

**DEPARTMENT OF HUMAN SERVICES, DIVISION OF DEVELOPMENTAL  
DISABILITIES SERVICES**

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**SUBJECT:** Community and Employment Supports (CES) Home and Community Based Waiver

**DESCRIPTION:**

Statement of Necessity

There are approximately 3,400 individuals waiting for a Community and Employment Supports (CES) Waiver slot (formerly called the Alternative Community Services Waiver Program). Act 775 of 2017 outlines the Provider-led Arkansas Shared Savings Entity (PASSE) program. In accordance with that Act, premium tax collected from PASSE must be:

“Transferred in amounts not less than fifty percent (50%) of the taxes based on premiums collected under the Arkansas Medicaid Program as administered by a risk-based provider organization to the designated account created by § 20-48-1004 within the Arkansas Medicaid Program Trust Fund to solely provide funding for home and community-based services to individuals with intellectual and developmental disabilities until the Department of Human Services certifies to the Department of Finance and Administration that the waiting list for the Alternative Community Services Waiver Program, also known as the ‘Developmental Disabilities Waiver,’ is eliminated.”

Rule Summary

Effective 12/01/2020, the Community and Employment Supports (CES) Waiver is amended as follows:

- Six hundred (600) regular slots are being added to the CES Waiver and one hundred (100) priority slots for children in DCFS custody
- Cost neutrality analysis is being updated to reflect these new slots

**PUBLIC COMMENT:** A public hearing was held on this rule on September 14, 2020. The public comment period expired on September 26, 2020. The agency provided the following summary of the public comments it received and its responses to those comments:

Commenter’s Name: Stephanie Smith

**COMMENT:** How will families be notified when this happens? Are they going to go ahead and start being notified or is that notification will not start [sic] until December 1<sup>st</sup>?

**RESPONSE:** This was noted during the hearing as a question and not a comment. It was not relevant to this public hearing.

Commenter's Name: Cindy Alberding

**COMMENT 1:** But I don't believe the past legislation specified that the amount of additional money that was going to be saved was going to be used for the DDS waiting list and to cover DCFS children. I believe the legislation says that the money was going to be used for the DDS waiting list. So while I appreciate you need 100 more slots for DCFS children, I believe there are 600 slots due the ACS waiver. The last point I would make on that is, there is other funding that can be used to support the DCFS children that need care. We don't want them to not have care because of this, but I do think the 600 slots funded from the past money should be allocated, and then the additional 100 can be determined by DHS with other funding. My opinion. My comment.

**RESPONSE:** Thank you. The total number of slots being requested (regular and DCFS reserved) are 700.

**COMMENT 2:** So that language says "and"? So you're actually adding 700 slots? As long as that's what we end up with, then my comment is already satisfied. Thank you.

**RESPONSE:** Thank you.

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

1. The numbers on page 35, when compared to the old waiver application, appear to show that 600 total slots are being added to the waiver. Do the 600 new slots added to the waiver include the 100 slots for children in DCFS custody, or are 700 slots being added to the waiver?

**RESPONSE:** Table: B.3.A year 5 should be 5483 (this has been corrected in the attached documented). This number reflects 600 additional regular waiver slots. DCFS reserved slots went from 200 to 300 for year 5 and are shown correctly on the tables. Point In Time numbers are correct. The total number of slots being requested (regular and DCFS reserved) are 700.

2. Will the added slots eliminate the waiting list? **RESPONSE:** No.

The proposed effective date is December 1, 2020.

**FINANCIAL IMPACT:** The agency indicated that this rule will have a financial impact.

Per the agency, the total cost to implement this rule is \$10,422,028.99 for the current fiscal year (\$7,450,708.53 in federal funds and \$2,971,320.47 in other funds) and \$45,502,524 for the next fiscal year (\$32,529,754.41 in federal funds and \$12,972,769.59 in other funds). The agency indicated that all costs of Medicaid services for the additional waiver slots will be borne by Arkansas Medicaid.

The total estimated cost by fiscal year to state, county, and municipal government to implement this rule is \$2,971,320.47 for the current fiscal year and \$12,972,769.59 for the next fiscal year. The agency indicated that this represents the required state share of Medicaid expenditures for the additional waiver slots.

The agency indicated that there is a new or increased cost or obligation of at least \$100,000 per year to a private individual, private entity, private business, state government, county government, municipal government, or to two or more of those entities combined. Accordingly, the agency provided the following written findings:

*(1) a statement of the rule's basis and purpose;*

To add additional slots to the existing CES Waiver

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

There is currently a waiting list for participation in the CES Waiver. Act 775 of 2017 requires that certain premium tax revenues be used to reduce the size of the waiting list.

*(3) a description of the factual evidence that:*

*(a) justifies the agency's need for the proposed rule; and*

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

There is currently a waiting list for participation in the CES Waiver. Act 775 of 2017 requires that certain premium tax revenues be used to reduce the size of the waiting list.

*(4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;*

There is currently a waiting list for participation in the CES Waiver. Act 775 of 2017 requires that certain premium tax revenues be used to reduce the size of the waiting list.

*(5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;*

No alternatives have been suggested as a result of public comment.

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

No existing rules have created or contributed to the problem the agency seeks to address.

*(7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:*

*(a) the rule is achieving the statutory objectives;*

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

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

The agency is required by federal law to review and renew the CES Waiver at least every five years. In the course of this review, the agency will review these criteria.

### **LEGAL AUTHORIZATION:**

The Department of Human Services has the responsibility to administer assigned forms of public assistance and is specifically authorized to maintain an indigent medical care program (Arkansas Medicaid). See Ark. Code Ann. §§ 20-76-201(1), 20-77-107(a)(1). The Department has the authority to make rules that are necessary or desirable to carry out its public assistance duties. Ark. Code Ann. § 20-76-201(12). The Department and its divisions also have the authority to promulgate rules as necessary to conform their programs to federal law and receive federal funding. Ark. Code Ann. § 25-10-129(b). These proposed rules implement Act 1033 of 2019.

Act 1033, sponsored by Representative Josh Miller, eliminated the waiting list for the Alternative Community Services Waiver Program, also known as the “Developmental Disabilities Waiver.” Per the Act, within three years of the Act’s effective date “[t]he Department of Human Services shall eliminate the waiting list as existing on March 1, 2019, for the” Program or its successor, “using available funding streams, unless the department determines that an adequate number of providers for individuals with developmental disabilities does not exist within the state.” Act 1033, § 1(b), *codified at* Ark. Code Ann. § 20-77-135(b).

**QUESTIONNAIRE FOR FILING PROPOSED RULES AND REGULATIONS  
WITH THE ARKANSAS LEGISLATIVE COUNCIL**

DEPARTMENT/AGENCY Department of Human Services  
DIVISION Division of Developmental Disabilities Services  
DIVISION DIRECTOR Melissa Stone  
CONTACT PERSON Mac Golden  
ADDRESS P. O. Box 1437, Slot S295 Little Rock, AR 72203-1437  
PHONE NO. 501-563-7634 FAX NO. 501-404-4619 E-MAIL Mac.E.Golden@dhs.arkansas.gov  
NAME OF PRESENTER AT COMMITTEE MEETING Melissa Stone  
PRESENTER E-MAIL Melissa.Stone@dhs.arkansas.gov

**INSTRUCTIONS**

- A. Please make copies of this form for future use.
- B. Please answer each question **completely** using layman terms. You may use additional sheets, if necessary.
- C. If you have a method of indexing your rules, please give the proposed citation after "Short Title of this Rule" below.
- D. Submit two (2) copies of this questionnaire and financial impact statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:

Jessica C. Sutton  
Administrative Rules Review Section  
Arkansas Legislative Council  
Bureau of Legislative Research  
One Capitol Mall, 5<sup>th</sup> Floor  
Little Rock, AR 72201

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1. What is the short title of this rule? Community and Employment Supports (CES) Home and Community Based Waiver

2. What is the subject of the proposed rule? To add 600 slots to the existing CES Waiver pursuant to Act 775 of 2017 and 100 priority slots for children in the custody of the Division of Children and Family Services.

3. Is this rule required to comply with a federal statute, rule, or regulation? Yes  No   
If yes, please provide the federal rule, regulation, and/or statute citation. \_\_\_\_\_

4. Was this rule filed under the emergency provisions of the Administrative Procedure Act? Yes  No

If yes, what is the effective date of the emergency rule? \_\_\_\_\_

When does the emergency rule expire? \_\_\_\_\_

Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act?

Yes  No

5. Is this a new rule? Yes  No   
If yes, please provide a brief summary explaining the regulation. \_\_\_\_\_

Does this repeal an existing rule? Yes  No   
If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does. \_\_\_\_\_

Is this an amendment to an existing rule? Yes  No   
If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. **Note: The summary should explain what the amendment does, and the mark-up copy should be clearly labeled "mark-up."**

See attached.

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation. Arkansas Code §§ 20-76-201, 20-77-107, and 25-10-129
7. What is the purpose of this proposed rule? Why is it necessary? See Attached.
8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b).

<https://medicaid.mmis.arkansas.gov/general/comment/comment.aspx>

9. Will a public hearing be held on this proposed rule? Yes  No   
If yes, please complete the following:

Date: September 14, 2020

Time: 1:00 p.m.

Place: Conference Call

10. When does the public comment period expire for permanent promulgation? (Must provide a date.)  
September 26, 2020

11. What is the proposed effective date of this proposed rule? (Must provide a date.)  
12/1/2020

12. Please provide a copy of the notice required under Ark. Code Ann. § 25-15-204(a). and proof of the publication of said notice. See Attached.

13. Please provide proof of filing the rule with the Secretary of State as required pursuant to Ark. Code Ann. § 25-15-204(e). See Attached.

14. Please give the names of persons, groups, or organizations that you expect to comment on these rules?

Please provide their position (for or against) if known. For: CES Waiver Providers, families on the waitlist, and the PASSES.

**FINANCIAL IMPACT STATEMENT**

**PLEASE ANSWER ALL QUESTIONS COMPLETELY**

**DEPARTMENT** Department of Human Services

**DIVISION** Division of Developmental Disabilities Services

**PERSON COMPLETING THIS STATEMENT** Jason Callan

**TELEPHONE** 501-320-6540 **FAX** \_\_\_\_\_ **EMAIL:** Jason.Callan@dhs.arkansas.gov

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

**SHORT TITLE OF THIS RULE** Community and Employment Supports (CES) Waiver

1. Does this proposed, amended, or repealed rule have a financial impact? Yes  No
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule? Yes  No
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes  No

If an agency is proposing a more costly rule, please state the following:

(a) How the additional benefits of the more costly rule justify its additional cost:

\_\_\_\_\_

(b) The reason for adoption of the more costly rule;

\_\_\_\_\_

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

\_\_\_\_\_

(d) Whether the reason is within the scope of the agency's statutory authority; and if so, please explain.

\_\_\_\_\_

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

(a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

General Revenue \$ \_\_\_\_\_  
Federal Funds \$ 7,450,708.53  
Cash Funds \_\_\_\_\_  
Special Revenue \_\_\_\_\_

Next Fiscal Year

General Revenue \$ \_\_\_\_\_  
Federal Funds \$ 32,529,754.41  
Cash Funds \_\_\_\_\_  
Special Revenue \_\_\_\_\_

Other (Identify) \$2,971,320.47  
 Total \$10,422,028.99

Other (Identify) \$12,972,769.59  
 Total \$45,502,524.00

(b) What is the additional cost of the state rule?

**Current Fiscal Year**

**Next Fiscal Year**

General Revenue \$ \_\_\_\_\_  
 Federal Funds \$ \_\_\_\_\_  
 Cash Funds \_\_\_\_\_  
 Special Revenue \_\_\_\_\_  
 Other (Identify) \_\_\_\_\_  
 Total \$ \_\_\_\_\_

General Revenue \$ \_\_\_\_\_  
 Federal Funds \$ \_\_\_\_\_  
 Cash Funds \_\_\_\_\_  
 Special Revenue \_\_\_\_\_  
 Other (Identify) \_\_\_\_\_  
 Total \$ \_\_\_\_\_

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

**Current Fiscal Year**

**Next Fiscal Year**

\$ \_\_\_\_\_

\$ \_\_\_\_\_

All costs of Medicaid services for the additional waiver slots will be borne by Arkansas Medicaid.

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

**Current Fiscal Year**

**Next Fiscal Year**

\$ 2,971,320.47

\$ 12,972,769.59

This represents the required state share of Medicaid expenditures for the additional waiver slots.

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes  No

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose: To add additional slots to the existing CES Waiver
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute: There is currently a waiting list for participation in the CES Waiver. Act 775 of 2017 requires that certain premium tax revenues be used to reduce the size of the waiting list.
- (3) a description of the factual evidence that:
  - (a) justifies the agency's need for the proposed rule; and



- (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs; There is currently a waiting list for participation in the CES Waiver. Act 775 of 2017 requires that certain premium tax revenues be used to reduce the size of the waiting list.
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule; There is currently a waiting list for participation in the CES Waiver. Act 775 of 2017 requires that certain premium tax revenues be used to reduce the size of the waiting list.
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule; No alternatives have been suggested as a result of public comment.
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and No existing rules have created or contributed to the problem the agency seeks to address.
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
- (a) the rule is achieving the statutory objectives;
  - (b) the benefits of the rule continue to justify its costs; and
  - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives. The agency is required by federal to review and renew the CES Waiver at least every five years. In the course of this review, the agency will review these criteria.

## **Statement of Necessity and Rule Summary Community and Employment Supports (CES) Waiver**

### **Statement of Necessity**

There are approximately 3,400 individuals waiting for a Community and Employment Supports (CES) Waiver slot (formerly called the Alternative Community Services Waiver Program.) Act 775 of 2017 outlines the Provider led Arkansas Shared Savings Entity (PASSE) program. In accordance with that Act, premium tax collected from PASSE must be:

“Transferred in amounts not less than fifty percent (50%) of the taxes based on premiums collected under the Arkansas Medicaid Program as administered by a risk-based provider organization to the designated account created by § 20-48-1004 within the Arkansas Medicaid Program Trust Fund to solely provide funding for home and community-based services to individuals with intellectual and developmental disabilities until the Department of Human Services certifies to the Department of Finance and Administration that the waiting list for the Alternative Community Services Waiver Program, also known as the "Developmental Disabilities Waiver", is eliminated.”

### **Rule Summary**

Effective 12/01/2020, the Community and Employment Supports (CES) Waiver is amended as follows:

- Six hundred (600) regular slots are being added to the CES Waiver and one hundred (100) priority slots for children in DCFS custody
- Cost neutrality analysis is being updated to reflect the new slots

## NOTICE OF RULE MAKING

The Director of the Division of Developmental Disabilities Services of the Department of Human Services hereby issues, for a public comment period of (30) calendar days, a notice of rulemaking for the following proposed rule under one or more of the following chapters, subchapters, or sections of the Arkansas Code: §§ 20-76-201, 20-77-107, 20-77-139, and 25-10-129.

**Effective December 1, 2020**, pursuant to Act 775 of 2017, the Community and Employment Supports (CES) Waiver is amended as follows:

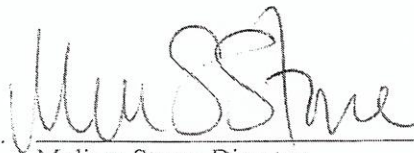
- Six hundred (600) regular slots are being added to the CES Waiver and one hundred (100) priority slots for children in the Division of Children and Family Services (DCFS) custody.
- Cost neutrality analysis is being updated to reflect the new slots

The proposed rule is available for review at the Department of Human Services (DHS) Office of Rules Promulgation, 2nd floor Donaghey Plaza South Building, 7th and Main Streets, P. O. Box 1437, Slot S295, Little Rock, Arkansas 72203-1437. You may also access and download the proposed rule on the Medicaid website at <https://medicaid.mmis.arkansas.gov/General/Comment/Comment.aspx>. Public comments must be submitted in writing at the above address or at the following email address: [ORP@dhs.arkansas.gov](mailto:ORP@dhs.arkansas.gov). All public comments must be received by DHS no later than **September 26, 2020**. Please note that public comments submitted in response to this notice are considered public documents. A public comment, including the commenter's name and any personal information contained within the public comment, will be made publicly available and may be seen by various people.

A public hearing by remote access only will be held on September 14, 2020, at 1:00 p.m. Individuals can access this public hearing by calling 1-888-240-3210 and entering the conference code, 4527581.

If you need this material in a different format, such as large print, contact the Office of Rules Promulgation at 501-320-6164.

The Arkansas Department of Human Services is in compliance with Titles VI and VII of the Civil Rights Act and is operated, managed and delivers services without regard to religion, disability, political affiliation, veteran status, age, race, color or national origin. 4501888131



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Melissa Stone, Director  
Division of Developmental Disabilities Services