

## DEPARTMENT OF HUMAN SERVICES, DIVISION OF MEDICAL SERVICES

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**SUBJECT:** Section I 1-21 - Telemedicine

**DESCRIPTION:**

Statement of Necessity

The 93rd General Assembly enacted Act 767 and Act 829. Act 767 amends the Telemedicine Act to allow the originating site to include the home of the client. Act 829 amends the Telemedicine Act to allow provider reimbursement for telemedicine provided via telephone. The Division of Medical Services is revising Section I of the General Provider Manual to reflect the changes in these two (2) acts.

Rule Summary

Section I- General

Section 105.190 (Telemedicine)

- Replaced the word “patient” with “client” throughout the section.
- Added, “An originating site includes the home of a client.”
- Added, “Any other originating sites are not eligible to bill a facility fee.”
- In number three (#3) on the first page, added the word “...professional...”
- Added, “6. The healthcare professional who is licensed in Arkansas has access to a client’s personal health record maintained by a healthcare professional and uses any technology deemed appropriate by the healthcare professional, including the telephone, with a client located in Arkansas to diagnose, treat, and if clinically appropriate, prescribe a noncontrolled drug to the client.”
- Added, “A health record is created with the use of telemedicine, consists of relevant clinical information required to treat a client, and is reviewed by the healthcare professional who meets the same standard of care for a telemedicine visit as an in-person visit.”
- Deleted, “4. Audio only communication, including without limitation interactive audio;”
- Deleted, “The use of interactive audio is not reimbursable under Arkansas Medicaid.”
- In the ‘Telemedicine with a Minor’ section, the word “client” follows the word “minor” throughout the section.
  - o Replaced “individual” with “provider.”
- Added, “Telemedicine Exclusions” section:
  - “Telemedicine does not include the use of:
    1. Audio-only communication unless the audio-only communication is in real-time, is interactive, and substantially meets the requirements for a health care service that would otherwise be covered by the health benefit plan:
      - a. Documentation of the engagement between patient and provider via audio-only communication shall be placed in the medical record

addressing the problem, content of the conversation, medical decision-making, and plan of care after the contact.

b. Medical documentation is subject to the same audit and review process required by payers and governmental agencies when requesting documentation of other care delivery such as in-office or face-to-face visits.

2. A facsimile machine;
3. Text messaging; or
4. Email.”

**PUBLIC COMMENT:** A public hearing was held on this proposed rule on October 19, 2021. The public comment period expired November 8, 2021. The agency provided the following summary of the single public comment it received and its response to that comment:

Commenter’s Name: Joel Landreneau, Executive Director, Behavioral Health Providers Association; Interim Executive Director, Mental Health Council

**COMMENT:** My name is Joel Landreneau. I am Executive Director of Behavioral Health Providers Association, and I’m also Interim Executive Director of the Mental Health Council, and I wanted to speak briefly today about this Section 100 rule promulgation, which appears to be a verbatim restatement of Act 829 in particular, which is the section that I’m focused on.

The Telemedicine exclusions, where it says that Telemedicine does not include the use of audio-only unless the communication is in real time, is interactive, and substantially meets the requirements for a healthcare service that would otherwise be covered by the health plan.

This rule, unless there’s another promulgation coming in Section 200 that would be provider type specific, then this doesn’t answer the questions that I get frequently about which services are permitted to be audio-only, when it’s interactive and real time, and which are not.

The way I read this provision of Act 829, it sounds to me as though the payor has some discretion deciding whose requirements are sought to be met to satisfy this requirement, - “substantially meets the requirements for health care service”. It doesn’t say whose requirements, but the way I read this, it sounds as though the payor has some discretion in deciding where the requirements are met for that service and where they are not met. So, this rule promulgation provides no guidance on whether or not it is each and every service that is available through audio-only, when it’s interactive and in real time, or if there are some that are allowed and some that not allowed.

I’m thinking, for example, individual psychotherapy has traditionally been allowed for telemedicine, and it would make sense that audio-only would also be allowed, but for a

group therapy session audio-only doesn't sound like that might be something that would work very well.

And so, unless there's another promulgation coming in the Section 200 Manual for Outpatient Behavioral Health, this needs to be clarified so that it's clear to the providers which billing codes are allowable to be billed audio-only and which are not. And that concludes my remarks.

**RESPONSE:** Telemedicine rules in Section I of the General Provider Manual of the Division of Medical Services (DMS) references that definitions are found in the Arkansas State Medical Board (ASMB) or licensing or certification board for other healthcare providers (if no less restrictive than ASMB). Standards of care and safeguards established by the healthcare professional's licensing board should be utilized in decision making regarding use of audio-only communication for service provision.

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

**Q.** In § 105.190, under the heading "Professional Relationship" after the numbered list, the proposed rules state, "A health record *is* created with the use of telemedicine..." However, Act 829 states that "a health record *may be* created with the use of telemedicine..." Is there a reason the proposed rules use "is created" rather than "may be created"?

**RESPONSE:** Division of Medical Services uses the term, "A health record is created with the use of telemedicine" for this rule to ensure providers of telemedicine understand that a health record is necessary for reimbursement of Medicaid treatment services regardless of method or location of service delivery. While the Act provides for the health record to be optional, Division of Medical Services requires documentation of all services provided as proof of service delivery and reimbursement.

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).

These proposed rules implement Acts 767 and 829 of 2021. Act 767, sponsored by Representative Aaron Pilkington, clarified the Telemedicine Act, specified that the home

of a patient may be the originating site for telemedicine and that group meetings may be performed by telemedicine, and clarified reimbursement of telemedicine services. Act 829, sponsored by Representative Jim Dotson, amended the Telemedicine Act and authorized additional reimbursement for telemedicine via telephone.

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

**DEPARTMENT/AGENCY** Department of Human Services  
**DIVISION** Division of 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. Whittaker  
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? Section I 1-21 – Telemedicine

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? \_\_\_\_\_

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://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 19, 2021

Time: 11:30a.m.

Place: <https://us02web.zoom.us/j/86967967222>

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

November 8, 2021

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

January 1, 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** 501-682-8155      **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**                      Section I 1-21 – Telemedicine

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?

<b><u>Current Fiscal Year</u></b>		<b><u>Next Fiscal Year</u></b>	
General Revenue	<u>\$0</u>	General Revenue	<u>\$0</u>
Federal Funds	<u>\$0</u>	Federal Funds	<u>\$0</u>
Cash Funds	_____	Cash Funds	_____
Special Revenue	_____	Special Revenue	_____

Other (Identify) \_\_\_\_\_  
 Total \$0 \_\_\_\_\_

Other (Identify) \_\_\_\_\_  
 Total \$0 \_\_\_\_\_

(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 \_\_\_\_\_

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**  
**Section I 1-21 -Telemedicine**

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

The 93<sup>rd</sup> General Assembly enacted Act 767 and Act 829. Act 767 amends the Telemedicine Act to allow the originating site to include the home of the client. Act 829 amends the Telemedicine Act to allow provider reimbursement for telemedicine provided via telephone. The Division of Medical Services is revising Section I of the General Provider Manual to reflect the changes in these two (2) acts.

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

**Section I- General**

Section 105.190 (Telemedicine)

- Replaced the word “patient” with “client” throughout the section.
- Added, “An originating site includes the home of a client.”
- Added, “Any other originating sites are not eligible to bill a facility fee.”
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  - Replaced “individual” with “provider.”
- Added, “Telemedicine Exclusions” section.

“Telemedicine does not include the use of:

  1. Audio-only communication unless the audio-only communication is in real-time, is interactive, and substantially meets the requirements for a health care service that would otherwise be covered by the health benefit plan:
    - a. Documentation of the engagement between patient and provider via audio-only communication shall be placed in the medical record addressing the problem, content of the conversation, medical decision-making, and plan of care after the contact.
    - b. Medical documentation is subject to the same audit and review process required by payers and governmental agencies when requesting documentation of other care delivery such as in-office or face-to-face visits.
  2. A facsimile machine;
  3. Text messaging; or
  4. Email.”

## NOTICE OF RULE MAKING

The Director of the Division of Medical Services of the Department of Human Services announces for a public comment period of thirty (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: §§ 25-10-129, 20-76-201, and 20-77-107.

### **Effective January 1, 2022:**

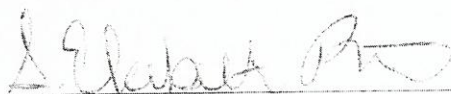
The Director of the Division of Medical Services (DMS) amends Section I f the General Provider Manual to incorporate Acts 767 and 829 of the 93<sup>rd</sup> General Assembly. DMS adds that an originating site includes the home of a client. DMS clarifies that only originating sites operated by a licensed or certified healthcare professional or entity are eligible to bill a facility fee. DMS also adds criteria to establish a professional relationship for health care providers licensed in Arkansas who have access to the personal health record maintained by a health care professional and uses technology deemed appropriate to diagnose and treat. Telemedicine Exclusions are added. The exclusion to telemedicine includes audio only communication (unless the communication is in real-time, is interactive, and substantially meets the requirements for a health care service that would otherwise be covered by the health benefit plan); fax machines; text messaging; or email.

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 at <https://humanservices.arkansas.gov/do-business-with-dhs/proposed-rules/>. 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 November 8, 2021. 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 through a Zoom webinar will be held on October 19, 2021, at 11:30 a.m. and public comments may be submitted at the hearing. Individuals can access this public hearing at <https://us02web.zoom.us/j/86967967222>. The webinar ID is 869 6796 7222. If you would like the electronic link, "one-tap" mobile information, listening only dial-in phone numbers, or international phone numbers, please contact ORP at [ORP@dhs.arkansas.gov](mailto:ORP@dhs.arkansas.gov).

If you need this material in a different format, such as large print, contact the Office of Rules Promulgation at 501-396-6428.

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. 4502035775



Elizabeth Pitman, Director  
Division of Medical Services