

**ADMINISTRATIVE RULES SUBCOMMITTEE  
OF THE  
ARKANSAS LEGISLATIVE COUNCIL**

**Wednesday, June 16, 2021**

**9:00 a.m.**

**Room A, MAC**

**Little Rock, Arkansas**

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- A. **Call to Order.**
  - B. **Presentation Regarding Status of the Code of Arkansas Rules.**
  - C. **Reports of the Executive Subcommittee.**
  - D. **Rules Filed Pursuant to Ark. Code Ann. § 10-3-309.**
- 1. **DEPARTMENT OF AGRICULTURE, ARKANSAS NATURAL RESOURCES COMMISSION (Mr. Wade Hodge, Mr. Ryan Benefield)**

- a. **SUBJECT: Title 14 Rules Implementing the Water Resource Conservation and Development Incentives Act**

**DESCRIPTION:** The Arkansas Department of Agriculture is seeking review and approval of proposed amendments to rules promulgated by the Arkansas Natural Resources Commission implementing the Water Resource Conservation and Development Incentives Act (“WRCDIA”). These rules are referred to as Title 14. The proposed amendments are necessary to comply with legislation passed by the Arkansas General Assembly during the 2019 regular session, specifically, Act 1073.

The WRCDIA, codified at Ark. Code Ann. § 26-51-1001 et seq., provides a tax credit incentive to persons or corporate entities that invest in the construction of water impoundments, convert from groundwater use to surface water use, reduce agricultural water use through land-leveling, or install water meters to monitor groundwater usage.

This program allows applicants to apply for a tax credit for development or implementation of a project, receive approval for the tax credit, and use the credit before completing the project. If an approved applicant fails to construct or implement a project within three years, or maintain the project for ten years, the approved applicant must repay any portion of the tax credit already claimed.

Act 1073 of 2019 amended the WRC DIA to enable approved applicants who are not able to use the full amount of tax credits available within a specified carryover period to transfer those credits to someone else.

The proposed amendments to these rules:

- Carry out the intent of Act 1073 of 2019.
- Provide helpful information to individuals transferring a tax credit.
- Change the words “taxpayer” and “well owner” with “applicant” or “approved applicant.”
- Clarify language dealing with the internal administration of the program.

Act 1073 directs the original approved applicant and transferee to perfect and claim the tax credit transfer through documents filed with the Department of Finance and Administration. Subtitle V is added to the rule to alert applicants to the availability of credit transfer. Subtitle V uses much of the actual language from Act 1073, but also provides helpful information to the transferor of the tax credit, since the transferor would have been subject to the rule as the original applicant.

The proposed amendment replaces the words “taxpayer” with “applicant” or “approved applicant” to track language changes made by Act 1073. Other changes include changing “well owner” to “applicant” to clarify that persons leasing farmland may also obtain tax credits for installation of water meters. The remaining proposed revisions clarify how the program is administered and eliminates collection of unnecessary information.

**PUBLIC COMMENT:** No public hearing was held. The public comment period expired on November 22, 2020. The Commission received no public comments.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) Pursuant to Arkansas Code Annotated § 26-51-1010(a)(1), the Arkansas Natural Resources Commission shall promulgate such rules as may be deemed necessary in administering projects submitted with the intent of qualifying for the tax incentives provided for in the Water Resource Conservation and Development Incentives Act, Ark. Code Ann. §§ 26-51-1001 through 26-51-1015. However, subsection (a)(2) of the statute provides that any rules shall not be adopted without the approval of the Department of Finance and Administration. Has approval by the DFA been obtained? **RESPONSE:** [An email was provided stating that DFA has approved the rules.]

(2) Section 1405.1(A) – Should “is still available to” preface “and has not been previously used” as that language is used in Ark. Code Ann. § 26-51-1015(b)? **RESPONSE:** “Is still available to” added.

(3) Section 1405.1(B) – Contains a reference to “in this subchapter,” which while included in the statute, seems somewhat unclear here? **RESPONSE:** “This subchapter” changed to “the Act.” “The Act” is included in the definitions as the Water Resource Conservation and Development Incentives Act.

(4) Section 1405.2(A) – Contains two references to “this subchapter.” **RESPONSE:** “This subchapter” changed to “the Act.”

(5) Section 1405.3(B) – Contains two references to “this subchapter.” **RESPONSE:** “This subchapter” changed to “the Act.”

(6) Title – I noticed that the title of the rules lacks the “s” on “Incentive.” **RESPONSE:** “S” added to Incentive.

The proposed effective date is pending legislative review and approval.

**FINANCIAL IMPACT:** The agency states that the amended rules have no financial impact.

**LEGAL AUTHORIZATION:** Pursuant to Arkansas Code Annotated § 26-51-1010(a)(1), the Arkansas Natural Resources Commission shall promulgate such rules as may be deemed necessary in administering projects submitted with the intent of qualifying for the tax incentives provided for in the Water Resource Conservation and Development Incentives Act, Ark. Code Ann. §§ 26-51-1001 through 26-51-1015. The rules shall not be adopted without the approval of the Department of Finance and Administration. *See* Ark. Code Ann. § 26-51-1010(a)(2). The proposed changes to the rules include those made in light of Act 1073 of 2019, sponsored by Representative Andy Davis, which promoted water resource conservation and development and amended the Water Resource Conservation and Development Incentives Act.

2. **DEPARTMENT OF AGRICULTURE, STATE PLANT BOARD (Mr. Wade Hodge, Mr. Scott Bray)**

a. **SUBJECT: Pesticide Classification Rules – Dicamba**

**DESCRIPTION:** The Department of Agriculture’s State Plant Board proposes changes to its Pesticide Classification Rules as they pertain to dicamba.

Current Plant Board rules require all dicamba products to be used in compliance with their EPA-issued federal labels and other Arkansas-specific requirements that are more stringent than the federal labels. In December of 2019, the Board voted to adopt a May 25 cutoff date for the use of dicamba and established a one-mile buffer zone around agricultural research stations and dicamba-intolerant crops for the 2020 growing season. In December of 2020, the Plant Board met and considered different proposals for extending the use of dicamba for the 2021 growing season beyond the current May 25 cutoff date, but was unable to reach an agreement. Since that time, the Board received a petition for rulemaking, which requested the Board to allow the use of dicamba in accordance with the federal label, without any additional restrictions. The Board considered the petition at its March 3, 2021 meeting.

The petition pointed out that since the Board’s previous discussions on the dicamba rule, it has been discovered that some palmer amaranth (pigweed) has become resistant to the active ingredient in the pesticide Liberty, which had been used as an alternative to dicamba-containing products. Additionally, the Board considered the fact that no other Southern states or states contiguous to Arkansas are restricting the use of dicamba beyond the federal label, and in fact, some states are requesting the EPA to allow an *expanded* use of dicamba. The Board also considered that Engenia, Xtendimax, and Tavium, which are the dicamba products approved by the Environmental Protection Agency for in-crop use, are less volatile than the dicamba products banned by the Board in 2017. Accordingly, the Board voted to initiate rulemaking as requested by the petition.

The proposed rules provide for use of dicamba products labeled for in-crop use until June 30. The proposed rules maintain a one-mile buffer from University and USDA research stations. The proposed rules reduce the buffer zone around non-dicamba-tolerant crops from one-half mile to one-quarter mile and reduce the buffer zone around specialty and organic crops from one mile to one-half mile. The proposed rules also repeal a late-season permit option for lands lying east of the Mississippi River levee.

Record keeping and training requirements were retained.

In sum, the proposed rules:

- are in response to the Plant Board approving a request to initiate rulemaking;
- allow the use of dicamba in crop until June 30;
- maintain a one-mile buffer from University and USDA research stations; and
- reduce the buffer zone around non-dicamba-tolerant crops from one-half mile to one-quarter mile and reduce the buffer zone around specialty and organic crops from one mile to one-half mile.

**PUBLIC COMMENT:** A public hearing was held on May 3, 2021. The public comment period expired on April 22, 2021. Due to the volume of comments received, the public comment summaries, in both narrative and chart formats, can be found electronically on the paperclip for the June 16, 2021 meeting of the Administrative Rules Subcommittee.

This rule received legislative review and approval by the Executive Subcommittee at its meeting of May 6, 2021, for emergency promulgation.

The proposed effective date for permanent promulgation is pending legislative review and approval.

**FINANCIAL IMPACT:** The agency states that the amended rules have no financial impact.

**LEGAL AUTHORIZATION:** The State Plant Board shall administer and enforce the Arkansas Pesticide Use and Application Act (“Act”), codified at Arkansas Code Annotated §§ 20-20-201 through 20-20-227, and shall have authority to issue rules after a public hearing following due notice to all interested persons to carry out the provisions of the Act. *See* Ark. Code Ann. § 20-20-206(a)(1). When the Board finds it necessary to carry out the purpose and intent of the Act, rules may relate to the time, place, manner, amount, concentration, or other conditions under which pesticides may be distributed or applied and may restrict or prohibit use of pesticides in designated areas during specified periods of time to prevent unreasonable adverse effects by drift or misapplication to: plants, including forage plants, or adjacent or nearby lands; wildlife in the adjoining or nearby areas; fish and other aquatic life in waters in reasonable proximity to the area to be treated; and humans, animals, or beneficial insects. *See* Ark. Code Ann. § 20-20-206(a)(1)(A)–(D). In issuing rules, the Board shall give consideration to pertinent research findings and recommendations of other agencies of this state, the federal government, or other reliable sources. *See* Ark. Code Ann. § 20-20-206(a)(2).

3. **DEPARTMENT OF HEALTH** (Ms. Laura Shue, Mr. Terry Paul, Mr. Ric Mayhan)

a. **SUBJECT: 2018 Arkansas Plumbing Code**

**DESCRIPTION:** In addition to the many engineering and quality standards updates and the new materials that have been added, below is a list of the most prevalent changes from the 2006 Plumbing Code to the 2018 Plumbing Code Draft:

**403.2 Separate facilities:** This code requires separate facilities to be provided for men and women. The exceptions have been amended for larger numbers of occupants to be able to utilize a single restroom before a separate facility is required.

Exception #2 changed to increase the minimum occupancy load from 15 to 25 before separate facilities are required for each sex.

Exception #3, “mercantile occupancies maximum count for a single restroom,” was changed from 50 to 100.

**403.2.1 Family or assisted-use toilet facilities serving as separate facilities:** This segment has been added approving the use of two family or assisted-use facilities to serve as gender separate facilities where only one water closet each is required. In short, these restrooms may serve as an addition male or female restroom as needed.

**403.3.4 Location of toilet facilities in malls:** Changes include that the required number of facilities calculations be based on occupancy load and not square footage.

**410.1 Approved:** Water dispensers (bottle fillers) have been added as a substitute for drinking fountains.

**410.2 Small Occupancies:** This code was added to exclude drinking fountain requirements in occupancies of less than 25 persons.

**421.5.2 Shower linings:** The addition of sheet applied and liquid trowel applied shower lining materials.

**427.1 Hand-wash sinks in Examination Rooms:** Hand wash sinks required in medical examination rooms.

**601.5 Rehabilitation of piping systems:** This is a new code provision approving epoxy lining systems meeting the specified standards, for pressure water piping rehabilitation.

**603.2 Separation of water service and building sewer:** This code segment has been revised to allow water service and building sewer to be installed in the same ditch where building sewer is constructed of materials listed in Table 702.2.

**SECTION 715 VACUUM DRAINAGE SYSTEMS:** This is a new code section approving Vacuum drainage systems.

**SECTION 716 REPLACEMENT OF UNDERGROUND SEWERS BY PIPE-BURSTING METHODS:** This is a new code section approving an alternate method of sewer pipe replacement.

**903.5 Location of vent terminal:** In this segment, “3” replaces “2” as the minimum size primary vent.

**PUBLIC COMMENT:** A public hearing was held on this rule on November 18, 2020. The public comment period expired November 18, 2020. The agency indicated that it received no public comments.

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

**Q.** Where do the new definitions of “minor repairs” and “tepid water” come from?

**RESPONSE:** The [“minor repairs”] definition originates in the Arkansas Plumbing Law § 17-38-302 (3), repairs exempt from licensing. “Minor repairs consisting of repairing minor working parts of plumbing, fixtures, or the removal of stoppages.” This updates the definition from the 2006 Code.

The [“tepid water”] definition comes from the American National Standards Institute / International Safety Equipment Association (ANSI / ISEA Z358.1/2014) which is referenced in *Section 411 Emergency Showers and Eyewash Stations* of the *International Plumbing Code*, but not specifically defined.

The proposed effective date is pending legislative review and approval.

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

**LEGAL AUTHORIZATION:** The State Board of Health has oversight over the safety and sanitation of “the construction, installation, and maintenance of plumbing in connection with all buildings in this state,” as well as general supervisory authority over “all plumbing[.]” Ark. Code Ann. § 17-38-201(a)(1), (2)(A). The Board of Health “shall prescribe and publish and enforce minimum reasonable standards that shall be uniform as far as practicable.” Ark. Code Ann. § 17-38-201(a)(2)(A).

**b. SUBJECT: 2018 Arkansas Fuel Gas Code**

**DESCRIPTION:** In addition to the many engineering and quality standards updates and the new materials that have been added, below is a list of the most prevalent changes from the 2006 Fuel Gas Code to the 2018 Fuel Gas Code Draft:

**SECTION 110 TEMPORARY EQUIPMENT, SYSTEMS AND USES.** A new section add to allow for and provide guidance on the installation and use of temporary installations.

**403.10.1 Pipe joints.** A press-connect fitting and a respective reference standard number have been added to the gas code. This is a highly effective and time saving method of piping gas developed since the last code update.

**403.10.3 Stainless steel tubing joints.** New code specifying joining methods and standard numbers have been added.

**404.14 Piping underground beneath buildings.** Approval for conduits specifically designed for gas piping underground beneath buildings, has been added. New CSST tubing, designed and manufactured within its own conduit is now available—a step and time saver.

**406.4.1 Test pressure.** Test pressures have been reduced sustainably to mirror the national standard. Where previously 25 lb. psi was required for piping intended for 4 to 8 oz. psi and 90 lb. psi for systems intended for 1 lb. working pressure, can now be tested at 1.5 times its intended working pressure with a minimum of 3 lb. psi.

**406.4.2 Test duration.** Test duration was changed to meet the intent of the national standard.

**406.7.1 Piping system required to be purged outdoors.** This is new code inserted in the existing section on purging outline safe outdoors purging practices.

**406.7.1.3 Outdoor discharge of purged gases through 406.7.2.1 Purging procedure.** Outline the procedures and precautions for purging large gas piping system outdoors and indoors.

**SECTION 413 COMPRESSED NATURAL GAS MOTOR VEHICLE FUEL-DISPENSING FACILITIES.** This section provides regulator parameters for CNG fueling facilities.

**SECTION 416 OVERPRESSURE PROTECTION DEVICES.** This section has been revised to protect gas utilization equipment designed to operate at a gas pressure of 14 inches w.c. (water column) or less from damage due to over pressurization when connected to a hybrid gas system operating at greater than 2 psi (pounds per square inch).

**503.4.1 Plastic pipe.** This code has been amended to provide approval standards for plastic pipe utilization as gas exhaust venting. This is the type of vent materials that may be utilized in high efficacy gas appliances that have low heat exhaust discharge.

**PUBLIC COMMENT:** A public hearing was held on this rule on November 18, 2020. The public comment period expired November 18, 2020. The agency indicated that it received no public comments.

The proposed effective date is pending legislative review and approval.

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

**LEGAL AUTHORIZATION:** The State Board of Health has oversight over the safety and sanitation of “the construction, installation, and maintenance of plumbing in connection with all buildings in this state,” as well as general supervisory authority over “all plumbing[.]” Ark. Code Ann. § 17-38-201(a)(1), (2)(A). “Plumbing” includes “all piping, fixtures, appurtenances, and appliances . . . used in the installation of natural gas.” Ark. Code Ann. § 17-38-101(9)(A)(iii). The Board of Health “shall prescribe and publish and enforce minimum reasonable standards that shall be uniform as far as practicable.” Ark. Code Ann. § 17-38-201(a)(2)(A).

4. **DEPARTMENT OF HUMAN SERVICES, DIVISION OF AGING, ADULT, AND BEHAVIORAL HEALTH SERVICES (Mr. Mark White, Mr. Jay Hill, Ms. Patricia Gann)**

a. **SUBJECT: DAABHS COVID-19 Response Manual**

**DESCRIPTION:**

Statement of Necessity

The rule is needed to render maximum assistance to the citizens of Arkansas so that the Division of Aging, Adult, and Behavioral Health Services (DAABHS) may continue to provide services to its clients between the expiration of the public health emergency through the end of the year. The temporary provisions amend certain rules and provide guidance, safeguarding DAABHS with adequate time to close out temporary measures that will no longer be needed in coming months without creating a financial risk for the state.

DAABHS identifies certain rules needing temporary revision and the necessity of continuing guidance to providers and clients so that services provided by the agency are available for the remainder of the year or through the national health emergency. The rule continues certain rule suspensions and issued guidance that began in March 2020. The provisions in the rule are temporary, expiring either on December 31, 2021, or upon the end of the federal national health emergency, as detailed in the rule.

Summary

DAABHS issues revisions, suspensions, and guidance in relation to certain rules. The affected areas and rules manuals affected are contained in the following chart:

<b>DAABHS Covid-19 Response Manual Section Number &amp; Title</b>	<b>Regular Manual</b>
211.000 – Extension of Person Centered Service Plans ARChoices, Living Choices, and PACE	ARChoices in Home Care Home and Community-Based 2176 Waiver Medicaid Provider Manual; Living Choices Assisted Living Medicaid Provider Manual; Program of All-Inclusive Care for the Elderly (PACE) Medicaid Provider Manual

212.000 – ARChoices, Living Choices, and PACE Manual – Suspension of Timelines for Evaluation	ARChoices in Home Care Home and Community-Based 2176 Waiver Medicaid Provider Manual; Living Choices Assisted Living Medicaid Provider Manual; Program of All-Inclusive Care for the Elderly (PACE) Medicaid Provider Manual
213.000 – Living Choices Assisted Living Facilities Reimbursement Rate	Living Choices Assisted Living Waiver
221.000 – Outpatient Behavioral Health Agencies Certified as Acute Crisis Units	Outpatient Behavioral Health Services (OBHS) Medicaid Provider Manual

**PUBLIC COMMENT:** No public hearing was held on this proposed rule. The public comment period expired on May 10, 2021. The agency provided the following summary of the single public comment it received and its response to that comment.

Commenter’s Name: Jaqueline Pendleton, on behalf of Summit Community Care

**COMMENT:** 221.000 OBH Agencies Certified as Acute Crisis Units: suspension of benefit limit of 96 hours per encounter, 1 per month and 6 encounters per SFY.

Are we mandated to implement this?

**RESPONSE:** The PASSEs have the option to approve up to 96 hours.

This rule was filed on an emergency basis and was reviewed and approved by the Executive Subcommittee on March 22, 2021. The proposed effective date for permanent promulgation is July 1, 2021.

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

Per the agency, the total estimated cost by fiscal year to implement the rule is \$0 for the current fiscal year and \$769,969 for the next fiscal year (\$219,518 in general revenue and \$550,451 in federal funds). The total estimated cost by fiscal year to state, county, and municipal government to implement the rule is \$0 for the current fiscal year and \$219,518 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;*

In response to the COVID-19 pandemic, the Department of Human Services identified programs and services that required additional flexibility or changes to adapt to ensuring the health and safety of our clients.

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

This is an extension of a current emergency rule expiring 7/29/21 and will extend the provisions until 12/31/21.

*(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;*

Due to the COVID-19 pandemic, additional flexibility or changes are needed to adapt to ensuring the health and safety of our clients.

*(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;*

Not applicable.

*(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;*

Not applicable.

*(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;*

The existing rules prior to the emergency extension would not have allowed the agency to adequately address the PHE.

*(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 continually monitors all rules to ensure we are achieving statutory and programmatic objectives.

**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); *see also* Ark. Code Ann § 20-10-203(b). 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).

5. **DEPARTMENT OF HUMAN SERVICES, DIVISION OF COUNTY OPERATIONS (Mr. Mark White, Ms. Mary Franklin)**

a. **SUBJECT: Medical Services Policy Sections D-210 and D-224**

**DESCRIPTION:**

Statement of Necessity

Medical Services Policy is being updated to reflect a change due to the Consolidated Appropriations Act, 2021, 8 U.S.C. § 1612. The amendment states that any individual who lawfully resides in 1 of the 50 States or the District of Columbia in accordance with the Compacts of Free Association between the Government of the United States and the Governments of the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau shall be eligible for Medicaid.

What does Policy Sections D-210 and D-224 cover?

Policy MS D-210 outlines the factors that are used to determine citizenship/qualified alien status for Medicaid applicants. A few steps are used to consider citizenship determination:

- Birth county of the individual or parents,
- U.S. National status, and
- Special note regarding citizens under a Compact of Free Association with United States.

Policy MS D-224 outlines Aliens Exempt from Five-Year Bar:

Aliens with the following statuses are potentially eligible for Medicaid from the date the status is obtained: Some of the statuses are:

- Refugees admitted under section 207 of the Immigration and Nationality Act (INA).
- Iraqi and Afghan Special Immigrants admitted as lawfully permanent residents but treated as refugees.
- Aliens granted asylum under section 208 of the INA.

### Rule Summary

The changes to MS Sections D-210 and 224 include:

- Removing the special note from policy D-210 regarding Marshall Islanders. Marshall Islanders have now been deemed qualified aliens, so the special rules do not apply.
- Adding information at D-224 - aliens who are lawfully living in the United States in accordance with the Compacts of Free Association to be granted an exemption from the five-year bar.

**PUBLIC COMMENT:** No public hearing was held on this proposed rule. The public comment period expired on April 1, 2021. The agency indicated that it received no public comments.

This rule was filed on an emergency basis and was reviewed and approved by the Executive Subcommittee on February 23, 2021. The proposed effective date for permanent promulgation is July 1, 2021.

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

Per the agency, this rule implements a federal rule or regulation. The estimated cost to implement the federal rule or regulation is \$6,543,810 for the current fiscal year (\$1,874,802 in general revenue and \$4,669,008 in federal funds) and \$13,087,620 for the next fiscal year (\$3,731,280 in general revenue and \$9,356,340 in federal funds). The total estimated cost by fiscal year to state, county, and municipal government to implement this rule is \$1,874,802 for the current fiscal year and \$3,731,280 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 comply with the Consolidated Appropriations Act of 2021, 8 U.S.C. § 1612.

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

To cover qualified Aliens and determine citizenship

*(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;*

The policy outlines factors that are used to determine citizenship/qualified alien status for applicants.

*(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*

Clarification to CMS policy required change

*(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 cost.

**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 emergency rule implements the federal Consolidated Appropriations Act of 2021, 8 U.S.C. § 1612(b)(2)(G). The Act specified that individuals residing “in 1 of the 50 States . . . in accordance with the Compacts of Free Association between” the United States and Micronesia, the Marshall Islands, and Palau “shall be eligible for any designated Federal program.” 8 U.S.C. § 1612(b)(2), (b)(2)(G).

**b. SUBJECT: Division of County Operations (DCO) COVID-19 Response Manual**

**DESCRIPTION:**

Statement of Necessity

The rule is needed to render maximum assistance to the citizens of Arkansas so that the Division of County Operations (DCO) may continue to provide services to its clients. The temporary provisions amend certain rules and provide guidance, safeguarding DHS with adequate time to close out temporary measures that will no longer be needed in coming months without creating a financial risk for the state.

DCO identifies certain rules needing temporary revision and the necessity of continuing guidance to providers and clients so that services provided by the agency are available for the remainder of the year or through the national health emergency. The rule continues certain rule suspensions and issued guidance that began in March 2020. The provisions in the rule are temporary, expiring upon the end of the federal national health emergency, or as detailed in the rule.

Summary

DCO issues revisions, suspensions, and guidance in relation to certain rules. The affected areas and rules manuals affected are contained in the following chart:

<b>Division</b>	<b>DCO Covid Response Manual – Section Number and Title</b>	<b>Regular Manual</b>
DCO – Medicaid Eligibility	251.000 – Section A-200 Medicaid Coverage Periods	Medical Services Policy Manual
DCO – Medicaid Eligibility	252.000 – Section F-130 Child Support Enforcement Services	Medical Services Policy Manual
DCO – Medicaid Eligibility	253.000 – Section F-172 Adjustments of Premiums	Medical Services Policy Manual
DCO – Medicaid Eligibility	255.000 – Section L-120 Continuation of Assistance or Services During Appeal Process	Medical Services Policy Manual
DCO – SNAP	282.000 – Provision for Impacted Students	Supplemental Nutrition Assistance Program Certification Manual
DCO – SNAP	284.000 – Work Participation for Able-Bodied Adults Without Dependents	Supplemental Nutrition Assistance Program Certification Manual
DCO – SNAP	285.000 – Supplemental Benefits	Supplemental Nutrition Assistance Program Certification Manual
DCO – TEA	291.000 – Section 2004 Application Interview and 2004.1 Personal Responsibility Agreement	Transitional Employment Assistance (TEA) Policy Manual

**PUBLIC COMMENT:** No public hearing was held on this proposed rule. The public comment period expired on May 10, 2021. The agency indicated that it received no public comments.

This rule was filed on an emergency basis and was reviewed and approved by the Executive Subcommittee on March 22, 2021. The proposed effective date for permanent promulgation is July 1, 2021.

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

Per the agency, the additional cost to implement this rule is \$70,699,701 for the current fiscal year (\$0 in general revenue and \$70,699,701 in federal funds) and \$141,399,402 for the next fiscal year (\$0 in general

revenue and \$141,399,402 in federal funds). There is no estimated cost (\$0) to state, county, and municipal government to implement this rule.

**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, along with the Division of Workforce Services, administers Arkansas’s Transitional Employment Assistance Program. *See* Ark. Code Ann. § 20-76-401(a)(2)(A). The Department also administers Arkansas’s Supplemental Nutrition Assistance Program (SNAP). *See* Ark. Code Ann. § 11-10-111(c).

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); *see also* Ark. Code Ann § 20-10-203(b). 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).

Portions of this proposed rule implement the Families First Coronavirus Response Act (P.L. 116-127, Mar. 8, 2020). Division B, Title III of the Act provided for SNAP flexibility for low-income jobless workers and additional SNAP flexibilities in a public health emergency. P.L. 116-127, §§ 2301-02. Division F of the Act provided a temporary increase to the Medicaid Federal medical assistance percentage (FMAP) determined for each state. P.L. 116-127, § 6008(b). However, a state may only receive that increase if individuals who were enrolled for benefits under a state plan or waiver at the time of the Act’s enactment or who subsequently enrolled in such benefits are “treated as eligible for such benefits through the end of the month in which [the COVID-19 national public health emergency] ends unless the individual requests a voluntary termination of eligibility or the individual ceases to be a resident of the State[.]” P.L. 116-127, § 6008(b)(3).

Other portions of this rule implement the Emergency Unemployment Insurance Stabilization and Access Act of 2020. The Act, part of the Families First Coronavirus Response Act, provided for emergency flexibility regarding modifications to “unemployment compensation law and policies with respect to work search, waiting week, good cause, or employer experience rating on an emergency temporary basis as needed to respond to the spread of COVID-19[.]” P.L. 116-127, § 4102(b).

6. **DEPARTMENT OF HUMAN SERVICES, DIVISION OF DEVELOPMENTAL DISABILITIES SERVICES (Mr. Mark White, Ms. Melissa Stone)**

a. **SUBJECT: DDS COVID-19 Response Manual**

**DESCRIPTION:**

Statement of Necessity

This rule is needed to render maximum assistance to the citizens of Arkansas so that the Division of Developmental Disabilities Services (DDS) may continue to provide services to its clients between the expiration of the public health emergency through the end of the year. The temporary provisions amend certain rules and provide guidance, safeguarding DDS with adequate time to close out temporary measures that will no longer be needed in coming months without creating a financial risk for the state.

DDS identifies certain rules needing temporary revision and the necessity of continuing guidance to providers and clients so that services provided by the agency are available for the remainder of the year or through the national health emergency. The rule contains certain rule suspensions and issued guidance that began in March 2020.. The provisions in the rule are temporary, expiring either on December 31, 2021, or upon the end of the federal public health emergency, as detailed in the rule.

Summary

DDS issues revisions, suspensions, and guidance in relation to certain rules. The affected areas and rules manuals affected are contained in the following chart:

<b>DDS Covid-19 Response Manual Section Number and Title</b>	<b>Regular Manual</b>
242.000 – Adult Developmental Day Treatment and Early Intervention Day Treatment Nursing Services Outside the Clinic	Adult Developmental Day Treatment Medicaid Provider Manual; Early Intervention Day Treatment Medicaid Provider Manual
243.000 – Prescription and Evaluation Extensions	Adult Developmental Day Treatment Medicaid Provider Manual; Early Intervention Day Treatment Medicaid Provider Manual; Child Health Services/Early and Periodic Screening, Diagnosis,

	and Treatment (EPSDT) Provider Manual; Occupational, Physical, Speech-Language Therapy Services Medicaid Provider Manual; Developmental Rehabilitation Services Medicaid Provider Manual
247.000 – Well Checks and Attendance Payments for Adult Developmental Day Treatment and Early Intervention Day Treatment	Adult Developmental Day Treatment Medicaid Provider Manual; Early Intervention Day Treatment Medicaid Provider Manual
248.000 – Community and Employment Support Waiver Supplemental Supports	Provider-Led Arkansas Shared Saving Entity (PASSE) Program Medicaid Provider Manual

**PUBLIC COMMENT:** No public hearing was held on this proposed rule. The public comment period expired on May 10, 2021. The agency indicated that it received no public comments.

This rule was filed on an emergency basis and was reviewed and approved by the Executive Subcommittee on March 22, 2021. The proposed effective date for permanent promulgation is July 1, 2021.

**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); *see also* Ark. Code Ann § 20-10-203(b). 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).

7. **DEPARTMENT OF HUMAN SERVICES, DIVISION OF MEDICAL SERVICES (Mr. Mark White, Ms. Elizabeth Pitman, Ms. Melissa Stone, Mr. Jay Hill, Ms. Patricia Gann)**

a. **SUBJECT: SPA 2021-0003 Medication Assisted Treatment**

**DESCRIPTION:** This proposed rule amends the Arkansas Medicaid State Plan to add a new section for Medication Assisted Treatment

(MAT). The addition implements guidance from the Centers for Medicare and Medicaid Services based on Section 1006(b) of the SUPPORT Act. The rule includes reimbursements based on the rate methodology used for individual MAT services provided within other sections of the Medicaid State Plan.

**PUBLIC COMMENT:** No public hearing was held on this proposed rule. The public comment period expired May 8, 2021. The agency indicated that it received no public comments.

The proposed effective date is July 1, 2021.

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

Per the agency, this rule implements a federal rule or regulation. The estimated cost to implement the federal rule or regulation is \$800,718.75 for the current fiscal year (\$230,366.78 in general revenue and \$570,351.97 in federal funds) and \$1,067,625 for the next fiscal year (\$304,032.91 in general revenue and \$763,592.09 in federal funds). The total estimated cost by fiscal year to state, county, and municipal government to implement this rule is \$230,366.78 for the current fiscal year and \$304,032.91 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 amend the State Plan to establish a separate and distinct Medication Assisted Treatment Program.

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

To comply with the Federal Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (SUPPORT Act), § 1902(a)(10)(A) of the Social Security Act, based on guidance from CMS's State Health Official Letter #20005, dated December 30, 2020.

*(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;*

Section 1902(a)(10)(A) of the Social Security Act, (SUPPORT Act) requires states to implement a Medication Assisted Treatment Program for Opioid Use Disorders for reimbursement by Medicaid. The rule seeks to assist clients in recovery from addiction to Opioids.

*(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;*

No alternatives have been identified.

*(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 comments were received.

*(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*

Not applicable.

*(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 cost.

**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); *see also* Ark. Code Ann § 20-10-203(b). 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 provisions from the federal SUPPORT Act, which altered the definition of medication-assisted treatment and required state Medicaid plans to provide coverage for medication-assisted treatment “for the period beginning October 1, 2020, and ending September 30, 2025[.]” 42 U.S.C. § 1396d(a)(29).

**b. SUBJECT: DMS COVID-19 Response Manual**

**DESCRIPTION:**

Statement of Necessity

The rule is needed to render maximum assistance to the citizens of Arkansas so that the Division of Medical Services (DMS) may continue to provide services to its clients between the expiration of the state public health emergency through the end of the year. The temporary provisions amend certain rules and provide guidance, safeguarding DHS with adequate time to close out temporary measures that will no longer be needed in coming months without creating a financial risk for the state.

DMS identifies certain rules needing temporary revision and the necessity of continuing guidance to providers and clients so that services provided by the agency are available for the remainder of the year or through the national health emergency. The rule continues certain rule suspensions and issued guidance that began in March 2020. The provisions in the rule are temporary, expiring on December 31, 2021.

Rule Summary

DMS issues revisions, suspensions, and guidance in relation to certain rules. The affected areas and rules manuals are contained in the following chart:

<b>DMS COVID-19 Response Manual Section Number &amp; Title</b>	<b>Regular Manual</b>
260.101 – Provider Enrollment fingerprint submission requirements	Medicaid Provider Manual Section I
261.100 – Ambulatory Surgical Center Provider Manual – Temporary Enrollment as Hospitals	Ambulatory Surgical Center – Medicaid Provider Manual

262.000 – Arkansas Independent Assessment Provider Manual – Temporary Use of Phone Assessments and Suspension of Timelines for Reassessments	Arkansas Independent Assessment (ARIA) – Medicaid Provider Manual
263.000 – Critical Access Hospital Provider Manual, End Stage Renal Disease Manual, Hospital Provider Manual – Use of Swing Beds	Critical Access Hospital – Medicaid Provider Manual
264.000 – Hospital Provider Manuals – Medicaid Utilization Management Program (MUMP) Review	Hospital – Medicaid Provider Manual
266.000 – Personal Care Manual – Annual Review and Renewal of Personal Care Service Plans	Personal Care – Medicaid Provider Manual
267.100 – Administration of Monoclonal Antibodies	Physician/Independent Lab/CRNA/Radiation Therapy Center Medicaid Provider Manuals
267.200 – Limitations on Outpatient Laboratory Services Related to a COVID-19 Diagnosis	Physician/Independent Lab/CRNA/Radiation Therapy Center Medicaid Provider Manuals
267.300 – Limitations on Outpatient Laboratory Services for COVID-19 Antigen Laboratory Testing with Procedure Code 87426	Physician/Independent Lab/CRNA/Radiation Therapy Center Medicaid Provider Manuals
267.400 – Limitations on Outpatient Laboratory Services for COVID-19 Laboratory Testing with Procedure Codes U0001, U0002, U0003, and U0004	Physician/Independent Lab/CRNA/Radiation Therapy Center Medicaid Provider Manuals
268.100 – Annual Limitations for Physician and Outpatient Hospital Visits (1) Treatment of COVID-19 by COVID-19 Diagnosis Codes (2) Physician and Nurse Practitioner Visits to Patients in Skilled Nursing Facilities	Physician/Independent Lab/CRNA/Radiation Therapy Center Medicaid Provider Manuals; Hospital Medicaid Provider Manual; Nurse Practitioner Medicaid Provider Manual
268.200 – Places for Delivery of Services by Physicians, Advanced Practice Registered Nurses, and Hospitals for Billing for a COVID-19 Screening and Diagnostic Testing at a Mobile (Drive-Thru) Clinic (Place of Service 15)	Physician/Independent Lab/CRNA/Radiation Therapy Center Medicaid Provider Manuals; Hospital Medicaid Provider Manual; Nurse Practitioner Medicaid Provider Manual; Rural Health Clinic Medicaid Provider Manual
269.000 – Transportation Provider Manual – Pick-up and Delivery Locations and Physician Certification Prior to	Transportation Medicaid Provider Manual

Transport by Non-emergency Ground Ambulance	
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**PUBLIC COMMENT:** No public hearing was held on this proposed rule. The public comment period expired on May 10, 2021. The agency provided the following summary of the public comments it received and its responses to those comments.

Commenter's Name: Jaqueline Pendleton, on behalf of Summit Community Care

**1:** 264.000 Hospital Provider Manuals: Medicaid Utilization Management Program (MUMP): Section 212.500 through 212.550 concerning PA requirements related to MUMP review for hospital stays greater than 4 days are suspended through date of service 12/31/2021; all hospital stays through date of service 12/31/2021 are subject only to retrospective review. This includes transfers between hospitals.

Are we mandated to abide by this entire rule? If a PASSE has no capacity or process in place to request retrospective reviews, this could lead to increased abrasion and possible recoupment if medical necessity denials are issued retrospectively. Suggest this be amended to include only COVID-diagnosis hospitalizations.

**RESPONSE:** This suspension is in regard to section 212.500 through 212.55 which is in reference to the DHS Quality Improvement Organization, Arkansas Foundation for Medical Care (AFMC), to determine covered lengths of stay in acute care/general and rehabilitative hospitals. This is in regard to AFMCs reviews in the FFS program.

**2:** 266.00 Personal Care Manual: Annual Review and Renewal of Personal Care Service Plans: Section 214.200 concerning annual review and renewal of PCSPs is suspended through 12/31/2021.

Is this a mandate or suggestion? Is this PASSE specific?

**RESPONSE:** 266.000 Personal Care Manual is suspending section 214.200 Service Plan Review and Renewal. This section is specific to state plan personal care services and the work done with EQ Health. This is not a PASSE suspension of PCSPs.

This rule was filed on an emergency basis and was reviewed and approved by the Executive Subcommittee on March 22, 2021. The proposed effective date for permanent promulgation is July 1, 2021.

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

Per the agency, the estimated cost to implement this rule is \$0 for the current fiscal year and \$584,549 for the next fiscal year (\$166,655 in general revenue and \$417,894 in federal funds). The total estimated cost by fiscal year to state, county, and municipal government to implement this rule is \$0 for the current fiscal year and \$166,655 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;*

In response to the COVID-19 pandemic, the Department of Human Services identified programs and services that required additional flexibility or changes to adapt to ensuring the health and safety of our clients.

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

This is an extension of a current emergency rule expiring 7/29/21 and will extend the provisions until 12/31/21.

*(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;*

Due to the COVID-19 pandemic, additional flexibility or changes are needed to adapt to ensuring the health and safety of our clients.

*(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;*

Not applicable.

*(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;*

Not applicable.

*(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;*

The existing rules prior to the emergency extension would not have allowed the agency to adequately address the PHE.

*(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 continually monitors all rules to ensure we are achieving statutory and programmatic objectives.

**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); *see also* Ark. Code Ann § 20-10-203(b). 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).

c. **SUBJECT: DHS Telemedicine COVID-19 Response Manual**

**DESCRIPTION:** This rule is needed to render maximum assistance to the citizens of Arkansas so the Department of Human Services (DHS) may continue to provide services to its clients between the expiration of the public health emergency through the end of the year. The temporary provisions amend certain rules and provide guidance, safeguarding DHS with adequate time to close out temporary measures that will no longer be needed in coming months without creating a financial risk for the state.

DHS identified certain rules needing temporary revision and the necessity of continuing guidance to providers and clients so that services provided

by the agency are available for the remainder of the year or through the national health emergency. The rule continues certain rule suspensions and issued guidance that began in March 2020. The provisions in the rule are temporary, expiring either on December 31, 2021, or upon the end of the federal national health emergency, as detailed in the rule.

The affected areas and rules manuals are as follows:

DDS Developmental Rehabilitation Services Medicaid Provider Manual (COVID-19 Response Manual Section 241.000—First Connections Developmental Therapy Telemedicine)

DDS Occupational, Physical, Speech-Language Therapy Services Medicaid Provider Manual (COVID-19 Response Manual Section 244.000—Telemedicine for Occupational, Physical, and Speech Therapists and Assistants)

DDS Child Health Services/Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Medicaid Provider Manual (COVID-19 Response Manual Section 245.000—Telemedicine for Applied Behavioral Analysis (ABA) by a BCBA)

DDS Autism Waiver Medicaid Provider Manual (COVID-19 Response Manual Section 246.000—Telemedicine for Autism Waiver)

DMS Medicaid Provider Manual Section I (COVID-19 Response Manual Section 260.102—Telemedicine Originating Site Requirements for APRNs and Section 260.103—Telemedicine Originating Site Requirements to Allow Services to a Beneficiary in His or Her Home Through Date of Service December 31, 2021)

DMS Outpatient Behavioral Health Services—Medicaid Provider Manual (COVID-19 Response Manual Section 265.100—Behavioral Health Telemedicine Services)

**PUBLIC COMMENT:** No public hearing was held on this proposed rule. The public comment period expired on May 10, 2021. The agency provided the following summary of the public comments it received and its responses to those comments.

Commenter's Name: Jaqueline Pendleton, on behalf of Summit Community Care

**1:** 241.00 First Connections Developmental Therapy Telemedicine: allows telehealth for developmental therapy (T1027, T1027UB).

We do not recall this from previous memos. Is this a new requirement and does it extend through only the emergency?

**RESPONSE:** Memorandum DMS-40 was dated 5/7/2020. The proposed rule in the DHS Telemedicine COVID-19 Response Manual extends it through 12/31/2021.

**2:** 260.102 Telemedicine Originating Site Requirements for APRNs: “Virtual Patient Check Ins” allows use of a virtual check-in (G2012) to be used to assess whether an established patient needs an office visit.

We do not recall this from previous memos. Is this a new requirement/suggestion for this COVID period? We have concerns this might set a precedent.

**RESPONSE:** Memorandum DMS-05 was dated 3/31/2020. The proposed rule in the DHS Telemedicine COVID-19 Response Manual extends it through 12/31/2021.

Commenter’s Name: Joel Landreneau, Esq., Crochet & Landreneau, PLLC, Attorneys at Law

**1:** I appreciate this opportunity to comment on the rule promulgation currently out for public comment regarding the use of telemedicine in the Medicaid program.

Individual Psychotherapy

This manual explicitly states that Marital/Family Psychotherapy can be delivered via telemedicine, and specifically, via telephones. This was one of the changes made by the rule suspensions adopted in the original response to COVID-19.

What is not explicit is that the use of telephone-only will continue to be authorized for Individual Psychotherapy. This was also a rule suspension issued by the Department pursuant to the Governor’s Executive Order 20-06, which has not been renewed. On a prior occasion, I asked the Department if telephone-only will still be permitted for Individual Psychotherapy, and I was directed to the Department’s FAQ page which states that it is, but which was dated May, 2020, and was issued under the authority of the now-expired 20-06.

My question is: will telephone-only still be acceptable for Individual Psychotherapy, and if so, under what authority? These draft rules do not address it. I would like to suggest reliance on the following language contained in Act 829 that has recently been enacted, and with an emergency clause, is in force already:

28

29 SECTION 4. Arkansas Code § 23-79-1601(7), concerning the definition of  
30 "telemedicine", is amended to read as follows:

31 (7)(A) "Telemedicine" means the use of electronic information  
32 and communication technology to deliver healthcare services, including  
33 without limitation the assessment, diagnosis, consultation, treatment,  
34 education, care management, and self-management of a patient.

35 (B) "Telemedicine" includes store-and-forward technology

3

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1 and remote patient monitoring.

2 (C) For the purposes of this subchapter, "telemedicine"  
3 does not include the use of:

4 (i)(a) Audio-only communication, including without  
5 limitation interactive audio unless the audio-only communication is real-  
6 time, interactive, and substantially meets the requirements for a healthcare  
7 service that would otherwise be covered by the health benefit plan.

8 (b) As with other medical services covered by  
9 a health benefit plan, documentation of the engagement between patient and  
10 provider via audio-only communication shall be placed in the medical record  
11 addressing the problem, content of conversation, medical decision-making, and  
12 plan of care after the contact.

The way this reads, it seems as though health insurers are given some discretion to determine if "audio-only communication . . . substantially meets the requirements for a healthcare service" (Individual Psychotherapy) that would otherwise be covered by the benefit plan. For the sake of clarity, it would be helpful if DHS state clearly how they intend to treat audio-only telemedicine delivery, and to make this determination and state so in these proposed rules. I would repeat this request for the other services mentioned as well: Mental Health Diagnosis, Substance Abuse Assessment, and Crisis Intervention.

**RESPONSE:** Audio only will continue to be allowed. Per your comment, Act 829 pertaining to audio-only communication is already in effect. DMS is taking steps to revise and promulgate its manuals as timely as the process will permit.

## **2: Originating Site definition**

Section 260.103 continues the suspension that allows the originating site to be the client's own home. This suspends Section 105.190 in the original manual, which is a provision of general application throughout the Medicaid program. Therefore, it would appear that this rule suspension would apply to behavioral health as well. However, all of the discussion that follows under this title applies only to physicians, nurse practitioners, and physician's assistants. It should be made clear whether this suspension is generally applicable to all provider types, or only to physicians and their assistants.

This, too, is the subject of recent legislation. Act 767 of 2021 applies the definition "originating site" to "healthcare services," which is broader than just physician services. Likewise, this law defines "originating site" as including the home of the patient. However, Act 767 does not have an emergency clause, so it is not in effect yet. It is important for behavioral health care providers to know that this rule suspension applies to their services as well.

At the time these proposed rules were published, these two bills from 2021 had not yet become law. I would suggest adding them to the list of authorizing legislation under which this manual is promulgated.

**RESPONSE:** Section 260.103 addresses suspension of the originating site requirement to allow all providers who can provide telemedicine services to a beneficiary in his or her home through the date of service December 31, 2021. DMS is currently initiating revisions to telemedicine rule to promulgate in accordance with Act 767 of 2021 in as timely a manner as the process will permit.

**3:** I would like to request that you add Supplemental Support to the list of services that can be delivered via audio-only telemedicine. This was allowed during the emergency declaration, and that service is allowed via telemedicine under Act 624 of 2021, but there is no specificity that telephone-only is allowed. This is a short service to check on well-being, and delivery via telephone is valuable.

**RESPONSE:** Section 248.000 of the DDS COVID-19 Response Manual addresses Supplemental Supports.

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

**Q:** The proposed rules indicate that, in an emergency situation, DMS has the authority to relax the requirement that a provider have an established

relationship with a patient before using telemedicine. I see that Ark. Code Ann. § 17-80-403(a)(2)(A) allows exceptions to the established relationship requirement if “the life or health of the patient is in danger or imminent danger.” Is this the authority DMS is relying upon for the proposed rule or is there some other source for this provision?

**Response:** Yes.

This rule was filed on an emergency basis and was reviewed and approved by the Executive Subcommittee on March 22, 2021. The proposed effective date for permanent promulgation is July 1, 2021.

**FINANCIAL IMPACT:** The agency indicated that this proposed 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); *see also* Ark. Code Ann § 20-10-203(b). 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).

d. **SUBJECT: Living Choices Assisted Living Facility Waiver Renewal; LCAL 2-20**

**DESCRIPTION:**

Statement of Necessity

CMS approves HCBS waivers for a period of 5 years. The Living Choices Assisted Living waiver expired 1/31/2021 and is currently operating under a temporary extension. This extension will allow DHS to align the waiver start date with the beginning of the state’s fiscal year.

Rule Summary

With this renewal cycle, the roles and responsibilities of the operating agencies (DMS, DAABHS, DPSQA, and DCO) are clarified. In addition, the appeals process is changing to an automatic continuation of benefits during the appeal process unless the waiver beneficiary opts out. Rates for services are being updated for the next 5 years. The Provisional Service Plan option is being removed.

**PUBLIC COMMENT:** A public hearing was held on this rule on April 16, 2021. The public comment period expired on May 13, 2021. The agency indicated that it received no public comments.

The proposed effective date is July 1, 2021.

**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).

8. **DEPARTMENT OF HUMAN SERVICES, DIVISION OF PROVIDER SERVICES AND QUALITY ASSURANCE (Mr. Mark White, Ms. Sarah Schmidt)**

a. **SUBJECT: Division of Provider Services and Quality Assurance (DPSQA) COVID-19 Response Manual**

**DESCRIPTION:**

Statement of Necessity

This rule is needed to render maximum assistance to the citizens of Arkansas so that the Division of Provider Services and Quality Assurance (DPSQA) may continue to provide services to its clients between the expiration of the public health emergency through the end of the year. The temporary provisions amend certain rules and provide guidance, safeguarding DHS with adequate time to close out temporary measures that will no longer be needed in coming months without creating a financial risk for the state.

DPSQA identifies certain rules needing temporary revision and the necessity of continuing guidance to providers and clients so that services provided by the agency are available for the remainder of the year or throughout the national health emergency. The rule contains certain rule suspensions and issued guidance that began in March 2020. The

provisions in the rule are temporary, expiring either on December 31, 2021, or upon the end of the federal national health emergency, as detailed in the rule.

Rule Summary

DPSQA issues revisions, suspensions, and guidance in relation to certain rules. The affected areas and rules manuals affected are contained in the following chart:

<b>DSPQA COVID-19 Response Manual – Section Number and Title</b>	<b>Regular Manual</b>
271.000 – Pre-Admission Screening for Nursing Facility Residents Potentially MI/DD	Procedures for Determination of Medical Need for Nursing Home Services
272.000 – Therapeutic Community Direct Service Requirements	Therapeutic Communities Certification Manual

**PUBLIC COMMENT:** No public hearing was held on this proposed rule. The public comment period expired on May 10, 2021. The agency indicated that it received no public comments.

This rule was filed on an emergency basis and was reviewed and approved by the Executive Subcommittee on March 22, 2021. The proposed effective date for permanent promulgation is July 1, 2021.

**FINANCIAL IMPACT:** The agency indicated that the proposed 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); *see also* Ark. Code Ann § 20-10-203(b). 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).

9. **DEPARTMENT OF LABOR AND LICENSING, DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING BOARDS AND COMMISSIONS, STATE BOARD OF BARBER EXAMINERS** (Ms. Denise Oxley, Ms. Phyllis Jacobsen)

a. **SUBJECT: Rule 7: Director and Investigator/Inspector Requirements, Rules Regarding Barbering**

**DESCRIPTION:** The proposed amendment to Rule 7 of the State Board of Barber Examiners would eliminate the requirement that an employee of the board seeking the Director's position would have to have two years of experience as a board investigator. The applicant would still be required to have two years of experience as a board employee, just not in an investigator position. The alternative qualification of five years of experience as a barber would remain unchanged.

**PUBLIC COMMENT:** A public hearing was not held in this matter. The public comment period expired on May 10, 2021. The State Board of Barber Examiners received no comments.

The proposed effective date is pending legislative review and approval.

**FINANCIAL IMPACT:** The State Board of Barber Examiners indicated that the proposed rule does not have a financial impact.

**LEGAL AUTHORIZATION:** The State Board of Barber Examiners has authority to make and promulgate reasonable rules for the administration of Title 17, Chapter 20 concerning barbers. *See* Ark. Code Ann. § 17-20-206(a).

E. **Agency Updates on Delinquent Rulemaking under Act 517 of 2019.**

1. **Department of Agriculture, Arkansas Bureau of Standards (Act 501)  
(REPORT BY LETTER PURSUANT TO MOTION ADOPTED AT JULY  
22, 2020 MEETING)**

F. **Adjournment.**