

## DEPARTMENT OF HUMAN SERVICES, DIVISION OF MEDICAL SERVICES

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**SUBJECT:** SPA 21-0011; FQHC 2021; FQHC Mental Health Clinicians Added

**DESCRIPTION:**

Statement of Necessity

Act 764 of the 2021 Legislative Session requires the Arkansas Department of Human Services, Division of Medical Services to apply for a State Plan Amendment and revise Medicaid rules to allow four (4) additional types of professionally licensed clinicians to provide core services in Federally Qualified Health Centers (FQHCs).

Rule Summary

To comply with Act 764, Arkansas must submit a Medicaid State Plan amendment by revising Attachment 3.1-A page 1eee and Attachment 3.1-B page 2eee to include

- Licensed certified social worker.
- Licensed professional counselor.
- Licensed mental health counselor.
- Licensed marriage and family therapist.

The FQHC provider manual has been updated to include these licensed professionals in Sections 212.200 and 214.100. Also, four (4) new sections have been added to the manual to instruct each type of clinician regarding the services and incidental supplies and services covered for them. Those sections are 212.260, 212.270, 212.280, and 212.290.

**PUBLIC COMMENT:** A public hearing was held on this rule on October 20, 2021. The public comment period expired November 8, 2021. The agency provided the following summary of the public comments it received and its responses to those comments:

Commenter's Name: Joel P. Landreneau, Esq., Interim Executive Director, on behalf of the Mental Health Council of Arkansas

**COMMENT:** I write to you on behalf of the Mental Health Council of Arkansas and the Behavioral Health Providers' Association of Arkansas concerning SPA 21-0011 and FQHC 2-21 rule promulgations for which public comment ends today.

I realize that this promulgation merely implements Act 764 of the 93rd General Assembly which requires DMS to add certain behavioral health practitioners to the list of core services for Federally Qualified Health Clinics, but I have concerns about the impact this may have on other types of behavioral health providers.

Under this revision, the Medicaid Manual for FQHC's will read: "The services of licensed professional counselors working within the scope of their state licenses are

covered if the services would be covered when furnished by a physician or incidental to a physician's services."

This appears to mean that the services of an LPC in an FQHC would be covered by Medicaid if ordered by or accompanying the services of a physician. This provision makes no distinction between those services provided to Medicaid-only recipients and those services provided to Medicaid beneficiaries who are also Medicare beneficiaries. This just says that services are covered.

This is not presently the case regarding LPC services rendered by OBHA's to Medicare/Medicaid dual eligibles. At present, if an LPC serves a Medicare patient who is Medicaid eligible as well, Medicare does not cover the service because LPC's are not authorized Medicare performing providers, and Medicaid also does not cover the service, even at the Medicare rate, because reasons. This appears to give FQHC's a means to obtain reimbursement using LPC's and LMFT's on some patients that Outpatient Behavioral Health Agencies do not also have. Once upon a time, Medicaid did pay for LPC's to see Medicare/Medicaid dual eligibles, and it appears that, under this rule, those days have returned, but only for FQHC's. Besides basic fairness, not paying OBHA's to have LPC's see dual eligibles is creating very real access barriers in some parts of the state where it is difficult to hire LCSW's.

If my reading of this is incorrect, please explain how that is. If my reading is correct, this uneven playing field needs to be corrected through the adoption of rules that allow for Medicare/Medicaid dual eligibles to be cared for by LPC's and LMFT's who work for OBHA's, CMHC's and CCBHC's and paid by Medicaid when Medicare does not pay. Please accept this as a rule promulgation request pursuant to Ark. Code Ann. § 25-15-204(d), which states:

- (d)(1) A person may petition an agency for the issuance, amendment, or repeal of a rule.*
- (2) Within thirty (30) days after submission of a petition, the agency shall:*
  - (A) Deny the petition, stating in writing its reasons for the denial; or*
  - (B) Initiate rule-making proceedings.*

**RESPONSE:** Act 764 of 2021 requires DMS to add certain behavioral health practitioners to the list of core services for Federally Qualified Health Clinic. It does not require DMS to change rules or criteria related to the practice of these individuals, nor does it change any rules, regulations, or criteria related to billing Medicaid secondary to Medicare. FQHCs must continue to follow the same rules, regulations, and criteria related to these practitioners in the same manner as they would for any other licensed practitioner. If the client has Medicare, it is expected that the FQHC follow primary Medicare billing regulations for that client.

We accept your public comment as a petition for the agency to issue, amend, or repeal a rule as permitted under 25-14-204(d). The agency will review your petition and respond timely, as required by law.

Commenter's Name: David Ivers, J.D., VP for External Affairs & General Counsel, on behalf of Easterseals Arkansas

**COMMENT:** Easterseals provides services to a number of individuals who are dually diagnosed with both developmental disability and mental health conditions. Can you please clarify if this proposed rule will allow FQHCs to bill Medicaid for services of certain licensed mental health clinicians who are not reimbursed by Medicare, such as LPCs, LMSWs, etc.? Medicare allows only the following:

- Psychiatrist or other doctor.
- Clinical psychologist.
- Clinical social worker.
- Clinical nurse specialist.
- Nurse practitioner.
- Physician assistant.

However, there is a severe shortage of these practitioners, which is why Medicaid traditionally reimbursed for other types, including those listed in the proposed rule. Due to a change in policy several years ago, Medicaid stopped reimbursing for other practitioners when the service is provided to an individual who is dually eligible (Medicare and Medicaid). This has created a severe access issue. We have a number of clients who are going without needed mental health care because of it. Will FQHCs now be allowed to bill Medicaid for services by the practitioners being added in the proposed rule who are serving dual eligible individuals?

While we support such a rule change, we support it for ALL Medicaid providers. This rule will create an unfair, unlevel playing field if not applied across the board. Also, failure to do so will not resolve the access issue since many of the individuals we and various other providers serve do not utilize FQHCs.

**RESPONSE:** Act 764 of 2021 requires DMS to add certain behavioral health practitioners to the list of core services for Federally Qualified Health Clinic. It does not require DMS to change rules or criteria related to the practice of these individuals, nor does it change any rules, regulations, or criteria related to billing Medicaid secondary to Medicare. FQHCs must continue to follow the same rules, regulations, and criteria related to these practitioners in the same manner as they would for any other licensed practitioner. If the client has Medicare, it is expected that the FQHC follow primary Medicare billing regulations for that client.

The proposed effective date is January 1, 2022.

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

**LEGAL AUTHORIZATION:** The Department of Human Services has the responsibility to administer assigned forms of public assistance and is specifically authorized to maintain an indigent medical care program (Arkansas Medicaid). *See Ark.*

Code Ann. §§ 20-76-201(1), 20-77-107(a)(1). The Department has the authority to make rules that are necessary or desirable to carry out its public assistance duties. Ark. Code Ann. § 20-76-201(12). The Department and its divisions also have the authority to promulgate rules as necessary to conform their programs to federal law and receive federal funding. Ark. Code Ann. § 25-10-129(b).

This proposed rule implements Act 764 of 2021, sponsored by Representative Clint Penzo. The Act ensured reimbursement of all healthcare providers for behavioral health services by the Arkansas Medicaid Program. Per the Act, “[t]he Department of Human Services shall apply for any . . . Medicaid state plan amendments . . . necessary to implement this section.” Act 764, § 1(b), *codified at* Ark. Code Ann. § 20-77-144(b).

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

DEPARTMENT/AGENCY Department of Human Services  
DIVISION Medical Services  
DIVISION DIRECTOR Elizabeth Pitman  
CONTACT PERSON Mac Golden  
ADDRESS P. O. Box 1437, Slot S295 Little Rock, AR 72203-1437  
PHONE NO. 501-320-6383 FAX NO. 501-404-4619 E-MAIL Mac.E.Golden@dhs.arkansas.gov  
NAME OF PRESENTER AT COMMITTEE MEETING Elizabeth Pitman  
PRESENTER E-MAIL Elizabeth.Pitman@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? SPA 21-0011; FQHC 2-21; FQHC Mental Health Clinicians added

2. What is the subject of the proposed rule? See Attached.

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? N/A

When does the emergency rule expire? N/A

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://humanservices.arkansas.gov/do-business-with-dhs/proposed-rules/>

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

Date: October 20, 2021

Time: 11:30 a.m.

Zoom meeting -

<https://us02web.zoom.us/j/86263838370>

Place: Webinar ID: 86263838370

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

November 8<sup>th</sup>, 2021

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

January 01, 2022

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. Unknown

**FINANCIAL IMPACT STATEMENT**

**PLEASE ANSWER ALL QUESTIONS COMPLETELY**

**DEPARTMENT** Department of Human Services

**DIVISION** Division of Medical 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** SPA 21-0011; FQHC 2-21; FQHC Mental Health Clinicians added

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 \$ \_\_\_\_\_  
Cash Funds \_\_\_\_\_  
Special Revenue \_\_\_\_\_

**Next Fiscal Year**

General Revenue \$ \_\_\_\_\_  
Federal Funds \$ \_\_\_\_\_  
Cash Funds \_\_\_\_\_  
Special Revenue \_\_\_\_\_

Other (Identify) \_\_\_\_\_  
 Total \$ \_\_\_\_\_

Other (Identify) \_\_\_\_\_  
 Total \$ \_\_\_\_\_

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

**Current Fiscal Year**

General Revenue \$ 0  
 Federal Funds \$ 0  
 Cash Funds \_\_\_\_\_  
 Special Revenue \_\_\_\_\_  
 Other (Identify) \_\_\_\_\_  
 Total \$ 0

**Next Fiscal Year**

General Revenue \$ 0  
 Federal Funds \$ 0  
 Cash Funds \_\_\_\_\_  
 Special Revenue \_\_\_\_\_  
 Other (Identify) \_\_\_\_\_  
 Total \$ 0

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**

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

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**

\$ 0

**Next Fiscal Year**

\$ 0

Budget Neutral

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;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
  - (a) justifies the agency's need for the proposed rule; and
  - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;



- (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;
- (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;
- (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
- (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.

**Statement of Necessity and Rule Summary**  
**State Plan Amendment 2021-0011, Federally Qualified Health Center 2-21**

**Why is this change necessary? Please provide the circumstances that necessitate the change.**

Act 764 of the 2021 Legislative Session requires Arkansas Department of Human Services, Division of Medical Services, to apply for a State Plan Amendment and revise Medicaid rule to allow four (4) additional types of professionally licensed clinicians to provide core services in Federally Qualified Health Centers (FQHCs).

**What is the change? Please provide a summary of the change.**

To comply with Act 764, Arkansas must submit a Medicaid State Plan amendment by revising Attachment 3.1-A page 1eee and Attachment 3.1-B page 2eee to include:

- Licensed certified social worker.
- Licensed professional counselor.
- Licensed mental health counselor.
- Licensed marriage and family therapist.

The FQHC provider manual has been updated to include these licensed professionals in Sections 212.200 and 214.100. Also, four (4) new sections have been added to the manual to instruct each type of clinician regarding the services and incidental supplies and services covered for them. Those sections are 212.260, 212.270, 212.280, and 212.290.