

DEPARTMENT OF HUMAN SERVICES, DIVISION OF MEDICAL SERVICES

SUBJECT: Outpatient Behavioral Health Services (OBHS) and School-Based Mental Health Services (SBMHS) Manuals

DESCRIPTION:

Statement of Necessity

The 93rd General Assembly enacted Act 886. Arkansas Medicaid shall not require a beneficiary to first obtain a referral from a primary care provider (PCP) before receiving the first ten (10) visits for mental health counseling. The Division of Medical Services (DMS) is revising Section 217.100 (Primary Care Physician (PCP) Referral) of the Outpatient Behavioral Health Services (OBHS) Provider Manual and Section 211.300 (Primary Care Physician (PCP) Referral) of the School-Based Mental Health Services (SBMHS) Manual to reflect changes enacted in Act 886.

Rule Summary

Outpatient Behavioral Health Services Manual, Section 217.100

- Replaced “three (3)” with “ten (10)”
- Added “...referral”

School-Based Mental Health Services Manual, Section 211.300

- Replaced “three (3)” with “ten (10)”

PUBLIC COMMENT: A public hearing was held on this rule on March 17, 2022. The public comment period expired on April 9, 2022. The agency provided the following public comment summary:

Commenter’s Name: Joel P. Landreneau, Esq., on behalf of Arkansas Behavioral Health Council

COMMENT: We note that the proposed rule changes restate the provisions in Act 886. We also note that Act 886 became effective on or about July 28, 2021, and that the proposed rule changes do not address whether or not the claims for services that should have been payable under the act that were denied payment prior to February 19, 2022 are going to be payable.

Please find attached to this email a survey of Council members which indicates that there are at least \$100,000 in denied claims by only 11 Council members that should have been paid had Act 886 been given the force and effect of law.

Please indicate which provision of Arkansas law allows the Department to disregard the effectiveness of enacted legislation for over seven months. In the absence of said citation, please indicate how those providers who provided services to Medicaid beneficiaries in

good faith reliance on the passage of Act 886 can receive payment for the services they have rendered.

RESPONSE: Thank you for your comment. The Department of Human Services will retroactively implement this rule to July 28, 2021. Details and timeline for implementation will be provided via standard notification methods when available.

The proposed effective date is June 1, 2022.

FINANCIAL IMPACT: The agency indicated that this rule has a financial impact.

Per the agency, the total cost to implement this rule is \$286,512 for the current fiscal year (\$81,312 in general revenue and \$205,200 in federal funds) and \$3,438,149 for the next fiscal year (\$975,747 in general revenue and \$2,462,403 in federal funds). The total estimated cost by fiscal year to state, county, and municipal government to implement this rule is \$81,312 for the current fiscal year and \$975,747 for the next fiscal year.

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 extend the number of mental health counseling visits a client may have prior to obtaining a PCP referral

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

To ensure the availability and quantity of mental health counseling sessions for Medicaid clients. This rule is required by Act 886 of 2021.

(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;

To ensure the availability and quantity of mental health counseling sessions for Medicaid clients. This rule is required by Act 886 of 2021. The cost is justified by allowing more outpatient mental health visits which reduces the need for inpatient stay.

(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;

None.

(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;

None at this time.

(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

N/A

(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 monitors state and federal rules and policies for opportunities to reduce and control costs.

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 rule implements Act 886 of 2021. The Act, sponsored by Representative Lee Johnson, prohibited requiring certain referrals from a primary care provider in order for a beneficiary in the Arkansas Medicaid Program to receive mental health counseling.

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

DEPARTMENT/AGENCY 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. 501-563-7634 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, 5th Floor
Little Rock, AR 72201**

1. What is the short title of this rule? Act 886 – Outpatient Behavioral Health Services (OBHS) and School Based Mental Health Services (SBMHS) Manuals

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: March 17, 2022

Time: 2:00 PM

Place: <https://us02web.zoom.us/j/87109354772>
Webinar ID: 871 0935 4772

10. When does the public comment period expire for permanent promulgation? (Must provide a date.)
April 9, 2022

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

DIVISION 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 Act 886 – Outpatient Behavioral Health Services (OBHS) and School Based Mental Health Services (SBMHS) Manuals

- 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 \$81,312
 Federal Funds \$205,200
 Cash Funds _____
 Special Revenue _____
 Other (Identify) _____
 Total \$286,512

Next Fiscal Year

General Revenue \$975,747
 Federal Funds \$2,462,403
 Cash Funds _____
 Special Revenue _____
 Other (Identify) _____
 Total \$3,438,149

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

\$ 81,312

Next Fiscal Year

\$ 975,747

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 extend the number of mental health counseling visits a client may have prior to obtaining a PCP referral.*
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute; - *To ensure the availability and quantity of mental health counseling sessions for Medicaid Clients. This rule is required by Arkansas Act 886 of 2021.*
- (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; - *To ensure the availability and quantity of mental health counseling sessions for Medicaid Clients. This rule is required by Arkansas Act 886 of 2021. The cost is justified by allowing more outpatient mental health visits which reduces the need for inpatient stay.*
- (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; - *None*
- (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; - *None at this time.*
- (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 - *N/A*
- (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 monitors State and Federal rules and policies for opportunities to reduce and control costs.*

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: §§20-76-201, 20-77-107, and 25-10-129.

Effective June 1, 2022:

The Director of the Division of Medical Services amends Section 217.100 of the Outpatient Behavioral Health Services Manual and Section 211.300 of the School-Based Mental Health Services Manual to comply with Act 886 of the 93rd General Assembly. Act 886 allows a beneficiary to receive the first ten (10) visits for mental health counseling without a referral from a primary care provider.

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. All public comments must be received by DHS no later than April 9, 2022. 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 March 17, 2022, at 2:00 p.m. and public comments may be submitted at the hearing. Individuals can access this public hearing at <https://us02web.zoom.us/j/87109354772>. The webinar ID is 871 0935 4772. 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.

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

Statement of Necessity and Rule Summary
**Act 886 – Outpatient Behavioral Health Services (OBHS) Manual and School-Based
Mental Health Services (SBMHS) Manual**

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

The 93rd General Assembly enacted Act 886. Arkansas Medicaid shall not require a beneficiary to first obtain a referral from a primary care provider (PCP) before receiving the first ten (10) visits for mental health counseling. The Division of Medical Services (DMS) is revising Section 217.100 (Primary Care Physician (PCP) Referral) of the Outpatient Behavioral Health Services (OBHS) Provider Manual and Section 211.300 (Primary Care Physician (PCP) Referral) of the School Based Mental Health Services (SBMHS) Manual, to reflect changes enacted in Act 886.

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

Summary:

Outpatient Behavioral Health Services Manual
Section 217.100 Primary Care Physician (PCP) Referral

- Replaced three (3) with ten (10).
- Added, "...referral."

School-Based Mental Health Services Manual
Section 211.300 Primary Care Physician (PCP) Referral

- Replaced three (3) with ten (10).

Please attach additional documents if necessary

211.300 Primary Care Physician (PCP) Referral

7-1-176-1-
22

Each beneficiary who receives School-Based Mental Health Services can receive a limited amount of services. Once those limits are reached, a Primary Care Physician (PCP) referral or Patient-Centered Medical Home (PCMH) approval will be necessary to continue treatment. This referral or approval must be retained in the beneficiary's medical record.

A beneficiary can receive ~~three (3)~~ten (10) School-Based Mental Health Services before a PCP/PCMH referral is necessary. No services will be allowed to be provided without appropriate PCP/PCMH referral. The PCP/PCMH referral must be kept in the beneficiary's medical record.

The Patient-Centered Medical Home (PCMH) will be responsible for coordinating care with a beneficiary's PCP or physician for School-Based Mental Health Services. Medical responsibility for beneficiaries receiving School-Based Mental Health Services shall be vested in a physician licensed in Arkansas.

The PCP referral or PCMH authorization for School-Based Mental Health Services will serve as the prescription for those services.

See Section I of this manual for the PCP procedures. A PCP referral is generally obtained prior to providing service to Medicaid-eligible children. However, a PCP is given the option of providing a referral after a service is provided. If a PCP chooses to make a referral after a service has been provided, the referral must be received by the SBMH provider no later than 45 calendar days after the date of service. The PCP has no obligation to give a retroactive referral.

The SBMH provider may not file a claim and will not be reimbursed for any services provided that require a PCP referral unless the referral is received.

217.100 Primary Care Physician (PCP) Referral

6-1-213-4
49

Each beneficiary that receives only Counseling Level Services in the Outpatient Behavioral Health Services program can receive a limited amount of Counseling Level Services. Once those limits are reached, a Primary Care Physician (PCP) referral or PCMH approval will be necessary to continue treatment. This referral or approval must be retained in the beneficiary's medical record.

A beneficiary can receive ~~three (3)~~ ten (10) Counseling Level services before a PCP/PCMH referral is necessary. Crisis Intervention (Section 255.001) does not count toward the ~~three (3)~~ ten (10) counseling level services. No services, except Crisis Intervention, will be allowed to be provided without appropriate PCP/PCMH referral. The PCP/PCMH referral must be kept in the beneficiary's medical record.

The Patient Centered Medical Home (PCMH) will be responsible for coordinating care with a beneficiary's PCP or physician for Counseling Level Services. Medical responsibility for beneficiaries receiving Counseling Level Services shall be vested in a physician licensed in Arkansas.

The PCP referral or PCMH authorization for Counseling Level Services will serve as the prescription for those services.

Verbal referrals from PCPs or PCMHs are acceptable to Medicaid as long as they are documented in the beneficiary's chart as described in Section 171.410.

See Section I of this manual for an explanation of the process to obtain a PCP referral.

211.300 Primary Care Physician (PCP) Referral

6-1-22

Each beneficiary who receives School-Based Mental Health Services can receive a limited amount of services. Once those limits are reached, a Primary Care Physician (PCP) referral or Patient-Centered Medical Home (PCMH) approval will be necessary to continue treatment. This referral or approval must be retained in the beneficiary's medical record.

A beneficiary can receive ten (10) School-Based Mental Health Services before a PCP/PCMH referral is necessary. No services will be allowed to be provided without appropriate PCP/PCMH referral. The PCP/PCMH referral must be kept in the beneficiary's medical record.

The Patient-Centered Medical Home (PCMH) will be responsible for coordinating care with a beneficiary's PCP or physician for School-Based Mental Health Services. Medical responsibility for beneficiaries receiving School-Based Mental Health Services shall be vested in a physician licensed in Arkansas.

The PCP referral or PCMH authorization for School-Based Mental Health Services will serve as the prescription for those services.

See Section I of this manual for the PCP procedures. A PCP referral is generally obtained prior to providing service to Medicaid-eligible children. However, a PCP is given the option of providing a referral after a service is provided. If a PCP chooses to make a referral after a service has been provided, the referral must be received by the SBMH provider no later than 45 calendar days after the date of service. The PCP has no obligation to give a retroactive referral.

The SBMH provider may not file a claim and will not be reimbursed for any services provided that require a PCP referral unless the referral is received.

217.100

Primary Care Physician (PCP) Referral

6-1-21

Each beneficiary that receives only Counseling Level Services in the Outpatient Behavioral Health Services program can receive a limited amount of Counseling Level Services. Once those limits are reached, a Primary Care Physician (PCP) referral or PCMH approval will be necessary to continue treatment. This referral or approval must be retained in the beneficiary's medical record.

A beneficiary can receive ten (10) Counseling Level services before a PCP/PCMH referral is necessary. Crisis Intervention (Section 255.001) does not count toward the ten (10) counseling level services. No services, except Crisis Intervention, will be allowed to be provided without appropriate PCP/PCMH referral. The PCP/PCMH referral must be kept in the beneficiary's medical record.

The Patient Centered Medical Home (PCMH) will be responsible for coordinating care with a beneficiary's PCP or physician for Counseling Level Services. Medical responsibility for beneficiaries receiving Counseling Level Services shall be vested in a physician licensed in Arkansas.

The PCP referral or PCMH authorization for Counseling Level Services will serve as the prescription for those services.

Verbal referrals from PCPs or PCMHs are acceptable to Medicaid as long as they are documented in the beneficiary's chart as described in Section 171.410.

See Section I of this manual for an explanation of the process to obtain a PCP referral.

Stricken language would be deleted from and underlined language would be added to present law.
Act 886 of the Regular Session

1 State of Arkansas
2 93rd General Assembly
3 Regular Session, 2021
4

As Engrossed: H4/7/21

A Bill

HOUSE BILL 1862

5 By: Representative L. Johnson
6

For An Act To Be Entitled

8 AN ACT TO PROHIBIT REQUIRING *CERTAIN REFERRALS* FROM A
9 PRIMARY CARE PROVIDER IN ORDER FOR A BENEFICIARY IN
10 THE ARKANSAS MEDICAID PROGRAM TO RECEIVE MENTAL
11 HEALTH COUNSELING; AND FOR OTHER PURPOSES.
12
13

Subtitle

14
15 *TO PROHIBIT REQUIRING CERTAIN REFERRALS*
16 *FROM A PRIMARY CARE PROVIDER IN ORDER FOR*
17 *A BENEFICIARY IN THE ARKANSAS MEDICAID*
18 *PROGRAM TO RECEIVE MENTAL HEALTH*
19 *COUNSELING.*
20
21

22 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
23

24 SECTION 1. Arkansas Code Title 20, Chapter 77, Subchapter 1, is
25 amended to add an additional section to read as follows:

26 20-77-142. Prohibition on referrals for mental health counseling.
27 The Arkansas Medicaid Program shall not require a beneficiary to first
28 obtain a referral from a primary care provider before receiving mental health
29 counseling for the first ten (10) visits for mental health counseling.
30

31 /s/L. Johnson
32
33

34 APPROVED: 4/25/21
35
36



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