ADMINISTRATIVE RULES SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL

Tuesday, September 14, 2021
9:00 a.m.
Room A, MAC
Little Rock, Arkansas

A. Call to Order.

B. Reports of the Executive Subcommittee.

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

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

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

<u>DESCRIPTION</u>: The Arkansas Department of Agriculture ("Department") seeks to repeal the Arkansas Livestock and Poultry Commission's ("Commission") existing rules for Disbursement of State Funds for Fairs and Livestock Shows.

State law previously required the Commission to grade fairs based on a point system developed by Commission rules. The Commission's rules awarded points based on many specific but far-ranging criteria including, but not limited to, the duration of the fair, the population attendance, whether numbered gate tickets with stubs are sold, whether fairs appointed delegates to attend the Arkansas Fair Managers Convention, and the types and numbers of exhibits at the fair, etc. The fairs were then funded based on the fair's total points in relation to the total points of all counties with qualifying associations.

During the 2021 session of the Arkansas General Assembly, the legislature passed Act 700, which repealed the current fair funding point system. Instead of a point system, Act 700 provides funds based on a historical average of total fair-funding provided by the State. The Act requires funding recipients to keep financial records and submit annual financial reports to the Department and Arkansas Legislative Audit. The

Act is self-executing and does not require the Department to promulgate rules to implement the law.

Prior to Act 700, the Commission was required to promulgate rules to develop the point system and grade fairs for funding based on the criteria it developed. Now that Act 700 has repealed the point system in favor of providing funding based on historical funding averages, the Commission's rules no longer are necessary, and further, they conflict with the new funding system in Act 700. It is therefore necessary to repeal the current fair funding rules, and because Act 700 is self-executing, it is not necessary to promulgate any further rules in response to the Act.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on July 25, 2021. The Commission received no public comments.

The proposed effective date is November 1, 2021.

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

LEGAL AUTHORIZATION: Previously, the Arkansas Livestock and Poultry Commission was permitted to formulate necessary and appropriate rules for the grading of fairs on a point system in cooperation with an ad hoc advisory committee formed of representatives of agriculture consisting of representatives from the United States Department of Agriculture, the University of Arkansas Cooperative Extension Service, the Office of Agricultural Science and Technology of the Division of Career and Technical Education, and the Arkansas Fair Managers Association, which was to make recommendations as to criteria for the allotment of grade points to the Commission. *See* Ark. Code Ann. § 2-36-101(a). Amendments were made to the statute, including the removal of this language, by Act 700 of 2021, which was sponsored by Senator James Sturch and established a fair-funding program within the Department of Agriculture, repealed existing law regarding livestock shows and fairs, and established the Agri Fair Fund.

b. SUBJECT: Garbage Feeding

DESCRIPTION: The Arkansas Department of Agriculture ("Department") proposes amendments to the Garbage Feeding rules of the Arkansas Livestock and Poultry Commission ("Commission").

The Commission's current rules authorize the Commission to issue a permit for the feeding of garbage to swine. On December 12, 2019, the Commission proposed amendments to the rules to ban the feeding of

garbage, including any animal or vegetable wastes resulting from handling, preparation, cooking, and consumption of foods, and parts of animal carcasses, to swine. The Administrative Procedure Act process for promulgation for those amendments then began.

At the ALC Administrative Rules Review Subcommittee meeting June 17, 2020, committee members had concerns about the proposed changes, specifically the prohibition against feeding vegetable wastes and the broad discretion the Commission has in penalty assessment. The Department agreed to pull the rules back and address the Subcommittee's concerns. At its July 22, 2020 meeting, the Commission approved a new version to address those issues.

Subsequent to that approval, it was determined that a potential conflict existed between the proposed rules and the then-existing law regarding fowl carcass disposal. During the 2021 session of the Arkansas General Assembly, the legislature passed Act 716, which amended the fowl carcass disposal law, Ark. Code Ann.§ 2-40-403, and resolved the conflict by eliminating cooking for swine food as an acceptable method of fowl carcass disposal. On April 16, 2021, the Commission eliminated the feeding of meat and meat by-products from the proposed rules and voted to move forward with the new rules.

The proposed rules:

- prohibit feeding of meat and meat by-products to swine and allowing swine to have access to garbage and garbage dumps;
- allow feeding of vegetable wastes to swine;
- authorize the State Veterinarian to quarantine swine that have been fed meat or meat by-products; and
- provide for a warning letter for first offenses.

Feeding garbage to swine is a direct path for introducing diseases to swine. The spread of African Swine Fever ("ASFV") has been directly linked to garbage feeding. ASFV is a serious, highly contagious, viral disease of pigs that can spread very rapidly in swine populations by direct or indirect contact. It can persist for long periods in uncooked swine products, facilitating its introduction into new areas. This virus can also become endemic in feral hogs, and transmission cycles between these animals and ticks can complicate or even prevent eradication. ASFV isolates vary in virulence from highly pathogenic strains that cause near 100% mortality to low-virulence isolates that can be difficult to diagnose. There is currently no vaccine or treatment.

Industry has prohibited garbage feeding in commercial operations. Twenty-two (22) states have banned the practice of private owners feeding

garbage to swine. No garbage feeding permits have been issued by the Commission to swine operations in several years.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on July 25, 2021. The Commission received no public comments.

The proposed effective date is November 1, 2021.

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

LEGAL AUTHORIZATION: Authority for the control, suppression, and eradication of livestock and poultry diseases and pests, and supervision of livestock and poultry work in this state, including authority to promulgate rules governing the handling, sale, and use of vaccines, antigens, and other biological products used for reportable diseases and emergencies affecting livestock and poultry, is vested in the Arkansas Livestock and Poultry Commission. *See* Ark. Code Ann. § 2-33-107(a). Pursuant to Arkansas Code Annotated § 2-33-107(c), 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.

c. SUBJECT: Disposal of Large Animal and Poultry Carcasses and REPEALS

DESCRIPTION: The Arkansas Department of Agriculture ("Department") proposes a new rule regarding Disposal of Large Animal and Poultry Carcasses and the repeal of two existing carcass disposal rules, promulgated by the Arkansas Livestock and Poultry Commission ("Commission").

Disposal of animal carcasses needs to be done in a manner that is safe and does not cause issues for the surrounding community. The Commission currently has one rule for disposal of large animal carcasses and one rule for disposal of poultry carcasses dating back to the 1990s and early 2000s. In early 2020, Department staff held meetings with an advisory committee comprised of producers, veterinarians, and other industry representatives and was able to combine those two rules into one rule. On April 24, 2020, the Commission voted to repeal the two existing rules and go forward with promulgation of the combined rule.

Subsequent to that approval, it was determined that a potential conflict existed between the proposed rule and the then-existing law regarding fowl carcass disposal. During the 2021 session of the Arkansas General

Assembly, the legislature passed Act 716, which amended the fowl carcass disposal law, Ark. Code Ann. § 2-40-403, and resolved the conflict by eliminating extrusion and cooking for swine food as acceptable methods of disposal. On April 16, 2021, the Commission made adjustments to the previously proposed rule to be in compliance with Act 716 and voted to move forward with the new rule.

The proposed rulemaking:

- Combines two separate rules;
- Adds a "Definitions" section;
- Removes or clarifies confusing or contradictory language;
- Allows interested parties to find needed information in one document;
- Clarifies proper disposal methods; and
- Repeals two existing rules.

The differences between this proposed rule and the proposed rule approved by the Commission in 2020 include the following:

- Definition of large animal changed to mirror the definition contained in law;
- Clarifies process for rendering as a method for poultry carcass disposal;
- Clarifies that the rule does not apply to dogs, cats, or feral hogs; and
- Adds a section listing the Commission's authority to promulgate the rule.

Extrusion is a method of carcass disposal using high heat and processing the carcass into animal feed. Extrusion and cooking carcasses to use as food for swine has been removed to make the proposed rule compatible with recent changes to the law and the Commission's proposed amendments to its Garbage Feeding rule for swine. Elimination of these methods also reduces bio-security risks by reducing the transportation of poultry carcasses.

The information contained in the Commission's two current carcass disposal rules is in many instances duplicative. Both of the existing rules are 3 to 4 pages each, but by combining the two rules and eliminating duplicative language, the proposed new rule is only four pages long. Combining these into one rule better serves the agricultural community by allowing those who are subject to the rules to more conveniently locate the information they need.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on July 25, 2021. The Commission received no public comments.

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

(1) Section II.A.2. – This section appears to provide that carcasses might be buried in a landfill with prior approval of the State Animal Health Official or the Director of the Commission; however, Ark. Code Ann. § 2-40-1302(a)(2) states that "no large animal carcass shall be buried or otherwise disposed of in any landfill operated under a permit issued by the Division of Environmental Quality." Can you explain? **RESPONSE:** The agency has deleted the portion of the rule that would allow disposal in a landfill. Since that situation would be such a rare occurrence, the agency does not consider this to be a substantial change, and accordingly, we are submitting a version with that reference deleted. Please substitute the attached clean and markup copies for versions submitted earlier.

(2) Section III.A.2.c. – This section references "[a] temperature" that must be achieved during composting to reduce pathogen load. Is there a specific temperature that the Commission intends be achieved? **RESPONSE:** Guidance from the USDA should be followed.

The proposed effective date is November 1, 2021.

FINANCIAL IMPACT: The agency states that the proposed rule and repeals have no financial impact.

LEGAL AUTHORIZATION: The authority for the control, suppression, and eradication of livestock and poultry diseases and pests, and supervision of livestock and poultry work in this state, including authority to promulgate rules governing the handling, sale, and use of vaccines, antigens, and other biological products used for reportable diseases and emergencies affecting livestock and poultry, is vested in the Arkansas Livestock and Poultry Commission. *See* Ark. Code Ann. § 2-33-107(a). Pursuant to Arkansas Code Annotated § 2-33-107(c), 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. It is further the duty of the Commission to establish and promulgate rules in regard to isolation or quarantine of infected animals, disinfection of animals and premises, destruction of incurably diseased animals, and disposal of carcasses as it may deem necessary to prevent the spread of disease. *See* Ark. Code Ann. § 2-40-103(a)(2).

Pursuant to Ark. Code Ann. § 2-40-1302(a)(1), all large animal carcasses and all parts of large animal carcasses shall be disposed of in a manner prescribed by rules of the Arkansas Livestock and Poultry Commission.

The Commission shall further, by rule, specify acceptable methods for the disposal of fowl carcasses, including, but not limited to composting of carcasses, cremation or incineration, on-farm freezing, and rendering. *See* Ark. Code Ann. § 2-40-403, as amended by Act 716 of 2021, § 1. Additionally, the Commission shall, by rule, specify acceptable methods of the disposal of fowl carcasses in the event of a major die-off. *See* Ark. Code Ann. § 2-40-404.

The proposed rules incorporate changes made in light of Act 716 of 2021, sponsored by Representative Jon Eubanks, which amended the law related to the disposal of fowl carcasses.

2. DEPARTMENT OF AGRICULTURE, WATER WELL CONSTRUCTION COMMISSION (Mr. Michael Bynum, Mr. Jim Battreal)

a. SUBJECT: Supervision Rule

DESCRIPTION: The Department of Agriculture's Water Well Construction Commission ("AWWCC") proposes changes to its Supervision Rule, requiring on-site supervision of all water well construction, installation, or repair activities ("Proposed Rule"). Currently, AWWCC Rule 3.2 provides the following: "*3.2 Supervision.* During the construction, alteration, or repair of a water well, or installation or repair of pumping equipment there must be, within a two-hour drive, a person who has obtained a registration certificate and has been certified in the type of construction engaged. The person who has obtained a registration certificate or an apprentice with proper supervision as defined by Rule 3.10.1.1 shall remain informed and have knowledge of the status of the work being accomplished."

AWWCC has traditionally interpreted AWWCC Rule 3.2 to require either an AWWCC-certified person or an apprentice to be on-site during water well construction, alteration, and repair or water pump installation. However, upon further review it has been determined that the current rule can be interpreted to only require an AWWCC-certified person or apprentice be within two hours' drive of the site. Therefore, AWWCC voted at its regular meeting on April 2, 2021, to initiate rulemaking to clarify the Proposed Rule.

Changes to the rule include the following:

- The Proposed Rule requires an AWWCC-certified person or apprentice to be on-site at all times during the construction, alteration, or repair of a water well.
- On-site apprentices must remain under the personal supervision of an AWWCC-certified person, meaning the AWWCC-certified supervisor

must be at the job site with the apprentice or within two hours' traveling distance of the apprentice whenever the apprentice is working in well construction or pump installation.

- When the apprentice's supervisor is not on-site, he or she must be aware at all times of the progress of the work being performed and reachable by wireless phone or radio.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on July 16, 2021. The Commission received no public comments.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 17-50-204(a), the Commission on Water Well Construction shall be responsible for the administration of Title 17, Chapter 50 of the Arkansas Code, concerning water well constructors, and shall adopt, and from time to time amend or repeal, necessary rules governing the installation, construction, repair, and abandonment of water wells and pumping equipment.

3. DEPARTMENT OF ENERGY AND ENVIRONMENT, LIQUEFIED PETROLEUM GAS BOARD (Mr. Kevin Pfalser)

a. SUBJECT: Ark. Admin. Code 237.08.1-10; 237.08.1-12; 237.08.1-16; 237.08.1-17

DESCRIPTION: The Liquefied Petroleum Gas Board proposes changes to its Arkansas Administrative Code 237.08.1-10; 237.08.1-12; 237.08.1-16; and 237.08.1-17. Change 1 would allow a replacement "Fit for Service" name plate/data plate to be affixed to LP-Gas storage containers and then placed in service within the following agriculture applications: (a) fuel for irrigation units; (b) fuel for livestock operations; and (c) fuel for crop drying. Current language prohibits the servicing of an LP-Gas storage container that has a missing name plate/data plate. This forces what would be otherwise good storage containers to be taken out of service. Rather than scrapping good storage containers, this rule provides a procedure that would allow a storage container to go through a Board-approved inspection process that would certify the storage container as "Fit for Service." The storage container could then have a "Fit for Service" name plate/data plate affixed to it and placed back into service. Applications in which "Fit for Service" storage containers could be used

would be limited to agricultural. This rule would have a large positive economic impact on LP-Gas dealers locating storage containers at poultry houses, hog farms, irrigation pumps, and grain dryers.

Change 2 would allow the transfer of LP-Gas directly from a railcar into a cargo tank under the following conditions: (a) installation is done in accordance with NFPA 58 requirements; (b) the period of installation is limited to 24 months; (c) installation must meet requirements for a Class 8 Permit; and (d) annual inspections must be made. The purpose of this rule is to remove language that prohibits the procedure of transferring LP-Gas directly from a railcar into a cargo tank. By allowing this procedure, the LP-Gas industry could build infrastructure in the state that could insulate it from product shortage due to unforeseen events such as extended or extreme winter weather, pipeline interruption, refinery shutdown, terminal shutdown or closure, and diversion for feed stock. This will encourage competition at the wholesale level allowing entry into the market at a greatly reduced capital investment. This removes the limitation of terminal services needing access to a pipeline and can be opened up to locations throughout the state.

Change 3 would require all cylinders with a capacity of over 40 lbs of propane, which are not fitted with an OPD valve, must be transported and stored with a POL plug. Cylinder valves requiring maintenance that are fifteen (15) years or older must be replaced. Board-approved signage must be displayed in a prominent location. Permit holders must use the Board-approved form to report new and existing station locations. Class 1 and Class 3 permit holders will provide Board-approved training for exchange station employees. Records of such training will be transmitted to the Board office. The purpose of this rule change is to ensure public safety concerning transportation of propane cylinders.

Change 4 includes basic clean up to fix references to the current NFPA standards, etc.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on May 18, 2021. The Board received no public 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: Pursuant to Arkansas Code Annotated § 15-75-207(a), the Liquefied Petroleum Gas Board is empowered to make reasonable rules to carry out the provisions of Arkansas Code Title

15, Chapter 75, Subchapter 2, concerning the Board. In addition to the functions, power, and duties conferred and imposed upon the Board by the subchapter, and the regulation of its own procedure and carrying out its functions, powers, and duties, the Board shall have the authority from time to time to make, amend, and enforce all reasonable rules not inconsistent with law, which will aid in the performance of any of the functions, powers, or duties conferred or imposed upon it by law. *See* Ark. Code Ann. § 15-75-207(b).

4. DEPARTMENT OF HEALTH, CENTER FOR PUBLIC HEALTH PRACTICE (Ms. Laura Shue, items a, b; Ms. Lori Simmons, item b)

a. SUBJECT: Rules Pertaining to the Arkansas Cancer Registry

DESCRIPTION: Amendments to the rule implement Act 345 of 2021, which removed the requirement for Board of Health approval to release statistical information from the Arkansas Central Cancer Registry and added a definition of "qualified researcher." Board of Health approval would no longer be required for the Central Cancer Registry to disclose statistical information for purposes of ongoing research. This change would allow the Board of Health to approve data requests for the entire length of a grant.

Amendments to the rule implement Act 315 of 2019, which removes unnecessary usage of the term "regulation."

Amendments revise the rule to remove the definition of "Hospital and Non-Hospital Reporting Manuals."

PUBLIC COMMENT: A public hearing was held on this proposed rule on August 11, 2021. The public comment period expired August 11, 2021. The agency indicated that it did not receive any public comments.

The proposed effective date is January 1, 2022.

FINANCIAL IMPACT: The agency indicated that this proposed rule does not have a financial impact.

LEGAL AUTHORIZATION: The Department of Health has the responsibility to collect "such data concerning cancer in Arkansas and its residents as is deemed appropriate for the purposes of describing the frequency of cancer, furnishing reports to health professionals and the public, and for planning and evaluating cancer prevention and control programs." Ark. Code Ann. § 20-15-201. "The data shall be collected

under the authority of rules promulgated by the State Board of Health." Ark. Code Ann. § 20-15-201.

This rule implements Act 345 of 2021. The Act, sponsored by Representative Jack Ladyman, removed barriers to the release of data in the Arkansas Central Cancer Registry to qualified cancer researchers.

b. SUBJECT: Rules Pertaining to Lead-Based Paint Activities

DESCRIPTION: This proposed amendment to the Arkansas Department of Health Rules Pertaining to Lead-Based Paint changes the clearance levels for lead in dust to meet industry standards. This rule change amends the definition of "Dust-lead hazard" to mean a surface dust in a residential dwelling or child-occupied facility that contains a mass-per-area concentration of lead equal to or exceeding 10 $\mu g/ft^2$ (micrograms per square foot) on floors or 100 $\mu g/ft^2$ on interior windowsills based on wipe samples.

In December 2020, EPA announced a new action to better protect American children from the dangers of lead. The Final Rule lowers the clearance levels for the amount of lead that can remain in dust on floors and windowsills after lead removal activities. EPA's new clearance levels are 10 micrograms (μg) of lead in dust per square foot (ft^2) for floor dust and 100 $\mu g/ft^2$ for windowsill dust, lower than the previous levels of 40 $\mu g/ft^2$ for floor dust and 250 $\mu g/ft^2$ for windowsill dust. These new clearance levels will reduce lead dust-related risks to children in pre-1978 homes and childcare facilities where lead abatement activities take place. The EPA requires states to update their Rules to reflect this change by January 1, 2022.

PUBLIC COMMENT: No public hearing was held on this proposed rule. The public comment period expired on August 6, 2021. The agency indicated that it did not receive any public comments.

The proposed effective date is January 1, 2022.

FINANCIAL IMPACT: The agency indicated that this rule does not have a financial impact.

LEGAL AUTHORIZATION: The State Board of Health has the authority "to make all necessary and reasonable rules of a general nature for . . . [t]he proper control of chemical exposures that may result in adverse health effects to the public." Ark. Code Ann. § 20-7-109(a)(E). The Arkansas Department of Health has the authority to "[e]nforce rules necessary or appropriate to the implementation of [the Arkansas Lead-Based Paint Hazard Act of 2011.]" Ark. Code Ann. § 20-27-2505(3).

This rule implements a federal rule change promulgated by the Environmental Protection Agency. Per the amendment to federal law, "[a] dust-lead hazard is surface dust in a residential dwelling or child-occupied facility that contains a mass-per-area concentration of lead equal to or exceeding 10 µg/ft2 on floors or 100 µg/ft2 on interior window sills based on wipe samples." 40 C.F.R. § 745.65(b).

5. DEPARTMENT OF HUMAN SERVICES, DIVISION OF COUNTY OPERATIONS (Mr. Mark White, Ms. Mary Franklin)

a. SUBJECT: Medical Services Policy B-220 Newborns

DESCRIPTION:

Statement of Necessity

Medical Services Policy is updated to reflect a change in the Newborn category that applies to eligibility. It has become necessary to update the business processes and information regarding Unborn coverage.

This step assists the eligibility worker with the details of our policy and a revision from 42 CFR § 435.117 and 42 CFR § 435.139. The newborn policy must be revised to reflect both 42 CFR § 435.117 and 42 CFR § 435.139.

Rule Summary

Policy MS B-220 outlines the factors that are used to determine the eligibility of newborn categories. Newborns are guaranteed Medicaid coverage for the first year of life regardless of income changes.

The change adds a step to determine Newborn coverage eligibility outside of normal determination rules: Was the mother eligible at the time of the child's birth?

The change to MS B-220 includes adjusting the current policy to ensure that newborns born to pregnant women approved under the Unborn child category are also eligible for the Newborn category.

PUBLIC COMMENT: No public hearing was held on this proposed rule. The public comment period expired on July 25, 2021. The agency indicated that it did not receive any public comments.

The proposed effective date is November 1, 2021.

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

Per the agency, this rule implements a federal rule or regulation. The cost to implement this federal rule or regulation is $145,600 for the current fiscal year ($41,321 in general revenue and $104,279 in federal funds) and $0 for the next fiscal year. The total estimated cost by fiscal year to state, county, and municipal government to implement this rule is $41,321 for the current fiscal year and $0 for the next fiscal year.

LEGAL AUTHORIZATION: The Department of Human Services has the responsibility to administer assigned forms of public assistance and is specifically authorized to maintain an indigent medical care program (Arkansas Medicaid). *See* Ark. Code Ann. §§ 20-76-201(1), 20-77-107(a)(1). The Department has the authority to make rules that are necessary or desirable to carry out its public assistance duties. Ark. Code Ann. § 20-76-201(12). The Department and its divisions also have the authority to promulgate rules as necessary to conform their programs to federal law and receive federal funding. Ark. Code Ann. § 25-10-129(b).

This rule implements provisions from the Code of Federal Regulations regarding Medicaid eligibility for newborns. 42 C.F.R. § 435.117(b)(1) requires states to "provide Medicaid to children from birth until the child's first birthday without application if, for the date of the child's birth, the child's mother was eligible for and received covered services under" the Medicaid state plan.

b. SUBJECT: MS E-300 Sponsor Deeming

DESCRIPTION:

Statement of Necessity

Medical Services Policy is updated to reflect a change in the sponsor affidavits of support and deeming policy. The change applies to deeming instruction and conditions. It has become necessary to update the business processes and information regarding the deeming process.

Policy MS E-300 outlines the factors that are used to determine alien sponsor deeming that apply to Medicaid categories.

A few steps are used in sponsor deeming and conditions:
- Count all income of the sponsor and sponsor's spouse living in the same household as if they were income and resources of the alien.
- States may apply approved income and resource disregards.

- Count the sponsor's income as the alien's unearned income and use it to determine the alien's eligibility.
- Do not count the sponsor's income when determining eligibility for the alien's eligible children.
- Count the household size of the alien according to MAGI or SSI rules.

Deeming continues until one of the following conditions is met:
- The sponsored immigrant becomes a naturalized citizen.
- The sponsored immigrant achieves 40 qualifying work quarters, as defined by the Social Security Act.
- The sponsored immigrant or the sponsor dies.

Rule Summary

The change to MS E-300 includes adjusting the sponsor deeming instructions.

1. Income and resource disregards may be applied for sponsor; and
2. Household size is counted according to MAGI or SSI rules.

In addition, some changes to deeming conditions are:

1. Updated wording to match CMS updates;
2. Removed wording that did not match changes to CMS updates; and
3. Added 40 qualified work quarters.

PUBLIC COMMENT: No public hearing was held on this proposed rule. The public comment period expired on July 24, 2021. The agency indicated that it received no public comments.

The proposed effective date is November 1, 2021.

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

Per the agency, this rule implements a federal rule or regulation. The cost to implement the federal rule or regulation is estimated at $157,300 for the current fiscal year ($44,720 in general revenue and $112,580 in federal funds) and $0 for the next fiscal year. The total estimated cost by fiscal year to state, county, and municipal government to implement this rule is $44,720 for the current fiscal year and $0 for the next fiscal year.

Per the agency, this rule change requires a system change to a DHS administrated system. The agency anticipates the system change to be completed between CY 2021 July – September for a November 1, 2021 rule change implementation.

LEGAL AUTHORIZATION: The Department of Human Services has the responsibility to administer assigned forms of public assistance and is specifically authorized to maintain an indigent medical care program (Arkansas Medicaid). *See* Ark. Code Ann. §§ 20-76-201(1), 20-77-107(a)(1). The Department has the authority to make rules that are necessary or desirable to carry out its public assistance duties. Ark. Code Ann. § 20-76-201(12). The Department and its divisions also have the authority to promulgate rules as necessary to conform their programs to federal law and receive federal funding. Ark. Code Ann. § 25-10-129(b).

Federal law requires consideration of a sponsor's income and resources when determining certain immigrants' eligibility for federal means-tested public benefits. 8 U.S.C. § 1631(a). States may also consider the sponsor's income and resources "in determining the eligibility and the amount of benefits of an alien for any State public benefits[.]" 8 U.S.C. § 1632(a).

This rule implements guidance from the Centers for Medicare and Medicaid Services providing examples of appropriate deeming methodologies. *See* Ctrs. for Medicare & Medicaid Servs., Letter Re. Sponsor Deeming and Repayment for Certain Immigrants (Aug. 23, 2019), at 4-6. The guidance authorizes states to "[d]eem all gross or countable income and resources," "account for the sponsors' needs or the needs of sponsors' dependents," and "[a]pply income and/or resource disregards adopted under the state plan[.]" Letter, at 5-6.

6. DEPARTMENT OF HUMAN SERVICES, DIVISION OF MEDICAL SERVICES (Mr. Mark White, items a, b, c; Ms. Elizabeth Pitman, items a, c; Ms. Patricia Gann, item b)

a. SUBJECT: Extension of Benefits for Acute Crisis Units and Substance Abuse Detoxification, and Telemedicine for Specific Services

DESCRIPTION:

Statement of Necessity

The Division of Medical Services (DMS) revises the Outpatient Behavioral Health (OBH) Provider Manual and amends the State Plan to incorporate an extension of benefits to replace previous hard limits so that clients can access medically necessary services. Correspondingly, DMS adds provisions allowing for telemedicine for certain services. Finally, DMS updates Section III of all provider manuals to reflect the telemedicine changes.

Rule Summary

DMS revises the OBH provider manual to incorporate an extension of benefit process when it is medically necessary for a client to exceed ninety-six (96) hours per admission in an Acute Crisis Unit, and when it is medically necessary to exceed six (6) encounters per State Fiscal Year of Substance Abuse Detoxification. The State Plan was amended to reflect the changes.

Correspondingly, updates to the manual include provisions allowing for telemedicine for:

- Group Behavioral Health Counseling, ages eighteen (18) and above
- Marital/Family Behavioral Health Counseling with Beneficiary Present
- Marital/Family Behavioral Health Counseling without Beneficiary Present
- Mental Health Diagnosis, under age twenty-one (21)
- Substance Abuse Assessment
- Crisis Intervention

The following changes to the OBH provider manual and Section III of all provider manuals:

- Section 252.111 is revised to remove the GT informational modifier for telemedicine.
- Section 252.112 is revised to include use of telemedicine for ages eighteen (18) and over.
- Section 252.113 is revised to include use of telemedicine.
- Section 252.114 is revised to include use of telemedicine.
- Section 252.115 is revised to remove the GT informational modifier for telemedicine.
- Section 252.117 is revised to remove age limitations for use of telemedicine for mental health diagnoses, and to remove the GT informational modifier for telemedicine.
- Section 252.118 is revised to remove the GT informational modifier for telemedicine.
- Section 252.119 is revised to include the use of telemedicine.
- Section 252.121 is revised to remove the GT informational modifier for telemedicine.
- Section 252.122 is revised to remove the GT informational modifier for telemedicine.
- Section 255.001 is revised to include use of telemedicine.
- Section 255.003 is revised to include extension of benefits for additional days when medically necessary and duplication of rule is deleted.

- Section 255.004 is revised to include extension of benefits for additional encounters when medically necessary.
- Section 305.000 is revised to remove references to the GT modifier when billing for telemedicine.

PUBLIC COMMENT: A public hearing was held on this rule on June 29, 2021. The public comment period expired June 29, 2021. The agency provided the following summary of the public comments it received and its responses to those comments:

Commenter's Name: Joel Landreneau, Crochet & Landreneau, PLLC

1. Okay, I have two comments to make about the proposed rules, the proposed changes in 252 and the billing codes for outpatient behavioral health services. During the COVID pandemic and the emergency rule suspensions that were put into place during that time, there were somewhat different treatment for different codes, with respect to audio only telemedicine, some and the COVID emergency promulgated manual that came out in early April, also, made a specific provision, say, for example, for marital and family counseling which could be done audio only, but then some of the other telemedicine approved services, such as crisis intervention, made no specific mention of audio only and whether or not audio only was or was not permitted.

And so individual therapy was also one that was not specifically addressed in that manual and it isn't here either, and so I would request that if there is going to be an allowance for audio only for some or all of the billing codes, that the manual would reflect, that so that unless that's addressed somewhere else I don't see it here, it looks like telemedicine is just that, a term is just used. I guess the definition of that term would be as Arkansas law now defines telemedicine. I think it's act 829 that allowed audio only, but then it has a qualification in it that says, "if it meets the standards for the service," or something along those lines, it looks like it might be a payor decision whether or not audio only does or does not substantially meet the standards for that service, so I would request that clarification be made. I get that question a lot.

I'm sorry, I didn't even introduce myself, I'm Joel Landreneau, I'm Executive Director of Behavioral Health Providers Association and I get this question a lot, "is audio only allowed or not allowed for this or that service," and it would be very helpful if that was clarified.

RESPONSE: Thank you for your comment and questions. The comments and questions related to Act 829 and other telemedicine acts will be reviewed separately from this rule. We will consider what

revisions may need to be promulgated and implemented during that review.

2. The second comment I would like to make is, with respect to who the authorized performing providers are. The proposed changes allow for, say, for example, individual behavioral health counseling 90832, 90834, 90837, have modifiers for substance abuse U4 and U5 and those services can be in our judgment, delivered by people who hold the AADC credential. These are master's degree therapists who are specifically trained and supervised in the delivery of substance abuse services.

It doesn't appear, I think, historically, they haven't been permitted to provide individual psychotherapy, even when substance abuse is the primary diagnosis, and I would request that the AADC's, of which there are little more than 100 in the state who have that credential. It is a nationally recognized credential and it is, it qualifies them to render substance abuse services, so it would, I think that would appear to individual behavioral health counseling the 90832, 34, 37, U4 and U5 modifiers, it would also apply to the group behavioral health counseling and 90853 U4 and U5 and marital and family, there's a substance abuse modifier at 90847.

So I would request, some of the AADC's also have LPC and LCSW credentials, which would enable them to do this, but not all of them do, but all a AADC's have Master's degrees and to the extent that there are those out there who have Master's degrees and the requisite training in substance abuse treatment, they should be reimbursed for Medicaid, when they render substance abuse treatment.

And that concludes my remarks.

RESPONSE: Thank you for your comments. Your request is outside the scope of this proposed rule change. No changes were proposed regarding allowed performing providers. For a list of currently authorized providers see section 211.200 Staff Requirements in Section II of the Outpatient Behavioral Health Services manual.

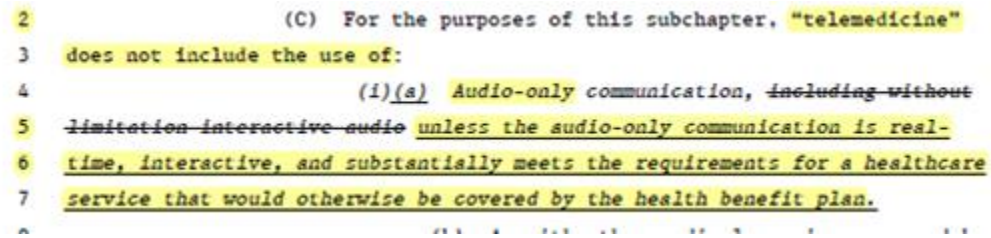
Commenter's Name: Joel Landreneau, on behalf of the Behavioral Health Providers' Association

1. The removal of the telemedicine modifier from certain codes is a welcome development. It has been a needless effort by providers and a needless expense for the state to require separate authorizations for the same service according to delivery modality. Our understanding of this change is that one authorization will be required for a service, which will then be interchangeable between face-to-face and telemedicine, and

identifiable by the place of service codes. Please confirm that this understanding is correct.

RESPONSE: Under the proposed change, one authorization will be required for a service to be provided. Separate authorizations for face-to-face or telemedicine provision of services will not be required.

2. There needs to be a distinction made clear between those services that can be delivered via telemedicine audio-only, and those that cannot. Act 829 of 2021 amended the definition of "telemedicine" to read as follows:



(C) For the purposes of this subchapter, "telemedicine" does not include the use of:

(i)(a) Audio-only communication, ~~including without limitation interactive audio~~ unless the audio-only communication is real-time, interactive, and substantially meets the requirements for a healthcare service that would otherwise be covered by the health benefit plan.

This definition of "telemedicine" applies to each and every service. In all cases, telephone-only is "real-time" and "interactive." These rules should establish bright-line rules for when a service "substantially meets the requirements for a healthcare service that would otherwise be covered by the health benefit plan." Our reading of this language is that the payors determine when audio-only "substantially meets the requirements for a healthcare service." The present rules, as enacted and as proposed, do not make these determinations, leaving providers uncertain regarding when audio-only can or cannot be used in service delivery. Act 829 had an emergency clause, and thus it has been law since April 21, 2021. These rules should be revised to clarify when audio-only is permitted or prohibited.

RESPONSE: Thank you for your comment and questions. Comments and questions related to Act 829 and other telemedicine acts will be reviewed separately from this rule. We will consider what revisions may need to be promulgated and implemented during that review.

3. Codes with Substance-Abuse modifiers should add LADAC's and AADC's to the list of Allowable Performing Providers. Behavioral Health Agencies ("BHA's") in this state are facing great difficulties in recruiting and retaining Independently Licensed Practitioners who are willing to do the work required of therapists in BHA's, such as supervision of paraprofessionals. Some agencies are in such straits that they are unable to assign a therapist to a new patient for weeks at a time. There are strong incentives for therapists to leave BHA's and establish independent practices, including a billing rate that is equal to that paid to BHA's, but

without the added, uncompensated responsibilities therapists are need for in agencies.

There are several policy changes that are needed to address this situation, which is beginning to approach crisis levels. One simple change that could be made in this draft is for Medicaid to recognize Licensed Alcoholism and Drug Abuse Counselors (LADAC's) and Advanced Certified Alcohol Drug Counselor (AADC's) for those codes that have a Substance Abuse modifier, and recognize these practitioners for services requiring that modifier. LADAC's and AADC's both require a Master's Degree in a Behavioral Science or Human Services field with a clinical application from an accredited university. AADC's require a 300-hour supervised practicum and 2,000 hours of supervised work experience under a Master's Level supervisor. LADAC's likewise require a Master's degree in a health or behavioral services field, along with 3 years' clinically supervised work experience in the field of Substance Abuse and Mental Health. Many of these professionals also hold certifications as LCSW's or LPC's, but there is a sizeable number within the state that do not. This means that Medicaid will not pay for a certified substance abuse practitioner with a Master's Degree to render Individual Therapy to SUD-primary patients, even though they are qualified to do so within the scope of their practice.

As of July 13, 2021, there are presently 120 AADC's in the State of Arkansas who are qualified to serve SUD patients, but who are not reimbursed by Medicaid for doing so unless they also hold an LCSW or an LPC. There is no public policy reason who Master's-level treatment professionals should be excluded from serving Medicaid patients, especially in this time when recruiting and retaining LCSW's and LPC's is so difficult for BHA's. I would ask that this request be treated as a request for rule promulgation under Ark. Code Ann. § 25-15-204(d).

RESPONSE: Your request is outside the scope of this proposed rule change. No changes were proposed regarding allowed performing providers. For a list of currently authorized providers see section 211.200 Staff Requirements in Section II of the Outpatient Behavioral Health Services manual.

4. Mental Health Diagnosis should be increased to a maximum of two hours per encounter. Mental Health Diagnosis was reduced in rate in the 2018 transformation to an equivalent of one hour of service in the old rate. Practitioners routinely tell me that they take about two (2) hours at a minimum to do a thorough intake, which they regard as vital to arrive upon an accurate diagnosis and well-informed plan of care. The one single encounter, at the rate at which it is paid, is not sufficient to meet the needs of the patient, and more often than not, the practitioners simply perform

the thorough intake anyway, and accept the inadequate payment. I would ask that this request be treated as a request for rule promulgation under Ark. Code Ann. § 25-15-204(d).
RESPONSE: Thank you for your comment. Your requested change is outside of the scope of this proposed rule change. This proposed rule change does not address the encounter or rate for Mental Health Diagnosis service but is limited only to changes regarding telemedicine service for Medicaid beneficiaries who are under age 21.

The proposed effective date is October 1, 2021.

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

Per the agency, the total estimated cost to implement this rule is $163,170 for the current fiscal year ($46,308 in general revenue and $116,862 in federal funds) and $217,560 for the next fiscal year ($61,744 in general revenue and $155,816 in federal funds). The total estimated cost by fiscal year to state, county, and municipal government to implement this rule is $46,308 for the current fiscal year and $61,744 for the next fiscal year.

LEGAL AUTHORIZATION: The Department of Human Services has the responsibility to administer assigned forms of public assistance and is specifically authorized to maintain an indigent medical care program (Arkansas Medicaid). *See* Ark. Code Ann. §§ 20-76-201(1), 20-77-107(a)(1). The Department has the authority to make rules that are necessary or desirable to carry out its public assistance duties. Ark. Code Ann. § 20-76-201(12). The Department and its divisions also have the authority to promulgate rules as necessary to conform their programs to federal law and receive federal funding. Ark. Code Ann. § 25-10-129(b).

Portions of this rule implement Act 624 of 2021. The Act, sponsored by Representative Lee Johnson, ensured that reimbursement in the Arkansas Medicaid Program for certain behavioral and mental health services provided via telemedicine continues after the public health emergency caused by COVID-19. Per the Act, Arkansas Medicaid must reimburse for "crisis intervention services; substance abuse assessments; mental health diagnosis assessments for" beneficiaries under age 21; group therapy for beneficiaries 18 and older; and "counseling and psychoeducation provided by" certain licensed personnel. Act 624, § 1(b).

b. **SUBJECT: ARChoices in Homecare Renewal**

DESCRIPTION:

Statement of Necessity

Pursuant to A.C.A. § 20-77-107, the Department of Human Services is authorized to establish and maintain an indigent medical care program. A.C.A. § 25-10-129 directs the Department to promulgate rules to assure compliance with federal statutes, rules, and regulations and to promulgate rules as necessary to receive any federal funds. Department rule promulgation authority is also provided under A.C.A. § 20-76-201(12) which directs the Department to make rules that are necessary to provide public assistance.

CMS approves HCBS waivers for a period of 5 years. The AR Choices in Homecare waiver expired 12/31/2020 and is currently operating under a temporary extension. This extension will allow DHS to align the waiver start date with the beginning of the state's fiscal year of 07/01/2021.

Rule Summary

The roles and responsibilities of the operating agencies (Division of Medical Services, Division of Aging, Adult, & Behavioral Health Services, Division of Provider Services and Quality Assurance, and Division of County Offices) will be clarified with this waiver renewal. The AR Choices Manual will now reflect the functional eligibility determinations and evaluations listed in the AR Choices waiver. The Personal Care Manual has been updated to remove duplication of ARChoices rules and references to ARChoices Manual.

The appeals process language is updated throughout as necessary to reflect the automatic continuation of benefits during the appeal process unless the waiver beneficiary opts out. Rates for services are being updated for the next five years and additional waiver slots are added. The rate changes to $5.12, which is a 12% increase. The Service Budget Limits are being updated, and the Provisional Service Plan option is being removed.

The financial impact is $12,992,412 for State Fiscal Year (SFY) 2022 and $13,615,716 for SFY 2023. The state share of increasing the Attendant Care and In-Home Respite Care rates is $3,699,914 for SFY 2022 and $3,864,140 for SFY 2023.

PUBLIC COMMENT: A public hearing was held on this rule on July 13, 2021. The public comment period expired August 2, 2021. The agency

provided the following summary of the public comments it received and its responses to those comments:

Commenter's Name: Luke Mattingly, CEO/President, on behalf of CareLink

1: ARChoices Section 212.000(D) - Refers readers to the approved assessment manual. When reviewing this current on-line manual, there is no mention of ARChoices or how the tiers for LTSS are established and applied. Also, the eligibility rules have been red-lined and the rules only now reference the State Administrative Rule for level of care. This revision lacks transparency within the waiver for how the eligibility process is established, changed, and controlled.

RESPONSE: Thank you for your comment. The approved assessment tool manual is referenced to provide transparency in relation to the tool. Notwithstanding the final tier determination, the Level of Care eligibility is made by the Division of County Operation. The assessment of functional need is used as part of the process to determine medical eligibility and in the development of the PCSP. We have included reference to the State Administrative Rule to avoid possible incongruence should there be future rule change.

2: ARChoices Section 240.000 Prior Authorization - There is very little detail in this section. It needs to be changed to reflect the same language as the Personal Care Manual.

RESPONSE: Thank you for your comment. DHS will update this section to clarify that the authorization mechanism for the ARChoices program is the Person-Centered Service Plan. Additionally, sections 212.320 and 212.323 include language that the PCSP serves as the authorization for ARChoices waiver services.

3: ARChoices Section 262.300 Billing Instructions - The requirement for providers to supply the documentation proving that services were rendered at a time before or after the hospital discharge occurred has always been administratively burdensome. Medicaid has the information as a payor and has access to admission and discharge data. Unskilled home health providers do not have direct access to the information being requested. It requires significant administrative effort to obtain the required documentation.

With the implementation of state-wide requirement for Electronic Visit Verification systems, Medicaid has access to all information required to compare data and verify that services occurred before admission or after discharge without additional provider input.

This section needs to be revised to eliminate the provider requirement and to reflect that Medicaid will verify that services have been provided before admission or after discharge. All information to verify this is within state data systems available to Medicaid.

RESPONSE: Thank you for your comment. It is the provider's responsibility to develop and maintain sufficient written documentation to support each service for which billing is made.

4: Methods for Remediation / Fixing Individual Problems – References an Intra-agency agreement between AADHS and DMS. What are the parameters of this agreement and where can this agreement be reviewed?

RESPONSE: Thank you for your comment. Providers may request a copy of this agreement through the Freedom of Information process.

5: Appendix J Cost Neutrality – It is interesting to note that the state projects a 2.5% annual inflationary factor for SNF's in factor D derivation. The state makes no such annual inflationary consideration for ARChoices providers. There are always several years between rate changes for ARChoices services. This 2.5% annual inflationary consideration is not applied to ARChoices waiver provider operational inflationary costs/expense, however the 2.5% increase for SNF's is directly applies to inflationary expenses related to operations. This is yet another inequity between SNF's and HCBS.

RESPONSE: Thank you for your comment.

6: Rate for service - While the rate increase in the waiver is desperately needed, the rate setting methodology for In-home services is derived from "what is the minimum Medicaid can pay for this service" resulting in low wages and minimal benefits for workers. The rate setting process does not provide the opportunity to build a career ladder for in-home Aides nor does it focus on paying a wage that attracts high quality candidates. The rate is such that providers can only offer minimum wage or close to minimum wage pay. This is not conducive to providing high quality services and results in high turnover rate for this occupation, which is detrimental to participant care.

The state needs to engage in a more open conversation about this occupation and what skill sets would be preferable to deliver high quality customer care. This in turn would help ascertain what wage rate needs to be in place to support this high-quality care and in turn what rate would support the wage. Instead, the base assumption starting point for determining the rate is minimum wage, which here in Arkansas is $ 11.00 per hour.

RESPONSE: Thank you for your comment. Under Executive Order 19-02 rates are reviewed on a regular cycle utilizing a standard rate review methodology.

7: Removal of Provisional Plans of Service - What is the plan to make ARChoices readily available to eligible participants? SNF's have the ability to begin services and then retro bill to first day of service after deemed eligible. No such provision is in place for ARChoices. With average processing of ARChoices initial applications exceeding 45 days or more it leaves many families with no choice but to select a facility placement over HCBS.

RESPONSE: In order to be determined eligible for the ARChoices waiver, individuals must meet both financial and medical eligibility requirements. Allowing for services to begin prior to determination of both financial and medical eligibility places both providers and individual at financial risk. Individuals with active full Medicaid benefit plans may receive services under state plan personal care until waiver services are approved.

8: Additional Requirements/Access to Services - In addition to topics already mentioned which fall into this category, the inability of DHS to issue a Prior Authorization at the same time as issuing the approved PCSP is detrimental to service providers and places participant services at risk. The prior authorization (PA) should be issued and coincide with the issuance of the PCSP. A prior authorization is required for a provider to be reimbursed for services. DHS issues the PCSP and expects providers to start services immediately upon receipt, but the Prior Authorization is not issued until a later date.

RESPONSE: Thank you for your public comment. DHS is reviewing internal processes to improve efficiency in systems. The authorization for services continues to be the Person-Centered Service Plan which is sent to the provider by the DHS PCSP/CC nurses.

9: Service Budget Caps - Tier 1: $ 34,000; Tier 2: $ 23,000; Tier 3: $ 6,000

All service caps are set to low to ensure that participants in that particular level of care has a reasonable opportunity to remain in their homes as long as possible. In Tier 1 allowing only $34,000 annually to someone that is totally dependent and requires extensive assistance is not sufficient to ensure Home and Community Based care will assist the individual from being institutionalized. Likewise Tier 2 participants need additional supports than the budget cap allows. However, the $ 6,000 cap for Tier 1

services is the most egregious. These individuals meet the functional needs requirements to be eligible for ARChoices. This service cap barely provides any services at all. The cap should be at least doubled to ensure a level of care that keeps participants in their home and delays progression into Tiers requiring more care or institutionalization. The service budget cap should at least be doubled to $ 12,000.

RESPONSE: The Service Budget Limit (SBL) amounts were adjusted to incorporate rate increases to ensure clients continued to receive services authorized, notwithstanding subsequent rate increases. SBL's limit the maximum dollar amount of services that may be authorized based on medical determination by the Division of County Operation. Section 212.200 outlines the process for adjustments to the SBL based on change in condition.

Commenter's Name: Jacque McDaniel, Executive Director, on behalf of East Arkansas Area Agency on Aging

1: Section 200.120-262.410 -The Personal Care policy changed "beneficiary" to "client". The ARChoices policy changed "Beneficiaries" and "individuals" to "participants". Why was different terminology utilized?

RESPONSE: Notwithstanding any difference in the terminology the individuals referenced are the same.

2: Section 213.540 E: There are three applicable rules listed—Section 215.350, 215.351 and 262.100. Is there a Section 262.100?

RESPONSE: Thank you for your comment. The reference to Section 262.100 has been removed.

3: Section 200.120-262.410 of the Personal Care policy changed "beneficiary" to "client". The ARChoices policy changed "Beneficiaries" and "individuals" to "participants". Why was different terminology utilized between Personal Care and ARChoices policies?

RESPONSE: Notwithstanding any difference in the terminology the individuals referenced are the same.

4: Section 212.000 Item B: The last sentence of this paragraph may have an error with the change from 'individual' to 'participant'.

RESPONSE: Language has been reviewed to ensure consistency in the manual.

5: Section 212.000 Item I: The policy states the "program provides for the entrance of all eligible persons on a first-come, first-served basis, once participants meet all functional and financial eligibility requirements." Should "functional" be changed to "medical"?

RESPONSE: Thank you for your comment. The language has been updated.

6: Section 212.000 Item I states eligible persons will be served on a first-come, first-served basis. With the elderly, behavioral health (BH) and development disabled (DD) populations being combined in one waiver, should the slots be segregated to the different populations to assure availability for the elderly population? The average length of program eligibility for elderly waiver clients is much shorter than the BH and DD populations.

RESPONSE: The ARChoices waiver is a distinct waiver and has not been combined with BH or and DD waivers. The slots available under the ARChoice waiver are available only to those beneficiaries who have been determined eligible for the ARChoices waiver.

7: Section 212.200 "Waiver Renewal Process:" Item C states "unless one of the following conditions applies:" then lists item 1, item 2, item 3 "or the participant disenrolls from the ARChoices Waiver program." Should this last item actually be numerated as item 4?

RESPONSE: This item is listed as item 4.

8: Section 212.300 lists the acronym for person-centered service plan (PCSP) several times, but some of the listings were transposed as PCPS in Items A and C.

RESPONSE: Thank you for your comment. The manual has been updated.

9: Section 262.300 Billing Instructions: With the detailed requirements for caregivers to utilize electronic visit verification for documenting and billing services, the policy requiring a provider to gather documentation to prove what time the participant was admitted to a facility needs to be changed. The state should have the information to determine what time the participant was admitted to a facility instead of placing another burden on the lowest paid provider to gather this information.

RESPONSE: Thank you for your comment. It is the provider's responsibility to develop and maintain sufficient written documentation to support each service for which billing is made.

10: Appendix 1-2: Rates, Billing and Claims— Rate Determination Methods: Even though various methodologies were used for rate determination, the rate is inadequate to support the services in our state when the minimum wage increase and other costs far exceeded the percentage increase in the rate. The added stress of low unemployment rates and shortage of workers with the ever-increasing older population has seriously threatened the viability of Home and Community-Based Services in our state.

RESPONSE: Thank you for your comment. Under Executive Order 19-02 rates are reviewed on a regular cycle.

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

Q. What is the status on CMS approval? **RESPONSE:** We do not have CMS approval, but I will provide the letter once we receive it.

The proposed effective date is pending legislative review and approval.

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

Per the agency, this rule implements a federal rule or regulation. The cost to implement the federal rule or regulation is $12,992,412 for the current fiscal year ($3,699,914 in general revenue and $9,292,498 in federal funds) and $13,615,716 for the next fiscal year ($3,864,140 in general revenue and $9,751,576 in federal funds). The total estimated cost to state, county, and municipal government is $3,699,914 for the current fiscal year and $3,864,140 for the next fiscal year. The agency indicated that these amounts represent the state share of increasing the Attendant Care and In-Home Respite Care rates.

Per the agency, this rule will result in a new or increased cost or obligation of at least $100,000 per year to a private individual, private entity, private business, state government, county government, municipal government, or to 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;

The AR Choices Waiver is being renewed as required by § 1915(c) of the Social Security Act. The current waiver expired 12/31/2020 and operates under a temporary extension until the renewal is approved.

(2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;

The AR Choices Waiver is being renewed as required by § 1915(c) of the Social Security Act. The current waiver expired 12/31/2020 and operates under a temporary extension until the renewal is approved.

(3) a description of the factual evidence that:
(a) justifies the agency's need for the proposed rule; and

We are adding 75 additional slots every year of the waiver to accommodate an increase in the aging population which allows individuals to remain in their homes. There is also a rate increase that is being implemented to create rate parity between personal care, attendant care, and respite.

(b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;

This rule will allow individuals to remain in their homes and to reduce more costly alternative placements.

(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 less costly alternatives.

(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;

None

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

Existing rates and waiver capacity require an increase to ensure rate parity and an increasing aging population.

(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;

The Agency must renew this waiver no later than every five years.

(b) the benefits of the rule continue to justify its costs; and

The State is required to demonstrate continued cost neutrality annually and to amend the waiver if cost neutrality is not met.

(c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

The State is required to demonstrate continued cost neutrality annually and to amend the waiver if cost neutrality is not met.

LEGAL AUTHORIZATION: The Department of Human Services has the responsibility to administer assigned forms of public assistance and is specifically authorized to maintain an indigent medical care program (Arkansas Medicaid). *See* Ark. Code Ann. §§ 20-76-201(1), 20-77-107(a)(1). The Department has the authority to make rules that are necessary or desirable to carry out its public assistance duties. Ark. Code Ann. § 20-76-201(12). The Department and its divisions also have the authority to promulgate rules as necessary to conform their programs to federal law and receive federal funding. Ark. Code Ann. § 25-10-129(b).

c. SUBJECT: Physician Manual – Anesthesia Services

DESCRIPTION:

Statement of Necessity

The Division of Medical Services is updating the Physician Manual to clarify billing instructions when filing paper or electronic claims for anesthesia services. Providers submitting a paper claim for anesthesia services must bill units in whole numbers. Providers submitting an electronic claim for anesthesia services must bill for total minutes. For billing purposes, 15 minutes equals (1) unit. In addition, the anesthesia section was updated to indicate the type of documentation and attachments required, when applicable.

Rule Summary

292.310 Completion of the CMS-1500 Claim form – 24(G)
• Added the phrase, "For paper claims, including Anesthesia on paper claims, enter," and added the sentence, "For electronic claims submission, for Anesthesia services, enter total minutes."

292.440 Anesthesia Services
• (A) Added, “For electronic claims for Anesthesia services (procedure codes 00100 through 01999), for total minutes should be in the units’ field.”
• Deleted the sentence, “Electronic claims submission may be used unless attachments are required.”
• (C) Added the phrase, “require attachments or documentation.”
• (C) Deleted the phrase, “for hysterectomies and abortions must be billed on CMS-1500 paper claims because they require attachments or documentation.”
• Procedure Code 00800 – Added, “Operative Report.” Deleted information on female-only procedures.
• Procedure Code 00840 – Added, “Operative Report.” Deleted information on female-only procedures. Added modifiers U1, U2, and U3 when billing for payment, added a description sections and documentation requirements.
• Procedure code 00848 – Added “Acknowledgement of Hysterectomy Information (DMS-2606). View or print form DMS-2606 and instructions for completion.”
• Procedure code 00940 – Added, “Operative Report.” Deleted, “Required to name each procedure by surgeon in “Procedures, Services or Supplies” column.”
• Procedure code 00944 – Added, “View or print form DMS-2606 and instructions for completion.”
• Procedure code 01962 – Added, “Operative Report”, and added, “View or print form DMS-2606 and instructions for completion.”
• Procedure code 01963 - Added, “Operative Report”, and added, “View or print form DMS-2606 and instructions for completion.”
• Procedure code 01966 – Added, “Operative Report.”
• Added, “***Other documentation may be requested upon review.”
• (D) Arranged codes in numerical order: 11, 21, 22, and 24.

Section 292.446 Time Units
• Added, “…for paper claims. If filing electronically, the value submitted in this field should be the total anesthesia in minutes.”

PUBLIC COMMENT: A public hearing was held on this rule on July 28, 2021. The public comment period expired August 13, 2021. The agency indicated that it received no public comments.

The proposed effective date is October 1, 2021.

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

LEGAL AUTHORIZATION: The Department of Human Services has the responsibility to administer assigned forms of public assistance and is specifically authorized to maintain an indigent medical care program (Arkansas Medicaid). *See* Ark. Code Ann. §§ 20-76-201(1), 20-77-107(a)(1). The Department has the authority to make rules that are necessary or desirable to carry out its public assistance duties. Ark. Code Ann. § 20-76-201(12). The Department and its divisions also have the authority to promulgate rules as necessary to conform their programs to federal law and receive federal funding. Ark. Code Ann. § 25-10-129(b).

D. Agency Updates on Delinquent Rulemaking under Act 517 of 2019.

1. Department of Agriculture, Arkansas Bureau of Standards (Act 501) (REPORT BY LETTER PURSUANT TO MOTION ADOPTED AT JULY 22, 2020 MEETING)

E. Monthly Written Agency Updates Pursuant to Act 595 of 2021.

F. Adjournment.