

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

**Thursday, November 17, 2022
1:00 p.m.
Room B, MAC
Little Rock, Arkansas**

- A. Call to Order**
- B. Reports from the Executive Subcommittee Concerning Emergency Rules**
- C. Reports from ALC Subcommittees Concerning the Review of Rules**
- D. Reports on Administrative Directives Pursuant to Act 1258 of 2015, for the Quarter Ending September 30, 2022 (Lindsay Wallace)**
 - 1. Department of Corrections**
 - 2. Parole Board**
- E. Rules Filed Pursuant to Ark. Code Ann. § 10-3-309**
 - 1. DEPARTMENT OF CORRECTIONS (Solomon Graves, Sterling Penix, Lindsay Wallace)**
 - a. SUBJECT: Minimum Standards for Adult Criminal Detention Facilities**

DESCRIPTION: The Department of Corrections is seeking review and approval of minimum standards for adult criminal detention facilities. The current standards have not been revised since 2014. In considering potential revisions, a thorough review of legislative changes since 2014 was conducted, as well as a survey of comparable standards in other states. In the seven years that have lapsed since the last revision, there have been a variety of legislative changes that impact the operations and procedures of adult detention facilities. This proposed revision has incorporated legislative changes relevant to the operation of adult criminal detention facilities across the State, including to reflect changes enacted via Act 566 of 2019 regarding the treatment of pregnant inmates within detention facilities.

PUBLIC COMMENT: A public hearing was not held in this matter. The public comment period expired on September 27, 2022. The agency received no comments.

Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following question and received the following response thereto:

Q. There appear to be numerous changes to these rules. Could you please provide some context to these changes? (i.e. was it a result of changing statutory language, what precipitated the changes, where was the language taken from?) **RESPONSE:** The Standards have not seen any significant revisions since 2014. As was mentioned in the summary, due to the time lapse, a thorough review was warranted, and this revision is a culmination of that effort. Legislative changes enacted since 2014 were reviewed and adjustments were made accordingly (for example: Act 566 of 2019 concerning the treatment of pregnant inmates within detention facilities). In addition, comparable standards in other jurisdictions were reviewed and best practices were built into this proposal. In some cases, the standards were reorganized to reflect a more reader friendly version – sections were moved from one chapter to another. Finally, the Office of the Criminal Detention Facilities Coordinator receives calls regularly to explain what a portion of the existing standards means. Based on many of those conversations, we have attempted to clarify the Standards so that the audience can better understand what they mean.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency indicated that the rule had a financial impact, but was unable to specifically quantify it. The agency provided the following explanation: “The financial impact is dependent upon the facility itself, the staffing, budget, etc. Each adult criminal detention facility in the state is different and we see a wide variety of operational structures. We did not feel it was accurate to say there would be no fiscal impact for implementation of this rule – for some facilities, there may be some impact. For others, it may be zero. We cannot quantify the impact because we do not know to what degree it will take to implement the legislative changes or best practices set out in the proposed rule.”

LEGAL AUTHORIZATION: The Office of Criminal Detention Facilities Review Coordinator shall be responsible for promulgating, upon approval of the secretary, minimum standards for the construction, maintenance, and operation of local, county, regional, or state criminal detention facilities and juvenile detention facilities in accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq. *See Ark. Code Ann. § 12-26-103(b).*

2. **DEPARTMENT OF EDUCATION, DIVISION OF ELEMENTARY AND SECONDARY EDUCATION (Courtney Salas-Ford)**

a. **SUBJECT:** Rules Governing the Succeed Scholarship Program

DESCRIPTION: The Arkansas Department of Education, Division of Elementary and Secondary Education (“DESE”), proposes amendments to its Rules Governing the Succeed Scholarship Program. These rules govern the Succeed Scholarship Program, which provides state-funded scholarships to students with disabilities, students in group foster homes, and children of members of the uniformed services, to attend an eligible private school. The proposed amendments to these rules incorporate the following provisions of Acts 689 and 741 of 2021:

- Add eligibility for children of a member of the uniformed services.
- Remove the definitions of IEP and ISP as these are no longer required. Eligibility for a student with a disability is based on identification by the public school pursuant to IDEA.
- Limit participation in the Program to students and schools within the State of Arkansas.
- Clarify allowable expenditures for “tuition and fees” using scholarship funds.
- Provide that a random, anonymous lottery selection process shall be used if the number of new eligible applicants exceeds the number of available scholarships.

Following the public comment period, the words “public school” were removed from Section 4.01, and a typographical error was corrected in Section 7.02.1.

PUBLIC COMMENT: A public hearing was held on September 12, 2022. The public comment period expired on September 29, 2022. DESE indicated that it received no public comments.

Jason Kearney, an attorney with the Bureau of Legislative Research, asked the following questions:

- (1) Section 3.07 – What prompted the agency to change the definition of “School District” in this rule? **RESPONSE:** Need for alignment with definition in other sections to include school districts under state authority.
- (2) Section 4.01 – Did the agency intend to leave the identifier “public school” in front of “student”, in light of Arkansas Code Annotated § 6-41-902(a), as amended by Act 741 of 2021? **RESPONSE:** No, correction made.

(3) Section 4.05 – The triggering event, “enrolls in a private school not eligible to participate in the Succeed Scholarship Program” does not appear in A.C.A. § 6-41-902(d), which discusses continuing payments. What was the agency’s reasoning for adding this language? **RESPONSE:** To clarify that not all private schools are eligible for participation in the program and if a student receiving a scholarship leaves an eligible school to attend an ineligible school, the scholarship payments do not continue.

The proposed effective date is December 1, 2022.

FINANCIAL IMPACT: DESE states that the proposed rules have no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-41-906(a)(1), the State Board of Education shall adopt rules and develop notices and other documentation necessary to administer the Succeed Scholarship Program, including without limitation rules concerning the method of applying for a scholarship, that are in the best interest of students. Further authority for the rulemaking can be found in Ark. Code Ann. § 6-41-906(a)(2)(A), which provides that the State Board of Education may promulgate rules and develop a process to award scholarships using a lottery selection process if parent applications exceed the number of available scholarships. The proposed changes include those made in light of Act 689 of 2021, sponsored by Representative David Ray, which concerns the Succeed Scholarship Program and made children of members of the uniformed services eligible to receive a scholarship under the Program; and Act 741 of 2021, sponsored by Senator Bart Hester, which amended provisions of the Arkansas Code concerning the Succeed Scholarship Program.

3. **DEPARTMENT OF FINANCE AND ADMINISTRATION, ARKANSAS RACING COMMISSION** (Byron Freeland, Smokey Campbell)

a. **SUBJECT:** Thoroughbred Rule 1217.3 – Shock Wave Therapy

DESCRIPTION: This amendment to Rule 1217.3 requires disclosure of shock wave therapy to the ARC veterinarian no less than forty-eight (48) hours prior to racing and makes the use of shock wave therapy uniform with other states’ adoption of the Horseracing Integrity and Safety Authority (“HISA”) regulations.

Following the public comment period, the agency amended subparagraph (d) to reference the Attending Veterinarian rather than the Commission Veterinarian. Per the agency, it was the intent of the Commission to make the Attending Veterinarian responsible for reporting treatments to a horse

and not the Commission Veterinarian. The original use of Commission Veterinarian in subparagraph (d) was in error.

PUBLIC COMMENT: A public hearing was held on this rule on September 22, 2022. The public comment period expired September 22, 2022. 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 has no financial impact.

LEGAL AUTHORIZATION: The Arkansas Racing Commission has “sole jurisdiction over the business and the sport of horse racing in this state where the racing is permitted for any stake, purse, or reward[.]” Ark. Code Ann. § 23-110-204(a). The Commission has “full, complete, and sole power and authority” to promulgate rules related to its duties and may “make, amend, and enforce all necessary or desirable rules not inconsistent with law.” Ark. Code Ann. § 23-110-204(b)(1)(E), (d).

b. **SUBJECT:** **Thoroughbred Rule 1218 – Non-Invasive Treatment**

DESCRIPTION: This rule addresses non-invasive treatment of horses prior to a race. Sections (b)(1) and (2) of the current Rule 1218 conflict with a new HISA Rule. The ARC is attempting to make its rules comply with HISA before it is mandatory.

PUBLIC COMMENT: A public hearing was held on this rule on September 22, 2022. The public comment period expired September 22, 2022. 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 has no financial impact.

LEGAL AUTHORIZATION: The Arkansas Racing Commission has “sole jurisdiction over the business and the sport of horse racing in this state where the racing is permitted for any stake, purse, or reward[.]” Ark. Code Ann. § 23-110-204(a). The Commission has “full, complete, and sole power and authority” to promulgate rules related to its duties and may “make, amend, and enforce all necessary or desirable rules not inconsistent with law.” Ark. Code Ann. § 23-110-204(b)(1)(E), (d).

c. **SUBJECT:** Thoroughbred Rule 1219 – Prohibited Practices

DESCRIPTION: This new rule addresses prohibited practices. It is to adopt uniform rules consistent with HISA and other states before HISA rules become mandatory.

PUBLIC COMMENT: A public hearing was held on this rule on September 22, 2022. The public comment period expired September 22, 2022. 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 has no financial impact.

LEGAL AUTHORIZATION: The Arkansas Racing Commission has “sole jurisdiction over the business and the sport of horse racing in this state where the racing is permitted for any stake, purse, or reward[.]” Ark. Code Ann. § 23-110-204(a). The Commission has “full, complete, and sole power and authority” to promulgate rules related to its duties and may “make, amend, and enforce all necessary or desirable rules not inconsistent with law.” Ark. Code Ann. § 23-110-204(b)(1)(E), (d).

d. **SUBJECT:** Thoroughbred Rule 2099.1 – Commission Clocker

DESCRIPTION: Horsemen have had difficulty scheduling timed workouts when the track is closed to workouts. This rule allows Stewards to grant 7-day extensions for horse owners/trainers to record timed workouts if the horse was unable to complete the required workouts due to the track being closed to workouts.

PUBLIC COMMENT: A public hearing was held on this rule on September 22, 2022. The public comment period expired September 22, 2022. 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 has no financial impact.

LEGAL AUTHORIZATION: The Arkansas Racing Commission has “sole jurisdiction over the business and the sport of horse racing in this state where the racing is permitted for any stake, purse, or reward[.]” Ark. Code Ann. § 23-110-204(a). The Commission has “full, complete, and sole power and authority” to promulgate rules related to its duties and may

“make, amend, and enforce all necessary or desirable rules not inconsistent with law.” Ark. Code Ann. § 23-110-204(b)(1)(E), (d).

e. **SUBJECT:** **Thoroughbred Rule 2128A – Hand-Held Communication Devices**

DESCRIPTION: This new rule will prohibit jockeys from using hand-held communication devices while on the race track and will conform the ARC Rules to the rules of other race tracks.

Following the public comment period, the agency amended the rule to state that use of hand-held communication devices is prohibited while a rider “is riding a horse (i) in a race or (ii) training or exercising on the track.” Per the agency, the Commission is of the opinion that a more comprehensive safety rule should prohibit use of hand-held communication devices by a rider while riding a horse in a race or while training or exercising a horse on the Oaklawn track.

PUBLIC COMMENT: A public hearing was held on this rule on September 22, 2022. The public comment period expired September 22, 2022. 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 has no financial impact.

LEGAL AUTHORIZATION: The Arkansas Racing Commission has “sole jurisdiction over the business and the sport of horse racing in this state where the racing is permitted for any stake, purse, or reward[.]” Ark. Code Ann. § 23-110-204(a). The Commission has “full, complete, and sole power and authority” to promulgate rules related to its duties and may “make, amend, and enforce all necessary or desirable rules not inconsistent with law.” Ark. Code Ann. § 23-110-204(b)(1)(E), (d).

f. **SUBJECT:** **Thoroughbred Rule 2260 – Purse Distribution**

DESCRIPTION: This rule amendment changes the purse distribution to include more horses.

PUBLIC COMMENT: A public hearing was held on this rule on September 22, 2022. The public comment period expired September 22, 2022. 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 has a financial impact.

Per the agency, the financial impact of this rule will be to provide more purse money to horse owners/trainers. The agency did not provide an estimated dollar amount.

LEGAL AUTHORIZATION: The Arkansas Racing Commission has “sole jurisdiction over the business and the sport of horse racing in this state where the racing is permitted for any stake, purse, or reward[.]” Ark. Code Ann. § 23-110-204(a). The Commission has “full, complete, and sole power and authority” to promulgate rules related to its duties and may “make, amend, and enforce all necessary or desirable rules not inconsistent with law.” Ark. Code Ann. § 23-110-204(b)(1)(E), (d).

g. **SUBJECT:** **Thoroughbred Rule 2444 – Claiming**

DESCRIPTION: This rule addresses multiple claims in the same race. The amendment is necessary to improve and clarify the claiming process.

PUBLIC COMMENT: A public hearing was held on this rule on September 22, 2022. The public comment period expired September 22, 2022. 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 has no financial impact.

LEGAL AUTHORIZATION: The Arkansas Racing Commission has “sole jurisdiction over the business and the sport of horse racing in this state where the racing is permitted for any stake, purse, or reward[.]” Ark. Code Ann. § 23-110-204(a). The Commission has “full, complete, and sole power and authority” to promulgate rules related to its duties and may “make, amend, and enforce all necessary or desirable rules not inconsistent with law.” Ark. Code Ann. § 23-110-204(b)(1)(E), (d).

4. **DEPARTMENT OF FINANCE AND ADMINISTRATION, REVENUE DIVISION (Alicia Austin Smith, Paul Gehring)**

a. **SUBJECT:** **2022-6: Arkansas Elective Pass-Through Entity Tax Rule**

DESCRIPTION: The Department of Finance and Administration, based on its internal determination and comments from the business community, has determined that the promulgation of a rule is necessary to administer

the elective tax imposed under the Elective Pass-Through Entity Tax Act. The Department developed the rule internally based on feedback from the public.

The proposed rule:

- Describes who is eligible to elect taxation under the Act.
- Clarifies the filing and reporting processes under the Act.
- Explains how to calculate the tax owed under the Act.
- Provides examples of how election to be taxed under the Act might impact an individual's tax liability or individual filing requirements.

PUBLIC COMMENT: A public hearing was held on this rule on October 3, 2022. The public comment period expired on October 15, 2022. The agency provided the following summary of the public comments it received and its responses to those comments:

Commenter's Name: Mr. Creed Spann

COMMENT: Mr. Spann requested that the Department add a parenthetical “(if otherwise required to file)” to Section VI(d) because some entities are not required to file. Mr. Spann was worried that there could be confusion regarding who would be required to file. **RESPONSE:** The comment was accepted and the phrase “if otherwise required to file” will be added between the words “shall” and “exclude.”

Tax rates were discussed at the public hearing and the rates for this rule will be 4.9% for individuals, 2.45% for capital gain, and 5.9% for tax year 2022 and 5.3% for tax year 2023 for “C” corporations.

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

Q. Section VIII(f) states, “The Secretary will impose penalties and interest upon an affected business entity that makes an underpayment of its required annual payment.” Is this section governed by Section V(h), which states, “Penalty and interest will be calculated and imposed pursuant to the Arkansas Tax Procedure Act,” or does the Department intend to calculate penalties imposed under Section VIII(f) based upon something else? **RESPONSE:** Yes, it is. The actual statute regarding an underpayment of the required annual payment refers directly to § 26-18-208 of the Tax Procedure Act. The rule creates no new penalty or interest not specifically spelled out in the TPA.

The proposed effective date is December 1, 2022.

FINANCIAL IMPACT: The agency indicated that this rule has no financial impact.

LEGAL AUTHORIZATION: The Secretary of the Department of Finance and Administration has authority to promulgate rules necessary to administer and enforce Arkansas tax laws. Ark. Code Ann. § 26-18-301(a)(1). This rule implements Act 362 of 2021. The Act, sponsored by Representative Joe Jett, created the Elective Pass-Through Entity Tax Act, imposed a tax on pass-through entities, and excluded certain income from gross income for pass-through entities. “The Secretary of the Department of Finance and Administration shall administer and enforce [the Elective Pass-Through Entity Tax Act] in accordance with the Arkansas Tax Procedure Act.” Ark. Code Ann. § 26-65-105.

5. DEPARTMENT OF HEALTH, ARKANSAS STATE BOARD OF DENTAL EXAMINERS (Meredith Rogers, Matt Gilmore)

a. **SUBJECT:** Licensure Fees

DESCRIPTION: The Arkansas State Board of Dental Examiners seeks legislative review and approval of a proposed rule concerning licensure fees. The proposed rule:

- Establishes the licensure/application fees that are charged by the Arkansas State board of Dental Examiners;
- Provides an initial fee waiver for eligible low-income individuals; and
- Complies with Acts 725 and 1101 of 2021.

PUBLIC COMMENT: A public hearing was not held in this matter. The public comment period expired on July 26, 2022. The agency indicated that it received no comments.

Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following question and received the following response thereto:

Q. Could you please provide statutory fee authority for the fees listed in this rule? **RESPONSE:** Ark. Code Ann. §§ 4-29-408; 17-82-304, 305, 306, 308, 310, 312; 17-82-404, 405; 17-82-503, 504; 17-82-602; and 17-82-702.

In addition, the agency provided the following responses to follow-up questions:

1. Concerning renewal of corporate registration, the rule lists a fee of \$20. However, it appears that Ark. Code Ann. § 4-29-408(d) provides a \$10

fee. Could you please explain the discrepancy between the rule and statute? **RESPONSE:** Please see the amended proposed rule, Section B(16) – this fee has been changed to \$10, per the statute.

2. One of the sections provided in response to my question was Ark. Code Ann. § 17-82-404. Do any of the fees listed in the rule implement the dental assistant examination and licensing fee? If so, which ones?

RESPONSE: Please see the amended proposed rule, Section A(14) – the name of the fee has been changed from “Registration for Dental Assistants” to “Exam and Licensing for Dental Assistants” in order to match the wording in the statute and avoid confusion.

3. Ark. Code Ann. §§ 17-82-503 and 504 appear to authorize a fee and annual renewal fee for dentists who wish to administer general anesthesia or sedation as defined by the rules of ASBDE. Do the rules define moderate sedation and local anesthesia as “general anesthesia or sedation?” If not, what fee-making authority is the board relying upon to implement permit fees for moderate sedation and local anesthesia?

RESPONSE: The different types of sedation are described in Article XIII of the Board’s existing Rules. General Anesthesia is: a drug-induced loss of consciousness during which patients are not arousable, even by painful stimulation. The ability to independently maintain ventilatory function is often impaired. Patients often require assistance in maintaining a patent airway, and positive pressure ventilation may be required because of depressed spontaneous ventilation or drug-induced depression of neuromuscular function. Cardiovascular function may be impaired. Code Ark. R. 007.08.1-XIII (A)(10).

There are different levels of sedation, such as minimal, moderate, and deep – all are defined in Article XIII. No permit is required for minimal sedation.

The requirements for a General Anesthesia and a Deep Sedation permit are the same, per Rule XIII(D)(5). The Board only charges dentists a fee for a general anesthesia/deep sedation permit or a moderate sedation permit, as allowed by Ark. Code Ann. § 17-82-503 and existing Rule XIII(E)(2)(a)(1). A higher fee is required for General Anesthesia/Deep sedation due to the on-site inspection required by Rule XIII(E)(2)(a)(3).

Ark. Code Ann. § 17-82-103(c)(4) authorizes the board to charge hygienists a fee for a local anesthesia permit.

4. Concerning mobile dental facility permits, Ark. Code Ann. § 17-82-602 appears to have an application fee of \$5000. However, the rules appear to only list a mobile dental facility permit for \$1000. Could you please explain this discrepancy? **RESPONSE:** Please see the amended

proposed rule, Section A(13) – the fee has been increased to \$5,000 in accordance with the statute.

5. Ark. Code Ann. § 17-82-702(b)(2)(B)(i) appears to contemplate a renewal fee for collaborative dental care permit. Does the board charge a renewal fee? **RESPONSE:** No, it never has.

6. Looking through all the statutory authority provided, I am not finding authority for the following fees listed in the rule. Please provide the authority upon which the board is relying upon to promulgate each of the fees listed below:

Dental License by Credentials (or educators of CODA-approved programs) - \$150

Fictitious name request - \$50

Facility permit (general/deep sedation) - \$500

Facility permit (moderate sedation) - \$50

Facility permit renewal - \$80

RDA Educational Packet - \$50

Listings (DDS, RDH or RDA) - \$25

License Verification - \$25

Wall Certificate Remake for dentists and hygienists - \$25

Reprocessing fee for renewals - \$25

NSF (returned) Check Fee - \$25

Background checks - \$38.50

Evaluator for Facility Permit - \$150/400 max per day for multiple evaluations

RESPONSE: All of the above-listed fees, except for certain fees described herein, have been deleted in the proposed amended rule. The Wall Certificate remake fee is supported by Ark. Code. Ann. § 17-82-304(d)(2). The Board added language to the NSF and Criminal Background check fees to clarify that these fees are merely pass-through to other entities as described.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency indicated that the proposed rules do not have a financial impact.

LEGAL AUTHORIZATION: The Arkansas State Board of Dental Examiners has authority to promulgate rules in order to carry out the intent and purposes of Title 17, Chapter 82 of the Arkansas Code concerning dentists, dental hygienists, and dental assistants. *See* Ark Code Ann. § 17-82-208(a). The proposed rule implements Act 725 and 1101 of 2021.

Act 725 of 2021, sponsored by Senator Ben Gilmore, created the Workforce Expansion Act of 2021.

Act 1101 of 2021, sponsored by Representative Justin Gonzales, amended Arkansas law concerning administrative fees and penalties and amended the law concerning review of agency rules by Legislative Council.

b. **SUBJECT:** **Credentials Required in Issuing Dental/Dental Hygiene License**

DESCRIPTION: The Arkansas State Board of Dental Examiners seeks legislative review and approval of proposed amendments to its rule concerning credentials required in issuing a dental or dental hygiene license. The proposed amendment:

- Updates the description of eligible uniformed service members/veterans and their spouses;
- Details the process for expediting licensure for eligible military members and their spouses;
- Grants temporary licensure for 90 days while awaiting the fulfillment of all licensure requirements;
- Extends the date that a license expires for a deployed service member and spouse; and
- Grants a full exemption from continuing education requirements for 180 days following the date of the service member's return from deployment.

PUBLIC COMMENT: Because this rule recommends an expedited process for military personnel to attain occupational licensure, this rule underwent review pursuant to Ark. Code Ann. § 17-4-109, as amended by Act 135 of 2021, by the Administrative Rules Subcommittee at its meeting of July 20, 2022. A public hearing was not held in this matter. The public comment period expired on September 19, 2022. The agency indicated that it received no comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency indicated that the amended rules do not have a financial impact.

LEGAL AUTHORIZATION: The Arkansas State Board of Dental Examiners has authority to promulgate rules in order to carry out the intent and purposes of Title 17, Chapter 82 of the Arkansas Code concerning dentists, dental hygienists, and dental assistants. *See Ark Code Ann. § 17-82-208(a).* The amended rules implement Act 135 of 2021, sponsored by Senator Ricky Hill, which established the Arkansas Occupational Licensing of Uniformed Service Members, Veterans, and Spouses Act of

2021, and modified automatic licensure requirements of uniformed service members, returning uniformed service veterans, and their spouses.

6. **DEPARTMENT OF HEALTH, STATE BOARD OF HEALTH (Chuck Thompson, Craig Smith)**

a. **SUBJECT:** Rules for Volunteer Health Care Immunity

DESCRIPTION:

These Rules provide for the registration of Free or Low-Cost Health Care Clinics, as defined in Ark. Code Ann. § 16-6-201, under the Arkansas Volunteer Immunity Act, to provide immunity from civil damages to physicians and licensed health care professionals who are rendering free and voluntary professional health care services; provide for the registration of healthcare providers and medical professionals, as defined in Ark. Code Ann. § 20-8-803, under the Volunteer Health Care Act, who are providing Volunteer Healthcare Services to low-income patients to provide immunity from civil damages to medical professionals who contract with the Department of Health; and, provide for the registration of retired physicians and surgeons who are licensed to practice medicine by the Arkansas State Medical Board under the laws of the State of Arkansas and who are providing Volunteer Healthcare Services to provide immunity from civil damages, under Ark. Code Ann. § 17-95-106.

The proposed rule:

- Removes outdated terms and organizes the rules for registration in an administratively more efficient manner; and
- Incorporates registrations in compliance with Act 958 of 2017, as amended by Act 968 of 2021, and with Ark. Code Ann. § 17-95-106.

The following changes are proposed:

Section 101 Purpose: Revised language to properly refer to intent for Arkansas Volunteer Immunity Act, and add language to explain intent of Arkansas Volunteer Health Care Act, and the statutory provisions for volunteer retired physicians and surgeons.

Section 102 Definitions: Corrected grammatical errors (capitalization, punctuation, and typographical errors). Expanded definitions to incorporate Arkansas Volunteer Health Care Act and Ark. Code Ann. § 17-95-106.

Section 201 Registration for the Free or Low-Cost Health Care Clinic: Corrected grammatical errors (capitalization, punctuation, and

typographical errors). Revised provisions for Arkansas Volunteer Immunity Act to clarify intent and application of the Act.

Section 202 Immunity Under Arkansas Volunteer Immunity Act For Healthcare Professionals: Corrected grammatical errors (capitalization, punctuation, typographical errors, and cross-reference errors). Moved provisions for application of qualified immunity under Arkansas Volunteer Immunity Act to clarify intent and application of the Act.

Section 203 Required Notice To Persons Receiving Health Care Services At Free Or Low-Cost Health Care Clinics: Corrected grammatical errors (capitalization, punctuation, typographical errors, and cross-reference errors). Moved provisions for required notices under Arkansas Volunteer Immunity Act to clarify intent and application of the Act.

Section 301 Registration Process For Healthcare Providers: Corrected grammatical errors (capitalization, punctuation, and typographical errors). Revised provisions for Arkansas Volunteer Health Care Act to clarify intent and application of the Act, provide for registration of providers.

Section 302 Licensing Individuals from a State that Does Not License Interpreters: Corrected grammatical errors (capitalization, punctuation, typographical errors, and cross-reference errors). Added provisions for Arkansas Volunteer Health Care Act to provide for registration of health care professionals.

Section 401 – 407 Applicability of the Volunteer Health Care Act: Corrected grammatical errors (capitalization, punctuation, typographical errors, and cross-reference errors). Added provisions for Arkansas Volunteer Health Care Act to provide for the applicability of the Volunteer Health Care Act, required contract provisions, reporting requirements, patient selection, and reporting to the Arkansas Department of Health.

Section 501 – 503 Registration For Volunteer Services By Retired Physicians And Surgeons: Corrected grammatical errors (capitalization, punctuation, typographical errors, and cross-reference errors). Added provisions for Arkansas law on immunity for volunteer retired physicians and surgeons to provide for the registration process, application of immunity, and reporting requirements.

Section 601 – 602 Miscellaneous Provisions: Corrected grammatical errors (capitalization, punctuation, and typographical errors). Added miscellaneous provisions for severability and repeal.

PUBLIC COMMENT: No public hearing was held on this proposed rule. The public comment period expired on October 4, 2022. The agency

provided the following summary of the single public comment it received and its response to that comment:

Commenter's Name: Arkansas Academy of Physician Assistants

COMMENT: The Arkansas Academy of PAs (ARAPA), on behalf of over 150 PAs (physician assistants) throughout Arkansas, appreciates the opportunity to provide comments on the Arkansas Volunteer Immunity Act For Health Care Professionals and the Arkansas Volunteer Health Care Act and its amendments. We would like to draw your attention to updating Section 102(g)(2) from the title "physician's assistant" to the official legal title of "physician assistant" as we are referred to by the Arkansas State Medical Board. **RESPONSE:** The proposed Rules Pertaining to the Arkansas Volunteer Immunity Act for Health Care Professionals and the Volunteer Health Care Act were drafted using language provided in Act 958 of 2017 and Act 968 of 2021, which utilized "physician's assistant." After review of this comment and Ark. Code Ann § 17-105-101, the Arkansas Department of Health will update the references of "physician's assistant" to "physician assistant."

The proposed effective date is January 1, 2023.

FINANCIAL IMPACT: The agency indicated that this rule has no financial impact.

LEGAL AUTHORIZATION: The Department of Health has authority to make rules necessary for the implementation of the Volunteer Health Care Act. Ark. Code Ann. § 20-8-809. The State Board of Health has authority to adopt rules regarding the registration of free or low-cost medical clinics under Ark. Code Ann. §§ 16-6-201 and 17-95-106.

These rules implement Act 968 of 2021. The Act, sponsored by Representative Aaron Pilkington, updated the Volunteer Health Care Act and included therapists, addiction specialists, and counselors in the Volunteer Healthcare Program.

7. **DEPARTMENT OF HUMAN SERVICES, DIVISION OF CHILD CARE AND EARLY CHILDHOOD EDUCATION** (Tonya Williams)

a. **SUBJECT:** Better Beginnings Quality Rating Improvement System

DESCRIPTION:

Statement of Necessity

Better Beginnings requirements have not changed since they were implemented in 2010. These changes are necessary to encourage advancement in the quality of early care and education in the State of Arkansas by adding three (3) additional levels to the current tiered quality rating and improvement system. This will give families additional information and options when selecting an early care and education provider for their child. It will also provide an opportunity for providers to be recognized for the high quality of care that they are providing. The change is also necessary to clarify rules for the application and recertification process as well as adverse action. The amendment updates the name of the manual to the Better Beginnings Tiered Quality Rating and Improvement System.

Rule Summary

The change adds levels four (4) through six (6) to the current tiered quality rating and improvement system. The new levels build upon the already existing levels, one (1) through three (3), and are optional for providers to participate in. Providers currently participating would have the option of maintaining their current level or applying for a higher level. Participation at the higher levels will give them a new rating available for parents and the public to see, enabling them to choose higher quality care for their child.

In addition, the rule change updates, clarifies, and provides additional details regarding the application and recertification process, and adverse actions. Also, the rule organization and formatting is updated.

PUBLIC COMMENT: A public hearing was held on this rule on September 13, 2022. The public comment period expired on September 19, 2022. The agency provided a public comment summary, which, due to its length, is attached separately.

The proposed effective date is January 1, 2023.

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

Per the agency, the total estimated cost to implement the proposed rule is \$3,856,010 for the current fiscal year and \$1,151,000 for the next fiscal year, all in federal funds. The agency indicated that there is no cost to state, county, or municipal government as a result of this rule.

LEGAL AUTHORIZATION: The Department of Human Services, Division of Child Care and Early Childhood Education has authority to make rules “setting minimum standards governing the granting, revocation, refusal, and suspension of licenses for a childcare facility and the operation of a childcare facility.” Ark. Code Ann. § 20-78-206(a)(1)(A). 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 CHILDREN AND FAMILY SERVICES (Christin Harper)

a. SUBJECT: Foster Care Driving Program and Car Insurance Reimbursement Program

DESCRIPTION:

Statement of Necessity

This rule revision is necessary to allow the Division of Children and Family Services to update policy regarding its Foster Care Driving Program and Car Insurance Reimbursement Program to better align it with existing state law related to minors in DHS custody applying for their driving permit or license.

Rule Summary

Policy XI-Q: Foster Care Driving Program and Car Insurance Reimbursement Program is being amended as follows:

- To clarify the Foster Care Driving Program as it applies to instruction permits, learner's licenses, intermediate licenses, and motorcycle licenses, and follow all restrictions set forth at A.C.A. § 27-16-804.
- To update the information that will be considered by the Transitional Youth Services (TYS) Program Manager or designee when reviewing the Foster Care Driving Program application for youth in foster care who are under eighteen (18) years of age.
- To make reference to the directive in A.C.A. § 27-16-702 that any negligence or willful misconduct of the person, when driving a motor vehicle upon a highway, shall not be imputed to the

authorized employee or authorized resource parent who signed the driving permit or license application of a youth who is under eighteen (18) years of age and in the custody of DHS, nor shall they be held liable in conjunction with the minor for any damages caused by the negligence or willful misconduct of the minor.

- To add timeframe and documentation parameters that must be met to reimburse a youth or foster parent for car insurance costs.
- To make formatting, organizational, and other technical changes.

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired on September 17, 2022. The agency indicated that it received no public comments.

The proposed effective date is December 1, 2022.

FINANCIAL IMPACT: The agency indicated that this rule has no financial impact.

LEGAL AUTHORIZATION: The Department of Human Services, Division of Children and Family Services has the authority to promulgate rules regarding providing services to dependent-neglected children and their families, ensuring “child placements support the goal of permanency for children when the division is responsible for the placement and care of a child,” and ensuring “the health, safety, and well-being of children when the division is responsible for the placement and care of a child.” Ark. Code Ann. § 9-28-103. 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).

b. **SUBJECT: REPEAL – DCFS Policy XI: Educational Leave and Educational Assistance Policy**

DESCRIPTION:

Statement of Necessity

It is necessary to rescind the Division of Children and Family Services (DCFS) Policy XI: Educational Leave and Educational Assistance Policy because DHS Policy 1120 supersedes directives within DCFS Policy XI as it relates to educational leave and educational assistance for employees.

Rule Summary

The Division of Children and Family Services will rescind Policy XI: Educational Leave and Educational Assistance Policy and its subsections. From that point forward, refer to DHS Policy 1120 as needed.

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired on September 17, 2022. The agency indicated that it received no public comments.

The proposed effective date is December 1, 2022.

FINANCIAL IMPACT: The agency indicated that this rule has no financial impact.

LEGAL AUTHORIZATION: The Department of Human Services, Division of Children and Family Services has authority to promulgate rules necessary to administer Title 9, Chapter 28, Subchapter 1 of the Arkansas Code, regarding children and family services. Ark. Code Ann. § 9-28-103(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 THE MILITARY** (Brigadier General John Payne, Scott Stanger)

a. **SUBJECT:** Military Family Relief Trust Fund Operating Guide and Procedures

DESCRIPTION: The Department of the Military proposes amendments to its Military Family Relief Trust Fund Operating Guide and Procedures. The proposed amendments name the Arkansas National Guard Foundation as The Adjutant General's designee to administer grants under the program. According to the agency, the purpose of the proposed amendments is to clarify and enhance the process of applying for and receiving grants for emergency situations involving Arkansas National Guard members, Reserve Component members, and their families. The proposed amendments incorporate specifics on receipt, processing, and approval or disapproval of grant applications. They establish that funds are administered through an interest-bearing bank account maintained by the TAG designee. They also create an emergency assistance approval committee to assist in review of applications, increase the limit for awards from \$1,500 to \$2,500 in a 12-month period, modify examples of items that can be covered by grants, and create an appeal process to the Deputy Adjutant General.

Following the public comment period, the agency indicated that the following clerical changes were made: in Section 1-3, line 3, "had" was changed to "has"; in Section 1-4, line 3, the missing "t" was added in "grants"; and in Section 1-8, line 3, "theirs" was changed to "its".

PUBLIC COMMENT: A public hearing was held on September 13, 2022. The public comment period expired on October 10, 2022. The Department received no public comments.

Jason Kearney, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) Section 1-4(c): This subsection submits as one example of eligibility criteria “[t]he difference between the member’s military and civilian pay.” Is there a reason that this language differs from that which appears in Arkansas Code Annotated § 26-51-2506(i)(2)(B)(iii), which reads “[t]he difference between the member’s military salary and civilian salary”?

RESPONSE: I assume the original drafters used the word pay because it would seem to be broader and encompass more forms of income than the word “Salary”. Few of the applicants are actually “salaried” employees. Most are working for an hourly wage.

(2) Section 1-5: This section removes examples of situations that could qualify for grant awards. Is it the Department’s intention to not publish within these rules any such examples? **RESPONSE:** It was our intent to remove these examples. They have been interpreted rather strictly in the past as the rule rather than examples.

(3) Section 1-7: This section removes the following language: “[t]he amount of assistance will not exceed \$1,500.00 in a 12 month period.” Is it the Department’s intention to remove any mention of a specific award amount or maximum award amount within these rules? **RESPONSE:** Yes. That was our intent. Our internal policy will limit awards to \$2500.

The effective date of this rule is pending legislative review and approval.

FINANCIAL IMPACT: The Department states that the proposed rules have no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 26-51-2506(h), the Adjutant General shall promulgate all rules necessary for implementing the grant program created under the Military Family Relief Check-off Program for the Military Family Relief Trust Fund.

F. Rules Filed Pursuant to Ark. Code Ann. § 10-3-309 to Be Considered Pending Suspension of Subcommittee Rules Due to Public Comment Period Expiring After October 15, 2022 Deadline

1. DEPARTMENT OF COMMERCE, ARKANSAS ECONOMIC DEVELOPMENT COMMISSION (Jim Hudson, Glen Howie)

a. SUBJECT: Addendum 2 to Arkansas Rural Connect – ARPA

DESCRIPTION: The Arkansas Broadband Office is seeking to promulgate a permanent version of an emergency rule as an addendum to the Arkansas Rural Connect Broadband Grant Program (ARC). The purpose of the rule is to incorporate recent federal guidance as it relates to dispensing American Rescue Plan Act (ARPA) funds, including State and Local Fiscal Recovery Funds (SLFRF) and Coronavirus Capital Projects Funds (CPF). Qualifications for these two funding programs under ARPA are different for the expansion of broadband network infrastructure in rural unserved and underserved areas. Additionally, the proposed rule incorporates recommendations published in the Arkansas Broadband Master Plan commissioned by the Broadband Office and requested by the Arkansas General Assembly. Key points in the rule include:

- Each project will be comprised of full and partial census blocks identified as unserved and underserved areas in the Broadband Master Plan defined by a set of polygons in a GIS shapefile;
- Each project is open to multiple bidders;
- Each project will be scored individually using a rubric evaluating 8 different scoring metrics;
- The Arkansas Broadband Office will specify how many census blocks are associated with each project;
- The proposed rule outlines a process for Incumbent providers to challenge the inclusion of their existing service areas within a project footprint, if the existing service is at least 100/20 mbps;
- Project cost (materials and labor) must be shared up to 75% by the State and a minimum of 25% by the grantee;
- A Grantee must guarantee service availability within its footprint for a minimum 10 years from the time of completed infrastructure deployment;
- Build-out must be complete within at least 3 years following a grant award;
- Internet service providers will obtain a required irrevocable standby letter of credit for 100% of the grant award disbursement, or in lieu thereof, obtain a performance bond covering the same;
- The Broadband Office may allow the letter of credit or performance bond to be reduced to no less than 25% of the grant

- award disbursement as the project progresses and defined milestones in the project deployment are met;
- The letter of credit or performance bond will remain in place until the project is completed and acceptance testing by the Broadband Office is satisfactorily concluded; and
 - An applicant may submit audited financial statements or such other financial and operational information that demonstrates, to the satisfaction of the Arkansas Broadband Office, the financial stability of the applicant.

PUBLIC COMMENT: This rule was filed on an emergency basis and was reviewed and approved by the Executive Subcommittee at its meeting on July 20, 2022. The agency now seeks permanent promulgation of the rule. A public hearing was held on August 19, 2022, and the first public comment period expired on August 22, 2022. Following changes to the rule, a second public hearing was held on October 6, 2022, and a second public comment period was held from September 23, 2022 to October 22, 2022. Due to the volume of comments received, the public comment summary can be found electronically on the paperclip for the November 17, 2022 meeting of the Administrative Rules Subcommittee.

Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses thereto:

1. In reviewing your public comment summary, it appears that many commenters were concerned about the irrevocable letter of credit requirement and requested that a performance bond be allowed in lieu. Could you please explain the agency's rationale for requiring the letter of credit? **RESPONSE:** The letter of credit is required under the federal Infrastructure Investment and Jobs Act (IIJA). Although we are not currently funding grants with IIJA funds, we will next year. The agency's rationale was to go ahead and implement that requirement now. The agency is also seeking to satisfy legislative concerns that we needed recourse in the event a contractor failed to fulfill its obligations under the grant. The letter of credit (LOC) is also presently required by the FCC for broadband grants issued under the Rural Digital Opportunity Fund.
2. It appears that the amount covered by the letter of credit may differ depending of the amount of the grant award. Could you please clarify the percentage that the letter of credit must cover, when it can be reduced, and when it can be discontinued? **RESPONSE:** The letter of credit will be a variable amount that depends on the grant funds disbursed and the percentage of the project completed. Initially, the LOC will be 100% of the grant funds disbursed. It will then be reduced to 25% of the grant funds disbursed once milestones are being completed. As a practical matter, this would mean that in most instances the LOC will be 25% of the

grant funds disbursed as long as the project is on track. If it falls behind or inspection testing identifies defects, the broadband office could require that the higher amount be maintained. After the project is completed in its entirety and acceptance testing confirms that the network functions correctly, the LOC is terminated.

3. In response to public comments, it appears that the agency added language allowing service providers to furnish a performance bond in an amount equal to the grant award in lieu of the letter of credit. In certain responses, the agency indicated that this would only be allowed for the current grant round. Could you please clarify whether this will be allowed in future rounds? If there is uncertainty on whether a performance bond will be allowed in lieu of a letter of credit for future rounds, could you please explain why? **RESPONSE:** The letter of credit requirements will follow the requirements of the funding source of any future rounds. The current round covered by the proposed rule is funded through the U.S. Treasury Capital Projects Fund. That funding source does not have specific security interest requirements, which is why the broadband office has the flexibility to adjust the rule to add the performance bond as an option. It is our expectation that the next grant round will occur in 2023 utilizing funds under IIJA. That funding source does have specific requirements for security interests, specifically a letter of credit. (See p. 72 of the Notice of Funding Opportunity under the Broadband Equity, Access, and Deployment (“BEAD”) Program issued by the National Telecommunications and Information Administration (“NTIA”), U.S. Department of Commerce, which may be found here: <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>. The BEAD Notice of Funding Opportunity (“NOFO”) makes no provision for an alternative security interest, such as a performance bond. Certain public commenters indicated that efforts were underway to request NTIA to modify the NOFO to allow for performance bonds in lieu of a LOC, but to date no modifications have been made by NTIA. If modifications are made to the LOC requirement by NTIA, the broadband office will incorporate those changes into a future rule. But the broadband office cannot disregard NTIA requirements, otherwise it will jeopardize its funding. Regardless of any changes to the LOC in the NOFO, the broadband office will be required to promulgate a new rule next year to meet IIJA specific requirements (many of which have not yet been determined by NTIA). At that time the public will have the opportunity to comment on, and the General Assembly will have the opportunity to review, the broadband office’s rule implementing the IIJA requirements, including any LOC.

4. Concerning the 25% of the project costs which must be funded by the applicant, are there any rules on what types of funding will be considered toward the 25% (cash, materials, labor, etc.)? **RESPONSE:** The 25%

will be derived from the overall project budget developed by the applicant. Since the grant funds are paid on a reimbursement basis, 100% of the project expenses will be initially funded by the grant awardee. The grant proceeds will reimburse up to 75% of any expense that is allowed and verifiable, either through a third-party invoice (in the case of materials) or payroll records in the case of labor. *See* Section 5 the ARC Program Rule concerning allowed expenses.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency indicated that the proposed rule does not have a financial impact.

LEGAL AUTHORIZATION: In accordance with state and federal law, the Arkansas Economic Development Commission shall administer grants, loans, cooperative agreements, tax credits, guaranties, and other incentives, memoranda of understanding, and conveyances to assist with economic development in the state. *See* Ark. Code Ann. § 15-4-209(a)(1). Pursuant to Ark. Code Ann. § 15-4-209(b)(5), the Commission may promulgate rules necessary to implement the programs and services offered by the Commission.

G. Agency Updates on the Status of Outstanding Rulemaking Pursuant to Act 595 of 2021¹

1. **Department of Agriculture**
2. **Department of Education**
3. **Department of Health, Division of Health-Related Boards***
4. **Department of Health, State Board of Health**
5. **Office of Arkansas Lottery**

H. Agency Updates on the Status of Outstanding Rulemaking Pursuant to Act 517 of 2019

1. **Department of Agriculture, Arkansas Bureau of Standards**

I. Monthly Written Agency Updates Pursuant to Act 595 of 2021

J. Adjournment

¹ For those items designated by an asterisk (“*”), no update may be required depending on the action taken by the Subcommittee with respect to that agency’s rules under Item E.