

# EXHIBIT E

## DEPARTMENT OF HUMAN SERVICES, MEDICAL SERVICES

### SUBJECT: SPA #2015-005; Private Duty Nursing Services

**DESCRIPTION:** Effective for dates of service occurring July 1, 2015 and after, Arkansas Medicaid will increase maximum reimbursement rates for Private Duty Nursing (PDN), Registered Nurse (RN) services, and RN supervisory visits will increase from \$38.50 to \$54.00 per hour, and Licensed Practical Nurse (LPN) services will increase from \$32.00 to \$37.00 per hour. The new maximum reimbursement rates are based on market analysis. These reimbursement changes are necessary to ensure access to Private Duty Nursing services for Arkansas Medicaid beneficiaries.

**PUBLIC COMMENT:** No public hearing was held on this rule. The public comment period ended on July 28, 2015. There were no comments received by the department. The proposed effective date is October 1, 2015.

**CONTROVERSY:** This is not expected to be controversial.

**FINANCIAL IMPACT:** The budget impact for this rule is \$2,365,888 (\$688,947 in general revenue and \$1,676,941 in federal funds) for the current fiscal year and \$2,365,888 (\$695,808 in general revenue and \$1,670,080 in federal funds for the next fiscal year).

Since the cost or obligation exceeded \$100,000 per year to the state government, the department filed the following written findings:

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

**This rule's basis and purpose is to increase private duty nursing program reimbursement rates so that the transfer of patients from inpatient hospital stay care to less costly home based private duty nursing program care is accomplished more timely.**

(2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute; **Increasing reimbursement rates for these services will allow Private duty Nursing providers to attract and retain RN and LPN staff necessary to provide less costly home based private duty nursing services when compared with the more costly inpatient hospital care. Attracting new RN and LPN staff and retaining current staff is necessary in order to fulfill the demand and access for these services. Many patients receiving these private duty nursing services are children on ventilators. Annual review of private duty nursing reimbursement rates with agreed upon rate changes are as ordered by a Consent Decree through the United States District Court for the Eastern District of Arkansas in the case of Arkansas Medical Society v. Reynolds.**

(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; **Reimbursement rates for these services were last increased in 2008. Current access to these services for all qualifying children may not always be available if these rates are not increased.**

# EXHIBIT E

(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; **Twenty four hour care is generally necessary for children using ventilators. The only alternative care to inpatient hospital care is the private duty nursing program. Ventilator services must usually be provided for extended periods of time if not for the rest of the child's life.**

(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 proposed 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 **The State is under a Consent Decree obligation (see response above in #2) to meet with the Association and arrive at mutually agreed upon reimbursement rate changes for these services. The rates were last increased in 2008.**

(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 state plans to continue to abide by the court mandated Consent Decree.**

**LEGAL AUTHORIZATION:** Ark. Code Ann. § 20-76-201 authorizes the Department of Human Services to administer programs for the indigent and to "make rules and regulations" pertaining to the administration of those programs. Ark. Code Ann. § 20-77-107 specifically authorizes the Department to "establish and maintain an indigent medical care program."

Ark. Code Ann. § 25-10-129 directs the Department to promulgate rules to conform to federal law that affects "programs administered or funded by or through the department" as necessary to receive available federal funds.

A 1997 Consent Decree from the case *Arkansas Medical Society v. Reynolds*, in the Eastern District of Arkansas, United States District Court, in which the Department of Human Services was the Defendant, provides that reimbursement rates for private duty nursing will be assessed annually and reimbursement rates will be adjusted "based upon market forces as they impact on access".

QUESTIONNAIRE FOR FILING PROPOSED RULES AND REGULATIONS  
WITH THE ARKANSAS LEGISLATIVE COUNCIL AND JOINT INTERIM COMMITTEE

DEPARTMENT/AGENCY Department of Human Services  
DIVISION Division of Medical Services  
DIVISION DIRECTOR Dawn Stehle  
CONTACT PERSON Brian Jones  
ADDRESS PO Box 1437, Slot S295, Little Rock, AR 72203  
PHONE NO. 501-537-2064 FAX NO. 501-404-4619 E-MAIL brian.jones@dhs.arkansas.gov  
NAME OF PRESENTER AT COMMITTEE MEETING Tami Harlan  
PRESENTER E-MAIL tami.harlan@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:

Donna K. Davis  
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 #2015-005
  
2. What is the subject of the proposed rule? To increase RN and LPN hourly reimbursement rate for Private Duty Nursing 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: This rule increases the hourly reimbursement rate for RN and LPN Private Duty Nursing services.**

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation. Arkansas Statute 20-76-201

7. What is the purpose of this proposed rule? Why is it necessary? The purpose of the proposed rule is to bring the Private Duty Nursing fee schedules to current market analysis of salaries in order to ensure access of Private Duty Nursing services for Arkansas Medicaid beneficiaries.

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://www.medicaid.state.ar.us/InternetSolution/general/comment/comment.aspx>

9. Will a public hearing be held on this proposed rule? Yes  No

If yes, please complete the following:

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Place: \_\_\_\_\_

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

July 28, 2015

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

October 1, 2015 (Adopted by Federal Regulation July 1, 2015)

12. Do you expect this rule to be controversial? Yes  No

If yes, please explain. \_\_\_\_\_

13. 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.

Arkansas State Nursing Board will be in favor of this rule.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

**DEPARTMENT**     Department of Human Services  
**DIVISION**        Division of Medical Services  
**PERSON COMPLETING THIS STATEMENT** Brian Jones  
**TELEPHONE NO.** 501-537-2064 **FAX NO.** 501-404-4619 **EMAIL:** brian.jones@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 #2015-005

- 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 \_\_\_\_\_  
Other (Identify) \_\_\_\_\_

**Next Fiscal Year**

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

Total \_\_\_\_\_

Total \_\_\_\_\_

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

**Current Fiscal Year**

**Next Fiscal Year**

General Revenue	<u>\$688,947</u>
Federal Funds	<u>\$1,676,941</u>
Cash Funds	_____
Special Revenue	_____
Other (Identify)	_____
<b>Total</b>	<b><u>\$2,365,888</u></b>

General Revenue	<u>\$695,808</u>
Federal Funds	<u>\$1,670,080</u>
Cash Funds	_____
Special Revenue	_____
Other (Identify)	_____
<b>Total</b>	<b><u>\$2,365,888</u></b>

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**

\$ 688,947

**Next Fiscal Year**

\$ 695,808

The above amount is paid through state general revenue.

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;

**This rule's basis and purpose is to increase private duty nursing program reimbursement rates so that the transfer of patients from inpatient hospital stay care to less costly home based private duty nursing program care is accomplished more timely.**

- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute; **Increasing reimbursement rates for these services will allow Private duty Nursing providers to attract and retain RN and LPN staff necessary to provide less costly home based private duty nursing services when compared with the more costly inpatient hospital care. Attracting new RN and LPN staff and retaining current staff is necessary in order to fulfill the demand and access for these services. Many patients receiving these private duty nursing services are children on ventilators. Annual review of private duty nursing reimbursement rates with agreed upon rate changes are as ordered by a Consent Decree through the United States District Court for the Eastern District of Arkansas in the case of Arkansas Medical Society v. Reynolds.**
- (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; **Reimbursement rates for these services were last increased in 2008. Current access to these services for all qualifying children may not always be available if these rates are not increased.**
- (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; **Twenty four hour care is generally necessary for children using ventilators. The only alternative care to inpatient hospital care is the private duty nursing program. Ventilator services must usually be provided for extended periods of time if not for the rest of the child's life.**
- (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 proposed 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 **The State is under a Consent Decree obligation (see response above in #2) to meet with the Association and arrive at mutually agreed upon reimbursement rate changes for these services. The rates were last increased in 2008.**
- (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 state plans to continue to abide by the court mandated Consent Decree.**



Summary for SPA #2015-005 - Private Duty Nursing

Effective for dates of service occurring July 1, 2015 and after, Arkansas Medicaid will increase maximum reimbursement rates for Private Duty Nursing (PDN), Registered Nurse (RN) services, and RN supervisory visits will increase from \$38.50 to \$54.00 per hour and Licensed Practical Nurse (LPN) services will increase from \$32.00 to \$37.00 per hour. The new maximum reimbursement rates are based on market analysis. These reimbursement changes are necessary to ensure access of Private Duty Nursing services for Arkansas Medicaid beneficiaries. The annual budget impact associated with this change is \$2,365,888.

METHODS AND STANDARDS FOR ESTABLISHING PAYMENT RATES -  
OTHER TYPES OF CARE

Revised: July 1, 2015

8. Private Duty Nursing to enhance the effectiveness of treatment for ventilator-dependent beneficiaries, high technology non-ventilator beneficiaries or tracheotomy beneficiaries

Reimbursement is based on the lesser of the amount billed or the maximum Title XIX (Medicaid) charge allowed. The State is under a U. S. District Court order that sets out the process for rates to be determined. That process includes evaluation of rates based upon market forces as they impact on access. Payment of the resultant rates is ordered by the court.

The agency's private duty nursing fee schedule rates were set as of **July 1, 2015** and are effective for fee schedule services on or after that date. All fee schedule rates are published on the agency's website ([www.medicaid.state.ar.us](http://www.medicaid.state.ar.us)). Except as noted in the plan, state developed fee schedule rates are calculated using the same method for both governmental and private providers of private duty nursing services.

Effective for dates of service on or after October 1, 1994, reimbursement for private duty nursing medical supplies is based on 100% of the Medicare maximum for medical supplies reflected in the 1993 Arkansas Medicare Pricing File not to exceed the Title XIX coverage limitations as specified in Attachment 3.1-A, page 3d, and Attachment 3.1-B, page 4a.

Effective for dates of service on or after **July 1, 2015**, RN and LPN hourly reimbursement rate maximums are set based on market analysis of salaries, fringe benefits and administrative/overhead costs. Market analysis included the following steps:

- Acquired **2013** wage rates from the Federal Bureau of Labor Statistics for **Arkansas**,
- Determining employee benefit costs by using **Skilled Nursing Facility cost reports submitted as of July 1, 2014**,
- Assessing overhead costs by calculating the percent of direct to indirect costs reported in the most recent audited Medicare Home Health cost reports by the top 70% of Medicaid reimbursed non-hospital home health providers during SFY 2007, and
- **It was estimated that a private duty nurse will travel approximately 8 miles each hour.**

**PROMISED**

Mark Up

METHODS AND STANDARDS FOR ESTABLISHING PAYMENT RATES -  
OTHER TYPES OF CARE

Revised: July 1, 2015

8. Private Duty Nursing to enhance the effectiveness of treatment for ventilator-dependent beneficiaries, high technology non-ventilator beneficiaries or tracheotomy beneficiaries

Reimbursement is based on the lesser of the amount billed or the maximum Title XIX (Medicaid) charge allowed. The State is under a U. S. District Court order that sets out the process for rates to be determined. That process includes evaluation of rates based upon market forces as they impact on access. Payment of the resultant rates is ordered by the court.

The agency's private duty nursing fee schedule rates were set as of ~~April 4, 2008~~ July 1, 2015 and are effective for fee schedule services on or after that date. All fee schedule rates are published on the agency's website ([www.medicaid.state.ar.us](http://www.medicaid.state.ar.us)). Except as noted in the plan, state developed fee schedule rates are calculated using the same method for both governmental and private providers of private duty nursing services.

Effective for dates of service on or after October 1, 1994, reimbursement for private duty nursing medical supplies is based on 100% of the Medicare maximum for medical supplies reflected in the 1993 Arkansas Medicare Pricing File not to exceed the Title XIX coverage limitations as specified in Attachment 3.1-A, page 3d, and Attachment 3.1-B, page 4a.

Effective for dates of service on or after ~~April 4, 2008~~ July 1, 2015, RN and LPN hourly reimbursement rate maximums are set based on market analysis of ~~2008~~ salaries, fringe benefits and administrative/overhead costs. Market analysis included the following steps:

- ~~Acquiring~~ 2008 2013 wage rates from various information providers including the Federal Bureau of Labor Statistics and ~~calculating an average wage for Arkansas.~~
- Determining employee benefit costs by using the most current employee benefit percentage reported in the "Almanac of Hospital Financial and Operating Indicators for 2008" published by INGENIX, and Skilled Nursing Facility cost reports submitted as of July 2014.
- Assessing overhead costs by calculating the percent of direct to indirect costs reported in the most recent audited Medicare Home Health cost reports by the top 70% of Medicaid reimbursed non-hospital home health providers during SFY 2007.
- It was estimated that a private duty nurse will travel approximately 8 miles each hour.