ADMINISTRATIVE RULES AND REGULATIONS SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL

Room A, MAC
Little Rock, Arkansas

Tuesday, December 18, 2018
1:00 p.m.

A. Call to Order.

B. Reports of the Executive Subcommittee.

C. Reports on Administrative Directives for the Quarter ending September 30, 2018 Pursuant to Act 1258 of 2015.

1. Arkansas Parole Board (Brooke Cummings)

2. Department of Correction (Solomon Graves)

D. Deferred from the September 18, 2018 Meeting of the Administrative Rules and Regulations Subcommittee.

1. <u>DEPARTMENT OF HUMAN SERVICES, DIVISION OF AGING, ADULT, AND BEHAVIORAL HEALTH SERVICES</u>
(Craig Cloud and Mark White)

a. <u>SUBJECT</u>: Section 104 Intrastate Funding Formula

<u>DESCRIPTION</u>: The purpose of the intrastate funding formula is to reach older Arkansans with the greatest economic and social needs by using a fair and objective allocation methodology. This amendment will add two factors to broaden the allocation methodology: rural population data of Arkansans ages 60 and older and population data of Arkansans ages 75 and older. The addition of these two factors to the allocation methodology will improve the equitable distribution of Title III funds and other state and federal funds.

After public comment, two substantive changes were made to the amended policy. First, the language has been revised to clarify that

the funding formula applies only to funds that are intended to be distributed by formula to Area Agencies on Aging (AAAs). Second, the proposed rule has been revised to specifically identify the percentages used for the formula components and to specifically identify the base percentage allocated to agencies.

PUBLIC COMMENT: The Department of Human Services (DHS) did not hold a public hearing. The public comment period expired on July 14, 2018. The Department provided the following summary of public comments and its responses:

Luke Mattingly, CEO/President, CareLink, Comment Submitted 7/3/18

Comment Summary: Proposed section 104.200 should stipulate the percentages used for the various components of the formula and if changes are recommended then 104.000 should be brought back to the Legislature for evaluation and approval. The formula proposed in Section 104.200 only identify the factors of the census to be considered without specifics of how each will be weighted. By allowing broad changes on an annual basis by DHS without Legislative oversight, drastic changes in weighting for each factor may occur and cause a reduction for some providers and an increase for others. This instability will make budgeting and planning very difficult. CareLink respectively requests that the FY19 formula that was agreed upon by DHS and the AAAs be stipulated in section 104.200 A and B.

Agency Response: Comment accepted. The proposed rule has been revised to specifically identify the percentages used for the formula components and to specifically identify the base percentage allocated to agencies.

Jerry L. Mitchell, Executive Director, Area Agency on Aging of Northwest Arkansas, Comment Submitted 7/11/18

Comment Summary: The proposed rule states that DHS "will apply the same methodology to the distribution of other funds," but historically NSIP, SHIP, MIPPA, SFMNP, and Title VII have not been distributed by formula to the AAAs.

Agency Response: Comment accepted. The language has been revised to clarify that the funding formula applies only to funds that are intended to be distributed on an equitable statewide basis.

Comment Summary: The MOU between DHS and the AAAs states that the funding formula "shall be enforceable as soon as practicable upon promulgation." Was the new funding formula for SFY2019 promulgated, and can it be retroactively applied?

Agency Response: Comment considered. Funding for AAAs is distributed gradually over the course of the year. If the proposed policy is not promulgated, DHS will adjust funding amounts to ensure that the funding for the fiscal year complies with the promulgated policy in effect as of the close of the fiscal year.
Comment Summary: The proposed rule states that the Older Americans Act was last amended in 2006, but it was last amended in 2016.
Agency Response: Comment accepted. This typo has been corrected.
Comment Summary: Proposed section 104.200 A gives DHS the discretion to award a AAA any percentage (or not a percentage) it chooses since it does not say an equal percentage to each of the other AAAs, and it does not say that this percentage is base funds that will be taken off the total allocation prior to allocating the funds in 104.200 B.
Agency Response: Comment accepted. Because of the ambiguity of the current language in 104.200 A, proposed 104.200 A has been revised to clarify that each AAA receives an equal percentage, to make explicit that the base percentage is 1% of the total funding, and to remove any ambiguity so that the language is consistent with current practice.
Comment Summary: By not including the specific percentages for the formula components, it does not allow for public transparency in that no one other than DHS knows what the formula will be and why the percentages are allocated to each category.
Agency Response: Comment accepted. The proposed rule has been revised to specifically identify the percentages used for the formula components and to specifically identify the base percentage allocated to agencies.
Comment Summary: Funding for the senior services programs has remained stagnant for a long time and loses buying power each year because of inflation. It is not adequate to address the continuing needs of our 60+ population. Arkansas's 60+ population will continue to grow and using the population trends for the 60+ population, it is unlikely that any region will have a decreased 60+ population.
Agency Response: Comment considered. Overall appropriation and funding levels are determined annually in the legislative fiscal session and biennial regular session. The changes proposed in this rule do not govern and cannot modify the overall appropriation and funding levels.

Robert Wright, Arkansas Association of Area Agencies on Aging, Comment Submitted 7/12/18

Comment Summary: The biggest problem is the lack of increases in funding over the years. When the total funding stays the same and inevitable population shifts occur, there will be movement of funds among regions no matter what formula you use.

Agency Response: Comment considered. Overall appropriation and funding levels are determined annually in the legislative fiscal session and biennial regular session. The changes proposed in this rule do not govern and cannot modify the overall appropriation and funding levels.

Comment Summary: The allocation should be updated as new relevant demographic information becomes available. While negative impacts on individual AAAs should be minimized, the allocation should reflect to the most reasonable extent possible the actual need around the state as indicated by the presence of the population served by the funds.

Agency Response: Comment considered. The proposed rule allows for annual adjustments pursuant to US Census Bureau data to reflect new demographic information as it becomes available.

Comment Summary: We request that the rule reflect the current allocation formula, including the percentages, with any future changes to be made as part of the established rule promulgation process.

Agency Response: Comment accepted. The proposed rule has been revised to specifically identify the percentages used for the formula components and to specifically identify the base percentage allocated to agencies.

Jennifer Hallum, President/CEO, Area Agency on Aging of Western Arkansas, Comment Submitted 7/13/18

Comment Summary: Funding has not increased but the cost of goods, services, and staff has increased. In the environment we are in, the amount of funding received will not guarantee sustainability. If changes need to be made I ask that be done with at least a 3 to 5-year consistency, which help our centers in preparing budgets and decision making and will allow less steep cuts.

Agency Response: Comment considered. The proposed rule has been revised to specifically identify the percentages used for the formula components and to specifically identify the base percentage allocated to agencies; any change to the formula or to the percentages will require a promulgation process and legislative review. Overall appropriation and funding levels are determined

annually in the legislative fiscal session and biennial regular session. The changes proposed in this rule do not govern and cannot modify the overall appropriation and funding levels.

Per the agency, CMS approval is not required for these rule changes.

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

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: DHS is authorized to promulgate rules as necessary to conform to federal rules that affect its programs as necessary to receive any federal funds. *See* Ark. Code Ann. § 25-10-129(b).

The Older Americans Act of 1965, as amended, provides services and programs designed to help older Americans live independently in their homes and communities. The Act has a funding system for state and community programs and services established under Title III, under which each state is allotted funds based upon its proportion of the total U.S. population age 60 or older. *See* 42 U.S.C. § 3024(a)(1). A state plan must be approved by the federal Administration on Aging of the Department of Health and Human Services. *See* 42 U.S.C. § 3027(b). DHS distributes the funds to an area agency on aging in each planning and service area within the state which, in turn, awards subgrants and contracts with local providers for services.

DHS is authorized to develop a funding formula, under guidelines issued by the Administration on Aging (AOA), for the distribution of funds taking into account, to the maximum extent feasible, the best available statistics on the geographical distribution of individuals aged 60 and older in the state. *See* 42 U.S.C. § 3025 (a)(2)(C). Federal regulations require the intrastate funding formula to reflect the proportion among the planning and service areas of persons age 60 and over in greatest economic or social need with particular attention to low-income minority individuals. *See* 45 CFR 1321.37(a). DHS must submit the intrastate formula to the AOA for review and comment. *See* 45 CFR 1321.37(c). DHS submitted the proposed changes to the AOA, which informally advised that the proposed changes were satisfactory.

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

1. STATE BOARD OF BARBER EXAMINERS (Michael Wooldridge)

a. SUBJECT: Rules & Regulations for Barbering

DESCRIPTION: This amendment to Rule 023.00.92-001 will effectively bring up to date the standards for the safety and sanitation requirements for barbershops and barber schools, eliminate rules that are now in Barber Law A.C.A. § 17-20-101 and reduce confusion in the antiquated set of regulations.

The changes regarding sanitation were approved by the Director and State Health Officer, Doctor Nathaniel Smith in September. In these rules, the board has established different methods of cleaning necessary to prevent the spread of infection or disease.

Curriculum additions are a result of national findings and recommendations for a more uniform curriculum across the states.

Changes in the licensure regulations are a result of statute changes done last year and licensing information received during the Occupational Licensing Advisory Group meetings.

PUBLIC COMMENT: A public hearing was held on November 8, 2018. The public comment period expired on November 7, 2018. No public comments were submitted to the board.

Jessica Sutton, an attorney with the Bureau of Legislative Research, asked the following question: Arkansas Code Annotated § 17-20-206(b) requires the State Board of Barber Examiners to prescribe sanitary requirements for barbershops and barber schools, subject to the approval of the State Board of Health. Did the State Board of Health review these regulations? **RESPONSE**: Yes, they reviewed and submitted a letter stating that they did not find anything that was incorrect or improper from a public health perspective. They noted a misspelling, which was corrected.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The State Board of Barber Examiners is authorized to make and promulgate reasonable rules for the administration of the Arkansas Barber Law, Ark. Code Ann. § 17-20-101 et seq. *See* Ark. Code Ann. § 17-20-206(a). Additionally, the board shall prescribe sanitary requirements for barbershops and barber schools, subject to the approval of the State Board of Health. Ark. Code Ann. § 17-20-206(b).

2. CAPITOL ZONING DISTRICT COMMISSION (Boyd Maher)

a. SUBJECT: Relax Certain Sign Regulations

DESCRIPTION: This new language:

1. Allows the agency staff to approve larger wall-mounted signs in the Capitol Area when a building is set farther from the street.

2. Clarifies that the commission may approve certain signs that cannot be approved by staff because of their placement.

3. Removes content-specific language regarding signs on residential properties.

4. Removes a general prohibition on roof-mounted signs.

PUBLIC COMMENT: A public hearing was held on October 18, 2018. The public comment period expired on October 26, 2018. The Capitol Zoning District Commission received no public comments.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Capitol Zoning District Commission ("Commission"), using professional and technical assistance as it deems necessary, shall make, adopt, maintain, and revise, from time to time, an official master comprehensive plan for the Capitol Zoning District for the purpose of bringing about coordinated physical development in accordance with the present and future needs of the district. *See* Ark. Code Ann. § 22-3-305(a). The master plan should include, among other things, regulations

relative to the location and character of roads and other transportation routes, utility services, parks, buildings, and other construction within the district. *See* Ark. Code Ann. § 22-3-305(c). Pursuant to Ark. Code Ann. § 22-3-307(a), the Commission shall have the power and authority to prescribe such rules and regulations concerning procedure before it and concerning the exercise of its functions and duties as it shall deem proper.

3. DEPARTMENT OF CAREER EDUCATION, ARKANSAS REHABILITATION SERVICES (Carl Daughtery, Charles Lyford, Alan McClain, and James McCune)

a. SUBJECT: ARS Field Services Policy and Procedure Manual

DESCRIPTION: Arkansas Rehabilitation Services receives a grant from the Rehabilitation Services Administration, a division of the U.S. Department of Education. This grant enables ARS to provide vocational-rehabilitation services for individuals with disabilities. The proposed revisions to the Field Services Policy and Procedure Manual will inform and guide field counselors as they further the agency's goal of providing competitive, integrated employment for their clients.

PUBLIC COMMENT: Public hearings were held at the Arkansas Rehabilitation Services' Central Office and at the Fayetteville District Office on October 25 and October 26, 2018, respectively. The public comment period expired on November 6, 2018. The Department provided the following summary of the comments that it received and its responses thereto:

Commenter's Name: Credonna Miller
Commenter's Business/Agency: Saline Audiology
Summary of Comment: Credonna Miller is a doctor of audiology who practices in Benton and Hot Springs Village. She stated that it is unnecessary for a vocational-rehabilitation client to see a medical doctor prior to being approved by Arkansas Rehabilitation Services for a hearing aid. Dr. Miller stated that doctors of audiology can screen clients for medical issues directly, without an initial referral to a physician.
Agency's Response to Comment: ARS recognizes the clinical training and diagnostic ability of a doctor of audiology. However, it is in the best interest of the agency's clients to require a medical

assessment before approving the purchase of a hearing aid or similar device. A medical assessment (by an otologist, otolaryngologist, ENT, or primary-care physician) would ensure that issues like ear infections are treated without recourse to a hearing aid; likewise, the assessment would confirm that a hearing aid is recommended in the absence of a medical issue causing the hearing loss.

No changes were made as a result of the comment.

Commenter's Name: Tom Masseau, Executive Director of Disability Rights Arkansas
Commenter's Business/Agency: Disability Rights Arkansas is the non-profit organization federally designated as the Client Assistance Program/Protection and Advocacy System for individuals with disabilities in Arkansas.
Summary of Comment: 34 C.F.R. § 361.41 allows sixty days for the vocational-rehabilitation agency to determine whether an individual is eligible to receive client services. The 60-day time period is absent from Section II, p. 3 ("Referral, Application, and Assessment") of the revised policy manual.
Agency's Response to Comment: The commenter is correct that the 60-day time period for determining an applicant's eligibility was deleted from Section II, p. 3. However, this time period is referenced and discussed in Section III ("Eligibility and Ineligibility Determination").

No changes were made as a result of the comment.

Commenter's Name: Tom Masseau
Commenter's Business/Agency: Disability Rights Arkansas
Summary of Comment: 34 C.F.R. § 361.42 requires ARS to "conduct an assessment for determining eligibility and priority for services." The revised manual states that ARS will assess all individuals applying for services, but also states that the agency will "review existing data before determining if an assessment is needed ... and if so, what type." Section II, p. 6.
Agency's Response to Comment: The commenter is correct that a state's vocational-rehabilitation agency must assess all applicants for services in order to determine eligibility and priority.

Changes made. Section II has been revised as follows: "The counselor will review existing data before determining ~~if an~~

~~assessment is needed to determine eligibility and, if so,~~ what type of assessment is needed."

Commenter's Name: Tom Masseau
Commenter's Business/Agency: Disability Rights Arkansas
Summary of Comment: The section on "extended evaluation," a VR status available if achievement of a vocational goal was uncertain for a particular client, has been deleted from the revised manual. The commenter states that clients must be afforded extended evaluation status under federal law, specifically 34 C.F.R. 361.42(f).
Agency's Response to Comment: 34 C.F.R. 361.42 ("Assessment for determining eligibility and priority for services") was modified in August of 2016 to remove the extended-evaluation requirement. As a result, the revised manual focuses on "trial work experiences" and no longer requires counselors to consider extended-evaluation periods.

No changes were made as a result of the comment.

Commenter's Name: Tom Masseau
Commenter's Business/Agency: Disability Rights Arkansas
Summary of Comment: There is a discrepancy in the manual's definition of individuals with most significant, significant, and non-significant disabilities. The manual states that the agency currently defines "non-significant disability" as a disability that seriously impairs *one* functional capability. And the manual states that if ARS becomes subject to an order of selection (prioritizing services for individuals with the most significant disabilities), then "non-significant disability" will be defined as a disability that seriously impairs *two* functional capabilities.
Agency's Response to Comment: The discrepancy noted by the commenter is intentional. ARS is not subject to an order of selection, and it currently serves (as its lowest priority) individuals with impairment in only one functional area. Under an order of selection, individuals with serious impairment in two functional areas will be the agency's lowest priority of service.

No changes were made as a result of the comment.

Commenter's Name: Tom Masseau
Commenter's Business/Agency: Disability Rights Arkansas
Summary of Comment: The revised manual states that the agency will support online courses only if "training cannot be

arranged [for the client] by any other method." The commenter states that this requirement "discourages online courses." The commenter also states that ARS "require[s] students to pay for a semester of a training program or college prior to receiving ARS financial support."
Agency's Response to Comment: In-person training is preferable for a number of reasons, such as student-teacher interaction and hands-on experience. Moreover, the cost of online courses tends to exceed the cost of similar programs from public institutions in Arkansas. Counselors are therefore required to verify that the client's course of study "cannot be arranged by any other method" before authorizing online training.

The agency is unsure which part of the revised manual prompted the comment about clients paying for a semester of training before ARS provides support. ARS is not the primary funding source for training programs, given the potential availability of federal financial aid for student-clients. But there is no requirement that ARS withhold payments until clients have paid for one semester out of pocket.

No changes were made as a result of the comment.

Commenter's Name: Tom Masseau
Commenter's Business/Agency: Disability Rights Arkansas
Summary of Comment: 34 C.F.R. § 361.54(b)(3)(ii) states that a VR agency cannot require a client's financial participation "[a]s a condition for furnishing any vocational rehabilitation service if the individual ... has been determined eligible for Social Security benefits ... ."

The commenter requests that the manual "be changed to reflect the federal mandate that individuals eligible for SSI and/or SSDI benefits are exempt from financial participation in vocational rehabilitation services, including maintenance."
Agency's Response to Comment: The commenter is correct that VR services cannot be conditioned on the contribution of SSI or SSDI benefits toward those services. The VR service at issue here is "maintenance," or certain financial assistance for room and board.

The revised manual states that ARS counselors "must first utilize comparable services/similar benefits such as Social Security, community resources, and consumer resources before any ARS

funds can be committed for rental assistance payments." The manual should state that if maintenance payments are otherwise authorized, Social Security benefits cannot be counted as a comparable benefit to reduce the agency's share.

Changes made. Section VI ("Maintenance") has been revised as follows:

"The counselor must first exhaust the assistance available through ~~the Social Security Administration,~~ consumer resources and any other comparable services or benefits programs before funding maintenance support. ...

The Counselor must first utilize comparable services/similar benefits such as ~~Social Security,~~ community resources and consumer resources before any ARS funds can be committed for rental assistance payments. Individuals who receive SSI or SSDI ~~cash~~ benefits are expected to use those funds for their normal living expenses, but not for payment of VR services. <u>If an individual receiving SSI or SSDI benefits is authorized by ARS to receive maintenance support, the individual will not be required to contribute the SSI/SSDI benefits toward the maintenance support.</u>"

Commenter's Name: Tom Masseau
Commenter's Business/Agency: Disability Rights Arkansas
Summary of Comment: The commenter states that 34 C.F.R. § 361.49(g) requires vocational-rehabilitation agencies to provide VR services to family members of clients, "if necessary ... to achieve an employment outcome" for the client. The commenter states that the manual's "new 3 month limit placed on services to family members is too restrictive and in violation of federal regulations."
Agency's Response to Comment: The regulation cited by the commenter, 34 C.F.R. § 361.49, does not address services to family members. The relevant regulation appears to be 34 C.F.R. § 361.48(b)(9). ARS does not read this regulation as prohibiting a time limit on such services. However, the policy will be changed to allow for extensions on a case-by-case basis.

Changes made. Section VI ("Services to Family Members") has been revised as follows:

"Services may include childcare (up to three months), training, transportation (up to three months), and relocation of the family to

an area where work is available for the individual (up to three months). Services may be authorized for greater than three months on a case-by-case basis, as determined by the counselor in consultation with the individual and the individual's family."

Commenter's Name: Tom Masseau
Commenter's Business/Agency: Disability Rights Arkansas
Summary of Comment: The small-business appendix states that clients "must complete a small business plan/feasibility statement within 15 business days from RIDAC approval." The commenter requests a "more realistic timeframe" for clients to complete their plans.
Agency's Response to Comment: ARS agrees that a hard-and-fast deadline of 15 business days may be unrealistic.

Changes made. Appendix A ("Self-Employment/Small Business Program") has been revised as follows:

"~~If has approved~~ Following RIDAC assessment, client completes Small Business plan/feasibility statement that includes labor market analyses, with target deadline of ~~within~~ 15 business days from RIDAC approval date."

Commenter's Name: Tom Masseau
Commenter's Business/Agency: Disability Rights Arkansas
Summary of Comment: Appendix C of the revised manual applies to Community Rehabilitation Programs, which are organizations that directly provide, or facilitate the provision of, VR services to individuals with disabilities. The commenter raises three points with respect to Appendix C.

First, the commenter requests that the revised manual "explicitly state who is responsible for ensuring individuals in subminimum wage employment receive the initial and ongoing counseling" required by federal law.

Second, the commenter requests that the manual "reflect that counselors and individuals [receiving subminimum wage] work jointly to identify needed services."

Third, the commenter notes that the manual allows for "technical assistance ... to determine if a job position meets the Competitive Integrated Employment definition," but does not "explicitly

describe the process and the standards" involved with this assistance.

Agency's Response to Comment: As to the first comment, the manual should state that ARS will be responsible for the initial and ongoing counseling provided to individuals receiving a subminimum wage. As to the second comment, the manual should state that services are determined through counselor-client collaboration. As to the third comment, the manual should incorporate the statutory definition of "competitive and integrated employment." But this determination is extremely fact-sensitive, so it is inappropriate to fix agency "standards" beyond those already provided by federal law.

Changes made. In response to the first comment, Appendix C ("Community Rehabilitation Programs") and parallel parts of Section VI ("Limitations on Subminimum Wage") have been revised as follows:

"In addition, individuals with disabilities regardless of their age who are employed by a 14(c) must be provided career counseling and <u>related</u> information <u>by ARS</u>. <u>These individuals</u> must <u>also</u> be provided, <u>by ARS or the CRP</u>, information about self-advocacy, self-determination, and peer mentoring training opportunities available in the individual's geographic area every six months for the first year they are employed, and annually thereafter. ...

A youth with a disability ... cannot start working for less than minimum wage until he/she has had the opportunity to ... [r]eceive career counseling, including information and referrals to other state and federal entities that provide employment services, <u>from ARS</u>."

In response to the second comment, Appendix C has been revised as follows:

"The counselor <u>and individual</u> will <u>jointly</u> work to determine which services, including external employment services, ~~an~~ <u>the</u> individual may need to be successfully employed."

In response to the third comment, Appendix C has been revised as follows:

"Prior to job placement, an ARS Counselor ... may seek ~~technical~~ assistance from the ARS Community Program Development Section ~~for an evaluation to determine if~~ <u>as to whether</u> a ~~job~~

position ~~meets the~~ qualifies as Competitive Integrated Employment ~~definition as established in the regulations~~. As stated in 29 U.S.C. § 705(5), "competitive integrated employment" means full- or part-time work:

for which an individual is compensated at a rate that shall be not less than the higher of the rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 ... or the rate specified in the applicable State or local minimum wage law; and ... is not less than the customary rate paid by the employer for the same or similar work performed by other employees who are not individuals with disabilities, and who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills; or ...

in the case of an individual who is self-employed, yields an income that is comparable to the income received by other individuals who are not individuals with disabilities, and who are self-employed in similar occupations or on similar tasks and who have similar training, experience, and skills; and ... is eligible for the level of benefits provided to other employees; [and]

that is at a location where the employee interacts with other persons who are not individuals with disabilities (not including supervisory personnel or individuals who are providing services to such employee) to the same extent that individuals who are not individuals with disabilities and who are in comparable positions interact with other persons; and ...

that, as appropriate, presents opportunities for advancement that are similar to those for other employees who are not individuals with disabilities and who have similar positions.

Commenter's Name: Tom Masseau
Commenter's Business/Agency: Disability Rights Arkansas
Summary of Comment: Appendix H applies to pre-employment transition services, which are generally available to youth with disabilities. The commenter notes that in this appendix, "IEP" appears as "Individualized Education Plan" instead of "Individualized Education Program." Second, the commenter notes that Appendix H appears to provide a "bypass" to subminimum wage employment for youth with disabilities. Third, the commenter asks when forms referenced in Appendix H will be finalized.

Agency's Response to Comment: The commenter is correct that IEP in this context stands for "Individualized Education Program." As to the second comment, the "Refusal of Services" section was intended to establish a documentation procedure that applies when youths decline services. ARS did not intend this procedure to somehow authorize youths to seek subminimum-wage employment. As to the final comment, forms consistent with Appendix H are being developed, although the anticipated date of release is not known at this time.

Changes made. References in Appendix H to "Individualized Education Plans" have been changed to "Individualized Education Programs."

In response to the second comment, Appendix H has been revised as follows:

"In the event a ~~student/~~youth with a disability or, as applicable, the youth's parent or guardian, refuses ~~services~~ through informed choice to participate in services offered by ARS, and the ~~student/~~youth is known to be seeking subminimum wage employment, the transition counselor will document the refusal of services by ... ."

Commenter's Name: Tom Masseau
Commenter's Business/Agency: Disability Rights Arkansas
Summary of Comment: Appendix E includes forms associated with the due-process section of the revised manual. These forms reference "Disability Rights Center" instead of the organization's current name.
Agency's Response to Comment: "Disability Rights Center" is outdated.

Changes made. References in the due-process forms to "Disability Rights Center" have been changed to "Disability Rights Arkansas."

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 20-79-204(b)(1), the Arkansas Rehabilitation Services is authorized to promulgate regulations governing personnel

standards; the protection of records and confidential information; the manner and form of filing applications; eligibility and investigation and determination thereof for rehabilitation services; procedures for fair hearings; and such other regulations necessary to carry out the purposes of the Rehabilitation Act of Arkansas, codified at Ark. Code Ann. §§ 20-79-201 through 20-79-216, including the order to be followed in selecting those to whom rehabilitation services are to be provided in situations where service cannot be provided to all who are eligible for service. The agency states that these rules are further required to comply with the Federal Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.*

4. <u>DEPARTMENT OF EDUCATION</u> (Courtney Salas-Ford, item a; and Mary Claire Hyatt, item b)

a. <u>SUBJECT</u>: Consolidation and Annexation of School Districts

<u>DESCRIPTION</u>: Amendments to these rules are necessary as a result of Acts 745 and 936 of 2017.

- Sections 5.01.1, 5.02.1, 6.02.1, 11.02, are amended to change "the Arkansas Comprehensive Testing, Assessment, and Accountability Program Act" to the "Arkansas Educational Support and Accountability Act," to reflect changes made by Act 936 of 2017.

- Section 14.01 is amended to reflect the code revisions made by Act 1155 of 2013.

- Section 17.00 is removed to reflect the repeal of Ark. Code Ann. § 6-13-1606 by Act 745 of 2017.

<u>PUBLIC COMMENT</u>: A public hearing was held on September 26, 2018. The public comment period expired on October 22, 2018. The Department provided the following summary of the comments that it received and its responses thereto:

Lucas Harder, ASBA
Comment: Correct references to "Arkansas Geographic Information Systems Office" and other grammatical errors.
Agency Response: Corrections made.

Jennifer Wells, APSRC

Comment: Sections 5.01.1, 5.02.2, 6.01.1, 6.02.1 and 11.00, do not track language of Act 936 of 2017. It should read "... standards for accreditation, failure to meet fiscal or facilities distress requirements, or failure to meet the requirements to exit Level 5 - Intensive support pursuant to ... ."
Agency Response: Corrections made as appropriate.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-13-1409(a)(3), the State Board of Education shall have the duty to enact rules and regulations regarding the consolidation and annexation of school districts under Title 6 of the Arkansas Code. The proposed rules include revisions made in light of Act 745 of 2017, sponsored by Representative Bruce Cozart, which amended various provisions of the Arkansas Code concerning public education, and Act 936 of 2017, sponsored by Senator Jane English, which amended provisions of the Arkansas Code concerning public school education.

b. SUBJECT: Declining Enrollment and Student Growth Funding for Public School Districts

DESCRIPTION: The proposed changes include:

Formatting (indentations, capitalizations, etc.) made throughout to keep consistent formatting with ADE rules.

Renumbering where insertions/deletions have been made.

The rule title has been updated.

Section 1.01 Regulatory authority has been updated to include Act 741 of 2017.

Section 1.02 Updated to reflect corrected rule title.

Section 2.01 Removed reference to calculation method.

Section 3.00 Definitions have been updated, removed, and added as necessary to clarify the terms used in the rule.

Section 4.00 Section has been updated to provide clarity to the process for determining how declining enrollment funding is calculated, its allowable uses, and the requirement for tracking of expenditures from the fund.

Section 5.00 Section has been updated to remove changes made in the law. Additionally, the section has been updated to provide clarity to the process for determining how student growth funding is calculated, its allowable uses, and the requirement for tracking of expenditures from the fund.

PUBLIC COMMENT: A public hearing was held on September 26, 2018. The public comment period expired on October 22, 2018. The only comments received by the Department are those set forth below.

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

(1) Section 3.0~~3~~2 – Is there an extra a before "the decline"? **RESPONSE:** No.

(2) Section 3.0~~9~~7 – What is the reasoning for the additional language in the definition of "student growth funding," which differs from Ark. Code Ann. § 6-20-2303(23) that defines the term? **RESPONSE:** The definition was expanded to include the calculation method, in addition to the definition in Ark. Code Ann. § 6-20-2302(23).

(3) Section 4.0~~2~~1 – What is the reasoning for the addition of the "three-quarter" language preceding ADM? **RESPONSE:** In an effort to get declining enrollment and student growth funding to the Districts in the year that they experience the loss or gain of students, the calculation method has been changed. Districts receive either declining enrollment or student growth funding, but not both. The current calculation method can lead to overpayment by ADE to the Districts, resulting in the Districts having to pay back money to the State. In the new calculation method, the calculation is based [on] the 4th quarter of one year and the first three quarters of the next year for student growth funding, compared to the average three-quarter ADM for the prior year and the current year for declining enrollment funding. The result is that Districts get the money one quarter earlier.

(4) Section 5.01.1.~~2~~3 – Should there be an "and" following the second "ADM," in accord with Ark. Code Ann. § 6-20-2305(c)(2)(A)(iii), as amended by Act 741 of 2017, § 7? **RESPONSE:** Yes. The "and" was accidentally omitted.

(5) Section 5.01.1.~~4~~5 – Is Section 5.01.1.1 not included in the final comparison? Only Sections 5.01.1.2, 5.01.1.3, and 5.01.1.4? **RESPONSE:** It is included. It was accidentally omitted.

(6) Section 5.02 – What is the reasoning for the deviation from the language used in Act 741, *i.e.*, "repayment of funds" rather than "recoupment"? **RESPONSE:** The language will be changed to use the language as it appears in Act 741.

(7) Section 5.02 – Isn't the recoupment under Ark. Code Ann. § 6-20-2305(a)(4)(B) the difference between (i) net revenues and (ii) the sum of 98% URT multiplied by property assessment? Is the latter (ii), "the sum of 98% URT multiplied by property assessment" the same as "above the ninety-eight (98%) URT" as used in this section? **RESPONSE:** The language in this section is from Ark. Code Ann. § 6-20-2305(c)(2)(C).

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The State Board of Education shall have the authority, acting pursuant to its rulemaking powers, to adopt regulations for the implementation of the provisions of the Public School Funding Act of 2003, codified at Arkansas Code Annotated §§ 6-20-2301 through 6-20-2309. *See* Ark. Code Ann. § 6-20-2304(a). The proposed changes include revisions made in light of Act 741 of 2017, sponsored by Representative Bruce Cozart, which amended provisions of the Arkansas Code concerning public school funding and indebtedness.

5. STATE BOARD OF FINANCE (Ed Garner)

a. SUBJECT: State Treasury Money Management Trust Policy: 2018-2

DESCRIPTION: This revision changes the limit for short-term commercial paper from seven to eight days. This expansion will allow additional investment opportunities for Treasury funds and will help bring those investments more in line with normal weekly cash flows.

PUBLIC COMMENT: This rule was reviewed and approved by the Executive Subcommittee at its meeting on September 19, 2018, for emergency promulgation. With respect to permanent promulgation, a public hearing was held on October 29, 2018. The public comment period expired on October 26, 2018. The Board received no public comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that if the term "financial impact" is for any additional expenditure of state funds, it does not appear that these rule changes would necessitate any additional expenditure of state funds. However, from the Treasury's perspective, the State Board of Finance's proposed rule changes do have a financial impact. Any State Board of Finance rule that alters the amounts/percentages that the Treasury can invest potentially impacts investment returns and thus, has a "financial impact" on the State of Arkansas's bottom line.

In response to the question of what is the total estimated cost by fiscal year to state, county, and municipal government to implement the rule, the agency states that there is no cost unless money is invested in the program; then, the fee is 0.5% of the interest earnings.

LEGAL AUTHORIZATION: The State Board of Finance ("Board") shall 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). Pursuant to Ark. Code Ann. § 19-3-704(e), the Board may make, amend, adopt, and enforce rules and policies to regulate board procedure and execute board functions.

b. **SUBJECT: Arkansas State Treasury Investment Policy: 2018-1**

DESCRIPTION: This revision changes the limit for short-term commercial paper from seven to eight days. It also clarifies that Treasury funds invested in the Money Management Trust program are exempt from the 5% per issuer and 30% for the total portfolio limits on long-term commercial paper held by Treasury General. These expansions will allow additional investment opportunities for Treasury funds.

PUBLIC COMMENT: This rule was reviewed and approved by the Executive Subcommittee at its meeting on September 19, 2018, for emergency promulgation. With respect to permanent promulgation, a public hearing was held on October 29, 2018. The public comment period expired on October 26, 2018. The Board received no public comments.

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

(1) Section III.E. – What was the Board's reasoning behind removing the minimum certificate of deposit rates from the rules? **RESPONSE:** The CD rates set by the SBF need to be flexible relative to then-current market conditions. If the minimum rates remained in the rules, then there was concern that the SBF would have to wait for the APA/promulgation process to move rates (or at least to post those rates as part of the investment policy). This would cause rates to lag behind the market by 3-6 months. Artificial minimums in the rules may result in rates with potentially no market.

(2) Section III.E. – Where will the future rates be located or published once established by the Board? **RESPONSE:** Current rates are already provided by the Treasury to participating financial institutions. The minimum rates will also be made available to the public on the Treasury's website.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that if the term "financial impact" is for any additional expenditure of state funds, it does not appear that these rule changes would necessitate any

additional expenditure of state funds. However, from the Treasury's perspective, the State Board of Finance's proposed rule changes do have a financial impact. Any State Board of Finance rule that alters the amounts/percentages that the Treasury can invest potentially impacts investment returns and thus, has a "financial impact" on the State of Arkansas's bottom line.

LEGAL AUTHORIZATION: The State Board of Finance ("Board") shall 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). Pursuant to Ark. Code Ann. § 19-3-704(e), the Board may make, amend, adopt, and enforce rules and policies to regulate board procedure and execute board functions.

6. DEPARTMENT OF FINANCE AND ADMINISTRATION, RACING COMMISSION (Byron Freeland and Smokey Campbell)

a. SUBJECT: Thoroughbred Rule 1211-Requirements for Horse Shoes

DESCRIPTION: This amendment prohibits horses from running without shoes, unless permission is obtained from the stewards.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

b. SUBJECT: Thoroughbred Rule 1216-Administration of Drugs Prior to Post Time

DESCRIPTION: This amendment corrects the Lasix exception rule number from 1217, which is incorrect, to 1232, the correct

rule number, and it adds the new 24-hour ban prior to post time, prohibiting the administration of any drug except Lasix.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

c. SUBJECT: Thoroughbred Rule 1217-Administration of Drugs and Testing Procedures

DESCRIPTION: This rule would update the current ARC Rules by adopting an edited version of the current RCI rule used by other states. This rule prohibits the administration of any drug except Lasix within 24 hours of post time; establishes threshold levels for 26 drugs that are currently used in all states that have adopted the RCI rules; and sets out the procedures for split sample tests.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date.

Skip Ebel, an attorney for Oaklawn Park, pointed out typographical errors in the rule, which were acknowledged by the Commission. It was agreed to correct the errors at the conclusion of the meeting. The errors do not affect the content of the rule. Oaklawn supported the rule.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

d. **SUBJECT: Thoroughbred Rule 1231-Total Dissolved Carbon Dioxide Testing**

DESCRIPTION: This amendment lowers the allowable TCO_2 level from 39 to 37 millimoles per liter to comply with national standards for graded stakes races. This change was made on an emergency basis for 2017, and it is required for graded stakes races at Oaklawn to be certified as meeting national industry standards.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

e. **SUBJECT: Thoroughbred Rule 1233-Trainer Responsibilities**

DESCRIPTION: This amendment merely corrects the rule number referenced from 1217 to 1232 to correct an error in the existing book.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

f. **SUBJECT: Thoroughbred Rule 1245-Disqualifiction of Horse for Fraudulent Practice**

DESCRIPTION: This amendment allows horses to be disqualified for the remainder of the calendar year rather than through the end of the Oaklawn meet in May of each year. In the past, a horse could violate a rule near the end of the meet and be suspended for only a few days until the end of the meet. Under this amendment, a horse can be suspended until December 31 of each year.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

g. **SUBJECT: Thoroughbred Rule 1255 – Imposition of Fines**

DESCRIPTION: The amendment is to allow imposition of fines in the amount currently authorized by Arkansas law.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

h. **SUBJECT: Thoroughbred Rule 1269(f)-Twenty-four Hour Ban**

DESCRIPTION: This amendment prohibits the administration of drugs beginning 24 hours prior to post time and also contains language requiring the proper treatment of horses. The old rule allowed the administration of drugs prior to 6:00 p.m. the day before the race. This amendment adopting a 24-hour ban is the standard in the industry.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

i. **SUBJECT: Thoroughbred Rule 2094(g)-Authority of Stewards when Investigating Possible Rule Violations**

DESCRIPTION: This amendment clarifies the stewards' authority to order licensees to attend hearings and produce documents when they are investigating a complaint or incident in a race.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

j. SUBJECT: Thoroughbred Rule 2094(h)-Appeals from Stewards' Rulings are heard *de novo*

DESCRIPTION: This amendment ensures that all parties understand that appeals from stewards' rulings to the commission are *de novo*.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

k. SUBJECT: Thoroughbred Rule 2094(i)-Stewards List of Poor or Inconsistent Performances by Horses

DESCRIPTION: This amendment requires owners/trainers of a horse that is placed on the Stewards List for poor or inconsistent performances to obtain the stewards' permission prior to entering the horse to run again after the horse has been placed on the list.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

l. **SUBJECT: Thoroughbred Rule 2094(j)-Stewards List for Horses with Issues about Ownership**

DESCRIPTION: This amendment allows the stewards to place a horse on the Stewards List when more than one person claims ownership of a horse, and it provides that the ownership conflicts must be settled before the horse can be entered in a race.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

m. **SUBJECT: Thoroughbred Rule 2094(k)-Requires Notice to Stewards when an Owner Changes Trainers**

DESCRIPTION: This amendment requires an owner to give the stewards immediate notice when the owner changes trainers for any horse. This amendment is necessary because the trainer is the absolute insurer of the condition of a horse entered to race.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

n. **SUBJECT: Thoroughbred Rule 2162-Jockeys' Attire and Prohibition of Advertising**

DESCRIPTION: This amendment prohibits advertising on jockeys' attire without the consent of the owner, the stewards, and the franchise holder.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date.

David Longinotti, an executive employee of Oaklawn Park, commented on Rule 2162, which bars jockeys from wearing advertising on their uniforms without the permission of Oaklawn, the horse owner and the Stewards. Mr. Longinotti stated that the issue of advertising by jockeys had come up infrequently and had not been a problem in the past. He stated the rule was common in the industry and supported the adoption of the rule.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

o. **SUBJECT: Thoroughbred Rule 2169-Jockey Mount Fees**

DESCRIPTION: This amendment requires owners to pay two jockeys if the owner double-books jockeys and one jockey does not ride in the race. This amendment is to protect jockeys who are double booked and do not get to ride in the race.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date.

Terry Brennen, a representative of the Horsemen's Benevolent and Protective Association (HBPA), which represents horse owners, commented that this rule was common at other tracks, and that double-booking does occur. Mr. Brennen did not oppose the proposed rule.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: The amendment could cost an owner an additional fee of $70 to $105 in a race when the owner double-books jockeys. This amendment keeps owners from double-booking jockeys and not paying one of the jockeys who does not ride. The ARC is given the authority in A.C.A. § 23-110-204 to supervise, regulate, and control horse racing and can protect jockeys from abuse.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

p. SUBJECT: Thoroughbred Rule 2216-Submission of Entries

DESCRIPTION: This amendment prohibits entries from being made by text message to the personal telephones of racing office employees.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

q. SUBJECT: Thoroughbred Rule 2281-Overflow Entries

DESCRIPTION: This amendment provides a procedure for selecting entries when more than 12 horses enter a race.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

r. SUBJECT: Thoroughbred Rule 2444-Claiming Procedure when an Original Claim is Ruled Invalid

DESCRIPTION: This amendment governs a situation when an original claim is declared invalid in situations where there are multiple claims, and it voids all remaining claims that were made for the horse.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date.

David Longinotti, an executive employee of Oaklawn, commented that this proposed rule is intended to clarify the rules in a situation that arose during the 2018 race meet when a claim was voided. Mr. Longinotti expressed support of this proposed rule.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

s. SUBJECT: Greyhound Rule 1359-Amounts of Fines for Rules Violations

DESCRIPTION: This amendment authorizes fines up to $100,000 for rules violations to conform the rule to current Arkansas law. Some of the races at Southland have up to a million dollars in purses. Under the old rule, the maximum fine was $1,000.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-111-203, the Arkansas Racing Commission has sole jurisdiction over the business and sport of greyhound racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

t. SUBJECT: Greyhound Rule 1362-Amounts of Fines for Rules Violations

DESCRIPTION: This amendment authorizes fines up to $100,000 for rules violations to conform the rule to current Arkansas law. Some of the races at Southland have up to a million dollars in purses. Under the old rule, the maximum fine was $1,000.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-111-203, the Arkansas Racing Commission has sole jurisdiction over the business and sport of greyhound racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

u. SUBJECT: Thoroughbred Rule 2069-Amendment-Lowers the Breath or Urine Sample

DESCRIPTION: This amendment lowers the breath and urine sample alcohol testing levels for jockeys to 0.00%. The old rule would have allowed jockeys to have up to 0.05% alcohol concentration in their system.

PUBLIC COMMENT: A public hearing was held on November 15, 2018, and the comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204, the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas, and the commission has the full, complete, and sole power and authority to promulgate rules accordingly.

7. DEPARTMENT OF HEALTH, HEALTH SYSTEMS LICENSING AND REGULATION/COSMETOLOGY AND MASSAGE THERAPY SERVICES (Laura Shue)

a. SUBJECT: Rules and Regulations for Massage Therapy in Arkansas

DESCRIPTION: The Cosmetology and Massage Therapy Section of the Department of Health propose the following amendment to the Massage Therapy Rules and Regulations to add Cupping Therapy pursuant to Act 530 of 2017. Cupping Therapy is a modality used to release rigid soft tissues, through the application of a non-heated device that creates suction to lift the tissue away from the body.

The amendments provide new requirements to practice cupping therapy. A massage therapist must have a minimum of six (6) hours in-class, specialized training in cupping therapy. The training must be noted on a massage therapy school or postsecondary massage therapy school transcript or a certificate of completion.

PUBLIC COMMENT: A public hearing was held on September 22, 2017. The public comment period expired on September 22, 2017. The Department received no public comments.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: This revision to the rules and regulations for massage therapy is the result of Act 530 of 2017, sponsored by Representative Fredrick Love. Act 530, which is codified at Arkansas Code Annotated §§ 17-86-102(3)(C) and 17-102-311(c), added the practice of cupping to the scope of massage therapy. Arkansas Code Annotated § 17-86-203(a)(1) gives the State Board of Health general authority to promulgate and enforce reasonable rules related to massage therapy.

8. DEPARTMENT OF HEALTH, OUTBREAK RESPONSE SECTION (Laura Shue)

a. SUBJECT: Rules and Regulations Pertaining to Reportable Disease

DESCRIPTION: The Outbreak Response Section proposes the following changes to the Rules and Regulations Pertaining to Reportable Diseases. The following proposed changes agree with recent modifications of the nationally notifiable disease list by the Council of State and Territorial Epidemiologists and practices among other state health departments:

Conditions newly made mandatorily reportable nationally:
Carbapenem-resistant Enterobacteriaciae (CRE):
These rare but highly drug-resistant infections are emerging nationally as an important clinical problem. They are highly fatal and often reflect major deviations in recommended antibiotic prescribing and thus are a focus of intensive infection containment and quality improvement efforts.

Conditions newly defined nationally:
Candida Auris (Candida haemulonii):
This non-albicans Candida species emerged internationally in the last 12 months and has been found to be resistant to all anti-fungal medicines. Infections are often fatal and risk factors are poorly defined. Identifying the organism is challenging and it is routinely mis-identified as *C. haemulonii*, so we propose to add both rare organisms to the list.

Conditions newly proposed to be added at the state level:
Bacillus cereus as well as Bacillus species that cannot be ruled out as *B. anthracis* or *B.*
cereus bv anthracis, and *Yersinia enterocolitica:*

Both *B. cereus* and *Y. enterocolitica* are rarely diagnosed, but are thought to be an important cause of preventable foodborne disease outbreaks. If an Arkansan tests positive for these infections via a lab test, we would want to know of it.

Conditions proposed to be removed from the state's reportable disease list:

Non-fatal and non-hospitalized influenza infection:
Influenza remains a major public health and clinical priority, killing hundreds and sickening hundreds of thousands of Arkansans each year. The reporting of influenza has been recognized as a major burden for clinicians and the ADH for years and has been a target of ongoing surveillance improvement strategies. Several automated electronic data feeds from the majority of Arkansas hospitals, many clinics, a few large pharmacies, vital records, industry partners, and the state's largest insurer have been piloted for the last two years and are now considered mature enough to forgo the need for individual provider-based case reporting of routine influenza cases. We still intend to require that all influenza hospitalizations and deaths be reported as before.

Conditions added to improve detection of potential terrorist events/radiation misadministration:

Suspected unintentional radiation exposure:
While it is unlikely that a provider would not recognize this as an example of potential terrorism, we wanted to assure that the ADH was notified early, along with law enforcement, in case it represented a failure to appropriately contain or handle medical supplies or medical waste.

Clinical radiation adverse event:
The ADH licenses and regulates providers who administer radiotherapy. Suspected equipment failure, radiation misdosing, or unusually severe reactions should initiate prompt investigation by the licensee and ADH.

Updates regarding isolates or specimens that must be submitted to the ADH public health laboratory:

Bacillus cereus bv anthracis or Bacillus species that cannot be ruled out as *B. anthracis* or *B. cereus bv anthracis,Candida Auris (Candida haemulonii),Vibrio Cholera, V. parahaemoliticus, V. vulnificus,* Brucellosis, Melioidosis (Burkholderia pseudomallei), Glanders (Burkholderia mallei),

During the last update to these rules and regulations, these rare species were inadvertently left off from being required to be submitted.

Clarifications:
All outbreaks of diseases on the list (or other emerging diseases not specifically mentioned on the list) should be reported immediately (within 4 hours) via phone to the ADH.

All unusually drug resistant infections should be reported within 24 hours to the ADH.

PUBLIC COMMENT: A public hearing was held on November 1, 2018. The public comment period expired on November 1, 2018. The Department received no comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Arkansas Code Annotated §§ 20-7-109(a)(1)(A)&(C) authorize the State Board of Health to make all necessary and reasonable rules and regulations of a general nature for the protection of the public health and safety and for the suppression and prevention of infectious, contagious, and communicable diseases.

9. DEPARTMENT OF HUMAN SERVICES, AGING AND ADULT SERVICES AND BEHAVIORAL HEALTH SERVICES, OFFICE OF STATE DRUG DIRECTOR (Kirk Lane)

a. SUBJECT: AADACC Rules of Procedure

DESCRIPTION: Effective January 1, 2019:

1. The Arkansas Alcohol and Drug Abuse Coordinating Council Rules of Procedure will be revised to clarify the membership of the Council, clarify the structure, operation, and procedure of its committees, and make other technical changes.

2. The Rules of Procedure for the State Drug Crime Enforcement and Prosecution Grant Fund will be revised to clarify

the manner in which a determination is made of whether funds are being supplanted, remove the requirement that a Memorandum of Understanding formed for managing grant funds contain an agreement to maintain a minimum balance, and make other technical changes.

3. The Rules of Procedure for the Special Assets Forfeiture Fund will be revised to allow the Council to receive recommendations for funding from its committees or members, establish the procedures for making a petition for funding, clarify the procedure for providing notices of award to grant recipients, clarify the procedure for modifying the budget or grant award agreements, and make other technical changes.

PUBLIC COMMENT: The Department of Human Services (DHS) did not hold a public hearing. The public comment period expired on November 10, 2018. DHS received no comments.

Per the agency, CMS approval is not required for these rule changes.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas Drug Director, who serves as the coordinator for development of an organizational framework to ensure that alcohol and drug programs and policies are well planned and coordinated, is authorized to establish and enforce rules regarding the management of the Special State Assets Forfeiture Fund and the maintenance and inspection of drug-task-force records concerning asset forfeitures, revenues, expenditures, and grant funds. *See* Ark. Code Ann. §§ 20-64-1001(b) & (d)(2). *See also* Ark. Code Ann. § 5-64-505(i)(3)(D)(i) ("The Arkansas Drug Director shall establish through rules and regulations a procedure for proper investment, use, and disposition of state moneys deposited into the Special State Assets Forfeiture Fund in accordance with the intent and purposes of this chapter.") The Arkansas Alcohol and Drug Abuse Coordinating Council (the Council) is responsible for overseeing all planning, budgeting, and implementation of expenditures of state and federal funds allocated for alcohol and drug education, prevention, treatment, and law enforcement. *See* Ark. Code Ann. § 20-64-1003(a). The Council has the authority to develop its rules of procedure to include the

establishment of a committee structure for the approval of funding and other purposes. *See* Ark. Code Ann. § 20-64-1003(e)(1). State moneys in the Special State Assets Forfeiture Fund shall be distributed by the Council and shall be distributed for drug interdiction, eradication, education, rehabilitation, the State Crime Laboratory, and drug courts. *See* Ark. Code Ann. § 5-64-505(i)(3)(D)(ii).

Additionally, pursuant to Arkansas Code Annotated § 12-17-102(a), the State Drug Crime Enforcement and Prosecution Grant Fund was established for the purpose of funding state grant awards for multi-jurisdictional drug-crime task forces to investigate and prosecute drug crimes within the State of Arkansas. The Council is responsible for developing and promulgating by rule criteria for the grant applications and awards process for the State Drug Crime Enforcement and Prosecution Grant Fund, reviewing all grant applications, determining which applicant or applicants should receive grant awards, and retaining oversight of all grant expenditures for the Fund. *See* Ark. Code Ann. §§ 12-17-104(1)–(4).

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10. <u>DEPARTMENT OF HUMAN SERVICES, CHILDREN AND FAMILY SERVICES</u> (Christin Harper)

a. <u>SUBJECT</u>: Child Maltreatment Investigative Actions and Programs

<u>DESCRIPTION</u>: This rule provides additional guidance to staff regarding actions to occur during child maltreatment investigations, including referrals of families to Team Decision Making meetings, when applicable, and policy regarding reports of maltreatment in foster homes. Specifically, the changes include:

POLICY II-D: Investigation of Child Maltreatment Reports

- Remove obsolete form references and make edits to the policy for general organizational improvement purposes;

- More clearly outline child maltreatment investigation interview requirements per A.C.A. § 12-18-605;

- Provide clarification to existing practices regarding actions included in protection plans and information that must accompany

the request for DHS to file a dependency-neglect petition in relation to a protection plan;

- Specify requirements for protection plans in place for more than 30 days per A.C.A. § 12-18-1001 and case plan requirements for any dependency-neglect petition filed with the court per A.C.A. § 9-27-402; and,

- Clarify responsible parties within DCFS for sending various investigative notices.

POLICY II-F: Team Decision Making

- Standardize the timeframe in which a Team Decision Making must be held regardless of the reason for which a family is referred for a Team Decision Making Meeting;

- Add references to the requirement to formally reassess protection plans within 30 days per A.C.A. § 12-18-1001; and,

- Clarify existing referral criteria and meeting logistics.

POLICY VII-K: Maltreatment Allegations Made in Out-of-Home Placements

- Provide more guidance regarding implementing corrective action plans for foster homes, as appropriate;

- Formalize the role of the Resource Family Review Committee regarding consideration of open foster homes that have had a child maltreatment report; and,

- Specify actions and considerations for foster homes involved in a child maltreatment investigation at various points throughout a child maltreatment investigation and depending on the outcome of a child maltreatment allegation.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on October 13, 2018. The Department provided the following summary of the sole public comment that it received and its response thereto:

Commenter: Children's Advocacy Centers (CACs) of Arkansas
Comment: Request that language be added to Policy II-D: Investigation of Child Maltreatment Reports to encourage the Division of Children and Family Services (DCFS) staff to utilize CACs (referred to as Child Safety Centers in Arkansas statute) during the course of child maltreatment investigations for a variety of maltreatment allegations when available and appropriate.
Response: The requested language has been added to Policy II-D: Investigation of Child Maltreatment Reports. This language has been shared with the Children's Advocacy Centers of Arkansas and met their approval. The language is as follows (see p. 4 of clean version of Policy II-D: Investigation of Child Maltreatment Reports):
"DCFS staff are encouraged to bring child victims of Priority I reports involving sexual abuse, physical abuse, neglect, and witness to violence to the nearest Child Safety Center for the interview whenever available and appropriate. In some cases, it may also be appropriate to bring child victims of certain Priority II maltreatment reports to the nearest Child Safety Center for the interview."

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Division of Children and Family Services ("Division") of the Department of Human Services ("Department") shall perform the following functions and have the authority and responsibility to: coordinate communication between various components of the child welfare system; provide services to dependent-neglected children and their families; investigate reports of child maltreatment and assess the health, safety, and well-being of the child during the investigation; provide services, when appropriate, designed to allow a maltreated child to safely remain in his or her home; protect a child when remaining in the home presents an immediate danger to the health, safety, or well-being of the child; ensure child placements support the goal of permanency for children when the Division is responsible for the placement and care of a child; and ensure the health, safety, and well-being of children when the Division is responsible for the placement and care of a child. *See* Ark. Code Ann. § 9-28-103(a)(1)–(7). The Division may promulgate rules necessary to administer Title 9, Chapter 28, Subchapter 1 of the Arkansas Code,

Children and Family Services. *See* Ark. Code Ann. § 9-28-103(b). Further authority for the rulemaking can be found in Arkansas Code Annotated § 12-18-105, which provides that the Department and the Department of Arkansas State Police shall promulgate rules to implement the Child Maltreatment Act, codified at Ark. Code Ann. §§ 12-18-101 through 12-18-1202.

11. DEPARTMENT OF HUMAN SERVICES, COUNTY OPERATIONS (Larry Crutchfield and Lisa Teague, item a; Mary Franklin, items b and d; Lorie Williams, item c)

a. SUBJECT: Medical Services Policy Manual Sections K-111

DESCRIPTION: The proposed rule change revises Medical Services policy to provide clarification that children who are adopted or in a pre-adoptive placement may continue to receive Medicaid whether or not an IV-E subsidy payment is being made.

PUBLIC COMMENT: The Department of Human Services (DHS) did not hold a public hearing. The public comment period expired on October 3, 2018. DHS received no public comments.

Per the agency, this rule change did not require CMS approval, as it was a change to become compliant with federal regulations.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The total estimated financial impact is $172,085 ($50,593 in general revenue and $121,492 in federal funds) for the current fiscal year and $295,004 ($86,731 in general revenue and $208,273 in federal funds) for the next fiscal year.

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

See Ark. Code Ann. § 20-76-201(12). DHS is also authorized to promulgate rules as necessary to conform to federal rules that affect its programs as necessary to receive any federal funds. *See* Ark. Code Ann. § 25-10-129(b).

Per the agency, this rule change is being promulgated to comply with 42 U.S.C. § 673(b), Section 473A, which addresses adoption and legal-guardianship incentive payments. In order for a State to be eligible for foster-care and adoption assistance payments under 42 U.S.C. §§ 670 et seq., it shall have a plan approved by the Secretary which provides for foster-care maintenance payments in accordance with section 472 of the Social Security Act [42 U.S.C. § 672] and for adoption assistance in accordance with section 473 [42 U.S.C. § 673]. *See* 42 U.S.C. § 671(a)(1).

b. **SUBJECT: SNAP 3000 Work Registration Requirements**

DESCRIPTION: The revisions in the SNAP 3000 (Work Registration) section of the manual feature additional guidance regarding SNAP Work Registration violations, the sanction process, and regaining eligibility after a Work Registration violation sanction has ended.

The revision also includes updates that:

1. Strengthen the monitoring of work and community engagement activity participation.

2. Provide examples of allowable reimbursements in the Employment and Training program.

3. Make general language and content naming updates.

4. Rewrite rules regarding the sanction and cure process for work registration violations.

The result of these changes will decrease the potential for findings regarding sanctions during audit reviews, and it will strengthen the state staff understanding of SNAP work requirements when processing cases.

PUBLIC COMMENT: The Department of Human Services (DHS) did not hold a public hearing. The public comment period expired on October 2, 2018. DHS received no comments.

Per the agency, this rule change does not require CMS approval.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 20-76-201, DHS shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. *See* Ark. Code Ann. § 20-76-201(1). DHS shall also make rules and regulations and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76, Public Assistance Generally, of the Arkansas Code. *See* Ark. Code Ann. § 20-76-201(12). DHS is also authorized to promulgate rules as necessary to conform to federal rules that affect its programs as necessary to receive any federal funds. *See* Ark. Code Ann. § 25-10-129(b).

Per the agency, these rule revisions are further being implemented to comply with provisions of the Food and Nutrition Act of 2008 (Public Law No. 110-246).

c. SUBJECT: Low Income Home Energy Assistance Program (LIHEAP) Plan for the FY2019

DESCRIPTION: The proposed rule serves as Arkansas's application for federal funds for the implementation of the LIHEAP Program. The revisions include the following:

1. Section 1.5 – Response to 1.5 was changed to "No." A Potentially Eligible (PE) Application is required for enrollment.

2. Section 2.5 – Energy Burden is now checked as it was used to determine the current LIHEAP household benefit.

3. Section 3.5 – Box 3.5 for Energy Burden was checked as a result of changes in the Benefit Matrix.

4. Section 3.6 – The LIHEAP benefit amount to households is based on three components: Monthly Countable Income, Household Size, and Families with the Highest Energy Burden.

In communications with Kay Joiner, the Weatherization Staff at ADEQ, the following revisions were modified to provide clarity to the FFY 2019 LIHEAP State Plan and the following boxes were checked for the FFY 2019.

5. Section 5.5 – Weatherization for entire multi-family housing structure is permitted if at least 66% of units are eligible units. Under the lead in, "mostly under DOE WAP Rules," the box "OTHER" was checked to better clarify what is allowed under DOE rules.

PUBLIC COMMENT: Public hearings were held on October 2, 3, 4, and 5, 2018, in Russellville, West Memphis, Warren, and Little Rock, respectively. The public comment period expired on October 25, 2018. The Department provided the following summary of the sole public comment that it received and its response thereto:

Commenter: Yovondra Walton, CRDC – Jonesboro AR
Comment: Voiced concerns for the office hours of operation for the Community Action Agency and the time frame for the acceptance of applications from the general public. Her concern was the cut off hours to accept applications lend hardship to working parents/families. Normal working hours for most employees are 8 a.m. to 5 p.m. CRDC hours of operations are 8:00 a.m. to 4:30 p.m., Monday through Friday.
Response: We appreciate the feedback received during the public hearing and look forward to make our program more accessible to the customers we serve. To address the concerns we heard, we plan to hire additional staff for each county. We think this will allow more staggering of staff hours to remain open during our posted hours for accepting LIHEAP applications. We also anticipate this will reduce the wait time for the customer.

Secondly, we recognize the challenge our office hours pose specifically for customers who work. Therefore, we plan to begin offering Saturday hours in each county in an effort to meet the needs of those who cannot visit CRDC office during regular weekday hours.

Finally, we plan to increase the locations of satellite days where we move away from the county offices and in strategic locations in

counties. We are also planning to ensure that some satellite days have non-standard hours outside of our normal operating hours.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: The cost to implement the federal rule or regulation for the current fiscal year is $1,000,000 in federal funds and, for the next fiscal year, $13,000,000 in federal funds.

LEGAL AUTHORIZATION: Arkansas Code Annotated § 25-10-129(b) authorizes and directs the Department of Human Services and its various divisions to "promulgate rules, as necessary to conform to federal statutes, rules, and regulations as may now or in the future affect programs administered or funded by or through the department or its various divisions, as necessary to receive any federal funds." Per the agency, the proposed rule consists of the state plan for distribution of federal Low-Income Home Energy Assistance Program (LIHEAP) block grant funds and administration of the Home Energy Assistance Program under Public Law 97-35, as amended.

d. SUBJECT: Medical Services Policy Manual Sections H-300 through H-325

DESCRIPTION: The summary of changes for Section MS H-300 Transfer of Resources follows:

Various sections under MS H-300 are being amended to revise the process of determining a start date of an asset transfer penalty period for Home and Community-Based Services (HCBS) Waivers, incorporating a new interpretation of the law by CMS; and to revise that an individual may establish their own special needs trust, complying with 5007 of the Cures Act (42 U.S.C. § 1396p(d)(4)(A)).

MS H-303 *Transfer for Less than Fair Market Value*: Revised that an HCBS Waiver applicant/recipient who has transferred resources for less than fair market value will be ineligible for a period of time as specified at MS H-308.

MS H-304 T*ransfers to Trusts*: For trusts established after 8/11/93, revised policy allowing that an individual may establish their own special needs trust.

MS H-308 *Determination of Uncompensated Value and Penalty Period*: Revised how long HCBS Waiver applicants/recipients remain ineligible due to a transfer of resources for less than fair market value.

MS H-310 *Imposing the Penalty*: Revised the criteria necessary to impose a penalty period for HCBS Waiver applicants and the begin dates of the penalty period for applicants and recipients.
MS H-311 *Notifying Individual of Established Uncompensated Value and Penalty Period:* Revised when a penalty period for HCBS Waiver applicants can and cannot be imposed.
MS H-316 *Transfer of Resources Divisor Definition:* Revised when the HCBS Waiver case may be approved following the penalty period.

Terminology updates and formatting corrections have been made throughout MS H-300:

- *Caseworker* changed to *eligibility worker*;
- *DCO*-707 changed to *DHS*-707*;*
- *DCO*-727 changed to *DHS*-727;
- *DCO*-732 changed to *DHS*-732*;*
- *Office of Policy and legal Services (OPLS)* changed to *Office of Chief Counsel (OCC)*;
- *LTC* changed to *nursing facility* for clarity;
- Punctuation, spacing, and capitalization corrected throughout for consistency;
- Business processes and examples removed; and
- *Home and Community Based (HCBS)* added to replace *Waiver* for clarity.

PUBLIC COMMENT: The Department of Human Services (DHS) did not hold a public hearing. The public comment period expired on November 6, 2018. DHS received no public comments.

Per the agency, this rule change did not require CMS approval, as it was a change to become compliant with federal regulations.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: The impact is unknown as no record of the number of persons who did not apply for Medicaid Home and Community Based Services (HCBS) due to this rule exists. However, some persons not eligible for Medicaid waiver services may have entered long term care facilities due to difference in

eligibility criteria (being corrected here). Had this proposed rule been in place, they may have entered an HCBS waiver at a cost savings to the state.

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

Per the agency, the portion of the policy change allowing that an individual may establish his or her own special needs trust is being promulgated to comply with Section 5007 of the 21st Century Cures Act (the "Cures Act"), Pub. L. No. 114-255.

12. DEPARTMENT OF HUMAN SERVICES, MEDICAL SERVICES (Tami Harlan, items a and b; Mark White, items c and d; Paula Stone, item e; and Melissa Stone and Paula Stone, item f)

a. SUBJECT: PCMH 1-18 (Patient-Centered Medical Home); State Plan Amendment 2018-013

DESCRIPTION: Effective January 1, 2019, Arkansas Patient-Centered Medical Homes will use performance-based incentive payments instead of shared savings incentive payments.

DMS is proposing the following changes to the 2019 PCMH Program Manual and SPA:

1. Remove definitions related to total cost of care and shared savings and add definition for Performance-Based Incentive Payments.

2. Define performance-based incentive payment methodology.
3. Define focus measure.
4. Define performance-based payment amounts.
5. Remove total cost of care calculations.
6. Reduce the number of weeks enrollment is open.
7. Clarify practice transformation payments.
8. Revise shared-savings incentive payments to performance-based incentive payments.
9. Decrease pool size to 1000.
10. Change savings to performance based.
11. Change per beneficiary cost to utilization measures and focus measures.
12. Add core measure requirement.
13. Replace shared savings with performance based and total cost of care with utilization rates.
14. Replace shared savings entities with performance risk entities.

PUBLIC COMMENT: The Department of Human Services (DHS) held a public hearing on November 2, 2018. The public comment period expired on November 11, 2018. DHS provided the following comments and its responses:

Chimere Ashley, Pratapji Thakor, Sejal Thakor, Stephen Pirtle (all writing separately)

Comment: It has come to my attention that in the proposed 2019 PCMH manual a practice transformation coach is no longer provided for a new PCMH at no cost to them. In previous manuals a transformation coach was provided at no charge for the first 24 months of participating in the state PCMH program. I am in a group with 3 other providers, separated into 3 clinics that fall into the state default pool. The group I am in was new to PCMH in 2016 and having three clinics to transform has to say the least been quite an undertaking for our care coordinator, four providers and our clinic staff members. With that being said, practice transformation is a huge undertaking for a practice(s). A state funded transformation coach is very beneficial to a care coordinator when beginning the state program. There are so many guidelines to understand, policies and procedures to write, as well as reports to maintain. It is my opinion that the policy remains as written in previous manuals and a transformation coach is provided to a new PCMH for the first 24 months of their program.

Response: The agency wants to thank you for your feedback and concerns regarding practice transformation. We understand the importance of this resource tool and how it has impacted clinics within the PCMH community and for that reason this is why DMS extended the contract, because of the outreach on so many clinics. The agency will keep your concerns in mind and if there is any other feedback in the future please feel free to share.

Public Hearing, Little Rock, 11/2/18

Dr. Curt Patton, East Arkansas Children's Clinic
Oral comments

Comment: First of all, let me apologize for responding to something that is not true. You know, when you are outside of central Arkansas and you are not in policy development and you don't read manuals for a living, you know, some of what I have heard and been told may not be accurate. So, if some of my remarks seem pointed towards some particular item and they are incorrect, I apologize for that on the front end. My concern about the new manual and the changes in it have to do with how smaller clinics outside of central Arkansas and northwest Arkansas, for those of us that are trying to make PCMH work, how it affects us. I have been in the program for five years, and I'm generally committed toward -- I mean, our clinic is committed to excellence and quality. We try not to tell people, because we are in a small town, that we do a less good job. And I believe that the twin goals of PCMH of improved quality of care and cost savings are admirable. Just for background, I'm not just a country doctor, but I serve on the board of Arkansas Children's Care Network, ACCN, an institution initiated by Arkansas Children's Hospital. I am a past president of the Arkansas Academy of Pediatrics for the state. And so, I have some experience in this area.

The first thing I will start out with -- and again, these are more stream of consciousness that I typed up than an organized paper. So, I apologize for any duplications or poor grammar. My first concern when I read the new manual is that the design for '19 appears to put two-thirds of clinics that participate in PCMH in the position of not getting any incentive payments. Yes, the top 30 percent will get some and the top ten percent will get the most. But considering the challenges to smaller clinics, we start out kind of behind, in my opinion. Part of it is, is that as physicians, we really don't have much control over when people go to the emergency

room or get admitted because there are other players involved, and there are so many factors at play: Availability of transportation, clinic hours that I can operate as a 64-year-old pediatrician who has had a stroke, and the difficulty of recruiting help to the Delta to have a larger clinic to do that. But we are trying to do what we can. But I believe that the way it is designed inadvertently penalizes the smaller rural clinics. And so, I'm not necessarily prepared -- I'm not expecting to get some of the incentives as they are currently designed.

Amongst my colleagues, I sometimes have a reputation as a bomb thrower, but I usually won't come up with a criticism unless I have a suggestion. And so, I would consider spreading out the incentive payments percentage-wise to a larger number of clinics. I don't think you need to incentivize the lowest performing percentage, whether it's the lowest ten percent or the lowest 30 percent. But I think the middle third consists of clinics like mine who are honestly trying to make the program work. And I don't necessarily think that I should get the same amount of incentive as a top ten percent clinic, but I think an adjusted amount ought to be considered.

If the numbers of incentive payments are accurate, from what I have been told, then we are talking about quite a significant amount of money that the department and the taxpayers of the state are investing in it, and I certainly applaud that. But as it is now, it's going to be the rich getting richer, the poor getting poorer, and the middle class getting poorer. So, I really would like to consider adjusting those percentages to incentivize those of us that are kind of in the middle. One reason that clinics like mine are in the middle is because we have several barriers, and they are outlined in the following comments. I'm across the street from a hospital that is using the rules and bending the rules and being dishonest with the rules as currently promulgated by Medicaid to create an income-generating center in the emergency room and their fast track version within the emergency room. I used to sit on the hospital board of my local small hospital, and I would hear financial reports over and over and over, year after year, that we are doing well as a small rural hospital because our lab and our x-ray in our ER is generating a lot of income. And when I got into it as a board member, it was because they were flaunting the rules. Several ways that they do that is, first of all, they market against supporting clinics. They have spent a large operating budget on marketing in radio and TV and billboards telling my patients that they will be

seen within 30 minutes in the emergency room. And so, I have had people walk into my office at 2:00 o'clock on a Friday afternoon, look at how full it is, and walk out and go across the street to the emergency room. And I cannot stop that. So, I think that we really need to think about some policy changes to give me more control. Yes, I might make some people unhappy, but again, I'm in a private practice, I'm not a rural clinic, I'm not government-funded. And so, I want to keep my patients happy and receiving good care. My malpractice attorney friends see to it that I provide good care. And so, I don't think that a change would really harm the quality of care that much.

I had one mother tell me that the reason she likes to go to the emergency room for non-emergencies is, "I can get all the lab and all the x-rays that I think my child needs." Whereas we are known, as a clinic, I'm a board certified pediatrician, trained at the university in Memphis, and I was not trained to get every lab I can think of on every patient that shows up in my clinic sick, whether they have flu, whether they have pneumonia, or whatever. And as a result, because the screening policy of Medicaid as it is currently set up for emergency rooms allows an inexperienced moonlighting dermatologist in the ER to get all the lab and x-ray that he thinks is necessary. And, in fact, the software for my local hospital emergency room makes suggestions to the physician or the PA that is seeing the child on what labs and x-rays to get. You type in "abdominal pain" and a whole list comes up, and the majority of the time the inexperienced ER physicians get all of that, and it is covered under the guise of screening lab and imaging. Because, as one PA told me, "Doctor Patton, we have to do this to figure out if they are an emergency." And I said, "I respect that, but I'm telling you I don't need all that to decide if it's an emergency."

So, the hospitals outside of the major ones in the urban centers do not have an incentive to triage appropriately. In other words, they triage as many of their patients as they can as emergent. And their attitude in their Billing Department is they look at it like being a white collar tax cheat, "I'm cheating on my taxes every year, but I only got caught one year. But think of those nine years that I got away with it." And so, as a result, there is an inadvertent incentive to get more lab, to classify things as emergency when they are not. A less educated population tends to use the ER more even when the clinic educates them and is open, which we have tried to do. My suggestion on that is to consider an incentive for both the ER and for patients for not using the ER for non-emergencies. It's not

as radical as it sounds. Many programs that have been funded by grants are paying young teenage mothers to not get pregnant. And I cannot quote statistics, but they seem to be helping. Again, anything we can do at an administrator level to give us the tools to help us succeed in the rural areas will help. And then, of course, the opposite is to consider disincentives for both ER and patients. One of the problems with the definition of an emergency currently under Social Security, I believe, is that an emergency is a medical condition that is judged by a prudent layperson to be an emergency. Well, is that prudent layperson the son of -- the daughter-in-law of a pediatrician who gets plenty of free advice, is that a prudent layperson, or is a prudent layperson a 16-year-old mother with her second child, raising the child by herself with no fund of health information, and, of course, then there are all sorts of in between. But again, the definition and the administrative policies kind of handicap us to make this successful, in my opinion. So, both incentives and disincentives should be considered, in my opinion. One thing about the prior manuals, if you will look at my "C", is that there was quite a bit of information sharing, in fact, I was asked to speak five years ago when the program first started because my cost per patient and my policies were felt to be in line with what PCMH was intending to do, and that I had been doing it for years. So, again, I'm not an expert in the true sense of the word, but I have a lot of experience. And so, we -- different clinics would go to PCMH meetings and we would say, "Well, how are you dealing with this outbreak of excessive ER usage?" "Well, we do this, this, and this." Now the clinics are competing against others. In other words, we are not trying to be the standard. This clinic is competing against this clinic to be in the top third to incentivize. There will be absolutely no sharing of best practices. And so far, our PCMH reps have been hesitant to give us more than general guidelines on best practices. But that information sharing is going out the window come January 1 because no clinic is going to help me improve if it kicks them out of the top third. It's another reason to expand the reward percentage of clinics. So, one obvious suggestion is to set a standard percentage like current metrics do for us to try to meet, that your ER utilization be, you know, like I say, in maybe the bottom 50 percent or less than "X" number of visits per year. Something like that we can hang our hat on and we can information share clinic to clinic on what we are doing to help that.

On "D", whereas adolescent wellness as an incentivized metric can mostly be controlled by us with getting kids in, doing wellness

metrics when they come in for things they didn't realize would be a wellness. Like a sports physical, camp physical, we are gung ho about doing wellness visits any time we have the patient in, and then if they are on a refill protocol for something like AD/HD where they have to get medicine from us in order to be compliant, then we internally set up things like, "It's time for your AD/HD checkup, and, oh, by the way, your wellness visit is due." So, we try not to miss opportunities. And I suspect most clinics trying to make it work are the same way. However, emergency room visits and admissions cannot be controlled by us. Current policy, if I'm correct, allows any admission from an emergency room to the hospital without a referral because it's an emergency; right? Well, that goes back to my definition that an emergency for a moonlighting dermatologist in a 40-bed rural hospital is not the same as an emergency for me or for an experienced pediatrician here at Arkansas Children's. Sometimes one of the problems of having, you know, monocular or tunnel vision when you are in central Arkansas is that the standard of care throughout the state is what Children's does. And that's obviously not correct. You know, they are way ahead of us in many ways. Their budget also allows them to have a lot of support people that we can't afford. And although we are grateful for the per member per month payments, some of which we use to get some help -- for example, I will probably be purchasing care management services from ACCN next year, in addition to services from my current AFMC rep. The bottom line is that the incentives are not going to help us do that unless we are in the top third. So, we cannot control who gets admitted if they go through the emergency room. We cannot control who goes to the emergency room except for education and/or for firing the patient from our practice.

One suggestion I heard from another clinic that I'm close enough to that we do information share is they are now sending letters to frequent ER utilizers, and the first one is a gentle reminder that, "Based on record review, two of your six emergency room visits in the last six months could have been handled in the office." One of the six we were actually open, and one more of the six was actually something they should have gone elsewhere for, like Children's or UT in Memphis. So, this policy could be fixed by a simple administrative change, and that's to require a referral from a PCP and PCMH, or all PCPs to submit a referral if someone wants to admit from the emergency room. Keeping in mind that all emergency rooms are not created equal and neither are the ER docs. I made a comment, indeed, that one doctor's emergency is

another doctor's, "Go home and see you tomorrow." And I do that quite a bit. You know, I will get a call from the emergency room to request a referral for a non-emergency visit, which is very rare, by the way. I never get called by my local facility, I never get called by surrounding facilities 15 miles up the road in Wynne, 50 miles up the road in Jonesboro, and 40 miles south of me in Helena. So, between those four hospitals, I never get a call from them saying, "We have a non- emergency, do you want us to treat it?" They treat them, assume a referral, and then I get a list a week later that says, "Doctor Patton, will you approve these referrals for non-emergency care?" I routinely don't do it, but that doesn't mean they quit sending me the list. So, again, one recommendation would be to require referral for admission, whether it's ER or from a clinic. And "E", my local emergency room is one of these, they code an excessive number of visits as emergent because they are not on a hundred percent review and it's a revenue center for the hospital. And even if they feel like they got away with it the other time and made a lot of money. So, I would suggest taking some of these funds, which I have heard anywhere from $9 million to $13 million to $15 million that may be disbursed this next year, and using a little bit of that to get some extra reviewers to do more hundred percent reviews specifically for the ER utilization.

My last two comments are more questions, which I, now that I know the routine, won't get answered, but I will say them anyway. The first is that the reports don't yet reflect where we stand on the metrics of admission, ER utilization, and adolescent wellness. We can guess from the raw numbers that are on the current report, but hopefully those will be forthcoming soon in 2019. And then, the manual's comment about excluding one patient per a thousand who is maybe an excessive utilizer. And of my top five, I know what that means, my top one has 39 ER visits this past year. They go to St. Jude, he has brain cancer, and so he will need a lot of care. And I am under no illusion that I need to restrict that unduly, but I don't know why the process at St. Jude is set up to see them in the emergency room this often. I get the feeling that maybe chemo is being administered outpatient but they are billing it as an ER rather than as a clinic visit. I can only tell you what fun it is to call the business office at a big facility like St. Jude and start asking questions. It is impossible to get a straight answer from a knowledgeable person. So, I personally think that the exclusion of one per thousand is unduly strict. I have about 15 patients that have been to the ER six times this past year, 15 that have been there

seven times, and then quite a few that are three and four. And to me, that's still too many based on their problem list.

However, I do have ten that are high utilizers, and of the ten, I can only not explain why in two of them. In addition to my two kids with cancer, I have -- I'm in an area that's highly African-American, and so, I have five sickle cell children who frequently go to the emergency room to get pain relief because their only car is not available until 6:00 o'clock at night, so they cannot make it to the clinic. Even with Medicaid-paid transportation, if it's a non-emergency, you require 48 to 72 hours' notice to get a ride. And most of my uneducated, ill-informed low health information families do not use that transportation in a realistic way. If I certify them as an emergency, I can get them there the same day, but I have to know about the patient in order to certify it. And if an uneducated Medicaid mom with more than she can handle doesn't call me and say, "I really need to come to the clinic, but I can't get there," then I can't help them. So, I would consider increasing that exclusion to five to ten per a thousand. No big secret, I have a caseload, since my whole practice is Medicaid, essentially, of 3,000. So, under the current policy, that means I can exclude three high utilizers. So, I get to decide between the two cancer patients and my four sickle cell who I can exclude. So, I really think that number should be considered to go up. That's really all my prepared comments. And I didn't want to take up excessive time. But this just gives you a smattering of the concerns we have outside of the larger clinics. I know that physicians were involved in the input of some of this through, I believe, a governor-appointed group, I have been told. And, of course, there is always politics. I am a loyal Democrat, so I did not expect to get appointed to a group by a Republican governor. No hard feelings there, it's just a fact of life. But that does cut out a group of people who might have a different view from some of the people that did get appointed. Any time a group is set up by appointees, the outcome is pre-determined. For example, the Board of Medicine, three, four, five, six of their membership is appointed by the medical society. Now, you cannot tell me that the medical society does not control the medical board. So, that's not DHS' problem. I'm just using that as an example to say, the recommendations you get from advisors depends on who you appoint. And I must say, to quote one of my favorite movies, most physician advisers these days in the State of Arkansas are from a list of usual suspects, and it's the same people over and over and over. People that don't have three colleagues, at least, like I have, never would have the time to come in and give

their comments. So, the next time a major overhaul is made, maybe consider regional meetings. You still might not get a huge turnout, but at least you would hear some alternative ideas. That's all I've got.

Dr. Curt Patton, East Arkansas Children's Clinic
Written comments

Comment: 1. The program's design for 2019 is 2/3 of clinic will get no incentive payments. Consider a lesser amount for the middle 3rd to encourage at least a simple majority to get gain share.
Challenges:
A. Clinics near a small hospital have to compete with their "fast track" program for patients ("guarantee 30 min wait, all of the lab and x-rays mom wants, can go at night")
B. Less educated population tend to use ER more even when clinic educates them and is open.

- Consider an incentive for hospital ER and/or patients for not using ER for non-emergencies.
- Consider disincentives for both ER and patients.

C. Clinics competing against each other for any incentive means best practices will not be shared

- One suggestion would be to set a standard percentage like current metrics for clinics to meet.

D. Whereas adolescent wellness can be controlled by the clinic, ER visits and admissions cannot be controlled by the clinic. Current ER policy allows any admission from an ER to be done without PCP referral.

- One recommendation would be to change this policy to require a referral when admitted from ER. (One doctor's emergency is another doctor's "go home and follow up tomorrow").

E. Some emergency rooms code an excessive number of visits as "emergent" because they are not on 100% review and these visits are a revenue center for the hospital.

- Consider spending some of the funds for extra reviewers to do more 100% reviews.

2. When will reports reflect our status of Inpatient Admission, ER Utilization and Adolescent Wellness compared to other clinics? Current reports only give us raw numbers without any ideas of where our current ranking is.
3. Excluding 1 patient per 1000 who is an "excessive utilizer" is excessively strict.

- Consider an exclusion of 5-10 patients per 1000

Response: The Patient-Centered Medical Homes (PCMH) program appreciates your comments and concerns about the proposed 2019 Medicaid PCMH Manual. It is concerns expressed by providers like yourself that have been the driving force in the new proposed direction for PCMH.

Under the proposed 2019 PCMH Manual, Medicaid will potentially pay incentive payments to the top 35% of PCMH's in three independent measures (Emergency Room Rates, Inpatient Stay Rates, Adolescent Wellness). Since each measure is independent of how a PCMH performs in each of the other measures, the potential is greater than 35% of PCMH's will be eligible for incentive payments. To give a comparison over how many PCMH's have receive incentive payments since the beginning of this program:

2014 24% of PCMH's received Shared Savings
2015 38% of PCMH's received Shared Savings
2016 7% of PCMH's received Shared Savings
2017 the trend seems to be following the same as 2016

We understand that there are obstacles that providers and clinics face when it comes to hospitalization. For that reason, ER Rates and Inpatient Rates will be risk adjusted based on attribution, regions, age of population and other factors that are unique to Arkansas. PCMH wants to make sure that all providers are on as equal of a playing field as possible.

We know that ER and Inpatient Stays will not be eliminated. The purpose of these measures are to possibly reduce the Non-Emergency ER visits, as well as catching some physical conditions before they require inpatient stays. We do this by tracking and rewarding those practices and PCP's that have voluntarily contracted and are participating in the Medicaid PCMH program.

Although it is true that this program will create a little competition amongst practices and providers, even after presenting these proposed changes to the provider community, over 300 of these same providers came together at the October 2018 CPC+ learning Session. During this session they discussed successes, obstacles, and ideas to improve in these same measures that they will also be competing in for incentive payment.

PCMH has released a new report this past October called the Provider Health Metric (PHM) Monthly Report. This will provide monthly data and updates on how a PCMH is performing in both Quality Metrics as well as Performance Measures tracked for Incentive Payments. This monthly report along with the quarterly PCMH report, a provider should be able to get a picture of how they are performing compared to other providers and their cohorts.

The Physician Exclusion of 1 patient per 1,000 has been part of the PCMH program from the beginning. This has always allowed a physician to exclude a patient that could adversely affect the performance of their clinic due to cost of care. With addition to this exclusion we also capped the cost of any individual beneficiary at $100,000, so that we could evaluate the provider on what they could control instead of what is out of their control. Likewise, in the new proposed manual for 2019 in addition to the physician exclusion of 1 patient per 1,000, we have added exclusions unique to each measure, as well as capping the number of ER visits to 12 per year, any additional visits over 12 per calendar year will not be counted against the provider.

Kathryn Henry, an attorney with the Bureau of Legislative Research, asked the following question: What is the reason for the change from shared-savings incentive payments to performance-based incentive payments? **RESPONSE**: Shared Savings is paid based upon Total Cost of Care Methodology averaged out over the provider's annual attribution. Over time, this has proven difficult to sustain in a fair and reliable manner. Escalating pharmacy costs, changes to reimbursement for ambulatory surgery, fluctuation within the Medicaid population, creation of the PASSE program, and implementation of a new DHS medical information system have led to time consuming difficulties in editing and sustaining a fair and consistent measurement of the total cost of care for and enrolled PCMH. Performance based incentive payments will focus on areas that have statistically shown to have a high correlation to cost, such as inpatient stays and ER rates and reward the providers with lowest rates in these measures. Those with lower rates in these areas show to have lower average total cost of care than those with higher utilization rates. By encouraging providers to decrease these numbers it in return will decrease cost.

Per the agency, CMS approval is not required for the PCMH manual updates. There is a corresponding state plan amendment, as to which CMS approval is required and currently is pending.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: The estimated savings for the current fiscal year is $7,725,000 ($2,271,150 in general revenue and $5,453,850 in federal funds) and $15,450,000 for the next fiscal year ($4,542,300 in general revenue and $10,907,700 in federal funds).

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

b. SUBJECT: Hospice 2-18

DESCRIPTION: Effective January 1, 2019, the Hospice provider manual has been updated to require all owners, principals, operators, employees, and applicants for hospice providers to comply with criminal background checks as required by Arkansas Code Annotated §§ 20-33-213 and 20-38-101 et seq.

PUBLIC COMMENT: The Department of Human Services (DHS) did not hold a public hearing. The public comment period expired on November 6, 2018. DHS received no comments.

DHS revised the rule after the comment period expired and gave the following explanation for the revision:

The reference in the rule to § 20-38-101 et seq., which includes the requirement that central registry checks be made, already required these central registry checks. However, for the sake of clarity and to ensure providers understand DHS's intent, we decided to explicitly include the central registry check language. Hospice providers are currently required by statute to perform these checks, and the rule reflects that statutory requirement. In addition, this language now mirrors the background and registry check language in the Home Health Manual.

Per the agency, CMS approval is not required for these rule changes.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: Because this is budget neutral, there is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 20-76-201, DHS shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. *See* Ark. Code Ann. § 20-76-201(1). DHS shall also make rules and regulations and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76, Public Assistance Generally, of the Arkansas Code. *See* Ark. Code Ann. § 20-76-201(12). Arkansas Code Annotated § 20-77-107 specifically authorizes DHS to "establish and maintain an indigent medical care program." The criminal-background-check portion of this rule change was required to comply with Arkansas Code Annotated §§ 20-33-213 and 20-38-191 et seq.

c. SUBJECT: Home Health 1-18

DESCRIPTION: Effective January 1, 2019, the Home Health provider manual has been updated to require all owners, principals, operators, employees, and applicants for home health providers to comply with criminal background checks as required by Arkansas Code Annotated §§ 20-33-213 and 20-38-191 et seq. Also, an old

reference to ElderChoices and Alternative for Adults with Physical Disabilities is being corrected to ARChoices in Homecare.

PUBLIC COMMENT: The Department of Human Services (DHS) did not hold a public hearing. The public comment period expired on November 6, 2018. DHS received no comments.

Per the agency, CMS approval is not required for these rule changes.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: Because this is budget neutral, there is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 20-76-201, DHS shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. *See* Ark. Code Ann. § 20-76-201(1). DHS shall also make rules and regulations and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76, Public Assistance Generally, of the Arkansas Code. *See* Ark. Code Ann. § 20-76-201(12). Arkansas Code Annotated § 20-77-107 specifically authorizes DHS to "establish and maintain an indigent medical care program." The criminal-background-check portion of this rule change was required to comply with Arkansas Code Annotated §§ 20-33-213 and 20-38-191 et seq.

d. **SUBJECT: ARChoices 2-18 and Homecare Home and Community-Based Services Waiver; Independent Choices 1-18; Personal Care 1-18; Living Choices Assisted Living 1-18 and Living Choices Assisted Living Home and Community-Based Services Waiver, Program for All-Inclusive Care for the Elderly (PACE) 1-18 and State Plan Amendment #2018-014**

DESCRIPTION: Pursuant to Arkansas Code Annotated §§ 20-10-1704, 20-77-107, 20-77-128, 20-77-1304, 25-10-101 et seq., 25-10-129, and 25-15-201 et seq., the Director of the Division of Medical Services of the Department of Human Services is proposing to create a new medical assistance rule, known as the "Arkansas Medicaid Task and Hour Standards," and to amend the following medical assistance rules: "ARChoices in Homecare §

1915(c) Home and Community-Based Services Waiver" and the "ARChoices in Homecare Home and Community-Based Services (HCBS) Waiver Manual" (also known and referred to collectively as ARChoices); the "Living Choices Assisted Living § 1915(c) Home and Community-Based Services Waiver" and the "Living Choices Assisted Living Manual" (also known and referred to collectively as Living Choices); "Supplement 4 to Attachment 3.1-A of the Medicaid State Plan Under Title XIX of the Social Security Act" (a State Plan Amendment) and the "IndependentChoices Manual" (also known and collectively referred to as "IndependentChoices" or "Self-Directed Personal Assistance Services"); "Page 10aa of Attachment 3.1-A of the Medicaid State Plan Under Title XIX of the Social Security Act" (a State Plan Amendment) and the "Personal Care Manual" (also known and collectively referred to as "Personal Care"); and the "Program of All-Inclusive Care for the Elderly (PACE) Manual" (also known and referred to as PACE). "§ 1915(c)" refers to section 1915(c) of the federal Social Security Act governing Medicaid HCBS waiver programs.

Effective January 1, 2019, the Department of Human Services (DHS) Division of Medical Services is proposing the following updates and changes to the rules governing the following five Arkansas Medicaid programs and services:

1. ARChoices in Homecare § 1915(c) Home and Community-Based Services (HCBS) Waiver Program (ARChoices), with updates and changes made through amendments to the current federal HCBS waiver, amendments to the ARChoices Waiver Manual, and the new Arkansas Medicaid Task and Hour Standards;

2. Living Choices Assisted Living § 1915(c) HCBS Waiver Program (Living Choices) with updates and changes made through amendments to the current federal HCBS waiver, amendments to the Living Choices Assisted Living Manual, and the new Arkansas Medicaid Task and Hour Standards;

3. Medicaid Self-Directed Personal Assistance Services Program (IndependentChoices), as provided under § 1915(j) of the Social Security Act, with updates and changes made through a Medicaid State Plan Amendment, amendments to the IndependentChoices Manual, and the new Arkansas Medicaid Task and Hour Standards;

4. Medicaid Personal Care Services delivered under the Medicaid State Plan, with updates and changes made through a Medicaid State Plan Amendment, amendments to the Personal Care Manual, and the new Arkansas Medicaid Task and Hour Standards; and

5. Program of All-Inclusive Care for the Elderly (PACE), with updates and changes made through amendments to the PACE Manual.

Proposed updates and changes effective on January 1, 2019, and affecting the five programs and services include, without limitation:

Administrative Changes:

- Terminology and division of administrative responsibilities for the programs are revised to reflect the separation of the units of the former DHS Division of Aging and Adult Services into the DHS Division of Aging, Adult, and Behavioral Health Services (DAABHS), the DHS Division of Provider Services and Quality Assurance (DSPQA), and the DHS Division of County Operations (DCO). ARChoices and Living Choices are amended to add DPSQA as a second operating agency. ARChoices is amended to transfer responsibility for determining financial eligibility to DCO. IndependentChoices is amended to designate DPSQA as the primary operating agency. PACE is amended to designate DAABHS as the primary operating agency.
- Assignments of responsibilities between DHS staff and DHS vendors are revised, and the processes followed by DHS staff and DHS vendors are revised.
- Transition language concerning the 2016 transition to ARChoices from ElderChoices and AAPD is repealed.
- For IndependentChoices, certain terms are renamed or rephrased, and the term "communications manager" is eliminated. Assignments of responsibilities between DHS staff and DHS vendor(s) are revised.

Changes in Eligibility Requirements and Limitations for ARChoices Waiver, Living Choices Waiver, and PACE:

- The Cognitive Performance Scale is eliminated as one of the three alternative tests for functional eligibility for ARChoices, Living Choices, and PACE, to be replaced with a requirement that an individual have a primary or secondary diagnosis of

Alzheimer's disease or related dementia and be cognitively impaired so as to require substantial supervision from another individual because he or she engages in inappropriate behaviors which pose serious health or safety hazards to himself or others.

- The Change in Health, End-Stage Disease and Signs and Symptoms (CHESS) is eliminated as one of the three alternative tests for functional eligibility for ARChoices, Living Choices, and PACE, to be replaced with a requirement that an individual have a diagnosed medical condition which requires monitoring or assessment at least once a day by a licensed medical professional and the condition, if untreated, would be life-threatening.
- The current ARChoices point-in-time cap, which limits the number of participants who may be enrolled in ARChoices at any one time, is revised to increase the point-in-time caps by year as follows: Calendar Year 2019, 9,071 participants maximum; and Calendar Year 2020, 9,434 participants maximum.
- Based on the changes to eligibility requirements, some individuals who would not be eligible for ARChoices, Living Choices, and PACE under the current rules may be eligible under the rules as amended; and some individuals who would be eligible under current rules may not be eligible under the rules as amended.

Independent Assessment Changes:

- DHS has selected an outside contractor ("DHS Independent Assessment Contractor") to perform independent assessments that gather functional need information using the Arkansas Independent Assessment (ARIA) instrument for each applicant and participant for ARChoices, Living Choices, IndependentChoices, Personal Care, and PACE.
- The independent assessments performed by the DHS Independent Assessment Contractor will replace the independent assessments currently performed by DHS registered nurses (RNs) using the ArPath assessment instrument for ARChoices, Living Choices, IndependentChoices, and PACE, as well as replace references to the MDS-HC assessment for IndependentChoices.
- For each individual assessed, the ARIA independent assessment instrument will generate a proposed level of care evaluation for the purposes of determining functional eligibility for ARChoices, Living Choices, Personal Care, and PACE. The level of care evaluation generated by ARIA will be reported as a "Tier Level" of Tier 0, 1, 2, or 3 to help further differentiate individuals by need. The DHS Office of Long Term Care (OLTC) will make the final level of care determination for ARChoices, Living Choices, and PACE after reviewing the ARIA assessment results.

Individuals receiving a Tier 0 will be ineligible for Personal Care services.

- The results of the ARIA independent assessment and information gathered during the assessment will be used to develop the beneficiary's person-centered service plan for ARChoices or Living Choices; to allocate hours of service for attendant care, respite care, and personal care under ARChoices and IndependentChoices, through the use of the Arkansas Medicaid Task and Hour Standards; to calculate the amount of the Cash Expenditure Plan for IndependentChoices, through the use of the Arkansas Medicaid Task and Hour Standards; and to allocate hours of service and develop an individualized plan of care for Personal Care, through the use of the Arkansas Medicaid Task and Hour Standards.
- Based on the changes to the independent assessment, some individuals who would not be eligible for ARChoices, Living Choices, Personal Care, and PACE under the current rules may be eligible under the rules as amended; and some individuals who would be eligible under current rules may not be eligible under the rules as amended.
- Based on the changes to the independent assessment, ARChoices, IndependentChoices, and Personal Care beneficiaries may see an increase, decrease, or no change in the number of hours of attendant care and/or personal care assigned to them, and IndependentChoices beneficiaries may see an increase, decrease, or no change to the amounts of their respective Cash Expenditure Plans.

Allocation of Hours of Service for Attendant Care, Respite Care, and Personal Care:

- The Resource Utilization Groups (RUGs) methodology currently used to allocate attendant care hours for ARChoices is repealed.
- DHS is creating a new rule, known as the Arkansas Medicaid Task and Hour Standards (THS), to be the written methodology used by DHS and its staff and contractors as the basis for calculating the number of attendant care hours, personal care hours, and/or respite care hours that are reasonable and medically necessary to perform needed activities of daily living (ADLs) and instrumental activities of daily living (IADLs) tasks that are covered and reimbursable. The THS provides a standardized process for calculating the amount of reasonable, medically necessary services hours, with the minute ranges and frequencies, and adjustments for availability of other, non-Medicaid supports.

- The THS includes four components: a Needs Intensity score for each ADL and IADL task; the number of minutes within the minute range for the Needs Intensity Score that are reasonable to perform the particular task at the respective Needs Intensity Score; the frequency with which a task is necessary and reasonably performed; and the amount of assistance with ADLs and IADLs provided by other sources.
- The number of service hours/minutes that are determined medically necessary and authorized for each necessary task by week/month are calculated consistent with the THS grid and based on responses by the participant and their representatives to certain relevant questions in the ARIA assessment instrument, and as appropriate, other information obtained from the participant and participants' representatives or from a participant's physician.
- The THS establishes minute ranges for each task consistent with the Needs Intensity score, allowing DHS staff or contractors to select a number of minutes within that range for each task. Deviations from the minute ranges are permitted with written justification and written supervisory approval.
- ARChoices and Personal Care are revised to use the THS to calculate the number of attendant care, respite care, and/or personal care hours that may be allocated to a beneficiary in the person-centered service plan or individualized plan of care. IndependentChoices is revised to use the THS to calculate the reasonable quantity of hours to perform medically necessary tasks covered under self-directed personal assistance, which in turn determines the amount of the beneficiary's Cash Expenditure Plan.
- Personal Care services will be based on an individualized plan of care that is developed based on the ARIA independent assessment results, information submitted by the personal care provider, and the THS. Personal Care services are to be individually designed to assist with a beneficiary's assessed physical dependency needs related to certain routine activities of daily living and instrumental activities of daily living.
- Personal Care services for all beneficiaries age 21 and older will be strictly limited to 64 hours per month. Although current rules permit extensions of benefits to allow more than 64 hours per month, these provisions are repealed.
- Based on the changes to the allocation of hours of service for attendant care, respite care, and personal care, ARChoices, IndependentChoices, and Personal Care beneficiaries may see an increase, decrease, or no change in the number of hours of attendant care, respite care, and/or personal care assigned to them, and IndependentChoices beneficiaries may see an increase,

decrease, or no change to the amounts of their respective Cash Expenditure Plans.

Individual Services Budgets in ARChoices:

- ARChoices is revised to implement an Individual Services Budget (ISB) that is a limit on the maximum dollar amount of waiver services that may be authorized for or received by each specific participant. The projected total cost of all authorized waiver services in a person-centered service plan may not exceed the ISB amount for that participant. With one exception noted below, the ISB will limit the availability of all services received under the waiver, including without limitation attendant care, respite care, and personal care services, whether received through agency care or through self-direction under IndependentChoices. The ISB will not limit the availability of non-waiver Medicaid state plan services. The ISB will not apply to environmental accessibility adaptations/adaptive equipment.
- If a participant's ISB limits or requires changes to the services that could otherwise be authorized for the participant, a DHS registered nurse (RN) will work with the participant to choose a different mix, type, or amount of covered waiver services. If the DHS RN determines that the waiver services available within the limit of the ISB are insufficient to meet the participant's needs, the DHS RN will counsel the participant on Medicaid-covered services in other settings that may be available to meet their needs.
- Participants may request exceptions to the ISB in certain situations. Exception requests will be reviewed and acted upon by a panel of nurses chosen by DAABHS.
- The ISB limit will apply to a new participant with their first person-centered service plan and thereafter. The ISB limit will apply to an existing participant on the earlier of when their waiver eligibility is re-determined; their level of care is reaffirmed or revised; a new independent assessment or re-assessment is performed; their person-centered service plan expires or renews or is extended or revised; or they are admitted to or discharged from an inpatient hospital, nursing facility, assisted living facility, or residential care facility, or are transferred from a hospice facility. In any other case, the ISB will apply 60 days after the effective date of these rules changes.
- The ISB is based on a participant's ISB Level, as determined by DAABHS from a review of the participant's Independent Assessment. The three ISB Levels and the corresponding ISB amounts are:

- Intensive: The participant requires total dependence or extensive assistance from another person in all three areas of mobility, feeding, and toileting. The ISB for a participant with an assessed ISB Level of Intensive is $30,000 annually.
- Intermediate: The participant requires total dependence or extensive assistance from another person in two of the areas of mobility, feeding, or toileting. The ISB for a participant with an assessed ISB Level of Intermediate is $20,000 annually.
- Preventative: The participant meets the functional need eligibility requirements for ARChoices in Section 212.000 but does not meet the criteria for the ISB Levels of Intensive or Intermediate. The ISB for a participant with an assessed ISB Level of Preventative is $5,000 annually.

- For a participant with total waiver expenditures of more than $30,000 in calendar year 2018, the participant will be granted a Transitional Allowance for one year, increasing the participant's maximum Individual Services Budget to the amount of the participant's total waiver expenditures in calendar year 2018. In the year following the Transitional Allowance, the participant's maximum Individual Services Budget will be 95% of the participant's total waiver expenditures in calendar year 2019. For each participant, DHS will calculate the participant's "total waiver expenditure" for purposes of the Transitional Allowance on an annualized basis, excluding expenditures for environmental accessibility adaptations/adaptive equipment.

Limits, Restrictions, and Exclusions on Services:

- ARChoices is revised to provide that if the self-directed delivery model is chosen by an individual other than the beneficiary, that individual may not be the paid employee.
- ARChoices is revised to require that a person-centered service plan may not include attendant care hours unless the plan provides for at least 64 hours per month of personal care services. Attendant care services are intended to supplement personal care services available under the Medicaid state plan.
- ARChoices is revised to redefine when certain waiver services may be provided to a participant by a relative, and to prohibit the provision of certain waiver services by an individual who lives with the participant or has a business partnership or financial or fiduciary relationship with the beneficiary, or by certain providers employing such an individual.
- ARChoices and IndependentChoices are amended to exclude certain services from coverage and reimbursement, including without limitation certain medical or licensed services;

services provided for someone other than the participant; companionship, socialization, entertainment, and recreational services or activities; housecleaning for home areas shared with a person physically able to perform housekeeping of those areas; habilitation services; and services received or available on a comparable or substitute basis from other sources.

- ARChoices is amended to clarify that attendant care and personal care services require prior authorization, while other services provided under an authorized person-centered service plan do not require separate prior authorization.
- IndependentChoices is amended to redefine the purpose and permissible uses of the Cash Allowance, and to establish and itemize which goods and services are excluded from coverage and reimbursement under the program. It is also amended to eliminate references to extensions of benefits for personal care services.
- Tasks performed as part of Personal Care services, including without limitation assistance with medication, will be subject to Arkansas State Board of Nursing Position Statement 97-2.
- Personal Care services for all beneficiaries age 21 and older will be strictly limited to 64 hours per month. Although current rules permit extensions of benefits to allow more than 64 hours per month, these provisions are repealed.
- When Personal Care services are delivered through a home health agency or private care agency, the person providing the direct care who works for the agency may not reside (permanently, seasonally, or occasionally) in the same premises as the beneficiary; may not have a business, financial, or fiduciary relationship of any kind with the beneficiary or the beneficiary's legal representative; and may not be related to the beneficiary by blood (consanguinity relationship) or by marriage or adoption (affinity relationship) to the fourth degree.
- Personal Care services may include employment-related personal care associated with transportation.
- Current language setting an eight-hour limit on shopping for personal care items and transportation to stores to shop for personal care items is repealed.
- The Personal Care Manual is revised to establish certain conditions of coverage and reimbursement. The conditions include without limitation that the personal care services must be reasonable and medically necessary, supported by the individual's latest nursing evaluation, and consistent with the individual's service plan; the services must be expressly authorized in an approved prior authorization; the services must not be available

from another source; the services may not be in excess of or otherwise inconsistent with limits on the amount, frequency, or duration of services; the services must be provided by qualified, Medicaid-enrolled, DPSQA-certified providers; and must be provided in compliance with all applicable Arkansas Medicaid program regulations and provider manuals, and with all applicable Arkansas scope of practice laws and regulations pertaining to nurses, physicians, skilled therapists, and other professionals.

- The Personal Care Manual is revised to impose certain exclusions from coverage and reimbursement. These exclusions include without limitation certain medical or licensed services; services provided for someone other than the participant; companionship, socialization, entertainment, and recreational services or activities; habilitation services; and mental health counseling or services.
- The length of Personal Care prior authorizations is extended from six months to one year but may be modified if the beneficiary has a change of condition.
- Based on the use of the ISB and/or the changes to limits and restrictions on services, ARChoices, Living Choices, IndependentChoices, and Personal Care beneficiaries may see an increase, decrease, or no change in the services or funds available to them or included on their person-centered service plan, cash expenditure plan, or individualized plan of care.

Availability and Definitions of Services:

- The Adult Family Homes service in ARChoices is eliminated. Any beneficiary currently receiving this service will be unable to receive this service after January 1, 2019.
- A new service, Prevocational Services, is added to ARChoices for participants with physical disabilities.
- The definition of Attendant Care services in ARChoices is amended to eliminate three tasks: “Managing Finances,” “Communication,” and “Traveling.” The definition is also amended to define “health-related tasks” and to modify and clarify the definitions of the following tasks: “personal hygiene,” “mobility/ambulating,” “meal planning,” “laundry,” “shopping,” and “housekeeping.” The definition is amended to specify circumstances under which Attendant Care services are not covered or reimbursable.
- The definitions and requirements for “Respite Care” are revised to clarify and limit when respite care is covered and reimbursed.

- The Personal Care service definitions and restrictions for "Consuming Meals" are revised to include the intake of fluids and to exclude meal preparation.
- The Personal Care service definitions and restrictions for "Personal Hygiene" are clarified to mean grooming, shampooing, shaving, skin care, oral care, brushing or combing of hair, and menstrual hygiene.
- The Personal Care service definitions and restrictions for "Mobility and Ambulation" are clarified to mean functional mobility (moving from seated to standing, getting in and out of bed) and mastering the use of adaptive equipment.
- The Personal Care service definitions and restrictions for "Incidental Housekeeping" are clarified to refer only to areas that are directly used by the beneficiary.
- The Personal Care service definitions and restrictions for "Shopping" are clarified to include items necessary for the beneficiary's health.

Service and Provider Requirements and Limitations:

- Providers under ARChoices, IndependentChoices, and Personal Care will be required to undergo state and national, fingerprint-based criminal background checks and central registry checks and repeat those checks on a regular basis consistent with state law.
- Provider certification requirements for ARChoices are amended to require all providers to recertify annually.
- ARChoices is amended to clarify when an environmental accessibility adaptation/adaptive equipment provider is required to submit a plumbing or electrical license with a bid, and to require bids to specify what work, if any, requires such a license.
- Providers of frozen home-delivered meals under ARChoices must contact each client daily, Monday through Friday, in person or by phone, to ensure the individual's safety and well-being, unless the client receives attendant care or personal care services more than three times per week, or the client receives only weekend meals.
- DHS will require providers of Attendant Care Services, Respite Care, and Home-Delivered Meals under ARChoices to participate in Electronic Visit Verification (EVV), consistent with new federal requirements.
- For Living Choices, DPSQA will be authorized to temporarily impose a moratoria, numerical caps, or other limits on the certification and enrollment of new assisted living facility providers, consistent with the authority and requirements of 42

CFR 455.470 (b) and (c) and with the approval of the federal Centers for Medicare and Medicaid Services (CMS). All Living Choices providers will be required to be certified by DPSQA.

- Living Choices providers will be required to immediately report to DHS any changes in a beneficiary's condition, rather than the current requirement of quarterly monitoring. The quarterly monitoring requirements are eliminated.
- For IndependentChoices, backup caregivers will now be required to enroll as caregivers with DPSQA.
- For Personal Care, current language permitting Level II Assisted Living Facilities (Level II ALFs) and Division of Developmental Disabilities Services Community Providers to enroll as personal care providers and to provide personal care services is repealed.
- All Personal Care providers will be required to be certified by DPSQA.
- Form/documentation requirements for Personal Care individualized service plans, requests submitted by providers, and service logs are clarified and revised. Service plan revisions will be required to be submitted as amended prior authorization requests.
- Reimbursement provisions and methodologies for residential care facilities (RCF) and assisted living facilities (ALF) are revised to use the term "Payment Level" in place of the term "Level of Care," and to incorporate the THS into the determination of the Payment Level.
- PACE is clarified to make explicit that failure to submit a PACE provider application to DAABHS at the same time or prior to submitting the application to CMS shall constitute grounds for DAABHS denying or delaying approval of the application.

Payment Changes:

- For ARChoices, the unit of service for Personal Emergency Response System (PERS) is changed from 1 day to 1 month, with a limit of 12 units per year.
- For Living Choices, the existing four-tier payment structure for assisted living facilities is eliminated and replaced with a single, statewide daily rate for all beneficiaries.

Taken together, all of the proposed changes outlined above will impact beneficiaries. Individual beneficiaries may see an increase or reduction in the amount, level, duration, frequency, type, and mix of services available to them, or their services may remain the same. Initial or continued eligibility for or enrollment in the ARChoices or Living Choices waiver programs or PACE, or

eligibility for coverage of Personal Care Services or IndependentChoices services may be positively or adversely affected in individual cases.

Taken together, all of the proposed changes outlined above will also impact the providers of services, including, without limitation, provider operations, finances, billing practices, staffing, and compliance.

The ARChoices Waiver Amendment, Living Choices Waiver Amendment, Personal Care State Plan Amendment, and IndependentChoices State Plan Amendment are further subject to review and approval by the federal Centers for Medicare and Medicaid Services (CMS).

Summary of Changes for Long Term Services Support (LTSS) Transformation Package following Public-Comment Period

ARChoices for Home Care Waiver Amendment

- Technical changes and corrections, including additional changes to existing language to reflect new divisional names for DAABHS and DPSQA
- Clarification of division of responsibility between DMS, DAABHS, and DPSQA
- Clarification that are limits imposed by the Task & Hour Standards are aggregate weekly/monthly limits, and not limits on the time spent on each performance of each individual task
- Rescission of proposal to restrict family members and roommates from serving as paid caregivers, and restoration of existing language regarding limitations on services provided by family members
- Clarification that that personal care and attendant care may be provided on the same day so long as the provider does not double bill for the same work, and to explicitly state that providers cannot bill for tasks that were not actually performed.
- Clarification of how Respite Care hours are allocated
- Change calculation for eligibility for the Transitional Allowance to be based on the value of the person-centered service plan, rather than actual expenditures

ARChoices for Home Care Provider Manual

- Technical changes and corrections, including additional changes to existing language to reflect new divisional names for

DAABHS and DPSQA

- Revised 212.200(D)(3) to provide that eligibility for the Transitional Allowance is based on the value of the person-centered service plan, rather than actual expenditures
- Revised 212.600, 213.210, 213.240, 213.620, and 213.700 to restore the original language regarding relatives providing services.
- Revised 213.210 to clarify that attendant care may be provided while accompanying the beneficiary to other locations, including community events
- Revised 213.210 to clarify that the limits in the Task & Hour Standards are aggregate weekly/monthly limits, and not limits on the time spent on each performance of each individual task.
- Revised 213.210 to clarify that personal care and attendant care may be provided on the same day so long as the provider does not double bill for the same work, and to explicitly state that providers cannot bill for tasks that were not actually performed.
- Added 213.220 to define when travel time for an attendant may be billed as attendant care
- Revised 213.620 and 260.000 to change the unit of service for prevocational services from 1 hour to 15 minutes.
- Revised 213.700 to clarify how respite care is allocated.
- Added 214.000 to explicitly state that providers need not itemize the time spent on each individual task for attendant care or respite care.
- Revised 240.000 to require prior authorization for prevocational services.

<u>Living Choices Waiver Amendment</u>

- Technical changes and corrections, including additional changes to existing language to reflect new divisional names for DAABHS and DPSQA
- Increase the unduplicated participation cap for the waiver from 1,300 to 1,725
- Provide for a one-year phase-in of the new per diem rate beginning January 1, 2019
- Revised cost-neutrality analysis to reflect impact of increased participation cap and phase-in- of new per diem rate

<u>Personal Care Services Provider Manual</u>

- Technical changes and corrections
- Revised 216.000(B) to clarify that personal care may be

provided while accompanying the beneficiary to other locations, including community events, and to define when travel time for a personal care aide may be billed as personal care

- Revised 216.140(C)(4) to clarify that the limits of the Task & Hour Standards are aggregate weekly/monthly limits, and not limits on the time spent on each performance of each individual task
- Revised 216.400(B)(1) to clarify that providers need not itemize the time spent on each individual ADL/IADL task for personal care
- Revised 222.100 to restore the original language regarding relatives providing services

Personal Care State Plan Amendment

- Rescission of proposal to restrict family members and roommates from serving as paid caregivers, and restoration of existing language regarding limitations on services provided by family members

IndependentChoices Provider Manual

- Technical changes and corrections
- Revised 202.600 to clarify that the IC Cash Expenditure Plan amount for an ARChoices beneficiary is subject to the beneficiary's Individual Services Budget amount

Arkansas Medicaid Task and Hour Standards

- Revised language for the Laundry IADL to increase flexibility

Added an additional grand total line for the weekly number of hours

PUBLIC COMMENT: The Department of Human Services (DHS) held public hearings on these changes on the following dates, times, and locations:

- Monday, October 15, 2018, 5pm, Arkansas College of Osteopathic Medicine, 7000 Chad Colley Blvd, Fort Smith, AR;
- Thursday, October 18, 2018, 5pm, Drew Memorial Hospital Conf. A., 778 Scoggin Dr., Monticello, AR;
- Thursday, October 22, 2018, 5pm, UA Hope Hempstead Hall, 2500 South Main St., Hope, AR;

- Tuesday, October 29, 2018, 5pm, Arkansas Enterprises for the Developmentally Disabled, 105 E Roosevelt Rd., Little Rock, AR; and
- Wednesday, November 7, 2018, 5pm, St. Bernard's Medical Center Auditorium, 225 E. Jackson Ave., Jonesboro, AR.

The public comment period expired on November 7, 2018. DHS provided a summary of the public comments received and its responses; that summary, due to its length, is attached hereto.

Per the agency, DHS continued to receive public comments after the expiration of the public comment period. Although those comments were received late, DHS responded to them as a courtesy and posted the responses on its website. The belated comments and DHS's responses are attached hereto in a separate document from the timely received comments.

Additionally, Kathryn Henry, an attorney with the Bureau of Legislative Research, asked the following question: Given that there is the new Arkansas Medicaid Task and Hour Standards rule and several amendments to previous rules, what is the reasoning in submitting them all together? **RESPONSE:** They are being submitted as a package because they are related to and interdependent on one another. For example, the Task and Hour Standards is the new method for determining the allocation of in-home hours under the revised ARChoices Manual and Personal Care Manual, which in turn reflect the ARChoices Waiver Amendment and the Personal Care SPA. And all of them are dependent on the change in the Independent Assessment – all of the programs will use the same Independent Assessment, and the Task and Hour Standards tie back to the Independent Assessment results. Finally, because it is an internally related and interdependent package, the fiscal impact is calculated as a net amount across all of the programs. And that in turn is because the savings goals established by the Legislature are across the entire set of LTSS programs and are not itemized among the individual programs.

Per the agency, CMS approval is required and pending for the ARChoices Waiver Amendment, Living Choices Waiver Amendment, Personal Care State Plan Amendment, and Independent Choices State Plan Amendment. CMS approval is not required for the Task and Hour Standards or the PACE manual.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: DHS estimates that the proposed changes outlined above are expected to result in a net decrease in aggregate Medicaid expenditures of $6.18 million in State Fiscal Year 2019 ($1,822,379.96 in general revenue and $4,357,273.00 in federal funds) and $12.37 million in State Fiscal Year 2020 ($3,650,262.59 in general revenue and $8,723,508.00 in federal funds).

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 20-76-201, DHS shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. *See* Ark. Code Ann. § 20-76-201(1). DHS shall also make rules and regulations and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76, Public Assistance Generally, of the Arkansas Code. *See* Ark. Code Ann. § 20-76-201(12). DHS may promulgate rules as necessary to conform to federal rules that affect its programs as necessary to receive any federal funds. *See* Ark. Code Ann. § 25-10-129(b).

Arkansas Code Annotated § 20-77-107(a)(1) specifically authorizes DHS to "establish and maintain an indigent medical care program." Additionally, Arkansas Code Annotated § 20-10-170(a) authorizes DHS to establish an assisted living program for adults. And DHS "shall promulgate rules and regulations not inconsistent with the provisions of [the Arkansas Assisted Living Act, codified at Ark. Code Ann. §§ 20-10-1701 through 1709 ("the Act")] as it shall deem necessary or desirable to properly and efficiently carry out the purposes and intent of [the Act]." Ark. Code Ann. § 20-10-1704(b)(1).

"Pursuant to rules and regulations promulgated in accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq., the Director of the Department of Human Services shall establish a process to review a claim made by a healthcare provider to determine whether the claim should be or should have been paid as required by federal or state law or rule." Ark. Code Ann. § 20-77-1304(a)(1). The Director also may establish various types of administrative sanctions pursuant to rules and regulations promulgated in accordance with the Arkansas Administrative

Procedure Act which may be imposed on a healthcare provider or other person who violates any provision of the Medical Assistance Programs Integrity Law, codified at Ark. Code Ann. §§ 20-77-1301 through 1305, or any other applicable federal or state law or rule related to the medical assistance programs. *See* Ark. Code Ann. § 20-77-1304(b)(1).

e. **SUBJECT: 1915(i) Fee-for-Services Adult Behavioral Health Services for Community Independence Manual; State Plan Amendment #2018-16**

DESCRIPTION: This manual and State Plan Amendment creates the Adult Behavioral Health Services for Community Independence program, which are Tier II and Tier III home and community-based treatment and services provided by a Certified Behavioral Health Agency to individuals eligible for Medicaid based upon the following criteria:

- Beneficiaries receiving Arkansas Medicaid healthcare benefits on a medical spenddown basis; and
- Beneficiaries who are eligible for Arkansas Medicaid healthcare benefits under the 06, Medically Frail, Aid Category.

If an individual falls into one of the above two categories, that individual will not be enrolled into a Provider-Led Arkansas Shared Savings Entity (PASSE) and, if determined by the Independent Assessment to be eligible for Tier II or Tier III services, will be provided access to those services through traditional Fee-for-Service Medicaid.

PUBLIC COMMENT: The Department of Human Services (DHS) held two public hearings, one in Springdale on October 26, 2018, and one in Little Rock on November 5, 2018. The public comment period expired on November 12, 2018. DHS received the following comments and provided its responses:

Bonnie Bryant, LPC
Comment: I am a mental health therapist who primarily works with people with serious mental illness and who are suicidal. When we have these clients who are Medicaid recipients, they are assessed by a clinician, determined to meet Tier 2 or 3 category of services, then they must wait for their Independent Assessments before they can start their services. This wait period is essentially a denial of services for the client, and unethical, as well as dangerous

to the client. Also, the fact that Medicaid will not retro-actively cover the service, should the Independent Assessor agree with the licensed mental health clinician, places the providers in an ethical bind. You see, clinicians' ethical duties are to never abandon a client, and to provide the appropriate service for the person's need. So providers are placed in the position of choosing to provide mental health services for FREE, or to deny the client necessary services, because they have no funding source. I am not alone in the firm belief that a licensed clinician is qualified to assess a client's level of care need and to have to be "double checked" by anyone, much less a non-licensed, non-clinical assessor, is an arbitrary, useless barrier to care. I don't know of other medical services where a lesser qualified personnel can trump the clinical recommendation of someone with further training and licensure. I don't know of any sensible reason a person must wait to start a service that is essential to preventing decompensation that is a covered service. We are seeing clients become hospitalized, incarcerated, disappear even, because of barriers to access to care for what is now classified as Tier 2 or Tier 3 services, simply because of the wait time on a redundant, and less useful in my opinion, Independent Assessment.

I realize this is a complicated subject and I can't possibly know all the contingencies with Medicaid. I am not sure this message should go to you, or someone else, but I am starting here. Please help in whatever capacity you can, to help us providers find ways to serve our community members with the necessary care for which they are entitled.

Response: The independent assessment required to obtain services contained in the 1915(i) is a functional assessment and is being used to determine need for home and community based services. Clinical services provided by licensed professionals can and should be provided through the Outpatient Behavioral Health program. These services were designed to be easily accessed and do not require an independent assessment or prior authorization. In addition, services for crisis include hospitalization and acute crisis units that can be accessed prior to an independent assessment. The HCBS services contained in the (i) services are intended for individuals that have chronic functional deficits related to their mental health condition.

Brad Holloway, Chief Operations Officer – Birch Tree Communities

Comment: ISSUE#1: Following thorough review of the above mentioned proposed manual it appears that several key services were excluded for Tier I (Counseling level) and Tier 2 (Rehabilitative level) beneficiaries.

The covered services outlined in the manual include (Section 218.00):

- Supportive Employment
- Supportive Housing
- Partial Hospitalization
- Adult Rehabilitative Day Service
- Adult Life Skills Development
- Treatment Plan
- Therapeutic Com munities - Level I
- Therapeutic Communities - Level 2

While these services are clinically indicated and needed for the majority of our Spend Down beneficiaries, there are at least five medically necessary and key services that appear to have been omitted:

- Diagnostic Assessment
- Psychiatric Evaluation
- Pharmacological Management
- Individual Psychotherapy
- Group Psychotherapy

These services are clearly outlined in the Current OBH manual as medically necessary and Psychiatric Evaluation is required. It is assumed that these services would be covered by reverting back to the current OBH manual. lf this is the case, then all of these Tier 2 (Rehab level) beneficiaries would only be allowed the services limited to Tier I (Counseling level) beneficiaries.

According to the current OBH manual, beneficiaries who have been assessed at the Tier 2 level are approved at a higher level of care for additional services above and beyond what is allowed for Tier 1 beneficiaries, and these services have already clearly been determined to be medically necessary by virtue of the Independent Assessment.

Tier 1 Services are limited to:

- Twelve (12) Individual Behavioral health Counseling Encounters per year
- Twelve (12) Group Behavioral Health Counseling Encounters per year

- Twelve (12) Pharmacologic management Encounters per year

Tier 2 Services are limited to:

- Twelve (26) Individual Behavioral health Counseling Encounters per year
- One hundred four (104) Group Behavioral Health Counseling Encounters per year
- Twelve (12) Pharmacologic management Encounters per year

By virtue of the Tier 2 assessment, it has been determined that the amount of services for these beneficiaries are warranted and medically necessary. It is contradictory to only allow these beneficiaries the Tier I limits. This will require an Extension of Benefits request to be filed on an ongoing basis with the uncertainty of whether or not the extensions will be granted?
The question also arises as to whether or not a PCP referral will be required, as is the case for Tier I (Counseling level) beneficiaries after the 3rd visit? If the answer is that they will not require a PCP referral, it would need to be documented somewhere in one of the manuals?
Response: The public comment period is for the (i), this comment is for a manual that has already been promulgated. The Adult Behavioral Health Community Independence manual will be updated to reflect a PCP referral is not required.

Comment: ISSUE #2:
There appears to be a contradiction in the manual regarding treatment planning.
Section 213 states that:
.... "Revisions to the Treatment Plan for Adult Behavioral Health Services for Community Independence must occur at least annually, in conjunction with the results s of the Independent Assessment."
Section 253.00 I (in the NOTES column) states that:
.... "This service may be billed when the beneficiary enters care and must be reviewed every ninety (90) calendar days or more frequently if there is documentation of significant acuity changes ....."
THEN.... Directly across from those notes in the column titled SPECIAL BILLING INSTRUCTIONS, it states: "Must be reviewed every 180 calendar days."
Response: DHS agrees and this will be updated.

Tom Masseau with Disability Rights of Arkansas, INC, David Deere with Partners for Inclusive Communities, Sha Anderson with Arkansas State Independent Living Council

Comment: Thank you for allowing our agencies this opportunity to provide comments regarding the Department of Human Services (OHS) proposed rulemaking regarding the above-referenced manuals and services.

Arkansas State Independent Living Council

The Arkansas State Independent Living Council is a non-profit organization promoting independent living for people with disabilities. The Arkansas State Independent Living Council has a Board of Directors comprised of Governor appointed Arkansans, the majority with disabilities.

The mission of the Arkansas State Independent Living Council is to promote independence, including freedom of choice and full inclusion into the mainstream of society, for all Arkansans with disabilities.

Partners for Inclusive Communities

Partners for Inclusive Communities (Partners) is Arkansas' University Center on Disabilities. Administratively located within the University of Arkansas College of Education and Health Professions. Partners is a member of the nationwide Association of University Centers on Disabilities - AUCD.

Partners' Mission is inclusion of people with disabilities in community life.

Disability Rights Arkansas, Inc.

Disability Rights Arkansas (ORA) is a private nonprofit organization designated by the Governor to implement the federally authorized Protection and Advocacy systems. Our mission is to vigorously advocate for and enforce the legal rights of people with disabilities in Arkansas. We assist people with disabilities through education, empowerment and protection of their legal rights. We serve all Arkansans with disabilities of all ages. We provide services through information and referral, direct advocacy and legal representation. DRA also provides training and outreach throughout the State.

Every year, the ORA Board of Directors solicits input into the development of the agency priorities. This solicitation is accomplished through public surveys and analyzing and reviewing prior year's request for assistance. In Fiscal Year 2019, the priorities established are as follows:

- Abuse, Neglect and Exploitation
- Community Integration
- Education
- Employment
- Access
- Self-Advocacy/Training

The priority that is most relevant to this issue is Community Integration. This priority focuses on the idea that individuals should receive quality support services, rights protection and be empowered to make choices in their lives.

Background

In 1999, the Supreme Court ruled in Olmstead v L.C. that public entities are required to provide community-based services to individuals with disabilities when, a) such services are appropriate; (b) the affected persons do not oppose community-based treatment and, (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services. Essentially state and local governments need to provide more integrated community alternatives to individuals in or at risk of segregation in institutions or other segregated settings. (US Department of Justice, Civil Rights Division, "Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v L.C.") Further, the Olmstead decision required each state to develop a plan that would place individuals with disabilities in less restrictive settings.

Following the Olmstead decision, former Governor Mike Huckabee formed the Governor's Integrated Services Taskforce. This taskforce was charged with assisting the state OHS in writing an Olmstead Plan. In 2003, the Taskforce completed its charge and developed The Olmstead Plan in Arkansas. The plan contained over one hundred recommendations for the state OHS and

members of the Legislature to consider. The report highlighted the intent of the state's movement towards providing services in less restrictive settings. Waiver services reduce the need for emergency care, increase quality of life for people with disabilities and their families and allow families to remain together in their communities.

Supportive Employment

The 1915(i) waiver offers supportive employment to individuals with behavioral health needs; however, they have limited this service to a maximum of 60 hours per quarter. OHS states that an extension of this benefit may be requested, but there is not a standard dictating under what circumstances an extension would be approved. Individuals who receive this behavioral health service and their providers need predictability in the services they expect to receive or provide. That said, the rules would benefit from a standard or description of circumstances an extension would be granted.

Sixty (60) hours of supported employment per quarter is equivalent to approximately 4.6 hours per week, or less than one hour per business day. We are concerned that this level of service is too low. We would like to know whether OHS is utilizing data to support this maximum level of service, and, if so, from where that data was obtained and if it can be published for review by the public. Additionally, if there is data, does it indicate whether this level of service provides any indicia of success for individuals who receive this level of service? Included in this request, are individuals who have received this level of service currently engaged in competitive integrated employment?

Arkansas Rehabilitation Services can provide this service to individuals who are eligible; however, they are a provider of last resort under their own regulations. Medicaid services are also typically a payer of last resort as well. Is supported employment offered under this program going to precede services offered by Arkansas Rehabilitation Services, and, if an individual requires more than the maximum amount offered by this program, will OHS coordinate with Arkansas Rehabilitation Services to ensure that this service is seamlessly provided to an individual, even though there will be a transition of payer?

Further, this rule indicates that an individual cannot receive Adult Rehabilitative Day Service or Adult Life Skills Development on the same date that the individual receives Supportive Employment. For what reason is OHS placing this restriction on individuals with behavioral health needs? Is this an area that is alleged to have been used · inappropriately by providers or beneficiaries? If so, please indicate how this limitation will prevent that. If OHS accumulated data to conclude that the effectiveness of the service is lessened by permitting them to occur on the same date, please indicate how that data was collected, from whom it was collected, and whether that data will be published to allow for public inspection.
Response: The criteria for treatment services is based on Medicaid medical necessity criteria. Supportive employment is one of the services in a full array of services to beneficiaries in tier 2 or tier 3. The service limit has not changed under this new program and remains the same as developed for the OBH manual. At this time there is no data to support a change, but DHS will continue to monitor. In addition, as with all services contained in the manual these services are individualized. If plans require an extension of benefits prior to benefits being extended for a specific individual, that can be accomplished through plan submission to the prior authorization vendor. Medicaid is the payor of last resort and it would be the responsibility of the provider to coordinate services and payors. It is unclear to DHS as to how a beneficiary would receive both Supportive Employment and Rehab Day Services or Adult Life Skills development on the same date of service. Due to lack of provision of this service during this transition period, DHS has been unable to analyze service provision patterns.

<u>Adult Rehab Day Treatment</u>

The 1915(i) waiver continues allowing adult Rehabilitative Day Service to individuals with behavioral health needs; however, they have limited this service to a maximum of 90 hours per quarter. OHS states that an extension of this benefit may be requested, but there is not a standard dictating under what circumstances an extension would be approved.Individuals who receive this behavioral health service and their providers need predictability in the services they expect to receive or provide. That said, the rules would benefit from a standard or description of circumstances an extension would be granted.

Ninety (90) hours of Rehabilitative Day Service per quarter is equivalent to approximately 6.9 hours per week, or less than one hour per calendar day. We are concerned that this maximum level of service is too low. We would like to know whether OHS is utilizing data to support this maximum level of service, and, if so, from where that data was obtained and if it can be published for review by the public. Additionally, if there is data, does it indicate whether this level of service provides any indicia of success for individuals who receive this level of service? For example, is there data that indicates whether individuals who receive this maximum level of service have voluntarily reduced this service after a period of time on average?

Further, this rule indicates that an individual cannot receive Adult Rehabilitative Day Service on the same date that the individual receives Individual Recovery Support or Group Recovery Support. For what reason is OHS placing this restriction on individuals with behavioral health needs? Again, is this an area that is alleged to have been used inappropriately by providers or beneficiaries? If so, please indicate how this limitation will prevent that. If OHS accumulated data to conclude that the effectiveness of the service is lessened by permitting them to occur on the same date, please indicate how that data was collected, from whom it was collected, and whether that data will be published to allow for public inspection.

Response: The criteria for treatment services is based on Medicaid medical necessity criteria. Adult Rehab Day Treatment is one of the services in a full array of services to beneficiaries in tier 2 or tier 3. The service limit has not changed under this new program and remains the same as developed for the OBH manual. At this time there is no data to support a change, but DHS will continue to monitor. In addition, as with all services contained in the manual these services are individualized. If plans require an extension of benefits prior to benefits being extended for a specific individual, that can be accomplished through plan submission to the prior authorization vendor. Due to lack of provision of this service during this transition period, DHS has been unable to analyze service provision patterns.

<u>Supportive Housing</u>

The 1915(i) waiver provides Supportive Housing to individuals with behavioral health needs; however, they have limited this service to a maximum of 60 hours per quarter. OHS states that an

extension of this benefit may be requested, but there is not a standard dictating under what circumstances an extension would be approved. Individuals who receive this behavioral health service and their providers need predictability in the services they expect to receive or provide. That said, the rules would benefit from a standard or description of circumstances an extension would be granted.

Sixty (60) hours of Supported Housing per quarter is equivalent to approximately 4.6 hours per week, or less than one hour per business day. We are concerned that this maximum level of service is too low. We would like to know whether OHS is utilizing data to support this maximum level of service, and, if so, from where that data was obtained and if it can be published for review by the public. Additionally, if there is data, does it indicate whether this level of service provides any indicia of success for individuals who receive this level of service? For example, is there data that indicates whether individuals who receive this maximum level of service have voluntarily reduced this service after a period of time on average?

Further, this rule indicates that an individual cannot receive Adult Rehabilitative Day Service or Adult Life Skills Development on the same date that the individual receives Supportive Housing. For what reason is DHS placing this restriction on individuals with behavioral health needs? Is this an area that is alleged to have been used inappropriately by providers or beneficiaries? If so, please indicate how this limitation by permitting them to occur on the same date, please indicate how that data was collected, from whom it was collected, and whether that data will be published to allow for public inspection.

Response: The criteria for treatment services is based on Medicaid medical necessity criteria. Supportive Housing is one of the services in a full array of services to beneficiaries in tier 2 or tier 3. The service limit has not changed under this new program and remains the same as developed for the OBH manual. At this time there is no data to support a change, but DHS will continue to monitor. In addition, as with all services contained in the manual these services are individualized. If plans require an extension of benefits prior to benefits being extended for a specific individual, that can be accomplished through plan submission to the prior authorization vendor. Due to lack of provision of this service during this transition period, DHS has been unable to analyze service provision patterns.

Community Integration

Services such as Supported Housing and Supportive Employment are absolutely vital to ensuring individuals with behavioral health needs are able to live and work in integrated community settings. We fear that DHS is not providing the level of support necessary to ensure that individuals with behavioral health needs are provided a meaningful opportunity to receive the supports and services necessary to regain or maintain their independence. Accordingly, if there is no data or limited data to show that the preceding levels of care authorized under this program are successful in providing sustained independence and integration, we would ask that DHS reconsider the limits applied, or ensure that extensions of these benefits are freely provided if requested.
Response: As this is not a service listed in the (i) services or Adult Behavioral Health Community Independence Manual, we are unable to respond to this comment.

Therapeutic Communities

The 1915(i) waiver provides a service called Therapeutic Communities to individuals with behavioral health needs. This service provides a structured, residential environment to individuals in the "Intensive" tier of services. This program is intended to provide daily services to individuals. That said, we have received concerns from providers that they will not be reimbursed for an entire week if an individual misses a single day. We do not see such a punitive approach to reimbursement in the proposed rule, but would greatly appreciate DHS's response to this concern.
Response: Therapeutic Communities is reimbursed on a per diem basis. DHS will follow the rules set forth in the manual.

Timing for Public Comment

The proposed rules represent more changes the programs whose implementation is uniformly described by stakeholders as "hurried." The proposed changes encompass several hundred pages of rules, regulations and technical applications to CMS.

The Arkansas Administrative Procedure Act requires that DHS allow at least thirty days for public comment. Ark. Code Ann. § 25-15-204. Given the volume of information individuals are

required to review, analyze, and consider, we believe that OHS and the public would both be better served by enlarging the period for public comment.
Response: The Waivers ran for public comment from October 14, 2018 to November 12, 2018. Two public hearings were held during this time, one in Springdale on October 26, 2018, and one in Little Rock on November 5, 2018. Additionally, the Waivers were posted on the Arkansas PASSE webpage for review and comment around August 31, 2018. And, letters were sent out at that time soliciting comments on the Waivers.

DHS has sought approval from CMS for the State Plan Amendment, and formal approval is pending.

The proposed effective date of the rule is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

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

f. SUBJECT: Provider-Led Arkansas Shared Savings Entity (PASSE) Program-1915(b) and (c) Waivers and 1915(i) State Plan Amendment #2018-17

DESCRIPTION: The 1915(b) and (c) waivers and 1915(i) State Plan Amendment are being sought pursuant to Arkansas Code Annotated § 20-77-2708, derived from Acts 2017, No. 775. These waivers will provide authorization from CMS for the Department of Human Services (DHS) to implement the PASSE Program, required by Acts 2017, No. 775.

These waivers and the State Plan Amendment authorize the following:

- PASSE entities continue to provide care coordination as that is defined by Act 775 of 2017. The four essential "case management" functions (independent assessment, plan development, referral for services, and service monitoring) must be performed in compliance with the CMS conflict-free case management rules. While this has been in place under Phase I, Phase II provides more detail on the conflict free case management rules. Additionally, under Phase II, the care coordinator is responsible for development of the Person Centered Service Plan (PCSP).

- PASSE entities become responsible for the provision of all services under Phase II, including all CES Waiver services and Medicaid State Plan services, including all home and community based services (HCBS) provided through the 1915(i) state plan amendment. The only services excluded from payment by the PASSE are:

1) Nonemergency medical transportation in a capitated program;
2) Dental benefits in a capitated program;
3) School-based services provided by school-employees;
4) Skilled nursing facility services;
5) Assisted living facility services;
6) Human development center (HDC) services provided to clients fully admitted to an HDC; or
7) Waiver services provided to adults with physical disabilities through the ARChoices in Homecare program or the Arkansas Independent Choices program, or any successor waiver for the frail, elderly, or physically disabled.

- Individuals will no longer be "attributed" to a PASSE based on their claims history and/or provider relationships. Instead, individuals will be "auto-assigned" to a PASSE using a round-robin methodology. PASSEs may be pulled out of auto-assignment if they are not in good standing or if they reach a certain percentage of market share (53%).

- The PASSE entity will receive a Per Member/Per Month (PMPM) global payment to cover all needed services for each assigned member. The PMPM will be based on historical utilization.

- The Network requirements were enhanced to reflect that PASSEs are now responsible for providing all services. These network requirements now include distance requirements, time-frame requirements, and provider to member ratio requirements. This now includes requirements for use of out-of-network providers.

- Each PASSE is now required to develop an internal appeal process, in addition to the grievance process, and the beneficiary must exhaust that appeal process before appealing to the state Medicaid agency.

- The PASSE entities will now be required to submit monthly encounter data so that service utilization can be tracked. This will be in addition to the quarterly reports that were submitted in Phase I, which will continue in Phase II. These will be used to monitor and improve quality of the PASSE program under the enhanced quality provisions of the PASSE model.

- The PASSE will now be responsible for credentialing all network providers, including Home and Community Based Services Providers that provide services to their enrolled members.

- **The 1915(i) State Plan Amendment details the home and community-based like services that the PASSE will be required to provide to eligible beneficiaries. Those services are: Supported Employment; Behavior Assistance; Adult Rehabilitation Day Treatment; Peer Support; Family Support Partners; Residential Community Reintegration; Outpatient Substance Abuse Treatment; Crisis Intervention; Planned Respite; Emergency Respite; Mobile Crisis Intervention; Therapeutic Host Home; Recovery Support Partners (for Substance Abuse); Substance Abuse Detox (Observational). Beneficiaries are eligible for the 1915(i) services if they meet the following criteria:**

Dually diagnosed clients:
1) Must have a documented behavioral health diagnosis and a documented developmental disability. These diagnoses must be made a physician and be contained in the individual's existing

medical record;
2) Must meet the institutional level of care criteria set forth by the Division of Developmental Disabilities Services for admission into an ICF/IID or CES Waiver;
3) Must have been deemed a Tier 2 or Tier 3 by the independent assessment of functional need related to diagnosis; and
4) Must be determined appropriate for HCBS State Plan services by the DHS Dual Diagnosis Evaluation Committee. The DHS Dual Diagnosis Evaluation Committee will be made up of clinicians and programmatic experts that work for or contract with the Division of Developmental Disabilities Services, the Division of Aging, Adult, and Behavioral Health Services, and the Division of Medical Services within the Arkansas Department of Human Services. This committee will be responsible for reviewing any cases presented for consideration to place the individual into a dual-diagnosed rate cell within the PASSE program and deemed eligible for the 1915(i) HCBS services.

Behavioral Health clients:
1) Must have a documented behavioral health diagnosis, made by a physician and contained in the individual's medical record; and
2) Must have been deemed a Tier 2 or Tier 3 by the independent assessment of functional need related to diagnosis.

Developmentally disabled clients:
1) Must have a documented developmental disability diagnosis, made by a physician and contained in the individual's medical record; and
2) Must have been deemed a Tier 2, or Tier 3 by the independent assessment of functional need related to diagnosis.

PUBLIC COMMENT: The Department of Human Services (DHS) held two public hearings, one in Springdale on October 26, 2018, and one in Little Rock on November 5, 2018. The public comment period expired on November 12, 2018. DHS provided a summary of the public comments received and its responses; that summary, due to its length, is attached hereto.

Additionally, Kathryn Henry, an attorney with the Bureau of Legislative Research, asked the following question: I saw in the newspaper that this rule will not be fully implemented until March 1, 2019. Why is March 1st the date for full

implementation? **RESPONSE:** DHS determined that in the best interest of the 40,000 Arkansans who will be served by the PASSEs, an additional two months to finalize operational preparedness was most appropriate. DHS made this decision based on a number of factors including readiness reviews of each of the PASSEs.

Per the agency, CMS approval is required for the 1915(b) and 1915(c) waivers, and that approval was obtained on December 7, 2018.

The proposed effective date of the rule is January 1, 2019.

FINANCIAL IMPACT: For a March 2019 implementation:

There will be a savings of $21,288,426 ($6,277,957 in general revenue and $15,010,469 in federal funds) in the current fiscal year and a savings of $63,989,034 ($18,870,366 in general revenue and $45,118,668 in federal funds) for the next fiscal year.

For the current fiscal year, additional revenue generated due to premium taxes from PASSE entities - $9,372,709 ($4,686,355 for use to offset general revenue of PASSE payments and $4,686,354 for use to reduce DDS wait list). For the next fiscal year, additional revenue generated due to premium taxes from PASSE entities - $29,846,433 ($14,923,217 for use to offset general revenue of PASSE payments and $14,923,216 for use to reduce DDS wait list).

The above amounts reported are updated to reflect March 1, 2019 implementation as opposed to the original January 1, 2019 implementation. Additionally, the original financial impact was based on July 30, 2018 databook supplied by the actuary. Updated numbers are based on October 1, 2018 rates finalized by the actuary.

The total estimated savings by fiscal year to the state government to implement this rule is $30,661,135 for the current fiscal year and $93,835,467 for the next fiscal year. These figures result from the savings from the PASSE in addition to the premium tax that will be generated. Legislation concerning the premium tax for PASSEs can be found in Sections 4-6 of Act 775 of 2017.

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

Act 775 of 2017, sponsored by Representative Aaron Pilkington, required DHS to submit an application for any federal waivers, federal authority, or state plan amendments necessary to implement the Medicaid Provider-Led Organized Care System. The Act authorized DHS to promulgate rules necessary to implement the system. *See* Ark. Code Ann. § 20-77-2708.

13. ARKANSAS INSURANCE DEPARTMENT (Gray Turner and Booth Rand)

a. SUBJECT: Rule 57: Administrative and Regulatory Fees

DESCRIPTION: The Arkansas Insurance Department seeks to amend AID Rule 57 that governs the manner in which fees are paid by insurance producers and agencies.

The proposed changes would:

1. Require all individual and business entity fees be paid electronically beginning in 2020.

2. Change the due date for fees to allow individuals to pay renewal fees biennially by the end of their birth month as opposed to their birthday.

3. Remove outdated language.

The specific changes to AID Rule 57 include:

1. TOC, Page 1. Replace the term “viatical” with “life settlement”

2. TOC, Page 1. Replace “surplus line” to “surplus lines”

3. Section 3, Page 3. Effective date of amended rule will be January 1, 2019, with the exception of the requirement to pay fees electronically, which will be January 1, 2020.

4. Section 6(a), Page 7. Clarifies when $35 license fees are due. Changes date fees are due to allow producers until the end of their birthday month, as opposed to the date of their birthday. Gives additional time to pay fees. This change is in conformity with the National Association of Insurance Commissioners model licensing rules. Does not change amount of fees.

5. Section 6(b), Page 7. Clarifies when fees are due for surplus lines producers and third-party administrators. Does not change amount of fees.

6. Section 6(c), Page 7. Removes outdated references to brokers and clarifies that $35 must be paid for both producers and surplus lines producers. Does not change amount of fees.

7. Section 6(d), Page 8. Requires license fees to be paid electronically. This change will not be effective until January 1, 2020.

8 Section 22, Page 12. Makes clear that producer licensing fees may not be paid by check.

PUBLIC COMMENT: A public hearing was held on November 14, 2018, and the public comment period expired on that date. No public comments were submitted to the department. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact. These changes do not increase any license fee or expense for producers and the AID will not incur any costs for these changes. These changes will streamline AID accounting methods and conform our practices to NAIC standards.

LEGAL AUTHORIZATION: The Insurance Commissioner shall collect annually or biennially as prescribed by the rule of the commissioner various fees, licenses, and miscellaneous charges, as set forth by Arkansas Code Annotated § 23-61-401. In addition to and notwithstanding all other statutory fees paid by licensees or registrants in connection with the issuance and renewal of their Arkansas licenses or registrations as required under the Arkansas Insurance Code or other Arkansas laws, new and additional or increased nonrefundable administrative and regulatory fees are imposed against all licensed resident and nonresident agents, agencies, brokers, surplus line and purchasing group brokers, risk retention agents, third party administrators, and similar licensees or registrants for each and every individual, firm, or corporation licensed or registered by the department. Ark. Code Ann. § 23-61-706(a). The annual fee per license shall be due in an amount and at such times or upon such schedule as the Insurance Commissioner shall prescribe, so long as the fee does not exceed fifty dollars ($50.00) per license. Ark. Code Ann. § 23-61-706(b).

14. DEPARTMENT OF LABOR, LABOR STANDARDS DIVISION (Denise Oxley)

a. SUBJECT: 010.14 Child Labor Rules

DESCRIPTION: The proposed amendments to the Department of Labor's child labor rules would accomplish the following:

1. Remove all references to hour restrictions or record-keeping requirements related to hour restrictions on 17 year olds pursuant to 2015 Ark. Acts 162;

2. Add a statutory exemption, Ark. Code Ann. § 11-6-102, exempting children 16 years old who have graduated high school, vocational school, or technical school, or who are married or are parents;

3. The rules would be re-numbered to conform to the Secretary of State's numbering convention, as well as the agency's overall numbering convention;

4. Update or eliminate some references to federal law or other sources;

5. Make some grammatical and stylistic changes; and

6. Establish an effective date and update the history of the child labor rules

PUBLIC COMMENT: A public hearing was held on October 29, 2018, and the public comment period expired on that date. No public comments were submitted. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Director of the Department of Labor is authorized to adopt rules and regulations for the enforcement and administration of Arkansas Code Annotated § 11-6-101 et seq. (law concerning child labor). *See* Ark. Code Ann. § 11-6-111(b)(2).

b. SUBJECT: 010.14-311 thru 316 Child Labor Rules, The Entertainment Industry

DESCRIPTION: The proposed amendments to the Department of Labor's child labor rules would accomplish the following:

1. Expand the number of hours a school age child with an entertainment work permit can be at the place of employment;

2. Expand the times of day a child with an entertainment work permit can be at the place of employment;

3. Make two (2) changes modifying or reducing requirements for permitting.

4. Re-number the rules to conform to the Secretary of State's numbering convention, as well as the agency's overall numbering convention; and

5. Make some grammatical and stylistic changes.

PUBLIC COMMENT: A public hearing was held on October 29, 2018, and the public comment period expired on that date. No public comments were submitted to the department. The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Director of the Department of Labor is authorized to promulgate rules and regulations for the implementation of Ark. Code Ann. § 11-12-101 et seq. (concerning employment of children in the entertainment industry). *See* Ark. Code Ann. § 11-12-105(1).

15. STATE BOARD OF PHARMACY (John Kirtley)

a. SUBJECT: Regulation 7: Drug Products/Prescriptions

DESCRIPTION: The proposed changes will reduce regulatory burdens when transferring prescriptions between pharmacies. It adds language to specify that a pharmacist cannot dispense more of a schedule II narcotic medication than a prescriber can prescribe. Language will also clarify partial filling of schedule II prescriptions.

PUBLIC COMMENT: A public hearing was held on September 26, 2018, and the public comment period on that date. The agency submitted the following public comment summary:

Summary of Verbal Comments Against:
There were no comments against this proposed regulation change.

Summary of Verbal Comments For:
John Vinson, COO Arkansas Pharmacists Association – Had a brief question about transfers and said he was in favor of this proposed change.

Travis Ezell, Pharmacy Student – Had a brief question about interns in transfer rules and said he was in favor of this proposed change.

Summary of Written Comments For:
John Rocchio – Director, Pharmacy Regulatory Affairs
Delivered letter with comments on proposed regulation changes thanking the Board for the opportunity for comment previously in June where the Board withdrew the proposed changes to rewrite into the current form. Dr. Rocchio commented in part, "CVS Health thanks the Board for the critical dialogue that took place during public comment on the first iteration of amendments to this

rule in June. We are pleased that the Board has incorporated our recommendations for faxed prescription transfers, removing the requirement to validate the transfer by telephone."

Mary Staples – Regional Director, State Government Affairs, National Association of Chain Drug Stores (NACDS)
Mrs. Staples delivered a letter in June requesting that the pharmacist should not need to further validate faxed transfers of prescriptions as it was an unnecessary step in this process that would be duplicative. This was incorporated into the rewrite and refiled proposed changes. Mrs. Staples submitted another set of comments on this regulation in September that asked the Board to include several other issues in this regulation change which fall into two categories:

1. Requested changes that are already accepted in Arkansas
2. Requested changes that would not apply to the proposed regulation change as they would be requests for a completely different regulation.

Board Staff responded in kind to the September letter.

The Board accepted all comments and voted to continue with this proposed regulation change as presented.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: This should actually save costs to pharmacies.

There is no cost to the state or federal governments.

LEGAL AUTHORIZATION: The Arkansas State Board of Pharmacy is authorized to make reasonable rules and regulations, not inconsistent with law, to carry out the purposes and intentions of the pharmacy laws of this state that the board deems necessary to preserve and protect the public health. Ark. Code Ann. § 17-92-205(a)(1). Additionally, the board shall promulgate rules limiting the amount of Schedule II narcotics that may be dispensed by licensees of the board. Ark. Code Ann. § 17-92-205(d).

16. BOARD OF PODIATRIC MEDICINE (Dr. John Robinette)

a. SUBJECT: Arkansas Board of Podiatric Medicine Rules and Regulations

DESCRIPTION: The board is revising its rules to repeal outdated and unduly burdensome rules; enact rules required by state statute regarding physician delegation, licensure for certain military personnel, re-licensure for podiatric physicians who want to return to practice in Arkansas, penalties for failure to comply with the Prescription Drug Monitoring Program; and increasing continuing education hours from fifteen to twenty hours.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on September 24, 2018. The board received no public comments.

Jessica Sutton, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) Page 2. Your rules refer to a fee as set by the Board that will accompany the application, but the fee is not set out in the rules. Arkansas Code Annotated § 17-96-302 sets forth a fee in an amount not to exceed $200. What is the relevant fee, and why does the Board not have this provided in its rules? **RESPONSE:** The fee is $200. The Board has never had its fees in its rules, and the failure to include them in this draft was an oversight. Rather than start the process over again, the Board intends to file a separate rule regarding its fees.

(2) Page 3. The rules state that the applications must be completed and submitted to the Board at least 60 days prior to the State Board examination. The reference to "filing" has been omitted. However, Ark. Code Ann. § 17-96-302(b) states that the "applicant shall file with the secretary at least two (2) months prior to an examination an approved application." Why was the reference to "filing" omitted? Also, two months may be more or less than 60 days, depending on the relevant months. **RESPONSE:** There is no substantive reason why the word "filing" was omitted – since it is still used in the statute, its omission from the rule is superfluous. The reference to "unless otherwise provided by law" should solve any problems with the "60 days" language, which is existing language that and the Board does not propose to change at this time. The Board can fix the discrepancy in the fee-related rule discussed in #1.

(3) Page 3. Regarding re-examination, the rules provide that the exam must be taken within a period of six months from the date of

the first examination of the applicant. However, Ark. Code Ann. § 17-96-304 states that the applicant is entitled to a reexamination within 6 months after the refusal of registration. **RESPONSE:** This is existing language that the Board does not propose to change at this time, and the statutory language will trump the rule.

(4) Page 4. Subsection (E) at the top of the page is not contained in the statute. Instead, the statute (Ark. Code Ann. § 17-1-107(b)) adds that the person demonstrates that he or she is sufficiently competent in his or her field. **RESPONSE:** Correct – the Board believes that a demonstration of sufficient competency would be licensure in good standing in another state.

(5) Page 4. What is the board's statutory authority for the emergency provisional licensure? **RESPONSE:** A.C.A. § 17-96-202(a)(3)(A).

(6) Page 9. The rules strike that the annual business meeting shall be in June; however, Ark. Code Ann. § 17-96-202 requires the annual meeting to be in June. **RESPONSE:** Correct – the board meeting must be in June, and the omission of the requirement from the rule does nothing to change the statutory requirement.

The proposed effective date is December 31, 2018.

FINANCIAL IMPACT: CME hours can be obtained for free through periodicals, however, many Podiatric Physicians attend seminars which may charge a fee; therefore, the estimated cost to the regulated party is between $0-125.

There is no cost to the state or federal government to implement the rule.

LEGAL AUTHORIZATION: The Arkansas Board of Podiatric Medicine shall make and adopt all necessary rules, regulations, and bylaws necessary or convenient to perform its duties and to transact business as required by law. Ark. Code Ann. § 17-96-202(a)(3)(A). The rules adopted shall authorize the delegation of certain medical practices to persons other than podiatrists. Ark. Code Ann. § 17-96-202(a)(3)(B).

The board shall adopt rules that establish standards to be met and procedures to be followed by a podiatrist with respect to the

podiatrist's delegation of the performance of medical practices to a qualified and properly trained employee who is not licensed or otherwise specifically authorized by the Arkansas Code to perform the practice. Ark. Code Ann. § 17-96-204(a).

Portions of these rules implement 2015 legislation, specifically Act 1066 (concerning reinstatement of licenses and certification) and Act 848 (concerning licensure, certification, or permitting of active duty service members, returning military veterans, and spouses). The rules also implement Act 820 of 2017, concerning the Prescription Drug Monitoring Program.

17. <u>COMMISSION FOR ARKANSAS PUBLIC SCHOOL ACADEMIC FACILITIES AND TRANSPORTATION</u> (Taylor Dugan)

a. <u>SUBJECT</u>: Appeals from Division Determinations of the Arkansas Division of Public School Academic Facilities and Transportation

<u>DESCRIPTION</u>: Amendments to these rules are necessary as a result of Act 542 of 2017. They also contain non-substantive edits that are mostly grammatical and stylistic.

These proposed amendments provide a method under which either a public charter school (as defined in Act 542) or traditional public school district may appeal a Division determination related to a public school district waiver petition to the Commission. Specifically, Act 542 provides that if a school district wishes to sell, lease, or otherwise transfer unneeded public school facilities (including but not limited to properties identified as unused or underutilized), there is a waiting period of two to three years. The school district may, however, petition the Division for a waiver of the waiting period. Amendments to the present rules provide a process for the appeal of the Division's determination by either the school district or charter school to the Commission.

No substantive changes were made post-public comment. The only changes made were editorial and for the purpose of clarification.

<u>PUBLIC COMMENT</u>: A public hearing was held on January 4, 2018. The public comment period expired on January 15, 2018.

The Commission provided the following summary of the public comments that it received and its responses thereto:

Commenter Name: Lucas Harder, Policy Services Director, Arkansas School Boards Association (1/3/18)
Comment (1): Section 1.02. I would recommend replacing 6-21-801 through 6-21-816 with 6-21-801 *et seq.* and moving it after 6-20-2516 as that would automatically include any new statutes added to the subchapter and have the statutory list in numerical order.
Response: Comment considered. Non-substantive change made.

Comment (2): Direct Appeals Hearing: I would recommend changing it to read 6-21-801 *et seq.* as the entire subchapter is listed.
Response: Comment considered. Non-substantive change made.

Comment (3): Section 6.08.4. I would recommend changing the new language to read "and in a manner identifying" in order to match the language in 4.05.
Response: Comment considered. Non-substantive change made.

Commenter Name: Harvie Nichols (1/15/18)
Comment (1): Section 3.02.2. The date for denying the appeal to be untimely should be based upon not being received within 60 calendar days of the date the appealing party receives a copy of the written determination of the division.
Response: Comment considered. Language changes in section 3.02.2, as well as sections 3.01.2 and 7.01. Non-substantive changes made.

Comment (2): Section 3.02.3. See the expanded comments on 6.04 which also apply here.
Response: Comment considered. Non-substantive change made.

Comment (3): Section 4.02. The last part of the first line should be changed to 6-21-815.
Response: Comment considered. Change made in sections 4.03 and 4.08 as well. Non-substantive changes made.

Comment (4): Section 4.06. This section allows the Commission to take a matter under advisement.
Comment (5): Section 4.07. States that the Commission shall render a written decision within thirty calendar days of the hearing

but does not specify how the Commission would render a decision if they have taken a case under advisement. I understand that a judge can issue a written decision after taking a case under advisement. However, in my opinion the Commission, because it is composed of multiple members, is subject to FOIA and can't discuss the case except in a convened meeting with proper notice provided. How can they render a decision if they have not met to discuss the issue? A section needs to be added to insure that they meet again with adequate notice to all parties.
Response: The CAPSAFT is undoubtedly a "governing body" under the Arkansas Freedom of Information Act and is subject to the open meeting provisions set forth in § 25-19-106 of the Act. Thus, if the CAPSAFT takes a matter under advisement, it must reconvene in an open meeting to further discuss the matter or issue its opinion. Appropriate notice to parties consistent with the FOIA must be provided. No changes made.

Comment (6): Section 4.08. Not being an attorney, I have no idea what the legal term means. Would it be possible to put it in plain language that an ordinary person understands?
Response: Comment considered. "Tolled" is a legal term of art meaning stayed, or suspended. No changes made.

Comment (7): Section 6.04. Based upon the language in 6.03 requiring that districts provide a brief written statement, I would suggest that the same language be used in 6.04 to characterize the division response. The page limit establishes the nature of the report but the language is just inconsistent.
Response: Comment considered. Non-substantive change made.

Comment (8): Same as in 4.07.
Response: *See* Response to (4) and (5) above. No changes made.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The instant proposed changes include revisions made in light of Act 542 of 2017, sponsored by Senator Alan Clark, which granted public charter schools a right of access to unused or underutilized public school facilities and clarified rights of first refusal to purchase or lease unused or underutilized public school facilities. In accordance with

procedures developed by the Commission for Arkansas Public School Academic Facilities and Transportation ("Commission"), a school district may appeal any determination of the Division of Public School Academic Facilities and Transportation ("Division") under the Arkansas Public School Academic Facilities Program Act, codified at Arkansas Code Annotated §§ 6-21-801 through 6-21-816, to the Commission. *See* Ark. Code Ann. § 6-21-814(a). Likewise, a decision by the Division under Ark. Code Ann. § 6-21-816, concerning the sale or lease of public school facilities, may be appealed to the Commission, and the Commission may promulgate rules to implement section 6-21-816. *See* Ark. Code Ann. § 6-21-816(g)(1), (i).

b. **SUBJECT: Bonded Debt Assistance**

DESCRIPTION: Amendments to these rules reflect changes made to bonded debt assistance law contained in Act 931 of 2017. Through bonded debt assistance, the state provides school districts financial assistance for the purpose of retiring outstanding bonded indebtedness in existence as of January 1, 2005. Prior to Act 931, school district expenditure of savings yielded from refunding these bonds was restricted to support academic facilities. This restriction resulted in inefficiencies and was time consuming to implement because refunding and restructuring the bonds multiple times made it difficult to track and accurately restrict and report bond savings, and any benefit derived from the restriction was minimal. Act 931 eliminated the restriction (and thus the inefficiency and undue expenditure) by allowing school districts to expend savings realized from the refunding of these bonds for any legitimate district purpose.

The proposed amendments also remove outdated language and provisions governing programs that have expired or been repealed, and bring language to reflect the current state of law.

Typographical corrections were made in Sections 4.01 and 4.04 post-public comment. No substantive changes were made.

PUBLIC COMMENT: A public hearing was held on August 13, 2018. The public comment period expired on September 4, 2018. The Commission provided the following summary of the public comments that it received and its responses thereto:

Commenter Name: Lucas Harder, Arkansas School Boards Association (8/31/18)
Comment (1): Section 4.01. The first transition from "this Rule" to "these Rules" has a dollar sign instead of a capital "r."
Response: Comment considered. Non-substantive change made.

Comment (2): The first "by" in "then multiplied by" should be "be" instead.
Response: Comment considered. Non-substantive change made.

Commenter Name: Jennifer Wells, Arkansas Public School Resource Center (9/4/18)
Comment: Section 4.01, Line 2. "$ules" should be "rules."
Response: Comment considered. Non-substantive change made.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

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"), codified at 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. Changes to the instant rules include revisions made in light of Act 931 of 2017, sponsored by Senator Jane English, which served to amend provisions of the Arkansas Code concerning bonded debt assistance and to improve efficiency in the provision of bonded debt assistance to public school districts.

c. SUBJECT: Right of Access to Unused or Underutilized School District Property

DESCRIPTION: These new rules implement Act 542 of 2017, which provides that a "public charter school" (as defined in the Act) has a right of access to a "public school facility or other real property" owned by a (traditional) school district when that property is identified by either the school district or the Arkansas Division of Public School Academic Facilities and Transportation

as being "unused or underutilized." Act 542 also provides a school district with a right to appeal any Division "unused or underutilized" identification to the Commission. (The process for this appeal is set forth in the proposed CAPSAFT Rules Governing Appeals from Determinations of the Division, which are being promulgated simultaneously with the present rules).

If the charter school and school district cannot reach agreement on the terms of a sale or lease of property identified as unused or underutilized, the charter school may petition the Commission for an order directing the school district to lease the property to it for fair market value. These rules provide a petition procedure, as well as a standard lease form.

These rules also incorporate by reference provisions of Act 542 that regulate a school district's sale/lease/transfer of public school facilities, including waiting periods during which the school district may not sell/lease/transfer property (to an entity other than a public charter school), a process for the school district to petition to the Division to waive the waiting period, and the opportunity for either a school district or public charter school to appeal the Division's waiver decision to the Commission. (The process for this appeal to the Commission is set forth in the proposed CAPSAFT Rules Governing Appeals from Determinations of the Division, which are being simultaneously promulgated with the present rules).

Changes Made Following First Public Comment Period

As a result of public comments received, several changes were made to the proposed rules. Following is a summary:

- Definitions were added in Section 2.00: "academic," "administrative," "educational," "extracurricular," "regular basis," and "significant portion." The definition of "unused or underutilized public school facility" was revised.

- In Section 3.01, a "Note" was included to notify public charter schools that they may contact the Division if they consider a traditional public school facility to be unused or underutilized, and that the Division would then consider that assertion.

- Language in Section 3.03 was clarified to provide that a traditional public school district's filing of a notification of intent

to file an appeal (of the Division's determination that it has an unused or underutilized facility) tolls the 60 days period set forth in 4.03 of the rules the same as filing an appeal does.

- In Section 6.02, "Note" was added to caution traditional public school districts to be mindful of IRS restrictions and processes concerning the sale or lease of a facility financed with tax-exempt debt that still exists on the date of the sale or lease of property.

- Section 6.06 clarifies that the Lease Agreement attached to the rules as Appendix "A" is merely a guide and not mandatory.

- Section 6.07 was added to clarify that for the duration of a traditional public school's lease of a facility to a public charter school, that facility is not considered a traditional public school facility for purposes of the Arkansas Public School Academic Facilities Program Act.

- Section 7.00 was added to clarify that vacant public school facilities must be properly secured.

Changes Made Following Second Public Comment Period

As a result of public comments received, a few grammatical and typographical changes were made, as well as changes to enhance clarity (*see* 2.08, 2.12.2, 2.14, and 2.15.5). Section 2.12.1 also was revised to define "regular basis" (of use) as a facility used fewer than ten times per year (to reflect the regular school year when students are present) as opposed to twelve times per year.

Changes Made Following Third Public Comment Period

Section 3.02.4 was added to provide that Division may correct the March 1 list if the Division possessed information that a traditional public school facility was unused or underutilized prior to March 1 but did not include it on the list.

Corrected Section 2.12.1 to add the word "no" prior to "fewer than ten times per year."

PUBLIC COMMENT: A public hearing was held on January 4, 2018. The public comment period expired on January 15, 2018. Substantive changes were made, and a second public hearing was

held on April 19, 2018, with the second public comment period expiring on April 27, 2018. Additional revisions were made, and a third public hearing was held on August 13, 2018. The third public comment period expired on September 1, 2018. The Commission provided the following summary of the public comments that it received and its responses thereto:

FIRST PUBLIC COMMENT PERIOD

Commenter Name: David Tollett, Superintendent, Barton-Lexa School District (1/3/18)
Comment: I would like to see these rules state that all public charter schools with underutilized facilities will be available to public schools for use, especially as charter schools expand, relocate, or disband in communities. These facilities should be treated the same way as public schools are treated under these rules. Also any furniture, buses, equipment, etc. being underutilized by public charter schools should be included especially if tax dollars (especially local) are used to buy them. Again the nearest public schools should have the first right of refusal for all of this. I would like to see this language incorporated into these rules for fairness reasons.
Response: Comment considered. A legislative change would be required. No changes made.

Commenter Name: Lucas Harder, Policy Services Director, Arkansas School Boards Association (1/3/18)
Comment (1): Transportation is misspelled in the title.
Response: Comment considered. Non-substantive change made.

Comment (2): In Section 2.09.4, the language appears incredibly broad to the extent that superintendents may not accurately be able to know when it would be triggered. In particular, "significant part" would appear to provide a fair amount of subjectivity to the Division and the Commission on when the building would be considered to be underutilized. It would provide a much more objective and put superintendents on better notice as to what the Division and Commission will be looking at if this could be better set forth in some kind of formula or examination rubric. A formula or rubric would also aid in the appeal process, as it would allow all sides to be more focused in their briefs.

Also, the language referring to a building being used irregularly or intermittently has the potential to bring in those buildings that a

district only has need to use intermittently, such as an auditorium, which may be used a couple of times per semester or even per year but is continuing to serve its purpose.
Response: Comment considered. "Significant portion" and "unused or underutilized public school facility" are further defined; threshold of use included in definition. Section containing terms "irregularly or intermittently" removed. Substantive changes made.

Comment (3): Section 2.09.5: Because this section covers all public school facilities, the section has the probability to pull in district buildings unnecessarily. If a district has a building that was specifically designed for storage rather than for academic or extracurricular purposes, then this language would require the district to either declare it to be unused or underutilized after the first year or appeal the placement of the building on the unused or underutilized list every year after the first year.

We would recommend combining an objective rubric, as suggested in comments to 2.09.4, with review of the CMMS submissions on the building and an in person review as necessary to make sure that the integrity of the building was being maintained and to prohibit the building from simply sitting empty with no plan for future use or replacement
Response: Comment considered. Section referring to one-year storage period removed. Substantive changes made.

Comment (4): "Underutilized" is misspelled in Section 3.00.
Response: Comment considered. Non-substantive changes made.

Comment (5): In Section 3.02.1, Section 2.08 is referenced instead of Section 2.09.
Response: Comment considered. Non-substantive changes made.

Comment (6): In Sections 5.01.1 and 5.02, "Arkansas Department of Education" should be moved in front of "Office of General Counsel" to match the revisions in the Rules Governing Appeals from Determinations of the Arkansas Division of Public School Academic Facilities and Transportation.
Response: Comment considered. Non-substantive changes made.

Commenter Name: Mark Lowery, Arkansas Representative (1/4/18—Public Comment Hearing)
Comment (1): Commenter was the lead House sponsor of the bill that ultimately became Act 542 of 2017, and spoke on behalf of himself and the Senate sponsor of the bill (Sen. Clark). This process has been in the works for four years. Previous law mandated that school districts give a right of first refusal to a charter school if one of the school district's buildings was available. Some school districts were "gaming" the process and not making buildings available for sale. Act 542 enables available public school buildings to continue to be used in a public education capacity by charter schools. Commenter concerned that although stakeholder input was sought prior to the drafting of the proposed rules, there was no attempt to contact the lead sponsors of the bill to ascertain legislative intent.
Response: Comment considered. Sponsors contacted by Division, meeting held with Representative Lowery. Substantive changes made.

Comment (2): Commenter concerned about the late submittal of the proposed rules, considering that the Act sets a February 1 deadline for districts to notify the ADE of which buildings they have that are unused or underutilized. This date is fast approaching and school districts do not have proper guidance. "Underutilized" and "unused" need better definitions than are currently contained in the proposed rules. It is a problem that there are not definitions in place for these rules, and commenter is concerned that districts might err in applying the current definitions. Additionally, terms "irregularly" and "intermittently" have been added in the rules, and they are not defined in Arkansas Code. This has compounded the problem. "Underutilized" needs to be defined to set forth a threshold of use. For example, if a district only is using 10% of a building, is that underutilized? There should be a 50% threshold for underutilization, and commenter notes that other stakeholders will propose the same.
Response: Comment considered. *See* Division Response to Harder Comment (2) above. (In summary, terms defined, section containing "irregularly" and "intermittently" removed, a threshold of use added). Substantive changes made.

Comment (3): Commenter is concerned with securing school district properties. For example, the PCSSD did not properly secure the Oak Grove High School building. This resulted in dramatic vandalism and use of the building for cooking

methamphetamine and other drug use, and the building was dramatically stripped. The non-profit that purchased it had to "recover" the building at significant cost. Commenter discussed the "broken glass theory," which provides that when a facility undergoes disrepair, be it by vandalism or broken glass, the surrounding community suffers the ill effects. School districts must be held responsible for making sure that they maintain the fair market value of a building. **Response:** Comment considered. New Section (7.00) added to clarify vacant buildings must be secured to prevent unauthorized entry in a manner in accordance with state and local fire prevention codes and other laws. Substantive changes made.

Comment (4): The proposed rules specifically give a right of appeal to school districts if the Division identifies one of its buildings as unused or underutilized; the school district can appeal to the CAPSAFT. The proposed rules should contain a reciprocal right of appeal to charter schools or other interested entities to the CAPSAFT if they know a building is unused or dramatically underutilized and has not been identified by the Division as such. **Response:** Comment considered. Legislative change would be required, as statute contains no provision allowing for public charter school appeal to the Commission in this circumstance (although it does expressly provide for a school district appeal). A note was added in Section 3.00 to notify that a public charter school may contact the Division if it believes that a particular facility is unused/underutilized. Non-substantive changes made.

Comment (5): Commenter does not want to rush promulgation of the rules merely because the February 1 deadline is approaching. Rather, he wants to get them right. This doesn't undermine or negate Act 542, but commenter doesn't want to implement rules not properly thought out and for which there has not been input from all stakeholders, including legislators who voted on Act 542 and sponsored Act 542 (in order to ascertain legislative intent). Recognizes school districts still must comply with the February 1 deadline, but must do so without guidance of rules.
Response: Comment considered. Sponsors have been contacted for input following public comment hearing. All General Assembly members may submit public comments through the Administrative Procedure Act process. Division will contact any school district that fails to identify what Division records show to be an unused or underutilized facility. No changes made.

Commenter Name: Scott Smith, Executive Director, Arkansas Public School Resource Center (1/4/18—Public Comment Hearing)

Comment (1): Commenter echoes Rep. Lowery's comments about the need for clarification of definitions of "unused" and "underutilized," as well as for the need for additional definitions. Act 542 turns in large part on the definitions of these terms, and they have not been sufficiently defined in the proposed rules.
Response: Comment considered. *See* response to Harder Comment (3) above. Also, many additional terms have been defined in response to various public comments. Substantive changes made.

Comment (2): Commenter has concerns about how time constraints contained in proposed rules will work practically (e.g., school district may use building for eleven months and two days, but then the building goes unused until the next school year).
Response: Comment considered. Definition of "regular basis" added. Substantive changes made.

Comment (3): Commenter concerned with space considerations in the proposed rules (e.g., if school district has a large building and are using only a broom closet, are they using the building). Would like to see space considerations.
Response: Comment considered. *See* Responses above. Threshold set at 40%, and language added establishing that if space in another building is available to satisfy the purpose (if the facility is used at less than 40% threshold), the building will be considered underutilized. Substantive changes made.

Comment (4): Commenter has concerns about the standard lease agreement; considers it ultra vires as it goes beyond the scope and purpose of Act 542. Concerned that proposed lease agreement does not leave arrangements up to the parties themselves.
Response: Comment considered. Act 542 mandates that these rules (governing what is codified as § 6-21-815) contain a "standard lease form." The rules thus contain as Appendix "A" a Standard Lease Form. Language added to clarify that the form is intended to assist the parties in negotiations but not bind them to specific terms. Non-substantive changes made.

Comment (5): Overall, feels there needs to be more detail in place to help everyone understand what their obligations are.

Response: Comment considered. *See* responses to comments above. Substantive changes made.

Commenter Name: Scott Beardsley, Crews & Associates, First Security (1/4/18—Public Comment Hearing)
Comment: Commenter has concerns about Section 6.03. Although he likes the section, he wants to ensure that if a school district has tax exempt debt, there will be no action taken that will adversely impact the tax exempt status of the debt. There are agreements with bond holders and the federal Internal Revenue Service regarding the debt, which apply until such time that the debt is extinguished. Noted that a lot of schools refinance their debt every five to seven years, extending the debt, and there is a pro-rata when the debt is extended (and it is very important that financial advisors for a school district do the calculation). Often, there is debt on a school building 30-35 years after a building is constructed. School districts need to ensure that fair market value is taken into consideration, regardless of who is purchasing the asset. This applies also when a school district borrows money for addition or repairs that are tax exempt. The research needs to be done and the debt needs to be properly extinguished before a sale or lease of the building.
Response: Comment considered. Regulatory note added to Section 6.00 to caution school districts in this regard. Non-substantive changes made.

Commenter Name: Bob Beach; Friday, Eldridge, and Clark (1/4/18—Public Comment Hearing)
Comment: School district facilities were financed with tax exempt debt, and the federal Internal Revenue Code applies. The Code does not allow a change in the use of property most times. A public facility often may not be used by a private organization or even a 501(c)(3) entity unless parties go through a certain procedure. The school district would have to comply with these IRS procedures to change the use of the building. Once it does that, even then, school districts are limited with what they can do with the proceeds they receive from a sale or lease of the facility. Districts need to be mindful of this when selling or leasing. They must be careful, or this can become an Internal Revenue Code issue.
Response: Comment considered. *See* Response to Beardsley above. Non-substantive changes made.

Commenter Name: Harvie Nichols (1/15/18)
Comment (1): Section 2.09.4. The language in this section is vague since "irregularly or intermittently" are not defined. Having made that comment, I am not sure that a rule can define those terms in a manner that would cover all the potential situations that occur. Perhaps the responsibility for carving out those definitions will be left to the Commission as they hear appeals from districts or charter schools. Failure to fully define the terms in 2.09 leaves school districts in a quandary about how to report those buildings or real property.
Response: Comment considered. *See* Response to Harder Comment (2) above. Section containing "irregularly or intermittently" removed, and other terms defined. Substantive changes made.

Comment (2): Section 2.09.5. I have failed to find that this language exists in Act 542. As written it appears to negate a district having storage facilities that would be used for more than one year. Districts must have storage facilities that are used to store paper, cleaning supplies, food, rarely used instructional materials, bus parts, extra educational items like desks, chairs etc. I can't see where this part of the rule is required or supports good public policy. In the alternative I would argue that storage is an educational purpose since that is not clearly defined.
Response: Comment considered. *See* Response to Harder Comment (3) above. The section containing the storage language has been removed. Substantive changes made.

Comment (3): Sections 5.05 & 5.06. The same argument is advanced here that was stated in the rule for appeals. Section 5.05 allows the Commission to take the matter under advisement and then in Section 5.06 it says that the Commission may render a written decision. My contention is that having taken it under advisement that the Commission must reconvene and take action (and hopefully discuss) before they can issue their written decision. There should not be communication between commissioners outside a legally called meeting so they couldn't arrive at a decision without meeting again.
Response: Comment considered. The CAPSAFT is undoubtedly a "governing body" under the Arkansas Freedom of Information Act and is subject to the open meeting provisions set forth in § 25-19-106 of the Act. Thus, if the CAPSAFT takes a matter under advisement, it must reconvene in an open meeting to further discuss the matter or issue its opinion. No changes made.

Comment (4): Section 6.02. While this section is in the law and therefore needs to be included, I would concur with the testimony offered in the public hearing about bond sales and use of the facilities. I believe taxpayers committed to a bond issue and taxation for a specific purpose which did not include providing those facilities to other entitles.
Response: Comment considered. *See* Response to Scott Beardsley above. Non-substantive change made.

Comment (5): Section 6.04. How would a district seek recovery from a charter school or other entity that operates the charter school should they lose their charter or no longer exist? Again, the law is clear but there are concerns that exist. I believe that before a public charter school is allowed to incur debt using the leased facility as collateral, some surety through bond or otherwise be issued by the charter school and placed on file with a state agency.
Response: Comment considered. Act 542 contains no provisions concerning recovery; general law would apply. The Act does not authorize a leased facility to be used as collateral, so again, applicable property/real estate law would apply. No changes made.

Comment (6): Section 7.01. Since there is not clarity in the law and as a result in the rules that can be developed I would suggest that the language here be changed to read "The Division may classify a school district that willfully fails to comply with the above provisions as being in academic distress under ACA 6-21-811." Or in the alternative allow the district to offer an affirmative defense that there was no willful intent in any conduct that fails to comply with the rules.
Response: Comment considered. This language mirrors that in Act 542. Changing it to add a "willfully" component would require a legislative change. No changes made.

Commenter Name: Mike Mertins, Arkansas Association of Educational Administrators (1/15/18)
Comment (1): Section 2.09.4 provides that "[a] public school facility shall be considered underutilized if it in whole or significant part is being used only irregularly or intermittently by the school district for educational, academic, extracurricular, or administrative purposes, and the district reasonably could satisfy those needs by using other available school district spaces." Recommendation is that this section of the proposed rules is not

necessary and should be removed. Rationale for this recommendation is:

1. Act 542 includes a meaning for "unused or underutilized public school facilities" and sections 2.09 through 2.09.3 of these proposed rules already address this meaning.
2. The use of terms such as "significant," "irregularly," "intermittently," and "reasonably" makes this section vague and confusing.
3. Furthermore, the concept proposed by some of using a percentage of utilization to determine "underutilized" public school facilities is not reasonable due to the fact that certain school facilities, such as athletic complexes, are seasonal in nature and not used on a regular basis. Other facilities, such as cafeterias, media centers, and CTE labs, may only be used periodically during the school day or week.
4. District administration and elected school boards are charged with making decisions regarding the best use of existing school facilities in meeting the needs of students. They have detailed knowledge of student needs, available resources, and existing facilities in their districts. This proposed section appears to limit this authority and is unclear on what entity will assume the oversight responsibilities of determining what other school district spaces could be used for educational, academic, extracurricular, and administrative purposes.

Response: Comments considered. *See* Responses above. (Prior) sections 2.09.4 and 2.09.5 removed, which contained the terms "significant," "irregularly," and "intermittently." Term "significant" in (previous) section 2.09.1 (now 2.15.1) mirrors language of Act 542. Definitions and provisions added to establish thresholds for amount of space used and duration of use, recognizing that certain facilities by their nature are ordinarily used intermittently (e.g., auditoriums, gymnasiums, and athletic facilities), and also recognizing that a facility will not be considered "underutilized" if a school district does not have other available spaces in which it can reasonably satisfy the educational, academic, extracurricular, or administrative purposes for which the space is being used. Substantive changes made.

Comment (2): Section 2.09.5 provides that "Administrative" activities do not include use of a public school facility or other real property as a whole or in significant portion for storage for a period of longer than one full school year. Recommendation is that this section of the proposed rules is confusing and needs to be completely removed. Storage, per say, is not addressed at all in

Act 542. Rationale for this recommendation is that facilities used for storage are essential to school district operations. These facilities can be classified as either education, extracurricular, or administrative facilities based on use. A facility or significant portion could easily be used for storage for a period of longer than one full school year (i.e. storage facilities for surplus instructional materials and supplies, district warehouse for maintenance and custodial supplies/equipment, financial/student records storage, athletic equipment storage for seasonal sports, etc.).
Response: Comment considered. The section addressing storage has been removed. Substantive change made.

Comment (3): Section 3.01 provides that "[b]y February 1 of each year, each school district shall submit to the Division a report that identifies…" Recommendation is that Section 3.01 should state, "By February 1 of each year, each school district and open-enrollment charter school should submit to the Division a report that identifies…" (NOTE: This change would require other sections of the proposed rules to be amended to reflect this recommended change). The rationale for this recommendation is that open-enrollment charter schools may very well own unused or underutilized facilities that could better serve the needs of students in public school districts. With the renewed emphasis on career and technical programs, additional facilities could be used to house these programs.
Response: Comment considered. Legislative change would be necessary, as Act 542 contains no provision requiring reporting by open-enrollment charter schools. No changes made.

Comment (4): Section 3.02 reads that "[b]y March 1 of each year, the Division shall . . . 3.02.2 Publish a list on its website identifying all unused or underutilized public school facilities, and notify any affected school district in writing of the identification." Recommendation is that Section 3.02.2 should include the following statement at the end of the sentence: "prior to March 1."
Response: Comment considered. Intent of this comment apparently is to ensure that a traditional public school will be on notice that one or more of its facilities will be included on the March 1 report. Language was added in 3.02.3 providing that prior notification will be made to the school districts by the Division. Non-substantive changes made.

Comment (5): Section 3.03.1 provides that "If a school district files an appeal, the Division will indicate on its website that the

appeal is pending." Recommendation is that Section 3.03.1 should be changed to say, "If a school district indicates intention to file an appeal, the Division will not identify the facilities as unused or underutilized on its website until the appeal process is completed."

The rationale for the two changes recommended in Comments 4 and 5 is that since Act 542 mentions the appeal process prior to the section dealing with the March 1 deadline, it is reasonable to assume that the intent of the law was for the appeal process to be completed before a facility is identified by the Division as being available. Also, since the law allows for a public charter school to give notice of its intent to purchase or lease the unused or underutilized facility once it is identified by the Division, the facility should not be identified as available until the district has the opportunity to appeal and the appeal has run its course.
Response: Comment considered. Because Act 542 mandates that the Division post the list of unused or underutilized public school facilities annually by March 1 (clarified in rule to provide "on or before March 1"), a legislative change would be necessary in order for the Division *not* to post on or before that date. However, Act 542 clearly contemplates that districts may appeal the identification. For this reason, language was included in the proposed rules that an appeal tolls the sixty-day period in Section 4.03 until such time that an appeal is resolved, and also requires the Division to indicate on its website that an appeal is pending. As noted above, language was added to require the Division to notify a traditional public school *prior* to March 1 if it has a facility or facilities that will be listed on March 1. Language also added to allow a school district to submit a "notification of intent" to file an appeal (which notification will toll the 60-day period but will not modify the timing to file the actual appeal). Substantive changes made.

Commenter Name: Mark White, Arkansas Public School Resource Center (1/15/18)
Comment (1): The proposed rules fail to include definitions for a number of key terms that, on their own, are ambiguous. The rules should be revised to add definitions for the terms "academic purpose," "administrative purpose," "educational purpose," "extracurricular purpose," and "irregularly or intermittently."
Response: Comment considered. Definitions of "academic," "administrative," "educational," and "extracurricular" added. Section removed that included the language "irregularly or intermittently." Substantive changes made.

Comment (2): Because the purpose of Act 542 of 2017 was to preserve and maximize the efficient use of public educational facilities for public educational purposes, the definition of "fair market value" in section 2.05 should be revised to recognize that the fair market value of a public school facility should be based on its value as a *public* facility intended to be used for *public* purposes, rather than by reference to the value of private facilities or private transactions.
Response: Comment considered. The language in Act 542 reads "fair market value." A legislative change would be needed to limit the meaning of this unambiguous term. No changes made.

Comment (3): The proposed rules should be revised to add a definition of "underutilized" that incorporates specific thresholds of use by time and space, for determining when a facility is deemed to be underutilized. For example, "underutilized" could be defined to include any facility that meets one or more of the following conditions:
a. Less than fifty percent (50%) of the gross square footage of the facility is used for the combined public educational, academic, extracurricular, and administrative purposes of the facility;
b. The facility is used for public educational, academic, extracurricular, or administrative purposes on fewer than ninety (90) days per school year;
c. For facilities that by their nature are ordinarily characterized by intermittent use, such as auditoriums, gymnasiums, and athletic facilities, the facility is used for public educational, academic, extracurricular, or administrative purposes fewer than twelve (12) times per school year;
d. The facility has been leased to a third party for less than fair market value for more than twelve (12) consecutive months, unless the leased facility is used exclusively for public educational, academic, extracurricular, or administrative purposes, including without limitation pre-kindergarten or adult education; or
e. The combined public educational, academic, extracurricular, and administrative uses of the facility are insufficient to preserve the integrity or purpose of the public school facility or other real property as a public education facility.
Response: Comments considered. *See* responses above. Also, (a) threshold set at 40%. Language in (b) and (c) included in proposed rule. Because Act 542 does not authorize the language in the first clause of (d), a legislative change would be necessary, and Act 542 already allows the uses in the second clause. Concerning language

proposed in (e), Act 542 reads that "nonuse or underutilization threatens the integrity or purpose of the public school facility or other real property as a public education facility," which language is mirrored in Section 2.15.2. Substantive changes made.

Comment (4): The definition of "unused or underutilized public school facility" in section 2.09 should be revised to:
a. Clarify that although storage may be a permissible administrative purpose under section 2.09.5, it is not a permissible educational, academic, or extracurricular purpose;
b. Clarify that using a public school facility in whole or in part for commercial purposes or for generating revenue for the district does not constitute an educational, academic, extracurricular, or administrative purpose; and
c. Provide that a facility leased to a third party for less than fair market value is *per se* unused or underutilized unless the leased facility is used for a public educational, academic, extracurricular, or administrative purpose, including without limitation as a pre-kindergarten or adult education facility.
Response: Comments considered. Concerning (a), *see* responses above; (previous) Section 2.09.5 removed. Act 542 does not support the proposition that storage is not a permissible academic, educational, academic, or extracurricular purpose. Concerning (b), language added to proposed rules. Regarding (c), *see* Responses to Comment (4)(d) above. Substantive changes made.

Comment (5): Section 3.02 of the proposed rules should be revised to provide a procedure for a public charter school or other interested entity to request that the Division classify a public school facility or other real property as unused or underutilized.
Response: Comment considered. *See* responses above. If a public charter school believes that a public school facility is unused or underutilized, the public charter school may bring this to the Division's attention within sufficient time to enable the Division to investigate prior to the March 1 identification date. Act 542 contains no provision authorizing an appeal by a public charter school, however, in the event that the Division disagrees. Non-substantive changes made.

Comment (6): Every public school district has an implied obligation under existing law to secure, protect, and preserve the condition of its facilities. The proposed rules should make this obligation explicit, by requiring school districts to take reasonably necessary steps to secure, protect, and preserve the condition of

any facility or other real property identified as unused or underutilized, and by prohibiting school districts from removing or disabling improvements, fixtures, or systems so as to render the facility unusable as a public education facility.
Response: Comment considered. New Section (7.00) added to clarify vacant buildings must be secured to prevent unauthorized entry in a manner in accordance with state and local fire prevention codes and other laws. Act 542 contains no language prohibiting a school district from reasonably removing its own property from an unused or underutilized building for reuse or sale, and does not contain language requiring that a district must preserve the condition of any facility. Substantive changes made.

Comment (7): The proposed rules should clarify that once a public school facility is sold or leased to a public charter school, the facility shall be, for the duration of the lease or ownership by the charter school:
a. Exempt from the provisions of the Arkansas Public School Academic Facilities Program Act, Ark. Code Ann. §§ 6-21-801 to 814, and the Commission's rules and regulations to the same extent that other public charter school facilities are exempt; and
b. Excluded from gross square footage calculations for the school district's campus value, program of requirements, and suitability analysis under the Academic Facilities Partnership Program.
Response: Comment considered. Language added, but reference to sale excluded due to fact that once a building is sold, it no longer belongs to the school district. Non-substantive changes made.

Comment (8): The proposed standard lease agreement is in part *ultra vires* in that it goes far beyond the Commission's statutory authority in terms of the obligations and restrictions it purports to impose on public charter schools. Though it may be permissible for the standard lease agreement to include suggested language or topics to be addressed, these terms and conditions should be determined by negotiation between the school district and public charter school, except for those provisions explicitly required by statute. The proposed agreement should be substantially revised to remove all of the prescriptive or mandatory components that are not explicitly authorized by statute.
Response: Comment considered. Act 542 requires that the Division develop a Standard Lease Form. The form does not contain mandatory provisions, but rather is intended to guide or

assist in negotiations. Language has been included in the rules to make this clear. Non-substantive changes made.

Comment (9): In addition to the broad lack of statutory authority, the specific provisions of the proposed Standard Lease Agreement ("Agreement") are problematic in a number of specific ways:

a. The Agreement cannot and should not require that payment be made monthly. Paragraph 2 should be revised to empower the school district and charter school to negotiate a mutually-agreeable payment schedule.

b. The Agreement cannot and should not give the public school district unilateral authority to approve or deny the public charter school's ability to improve, renovate, alter, or add to the facility. All such restricting language in paragraphs 3, 4, and 16 should be deleted.

c. The Agreement cannot and should not impose arbitrary restrictions on the charter school's use of the facility, such as the prohibition of "loud" noise in paragraph 4; the prohibition on "sharing" the facility or allowing "roomers or boarders" in paragraph 9; and the prohibition on activities that "tend to annoy other tenants or Lessor" in paragraph 15.

d. The Agreement cannot and should not require the public charter school to purchase liability insurance, in derogation of the charter school's statutory immunity to tort claims, nor should the Agreement give the school district discretionary authority to dictate the types and amount of insurance to be purchased by the charter school. All such language in paragraph 6 should be deleted.

e. Similarly, the Agreement cannot and should not attempt to defeat the public charter school's statutory immunity by requiring the charter school to assume liability for injury to the district's employees or guests, as contained in paragraph 6.

f. Although it may be appropriate in paragraph 8 of the Agreement to require the charter school to assume the risk of partial or total destruction of or injury to the facility, any required lease payments should abate during any term of non-occupancy caused by such partial or total destruction or injury.

g. Paragraph 11 of the Agreement is unnecessary and potentially confusing given that school districts already possess tort immunity by statute. This paragraph should be deleted entirely.

h. The Agreement should allow for the addition of other terms or conditions negotiated and agreed to by the participating school district and public charter school, as well as the modification or

deletion of any standard terms not otherwise explicitly required by statute.
Response: *See* response to Comment 8 above.

SECOND PUBLIC COMMENT PERIOD

Commenter Name: Roy Hester, Director, Guy Fenter Educational Service Cooperative (4/2/18)
Comment (1): How will they determine underutilized in "significant part"? How much is considered significant: one classroom in a building, 30% of the total square footage of a building. Will it be related to the POR (which doesn't tell the whole story)? Current working seems general and arbitrary for a rule that could lead to a loss of public property. I believe it needs to be more detailed/specific.
Response: "Significant portion" is defined in 2.14. No changes made.

Comment (2): What happens if the charter authorizer forces a school to lease or sell property to a charter, and years later, the public school experiences an increase in enrollment that requires more space? Can that be addressed?
Response: The charter authorizer has no authority under Act 542. If a public school facility is identified by the Division as unused or underutilized, a public charter school may give notice of its intent to purchase or lease it (at which point the traditional public school district may appeal to the *Commission*). Act 542 does not authorize the type of reversion to which you refer (due to increased enrollment); a legislative change would be required. No changes made.

Comment (3): Why do we (public schools) have to advertise excess property exclusively to open enrollment charter schools for two years before we can sell it to a third party, but we are not given the same two year consideration with excess charter property? Along those lines, why are we (public schools) not offered "right of first refusal" on excess charter property that is in our zone prior to the charter school selling to another charter school first?
Response: A legislative change would be necessary to afford traditional public schools the same right to purchase or lease unused or underutilized public charter school property. Also, please note that Ark. Code Ann. § 6-22-816(d)(1) authorizes a traditional public school to petition the Division for a waiver of the two-year requirement. No changes made.

Comment (4): Why doesn't the charter school have to submit the same facilities report and all excess charter school property be placed on a list for public schools to purchase or lease (if this is somewhere in the law or rules, I didn't notice it)?
Response: Such a provision is not contained in the law, and thus a legislative change would be required.

Commenter Name: Lucas Harder, Arkansas School Boards Association (4/3/18)
Comment (1): Section 1.01. "Arkansas Code Ann." should be "Ark. Code Ann." to match the other Commission rules.
Response: Comment considered. Non-substantive change made.

Comment (2): Section 2.07. Activity is included twice.
Response: Comment considered. Non-substantive change made.

Comment (3): Section 2.08. "Arkansas Athletic Association" should be "Arkansas Activities Association."
Response: Comment considered. Non-substantive change made.

Comment (4): Section 2.09. I would recommend changing the definition to read something more along these lines to assist in legibility: "Fair market value" means the price a property would change hands between a buyer and seller if: 2.09.1 Neither party is under any compulsion either to buy or to sell; and 2.09.2 Both parties have reasonable knowledge of relevant facts concerning the state of the property in question.
Response: Comment considered. Proposed language limits scope of term "relevant facts." No changes made.

Comment (5): Section 2.12.1. I would recommend changing this from twelve (12) times during the school year to be less than ten (10) times during the school year. If the district only has use for the building once a month when students are present and generally doesn't use it during the summer months when school is not in session, then it is possible that the building may only be used from August through May for a total of ten (10) times instead of twelve.
Response: Comment considered. Non-substantive change made.

Comment (5): The Act prohibits the school district from entering into a covenant that prohibits that property from being sold/leased for a charter school; however, the Act is silent on how any reversionary interest is to be handled in the event the school

district received the title to the property in fee simple determinable or subject to a condition subsequent that was worded in such a way that any reversionary interest in the deed is triggered.
Response: Comment considered. Commenter is correct that Act did not provide guidance in this regard. Both parties to any transaction should consult with local counsel on a case-by-case basis.

Commenter Name: Harvie Nichols (4/27/18)
Comment (1): Section 2.08. I believe the correct term is Arkansas Activities Association. To my knowledge there is no Arkansas Athletic Association that sponsors student activities.
Response: Comment considered. Non-substantive change made.

Comment (2): Section 2.12. I must admit that the language here confused me. We are defining regular basis as used fewer than 12 or 90 times a year? Would that not mean that if used more than that many times annually the facility would not be used on a regular basis? Perhaps I am misreading the definition but the plain language seems to be contradictory with the normal expectation of what "regular basis" would be.
Response: Comment considered. Non-substantive change made.

Comment (3): Section 2.14. Does the definition take into account the overall needs of a district? While the attempt to define "significant portion" at 40% is well intended, it concerns me that the definition could create problems for some districts. For example, a district has two elementary schools. One is being used 100% for required purposes. However, the second elementary school is at 35% capacity because the district can't place all the students in the one elementary school, or as is often the case, the second elementary school is the result of a consolidation and those students are being educated at a remote location that is necessary because of negative impact of transportation time to the campus. This appears to be covered in Section 2.15.4.
Response: Comment considered. Commenter is correct that Section 2.15.4 addresses the situations set forth in Comment 3. No changes made.

Commenter Name: Mike Mertens, Arkansas Association of Educational Administrators (4/27/18)
Comment (1): Proposed change in Section 2.12.2: Add the word "no" right before the word "fewer" in this section. Rationale: Since this statement is part of the meaning for "regular basis," it

appears that this change would make more sense than the existing word.
Response: Comment considered. Non-substantive change made.

Comment (2): Proposed change in Section 2.15.5: Add the "solely" right after the word "facility" in this section. Rationale: School districts may rent facilities such as auditoriums and gymnasiums. They also charge admission for athletic and other events. This generates revenue for districts. Districts should be allowed to do this periodically as deemed appropriate or necessary without affecting the status of the facility under these rules.
Response: Comment considered. Non-substantive change made.

Commenters Names: Tripp Walter, Arkansas Public School Resource Center; Gary Newton, Arkansas Learns (4/27/18)
Comment (1): The rules should be revised to add a definition for the term "irregularly or intermittently."
Response: Terms "irregularly" and "intermittently" are not contained in Act 542. Initial draft of rules used these terms, which were removed as a result of public comment. They were replaced in Section 2.12 by definition of "regular basis," which term is then used in Section 2.14 as part of the definition of "significant portion." No changes made.

Comment (2): Because the purpose of Act 542 of 2017 was to preserve and maximize the efficient use of public educational facilities for public educational purposes, the definition of "fair market value" in section 2.09 should be revised to recognize that the fair market value of a public school facility should be based on its value as a *public* facility intended to be used for *public* purposes, rather than by reference to the value of private facilities or private transactions.
Response: Comment considered. This same comment was made by Mark White of the Arkansas Public School Resource Center on 1/15/18 (*see* above, Division response to Comment (2)). No changes made.

Comment (3): The language in Section 2.14 should be revised to change the words "less than forty percent (40%) to "more than forty percent."
Response: *See* Response to Rebecca Miller-Rice Comment [that follows]. Language has been changed to read "at least forty percent (40%)." Non-substantive change made.

Comment (4): The proposed rules should be revised to add a definition of "underutilized" that incorporates specific thresholds of use by time and space, for determining when a facility is deemed to be underutilized. For example, "underutilized" could be defined to include any facility that meets one or more of the following conditions:

a. The facility has been leased to a third party for less than fair market value for more than twelve (12) consecutive months, unless the leased facility is used exclusively for public educational, academic, extracurricular, or administrative purposes, including without limitation pre-kindergarten or adult education; or

b. The combined public educational, academic, extracurricular, and administrative uses of the facility are insufficient to preserve the integrity or purpose of the public school facility or other real property as a public education facility.

Response: Comments considered. These same comments were made by Mark White of Arkansas Public School Resource Center on 1/15/18 (*see* above, Division responses to Comment 3, items (d) and (e)). No changes made.

Comment (5): The definition of "unused or underutilized public school facility" in section 2.15 should be revised to:

a. Indicate that storage is not a permissible educational, academic, or extracurricular purpose; and

b. Provide that a facility leased to a third party for less than fair market value is *per se* unused or underutilized unless the leased facility is used for a public educational, academic, extracurricular, or administrative purpose, including without limitation as a pre-kindergarten or adult education facility.

Response: Comments considered. Regarding (a), a substantially similar comment was made by Mark White of the Arkansas Public School Resource Center on 1/15/18 (*see* above, Division Response to Comment 4(a)). Regarding (b), the same comment was made by Mr. White on 1/15/18 (*see* above, Division Response to Comment 4(c)).

Comment (6): The language in Section 7.01 should be strengthened in accord with the following language: Every public school district has an implied obligation under existing law to secure, protect, and preserve the condition of its facilities. The proposed rules should make this obligation explicit, by requiring school districts to take reasonably necessary steps to secure, protect, and preserve the condition of any facility or other real property identified as unused or underutilized, and by prohibiting

school districts from removing or disabling improvements, fixtures, or systems so as to render the facility unusable as a public education facility.
Response: Comment considered. A substantially similar comment was made by Mark White of the Arkansas Public School Resource Center on 1/15/18 (*see* above, Division Response to Comment 6).

THIRD PUBLIC COMMENT PERIOD

Commenter: Tripp Walter, Arkansas Public School Resource Center (8/22/18)
Comment (1): Remove the "Note" following Subsection 3.01.3.
Response: Comment considered. This was one of the changes proposed to the Commission by the APSRC during the Commission's July 31, 2018 meeting in which these rules were before the Commission for final approval. After much discussion, the Commission voted that one of APSRC's suggestions should be incorporated into the rules, which was added as Section 3.02.4. No changes made.

Comment (2): Add a new Section 3.02 to read as follows: "A public charter school may notify the Division at any time of a public school facility that is unused or underutilized."
Response: Comment considered. This was one of the changes proposed to the Commission by the APSRC during the Commission's July 31, 2018 meeting in which these rules were before the Commission for final approval. After much discussion, the Commission voted that one of APSRC's suggestions should be incorporated into the rules, which was added as Section 3.02.4. No changes made.

Comment (3): Add new Subsection 3.02.1 to read as follows: "A public school facility reported to the Division under Section 3.02 shall be reviewed and placed on the list within thirty (30) calendar days of the Division's receipt of the information, if the property meets the requirements of Section 2.15."
Response: Comment considered. This was one of the changes proposed to the Commission by the APSRC during the Commission's July 31, 2018 meeting in which these rules were before the Commission for final approval. After much discussion, the Commission voted that one of APSRC's suggestions should be incorporated into the rules, which was added as Section 3.02.4. No changes made.

Comment (4): Amend proposed Subsection 3.02.4 to read as follows: "If the Division was in possession of information prior to March 1 that showed a public school facility to be unused or underutilized, but failed to place the facility on the list, it shall place the facility on the list within ten (10) calendar days after the information is discovered."
Response: Comment considered. Proposed language is closely analogous to that currently contained in Section 3.02.3. Verb tense changed; "calendar" days changed to "working" days; current language clarifies that the ten days begins to run once the Division learns of the error.

Comment (5): Add new Subsection 3.02.3 to read as follows: "If a school district fails to provide information to the Division concerning an existing unused or underutilized public school facility by February 1, and the Division fails to place the facility on the list on or before March 1, the Division shall place the facility on the list within ten (10) calendar days after discovering or being notified of the existence of the facility."
Response: Comment considered. This was one of the changes proposed to the Commission by the APSRC during the Commission's July 31, 2018 meeting in which these rules were before the Commission for final approval. After much discussion, the Commission voted that one of APSRC's suggestions should be incorporated into the rules, which was added as Section 3.02.4. No changes made.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following questions during the first public comment period:

Section 2.03 – Is this to be the same as the definition for "Authorizer" as in Ark. Code Ann. § 6-23-103? I'm not seeing the term "charter school authorizer" in that statute.
RESPONSE: Comment considered. Section 2.03 (now Section 2.05) has been changed to clarify that "charter school authorizer" has the same meaning as "authorizer" in Ark. Code Ann. § 6-23-103. The term "authorizer" also was changed in Section 6.05.2 to "charter school authorizer" for consistency. Non-substantive changes made.

Section 3.03 – Should the Commission's name include "Commission for *Arkansas Public School* Academic Facilities and

Transportation"? **RESPONSE:** Comment considered. Yes it should. Non-substantive changes made.

Following revisions that were made to the proposed rules after the first public comment period, Ms. Miller-Rice posed the following question:

Section 2.14 – I'm a bit confused by the definition of "significant portion" in terms of "less than" a percentage of use. When I substitute the definition for the term as used in Section 2.15, it seems to repeat certain language, i.e., [A public school that] As a whole or less than forty percent (40%) of the gross square footage of a public school facility is used by the school district for public educational, academic, extracurricular, or administrative purposes on a regular basis is not being used for a public educational, academic, extracurricular, or administrative purpose[.] I see the difficulty presented in defining the term, but I was curious as to whether there was a particular reason the Commission chose to define it in those terms, rather than just a straight percentage such as less than 100%, but at least 60%, or at least 60%?
RESPONSE: Language in 2.14 has been changed for enhanced clarity. Non-substantive change made.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The instant proposed changes include revisions made in light of Act 542 of 2017, sponsored by Senator Alan Clark, which granted public charter schools a right of access to unused or underutilized public school facilities and clarified rights of first refusal to purchase or lease unused or underutilized public school facilities. The Commission for Arkansas Public School Academic Facilities and Transportation ("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"), codified at Arkansas Code Annotated §§ 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* Ark. Code Ann. § 6-21-804(b). Further authority for the

rulemaking can be found in Ark. Code Ann. § 6-21-815(g), which provides that the Commission shall promulgate rules to implement the statute, concerning the right of access to unused or underutilized public school facilities, including without limitation a standard lease form, and Ark. Code Ann. § 6-21-816(i), which provides that the Commission may promulgate rules to implement the statute, concerning the sale or lease of public school facilities.

d. SUBJECT: The Facilities Master Plan

DESCRIPTION: Amendments to these rules are necessary as a result of Acts 935 and 542 of 2017. They also contain clarifications and non-substantive edits.

These proposed amendments incorporate the definition of "building" contained in Act 935 of 2017. Consistent with Act 542, the proposed amendments provide a definition of "unused or underutilized" property, require that a school district's master plan identify any such properties, and require school districts to identify these properties by February 1 of each year. They also clarify that master plans must be kept updated (consistent with Ark. Code Ann. § 6-21-805), and that school districts must use the statewide Computer Maintenance Management System (a/k/a "School Dude"), which is provided by the Division at no cost to the school districts, consistent with Ark. Code Ann. § 6-21-808(c)(2)(B)(ii).

No substantive changes were made post-public comment.

- Language was added in 3.05.1 to clarify that a "shed" or other structure not capable of supporting human occupancy is not included in the definition of "building."
- Removed language in Section 4.01.4 that indicated purpose of Master Plan is to collect and disseminate information regarding unused or underutilized property, which language is redundant to Sections 4.04.3 and 5.04, and according to a commenter created confusion.
- Revised Section 4.03.3 to clarify that the Computerized Maintenance and Management System *must* be used by school districts, but bringing the degree of mandated use more in line with existing law. Also, a provision was added that strongly recommends that at least one person in each school district receive facility director certification through the Arkansas School Plant Management Association or a similar certification program.

PUBLIC COMMENT: A public hearing was held on January 4, 2018. The public comment period expired on January 15, 2018. The Commission provided the following summary of the public comments that it received and its responses thereto:

Commenter Name: Lucas Harder, Policy Services Director, Arkansas School Boards Association (1/3/18)
Comment (1): 3.~~13~~14.3. The "14" here is both struck through and underlined when it should just be underlined as it is new language.
Response: Comment considered. Non-substantive change made.

Comment (2): 4.03.2.1. Because the CMMS is abbreviated in the definitions section, I would simply strike the unabbreviated language and the parenthesis here.
Response: Comment considered. Non-substantive change made.

Commenter Name: Harvie Nichols (1/15/18)
Comment (1): Section 3.05. I have not researched the actual language in the law but if possible some changes need to be made to the term building. As defined it includes "any structure used or intended for supporting or sheltering any use or occupancy." My experience is that many districts have small plastic or perhaps metal storage sheds that may measure 6 feet by 6 feet in which they store playground equipment or tools for working on playgrounds or athletic fields. Typically those types of structures do not have a concrete floor and are not permanent in nature and have no utilities. It would be helpful if there was some reasonable size established or a requirement that it be constructed so that utilities are installed in the building.
Response: Comment considered. Definition of "building" mirrors Ark. Code Ann. § 6-20-2502(4); language added at 3.05.1 to clarify that structures such as sheds are not included. Non-substantive changes made.

Comment (2): Section 4.03.3.1. While the impact of this rule change is significant, I will not comment other than to question the term "fully utilize" and the term "all reactive" work orders. In terms of the first term, more information should be provided as to what it means. There are a number of options available to Schooldude users under preventative maintenance work. For example, you are able to enter what tools will be needed to perform the work. Would this rule require that districts utilize every aspect of the program or utilize it for all buildings?

Clarification is needed to define fully utilize. Also, does fully utilize mean meeting some agency determination about how often preventative maintenance is performed? If so, then that is an unfunded mandate on schools in my opinion.
Response: Comments considered. Non-substantive changes made.

Commenter Name: Mike Mertens, Arkansas Association of Educational Administrators (1/15/18)
Comment: Recommendation: Add a new section, 4.03.3.5, reading "It is strongly recommended that school districts ensure that at least one (1) district employee has completed, or completes within three (3) years, the Certified Facility Director certification program offered by the Arkansas School Plant Management Association. Membership in ASPMA is not required to attend this training." Rationale: AAEA believes that the change in existing rules from "should" to "shall" in several incidences of using the management systems makes it essential for a district to have someone trained and very familiar with the CMMS software. Arkansas School Plant Management Association (ASPMA) has worked for several years with the Division to ensure quality training in this area. The new language would encourage that all districts have at least one person with the appropriate training.
Response: Comment considered. A note has been added containing this recommendation, but not limiting it to one organization. Non-substantive change made.

Commenter Name: Chad Davidson (1/15/18)
Comment (1): 3.05 "Building" means any structure used or intended for supporting or sheltering any use or occupancy.
Building definition is vague. Any structure for use or occupancy could potentially include a tool storage shed. However, these are minimally insured, if at all, and certainly not structures intended for student occupancy, but they might be district owned, and therefore used for supporting use. If these are to be tracked, then the utilization rule should also be modified to allow for structures such as this, IF they truly are intended to be identified with the definition of "building."
Response: Comment considered. Definition of "building" mirrors Ark. Code Ann. § 6-20-2502(4); language added at 3.05.1 to clarify that structures such as sheds are not included. Non-substantive changes made.

Comment (2): 3.27 "Unused or underutilized public school facility" has the same definition as in the [CAPSAFT] Rules Governing Unused or Underutilized Public School Facilities and the Sale or Lease of Public School Facilities. Once again, see explanation or questioning above of Section 3.05, for vague definition.
Response: Comment considered. The Division proposed several changes to the definition of "unused or underutilized public school facility" in the CAPSAFT Rules Governing Unused or Underutilized Facilities and the Sale or Lease of Public School Facilities in response to public comments and requests for clarification. No changes made (in the present proposed rules).

Comment (3): 4.01.4 Collect and disseminate information concerning unused or underutilized public school facilities or other real property as required by law. This section needs to be better defined, for the purpose of dissemination of unused/underutilized information. To whom will this information be disseminated? In what format will this information be disseminated? There should be a subsection defining this disseminating of this information, as other sections (4.03.10.1 & 4.03.11) clearly define how the information is collected.
Response: Comment considered. Because this section is redundant (sections 4.04.3 and 5.04 already set forth school district reporting requirements) and could lead to confusion, it has been removed. Non-substantive change made.

Comment (4): 4.03.3.1 School districts shall participate in the fully utilize CMMS to track all reactive and preventative maintenance work. This section requires districts to "fully utilize" CMMS, track "all reactive" maintenance work, "shall" enter preventative maintenance schedules, "shall" document completed work orders, and "shall" schedule state-mandated inspections. With this change of language to "shall," what distinguishes the change from shall participate in, to fully utilize? What will be different from how districts have reported in the past? Who determines full utilization versus only participating in? What level of participation is sufficient to count as fully utilizing? Is there a percentage governing this? How will this be enforced? What are the ramifications of not fully following this?
Response: Comments considered. Non-substantive changes made.

Comment (5): 4.03.10.1. The narrative analysis shall include an accounting of any changes to building or campus use, size, utilization, status, or condition. This section states that the narrative analysis of facility needs and response plans "shall include an accounting of any changes to building or campus use, size, utilization, status, or condition." Will a table suffice? To what level of narrative description is sufficient?
Response: Comment considered. The narrative analysis must contain enough information for the reviewer to form a comprehensive understanding of changes to building or campus use, size, utilization, status, or condition to aid in the review of the school district's master plan. A table would suffice if it meets this purpose. No changes made.

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

Section 3.27 – I'm just curious as to why the definition refers to the definition in another set of rules rather than setting forth the statutory language or referencing the statute? **RESPONSE:** This is one of the efficiency and clarity measures we're trying to start building into our rules when appropriate. In short, if the definition of unused/underutilized changes in either law or rules, we will only have to revise one set of rules (unused/underutilized) and not two. Sort of like avoiding unnecessary words when they are not needed for clarity.

Section 3.27 – Should the reference be to the Rules Governing *Right of Access to* Unused or Underutilized Public School Facilities and the Sale or Lease of Public School Facilities?
RESPONSE: You are correct. I'll make that change

Section 4.03.10.1 and Section 4.03.11 – What prompted the Commission's addition of these provisions? **RESPONSE:** Act 935 of 2017 amended § 6-21-806(b) by adding a subdivision that reads as follows:

(11) An update in a format prescribed by the division of any new public school facilities, as defined in § 6-21-803, constructed since the last master plan submission, including individual room types and sizes.

The other rule changes were also recommended by the division. It was necessary to ensure greater accuracy in district data that is

critical to the division ascertaining a comprehensive picture of existing district facilities in order to inform the division's master plan approval, partnership program application decisions, and subsequent funding recommendations presented to the commission. The more accurate data the districts provide the better the division is able to assist the districts in qualifying their projects with the correct square footage and program elements per the requirements in rule.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The instant proposed changes include revisions made in light of Act 542 of 2017, sponsored by Senator Alan Clark, which granted public charter schools a right of access to unused or underutilized public school facilities and clarified rights of first refusal to purchase or lease unused or underutilized public school facilities; and Act 935 of 2017, sponsored by Senator Jane English, which amended provisions of the Arkansas Code concerning public school academic facilities. With respect to rulemaking, 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. *See* Ark. Code Ann. § 6-21-114(e)(2)(A). Pursuant to Arkansas Code Annotated § 6-21-804(a)(1), the Division of Public School Academic Facilities and Transportation ("Division") shall develop a comprehensive Arkansas Public School Academic Facilities Program that includes an Academic Facilities Master Plan Program, which establishes a process by which each school district develops and submits a facilities master plan for review and approval by the Division and the Division develops a comprehensive state master plan for managing state financial participation in local academic facilities projects across the state. Further authority for the rulemaking can be found in Ark. Code Ann. § 6-21-804(b), providing 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"), codified at 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.

18. ARKANSAS TOBACCO SETTLEMENT COMMISSION
(Dr. John Henderson and Matt Gilmore)

a. SUBJECT: Amendment to Bylaws

DESCRIPTION: The proposed rule changes amend the Commission's bylaws to provide a more concise and up-to-date version that will fulfill the needs of the Commission. This amendment will allow the Commission to meet its directives as dictated through statute. The general content will not change as gathered from § 19-12-117, which formed the Commission from Initiated Act 1 of 2000.

This amended version is organized by commission membership, voting procedures, commission officers, committees, and meetings, etc. This amendment describes who is appointed as a commissioner and which agency directors serve as commissioners based on their position as an agency director. The duties of the elected officers of the Commission are listed, as well as the basic operations of the Commission.

The previously filed version from 2003 included the entire process for rulemaking. This has been condensed but includes the Commission's authority to promulgate rules per § 19-12-117(e). A requirement that dictates the Commission must vote to approve expenses annually has also been added.

PUBLIC COMMENT: A public hearing was held on November 13, 2018. The public comment period expired that same day. The Commission received no public comments.

The proposed effective date is February 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Arkansas Code Annotated § 19-12-117(a) created and recognized the Arkansas Tobacco Settlement Commission ("Commission"). Pursuant to Ark. Code

Ann. § 19-12-117(e), the Commission is specifically authorized to adopt bylaws.

19. VETERINARY MEDICAL EXAMINING BOARD (Cara Tharp and Dr. Conley Byrd)

a. SUBJECT: Prescribing Controlled Substances

DESCRIPTION: Pursuant to Act 820 of 2017, the rules of the Arkansas Veterinary Medical Examining Board are being updated to include limits on the amounts of opioids that may be prescribed and dispensed by licensees of the board. In addition, licensees will consider nonpharmacologic treatment or drugs that are not classified as a controlled substance prior to treatment with any Schedule II-V drug.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on November 2, 2019. Public comments were as follows:

COMMENTS:

Names of Commenters:
Steven A. Ward, DVM
Russ Smith, DVM
Robert Bronner, DVM
Meghan Sommers, DVM

The Arkansas Veterinary Medical Examining Board received two public comments. The first comment was from a veterinarian who felt that it was not in the best interest of his patients for the board to limit his prescribing of opioids. The second comment came from a group of veterinarians in a practice who felt that the proposed rule should be limited to Schedule II and III drugs only, and that including Schedule IV and V drugs does nothing to aid in the control of opioids.

RESPONSE:

The board appreciates the comments that were received and has taken them into consideration.

In response to the first comment, Act 820 of 2017 mandates that the board promulgate rules to put limits on the prescribing of opioids by its licensees; therefore, the board will continue to move forward with promulgating the proposed rule.

The board's intent of the proposed rule is to place prescribing limits on opioids, while also asking licensees to consider nonpharmacologic treatment or drugs that are not controlled substances prior to prescribing a controlled substance. In reviewing the second comment, the board was made aware that parts of the proposed rule should be moved around to better clarify the intent. By doing so, Subsection B of the proposed rule is now specific to the prescribing limits being placed on opioids. The original draft could have been interpreted to mean that the prescribing limit was being placed on all controlled substances, which was not the board's intent.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Veterinary Medical Examining Board is authorized to promulgate and enforce regulations necessary to establish recognized standards for the practice of veterinary medicine and to carry out the provisions of the Arkansas Veterinary Medical Practice Act, Ark. Code Ann. § 17-101-101 et seq. *See* Ark. Code Ann. § 17-101-203(7). Additionally, the board is authorized to promulgate rules limiting the amount of Schedule II narcotics that may be prescribed and dispensed by licensees of the board. Ark. Code Ann. § 17-101-203(12).

F. Rules Filed Pursuant to Ark. Code Ann. § 10-3-309 to be Considered Pending Suspension of the Rules:

1. STATE BOARD OF NURSING (Sue Tedford and Fred Knight)

a. SUBJECT: Chapter One: General Provisions; Chapter Two: Licensure; RN, LPN and LPTN; Chapter Three: Registered Nurse Practitioner; Chapter Four: Advanced Practice Registered Nurse; Chapter Six: Standards for Nursing Education Programs; Chapter Seven: Rules of Procedure

DESCRIPTION: The proposed changes follow:

Chapter 1
The definition of "failed drug screen" was added for clarification purposes.

Chapter 2
The term "good moral character" was removed to reduce and/or eliminate unnecessary regulatory barriers. The Rules for the original compact are repealed and the Rules for the Enhanced Compact are included pursuant to Act 454 of 2017. Section addressing considerations for military members and their spouses were moved to Section XII to achieve a central location. In order to facilitate inactivation of licensure for participants to enter into the alternative to discipline program, the term "inactive status" was redefined. The fees for retired status of nursing licensure is being removed because we have changed our business process and will no longer accept fees and renew retired licenses in our new data base. A section was added to address considerations for military members and their spouses pursuant to Acts 248 and 204 of 2017.

Chapter 3
For clarification purposes, we added the statement that renewal notices are sent to the last known address of record for the licensee. In order to facilitate inactivation of licensure for participants to enter into the alternative to discipline program, the term "inactive status" was redefined.

Chapter 4
We have waived the license renewal fee for active duty military pursuant to Act 204 of 2017. For clarification purposes, we added the statement that renewal notices are sent to the last known address of record for the licensee. In order to facilitate inactivation of licensure for participants to enter into the alternative to discipline program, the term "inactive status" was redefined. The fees for retired status of nursing licensure is being removed because we can no longer accept fees and renew retired licenses in our new data base. In compliance with Act 820 of 2017, we clarified prescribing for chronic nonmalignant pain. A section was added to address considerations for military members and their spouses pursuant to Acts 248 and 204 of 2017.

Chapter 6
Specifications were added regarding the use of simulation as a substitute for traditional clinical experience which will allow nursing students to receive training on simulated patients because clinical spots are not always available.

Chapter 7
For clarification purposes, supplemental definitions of unprofessional conduct to include refusing a drug screen, complying with Board actions, and establishing and maintaining a professional boundary were added.

PUBLIC COMMENT: A public hearing was held on November 13, 2018. The public comment period expired on November 16, 2018. No public comments were submitted to the board.

Jessica Sutton, an attorney with the Bureau of Legislative Research, asked the following question: I have a question concerning the board's deletion of "good moral character" from the Nursing Board rules. Arkansas Code Annotated § 17-87-301 requires "good moral character" as a qualification. Why is that term being deleted from the rules? **RESPONSE:** The ASBN is proposing to remove "good moral character" as a qualification for licensure. The reason for the removal of this qualification is this term is not well defined in statute and has not been adequately defined by a court of law. Therefore it is difficult to utilize in the review of applicant qualifications. The Board relies on other aspects such as completion of a nursing program, criminal records checks and passage of the licensure examination to determine if an individual is qualified to be issued a nursing license.

The proposed effective date is January 1, 2019.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas State Board of Nursing is authorized to promulgate whatever regulations it deems necessary for the implementation of Ark. Code Ann. § 17-87-101 *et seq*. (chapter concerning nurses). *See* Ark. Code Ann. § 17-87-203(1)(A). Portions of these rules implement various 2017 acts, specifically Act 204 of 2017, sponsored by Senator Missy Irvin, which waives the renewal fee of a nurse who holds a license to practice nursing in the State of Arkansas and is an active duty member of the military; Act 248 of 2017, sponsored by

Representative David Meeks, which requires state boards and commissions to promulgate rules for temporary licensure, certification, or permitting of active duty service members, returning military veterans, and spouses; Act 454 of 2017, sponsored by Representative Mary Bentley, which updates the Interstate Nurse Licensure Compact; and Act 820 of 2017, sponsored by Senator Jeremy Hutchinson, which amends the Prescription Drug Monitoring Program.

G. Adjournment.