

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

**Room A, MAC
Little Rock, Arkansas**

**Tuesday, August 16, 2016
9:00 a.m.**

Sen. David J. Sanders, Co- Chair
Sen. Bruce Maloch, Vice-Chair
Sen. David Johnson
Sen. Jonathan Dismang
Sen. Ronald Caldwell
Sen. Jane English
Sen. Bobby J. Pierce
Sen. Jim Hendren
Sen. Bill Sample, ex-officio
Sen. Terry Rice, ex-officio
Sen. Eddie Joe Williams, Alternate
Sen. Eddie Cheatham, Alternate

Rep. Andy Davis, Co-Chair
Rep. Lane Jean, Vice-Chair
Rep. Ken Henderson
Rep. Jeff Wardlaw
Rep. Nate Bell
Rep. Chris Richey
Rep. Joe Jett
Rep. Lanny Fite
Rep. David L. Branscum, ex-officio
Rep. Mark Lowery, ex-officio
Rep. John T. Vines, Alternate

Rep. Mary P. “Prissy” Hickerson, Alternate
Rep. Charles Armstrong, Alternate
Rep. Bill Gossage, Alternate
Rep. John Baine, Alternate
Rep. David Hillman, Alternate
Rep. Deborah Ferguson, Alternate
Rep. Rebecca Petty, Alternate
Rep. Clarke Tucker, Alternate
Rep. Tim Lemons, Alternate
Rep. Bob Johnson, Alternate
Rep. Dave Wallace, Alternate

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- A. Call to Order.**
- B. Report of the Department of Community Correction on Administrative Directives for the quarter ending June 30, 2016 pursuant to Act 1258 of 2015 (Dina Tyler)**
- C. Report of the Executive Committee Concerning Emergency Rules.**
- D. Report of the Senate and House Interim Committees on Public Health on the following rules referred to the committees on July 12, 2016 (Senator Bledsoe and Representative Ferguson)**

1. STATE MEDICAL BOARD (Kevin Odwyer)

- a. SUBJECT: Amendment to Regulation 2.8; Governing Physician/Patient Relationships**

DESCRIPTION: This amends the establishment of the patient physician relationship to allow for using real time audio visual telemedicine technology.

PUBLIC COMMENT: A public hearing was held on June 9, 2016, and the public comment period expired on that date. No public comments were submitted.

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

Regulation 38 states that a physician-patient relationship must be established in accordance with Regulation 2.8 before the delivery of services via telemedicine. See also § 17-80-118. Regarding the changes in Regulation 2.8, a proper physician/patient relationship could now include, at a minimum, a face to face examination using real time audio and visual telemedicine technology that provides information at least equal to such information as would have been obtained by an in-person examination. Is Regulation 2.8 saying that telemedicine can be a basis for establishing a professional relationship? **RESPONSE:** Yes. Under § 17-80-118(a)(4)(E), a relationship exists in other circumstances as defined by rule of the Arkansas State Medical Board for healthcare professionals under its jurisdiction and their patients. Under § 17-80-118(a)(4)(F), a relationship exists in other circumstances as defined by rule of a licensing or certification board for other healthcare professionals under the jurisdiction of the appropriate board and their patients if the rules are no less restrictive than the rules of the Arkansas State Medical Board. Regulation 2.8 is pertaining to establishing a physician/patient relationship before any treatment. Regulation 38 governs the practice of medicine via telemedicine.

The proposed effective date is pending legislative review and approval.

CONTROVERSY: This is not expected to be controversial.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: These rules implement Act 887 of 2015, the “Telemedicine Act.” This act required state licensing and certification boards for healthcare professionals to amend their rules where necessary to comply with the act. See Ark. Code Ann. § 17-80-118(f).

b. SUBJECT: Regulation 38; Governing Telemedicine

DESCRIPTION: This establishes a requirement for physicians to provide telemedicine services.

PUBLIC COMMENT: A public hearing was held on June 9, 2016, and the public comment period expired on that date.

Letters of support were received from the Arkansas Medical Society and a letter in support with the following signatures: Arkansas State Chamber of Commerce Associated Industries of Arkansas, Inc., Arkansas Trucking Association, Arkansas Freedom Fund for Veterans, America's Car Mart, Inc., American Fidelity General Agency, Inc., Carelink, the Central Arkansas Area Agency on Aging, Franklin Electric Co., Inc., Freshbenies, Martin Resource Management Corporation, National Multiple Sclerosis Society, New Benefits, Legacy Capital Group Arkansas, Parkinson's Action Network, Teladoc, TelaMedPlus, and United Spinal Arkansas.

The proposed effective date is pending legislative review and approval.

CONTROVERSY: This is not expected to be controversial.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: These rules implement Act 887 of 2015, the "Telemedicine Act." This act required state licensing and certification boards for healthcare professionals to amend their rules where necessary to comply with the act. *See* Ark. Code Ann. § 17-80-118(f).

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

1. DEPARTMENT OF EDUCATION (Jennifer Davis)

a. SUBJECT: Arkansas Qualified Teacher Requirements

DESCRIPTION: The Rules Governing the Arkansas Qualified Teacher Requirements are new rules. The rules apply to educators teaching core content courses who are in one of the following categories: 1) employed by a charter school or a school district that has a waiver of licensure; 2) a special education teacher teaching one (1) or more core content areas; or 3) an alternative learning environment teacher teaching one (1) or more core content areas.

Purpose:

The purpose in promulgating these emergency rules is to ensure that Arkansas has qualified teachers teaching core content courses for all students where licensure is waived, and for students in special education or alternative learning environments.

The United States Congress passed the Every Student Succeeds Act in December 2015, which removed the requirement that core content courses be taught by teachers who are licensed, degreed, and certified in content

knowledge as highly qualified teachers. Because Arkansas's rules for HQT were dependent on the No Child Left Behind Act, they are now essentially moot.

It is anticipated that upon the final approval of the permanent rules, the Department will repeal the Rules Governing Highly Qualified Teachers and promulgated pursuant to the No Child Left Behind Act of 2001.

The rules will provide greater flexibility than the current HQT. Unlike the current HQT, these rules:

- **Under Section 3.00** have more flexible options for qualifying as AQT, such as a bachelor's or advanced degree in the content area, a minimum of 18 hours in the content area within a bachelor's or advanced degree; National Board certification in the content area; or a bachelor's or advanced degree plus "successful, relevant work experience" in the teaching area. A teacher can still qualify using the AR Housse matrix;
- **Under Sections 3.01, 3.03, 3.04**, impact only a limited group of teachers. ADE licensure ensures that teachers have the education, content area knowledge, so these rules need only apply to charter schools and school districts where licensure has been waived, as well as special education and alternative learning environment teachers; and
- **Under Section 3.05** allow school districts to maintain AQT documentation locally without ADE approval of the AQT status. Districts will indicate on eSchool whether an educator falls under these rules, and the documentation will be available for review.

Changes in Response to Public Comments:

Sections 1.03.2, 3.03, and 3.04 were clarified, in response to public comments, to ensure the rules allow for educators working under Additional Licensure Plans for special education and educators in alternative learning environments who have had licensure requirements waived by the charter for a public charter school, or by an approved school of innovation plan for a school of innovation, or by the State Board of Education for a traditional public school district.

PUBLIC COMMENT: These rules were first promulgated on an emergency basis with an effective date of June 10, 2016. A public hearing on the permanent rules was held on June 16, 2016. The public comment period expired on June 20, 2016. The Department received the following public comments:

Tripp Walter, Arkansas Public School Resource Center

Comment: Section 3.03 (Special education teachers): This section should still allow schools which cannot employ a teacher licensed in special education to hire a teacher working under an Additional Licensure Plan.

Agency Response: Comment considered. Section 3.03 has been clarified in response to Commenter's concern.

Comment: Section 3.03 (Special education teachers): This section changes the requirement contained in the current Highly Qualified Teacher (HQT) Rules by having these Rules apply to educators teaching one (1) or more subjects in special education as opposed to teaching two (2) or more subjects in special education, which makes these new requirements more restrictive than before.

Agency Response: Comment considered. Section 3.03 has been clarified (See above.). This Section did not make the requirements more restrictive because special education teachers have always had to be licensed for the grade level and qualified for all core content areas taught.

Comment: Section 3.04 (Alternative learning environment teachers): The ADE may wish to make the following Rule clear in the situation when an ALE educator has a waiver of licensure and is not obligated to meet licensure and is not obligated to meet licensure requirements or can meet AQT alternatives to teacher licensure.

Agency Response: Comment considered. Section 3.04 has been clarified in response to Commenter's concern.

Comment: Section 3.04: This section changes the requirement contained in the current ADE HQT Rules by having these Rules apply to educators teaching one (1) or more subjects in ALE as opposed to teaching two (2) or more subjects in an ALE, which makes these new requirements more restrictive than before.

Agency Response: Comment considered. Section 3.04 has been clarified (See above.). This Section did not make the requirements more restrictive.

Comment: Will school districts and charters seeking licensure waivers be able to receive a waiver of these Rules?

Agency Response: Comment considered. Districts and charters may seek waiver of portions of these Rules consistent with the requirements of federal law governing special education.

Brenda Robinson, Arkansas Education Association

Comment: The AEA appreciates the Department of Education's efforts to maintain standards for teachers through these proposed rules. Decades of research suggests that teacher quality is highly correlated with student achievement. This link between teacher quality and student achievement cannot be ignored and serves as a clarion call for the State Board of

Education, the State Department of Education, and every school district in Arkansas to take all necessary measures to ensure that the standards for highly qualified teachers are being met so that every student in Arkansas has the benefit of the most qualified teacher possible regardless of state and federal law.

Agency Response: Comment considered. No changes made.

Comment: The proposed rules note the potential for future changes to be made after the state files its ESSA plan with the United States Department of Education. The Arkansas Education Association stands ready to help shape a plan which supports all educators become the best they can be for the benefit of their students and our State. We look forward to continuing a productive partnership as we shape this next chapter in education policy.

Agency Response: Comment considered. No changes made.

The agency states that certain changes were made as a result of the foregoing public comments. Specifically, Sections 1.03.2, 3.03, and 3.04 were clarified to ensure the rules allow for educators working under Additional Licensure Plans for special education and educators in alternative learning environments who have had licensure requirements waived by the charter for a public charter school, by an approved school of innovation plan for a school of innovation, or by the State Board of Education for a traditional public school district.

The proposed effective date for permanent promulgation is pending legislative review and approval.

CONTROVERSY: This is not expected to be controversial.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-17-402(b)(1), the State Board of Education (“Board”) shall promulgate rules and regulations for the issuance, licensure, relicensure, and continuance of licensure of teachers in the public schools of this state. With some limited exceptions, no class of students shall be under the instruction of a teacher who is not licensed to teach the grade level or subject matter of the class for more than thirty (30) consecutive school days in the same class during a school year. *See* Ark. Code Ann. § 6-17-309(a)(1). However, if this requirement imposes an undue hardship on a school district, the school district may apply to the Board for a waiver. *See* Ark. Code Ann. § 6-17-309(b)(1); *see also* Ark. Code Ann. § 6-15-1004(h)(1) (addressing similar waivers available and applicable to substitute teachers instructing for more than thirty (30) consecutive school days). The Board shall develop rules and regulations for granting a waiver. *See* Ark. Code Ann. § 6-17-309(b)(2); *see also* Ark. Code Ann.

§ 6-15-1004(h)(2) (requiring and authorizing the development of rules and regulations by the Board for granting waivers pertaining to substitute teachers). The Board is further authorized to “[t]ake such other action as it may deem necessary to promote . . . [t]he organization and efficiency of the public schools of the state.” Ark. Code Ann. § 6-11-105(a)(8)(B).

b. SUBJECT: Creation of School Districts by Detachment

DESCRIPTION: These rules provide governance on the creation of a school district by detachment. The rules outline the general requirements for the minimum number of students a newly created district may have and the minimum size area of the district. The rules outline the process for the initiation of a detachment and a petition to the State Board. The rules further provide guidance on how the district should be created and how all assets, territory, students, property, debt, funding, etc. shall be divided between the existing district and the newly created district. The proposed changes to the rules are a result of Acts 372 and 947 of 2015. A funding methodology was also added to assist districts in calculating the funding for the first year of detachment.

A summary of the proposed rules follows:

Section 1.02 Updated to show the rules are being updated pursuant to Acts 372 and 947 of 2015.

Section 2.01 Reduces the minimum number of students for the creation of a school district to 2,500.

Section 2.02 Deletes language dictating where territory for a new school district may come. Remaining Section renumbered.

Section 3.01 Reduces the minimum number of students in a newly created school district to 2,500 in average daily membership.

Section 3.02 Reduces the minimum number of students that an existing district can be reduced by detachment to 2,500.

Section 3.04.1 Reduces the limits to which these rules apply to districts having an average daily membership of at least 5,000 students.

Section 3.04.2 Reduces the limits to which these rules apply to districts with a total area of 450 square miles or more.

Section 5.03.1 Clarifies the code sections to which these rules governing detachment apply.

Section 6.02.1 This Section and following subsections outline the identification of the new school district following the entry of an order creating the new district.

Section 6.02.2 This Section and following subsections outline the powers a new school district may exercise following the entry of an order creating the new district.

Section 6.03 This Section and following subsections outline the allocation of assets of the original school district and newly created school district.

Section 6.03.1 This Section outlines that transfer or conveyance of title be documented through deeds, assignments, or bills of sale as necessary to prove transfer.

Section 6.03.2 This Section allows assets to be transferred in exchange for payment or assumption of liability.

Section 6.03.3 This Section and its subsections provides for value determination either by agreement or by the State Board.

Section 6.03.4 This Section limits the allocation and assignment of indebtedness such that it does not cause the original school district to default or violate any tax covenants under its own indebtedness obligations.

Section 6.03.5 This Section and its subsections outline the fair and reasonable methods of allocation of assets that shall be considered.

Section 6.04 Provides for the same ad valorem tax rate for the new school district as the old school district until such time an election and rate of tax is approved.

Section 6.05 Allows the new school district to use and pledge debt service millage to pay for all or part of any indebtedness assigned or allocated to it.

Section 6.06 This Section and subsection outlines the abilities of the new school district to satisfy payment obligations including borrowing funds from the original school district or other entities, entering into lease purchase agreements, and issuing bonds.

Remaining Sections renumbered.

Section 6.07 Includes rights of the State Board.

Section 6.07.2 Includes the loaning of funds to the new school district as a right and duty of the State Board.

Section 6.09 Requires the new school district to publish a projected budget at least 60 days before the next annual school election.

Section 6.10 Allows the new school district to present to the qualified electors a proposed ad valorem tax for the maintenance and operation of schools and the retirement of indebtedness.

Section 7.01 Technical correction – removed unnecessary comma.

Section 7.02 Corrected internal reference citation.

Section 7.03 Corrected internal reference citation.

Section 8.00 Entire Section outlines a funding methodology for the first year of funding the new school district and the original school district. This Section allows for the districts to make an agreement, in part or in whole, to modify the funding methodology provided or adjustment for any law, rule, or court order that may modify the provided methodology. The funding methodology provided allows for the establishment of the prior-year three-quarter average daily membership (ADM) for use in allocation of foundation funding with a true-up period based on current year enrollment later in the year. This Section also sets the establishment of the prior-year October 1 national school lunch free and reduced student lunch count and percentage allocated to the new school district and the remaining original school district. The remaining Sections outline allocation methodology for alternative learning environments, declining enrollment and student growth, and bonded indebtedness.

A summary of changes made as a result of the public comment period:

Section 5.03.1 Clarification change - “district[s]” to “school district[s]”

Section 5.03.2 Clarification change - “district[s]” to “school district[s]”

Section 6.02 Clarification change - “district[s]” to “school district[s]”

Section 6.02.1 Clarification change - “district[s]” to “school district[s]”

Section 6.03.1 Clarification change - “district[s]” to “school district[s]”

Section 6.03.4 Clarification change - “district[s]” to “school district[s]”

Section 8.01.1 Grammatical correction

Section 8.01.2 Section renumbered correctly and grammatical correction

Section 8.02 Grammatical correction

Section 8.03 Clarification change - “district[s]” to “school district[s]”

Section 8.04.1 Clarification change - “district[s]” to “school district[s]”

Section 8.05 Grammatical correction and clarification change - “district[s]” to “school district[s]”

Section 8.06 Grammatical correction

Section 8.07.1 Grammatical correction and clarification change - “district[s]” to “school district[s]”

Section 8.07.2 Grammatical correction

PUBLIC COMMENT: A public hearing was held on May 3, 2016. The public comment period expired on May 23, 2016. The Department received no public comments and states that only non-substantive, grammatical corrections were made after the public comment period.

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

Section 8.00: Can you provide the specific statutory authority relied on by the Department for its promulgation of this particular section relating to the State’s funding and/or the methodology for determining funding of districts by detachment?

AGENCY RESPONSE: Ark. Code Ann. § 6-1-1505(f)(3) gives the State Board the authority to enact rules and regulations regarding the creation of school districts by detachment and is the section the Department used for rulemaking authority to promulgate rules related to funding.

The proposed effective date is pending legislative review and approval.

CONTROVERSY: This is not expected to be controversial.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-13-1505(f), the State Board of Education has the following rights and duties regarding creation of a school district by detachment: (1) to form

local school districts, change boundary lines of school districts, create new school districts, and perform all other functions regarding changes in school districts in accordance with the law; (2) to transfer funds and attach territory that are in one school district to other school districts as may seem best for the educational welfare of the children, including the loaning of funds to the new school district under terms and conditions acceptable to the State Board; and (3) to enact rules and regulations regarding the creation of school districts by detachment under Title 6, Chapter 13, Subchapter 15 of the Arkansas Code. The State Board of Education further has 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 Ark. Code Ann. §§ 6-20-2301 through 6-20-2308. *See* Ark. Code Ann. § 6-20-2304(a). It is the intent of the Act to provide a system of school funding that provides to each public school child in the State of Arkansas an opportunity for an adequate education. *See* Ark. Code Ann. § 6-20-2302(e). In addition to the foregoing authority, these changes incorporate amendments brought about by Acts 372 and 947 of 2015, which modified the requirements for the creation of a school district by detaching territory from an existing school district and modified the requirements for school district detachment, respectively.

2. **DEPARTMENT OF ENVIRONMENTAL QUALITY, WASTE MANAGEMENT** (Tori Gordon and Tammie Hynum)

a. **SUBJECT: Regulation No. 27; Licensing of Operators of Solid Waste Management Facilities**

DESCRIPTION: The Arkansas Department of Environmental Quality (hereinafter ADEQ or the Department) proposes this rulemaking before the Arkansas Pollution Control & Ecology Commission (hereinafter APC&EC) to Regulation No. 27 (Licensing of Operators of Solid Waste Management Facilities and Illegal Dumps Control Officers) to create consistency between the language of Regulation 27 and Arkansas Code Annotated § 8-6-903 *et seq.* and to make stylistic and formatting corrections throughout the Regulation. Regulation 27 establishes the training, classification, qualifications, and licensing of operators of solid waste management facilities and illegal dumps control officers. The Commission's authority for amending Regulation 27 is found in Arkansas Code Annotated § 8-6-905(a).

Proposed changes to Regulation 27 include:

- **Director’s Authority to Grant Waiver.** To amend Reg.27.201 to add, “(L) To allow the Director to grant a written waiver from the solid waste management facility licensing requirements of this regulation; and”;

- **Director’s Authority to Withdraw Waiver.** To amend Reg.27.201 to add, “(M) To allow the Director to withdraw a written waiver from the solid waste management facility licensing requirements for just cause by written notice to the county, municipality, governmental subdivision, public or private corporation, or other persons to whom the written waiver is being granted.”;

- **Correction of Spelling Error in the Definition of “Recovered Materials.”** To correct a spelling error by amending Reg.27.103 in the definition of “Recovered Materials” by replacing “feasibly” with “feasibly”;

- **Stylistic and Formatting Corrections.** To make minor stylistic and formatting corrections throughout the Regulation.

PUBLIC COMMENT: A public hearing was held on June 8, 2016. The public comment period expired on June 22, 2016. No comments were received at the public hearing, and no written comments were received during the public comment period. The sole change made after the comment period was stylistic in nature, striking the Department’s former address in Reg.27.601.

The proposed effective date is pending legislative review and approval.

CONTROVERSY: This is not expected to be controversial.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 8-6-905(a), the Arkansas Pollution Control and Ecology Commission, with the advice and assistance of a licensing committee created by Ark. Code Ann. § 8-6-904, is given and charged with the power and duty to adopt rules and regulations implementing and effectuating such powers and duties of the Arkansas Department of Environmental Quality (“Department”) and the licensing committee under Title 8, Chapter 6, Subchapter 9 of the Arkansas Code, entitled “Licensing of Operators of Solid Waste Management Facilities,” as may be necessary for the administration and enforcement of the subchapter. The proposed rule changes implement Act 937 of 2015, which amended Ark. Code Ann. § 8-6-903. *See* Ark. Code Ann. § 8-6-903(c). The Act authorized the director of the Department: (1) with the advice and assistance of the licensing committee, to grant a written waiver of the licensing requirements for

operators of solid waste management facilities, and (2) to withdraw such a written waiver for just cause by written notice to the recipient of the waiver.

3. **DEPARTMENT OF HEALTH, CENTER FOR HEALTH PROTECTION**
(Robert Brech)

a. **SUBJECT:** Public Access to Auto-Injectable Epinephrine

DESCRIPTION: The proposed rules and regulation pertain to Act 1108 of 2015 as follows:

1. After training specified in this Act, a layperson may possess and administer auto-injectable epinephrine to a person who appears to be suffering a severe adverse allergic reaction.
2. Entities utilizing these laypersons are responsible for correct storage of this medication and for reporting to the Health Department each incident of usage of the medication. This reporting will be summarized and reported annually by the Health Department.
3. The Health Department will issue certificates to persons eligible to administer this medication and accept certificates issued pursuant to Section IV(3).

PUBLIC COMMENT: A public hearing was held on May 24, 2016. The public comment period expired on May 24, 2016. The Department received no comments.

The proposed effective date is pending legislative review and approval.

CONTROVERSY: This is not expected to be controversial.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: This rule implements Act 1108 of 2015. Arkansas Code Annotated § 20-7-109 (a)(1)(A) states that the State Board of Health has the authority to make all necessary and reasonable rules and regulations of a general nature for the protection of the public health and safety.

F. **Adjournment.**