savings will likely be effected by purchasing outside of the mandatory state contract." The authority to define "substantial savings" comes from the authority to adopt rules to include any necessary conditions related to the director's duty to promote mandatory state contract use. With "substantial savings" being what agencies are required to demonstrate in order to seek an exemption from a mandatory state contract, a standard definition is vital to a non-arbitrary system of administering mandatory state contract usage. R2:19-11-223 seeks to strike a reasonable balance between an individual agency's need to find savings, and the State's need to maintain favorable pricing through volume purchasing. In any event, clarity is needed on what "substantial savings" an agency must demonstrate to seek exemption from a mandatory state contract.

QUESTION #6: Act 419's training requirements (as codified at Ark. Code Ann. § 19-11-229) go into effect on July 1, 2021. Considering this fact, is proposed rule R11:19-11-229 intended to take effect on January 1, 2020, as indicated on the completed questionnaire? **RESPONSE:** Yes, because the section of the rule that pertains to training (R11:19-11-229(c)) is merely clarifying the administrative interpretation and has no practical impact until the statutory mandate it corresponds to becomes effective on July 1, 2021. OSP would rather have the rule's guidance in place before the law becomes effective than wait until or after the effective date.

QUESTION #7: Is there statutory authority for the points allocation provision of R5:19-11-230(b)(1)? **RESPONSE:** Act 419 of 2019 added new statutory language to Ark. Code Ann. § 19-11-230. In part, it added:

(3) The state's prior experience with an offeror may be considered and *scored* as part of the offeror's proposal only:
(A) To the extent that the request for proposals requests that all offerors provide references; and
(B) If the offeror's past performance with the state occurred no more than three (3) years before the offeror submitted the proposal.
(4) A state agency shall not include prior experience with the state as a mandatory requirement for submitting a proposal under this section.

Act 419 (emphasis added). Because this is new statutory language, it did not have a rule promulgated to correspond with its novel requirements. Under this new language, Ark. Code Ann. § 19-11-230(d)(3) limits the ways in which an offeror's past performance may be considered and "scored," and Ark. Code Ann. § 19-11-230(d)(4) provides that an offeror's past performance with the state cannot be made a mandatory prerequisite

for submitting a proposal. As a practical matter, proposals have been and are "scored" by means of a point allocation system. The rule seeks to clarify for procurement officials in a practical fashion the new statutory limits on the way in which points can be used to "score" prior experience consistent with the new language in Ark. Code Ann. § 19-11-230(d)(3) and (4).

QUESTION #8: Does R1:19-11-238's seven-year term-length limit for contracts apply if a longer term is permitted by statute as implied in Ark. Code Ann. § 19-11-238(a)? **RESPONSE:** No. The rule, as the statute, is only intended to apply to contracts that are not otherwise exempt from Arkansas Procurement Law. An earlier draft of the rule provided, in relevant part, as follows:

A non-exempt contract may be entered into for up to a maximum period of a total of seven (7) years.

It was abandoned, but it or a similar articulation can be adopted if you think it would more clearly convey OSP's intent not to reach contracts that are exempt from Arkansas Procurement Law or are governed by a particular law that puts them outside of the law of general application.

QUESTION #9: Is there statutory authority for the definitions in R2:19-11-265(b)? **RESPONSE:** The definitions "initial contract amount" and "total projected contract amount" mirror Ark. Code Ann. § 19-11-267(b)(1), Ark. Code Ann. § 19-11-273(a). "Essential terms of a contract" is defined in conformity with Arkansas common law as to the fundamental terms that must exist to create an enforceable contract. Accordingly, this definition would seem to align with the intent of Ark. Code Ann. § 19-11-265(a)(4)(A)(ii)(c) while clarifying for agencies the definition of the term.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked additional questions in follow-up:

(1) Section R1:19-11-203(a) – The rule provides that "real property" is expressly excluded by Ark. Code Ann. § 19-11-203(4)(B); however, Act 417 of 2019, § 1, appears to have stricken the term "real property" from the section addressing what "commodities" does not include. Can you explain the reason for the difference? **RESPONSE:** OSP wants its rules to offer clear guidance. It is trying to make something that is implicit in the law explicit in the rule. Act 417 of 2019, as codified in Ark. Code Ann. § 19-11-203(4)(B), expressly provides that the defined term "Commodities" "does not include: . . . Capital improvements." The term "Capital improvements" means "all lands," among other things. *See* Ark. Code Ann. § 19-11-203(3)(A). At law, the term "land" is understood to mean "[a]n estate or interest in real property." *See Black's Law*

Dictionary 881 (7th ed. 1999). Similarly, it is understood at law that "real property" means "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." *See id.* at 1234. Although this may be clear to lawyers familiar with property law, it may not be to all agency staff charged with carrying out procurement. Because the term "Commodities," as defined in Act 417 of 2019, does not include "Capital improvements," which term is defined to include land and structures built on it, it logically follows that the term "Commodities" cannot include "real property." In other words, the exclusion of real property from the definition of "Commodities" is implicit in the statutory framework. The rule just makes this explicit for those people who may not be familiar with the term "Capital improvements," but who may be familiar with the more common term "real property." OSP regularly gets calls from people who mistakenly assume that its rules apply to contracts for the sale or purchase of real property, and OSP would like its rules to make it clear that they do not.

(2) Section R1:19-11-203(a) – Is there a reason that OSP is using the term "excluded commodities and services" when the term used in Ark. Code Ann. § 19-11-203(4)(B)(ii), as amended by Act 417, § 1, is "exempt commodities and services"? **RESPONSE:** No. If the distinction between "exempt" and "excluded" is deemed material by the Committee, there isn't any reason why the phrase "excluded commodities and services" cannot be replaced with "exempt commodities and services."

(3) Section R1:19-11-203(b-e) – Can you provide the origin for the definitions of these terms used by OSP in these rules? **RESPONSE:** The terms in R1:19-11-203(b)-(e), "Consulting services," "Employment agreement," "Personal services," [and] "Professional services," are all terms used in the subchapter known as Arkansas Procurement Law but which are not defined in the subchapter.

The OSP definition of *"Consulting services"* originates in the ordinary meaning of the word "consulting" in the English language. *See* https://www.merriam-webster.com/dictionary/consulting?utm_campaign=sd&utm_medium=serp&utm_source=jsonld ("providing professional or expert advice").

The OSP definition of *"Employment agreement"* is a blended definition that draws on the legal definition of the term "employment contract," as defined in *Black's Law Dictionary* 321 ("A contract between an employer and employee in which the terms and conditions of employment are stated."), but which also draws on the definitions that mark the legal distinction between an employee and an independent contractor. *See* AMI 701 Agent—Employee—Definition ("An *[agent][employee]* is a person who, by agreement with another called the *[principal][employer]*, acts for

the *[principal][employer]* and is subject to *[his][her][its]* control. The agreement may be oral or written or implied from the conduct of the parties and may be with or without compensation. If one person has the right to control the actions of another at a given time, the relationship of *[principal and agent][employer and employee]* may exist at that time, even though the right to control may not actually have been exercised."); AMI 707 Agent or Independent Contractor (". . . An independent contractor is one who, in the course of *[his][her]* independent occupation, is responsible for the performance of certain work, uses *[his][her]* own methods to accomplish it, and is subject to the control of the employer only as to the result of *[his][her]* work."). OSP drafted the definition comprehensively because some procurement staff might not be aware of the legal distinction between an employee and an independent contractor.

The OSP definition of *"Personal services"* originates in well-established contract law recognizing that a personal service contract is one where the identity of the person performing the service is material. *See, e.g.*, *Redman v. Mena Gen. Hosp*., 152 S.W.2d 542, 544 (Ark. 1941) (adopting the definition articulated in 17 C.J.S. *Contracts*, § 10, wherein "personal contract" is defined as "a contract for personal services; a contract in which the personality of one of the parties is material"). *See also* http://www.duhaime.org/LegalDictionary/P/PersonalServicesContract.aspx (explaining that "[t]he distinctive feature of a personal service contract is that it must follow the person with the skills at the root of the contract.").

The OSP definition of *"Professional services"* is a blended definition that includes a generally accepted definition of the term "professional," *see Black's Law Dictionary* 1226 ("A person who belongs to a learned professional or whose occupation requires a high level of training and proficiency."), and pulls in the professional services specifically identified in Ark. Code Ann. § 19-11-801. This is done because the statutory definition for "Technical and general services" specifically provides that "Technical and general services" shall not be construed to include the procurement of *professional services under § 19-11-801 et seq*." Ark. Code Ann. § 19-11-203(34)(B) (emphasis added).

(4) Section R1:19-11-203(f) – Is there a reason that OSP's definition of "services" does not track that used in Ark. Code Ann. § 19-11-203(27), as amended by Act 417, § 3? **RESPONSE:** Yes. An earlier version started off tracking the statute and then provided the additional clarification, but during an internal review it was decided that the language that tracked the statute verbatim was merely redundant and that only the language that further clarified and elaborated the statutory definition needed to be kept. OSP has no objection to explicitly incorporating the statutory definition to the front portion of the rule since OSP understands it to be the base on which the rule rests. However, additional clarification is needed because

the root definition in the statute does not, by itself, provide enough guidance for procurement officials to reliably draw a clear distinction between labor that is incidental to a contract for the purchase of future goods and labor that is paid for under a contract requiring the production of a commodity or commodities. Although they both require some degree of labor, the contract in the first case is for the procurement of commodities and the contract in the second case is a contract for services. The rule seeks to make this distinction clear because it is an essential distinction with significant legal consequences.

(5) Section R1:19-11-203(g) –
(a) Can you provide the origin for the definition of the term used by OSP in these rules?

(b) Is there a reason OSP chose to reference Ark. Code Ann. § 19-11-203(27)(C) under "technical and general services" when that subsection of the statute falls under the definition of "services," which is defined in Section R1:19-11-203(f)?
RESPONSE: The definition of "technical and general services" in R1:19-11-203(g) expressly adopts the statutory definition in the statute.

In an earlier draft, the language referring to Ark. Code Ann. § 19-11-203(27)(C) was originally connected to the general definition of "services" that preceded definitions of specific types of services contracts, such as "professional services" and "technical and general services," etc. OSP proposes restoring it to the end of the comprehensive definition of "services" as follows:

> (f) "**Services**" is defined at Ark. Code Ann. § 19-11-203(27)(A). It refers to the labor, time, or effort that a contractor furnishes under a contract as performance for separate consideration and not labor, time, or effort included in or incident to the production or sale of a commodity or commodities.
>
> Labor, time, or effort are "included in" the production or sale of a commodity if expended within either the production or sale of the commodity and are not set apart for separate consideration outside of the purchase price of the commodity.
>
> Labor, time, or effort are "incident to" the production or sale of a commodity if they accompany the production or sale of the commodity as a minor consideration, even if a separate but relatively small fee is paid to the contractor for it. For example, where the purchase of a computer includes delivery and installation for a relatively small fee, the labor, time, and effort involved in the delivery and installation of the computer are incident to the sale of the commodity.

After the State's procurement and acceptance of a commodity as conforming to the contract, subsequent labor, time, or effort furnished by a contractor with respect to the commodity are considered "**services**" for purposes of Arkansas Procurement Law if they are not incident to the original procurement of the commodity and there is a separate consideration paid for those services. Labor, time, or effort that a contractor furnishes for the customization, configuration, or development of software, beyond that which is incident to the procurement, installation, maintenance, and routine technical support of the software, are considered "**services**" for purposes of Ark. Code Ann. § 19-11-265.

Based on the exclusionary definition in Ark. Code Ann. § 19-11-203(27)(C), the following types of contracts are excluded from being considered a contract requiring "**services**" within the meaning of Ark. Code Ann. § 19-11-265: (1) employment agreements; (2) collective bargaining agreements; (3) architectural or engineering contracts requiring approval of the Division of Building Authority Division of the Department of Transformation and Shared Services or higher education; and (4) other commodities and services exempted by law.

(6) Section R3:19-11-203 – The rule references "capital improvements valued at less than the bid requirement threshold stated in Ark. Code Ann. § 22-9-202(b)(2)(C)"; however, it appears that Act 658 of 2019, § 3, amended that language to read "[c]apital improvements valued at less than the amount stated in § 22-9-203." Can you explain the reason for the difference? **RESPONSE:** The rule should be revised to correctly reflect the amendment required by Act 658 of 2019, § 3. The definitional section of the Arkansas Procurement Law was amended by four different Acts in 2019 and the amendment changing the citation from Ark. Code Ann. § 22-9-202(b)(2)(C) to Ark. Code Ann. § 22-9-203 got missed.

(7) Section R1:19-11-218(A) – The rule references that the delegation may be for a specific time not exceeding two years and that the delegation shall be made by a written order "or by rules." However, Act 420 of 2019, § 1, appears to require that (a) the delegation order shall be in writing, *i.e.*, no reference to rules, and (b) shall include an expiration date. Can you explain the reason for the differences? **RESPONSE:** The current rule provides that delegation may be made by a written order "or by regulations." OSP Rule R1:19-11-218. The word "rules" was merely substituted for the word "regulations" consistent with the global change that was recently made throughout the Arkansas Code Annotated.

Whatever the original reason may have been for the reference to "regulations" in the rule, it squares with the statutory authority granted in

Ark. Code Ann. § 19-11-220(a), which expressly provides that a state agency may be authorized "by rule" to have an agency procurement official. *See* Ark. Code Ann. § 19-11-220(a) ("In addition to any state agency authorized by rule to have an agency procurement official . . ."). An agency procurement official is, by definition, a person authorized to exercise procurement authority. *See* Ark. Code Ann. § 19-11-203(1)(A). Consequently, authorizing a state agency "by rule" to have an agency procurement official necessarily entails delegating some procurement authority to the agency "by rule." The words "or by rules" merely acknowledges that state agencies may also be authorized, by rule, to exercise some procurement authority. *See* Ark. Code Ann. § 19-11-220(a).

(8) Section R1:19-11-218(B) – This section provides that the delegations shall remain in force according to the original terms unless modified or rescinded or until the expiration date *provided by law*; however, Act 420, § 1, appears to provide that (a) the delegation *itself* must contain an expiration date and (b) that the delegation shall remain in effect under the original terms unless those terms are modified or rescinded *in writing*. Can you explain the reason for the differences? **RESPONSE:** The rule does not replace the statute; it supplements it, so the statute is not reiterated verbatim. Before the enactment of Act 420 of 2019, delegation orders did not have an expiration date imposed by law. The existing rule, which already provides that delegation orders remain in force according to their terms or until rescinded, was simply amended to reflect the fact that now there is also an outer limit on the duration of a delegation order that is imposed by law. The existing rule would be amended by the proposed rule by adding the underlined text:

> All delegations of procurement authority shall remain in force according to the original terms thereof unless modified or until rescinded by the State Procurement Director<u>, or until the expiration date provided by law, whichever comes first. The term of delegation authority is counted from, and includes the date of, the effective date stated in the written delegation order.</u>

To mitigate any concern about the words "in writing" not appearing in the proposed rule, they can be inserted at the beginning of the proposed amendment to read:

> All delegations of procurement authority shall remain in force according to the original terms thereof unless modified or until rescinded by the State Procurement Director <u>in writing, or until the expiration date provided by law, whichever comes first. The term of delegation authority is counted from, and includes the date of, the effective date stated in the written delegation order.</u>

(9) Section R1:19-11-218(D) – The proposed rule provides that training shall be completed as *may* be required; however, Act 420, § 1, states that a person given authority "shall complete training . . ., as provided for in the subchapter and in the rules adopted by the director, before the written delegation order is issued."
(a) Can you explain the difference between the rule and the Act as it pertains to the required training? **RESPONSE:** The rule and the Act both use the word "shall" to mandate training for a designee. Although the statute mandates training on state procurement laws, it allows for the training to be determined according to rules yet to be adopted by the Director. The rule, like the Act, also uses "shall" to reflect that completing required training is mandatory. It only uses "may" to signal that the mandate applies to whatever type of training "may" be required. The director expects different types of training will be required depending on the different types of procurement activities and authority that the director may delegate. For example, someone receiving a delegation order to perform an invitation for bids will not need the same training as someone receiving a delegation order to make a cooperative purchasing determination.

(b) The Act requires that the Director adopt rules to outline the procurement training required. Will these rules be promulgated separately? **RESPONSE:** Yes.

(10) Section R1:19-11-218(E) – The rule provides that delegation orders may be suspended by the Director. On what authority does the OSP rely for taking such an action? **RESPONSE:** The Act explicitly provides that written delegation orders, "Remain in effect under the original terms *unless* the terms of the written delegation order are modified or rescinded in writing by the director." Ark. Code Ann. § 19-11-218(a)(3)(B)(iii) (emphasis added). The word "unless," if allowed its usual meaning, signals that the authority delegated under a delegation order does not last unconditionally, but instead only persists subject to the condition that it is not modified or rescinded. Since the Act explicitly allows the terms of a written delegation order to be modified in some fashion short of being completely rescinded, then implicitly the Director retains a degree of discretion to affect the effectiveness of a delegation order short of completely rescinding it. Suspending authority granted under a delegation order seems to be a reasonably intermediate alternative to completely rescinding an order. This also seems consistent with the State Procurement Director's statutory mandate to supervise designees and ensure compliance by designees. *See* Ark. Code Ann. § 19-11-217(c)(1) ("[The Director s]hall procure or supervise the procurement of all commodities and services for each state agency not having an agency procurement official and, when requested to do so by such an official, procure commodities and services not otherwise under state contract");

and Ark. Code Ann. § 19-11-217(c)(8) ("[The State Procurement Director s]hall ensure compliance with this subchapter and implementing rules by reviewing and monitoring procurements conducted by any designee, department, agency, or official delegated authority under this subchapter.").

(11) Section R1:19-11-219 – On what authority is OSP relying in establishing the findings to be certified by a reviewing attorney? **RESPONSE:** Act 418 of 2019 gives the State Procurement Director a broad mandate to adopt rules implementing attorney review and designating contracts to be reviewed. In pertinent part, it provides:

> (c) The director shall adopt rules to implement this section, including without limitation rules to:
>
> (1) Designate contracts that require review under this section, which may include without limitation contracts that:
>
> (A) Exceed a certain dollar amount;
>
> (B) Modify the standard state terms and conditions; and
>
> (C) Are based on other stated criteria; and
>
> (2) Identify the requirements for the attorneys who may review contracts under this section, including without limitation:
>
> (A) An attorney employed with the Office of State Procurement, an institution of higher education, or the Office of the Attorney General; and
>
> (B) Any other attorney employed by the state and licensed to practice law in Arkansas.

Ark. Code Ann. § 19-11-219(c). The basic list of specific items to be reviewed were developed in consultation with attorneys at the Arkansas Attorney General's offices. They address sovereign immunity, indemnification, FOIA compliance, and compliance with Arkansas constitutional provisions and public law prohibiting the State from paying for commodities and services before receipt.

(12) Section R1:19-11-223(b) – Is there a reason that the language used in the rule does not track that used in Ark. Code Ann. § 19-11-223(b)(2)(B)(ii), as amended by Act 421 of 2019, § 2? **RESPONSE:** Yes. The statutory language used in Ark. Code Ann. § 19-11-223(b)(2)(B)(ii) provides that denial of a request for an exemption is not required to be in writing, but it does not provide a clear standard for the way or ways in which denials may be communicated. The OSP rule seeks to provide supplemental guidance as to what is permissible since the statute only clarifies what is not required.

(13) Section R2:19-11-223(a) – Is there a reason that the OSP did not enumerate the services as they are enumerated in Ark. Code Ann. § 19-11-

223(b)(1), as amended by Act 421, § 2, *i.e.*, "technical and general services, and professional and consultant services"? **RESPONSE:** Yes. Thanks to Act 417 of 2019, Section 3, the definition of "Services" at Ark. Code Ann. § 19-11-203(27) was amended to include technical and general services, consulting services, and professional services, thus rendering the word "Services" into an effective shorthand that encompasses all of these types of contracts without the need for enumerating each separate subcategory of services contract. As a result of this amendment, one word (services) now can take the place of nine (technical and general services, and professional and consultant services).

(14) Section R2:19-11-223(b) – Can you provide the origin for the definition of "substantial savings"? **RESPONSE:** Arkansas Procurement Law only allows the State Procurement Director to approve an exemption from a mandatory contract when an agency demonstrates "substantial savings will likely be effected by purchasing outside of the mandatory state contract." Ark. Code Ann. § 19-11-223(b)(2)(A). However, the term "substantial savings" is not defined in Arkansas Procurement Law.

In order to have a uniform rule for administration of this statutory provision rather than arbitrary standard, OSP is proposing a rule through the promulgation process that will provide a standard essential to the orderly administration of the law. This is within the statutory mandate given to the Director to "adopt rules to include any necessary conditions, reporting, or document retention standards related to the director's duty to promote mandatory state contract use under this subsection." Ark. Code Ann. § 19-11-223(5)(B).

(15) Section R6:19-11-229 –
(a) On what authority does the OSP rely for its provision that a solicitation conference may be held by the State Procurement Director, as Ark. Code Ann. § 19-11-273, as amended by Act 419 of 2019, § 12, appears to permit a state agency to hold such a conference? **RESPONSE:** The State Procurement Director is the principal procurement officer of the State (Ark. Code Ann. § 19-11-217(a)) and is mandated to procure or supervise the procurement of all commodities for each state agency without an agency procurement official. Ark. Code Ann. § 19-11-217(c)(1). Although Ark. Code Ann. § 19-11-273 clearly permits an agency to hold a solicitation conference in connection with a procurement, it would be bizarre to read the statute as silently prohibiting the State Procurement Director from holding a solicitation conference, especially when the Director's approval (or that of another head of a procurement agency) is required when a solicitation seeks to make vendor participation in a solicitation conference mandatory. *See* Ark. Code Ann. § 19-11-273(b)(2). Furthermore, solicitation conferences may be required as part of an invitation for bids/competitive sealed bidding (*see* Ark. Code Ann.

§ 19-11-229(5)), and there has never been any question about the authority of the State Procurement Director to perform or supervise such a procurement.

(b) What is the authority on which OSP relies for the second sentence of the section that concerns discussions during a solicitation conference? The statute appears to speak to statements not changing the invitation for bids, request for proposals, or request for statements of qualifications and performance data, but does not appear to reference changes to competitive sealed bids? **RESPONSE:** An invitation for bids is the same thing as a competitive sealed bidding. *See* Ark. Code Ann. § 19-11-229(a).

(16) Section R8:19-11-229(2)(A) – It appears this section is premised upon the change made by Act 419, § 4, to Ark. Code Ann. § 19-11-229(f). Is there a reason that the second prong for when a time discount may be considered was omitted, *i.e.*, "[u]nder the structured terms of the invitation for bids"? **RESPONSE:** OSP reads each procurement rule alongside of a corresponding statute, which is why each OSP rule is enumerated to specifically reference a procurement statute and why OSP publishes a compilation of the procurement statutes with each statute followed by any corresponding rules. OSP rules do not stand in isolation from the procurement statutes they are tied to; they accompany and compliment them. Unless OSP sees a need to clarify, amplify, or supplement a statute for purposes of the orderly administration of the law, it sometimes forgoes verbatim repetition in a rule of the statute that it depends on and corresponds to since that language is already present in the statute alongside the rule.

(17) Section R2-19-11-230.2 – Is there a stray "if" in the introductory language? **RESPONSE:** Yes.

(18) Section R2-19-11-230.2(3) – Is there a reason that the rule omitted the language from Ark. Code Ann. § 19-11-230(d)(2)(C), as amended by Act 419, § 8, that the written determination must be submitted for legislative review "before the request for proposals is issued"? **RESPONSE:** There is no substantive reason why the entirety of the statute is not repeated in the rule, but as a practical matter it does not need to be repeated by OSP in order to be effective. In this case OSP believes the matter of timing to be clearly and comprehensively addressed by the statute. OSP reads each procurement rule alongside of its corresponding statute, which is why each OSP rule is enumerated to specifically reference a procurement statute and why OSP publishes a compilation of the procurement statutes with each statute followed by any corresponding rules. OSP rules do not stand in isolation from the procurement statutes they are tied to; they accompany and compliment them. Consequently,

unless OSP sees a need to clarify, amplify, or supplement a statute for purposes of the orderly administration of the law, it sometimes forgoes verbatim repetition in a rule of the statute that it depends on and corresponds to since that language is already present in the statute that is to be read alongside the rule.

(19) Section R5:19-11-230(b)(1) – It appears that Act 419, § 8, amending Ark. Code Ann. § 19-11-230(d)(3), addresses the only instances in which a state's prior experience with an offeror may be considered and scored. Is there a reason that the rule does not track the language in the Act? **RESPONSE:** OSP reads each procurement rule alongside of a corresponding statute, which is why each OSP rule is enumerated to specifically reference a procurement statute and why OSP publishes a compilation of the procurement statutes with each statute followed by any corresponding rules. OSP rules do not stand in isolation from the procurement statutes they are tied to; they accompany and compliment them. Unless OSP sees a need to clarify, amplify, or supplement a statute for purposes of the orderly administration of the law, it sometimes forgoes verbatim repetition in a rule of the statute that it depends on and corresponds to since that language is already present in the statute alongside the rule.

(20) Section R5:19-11-230(d) – In the same vein, is there a reason that the language used in the rule regarding private evaluators does not track each of the requirements set forth in Ark. Code Ann. § 19-11-230(h)(2), as amended by Act 419, § 10? **RESPONSE:** OSP reads each procurement rule alongside of a corresponding statute, which is why each OSP rule is enumerated to specifically reference a procurement statute and why OSP publishes a compilation of the procurement statutes with each statute followed by any corresponding rules. OSP rules do not stand in isolation from the procurement statutes they are tied to; they accompany and compliment them. Unless OSP sees a need to clarify, amplify, or supplement a statute for purposes of the orderly administration of the law, it sometimes forgoes verbatim repetition in a rule of the statute that it depends on and corresponds to since that language is already present in the statute alongside the rule.

(21) Section R1:19-11-233(a) – What is the rationale behind the striking of this subsection, when similar language was added to Ark. Code Ann. § 19-11-233, as amended by Act 419, § 11? **RESPONSE:** OSP felt the statute required no clarification, rendering R1:19-11-233(a) redundant.

(22) Section R1:19-11-233(c) – In referencing "all services contracts" must be presented for legislative review, does that mean "all" or those meeting the criteria of Ark. Code Ann. § 19-11-265, as amended by Act 417, § 7? **RESPONSE:** The sentence in question states "all services

contracts must be presented for legislative review as required under Ark. Code Ann. § 19-11-265." OSP is of the opinion that "all services contracts" is qualified by and limited to "as required under Ark. Code Ann. § 19-11-265." Therefore, the direct answer to your question is "yes," "all" is limited and qualified to mean all of those meeting the criteria of Ark. Code Ann. § 19-11-265.

(23) Section R1:19-11-238 – Is there a reason that the phrase "if funds for the first fiscal year of the contemplated contract are available at the time of contracting" as found in Ark. Code Ann. § 19-11-238(a) was omitted from the rule? **RESPONSE:** Since R1:19-11-238 doesn't speak to or provide guidance on the funding condition found in the statute, OSP deemed it redundant to repeat the statutory funding condition in the rule.

(24) Section R2:19-11-242(4)(B)(i) – The summary of changes provided references this section, but I do not see it between Section R1:19-11-238 and R1-19-11-244 in the markup provided? **RESPONSE:** Thank you for spotting this error. R2:19-11-242 is not intended to be included in this rules promulgation, and was thus errantly included in the summary of changes.

(25) Sections R1-19-11-244.9 – It appears that there are two sections with this number. **RESPONSE:** Thank you for spotting this error. The second R1:19-11-244.9 should have been renumbered to R1:19-11-244.10.

(26) Section R1:19-11-249(a) – It appears that Ark. Code Ann. § 19-11-249(a)(2)(B)(ii), as amended by Act 421, § 3, requires the State Procurement Director to adopt rules to create a review policy outlining how the economic justification for using a cooperative purchasing agreement may be demonstrated. Is this review policy included in the instant rules or will separate rules be promulgated? **RESPONSE:** R1:19-11-249 requires agencies subject to the Procurement Code to seek a determination from the OSP Director that the cooperative purchasing agreement substantially meets the requirements of the Procurement Code. Part of that determination by the OSP Director includes the economic justification required by Ark. Code Ann. § 19-11-249(a)(2)(B)(ii). The form for requesting a cooperative review request requires that the requestor include a verifiable economic justification as to why using the cooperative purchasing agreement is more cost effective or is likely to realize savings when compared to conducting a solicitation.

Accordingly, OSP is of the opinion that in adopting the revised R1:19-11-249(a), a rule is being adopted that creates the policy of agencies seeking a determination from the OSP Director that includes the economic justification requirement. To that end, OSP has already implemented this approach, and is now requiring the economic justification in the

determinations of whether cooperative purchasing agreements substantially meet the requirements of the Procurement Code.

(27) Section R2:19-11-249 – I see where the provision for the reporting of cooperative contract purchases of state agencies *without* an agency procurement official has been included, but what about Ark. Code Ann. § 19-11-249(b)(1)(B), as amended by Act 421, § 3, which pertains to a state agency *that has* an agency procurement official and requires an annual report to ALC or JBC. Is there a reason that this language was omitted from the rule? **RESPONSE:** R2:19-11-249 is only seeking to provide guidance for agencies required to submit the data to OSP, per Ark. Code Ann. § 19-11-249(b)(1)(A). BLR is in a better position to determine how ALC or JBC wants agencies to deliver their reports to the legislature. OSP does not want to overstep and is not seeking to provide a rule for a reporting process that, per Ark. Code Ann. § 19-11-249(b)(1)(B), happens between the agencies and the legislature. OSP limited the application of this rule to align with the statutory respective Requirements for agencies and OSP.

(28) Section R1:19-11-265(a) – Is there a reason that the rule omits the language "of one (1) or more persons" when it is included in Ark. Code Ann. § 19-11-265(a)(1), as amended by Act 417, § 7, and includes the language "before the execution of the contract" when that language is stricken? **RESPONSE:** "Services" is defined in R1:19-11-265(a) says "Contracts requiring "services" as defined in Arkansas Procurement Law and these rules," thereby including "of one (1) or more persons" in the definition. "Before the execution of the contract" is in the rule to provide agencies with guidance, and reduce confusion, as to what point in the procurement process the contract should be submitted to ALC or JBC.

(29) Section R1:19-11-265(b-d) – On what authority does the OSP rely for these sections? **RESPONSE:** Ark. Code Ann. § 19-11-225 gives the State Procurement Director broad discretion in adopting rules in accordance with the applicable provisions of the Procurement Code. Accordingly, the sections in R1:19-11-265(b-d) are based on caselaw and OSP policy as a result of these issues having led to confusion amongst agencies in the past, and thus necessitating a rule in OSP's opinion.

(30) Section R2:19-11-265(a)(1)(A) – Is there a reason that the Office included the term "initial" prior to contract amount when that term is not included in Ark. Code Ann. § 19-11-365(a)(4)(A)(ii)(a), as amended by Act 417, § 7? Can you have an increase "in" the initial amount on a renewal or extension, or would it be an increase "from" the initial amount? **RESPONSE:** With an increase in total projected contract amount already expressly included in the statutory definition of "material change" at Ark. Code Ann. § 19-11-265(a)(4)(A)(ii)(b), and with total projected contract

amount meaning the total possible number of years of a contract, OSP deduces Ark. Code Ann. § 19-11-265(a)(4)(A)(ii)(a) to be referring to increases in the contract amount during the initial term of a contract. The term "initial contract amount" is defined in R2:19-11-265(b)(1) as "the amount agreed to for the initial term of a contract."

(31) Section R1:19-11-267(c) – Is there a reason that the language included in Ark. Code Ann. § 19-11-267(b)(1), as amended by Act 418, § 4, that the state agency, board, commission, or institution of higher education shall use performance-based standards "that are specifically tailored to the services being provided in the contract" was omitted from the rule? **RESPONSE:** OSP understands the statute to be the base on which the rule rests. Accordingly, OSP does not believe statutory language can be effaced by omission from a rule. The requirement that the performance standards at issue be "specifically tailored to the services being provided in the contract" remains intact and was not in need of comment in a rule. R1:19-11-267(c) is repeating the mandatory performance standards contract thresholds as the launching point for the rest of the rule, and was not intended to also dive into other content already covered by the statute. With all of that being said, OSP certainly does not oppose adding that statutory language if the Committee deems it desirable.

(32) Section R1:19-11-267(h) – On what authority does the OSP rely for exempting such contracts from using performance-based standards? **RESPONSE:** Ark. Code Ann. § 19-11-267(d)(1) gives broad discretion to the OSP Director to promulgate rules to implement and administer this section of the Procurement Code, subject to ALC or JBC approval. The substantive language of R1:19-11-267(h) was previously promulgated, and this author is surmising the original intent of the rule drafters and the ALC reviewers.

Sole source – R1:19-11-267(h)(1) states that if the contract has been awarded to a contractor with whom the state was compelled to contract with due to legal mandates, the primary purpose behind performance standards is moot due to the inability of the State to find a different contractor.

Emergency – The intent of Ark. Code Ann. § 19-11-233 is to provide expedited processes in emergency circumstances, as defined by the statute, where time is of the essence. Given the urgency of an emergency and what is at stake in the event of delay, the time it takes to develop performance standards seems to run contrary to the statutory intent of Ark. Code Ann. § 19-11-233, leading to the R1:19-11-267(h)(2) potential exemption.

(33) Section R1:19-11-268 – The summary states that this section is being repealed due to changes introduced in Act 418; however, while Ark. Code Ann. § 19-11-1013 was repealed as duplicative in § 7 of the Act, it appears that vendor performance reports are still required in certain circumstances pursuant to Ark. Code Ann. § 19-11-268, as amended by Act 418, § 4. Is there a reason this section is being removed in its entirety? **RESPONSE:** The intent of R1:19-11-268 was to reiterate the thresholds and frequency of vendor performance reports. With those specific requirements having been removed by Act 418, that iteration of the rule was incorrect. OSP is of the opinion that the statute is sufficiently clear as to its meaning and reach and does not require a new rule that would merely repeat the statute.

(34) Section R1:19-11-[273] *Solicitation Conferences* – On what authority does the OSP rely for this section? **RESPONSE:** In addition to the general rulemaking authority given to the OSP Director under 19-11-225, OSP has attempted to craft a rule that dovetails with the other forms of communications authorized in law between the state and potential contractors. In that effort, OSP listed in R1:19-11-273 the type of information that could be exchanged in a solicitation conference that remains within those confines.

(35) Section R3:19-11-[273] –
(a) As with question 15(b) above, on what authority does OSP rely for the language concerning discussions?

(b) Is this section duplicative of Section R6:19-11-229?

(c) Does this section conflict with Section R6:19-11-229 in that this section appears to include a caveat to the rule that discussions will not be binding "unless it is subsequently reduced to writing and included in the solicitation" that is not included in Section R6:19-11-229?
RESPONSE: R3:19-11-273 mirrors Ark. Code Ann. § 19-11-273(d) in expressing that statements made during solicitation conferences does not alter solicitations unless made in writing.

R6:19-11-229 is applicable only to IFBs, while R3:19-11-273 is intended to be applicable to solicitation conferences generally, and the language has been modified to better capture this general applicability.

OSP does not believe R6:19-11-229 conflicts because Ark. Code Ann. § 19-11-273(d) states changes must be written. R6:19-11-229 is simply of narrower application because that rule is particular to competitive sealed bidding, which is authorized under Ark. Code Ann. § 19-11-229 and is one of the primary procurement methods. However, OSP would not object to R6:19-11-229 being removed since there is another rule that covers the same subject matter more broadly.

(36) Section R3:19-11-[275] – Is there a reason that the OSP did not simply track the language set forth in Ark. Code Ann. § 19-11-275(e), as amended by Act 419, § 12, concerning information provided in response to a request for information being exempt from the FOIA until one of three events occurs? **RESPONSE:** R3:19-11-275 substantially mirrors Ark. Code Ann. § 19-11-275(e). As it relates to R3:19-11-275(3), an earlier iteration of this proposed rule stated "In the event a final determination is made to not proceed with a solicitation following a request for information, the issuer of the request for information should insert a note or other documentation in the solicitation file of the request for information documenting the date of the determination." Internal concerns were raised this allowed for an open-ended ability to prolong the FOIA exemption indefinitely, and so the 24 month expiration was added to balance the exemption against the FOIA intent to provide transparency.

The proposed effective date is January 1, 2020.

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

LEGAL AUTHORIZATION: These rules implement Acts 417 through 421 of 2019, which made changes to the Arkansas Procurement Law, as well as incorporate changes brought about by Act 658 of 2019. The State Procurement Director has the general authority to promulgate rules implementing the Arkansas Procurement Law. *See* Ark. Code Ann. § 19-11-225(a), as amended by Act 419, § 2. *See also* Ark. Code Ann. § 19-11-217(b)(1). The Director also has the authority to "adopt rules governing the internal procedures of the Office of State Procurement." *See* Ark. Code Ann. § 19-11-217(b)(2). The Director has specific authority to promulgate rules related to emergency procurements (Ark. Code Ann. § 19-11-233), performance-based contracts (Ark. Code Ann. § 19-11-267(d)(1)), and contract review (Ark. Code Ann. § 19-11-219(c), as amended by Act 418, § 2).

Act 417, sponsored by Representative Jim Dotson, amended the review and reporting requirements for service contracts and provided for the tracking and reporting of contracts procured by state agencies. As codified at Ark. Code Ann. § 19-11-217(c)(9), it required the Director to maintain "a roster of expiring contracts entered into by a state agency for which there is no new requisition." Act 418, also sponsored by Representative Dotson, amended the law concerning the content, term, and review of contracts procured by the state. It also required the use of performance-based contracts and amended vendor performance report requirements.

Act 419, sponsored by Representative Jeff Wardlaw, amended the law concerning various procurement methods and provided for the training and certification of procurement officials. It also required additional legislative review of procurement rules. The Act, as codified at Ark. Code Ann. § 19-11-276(d)(2), specifically allows the Director to promulgate rules specifying procurement certification revocation procedures.

Act 420, sponsored by Representative Wardlaw, amended the law concerning the Director's delegation authority. It also amended the law concerning protests of solicitations and awards under the Arkansas Procurement Law. The Act, as codified at Ark. Code Ann. § 19-11-218(b), specifically requires the Director to adopt rules regarding written delegation orders and procurement training.

Act 421, also sponsored by Representative Wardlaw, amended the law concerning state contracts and cooperative purchasing agreements. As codified at Ark. Code Ann. § 19-11-223(d)(5), it requires the Director to promulgate rules "related to the [D]irector's duty to promote mandatory state contract use" as detailed.

Act 658, sponsored by Representative Jack Ladyman, amended the law concerning state agency capital improvement contracts for purposes of uniformity.

E. Proposed Rules Recommending Expedited Process and Procedure for Occupational Licensure Pursuant to Ark. Code Ann. § 17-1-106(c), as Amended by Act 820 of 2019

1. <u>DEPARTMENT OF PUBLIC SAFETY, DIVISION OF ARKANSAS STATE POLICE</u> (Ms. Mary Claire McLaurin, Lt. Michael Moyer)

a. Amendment to the Division of Arkansas State Police Rules for Licensing and Regulation of Private Investigators, Private Security Agencies, Alarm Systems Companies, Polygraph Examiners, and Voice Stress Analysis Examiners

b. Amendment to the Division of Arkansas State Police Used Motor Vehicle Dealer Licensing Rules

F. Adjournment.