

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

DEPARTMENT/AGENCY Department of Human Services
DIVISION Office of Chief Counsel
DIVISION DIRECTOR David Sterling
CONTACT PERSON Brad Nye
ADDRESS P.O. Box 1437, Slot N501
PHONE NO. (501) 320-6306 **FAX NO.** _____ **E-MAIL** Brad.nye@dhs.arkansas.gov
NAME OF PRESENTER AT COMMITTEE MEETING David Sterling
PRESENTER E-MAIL David.Sterling@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, 5th Floor
Little Rock, AR 72201

1. What is the short title of this rule? 1098 Appeals and Hearings Procedure
2. What is the subject of the proposed rule? The purpose of the proposed rule is to update DHS Appeals and Hearings Policy to provide specific protection for minors testifying in DCFS maltreatment hearings.
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? March 6, 2018
- When does the emergency rule expire? June 30, 2018
- Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act? Yes No

5. Is this a new rule? Yes No
If yes, please provide a brief summary explaining the regulation. _____

Does this repeal an existing rule? Yes No
If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does.

Is this an amendment to an existing rule? Yes No
If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes.
Note: The summary should explain what the amendment does, and the mark-up copy should be clearly labeled "mark-up."

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 et seq.

7. What is the purpose of this proposed rule? Why is it necessary? This rule change updates DHS Appeals and Hearings Policy to protect minors who are testifying in DCFS maltreatment hearings.

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/general/comment/comment.aspx>

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

Date: N/A

Time: N/A

Place: N/A

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

11. What is the proposed effective date of this proposed rule? (Must provide a date.)
Mar. 6, 2018

12. Please provide a copy of the notice required under Ark. Code Ann. § 25-15-204(a), and proof of the publication of said notice. N/A – Emergency Rule

13. Please provide proof of filing the rule with the Secretary of State and the Arkansas State Library as required pursuant to Ark. Code Ann. § 25-15-204(e). N/A – Emergency Rule

14. Please give the names of persons, groups, or organizations that you expect to comment on these rules? Please provide their position (for or against) if known. Unknown.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT Department of Human Services

DIVISION Office of Chief Counsel

PERSON COMPLETING THIS STATEMENT David Sterling

TELEPHONE 501-320-6306 **FAX** _____ **EMAIL:** David.Sterling@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 1098 Appeals and Hearings Procedures

- 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

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total 0 _____

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total 0 _____

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

Current Fiscal Year

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total 0

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total 0

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

Current Fiscal Year

Next Fiscal Year

\$ 0

\$ 0

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

Next Fiscal Year

\$ 0

\$ 0

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes No

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
 - (a) justifies the agency's need for the proposed rule; and
 - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
 - (a) the rule is achieving the statutory objectives;
 - (b) the benefits of the rule continue to justify its costs; and
 - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

1098.0 APPEALS AND HEARINGS PROCEDURES

1098.1 Policy

Department of Human Services (DHS) administrative adjudications are to be conducted impartially, timely, fairly, professionally, and objectively, and are to lead to decisions that are consistent with applicable state and federal laws.

1098.2 Definitions

1098.2.1 Administrative Adjudication: the process for the formulation of an order.

1098.2.2 APA: The Arkansas Administrative Procedure Act, beginning at Ark. Code Ann. §25-15-201.

1098.2.3 Appellant: the party applying for DHS services or appealing DHS adverse action.

1098.2.4 Burden of Proof: The responsibility to establish a proposition by sufficient evidence. An appellant seeking to establish eligibility for DHS benefits or services has the burden of proving his or her eligibility. If the appeal challenges DHS adverse action, DHS has the burden of proving the facts necessary to support the adverse action.

1098.2.5 Conflict of Interest: a situation where, with respect to the claim or controversy before the hearing official, the official:

A. has been a party or acted as an advocate for a party; or

B. has a direct or indirect financial interest. A financial interest is indirect if it exists through the hearing official's spouse, child, parent, sibling, or grandparent, or through the hearing official's ownership or management interest in any entity having a financial interest.

1098.2.6 DHS The Department of Human Services

1098.2.7 Process Procedures: procedures assuring that appellants have notice of the denial or other action, notice of the administrative adjudication proceedings, and an opportunity during those proceedings to appear, be represented, be heard, offer evidence and arguments, and call and cross examine witnesses.

1098.2.8 Financial Interest: more than a remote possibility of a gain or loss resulting from the outcome of the claim or controversy.

1098.2.9 Good Cause: Substantial reason, that which a reasonably prudent and intelligent person would find justifiable.

1098.2.10 Hearing Official: an administrative law judge or hearing officer employed by the Office of Administrative Hearings (OAH).

1098.2.11 Impartiality: the absence of bias or prejudice or the appearance of bias or prejudice, in the hearing official's application of the agency's special knowledge and expertise to

the issues under consideration. An appearance of bias or prejudice exists if any party has reasonable cause to question the hearing official's impartiality.

1098.2.12 OAH: the Office of Appeals and Hearings of the Department of Human Services.

1098.2.13 Order: a final agency determination that may be appealed to a circuit court under the APA.

1098.2.14 Party: the person asking for the administrative adjudication, and the DHS division or office, acting through its employees, which made the decision or took the action being appealed.

1098.2.15 Reasonable Cause: circumstances sufficiently strong to warrant a cautious person's belief that an allegation is true.

1098.2.16 Recusal: an order disqualifying the hearing official from hearing the appeal.

1098.2.17 Relevant Evidence: evidence tending to make the existence of any fact that is of consequence to the administrative adjudication more probable or less probable than it would be without the evidence.

1098.2.18 Representative: a person selected by a party to present that party's statements, arguments, and evidence during the administrative adjudication process. A corporation or association cannot be a representative.

1098.3 Right to Administrative Adjudication: Unless a different administrative remedy is provided by statute, regulation, or rule, any person denied DHS assistance, and any person entitled by state or federal law or rule to appeal an adverse DHS action, may initiate an administrative adjudication by submitting a written appeal in compliance with the requirements applicable to the assistance denied or adverse action taken.

1098.4 Notice of Representative: Appellants who intend to be represented at any stage of an adjudication must notify OAH of the name, address, and telephone number of the representative as soon as possible, and at least ten business days before any hearing. Appellants who fail to comply with this requirement must choose to: (1) proceed without representation; or (2) request that the hearing be delayed to afford the agency at least ten business days to secure representation, if the request includes a waiver of any timeframe that is inconsistent with the delay.

1098.5 Interpreters: If any party requires an interpreter, due to hearing impairment or an inability to communicate in the English language, the party must notify OAH of the need for an interpreter at least ten business days before a hearing. OAH will immediately direct DHS to secure the services of an interpreter. If the party requiring an interpreter does not furnish timely notice of the need for an interpreter, the hearing will be rescheduled. If the new schedule fails to comply with any applicable timeframe, the party requiring an interpreter will be deemed to have waived that timeframe.

1098.6 Timeframes: Most DHS programs have time limitations for the completion of administrative adjudications. Timeframes are the bases for hearing schedules. Failure to meet a timeframe does not deprive OAH of jurisdiction to administratively adjudicate the appeal, but may be the basis for one or more orders directing parties to take certain actions in a timely manner, and may warrant sanctions against parties that fail to follow OAH orders.

1098.7 Resolution without a Hearing: There are four ways to end an administrative adjudication without a hearing:

1098.7.1 DHS withdraws the adverse action on the record at the hearing or in writing before the hearing

1098.7.2 The appellant withdraws the appeal request on the record at the hearing or in writing before the hearing

1098.7.3 The parties reach a mutually agreeable resolution of the appeal and file written notice of settlement explaining the terms of the settlement; or

1098.7.4 OAH dismisses the appeal as defective.

1098.8 Hearings

1098.8.1 Special Types of Hearings

A. Special Nutrition Program: See Family Day Care Home (FDCH)-3.

B. Medical Necessity/ Medical Disability Decisions:

1. The hearing official will notify the appellant in writing that if the appellant has evidence regarding the initial application and asserted disability, the appellant must provide the information to the hearing official or complete a "Consent for Release of Information" form as soon as possible and before the hearing.
2. The hearing will not be delayed for failure to submit additional evidence.
3. Evidence presented to the hearing official will be limited to evidence of eligibility as of the date of denial by DHS. The hearing official will refuse evidence about subsequent medical necessity/disability and advise the applicant to submit a new application to DHS.
4. A physician employed by DHS to review denials will be available by phone for the hearing if requested or subpoenaed by any party.
5. The hearing official will hear medical and non-medical evidence regarding eligibility. The hearing official will make the final decision regarding eligibility.

1098.8.2 Hearing Officials: Each hearing official must act impartially.

- A. Hearing officials must not have communication with any party to an administrative adjudication if any other party is excluded from the communication, except that the following communications are acceptable:
 - 1. Communication necessary to schedule hearings and the submission of exhibits and arguments; or
 - 2. Communication necessary to identify, without comment or argument, any exhibits or documents being delivered to OAH.
- B. Conflict of Interest:
 - 1. Any hearing official having a conflict of interest must notify the OAH Managing Administrative Law Judge immediately upon discovering a conflict of interest, and must not take any further action regarding the claim or controversy.
 - 2. A hearing official must recuse if the hearing officer has personal knowledge of the facts of the case or has a conflict of interest.
 - 3. A hearing official should recuse if any party has reasonable cause to suspect that the hearing officer may not be impartial.

1098.8.3 Attendance: Administrative adjudications are public proceedings, and are open to the public subject to state and federal confidentiality laws and rules. An appellant may waive his or her right to confidentiality, but may not waive another's right to confidentiality. For example, an appellant may not waive an alleged child victim's right to confidentiality in a child maltreatment case; may not waive a nursing home resident's right to confidentiality in an adult abuse or neglect case; and may not waive a child's right to confidentiality in a Special Nutrition case.

- A. The hearing official may determine that a party is physically or mentally unable to attend or participate, or that the party's presence will so disrupt the proceedings that the adjudication cannot continue in an orderly fashion unless the party is excluded. Party representatives may be present at all stages of the proceedings unless the hearing official determines that a representative's presence will so disrupt the proceedings that the adjudication cannot continue in an orderly fashion unless the representative is excluded.
- B. Interpreters may be present when necessary to facilitate communication before and during a hearing. Interpreters shall be placed under oath before interpreting testimony. The following oath is suggested: "Do you solemnly affirm that you will truthfully and accurately interpret all questions and answers?"
- C. Witnesses may be present unless: (i) any party has asked that the witnesses be excluded except while testifying; or (ii) the evidence is confidential by state or federal law or rule, and disclosing the evidence to a non-testifying witness would violate that confidentiality. If witnesses are excluded from the hearing, the witnesses shall be instructed that until a witness is released, that witness must not

discuss the evidence with another witness, and must not discuss any other witness's testimony with anyone.

- D. Observers will be excluded if the evidence to be presented is confidential under state or federal law or rule, and disclosing the evidence to the observer would violate that state or federal law or rule.
- E. News media: Persons representing the news media will be excluded if the evidence to be presented is confidential under state or federal law or rule, and disclosing the evidence to the observer would violate that state or federal law or rule.

1098.8.4 Opening and Closing Statements: Each party may be given an opportunity to make an opening and closing statement, limited to ten minutes unless the issues are so complex that the hearing official determines that more time is required to adequately explain the parties' contentions.

1098.8.5 Questions Allowed: Questioners may ask only one question at a time. Questions may not take the form of statements or contentions, and must not be asked in such a way as to bully or intimidate a witness.

1098.8.6 Newly acquired evidence:

- A. Admissible evidence that was not submitted to the person or persons who made the decision under appeal may be admitted in appeals under Ark. Code Ann. § 12-12-512 or § 5-28-211. Newly acquired evidence may be admitted in other appeals only if the evidence:
 - 1. concerns events or circumstances predating the application, request, or decision under appeal; and
 - 2. could not have been obtained by the party offering the evidence despite that party's due diligence in acquiring evidence.
- B. If the hearing official determines that newly acquired evidence is admissible, the hearing official shall return the case to the decision-maker so that the newly acquired evidence may be considered, or shall determine that there is good cause not to return the case. Each good cause finding and the reasons therefore shall be stated in the findings of fact and conclusions of law.

1098.8.7 Allowing additional evidence after the hearing: If a request to receive additional identified and specifically described evidence is made at the hearing, OAH may for good cause hold the hearing record open for a specified period of time to receive additional admissible and relevant evidence that will assist the hearing official in deciding the case.

1098.9 Commencement of Administrative Adjudication

1098.9.1 Each appeal shall begin with the filing of a written notice of appeal in the time and manner specified for the subject matter of the appeal.

- 1098.9.2 Upon receipt of a sufficient and timely notice of appeal, the OAH shall assign a number to the appeal, schedule the appeal for a hearing within the applicable timeframe, and mail written notice of the time, date, and place of the appeal to the parties by regular mail posted at least thirteen days before the date of the hearing. DHS parties may be notified by interdepartmental mail or by DHS E-mail. Notice is presumptively complete upon mailing or upon transmission by interdepartmental mail or DHS E-mail.
- 1098.9.3 Upon receipt of an untimely notice of appeal OAH shall notify the appellant that the appeal was not filed in time. The notice shall be sent by certified mail, return receipt requested, and shall inform the person that he or she may have a right under the APA to appeal OAH's determination of untimely filing.
- 1098.9.4 Upon receipt of an appeal filed other than in the manner specified for the subject matter of the appeal, the OAH shall inform the appellant that the appeal was defective, and explain the defect. The notice shall be sent by certified mail, return receipt requested, and shall inform the appellant that he or she may have a right under the APA to appeal OAH's determination that the appeal was defective.
- 1098.10 Discovery:** Discovery is the process whereby one party requests documents from the other party, submits written interrogatories to the other party, or takes witness depositions by phone or in person. If one or more parties want to have discovery, the parties are encouraged to agree informally on discovery procedures. If the parties cannot agree, any party may ask the hearing official to enter a discovery order. All discovery orders will be guided generally by the Arkansas Rules of Civil Procedure regarding discovery, except as necessary to meet timeframes or otherwise fit the administrative adjudication process.
- 1098.11 Securing the Attendance of Witnesses:** Witnesses may appear voluntarily or involuntarily if properly served with a subpoena. Subpoenas direct the witness to appear and give testimony at a specified time and place, and also may direct the witness to bring documents. To obtain a witness subpoena, parties must follow the instructions on the attached subpoena request form. OAH must receive each subpoena request at least ten business days before the hearing. Each party is responsible for serving (delivering) each subpoena in accordance with Rule 45 of the Arkansas Rules of Civil Procedure.
- 1098.12 Postponements:** Any party may request that a hearing be rescheduled to a later date. Requests should be made in writing and delivered to OAH and all other parties. Verbal requests must be followed by a written request mailed or faxed no later than one business day after the verbal request. Except in cases of actual emergency, all postponement requests must be received at least ten days before a hearing. OAH shall deny DHS postponement requests that are incompatible with appeal timeframes. OAH may for good cause grant other postponement requests. Any postponement order that is incompatible with appeal timeframes shall notify the party requesting the continuance that his or her request is deemed a waiver of any objections, defenses, or both based on timeframes.

1098.13 Location of Hearings: Hearings may be held in the OAH office at 7th and Main Streets in Little Rock, Arkansas, in the county office in the county where the appellant resides, by telephone, or by videoconference.

1098.14 Failure to appear: Regardless of whether the appellant is represented, the appellant must appear in person for all hearings regarding program eligibility or program services, or show good cause why he or she cannot be present. If any party fails to appear (either in person or by telephone) within fifteen minutes after the hearing was scheduled to begin, OAH will confirm that the party had proper notice of the hearing and will attempt to contact the absent party. The hearing official may allow an additional fifteen minutes before beginning the hearing. When the hearing begins, the hearing official will identify for the record any party not present in person or by telephone. If the appellant does not appear, the appeal shall be deemed abandoned, subject to reopening on a showing that the appellant exercised due diligence but was unable to appear due to circumstances beyond the appellant's control. If the agency does not appear, the hearing official may proceed with the hearing and may consider any hearing statements or other documents submitted by the agency.

1098.15 Burden of Going Forward: When a hearing begins, the burden of going forward is on the party with the burden of proof. When that party has presented his or her evidence, the burden of going forward shifts to the other party. After that evidence is submitted, the party with the burden of proof may offer rebuttal evidence. For example, if a person named as a perpetrator of child maltreatment appeals the maltreatment finding, DHS has the burden of proof so it presents evidence first. The appellant then presents his or her evidence. After that, DHS may present rebuttal evidence. This process may continue until the party with the burden of proof decides to offer no more evidence.

1098.16 Order of Witnesses: The party with the burden of proof goes first. Each party determines the order in which to call its own witnesses. The hearing official may direct, or the parties may agree, to take one or more witnesses out of turn, for example, to accommodate the witness's schedule or expedite the hearing process.

Maltreatment Victim and Child Witnesses: In all maltreatment appeal hearings, the testimony of alleged victims and all child witnesses under the age of 18 shall be taken outside the presence of the Petitioner. Testimony from child witnesses and alleged victims shall be taken in one of the following manners:

(1) The victim or child may be physically present in the hearing room while the Petitioner listens in from another location by phone;

(2) The victim or child may testify by phone or live camera (FaceTime, audio-visual) from another location but the child or victim shall not face nor hear from the Petitioner;

(3) The victim or child may testify by other reasonable accommodations agreed upon by both parties as long as the Petitioner is not in the same room with the child or the victim and the child or victim can't see or hear the Petitioner; or,

(4) Previously recorded video or audio interviews also known as “safety assessments” with a victim may be introduced as evidence and shall be given the same weight as if the victim testified in person. The entire interview is subject to scrutiny at the hearing.

If the hearing is taking place in a county office and a child is scheduled to testify at a hearing, the hearing official shall notify the DCFS county supervisor in that county office and direct that appropriate arrangements are made. At the time and date of the hearing, the DCFS county supervisor shall provide:

- (1) A supervised waiting room for children; and,
- (2) A room with a telephone by which the Petitioner can listen to the child’s testimony when the child is called into the hearing room to testify.

Child witnesses or victims shall not be questioned by the Petitioner. If the Petitioner doesn’t have a representative to ask the victim or child witness questions, the Petitioner shall write them down for the hearing official to ask. The agency is not required to call any child maltreatment victims to testify in appeal hearings if doing so would unnecessarily traumatize the child (See AR DHS v. A.B., 374 Ark. 193 (2008)). Upon the request of the agency or the child’s parent or guardian, the hearing official may designate a “comfort person” to remain with the child before, during, and after testifying.

- 1098.17 Record Made:** OAH will tape record each hearing. If the OAH decision is appealed, OAH will prepare a transcript or cause a transcript to be prepared for filing in the circuit court as provided in the APA.
- 1098.18 Findings of Fact and Conclusions of Law:** Each OAH decision will be in writing and will separately set out findings of fact, conclusions of law, and an order. OAH will furnish each party a copy of the findings of fact, conclusions of law, and order by mailing a copy to the party's last known address by certified mail, return receipt requested.
- 1098.19 Reconsideration:** Within ten calendar days of a party’s receipt of the findings of fact, conclusions of law, and the order, any party may request reconsideration. Simultaneous to a request for reconsideration, the party shall notify the opposing party of the request.
- 1098.20 Grounds for Reconsideration:** Reconsideration is for the limited purposes of correcting material misstatements of the record, clear errors of law, or both. Each request for reconsideration must state in plain terms the grounds upon which the requestor relies. OAH shall summarily deny any reconsideration that asks OAH to receive additional evidence, exercise its discretion differently, or modify or reverse any finding, conclusion, or order for any reason other than correcting material misstatements of the record, clear errors of law, or both.

- 1098.21 Reconsideration Process:** Any party requesting reconsideration shall provide to OAH proof of notice to the opposing party. The opposing party shall have ten calendar days from the receipt of the notice to respond to the request. If necessary, OAH may reconvene both parties for argument on the request for reconsideration and shall notify both parties of a reconsideration conference.
- 1098.22 Reconsideration Decision:** If OAH determines that there are good and sufficient grounds for reconsideration, it shall amend the findings of fact, conclusions of law, and decision as necessary to correct any material misstatement of the record, clear error of law, or both. OAH shall issue any amended findings of fact, conclusions of law, and order within thirty calendar days of receiving the reconsideration request, unless the period for the reconsideration decision is waived. The amended findings of fact, conclusions of law, and order shall be the final agency determination as provided in the APA. OAH shall furnish copies of the amended findings of fact, conclusions of law, and order to the parties as provided in 1098.18.
- 1098.23 Final Agency Determination:** If OAH does not receive a written request for reconsideration within ten calendar days of a party's receipt of the initial findings of fact, conclusions of law, and order, the initial findings of fact, conclusions of law, and order shall become the final agency determination as provided in the APA.

1098.0 APPEALS AND HEARINGS PROCEDURES

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1098.4 Notice of Representative: Appellants who intend to be represented at any stage of an adjudication must notify OAH of the name, address, and telephone number of the representative as soon as possible, and at least ten business days before any hearing. Appellants who fail to comply with this requirement must choose to: (1) proceed without representation; or (2) request that the hearing be delayed to afford the agency at least ten business days to secure representation, if the request includes a waiver of any timeframe that is inconsistent with the delay.

1098.5 Interpreters: If any party requires an interpreter, due to hearing impairment or an inability to communicate in the English language, the party must notify OAH of the need for an interpreter at least ten business days before a hearing. OAH will immediately direct DHS to secure the services of an interpreter. If the party requiring an interpreter does not furnish timely notice of the need for an interpreter, the hearing will be rescheduled. If the new schedule fails to comply with any applicable timeframe, the party requiring an interpreter will be deemed to have waived that timeframe.

1098.6 Timeframes: Most DHS programs have time limitations for the completion of administrative adjudications. Timeframes are the bases for hearing schedules. Failure to meet a timeframe does not deprive OAH of jurisdiction to administratively adjudicate the appeal, but may be the basis for one or more orders directing parties to take certain actions in a timely manner, and may warrant sanctions against parties that fail to follow OAH orders.

1098.7 Resolution without a Hearing: There are four ways to end an administrative adjudication without a hearing:

1098.7.1 DHS withdraws the adverse action on the record at the hearing or in writing before the hearing

1098.7.2 The appellant withdraws the appeal request on the record at the hearing or in writing before the hearing

1098.7.3 The parties reach a mutually agreeable resolution of the appeal and file written notice of settlement explaining the terms of the settlement; or

1098.7.4 OAH dismisses the appeal as defective.

1098.8 Hearings

1098.8.1 Special Types of Hearings

A. Special Nutrition Program: See Family Day Care Home (FDCH)-3.

B. Medical Necessity/ Medical Disability Decisions:

1. The hearing official will notify the appellant in writing that if the appellant has evidence regarding the initial application and asserted disability, the appellant must provide the information to the hearing official or complete a "Consent for Release of Information" form as soon as possible and before the hearing.
2. The hearing will not be delayed for failure to submit additional evidence.
3. Evidence presented to the hearing official will be limited to evidence of eligibility as of the date of denial by DHS. The hearing official will refuse evidence about subsequent medical necessity/disability and advise the applicant to submit a new application to DHS.
4. A physician employed by DHS to review denials will be available by phone for the hearing if requested or subpoenaed by any party.
5. The hearing official will hear medical and non-medical evidence regarding eligibility. The hearing official will make the final decision regarding eligibility.

1098.8.2 Hearing Officials: Each hearing official must act impartially.

- A. Hearing officials must not have communication with any party to an administrative adjudication if any other party is excluded from the communication, except that the following communications are acceptable:
 - 1. Communication necessary to schedule hearings and the submission of exhibits and arguments; or
 - 2. Communication necessary to identify, without comment or argument, any exhibits or documents being delivered to OAH.
- B. Conflict of Interest:
 - 1. Any hearing official having a conflict of interest must notify the OAH Managing Administrative Law Judge immediately upon discovering a conflict of interest, and must not take any further action regarding the claim or controversy.
 - 2. A hearing official must recuse if the hearing officer has personal knowledge of the facts of the case or has a conflict of interest.
 - 3. A hearing official should recuse if any party has reasonable cause to suspect that the hearing officer may not be impartial.

1098.8.3 Attendance: Administrative adjudications are public proceedings, and are open to the public subject to state and federal confidentiality laws and rules. An appellant may waive his or her right to confidentiality, but may not waive another's right to confidentiality. For example, an appellant may not waive an alleged child victim's right to confidentiality in a child maltreatment case; may not waive a nursing home resident's right to confidentiality in an adult abuse or neglect case; and may not waive a child's right to confidentiality in a Special Nutrition case.

- A. The hearing official may determine that a party is physically or mentally unable to attend or participate, or that the party's presence will so disrupt the proceedings that the adjudication cannot continue in an orderly fashion unless the party is excluded. Party representatives may be present at all stages of the proceedings unless the hearing official determines that a representative's presence will so disrupt the proceedings that the adjudication cannot continue in an orderly fashion unless the representative is excluded.
- B. Interpreters may be present when necessary to facilitate communication before and during a hearing. Interpreters shall be placed under oath before interpreting testimony. The following oath is suggested: "Do you solemnly affirm that you will truthfully and accurately interpret all questions and answers?"
- C. Witnesses may be present unless: (i) any party has asked that the witnesses be excluded except while testifying; or (ii) the evidence is confidential by state or federal law or rule, and disclosing the evidence to a non-testifying witness would violate that confidentiality. If witnesses are excluded from the hearing, the witnesses shall be instructed that until a witness is released, that witness must not

discuss the evidence with another witness, and must not discuss any other witness's testimony with anyone.

- D. Observers will be excluded if the evidence to be presented is confidential under state or federal law or rule, and disclosing the evidence to the observer would violate that state or federal law or rule.
- E. News media: Persons representing the news media will be excluded if the evidence to be presented is confidential under state or federal law or rule, and disclosing the evidence to the observer would violate that state or federal law or rule.

1098.8.4 Opening and Closing Statements: Each party may be given an opportunity to make an opening and closing statement, limited to ten minutes unless the issues are so complex that the hearing official determines that more time is required to adequately explain the parties' contentions.

1098.8.5 Questions Allowed: Questioners may ask only one question at a time. Questions may not take the form of statements or contentions, and must not be asked in such a way as to bully or intimidate a witness.

1098.8.6 Newly acquired evidence:

- A. Admissible evidence that was not submitted to the person or persons who made the decision under appeal may be admitted in appeals under Ark. Code Ann. § 12-12-512 or § 5-28-211. Newly acquired evidence may be admitted in other appeals only if the evidence:
 - 1. concerns events or circumstances predating the application, request, or decision under appeal; and
 - 2. could not have been obtained by the party offering the evidence despite that party's due diligence in acquiring evidence.
- B. If the hearing official determines that newly acquired evidence is admissible, the hearing official shall return the case to the decision-maker so that the newly acquired evidence may be considered, or shall determine that there is good cause not to return the case. Each good cause finding and the reasons therefore shall be stated in the findings of fact and conclusions of law.

1098.8.7 Allowing additional evidence after the hearing: If a request to receive additional identified and specifically described evidence is made at the hearing, OAH may for good cause hold the hearing record open for a specified period of time to receive additional admissible and relevant evidence that will assist the hearing official in deciding the case.

1098.9 Commencement of Administrative Adjudication

1098.9.1 Each appeal shall begin with the filing of a written notice of appeal in the time and manner specified for the subject matter of the appeal.

- 1098.9.2 Upon receipt of a sufficient and timely notice of appeal, the OAH shall assign a number to the appeal, schedule the appeal for a hearing within the applicable timeframe, and mail written notice of the time, date, and place of the appeal to the parties by regular mail posted at least thirteen days before the date of the hearing. DHS parties may be notified by interdepartmental mail or by DHS E-mail. Notice is presumptively complete upon mailing or upon transmission by interdepartmental mail or DHS E-mail.
- 1098.9.3 Upon receipt of an untimely notice of appeal OAH shall notify the appellant that the appeal was not filed in time. The notice shall be sent by certified mail, return receipt requested, and shall inform the person that he or she may have a right under the APA to appeal OAH's determination of untimely filing.
- 1098.9.4 Upon receipt of an appeal filed other than in the manner specified for the subject matter of the appeal, the OAH shall inform the appellant that the appeal was defective, and explain the defect. The notice shall be sent by certified mail, return receipt requested, and shall inform the appellant that he or she may have a right under the APA to appeal OAH's determination that the appeal was defective.
- 1098.10 Discovery:** Discovery is the process whereby one party requests documents from the other party, submits written interrogatories to the other party, or takes witness depositions by phone or in person. If one or more parties want to have discovery, the parties are encouraged to agree informally on discovery procedures. If the parties cannot agree, any party may ask the hearing official to enter a discovery order. All discovery orders will be guided generally by the Arkansas Rules of Civil Procedure regarding discovery, except as necessary to meet timeframes or otherwise fit the administrative adjudication process.
- 1098.11 Securing the Attendance of Witnesses:** Witnesses may appear voluntarily or involuntarily if properly served with a subpoena. Subpoenas direct the witness to appear and give testimony at a specified time and place, and also may direct the witness to bring documents. To obtain a witness subpoena, parties must follow the instructions on the attached subpoena request form. OAH must receive each subpoena request at least ten business days before the hearing. Each party is responsible for serving (delivering) each subpoena in accordance with Rule 45 of the Arkansas Rules of Civil Procedure.
- 1098.12 Postponements:** Any party may request that a hearing be rescheduled to a later date. Requests should be made in writing and delivered to OAH and all other parties. Verbal requests must be followed by a written request mailed or faxed no later than one business day after the verbal request. Except in cases of actual emergency, all postponement requests must be received at least ten days before a hearing. OAH shall deny DHS postponement requests that are incompatible with appeal timeframes. OAH may for good cause grant other postponement requests. Any postponement order that is incompatible with appeal timeframes shall notify the party requesting the continuance that his or her request is deemed a waiver of any objections, defenses, or both based on timeframes.

1098.13 Location of Hearings: Hearings may be held in the OAH office at 7th and Main Streets in Little Rock, Arkansas, in the county office in the county where the appellant resides, by telephone, or by videoconference.

1098.14 Failure to appear: Regardless of whether the appellant is represented, the appellant must appear in person for all hearings regarding program eligibility or program services, or show good cause why he or she cannot be present. If any party fails to appear (either in person or by telephone) within fifteen minutes after the hearing was scheduled to begin, OAH will confirm that the party had proper notice of the hearing and will attempt to contact the absent party. The hearing official may allow an additional fifteen minutes before beginning the hearing. When the hearing begins, the hearing official will identify for the record any party not present in person or by telephone. If the appellant does not appear, the appeal shall be deemed abandoned, subject to reopening on a showing that the appellant exercised due diligence but was unable to appear due to circumstances beyond the appellant's control. If the agency does not appear, the hearing official may proceed with the hearing and may consider any hearing statements or other documents submitted by the agency.

1098.15 Burden of Going Forward: When a hearing begins, the burden of going forward is on the party with the burden of proof. When that party has presented his or her evidence, the burden of going forward shifts to the other party. After that evidence is submitted, the party with the burden of proof may offer rebuttal evidence. For example, if a person named as a perpetrator of child maltreatment appeals the maltreatment finding, DHS has the burden of proof so it presents evidence first. The appellant then presents his or her evidence. After that, DHS may present rebuttal evidence. This process may continue until the party with the burden of proof decides to offer no more evidence.

1098.16 Order of Witnesses: The party with the burden of proof goes first. Each party determines the order in which to call its own witnesses. The hearing official may direct, or the parties may agree, to take one or more witnesses out of turn, for example, to accommodate the witness's schedule or expedite the hearing process.

Maltreatment Victim and Child Witnesses: In all maltreatment appeal hearings, the testimony of alleged victims and all child witnesses under the age of 18 shall be taken outside the presence of the Petitioner. Testimony from child witnesses and alleged victims shall be taken in one of the following manners:

- (1) The victim or child may be physically present in the hearing room while the Petitioner listens in from another location by phone;
- (2) The victim or child may testify by phone or live camera (FaceTime, audio-visual) from another location but the child or victim shall not face nor hear from the Petitioner;
- (3) The victim or child may testify by other reasonable accommodations agreed upon by both parties as long as the Petitioner is not in the same room with the child or the victim and the child or victim can't see or hear the Petitioner; or,

(4) Previously recorded video or audio interviews also known as “safety assessments” with a victim may be introduced as evidence and shall be given the same weight as if the victim testified in person. The entire interview is subject to scrutiny at the hearing.

If the hearing is taking place in a county office and a child is scheduled to testify at a hearing, the hearing official shall notify the DCFS county supervisor in that county office and direct that appropriate arrangements are made. At the time and date of the hearing, the DCFS county supervisor shall provide:

- (1) A supervised waiting room for children; and,
- (2) A room with a telephone by which the Petitioner can listen to the child’s testimony when the child is called into the hearing room to testify.

Child witnesses or victims shall not be questioned by the Petitioner. If the Petitioner doesn’t have a representative to ask the victim or child witness questions, the Petitioner shall write them down for the hearing official to ask. The agency is not required to call any child maltreatment victims to testify in appeal hearings if doing so would unnecessarily traumatize the child (*See AR DHS v. A.B.*, 374 Ark. 193 (2008)). Upon the request of the agency or the child’s parent or guardian, the hearing official may designate a “comfort person” to remain with the child before, during, and after testifying.

1098.17 Record Made: OAH will tape record each hearing. If the OAH decision is appealed, OAH will prepare a transcript or cause a transcript to be prepared for filing in the circuit court as provided in the APA.

1098.18 Findings of Fact and Conclusions of Law: Each OAH decision will be in writing and will separately set out findings of fact, conclusions of law, and an order. OAH will furnish each party a copy of the findings of fact, conclusions of law, and order by mailing a copy to the party's last known address by certified mail, return receipt requested.

1098.19 Reconsideration: Within ten calendar days of a party’s receipt of the findings of fact, conclusions of law, and the order, any party may request reconsideration. Simultaneous to a request for reconsideration, the party shall notify the opposing party of the request.

1098.20 Grounds for Reconsideration: Reconsideration is for the limited purposes of correcting material misstatements of the record, clear errors of law, or both. Each request for reconsideration must state in plain terms the grounds upon which the requestor relies. OAH shall summarily deny any reconsideration that asks OAH to receive additional evidence, exercise its discretion differently, or modify or reverse any finding, conclusion, or order for any reason other than correcting material misstatements of the record, clear errors of law, or both.

- 1098.21 Reconsideration Process:** Any party requesting reconsideration shall provide to OAH proof of notice to the opposing party. The opposing party shall have ten calendar days from the receipt of the notice to respond to the request. If necessary, OAH may reconvene both parties for argument on the request for reconsideration and shall notify both parties of a reconsideration conference.
- 1098.22 Reconsideration Decision:** If OAH determines that there are good and sufficient grounds for reconsideration, it shall amend the findings of fact, conclusions of law, and decision as necessary to correct any material misstatement of the record, clear error of law, or both. OAH shall issue any amended findings of fact, conclusions of law, and order within thirty calendar days of receiving the reconsideration request, unless the period for the reconsideration decision is waived. The amended findings of fact, conclusions of law, and order shall be the final agency determination as provided in the APA. OAH shall furnish copies of the amended findings of fact, conclusions of law, and order to the parties as provided in 1098.18.
- 1098.23 Final Agency Determination:** If OAH does not receive a written request for reconsideration within ten calendar days of a party's receipt of the initial findings of fact, conclusions of law, and order, the initial findings of fact, conclusions of law, and order shall become the final agency determination as provided in the APA.

State of Arkansas
Bureau of
Legislative Research

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Memorandum

TO: ALC—Executive Subcommittee

FROM: Laura Kehler Shue, Legislative Attorney, Administrative Rules Review Section, Legal Services Division

CC: Marty Garrity, Director, Bureau of Legislative Research;
Jessica Sutton, Administrator, Administrative Rules Review Section, Legal Services Division

DATE: March 1, 2018

SUBJECT: Legal Authorization for the Department of Human Services—Emergency Rule regarding Appeals and Hearings Procedures

The Department of Human Services’ stated purpose for amending its Rule 1098 is to update its Appeals and Hearings Policy by protecting minors testifying in the Division of Child and Family Services maltreatment hearings. The added language provides the manner in which testimony of alleged victims and all child witnesses under the age of 18 shall be taken outside the presence of the offender in maltreatment appeal hearings. An offender may listen in from another location if the child is physically present, the child may testify by phone or live camera, the child may testify by reasonable accommodations agreed upon by both parties, or a previously recorded video or audio interview with a victim may be introduced in evidence and given the same weight as if the victim testified in person. If a hearing is to take place in a county office, a supervisor will direct that appropriate arrangements are made for any child witnesses. Child witnesses or victims shall not be directly questioned by the offender. The hearing official may also designate a “comfort person” to remain with the child before, during, and after testifying.

The Department of Human Services (DHS) is authorized to “make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith.” Arkansas Code Annotated § 20-76-201 (12). The Department’s Division of Children and Family Services (DCFS) has the power to promulgate rules necessary to administer the State Capitol, Room 315 Little Rock, AR 72201 (501) 682-1937 Fax (501) 682-1936 TDD (501) 682-1940

laws that address protecting children from abuse and neglect and providing services and support to promote the safety, permanency, and well-being of Arkansas children and families. *See* Ark. Code Ann. §§9-28-101 and 103. Further, pursuant to Ark. Code Ann. § 12-18-105, DHS and the State Police are authorized to promulgate rules to implement the Child Maltreatment Act, which includes a subchapter on administrative hearings and due process. *See* Ark. Code Ann. § 12-18-801 et seq.