ADMINISTRATIVE RULES AND REGULATIONS SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL

Room A, MAC
Little Rock, Arkansas

Tuesday, September 18, 2018
1:00 p.m.

A. Call to Order.

B. Reports of the Executive Subcommittee.

C. Arkansas Community Correction Quarterly Report Item on Medication Assisted Treatment of Opioid Substance Use AD 18-04. (Dina Tyler)

D. Report of the Veterinary Medical Examining Board Concerning Implementation Dates for the Livestock Embryo Transfer or Transplant and Livestock Pregnancy Determination Rule. (Dr. Doug Parker and Cara Tharp)

E. Rules Filed Pursuant to Ark. Code Ann. § 10-3-309.

1. <u>DEPARTMENT OF EDUCATION</u> (Courtney Salas-Ford)

a. <u>SUBJECT</u>: The Public School Rating System A-F

<u>DESCRIPTION</u>: These proposed new rules implement the school rating system ("A-F") established by Ark. Code Ann. § 6-15-2101 et seq., designate school performance category levels ("ratings") pursuant to Ark. Code Ann. § 6-15-2106, and implement the School Recognition Program established by Ark. Code Ann. § 6-15-2107 to provide financial awards to public schools that experience high student performance and those with high student academic growth. These proposed rules also incorporate new requirements of Act 744 of 2017.

These rules were revised to amend the Total Score Ranges for each rating after the first public comment period.

PUBLIC COMMENT: This rule was reviewed and approved by the Executive Subcommittee at its meeting of March 5, 2018, for emergency promulgation. With respect to permanent promulgation, a public hearing was held on March 19, 2018. The public comment period expired on March 27, 2018. Changes to the proposed rules were made, with a second public hearing held on June 6, 2018, and a third public hearing held on June 29, 2018. The second public comment period expired on July 3, 2018. The Department provided the following summary of the comments that it received and its responses thereto:

Kathy Smith, Walton Family Foundation
Comment: Appendix "A": Why is the value-added score only multiplied by 35 to arrive at the school growth score? How did the Department arrive at this number, and **why is it not larger?** This leaves schools in a position where the growth distribution is highly compressed, which in effect means that schools' growth results contribute less to their overall performance than would be the case if the multiplier was greater. Our concern is that there is not sufficient differentiation of the growth score from the proficiency score when calculating the overall index score.
Agency Response: The multiplier of 35 was used previously in 2015 when the value-added growth model was selected for use in the 2015 Public School Rating. The multiplier was selected to create a spread of scores that ranged mostly from 60 to 100 in subjects of math and ELA with the majority of scores falling within a 70 to 90 range. When the score distribution ranges lower than 60, these values were considered to be out of range and not aligned with the meaning of the growth score as intended. At the time of its creation, the transformation equation was intended to result in value-added school scores such that only very extreme values (very extreme high or low growth) fell outside the range of 70 to 90. This was done to keep the validity of the transformed growth score true to the intention of its use within a uniform grading scale. Thus, only schools with extremely low value-added scores would have had a transformed value-added score that equated to a 'D' grade for growth in 2015, the year of its first use.

A multiplier of 100 is being reviewed. There are several considerations that must be reviewed beyond spreading the scores across a wider range: 1) While a multiplier of 100 will spread the scores out from 80, thus increasing values above a score of 90, concurrently, this multiplier will decrease values at the lower end of the scale, possibly over-penalizing schools with lower growth

beyond what was intended by the use of the score; 2) The weight of 50% for growth, balances the compressed distribution with the achievement distribution, and simultaneous with the weighted achievement indicator, signals schools to grow students at all portions of the achievement continuum; 3) Differences among schools in terms of the value-added scores have been relative in nature through the test transitions that Arkansas has experienced between 2014-2016. Smaller variation has contributed to year-to-year stability in value-added scores during the test transition. The ADE has three consecutive years of the ACT Aspire scores. This will allow the ADE to evaluate the implications of a change to the spread of the distribution across years within a more stable assessment system.

The claim that a larger distribution would have a larger contribution to overall performance will continue to be reviewed, along with implications for other consequential uses of the scores.

Comment: Appendix "A": How does the model account for at-risk student populations? This question matters both within schools, as all schools have some students who are at-risk, as well as for alternative schools (ALE), which are entirely dedicated to at-risk students. The state has considered this before but it appears that ALEs are currently treated the same as all other schools. In previous years, districts were held accountable for ALE students by treating them as if they were still part of the schools from which they were originally referred for the ALE.
Agency Response: See Section 3.03. If a school district has an Alternative Learning Environment (ALE) or an alternative education (AE) program and the ALE or AE has a local education agency (LEA) number, the school district shall, for purposes of a rating pursuant to these rules only, include the ALE or AE students in their respective area schools. At risk student populations are treated fairly in the value-added growth model because their growth expectation is based on their student score history which controls for factors over which the school and teachers don't have control such as students' risk factors due to economic disadvantage. Unlike achievement scores, student value-added growth scores do not have a significant relationship with students' poverty status, race/minority status, English learning status or disability status.

Comment: Appendix "A," Page ADE 334-17: Replace the language "Community Service Learning Credits Earned" from

SQSS Indicator with "CTE Course Credits Earned" or "CTE Completers" or "Industry Certifications."
Agency Response: ADE is continuing to collaborate with the Department of Career Education to identify CTE completers. Once the data are available, the data will be studied for future use as part of the accountability system.

Tripp Walter, APSRC
Comment: Appendix "A": Why is the value-added score only multiplied by 35 to arrive at the school growth score? How did the Department arrive at this number, and **why is it not larger?** This leaves schools in a position where the growth distribution is highly compressed, which in effect means that schools' growth results contribute less to their overall performance than would be the case if the multiplier was greater. Our concern is that there is not sufficient differentiation of the growth score from the proficiency score when calculating the overall index score.
Agency Response: See response above.

Comment: Appendix "A": How does the model account for at-risk student populations? This question matters both within schools, as all schools have some students who are at-risk, as well as for alternative schools (ALE), which are entirely dedicated to at-risk students. The state has considered this before but it appears that ALEs are currently treated the same as all other schools. In previous years, districts were held accountable for ALE students by treating them as if they were still part of the schools from which they were originally referred for the ALE.
Agency Response: See response above.

Comment: Appendix "A," Page ADE 334-17: Replace the language "Community Service Learning Credits Earned" from SQSS Indicator with "CTE Course Credits Earned" or "CTE Completers" or "Industry Certifications."
Agency Response: See response above.

Gary Newton, Arkansas Learns
Comment: Appendix "A": Why is the value-added score only multiplied by 35 to arrive at the school growth score? How did the Department arrive at this number, and **why is it not larger?** This leaves schools in a position where the growth distribution is highly compressed, which in effect means that schools' growth results contribute less to their overall performance than would be the case if the multiplier was greater. Our concern is that there is not

sufficient differentiation of the growth score from the proficiency score when calculating the overall index score.
Agency Response: See response above.

Comment: Appendix "A": How does the model account for at-risk student populations? This question matters both within schools, as all schools have some students who are at-risk, as well as for alternative schools (ALE), which are entirely dedicated to at-risk students. The state has considered this before but it appears that ALEs are currently treated the same as all other schools. In previous years, districts were held accountable for ALE students by treating them as if they were still part of the schools from which they were originally referred for the ALE.
Agency Response: See response above.

Comment: Appendix "A," Page ADE 334-17: Replace the language "Community Service Learning Credits Earned" from SQSS Indicator with "CTE Course Credits Earned" or "CTE Completers" or "Industry Certifications."
Agency Response: See response above.

Second Public Comment Period

Gina Richard, Principal, Star City Middle School
Comment: Thank you for considering the impact the new cut off scores would have had for Arkansas' public schools. It is a pleasure to know our state department works in such cohesiveness to the public school needs.
Agency Response: Comment considered. No changes made.

Lucas Harder, Arkansas School Boards Association
Comment: On Page 17, in the table, Community Service Learning gets abbreviated in the description as "SL." I would recommend changing this to "CSL" to match the language in Commissioner's Memo LS-18-082.
Agency Response: Language revised.

Patti Smith, Drew Central Middle School Principal
Comment: I think that it is a great idea to revise the cut off grading scores. This shows educators in Arkansas that you are making every effort to help our schools.
Agency Response: Comment considered. No changes made.

Melody Morgan, Director of Accountability and Assessment, Springdale School District
Comment: In our new accountability system we are striving to ensure that ALL students are successful and have placed great value on grade spans in our new state ESSA plan.

The DRAFT rules governing the Public School Rating System on Annual School Performance Reports and the School Recognition Program does not recognize or place value on the grade spans (4.01.1 and 4.01.2). Specifically the Rewards and Recognition Program ignores the grade spans and looks collectively at all schools when calculating Performance Rankings and Growth Rankings. This causes the outcome to be skewed favorably towards elementary schools.

For example, Southwest Junior High (7207048) is at the 98th percentile when you look at their growth performance within the 9-12 grade span but did not receive any recognition or reward dollars because they get diluted with elementary even though they were at the top in growth performance within their respective ESSA grade span.

Just something to consider since we want performance and growth to occur at ALL grades and grade spans.
Agency Response: Ark. Code Ann. § 6-15-2107 requires performance-based funding to be awarded to schools in the top percentage of "all public schools" and does not give ADE the authority to differentiate among grade levels served. No changes made.

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

Section 1.02 – Both the summary and questionnaire reference Act 744 of 2017 as a basis for the proposed rules; however, the rules themselves also reference Act 869 of 2017. What changes to the rules were made in light of the latter? **RESPONSE:** We specifically wanted to point out Act 744 because it contains non-codified language that directly impacted the rules. Act 869 was included because it did amend Ark. Code Ann. § 6-15-2107 governing the School Recognition Program which is addressed in the rules but it is the repeal of language in Act 869 that impacted the rules. In other words, language was not included because it was repealed by Act 869.

Section 3.04 – Pursuant to the rule, the rating shall be included in the School Performance Report, and the report shall be posted on the Department's and the school districts' websites. While Ark. Code Ann. § 6-15-2006(b)(1) appears to make it optional for the report to be published in the paper, it looks like Ark. Code Ann. § 6-15-2101(a)(3) may still require it, as well as making it available to parents? **RESPONSE:** Yes, Ark. Code Ann. § 6-15-2101(a)(3) does still contain language requiring that the report be published in the newspaper and made available to parents. However, we only included the website requirement in the rule because that is what is monitored by ADE's Standards for Accreditation Unit.

Section 3.05 – What is the reasoning or the basis for the exemption from a school rating for these entities? **RESPONSE:** Each of these schools serves a specific student population that is not representative of an average public school student population (i.e. student with disabilities, students in the juvenile justice system), thus it is believed that the calculation for a school rating applicable to other public schools would not be an accurate representation of these schools.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: These proposed rules, which implement the school rating system, incorporate provisions of Act 744 of 2017, sponsored by Representative Jana Della Rosa, which concerned the accountability system developed by the State of Arkansas under the Every Student Succeeds Act, 20 U.S.C. § 6301 et seq. The State Board of Education ("State Board") shall qualify and standardize public schools and prescribe requirements for accrediting and grading public schools. *See* Ark. Code Ann. § 6-11-105(a)(5). Pursuant to Arkansas Code Annotated § 6-15-2101(a)(1), the Department of Education ("Department") shall prepare annual reports of the results of the statewide assessment program that describe student achievement in each school district and each school in the state and the school performance category levels under Ark. Code Ann. § 6-15-2103. The State Board shall adopt rules necessary to implement Title 6, Chapter 15, Subchapter 21 of the Arkansas Code, concerning a school rating system,

pursuant to the Arkansas Administrative Procedure Act, Ark. Code Ann. § 25-15-201 et seq. *See* Ark. Code Ann. § 6-15-2106(a). Further authority for the rulemaking can be found in Ark. Code Ann. § 6-15-2108(d), as amended by Act 744, § 4, which states that the Department shall promulgate rules to implement § 6-15-2108, providing that the school-rating system shall be a multiple-measures approach and consider without limitation one or more indicators set forth in the statute.

2. DEPARTMENT OF HUMAN SERVICES, DIVISION OF AGING, ADULT, AND BEHAVIORAL HEALTH SERVICES (Mark White and Craig Cloud)

a. SUBJECT: Section 104 Intrastate Funding Formula

DESCRIPTION: The purpose of the intrastate funding formula is to reach older Arkansans with the greatest economic and social needs by using a fair and objective allocation methodology. This amendment will add two factors to broaden the allocation methodology: rural population data of Arkansans ages 60 and older and population data of Arkansans ages 75 and older. The addition of these two factors to the allocation methodology will improve the equitable distribution of Title III funds and other state and federal funds.

After public comment, two substantive changes were made to the amended policy. First, the language has been revised to clarify that the funding formula applies only to funds that are intended to be distributed by formula to Area Agencies on Aging (AAAs). Second, the proposed rule has been revised to specifically identify the percentages used for the formula components and to specifically identify the base percentage allocated to agencies.

PUBLIC COMMENT: The Department did not hold a public hearing. The public comment period ended on July 14, 2018. The Department provided the following summary of public comments and its responses:

Luke Mattingly, CEO/President, CareLink, Comment Submitted 7/3/18
Comment Summary: Proposed section 104.200 should stipulate the percentages used for the various components of the formula and if changes are recommended then 104.000 should be brought

back to the Legislature for evaluation and approval. The formula proposed in Section 104.200 only identify the factors of the census to be considered without specifics of how each will be weighted. By allowing broad changes on an annual basis by DHS without Legislative oversight, drastic changes in weighting for each factor may occur and cause a reduction for some providers and an increase for others. This instability will make budgeting and planning very difficult. CareLink respectively requests that the FY19 formula that was agreed upon by DHS and the AAAs be stipulated in section 104.200 A and B.
Agency Response: Comment accepted. The proposed rule has been revised to specifically identify the percentages used for the formula components and to specifically identify the base percentage allocated to agencies.

Jerry L. Mitchell, Executive Director, Area Agency on Aging of Northwest Arkansas, Comment Submitted 7/11/18
Comment Summary: The proposed rule states that DHS "will apply the same methodology to the distribution of other funds," but historically NSIP, SHIP, MIPPA, SFMNP, and Title VII have not been distributed by formula to the AAAs.
Agency Response: Comment accepted. The language has been revised to clarify that the funding formula applies only to funds that are intended to be distributed on an equitable statewide basis.
Comment Summary: The MOU between DHS and the AAAs states that the funding formula "shall be enforceable as soon as practicable upon promulgation." Was the new funding formula for SFY2019 promulgated, and can it be retroactively applied?
Agency Response: Comment considered. Funding for AAAs is distributed gradually over the course of the year. If the proposed policy is not promulgated, DHS will adjust funding amounts to ensure that the funding for the fiscal year complies with the promulgated policy in effect as of the close of the fiscal year.
Comment Summary: The proposed rule states that the Older Americans Act was last amended in 2006, but it was last amended in 2016.
Agency Response: Comment accepted. This typo has been corrected.
Comment Summary: Proposed section 104.200 A gives DHS the discretion to award a AAA any percentage (or not a percentage) it chooses since it does not say an equal percentage to each of the other AAAs, and it does not say that this percentage is base funds that will be taken off the total allocation prior to allocating the funds in 104.200 B.

Agency Response: Comment accepted. Because of the ambiguity of the current language in 104.200 A, proposed 104.200 A has been revised to clarify that each AAA receives an equal percentage, to make explicit that the base percentage is 1% of the total funding, and to remove any ambiguity so that the language is consistent with current practice.

Comment Summary: By not including the specific percentages for the formula components, it does not allow for public transparency in that no one other than DHS knows what the formula will be and why the percentages are allocated to each category.

Agency Response: Comment accepted. The proposed rule has been revised to specifically identify the percentages used for the formula components and to specifically identify the base percentage allocated to agencies.

Comment Summary: Funding for the senior services programs has remained stagnant for a long time and loses buying power each year because of inflation. It is not adequate to address the continuing needs of our 60+ population. Arkansas's 60+ population will continue to grow and using the population trends for the 60+ population, it is unlikely that any region will have a decreased 60+ population.

Agency Response: Comment considered. Overall appropriation and funding levels are determined annually in the legislative fiscal session and biennial regular session. The changes proposed in this rule do not govern and cannot modify the overall appropriation and funding levels.

Robert Wright, Arkansas Association of Area Agencies on Aging, Comment Submitted 7/12/18

Comment Summary: The biggest problem is the lack of increases in funding over the years. When the total funding stays the same and inevitable population shifts occur, there will be movement of funds among regions no matter what formula you use.

Agency Response: Comment considered. Overall appropriation and funding levels are determined annually in the legislative fiscal session and biennial regular session. The changes proposed in this rule do not govern and cannot modify the overall appropriation and funding levels.

Comment Summary: The allocation should be updated as new relevant demographic information becomes available. While negative impacts on individual AAAs should be minimized, the allocation should reflect to the most reasonable extent possible the

actual need around the state as indicated by the presence of the population served by the funds.
Agency Response: Comment considered. The proposed rule allows for annual adjustments pursuant to US Census Bureau data to reflect new demographic information as it becomes available.
Comment Summary: We request that the rule reflect the current allocation formula, including the percentages, with any future changes to be made as part of the established rule promulgation process.
Agency Response: Comment accepted. The proposed rule has been revised to specifically identify the percentages used for the formula components and to specifically identify the base percentage allocated to agencies.

Jennifer Hallum, President/CEO, Area Agency on Aging of Western Arkansas, Comment Submitted 7/13/18
Comment Summary: Funding has not increased but the cost of goods, services, and staff has increased. In the environment we are in, the amount of funding received will not guarantee sustainability. If changes need to be made I ask that be done with at least a 3 to 5-year consistency, which help our centers in preparing budgets and decision making and will allow less steep cuts.
Agency Response: Comment considered. The proposed rule has been revised to specifically identify the percentages used for the formula components and to specifically identify the base percentage allocated to agencies; any change to the formula or to the percentages will require a promulgation process and legislative review. Overall appropriation and funding levels are determined annually in the legislative fiscal session and biennial regular session. The changes proposed in this rule do not govern and cannot modify the overall appropriation and funding levels.

The proposed effective date of the rule is October 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: DHS is authorized to promulgate rules as necessary to conform to federal rules that affect its programs as necessary to receive any federal funds. *See* Ark. Code Ann. § 25-10-129(b).

The Older Americans Act of 1965, as amended, provides services and programs designed to help older Americans live independently

in their homes and communities. The Act has a funding system for state and community programs and services established under Title III, under which each state is allotted funds based upon its proportion of the total U.S. population age 60 or older. *See* 42 U.S.C. § 3024(a)(1). A state plan must be approved by the federal Administration on Aging of the Department of Health and Human Services. *See* 42 U.S.C. § 3027(b). DHS distributes the funds to an area agency on aging in each planning and service area within the state which, in turn, awards subgrants and contracts with local providers for services.

DHS is authorized to develop a funding formula, under guidelines issued by the Administration on Aging (AOA), for the distribution of funds taking into account, to the maximum extent feasible, the best available statistics on the geographical distribution of individuals aged 60 and older in the state. *See* 42 U.S.C. § 3025 (a)(2)(C). Federal regulations require the intrastate funding formula to reflect the proportion among the planning and service areas of persons age 60 and over in greatest economic or social need with particular attention to low-income minority individuals. *See* 45 CFR 1321.37(a). The Department must submit the intrastate formula to the AOA for review and comment. *See* 45 CFR 1321.37(c). The Department submitted the proposed changes to the AOA, which informally advised that the proposed changes were satisfactory.

.

3. <u>DEPARTMENT OF HUMAN SERVICES, MEDICAL SERVICES</u> (Mark White and Craig Cloud)

a. <u>SUBJECT</u>: ARChoices 1-18; Resource Utilization Groups (RUGS) Overview

<u>DESCRIPTION</u>: A circuit court in Pulaski County determined that the 2015 Notice of Rulemaking for certain changes to the former DHS Alternatives for Adults with Physical Disabilities (AAPD) and ElderChoices Waiver programs, and the 2016 implementation of the ARChoices in Home Care (ARChoices) waiver program, were not in substantial compliance with the Administrative Procedure Act, Ark. Code Ann. § 25-15-204. Specifically, the court found that the previous rule notice did not refer to the specific nature and significance of the change in assessment methodology.

DHS states that this rule contains (1) changes to the methodology used to determine the amount, duration, and frequency of authorized attendant care hours for ARChoices program participants, and (2) use of the ArPath Assessment tool for assessments, with determination of attendant care hours using an evidence-based methodology known as Resource Utilization Groups (RUGs). DHS also states that the proposed amendments or changes to the prior rule explain, in narrative form, the RUGs methodology and program.

This rule applies to ARChoices in Home Care, a Medicaid Home and Community-Based Services (HCBS) waiver program previously approved by the federal Centers for Medicare and Medicaid Services (CMS) and operating under section 1915(c) of the Social Security Act and 42 CFR Part 441, Subparts G and H, as applicable. ARChoices covers an array of long-term care services and supports including attendant care, respite, adult day care, home-delivered meals, personal emergency response system (PERS), and environmental modifications. The scope of each service and any applicable limitations in amount, duration, and frequency are specified in the CMS-approved waiver and the ARChoices provider manual. As with any Medicaid covered service, ARChoices does not cover or reimburse medically unnecessary services. Services covered for an ARChoices participant are specified in the individual's DHS-approved person-centered service plan.

The former ElderChoices waiver program became ARChoices on January 1, 2016, which became the CMS-approved Home and Community-Based Waiver program administered by DHS for persons 21 through 64 with a physical disability who require an intermediate level of care in a nursing facility, and 65 years of age and older who require an intermediate level of care in a nursing facility. The former Alternatives for Adults with Physical Disabilities waiver program was terminated.

For eligibility in ARChoices, individuals must meet both financial criteria and level of care criteria. The criteria used to determine whether a person's needs and functional limitations meet the intermediate level of care in a nursing facility are established by administrative rules promulgated by Arkansas DHS. *Please see* DHS rule 016.06 CARR 057 (2017) (Procedures for Determination of Medical Need for Nursing Home Services).

Initially for each new applicant and at least annually for each ARChoices participant (enrollee), a comprehensive, independent, and face-to-face assessment of needs is performed by a DHS registered nurse. The DHS nurses use an assessment instrument approved for use by DHS and specified in the ARChoices HCBS waiver application approved by CMS. These assessments and re-assessments (also called evaluations and re-evaluations) are required under federal law and are a necessary part of the process to determine waiver program eligibility consistent with the level of care criteria and inform the development of person-centered service plans.

ArPath is the system used to (1) determine level of care eligibility for the ARChoices waiver program, (2) perform initial assessments and periodic re-assessment of individual needs, (3) provide necessary information for the development of person-centered service plans, and (4) determine the amount of ARChoices attendant care services medically necessary and authorized per month for a given participant as part of their person-centered service plan.

ArPath is comprised of the following:

- The interRAI Home Care (HC or InterRAI-HC) assessment instrument, as modified for ARChoices program requirements and consistent with the DHS promulgated level of care. The interRAI-HC is a standardized and validated multidimensional assessment instrument designed to assist in care planning and resource allocation for individuals who receive care at home. The interRAI-HC assessment instrument is used by multiple state Medicaid programs.

- The interRAI Resource Utilization Groups Home Care (RUGs or RUG/HC), a reliable and validated case-mix classification methodology specifically designed and tested for use in determining the amount of home-based services and supports a person may need based on their functional limitations. Based on participant responses to specific questions in the interRAI-HC assessment instrument, RUGs applies a validated algorithm to assign individuals into 23 groups reflecting the relative intensity of services they are likely to need.

- Two instruments necessary to gather information necessary to determine whether an applicant or participant meets the

Arkansas level of care criteria related to Alzheimer's or related dementia (Cognitive Performance Scale instrument) and daily skilled monitoring of a life-threatening medical condition (Changes in Health, End-Stage Disease and Symptoms and Signs [CHESS] instrument).

Effective October 1, 2018, the Department of Human Services Division of Medical Services (DMS) is proposing the following updates and/or changes to the ARChoices in Home Care waiver program rules:

- Program categorical eligibility, level of care, and attendant care monthly hour allocations will be determined using the interRAI Home Care (interRAI-HC) assessment tool, as modified, and the Resource Utilization Groups Home Care (RUGs or RUG/HC), known together in Arkansas as ArPath.

- The ArPath is the instrument or tool used to collect information to determine the initial and continuing level of care and medical need eligibility for ARChoices participants based upon information that the participant and/or parties on behalf of the participant provide during the assessment interview. Assessment interviews are conducted by DHS registered nurses.

- ArPath uses algorithms to evaluate and categorize a participant's information into scales, client assessment protocols, Resource Utilization Groups Home Care (RUGs), and levels of care which correspond to the eligibility level of care criteria and resource needs. An algorithm is simply a sequence of instructions that will produce the same result in order to effectively ensure consistency and eliminate any interviewer/assessor bias.

- Participant placement into one of the 23 available RUGs is based on the responses provided by or on behalf of the participant about his or her functional limitations. A participant's monthly attendant care hour allocation will correspond to the monthly hour allocation associated with the RUG (one of the 23 groups) in which the participant is placed.

- Using the RUGs methodology, the ArPath replaces nurse subjectivity in determining the number of attendant care hours medically necessary and covered per month for a participant. The RUGs methodology provides a valid and reliable system to objectively determine medically necessary needs for assistance

with specific Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs) tasks available through the ARChoices attendant care benefit. The RUGs methodology ensures that in authorizing the amount, duration, and frequency of ARChoices-covered attendant care service hours, individuals with similar functional limitations are treated alike.

- The complete ARChoices rule with all the terms and provisions of the waiver program is available for inspection and review. The rule includes, in narrative form, the RUGs methodology, and identifies the attendant care hours for each of the 23 groups in RUGs.

- This change in the assessment methodology (RUGs) is significant because, based on the outcome of their ArPath-based assessment or re-assessment and application of the RUGs methodology to determine the medically necessary amount of attendant care services, ARChoices beneficiaries may see an increase, decrease, or no change in the number of hours of ARChoices attendant care services authorized for them per month in their person-centered services plan.

- The ArPath assessment process, including use of the interRAI assessment and the Resource Utilization Groups Home Care (RUGs) methodology, provides an objective process and eliminates prior reliance on subjective opinions of nurses or on information from providers that is not independent or conflict-free. As proposed, ArPath replaces the previous subjective approach with an objective, valid and reliable evidence-based methodology. Inherent to such a change, increases or decreases in the amount, duration, or frequency of attendant care services determined medically necessary for a given person is likely and some of these changes may be significant. This is because subjective methods for determining needs are far more likely to result in unsupported inconsistencies and increase the risk for overuse, misuse, and underuse of services. The new methodology is far more likely to correct for overuse, misuse, or underuse of attendant care services while treating individuals with similar needs alike.

- Further, re-assessments with the same instrument are performed at least annually and more frequently in the event of significant changes in condition such as a hospitalization. An individual's assessment results may naturally change from year to year as health conditions, functional limitations, availability of

family or other outside supports, and other key factors change over time. In turn, this may affect the amount, duration, and frequency of ARChoices services, including attendant care, authorized for an individual.

PUBLIC COMMENT: The Department held five public hearings in 2018, on July 9 in Jonesboro, July 11 in Fort Smith, July 12 in Monticello, July 24 in Hope, and July 26 in Little Rock. The public comment period ended on July 31, 2018. The Department provided the following comment summary and responses:

Kevin De Liban, Legal Aid of Arkansas, comment received 7/9/2018

Comment Summary: There are a few things based on the proposed rule that we would like to highlight based on the experiences of our clients. The most pressing problem is that RUGS itself provides insufficient care to meet the care needs of ARChoices beneficiaries. The effective maximum for anybody is 161 hours per month, which translates to 37 hours per week, or five and a half hours a day. The only people who can get more than five and a half hours a day are those who require IV medications, suctioning, tracheostomy care, are on a ventilator or respirator, or abdominal feeding, or parenteral feeding. Individuals with Quadriplegia, individuals with Cerebral Palsy and Multiple Sclerosis and so forth are limited to five and a half hours a day of care. This is nowhere near enough to meet people's actual care needs. If you were to measure the amount of time that is spent doing all an individual's activities of daily living, they would far exceed five and a half hours of daily care. Prior to RUGS, the maximum was eight hours a day of care for individuals under 65, and seven hours a day for individuals 65 or over. People could just barely make it with those amounts who had really acute care needs. With the RUGS, there is no way for people to be able to meet the care needs. What we have seen is people lying in their own waste, going without food, going without any sort of community contact, all sorts of horrors that none of us would ever want to be subjected to. Prior to 2016 and the use of the RUGS, Legal Aid had zero clients dealing with the amount of hours somebody got, maybe one. In the two and a half years since RUGS was introduced, we have had nearly 200 clients. The appeals have increased exponentially, too, which shows the dissatisfaction and inadequacy of the RUGS-based program. It doesn't provide enough care. It cuts the hours to people who have demonstrated no medical improvement. The third issue is that RUGS has not been meaningfully validated or verified in

Arkansas. To the extent that there is any science behind the RUGS methodology, it was validated in Ontario, Canada, and in Michigan, not in Arkansas. There has been no validation of the RUGS methodology in Arkansas. When OHS came up with the figures of the maximum being effectively 161 hours per month and a few other figures in there, it says it did it on the basis of data. DHS no longer possesses the data that was used to determine those amounts. They lost it. DHS has not been able to generate any data regarding the magnitude of the cuts. So, early on, it estimated that 47 percent of people received cuts under RUGS, 43 percent received increases, and ten percent received no change. That data is from May 2016. There has been no updated data. And even then, they can't tell you, "Well, people got cut by an average of 20 hours per month, and people got an increase of four hours a month," or anything else that would allow us to evaluate whether or not this is even good policy. The fourth issue is that there has been no documented evidence of problems with the pre-existing system of nurse discretion. DHS offers the so-called subjectivity as an after the fact justification for adopting a policy that is being hugely harmful to people. DHS' implementation of RUGS was filled with software errors that the agency did not catch. For nearly two years, people with Cerebral Palsy were being denied on average 25 hours a month of care that they should have been receiving because DHS' software didn't pick it up. The only way DHS fixed it was when Legal Aid of Arkansas brought it to their attention in July and August of last year. At that point, they didn't fix it for everybody. It took a news story until December of 2017 for them to fix the software error around Cerebral Palsy. There is still a software error around diabetes that affects roughly 19 percent, one out of every five people in the program, is getting a different number of hours than they would get if diabetes were taken into account. The last thing is that the algorithm is fundamentally unfair to program beneficiaries. It is so complicated that essentially nobody could understand it before we did. DHS didn't have a single person on staff that could explain the algorithm until May of 2017. Legal Aid of Arkansas were the only people in the whole state that could explain what the algorithm was, how it worked, or could figure out if it was working right. So, DHS doesn't understand it themselves. It's 21 pages of computer code. Doctors' opinions are effectively excluded. And what this does is it leaves these individuals unable to understand the criteria by which they are being judged, oppose it and say, "No. You know what, this isn't enough," and present any sort of a case. With the RUGS, you have no way of knowing from one year to the next whether your

situation is going to change, because it uses these very arcane 60 questions out of the 286 asked, and there is no way for you to know that. So, it ends up being fundamentally unfair to the program beneficiaries. The promulgation raises two questions, one is what will happen to DHS' decision to freeze assessments, even though they were not required to by law, until October 1st, is everybody just going to have to wait, and then what will happen to DHS' new proposed algorithm? How is care going to be allocated in the near term and long-term future?

Agency Response: Comment considered. The RUGs algorithm itself was not invalidated in the litigation referred to and pursued by the commenter, but rather the underlying rule that was intended to implement it. An injunction sought by the commenter is what forced the agency to stop allocating attendant care hours for ARChoices beneficiaries. The agency attempted to quickly implement this rule in June by using the emergency promulgation process as permitted under state law, which would have made it effective immediately. That emergency promulgation process would have been followed by a regular rulemaking process with public notice and comment because emergency rules are only valid for 120 days. But the agency was then prohibited by a court order from enacting this proposed rule through an emergency promulgation; therefore, the agency is required to go through a 30-day public comment period, then consider and respond to public comments, and then seek legislative review, before the agency may implement the proposed rule. These timeframes and requirements are established by state law. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. Because of the court orders and the limitations of the waiver approval, the agency is currently prohibited from allocating attendant care hours for new applicants. This has resulted in delays in the initiation of service for both beneficiaries seeking care through an agency, and beneficiaries seeking self-directed care. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized. The fact that the RUGS methodology was subjected to studies in other regions of the county does not mean those studies were not applicable to Arkansans. An individual who has needs with activities of daily living like toileting, bathing, or transferring

in the northern United States or Canada is similar to an individual living anywhere else. The commenter asserts that the RUGs methodology has an "error" regarding how diabetes is accounted for in the algorithm. Yet documentation submitted by the commenter shows that the founder of the RUGs methodology explicitly determined that the treatment of diabetes in the methodology is not an "error." Some states use a RUGs methodology that takes diabetes into account as a factor; other states, including Arkansas, have modified the methodology so that diabetes is not taken into account, since the functional impairments related to diabetes are already measured elsewhere in the algorithm. This difference is a matter of a policy choice by different states using slightly different variations of the RUGs methodology. It is not a software error.

Bradley Ledgerwood, comment received 7/9/2018

Comment Summary: Is this program designed to cut, because that's the only thing we can figure out, because nobody can tell us why they even tried to do this, since there weren't any complaints to begin with. If you think the algorithm is fair, would you think it would be fair for people like me in wheelchairs to do an algorithm on your pay and how much you are worth without any input from you? And you could have fixed the problem for the disabled community by having higher tiers. I was doing fine on eight hours a day. You could put eight hours on the top tier. The programmer of this program said everyone should be grandfathered in. People that are working in nursing homes don't live as long. And a lot of patients have had to have nerve medicine, including me, and had to have it increased because of the stress you are putting us under. And if our family members were doing the same thing, you would take us away from our family members. I personally think I know why you are threatening cuts, is because you are trying to help the nursing homes. Because at the same time you are cutting this, you are cutting day services. And if my mom went to work, I would have to go to a day service. So, therefore, if it is not there, I go to a nursing home. And so, it seems like this is nothing but corruption. All we are asking the state for is what would be considered one shift. And this program is a lot cheaper than nursing home care. On the appeal process, I think you don't need somebody doing the appeals that works for DHS, you need a commission, maybe one person from DHS, a doctor, somebody from Area Agency on Aging, and somebody like me that is on the program. Also, I have three people coming out to do the same job. They do the exact same thing. If you are looking to implement this to cut waste, cut

out those two people and just have one person come. Area Agency on Aging comes and asks questions, and they do fine, and then Palco comes out and asks the same thing. And I don't know if you still have them do it or not, but then the nurse from DHS came, and filled out the exact same form three times in a row by three different people. The answers don't change. Just talking, three times or four times, however many times you need it.

Agency Response: Comment considered. When the agency first implemented the RUGs methodology, it also increased the cap on the number of participants younger than 65, and it ended waitlists for services that were in effect prior to ARChoices. As a result, several hundred waitlisted individuals immediately became eligible for and began receiving waiver services. Because of recent court orders and the limitations of the currently-approved Medicaid waiver, the agency is currently prohibited from allocating attendant care hours for new applicants until the rule implementing the RUGs system is properly promulgated, to include notice and public comment. The RUGs methodology is currently the only method permitted under the terms of the ARChoices Medicaid Waiver as approved by CMS to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized. Nothing in the proposed rule affects Adult Day or Adult Day Health Services under the ARChoices waiver. The agency is not proposing changes to the appeal process or to the Independent Choices self-direction program in this promulgation, but the agency can consider these comments for future promulgations.

<u>Rebecca Ledgerwood, comment received 7/9/2018</u>
Comment Summary: Why was no one from the disabled community consulted about how this is affecting them? We have reached out. In the beginning, we thought surely there was a mistake, surely that the hours weren't cut that way. And I can't find anyone in the disabled community who has been allowed to speak about that or to tell how it has affected them. It is just strange to me that people could make decisions if they haven't lived there and lived through it. These patients are actually confined to a body that doesn't work. There are just so many things that's not taken into consideration. One person in particular doesn't get enough hours and she is not allowed to go to the

bathroom. You can't say you are going to use the restroom in a five-hour period of time. It's a 24/7 job. It doesn't stop at four hours, five hours, eight hours. It is 24/7.

Agency Response: Comment considered. In July 2018, the agency conducted public hearings on the proposed rule in Jonesboro, Fort Smith, Monticello, Hope, and Little Rock. The agency also provided notice to all existing ARChoices beneficiaries and solicited comment from those beneficiaries. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours.

Cambra Lungrin, comment received 7/9/2018
Comment Summary: I have a client who has more hours than Bradley Ledgerwood and can walk on her own to the bathroom, and I would like an explanation for that.

Agency Response: Comment considered. Federal law prohibits the agency from publicly discussing the individual protected health information of any waiver beneficiary.

Shannon Brumley, comment received 7/9/2018
Comment Summary: What are you going to do about the hours that have been cut that you have done nothing about? I used to get 56 hours, now I get 37 hours. I am a quadriplegic. And I mean, really, 36 or 37 hours?

Agency Response: Comment considered. Adoption of the proposed rule will not reverse or modify any allocation decision made prior to May 14, 2018.

Ann Brumley, comment received 7/9/2018
Comment Summary: I'm Shannon's mom. He is a C4 quad. He can do absolutely nothing for himself. He can't get a drink, he can't go to the bathroom, he can't scratch himself. He has a skin disorder. He has a lot of different problems that we work with constantly. It's around-the-clock care. You never know from one day to the next if you are going to wake up with some kind of surprise that you may have to go to the ER. Your life is just different every day. But for someone to tell you that eight hours a day is too much care for someone that is totally helpless. If that was a baby, a newborn baby that can do nothing for itself, how

many hours would they give that family? Some of these people have been asking about getting on the alternative waiver program. You know, they can't right now. But if they could, I'm just curious as to how many hours they would get. It's not right, it's not fair. You can't justify this in any way. It's just wrong.

Agency Response: Comment considered. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Jeanette Dotson, comment received 7/9/2018

Comment Summary: I work for the Area Agency on Aging, and we serve a 12-county area. My heart goes out to the caseworkers at the DHS offices. Many of them do a great job in taking care of the applications once our case managers submit them to the office. There are a few in some of the counties who do not do such a great job. They seem to put those applications on the side of their desk and they sit there for many, many days. I think that you need to consider the process from the time that we drop it off at the front desk and they put it in their hands. It should not take over four months in a lot of cases for the process to be approved or denied. In Crittenden County, back in March, our case manager was very excited about a client who had just gotten approved, but that application was filled out back in 2017. That is too long. We are capable of doing business better than this in Arkansas. Please look at that process. When the DHS RNs go out to the homes to assess the client, at the end of their assessment, they ask them which provider they would like to provide the care for them. I would like for the people in charge to look more closely at the way they are assigning the providers to the clients, because it is supposed to be client's choice. But I have heard contrary to that. Some of them seem to have a close relationship with some providers.

Agency Response: Comment considered. The agency regularly reviews its processes to evaluate potential work flow issues and to make improvements, and this comment can be taken into consideration during those reviews. Federal law requires that beneficiaries have the freedom to choose a provider. The agency is

not proposing changes to waiver eligibility requirements, eligibility processes, or freedom of choice processes in this promulgation, but the agency can consider these comments for future promulgations.

Sonia Boling, comment received 7/9/2018
Comment Summary: As a provider, I do see what many of the patients have said. We get patients in often that are able to walk and able to talk that will get the same amount of hours as others that really need it once that RUG was implemented. That was the major difference that I saw. Those that really needed the help, they couldn't get it. Those that didn't really need the help as much got far more than they needed. And then, a lot of times wouldn't even use it, because they didn't really need it. They wanted more errands or more of the nonessential things. The RUG system does need to be looked at and some discretion needs to be able to be put in by the individual that's actually face to face with that client.

Agency Response: Comment considered. The agency asks the commenter to report any suspected waste, fraud, or abuse in this or any area of the Medicaid program. Reports can be made to the Arkansas Medicaid Inspector General Hotline at (855) 527-6644 or https://omig.arkansas.gov/fraud-form, or to the Attorney General's Medicaid Fraud Control Unit at https://arkansasag.gov/forms/medicaid-fraud-reporting/. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Laura Haddock, comment received 7/9/2018
Comment Summary: It will be October 1st to get back with people that have processed their applications and turned in their information has been there for several months. What about these people that need care? They can't wait until October 1st. We need to implement something now. I don't understand why it's taking so long. I have had three people personally pass away that we applied for in December and haven't even got anything, or that are about to pass away and facing nursing home care because nobody will get back with them. And I just feel that there needs to be something

implemented besides putting a value on somebody's life that you don't know and you don't know the situation.

Agency Response: Comment considered. The agency understands the commenter's frustration. The agency attempted to quickly implement this rule in June by using the emergency promulgation process as permitted under state law, which would have made it effective immediately. That emergency promulgation process would have been followed by a regular rulemaking process because emergency rules are only valid for 120 days. But the agency was then prohibited by a court order from enacting this proposed rule through an emergency promulgation; therefore, the agency is required to go through a 30-day public comment period, then consider and respond to public comments, and then seek legislative review, before the agency may implement the proposed rule. These timeframes and requirements are established by state law.

Amber Risner, comment received 7/9/2018
Comment Summary: I have a client who is bed-bound. She cannot do anything for herself, and her hours were cut significantly in December. I have seen this straight across the board over the past couple of years. I also have a client right now that has had a significant change in her circumstances. She has decreased in her mobility so severely, and we are looking into nursing home care if something can't be done about this. And I'm afraid if she goes into the nursing home she won't be with us much longer. And her life is very precious. And I just don't think that waiting until October or next December or whenever we decide to actually do something is going to be good for anybody.

Agency Response: Comment considered. The agency understands the commenter's frustration. The agency attempted to quickly implement this rule in June by using the emergency promulgation process as permitted under state law, which would have made it effective immediately. That emergency promulgation process would have been followed by a regular rulemaking process because emergency rules are only valid for 120 days. But the agency was then prohibited by a court order from enacting this proposed rule through an emergency promulgation; therefore, the agency is required to go through a 30-day public comment period, then consider and respond to public comments, and then seek legislative review, before the agency may implement the proposed

rule. These timeframes and requirements are established by state law.

Senator Linda Collins-Smith, comment received 7/9/2018
Comment Summary: I have five counties, Randolph, Independence, Izard, Fulton, and Sharp Counties. I finally got the right road and -- kind of missed my road, went around the loop and parked on somebody else's road and walked down here. And so, I had to cool down to get my breath. But I wondered how anyone with a handicap or disability got down - - got here to this location because I had a hard time getting here. So, whoever picked it, I sure did have a time getting here. When I got here, I couldn't get the handicap button to open the door. So, I'm glad Bradley made it in here, but I don't know how you made it without help, because I was cussing by the time I got the door open. And this is an issue, it is a problem that I have in my constituents that I care about and I love and that are across the state. I think that so many of them call me outside of my district because they know that I care. And it's not a just-in-my county issue, it's from all of the people that have issues that we have concerns, but also the folks that work in our agencies that don't know what to do. So, for all of you that work in our agencies that want to help, and the families, what do you do when you know you've got a senator that cares or other legislators that say, "Now, what do we do? Here are the issues, here is what we have to work around," we are here, there are those of us that care, and we will take those calls. So, we also want to hear what are those problems. And I'm listening. You don't all have to call me, I'm going to sit here and listen and I'm going to hear what those issues are. And I have been listening, because Bradley calls me, and his mother and I stay in touch, and I also stay in touch with the agencies because we have to figure out what we can do. The neediest of Arkansas, I believe that's what those dollars are for first, not the healthiest, not those that do not have a dependent first, that's who I will fight for first. So, we need to hear what those issues are first. That's who I'm going to fight for first, with those few dollars, because everybody wants a piece of the dollar. Linda always has, Linda always will, because there's only a few dollars and they have to spread thin. I'm going to sit here with you tonight, I'm going to be listening to all of you, because we need to know how we're going to divide those dollars. And just know that I will be fighting for you and for your neediest patients, because I have them, too, I have them in my district and across the state. So, you can count on me, I'm going to be right there with you. And if you have any questions for me, I just want you to know that I'm

here. So, I will stay as long as you need me tonight. I'm here for you. Thank you, all of you, every department. It's every agency, too. I mean, we are all in a bind here, we have got to know what we are going to do.

Agency Response: Comment considered. In light of the access issues noted, the Agency will consider other locations in the Jonesboro area for public hearings in the future.

Jacque McDaniel, Area Agency on Aging, comment received 7/9/2018

Comment Summary: We are using the independent assessment through Optum, presently. If that same process is going to be the process for this assessment for this group, we have run into some processes that are not very functional. The DMS 618 is very demanding to be submitted with a referral. And some of those get lost. They are hard to complete, they seem to be a redundancy. Also, we are having problems with our clients not responding to those toll-free numbers or the out-of-state calls. We have harped for years, "Do not talk to telemarketers," you know, "Protect the seniors from fraud," and now their very care is dependent on them answering a phone call from an unknown. And it has proved to be a challenge. Also, we are rural Arkansas. A lot of these people are on a dirt road, on a back alley, and there is not a sign on the road. And without communication with the local provider, it is proving to be a challenge to locate some of these clients. And what has happened is, they will get a tier zero and said that are unresponsive, and so they will lose their services. There needs to be a different option there to have better communication between the provider that knows that client. Our seniors love to put forth and be brave. And a lot of times when you come in there and ask them, "Have you driven your car," or, "Have you given yourself a bath," they can be brave and tell you that they have done it. In reality, they probably cannot take care of that for themselves. And so, it may mislead an assessor that is unfamiliar with them. And losing the contact with the physician or with the local provider that would be more aware of their condition, you really could come up with the wrong answer.

Agency Response: Comment considered. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours. This proposed rule does not change the assessment tool or

practice from what was used prior to May 14, 2018. The agency can take this comment into consideration in future promulgations that may change or replace the assessment instrument.

Senator Linda Collins-Smith, comment received 7/9/2018
Comment Summary: When you've got a court-appointed ad litem, it's kind of like -- don't you see those situations like you do with a child that looks out just for the child, they are not representing anyone except that child? We see that with children a lot of times. And they are only looking out for the child. You are kind of seeing those circumstances where that person is looking out just for that child, and they don't have to fear whether or not they tell someone, in the circumstance of an elderly person, where they are afraid to tell someone, "Oh, if I don't tell" -- or, "If I tell them, they are going to cut out my services, if I tell them the truth, or if I don't tell them the truth, they are going to cut it out this time, they won't come back and help me anymore." I think that's one of the things that we see, the fear, sometimes, that if they just miss one time, if they don't tell the truth, if they tell them one time, "Yes, I could wash myself, or bathe myself one time, they are going to cut out my services." I think that that is sometimes what we see, is this fear factor. And that's kind of what I think I'm hearing in between, maybe the doctor hearing one thing. So, maybe that's something like what we see with the ad litems when judges appoint an ad litem to represent only the child, when the child just needed a coat that day but was too fearful to tell anybody about needing a coat, so it caused problems, when they really just needed a coat, and that's what the whole problem was, that no one knew they just needed a coat.

Agency Response: Comment considered. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours. This proposed rule does not change the assessment tool or practice from what was used prior to May 14, 2018. The agency can take this comment into consideration in future promulgations that may change or replace the assessment instrument.

Shelley Mitchell, comment received 7/9/2018
Comment Summary: One of the things, as an RN, that I have depended on is that when I go into the home, people can act a different way from how they are every single day. They have called us, they know we are coming, they may pretend to have a

limp that they don't normally have. But when I do an assessment and I send it over to the doctor, these are the things that I observed, this is what they reported to me, then if that's not the case, then the doctor will call me and say, "You know what, they don't need the help," or, "They don't need this many hours. And we have lost that communication. And I think that's a tragedy that we have lost that. These doctors have been taking care of some of these patients 20 years, they know them better than anybody else.

Agency Response: Comment considered. The agency asks the commenter to report any suspected waste, fraud, or abuse in this or any area of the Medicaid program. Reports can be made to the Arkansas Medicaid Inspector General Hotline at (855) 527-6644 or https://omig.arkansas.gov/fraud-form, or to the Attorney General's Medicaid Fraud Control Unit at https://arkansasag.gov/forms/medicaid-fraud-reporting/. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Laura Hill, comment received 7/9/2018

Comment Summary: I see a lot of our clients that when we tell them that DHS is going to come into their home, they are going to ask them questions and all that, this big fear factor of, "If I don't tell them I can do it by myself, they are going to put me in a nursing home." And that, to them, is a scary, scary place. And a lot of them, we are their last resort. I know in our agency, alone, we probably have 60, 75 ARChoices applications out right now, which now we are learning we can't do anything until October 1st. And these people need that help. And a lot of them are facing nursing home placement, and they are losing what little independence they have. And to them, that feels like a jail cell, like we are just sticking them away and we don't care. And I think that needs to be looked at. Because, you know, these people trust us, because we a lot of them have been in the home, we have talked to them several times, and we have built that rapport to understand exactly what they need.

Agency Response: Comment considered. The agency understands the commenter's frustration. The agency attempted to quickly implement this rule in June by using the emergency promulgation process as permitted under state law, which would have made it effective immediately. That emergency promulgation process would have been followed by a regular rulemaking process because emergency rules are only valid for 120 days. But the agency was then prohibited by a court order from enacting this proposed rule through an emergency promulgation; therefore, the agency is required to go through a 30-day public comment period, then consider and respond to public comments, and then seek legislative review, before the agency may implement the proposed rule. These timeframes and requirements are established by state law. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Anna Lee Smith, Highland, AR, comment received 7/17/2018
Comment Summary: The personal care service we received and continue to receive is a Godsend. Such a help. Such a blessing. Without the help of the organization/DHS program, I just do not what we would have done. My husband would not have been able to stay at home. At home is the very best quality of care possible for him. He did not flourish in long term care facilities. He had good care but was just existing. At home with personal care, he has a "life". All the medical help is the difference between life and merely subsistence. Thank you.

Agency Response: Comment considered. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours.

Michael Dooley, comment received 7/17/2018
Comment Summary: I am commenting on the RUGs system. I do not agree with letting a computer program overriding a doctor's decision on a person's disability.

Agency Response: Comment considered. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Donna C. May, Mountain Home, AR, comment received 7/17/2018

Comment Summary: As a citizen of Arkansas and an elderly disabled person living at home, the services provided in home are essential to my remaining at home. The hours I am currently allotted to have an in home caregiver is not enough to pay for all I need done. My daughter, who is also my caregiver and has been most of her adult life, does practically everything for me. From showering to dressing and transportation. I am 56 years old and I have cerebral palsy, and until 2015, I was doing for myself. I was walking with the aid of a walker and doing my own showering. I had problems with toileting but I was independent. Now, after a neck fusion from C3-T1, two rods and ten screws holding my c-spine together, I am unable to walk, shower and dress myself. This is why I object to the hours I have been given. I am not going into an assisted living/nursing home because I feel I can do just as well at home.

Agency Response: Comment considered. The methodology in the proposed rule for allocating attendant care hours is the same methodology used by DHS prior to May 14, 2018. Adoption of the proposed rule will not reverse or modify any allocation decision made prior to May 14, 2018.

Mattie Brown, Plainview, AR, comment received 7/20/2018

Comment Summary: I really don't understand all this health care mess. What I do know is that my granddaughter is my live-in caretaker and this system is a mess. She lives with me 24 hrs a day and she is only paid for two to three hours per day. I need help most of the day with odds and ends. It took forever to get this set up and she can't even work a side job to make ends meet, because that's fraud. DHS really needs to re-evaluate this system. I live on a fixed income and have to do yard work, house care, etc., and if it wasn't for my live-in caretaker doing all this stuff for me, I don't

know what I would do. I will not go into a nursing home. This is my life. I would like to see all this changed for the better care of the elderly and the people that take care of us. That's what the system is supposed to be for.

Agency Response: Comment considered. The agency is not aware of any rule that prohibits caretakers from having other employment, so long as they are not billing Medicaid for hours worked in another job. The purpose of having an objective methodology for allocating attendant care hours is to ensure that each beneficiary receives a sufficient number of hours based on that individual beneficiary's assessed needs for assistance with activities of daily living (ADLs), and that the hours allocated are consistent across the state for similarly-situated beneficiaries. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours.

Ryan Kubik, comment received 7/20/2018
Comment Summary: Is it you as an individual that hates the injured and disabled, or is it because you are employed by the state? Real questions. I'm 23 and your state screws me over left and right because of my back injury.

Agency Response: Comment considered. The purpose of having an objective methodology for allocating attendant care hours is to ensure that each beneficiary receives a sufficient number of hours based on that individual beneficiary's assessed needs for assistance with activities of daily living (ADLs), and that the hours allocated are consistent across the state for similarly-situated beneficiaries. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours.

Dana Wolf, Mountain Home, AR, comment received 7/21/2018
Comment Summary: I have been a DHS client since June 2000. Prior to the RUGS algorithm, the DHS nurse did my annual assessments and determined I was eligible for the maximum 8 hours per day or 56 hours per week. I am a C4-5 quadriplegic injured in January 1974. I wear a Foley catheter and have home health nursing care. My health has diminished to the point I require more attendant care, not less. When I was assessed by a DHS

nurse for the years 2000-2008, I was living with family. Family is no longer an option for my needs as they are full-time employed elsewhere. From 2009 to current, I have been living alone in my personal residence with the help of this program. I have experienced serious health issues, such as pneumonia, which required manual assistance for coughing from an attendant throughout the day and night. I had a tracheotomy for 2 of the years that required suctioning throughout each 24-hour day. I had 2 pressure ulcers, one forming at the time your RUGS algorithm was implemented which cut my attendant hours by 13 hours per week. This created a tremendous hardship as I was unable to sit in my wheelchair, so had to remain in bed for 8 months to heal the pressure ulcer on my backside. I have a suction machine and do regular updrafts at least 4 per day to keep my airways clear. I have resident pseudomonas in my body which requires occasional IV antibiotics for 10-14 days at a time. I tried for 5 months living with the reduced hours. The isolation and lack of care hours left me vulnerable to bed sores, on bowel program nights I had to lay in my feces between shifts, and my diminished respiratory issues required me to contact 911. While I was on appeal, DHS reinstated my hours to the previous 8 hours per day. My current situation allows me to sit no more than 8 hours per day. I am in bed approximately 16 hours per day and require an attendant to perform all my basic needs as I am unable to use my hands. To minimize the attendant's presence, I have done my best to utilize technology, such as a self-dialing telephone, a button I can trigger in bed for emergencies, and voice-activated Echo-Dot to control my television and other devices. Without going into specifics of my daily routine of attendant care, the facts are: I require an attendant 2 hours per visit, 4 times per 24-hour period, just for the basics of life. Any reduction in hours would be detrimental to health and living independently in my home. I hope you consider a client's individual basic necessities in living when determining how you implement any form of reassessment.

Agency Response: Comment considered. The purpose of having an objective methodology for allocating attendant care hours is to ensure that each beneficiary receives a sufficient number of hours based on that individual beneficiary's assessed needs for assistance with activities of daily living (ADLs), and that the hours allocated are consistent across the state for similarly-situated beneficiaries. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to

allocate attendant care hours. Adoption of the proposed rule will not reverse or modify any allocation decision made prior to May 14, 2018.

Donna May, Mountain Home, AR, comment received 7/21/2018
Comment Summary: Many of us who have applied for self-directed care have been approved to work, and all we are waiting for is the start date so our caregivers can be paid. I have been told that DHS has been given requests for start dates but there is a hold up in communication. I would ask you to make it a priority to get these start dates out in a timely manner. Many people rely on your department doing its job and getting these request filled.

Agency Response: Comment considered. Because of recent court orders and the limitations of the currently-approved Medicaid waiver, the agency is currently prohibited from allocating attendant care hours for new applicants. This has resulted in delays in the initiation of service for both beneficiaries seeking care through an agency, and beneficiaries seeking self-directed care. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours. If the rule is approved, the agency will be able to resume initiation of self-directed care for beneficiaries such as the commenter.

Kathi Rohde, comment received 7/21/2018
Comment Summary: This algorithm is the worst idea anyone has ever thought of! It is totally unfair to everyone on any DHS program. It creates a totally unfair and unjustified circumstance for everyone and deprives everyone on any program of receiving the help necessary to adequately deal with any illness or disability. The year that I was subjected to this system was the most difficult and subjected me to a necessary and unfair lack of services.

Agency Response: Comment considered. The purpose of having an objective methodology for allocating attendant care hours is to ensure that each beneficiary receives a sufficient number of hours based on that individual beneficiary's assessed needs for assistance with activities of daily living (ADLs), and that the hours allocated are consistent across the state for similarly-situated beneficiaries. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to

allocate attendant care hours. The proposed rule and the RUGs methodology apply only to the ARChoices Medicaid waiver; they do not apply to any other waiver or Medicaid program.

Joann Faulkner, comment received 7/21/2018
Comment Summary: My personal care hours were cut because of the use of RUGs methodology. The cut in hours came at a time when I was just released from a week-long hospital stay. The method takes the human element out the equation. We don't mind been identified by a number, but we don't want to be defined by a number. I fully understand we search for ways to improve programs, but I feel safe in saying the RUGs methodology is not the answer.
Agency Response: Comment considered. The proposed rule and the RUGs methodology apply only to the ARChoices Medicaid waiver; they do not apply to personal care services, or to any other waiver or Medicaid program. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours.

Tonya Carpenter, comment received 7/22/2018
Comment Summary: I am a victim of the disastrous RUGs algorithm that the State and DHS imposed and enforced last year making a difficult life and situation for those of us a little less fortunate even more difficult. The first thing you need to consider and DO is to return back to the original tried, proven and worked method that was used flawlessly for 17 years, where the nurse went out and did an in-home honest, face-to-face visit to the patient, seeing their needs and the environment in which they lived to evaluate and accurately assess each individual's needs. It worked 17 years! It wasn't broke, so it didn't need fixing nor changing! Before one decides that I am just an old fogey stuck in my ways and not wanting, making nor adjusting to change, WRONG! I have more degrees behind my name than most do affiliated with this program, and yes the majority of them are health-related degrees. Not everyone has the same needs to be "equally" cared for. You cannot tell me one person that wants to be stuffed in a contained Nursing Facility, and warehoused like a cargo warehouse staring at four walls waiting to die if someone doesn't do it for them first. Yes, I do understand and I am thankful that there are such facilities that are out there available for those who under certain situations and circumstance for a very few individuals who have no family nor friends, and their environment

or health issues might be a risk or dangerous, but not everyone fits into that category (very few actually). See, I from my viewpoint can see much more than most folks can see it seems any more. And, I know how YOU would feel if it was YOU sitting in my seat, and the powers that be were forcing this on you. There is something wrong with my muscles folks, NOT my brain! And this program is absolutely nothing short of Communism, or if that word freaks you out too much we will just change the word, but not the meaning to "Socialism" and this computerized RUGs algorithm is nothing short of Communism/Socialism at its finest degree! Someone said that the Nurses Society claim that this system and program will save the state financially. I am not sure what school they went to, or what adding machine they were figuring on, but it must have been on the same computer as the RUGS algorithm. Pray tell, how did you figure that paying caregivers minimum wage of $10.40 an hour where the individual is in charge of their own rent and food cost, to spending from $3-5,000.00 a month on each body parked there in a nursing facility, each month. That will take one down in the red fast and not save a penny! Again I reiterate, they need to go back to the old, tried and proven method, the way that worked for 17 years. A computer is only as smart as the individual who programmed it, and then the knowledge of the system operator, and there is absolutely no way on earth a computer, a machine can accurately diagnose and prescribe the needs of any individual and that is exactly what you are doing! I sent you specific doctor and therapist orders stating my physical condition and my needs and they were totally ignored! The RUGs algorithm was what, 200 questions? Why, anyone with one eye and half sense would know that you cannot accurately determine anyone's health situation and/or need with that. It can't see what the condition, motivation nor what environment and condition an individual's personal needs are. People who have the same diagnosis can have drastic differences in the symptoms and healthcare needs yet have the same disease or issue. It doesn't matter if you have 400, 600, or 1,000 questions a machine cannot determine and diagnose, which is EXACTLY what the RUGs algorithm does. I was diagnosed with "Case Unknown" at 15 months old. I have developed issues from my "Unknown Case" but that computer cannot see nor comprehend, nor understand; it is a machine, it cannot think, see, feel or hear. This program doesn't care how much folks are in need, only if they have what that poorly orchestrated computer program said. My parents are my Caregivers, who this Birthday they will be 77 years old. They live on Social Security, and this illegal cut in my Caregiver hour pay

has been difficult on them paying insurance and taxes that the finances from my care assisted in paying. Struggle though we may because of the cut with the RUGS algorithm, God forbid should anything happen to my parents! This cut would leave me to where I could only get up, go to the bathroom, eat and drink every other day! And then months with 5 weeks, according to the RUGs, my allowance does not cover that week! And now you desire to change it again by creating three tiers?

Agency Response: Comment considered. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized. The purpose of having this objective methodology for allocating attendant care hours is to ensure that each beneficiary receives a sufficient number of hours based on that individual beneficiary's assessed needs for assistance with activities of daily living (ADLs), and that the hours allocated are consistent across the state for similarly-situated beneficiaries. Individuals within each RUG have similar functional abilities, even though they may have different diagnoses. The results of the RUGs methodology are used to allocate hours on a monthly basis, not a weekly basis, meaning that services are available in all weeks of any given month. The agency is not proposing in this promulgation to create any additional tiers for determining level of care.

Rhonda Mitchell, comment received 7/23/2018
Comment Summary: I am not pleased with the program. They took me off the program. It is awful when you have to depend on other people to help you. I never thought it would be me. I would rather have my health and strength then all the money in the world. They put me on the Independent Choice program because they said we don't have to have a background check anymore. I don't like that. I feel that if a person can't pass a criminal background check, they shouldn't work for handicapped people like myself. We need dependable and honest people to work for us.

Agency Response: Comment considered. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services

while the agency finalizes a new method to allocate attendant care hours. Caregivers under the Independent Choices self-direction program are required to pass criminal background checks to be eligible for payment.

Barbara Fjelsted, comment received 7/23/2018
Comment Summary: My disabled 40-year old son receives services from ARChoices. He is unable to do any of his own daily care. He has chronic respiratory failure, a neuromuscular disorder, and paraplegia. He is unable to turn or position himself. He only qualifies for 135 hours monthly of care according to his RUG assessment. He must be visually monitored and assessed 24 hours a day. He is at high risk for aspiration due to his lack of muscle strength. I highly object to the RUG tool. It does not fairly address the needs of my son or other individuals in similar circumstances.

Agency Response: Comment considered. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours.

Jonathon Holloway, comment received 7/23/2018
Comment Summary: I have been on this program for over 20 years. When DHS switched from using a real nurse to the RUGs algorithm, it was the worst thing they ever did for this program. The RUGs algorithm is not a good evaluation of the patient; a real-life nurse is 100 times better. I have Werdnig Hoffmann disease where your muscles die off over time. When I first started this program, I received 8 hours per day, or 112 hours every 2 weeks. When DHS started using the RUGs algorithm in 2016, my hours were cut. I fought it, and in the midst of that something happened so they gave everybody their hours back that got cut. Then in 2017, the RUGs algorithm cut my hours from 112 hours every 2 weeks to 92 1/2 hours every 2 weeks. I am in much worse shape now than I was when I first started this program. I am actually using Dragon NaturallySpeaking software to type this for me now by voice, because I do not have enough movement and strength in my hand to type. I barely have enough strength to move the mouse around and just enough to control my powered wheelchair. I am totally dependent on my caretakers to do everything for me. Even the nurses that come out to reevaluate me can't believe that my hours are getting cut by your RUGs algorithm, because I basically am a 24-hour job. You need to switch back to using a real-life nurse

because they know the situation and the condition of the patient, not a computer program that knows nothing.

Agency Response: Comment considered. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Frankie Miller, McRae, AR, comment received 7/24/2018
Comment Summary: I have been with White River Area Agency on Aging since 2013. At that time, I had a stroke and had to have in-home help. ARChoices has been very beneficial with my recovery process. Without this program, I would not be able to have help in my home. Due to the stroke, I have very limited mobility on my right side. With this limited mobility I am not able to clean my home, do my laundry, or prepare meals. ARChoices allows me to receive the help I need, in my home, to live comfortably. I am not financially able to afford physical therapy, maid service, or cab service for transportation. ARChoices benefits me with all of these needs. Without the ARChoices program I wouldn't be walking today. I was able to have physical and occupational therapy, and I truly believe that this program has aided in my ability to regain walking and talking.

Agency Response: Comment considered. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours.

Jearline Ford, Cross County, AR, comment received 7/24/2018
Comment Summary: I had a client who died waiting to be approved for ARChoices. Her family blamed me for the delay in getting services. The reason we are doing these applications is that clients need help now, not waiting 4 and up to 6 months for approval. Also I have a dementia client who needs services badly. The delay causes inconveniences to her family's livelihood; the daughter is missing work to cover hours. It makes me cry to see these clients suffer like this.

Agency Response: Comment considered. The agency understands the commenter's frustration. Because of recent court orders and the limitations of the currently-approved Medicaid waiver, the agency is currently prohibited from allocating attendant care hours for new applicants. This has resulted in delays in the initiation of service for both beneficiaries seeking care through an agency, and beneficiaries seeking self-directed care. The agency attempted to quickly implement this rule in June by using the emergency promulgation process as permitted under state law, which would have made it effective immediately. That emergency promulgation process would have been followed by a regular rulemaking process because emergency rules are only valid for 120 days. But the agency was then prohibited by a court order from enacting this proposed rule through an emergency promulgation; therefore, the agency is required to go through a 30-day public comment period, then consider and respond to public comments, and then seek legislative review, before the agency may implement the proposed rule. These timeframes and requirements are established by state law. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours.

Tairra Inmon, Crittenden County, AR, comment received 7/24/2018

Comment Summary: I'm very thankful we have such a program to help individuals, but there are some things I don't like or agree with. First, the "waiting process" for the nurse to go out and assess these individuals. For instance, I can turn in all paperwork needed for client within a month or so, but can't get a nurse to go out and assess these individuals until a month or so later. 2. Lack of communication between DHS workers and the care agency. I can turn in the application itself and a DCO 153. Yet, the eligibility nurse still will say, "I cannot give out that information without a consent." And I know I turned in a DCO 153. I don't understand why the eligibility worker doesn't send notices to me and client. Why can't the client and the authorized agency both get records of the notices? This is why so many people get denied. These are elders. Some may not understand the paperwork. That's why we have to do multiple applications. Then these nurses deny these folk, because they can sometimes transfer to the bathroom to the toilet, from the chair to the bed, or these individuals can eat by themselves. How does this determine whether a person can get

approved or not? This is just ridiculous. I did an application three times for a client. First time they denied him, because they said he can eat, toilet, and transfer by himself. The second time, they denied him, but a nurse lied and said she went to assess him and did not. The third time, he got approved. Yes, he got approved, but died two days after he got approved. I mean how many other people will die, because they applied for AR Choices and they were denied over and over again? Maybe, if he had an aide in the home, that aide could've saved his life. He was laying on the floor for hours and he had just taken his last breath when a firefighter kicked the door down.

Agency Response: Comment considered. The assessment tool is used to identify whether an individual has difficulty with one or more activities of daily living (ADL), and if so, the severity of that difficulty. Under the CMS-approved waiver terms, eligibility is conditioned on an individual requiring extensive or total assistance from another person for at least one ADL, or requiring limited assistance from another person for at least two ADLs. Some individuals will not qualify for the waiver even though they have some ADL limitations, if those limitations do not meet the waiver requirements. The agency is not proposing changes to waiver eligibility requirements or processes in this promulgation, but the agency can consider these comments for future promulgations.

Natalie Lotz, Hope, AR, comment received 7/24/2018
Comment Summary: My understanding is that the Arkansas Board of Nursing requires that an RN make an assessment to develop a Plan of Care. The way that you are using the new algorithm, that RN is not allowed to make that assessment, she just can ask the questions that the computer says that she can ask. If she deems the patient needs more hours, she is not allowed to give them more hours. That happened in my own child's life. We were cut significantly, although his condition has certainly not improved.

Agency Response: Comment considered. The agency is unaware of any law or rule that precludes the use of an assessment tool to allocate attendant care hours. The DHS nurses are still responsible for developing the plan of care for each beneficiary, and this proposed rule does not change that.

LaQuita Rainey, Hope AR, comment received 7/24/2018
Comment Summary: When the nurses go out to do the RUG assessment, is there something in writing that says that family

members not allowed to respond to those questions? Sometimes when the nurses do assessments, they are telling family members that they can't respond, because they want to know what the client has to say. But when they are visiting the client for only thirty minutes to an hour, that's a really small amount of time, a little snapshot. A client may be able to answer questions that may seem appropriate, but they are not appropriate. They say stuff and they ramble, or they do different things when the nurse is not there, because they do try to respond the way they think that is appropriate, but that's not the way that they are.

Agency Response: Comment considered. Family members, beneficiary representatives, and caregivers are permitted to participate in an assessment, so that the agency can obtain the most accurate possible information regarding the beneficiary's functional limitations.

Mrs. Aaron Chappell, Texarkana, AR, comment received 7/25/2018
Comment Summary: I appreciate the recent decision that was made to let me keep my attendant care hours. I am suffering from cancer. I do hope that DHS is approved by the Legislature again because we are suffering and need these programs. We need the RUGs methodology program.

Agency Response: Comment considered.

Tammy M. Dobbs, Cherokee Village, AR, comment received 7/25/2018
Comment Summary: I have cerebral palsy due to a birth injury. I also have a bad case of scoliosis, and I have no hip sockets. All of this limits my ability to care for myself. My condition has worsened, and I need the most hours I can receive; I have 56 hours per week. In the morning the aide gives me a bed bath, dresses me, and uses a hoyer lift to get me from the bed to a bedside commode. Then they clean me and put me in my motorized wheelchair. Sometimes they help me to comb my hair if I'm too spastic to do it myself. Preparing my breakfast is next. And they clean my house because I cannot. The aide puts me on the bedside commode again at the end of the two hours they are here. At noon the aide prepares lunch and something for me to drink during the afternoon. The aide then cleans up from lunch. At the end of the hour the aide uses the hoyer lift and puts me back on the bedside commode, cleans me, and puts me back in my wheelchair. If I need errands to be run, the

aide does them at noon. At night, the aide prepares my dinner and cleans up. I have diverticulitis which causes me to either be constipated or have diarrhea. At night I make many trips to the bedside commode to either make my bowels work or because I have diarrhea and I need help to get me on the bedside commode. At the end of the five hours, the aide undresses me and puts me to bed. I have to be positioned just right, because I lay that way from 9 pm until 8 am. During the week the aide does two loads of laundry, washes my hair, and does other things to help me with daily living. I have tried to be as independent as possible and to stay out of the nursing home. As you can see, I depend solely on the hours the aides are here. When my hours were cut due to the RUGs there were things I had to do without, causing dehydration, weight loss, infections, anxiety, and depression. Each duty an aide does takes more time than RUGs allows. People are not all the same like RUGs puts us in the same category. Under the nurse-based program, the nurse can "see" the differences and know that I need more help than one who walks. A computer program cannot see that. Besides being better mentally on the person, in-home services are cheaper on the state than a nursing home. We, the disabled and elderly, have to deal with pain and suffering every day due to our illnesses. Now we have to fight DHS for the help we need. If you do not do away with the RUGs methodology and go back to the nurse-based system we will continue to be upset, because this is "our life" you are changing and putting us in turmoil.

Agency Response: Comment considered. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized. Adoption of the proposed rule will not reverse or modify any allocation decision made prior to May 14, 2018.

Shannon, comment received 7/25/2018

Comment Summary: The DHS mission is to "improve the quality of life of all Arkansans by protecting the vulnerable" and "promoting better health." You are, have been, and want to continue cutting the hours of ARChoices beneficiaries, forcing people INTO nursing homes! In my opinion DHS should be

ordered to change its name to DIS (Department of IN-Humane Services). You are not just cutting our hours, you are not accepting any new applicants who desperately need your help. So you let DHS cut our hours, but give a pay raise to the DHS Director? I wish I had the recording of the meeting we had in Jonesboro we went to, all the comments were bad or negative! Not one positive comment or remark! It's plain and simple, there is no computer-based algorithm that can take a nurses place!! Arkansas can no longer be associated with the phrase "Land Of Opportunity"!

Agency Response: Comment considered. The agency understands the commenter's frustration. Because of recent court orders and the limitations of the currently-approved Medicaid waiver, the agency is currently prohibited from allocating attendant care hours for new applicants. This has resulted in delays in the initiation of service for both beneficiaries seeking care through an agency, and beneficiaries seeking self-directed care. The agency attempted to quickly implement this rule in June by using the emergency promulgation process as permitted under state law, which would have made it effective immediately. That emergency promulgation process would have been followed by a regular rulemaking process because emergency rules are only valid for 120 days. But the agency was then prohibited by a court order from enacting this proposed rule through an emergency promulgation; therefore, the agency is required to go through a 30-day public comment period, then consider and respond to public comments, and then seek legislative review, before the agency may implement the proposed rule. These timeframes and requirements are established by state law. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours. Adoption of the proposed rule will not reverse or modify any allocation decision made prior to May 14, 2018.

Suzanne Williams Kline and Ray T. Williams, comment received 7/26/2018

Comment Summary: The ARChoices rule-making process cut the hours available for the care of our family member Holly by 33% (from 40 hours per week to 26.5 per week). It's hard to imagine that a computer can walk in and make such a life-changing decision to determine the level of care and safety for a disabled person who cannot take care of themselves. This annual computer decision (without recourse for adjustment) is based on two-hours'

worth of ambiguous questions and ambiguous multiple choice answers that likely force inaccuracy. Can the definitive data regarding this current rule-making methodology be provided for our review? Data that supports the validity, accuracy, and the resulting positive benefits to the consumer? This faulty algorithm coding should not be the judge and the jury making such a crucial decision. Any person, trained or untrained, that observes Holly knows that she would need maximum care to protect and provide for her. Why doesn't DHS get a statement from the consumer's physician on the consumer's status? It seems like this should be weighted in the decision, in addition to what an inanimate algorithm says. Holly is unable to answer most of the assessment questions. She has no concept of the meaning of the questions. She becomes agitated with the questioning and basically shuts down after being repeatedly asked question after question that she doesn't understand. The questions are directed to Holly for Holly to answer. We have been advised that in the future that no one should be answering the questions in place of Holly's inability to answer. It's illogical (at least in her case) for someone to ask these questions to a developmental child (Holly) and then that child be able to answer with the provided multiple choice answers and result in any kind of meaningful result. Holly needs and deserves her fair share of care for her disability. She was assessed as needing 40 hours per week of care. Cutting hours by 1/3 would seem to imply that her condition has improved and therefore she would need less care. In reality, Holly needs 168 hours of care per week. It was a difficult situation to provide physical, emotional, and financial care for Holly at 40 hours, and exponentially more stress on all of us at the current 26.5 hours. The appearance is that this rule-making process was implemented in a surreptitious manner in order to benefit budget-cutting rather than benefiting the consumer in need. This in theory would take 'blame' off of top DHS administration officials.

Agency Response: Comment considered. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized. Adoption of the proposed rule will not reverse or modify any allocation decision made prior to May 14, 2018.

Nancy Morrell, comment received 7/26/2018
Comment Summary: We do not support the RUG methodology in determining the number of attendant care hours Carolyn needs. Carolyn does not walk or talk. She has to be fed, carried to the bathroom, turned over at night approximately 10-12 times. Questions about Carolyn getting dizzy when she walks were insulting. Most of the questions did NOT even pertain to her condition. She is completely dependent on others to survive. The questions were also extremely time consuming and frustrating.

Agency Response: Comment considered. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Thomas Nichols, Disability Rights Arkansas, comment received 7/26/2018
Comment Summary: This is an issue that DRA and others brought to DHS's attention more than one year ago. This is a problem created by DHS's unwillingness to apprise the public of changes to these life-saving services in a way that is transparent and legal. DHS represents that the data used to create the RUGs no longer exists; accordingly, it is not verifiable. Despite DHS understanding the variance of needs among individuals even though they may have the same disease or condition, with this rule DHS intends to lump more than eight thousand individuals into only twenty-three categories. This proposed system yields confounding results, contrary to the purpose of the rule. One of the founders of the system, Brant Fries, described DHS's swift move from one of nurse discretion to the proposed rigid, automated operation of an algorithm as "stupid" and advised against it. The RUGs system does not permit any evidence from a medical care provider to challenge the medical necessity of attendant care hours in a greater number than those that are assigned to a RUG. The inflexibility of the system is also contrary to Brant Fries's user's manual for administering the assessment. The "rulebook" provided by DHS is also problematic; it is almost as difficult to read and understand as the algorithm itself. Many of the areas of questioning only capture

treatments or conditions that existed three days to a week preceding the assessment. One specific problem is that individuals are placed in the first RUG for which they are eligible, but this means that an individual who received speech, occupational, or physical therapy in the week preceding the assessment is automatically assigned to a fixed RUG level that is less than what they would otherwise qualify for if not receiving therapy. Another problem is the weight applied to parenteral feeding, which some clients postpone to continue tasting their food. This punishes clients for taking a less risky and less restrictive alternative that typically will result in a better quality of life, at a sacrifice of fewer hours of attendant care. Use of the RUGs system has had a tremendously detrimental impact on individuals with disabilities and has resulted in drastic cuts to DRA's clients' hours. They have had to consider institutionalization should the process not change to provide them with adequate attendant care hours.

Agency Response: Comment considered. Because of recent court orders and the limitations of the currently-approved Medicaid waiver, the agency is currently prohibited from allocating attendant care hours for new applicants. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Jack Moore, comment received 7/26/2018 (same comment also submitted in writing by Robert Moore, comment received 7/31/2018)

Comment Summary: (1) I want to know how the RUG system doesn't classify myself in the category with the highest hour allotment. Every medical professional I've seen in the 14 years since my accident has agreed that I require 24-hour a day care, 7 days a week. The reason given for my exclusion from the highest RUG category was that I didn't have medical devices like peg tubes, trachs and IV's in my body. This is illogical for 2 reasons, the first being that all these apparatuses increase the risk for serious infection in my body, and the second being that all these devices actually lessen the amount of time for care, not increase it. For example, if I had a peg tube it would take 10 minutes to feed me a meal, and the care attendant doesn't have to be in the room

with me. Whereas, it takes over an hour to feed me a meal with constant attention. (2) Why is it that disabled people have no voice in deciding their own care? Our quality of life is determined by a group of people who could care less about our health. My caregiver is only reimbursed for 5 hours of care daily when my care is round the clock. 5 hours daily isn't even a full shift of work for any job. (3) It makes no sense for DHS to slash my hours catastrophically but then offer me 100 hours a month of respite care from a different caregiver at a higher rate. (4) I've had two appeal hearings after my hours were cut, the first one I won but after the second one my hours were cut because essentially I was healthy. Are you aiming for me not to be healthy so you can put me in a nursing home? (5) None of the questions on the questionnaire uses for the RUG system even pertain to me or my physical condition. Questions like have you walked around the house in the last 2 days is easily answered by simply looking at me. There are questions about depression and suicide which I know are to ascertain my mental and emotional state. However, I don't see how my mental and emotional state help me use the bathroom by myself or feed myself, so why are these questions even on there? None of the answers to the questions even apply to my situation. The answer that I had to pick most of the time was, the person did not attempt this task in the last 2 days. That answer implies that I can do these tasks but I've just not attempted to. (6) What was the algorithm originally created to determine and who were the institutions/people it was designed for? Who created the algorithm and what is their expertise in the healthcare field? If it was designed for an institutional setting how can it be used on an individual basis when the scale of work is totally different? Is anyone else currently using this algorithm? If so, is it used as a stand-alone tool or with other assessment tools such as doctors, nurses, and therapists' input? Has the algorithm been edited or modified from its original state? If so, why and by who? if an algorithm is to be used as a stand-alone assessment tool, more thought has to be put into the rules and values within the formula to more adequately address the daily needs. Please use compassion, understanding, and be open to continually improving the process, because these are real people with real lives that are attempting to live on their own.

Agency Response: Comment considered. The purpose of having an objective methodology for allocating attendant care hours is to ensure that each beneficiary receives a sufficient number of hours based on that individual beneficiary's assessed needs for assistance

with activities of daily living (ADLs), and that the hours allocated are consistent across the state for similarly-situated beneficiaries. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours. Nothing in the proposed rule would modify the availability of respite services.

Andrea Reaves, comment received 7/26/2018
Comment Summary: I had a car accident which left me a Quadriplegic from the chest down 19 years ago when I was 16. I do not have family support other than my brother, who is one of my daily care attendants. My parents passed away. Before that, they were my care attendants. It's very hard to find caregivers at the low rate of pay they are given, and especially if they are not getting at least eight full hours a day. My hours were significantly decreased by the use of this algorithm, and I have not had any improvement in my health condition, and have actually had a decline in health due to recent pressure sores after they cut my hours. With a registered nurse's discretion, this would not have happened. The nurses would have been able to see my situation and know that a decrease in my hours could cause more harm to my health and limit my ability to be a mother and live in my home and be able to have a job and contribute to my community. My question is, why must I and thousands of other disabled Arkansans live in constant fear of being placed in an institution? Why are our hours being cut significantly when our conditions aren't improving? During my assessments, the nurse couldn't even find the code numbers for many of my health issues. I also brought today a friend of mine, Randy Hudson, and he is a Quadriplegic. He was working one evening when two men got in his car, put a gun to him, told him to drive, and then they shot him, and his car caught on fire and they left the scene. And he is still receiving eight hours as of now. But for the care that goes into our lives, eight hours is simply not even enough. But we are here begging for just our eight hours. When they get cut down to five and six hours, or two hours or three hours, that's ridiculous. We want to live in our homes and we don't want to be institutionalized. I'm sick of the constant fear that I have lived with now for 19 years that that's where I'm going to end up and without my daughter, without what family I have left.

Agency Response: Comment considered. The RUGs methodology is currently the only method permitted, under the terms of the

ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized. Adoption of the proposed rule will not reverse or modify any allocation decision made prior to May 14, 2018.

Jessie Edwards, comment received 7/26/2018
Comment Summary: I'm a target case manager for our clients that are on the ARChoices waiver. My caseload is about 40. And out of all 40 of my clients, not one client got an increase. Most -- pretty much all of my clients got a decrease. People with disabilities are the ones who have been affected by these changes with this algorithm and are being cut significantly. We have great DHS nurses, but the only thing they can do to try and help my clients is offer them respite. That's not a choice for some clients, they don't want strangers in their home. The whole point of community-based living is choice. Clients like Andrea and my other clients deserve the opportunity to live in their homes, to contribute to their community. They can't do that if they are institutionalized. They can't do that, with their hours decreased, if they are dead. A decrease in hours means not only is the family's income reduced, it means their health can deteriorate. Without the proper care they need, they will die. I understand CMS guidelines say we have to use an algorithm; they want it to be nonbiased. There still should be some room for nurse's discretion. For 17 years that the waivers have been active, the nurses had that discretion, and they no longer do.

Agency Response: Comment considered. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Regina Foster, comment received 7/26/2018
Comment Summary: I'm here on behalf of a family member. He's 64 years old, his mom who is still living, they live in the home

together, is 85. His whole life she and his father have taken total care of him. He has cerebral palsy, totally dependent on his family. He can do absolutely nothing for himself. He has the same braces that he was put in in the 1960s. They have never used services from the state, they have never had caregivers to take care of him. He has never had any issues with his health except for kidney stones. His father fell dead of an unexpected aortic aneurism a few years ago, and they came to me for help as the nurse in the family. I took them to the Baseline DHS office, and the first thing the worker said was, "Had you not waited until now to decide you need help and not helped by coming in and putting him on a list when he was younger, you wouldn't be in this situation." I'm about to file his fourth application for ARChoices. Last year he was approved, but the person who was already coming in to help did not want to give their Social Security number, afraid they would lose their own benefits, so the mother continued to pay the worker out of her own pocket. Then they moved from Little Rock to Humnoke, and when I called to get everything changed, I found out that his services lapsed because she wasn't paying the caregiver through ARChoices and they had stopped using the other services. We filed another application but it was denied because of financial issues. It was denied again after DHS said that's what you need to do to fix this. They finally shared with me the attorney information, and the attorney said to appeal. I appealed in April, but they seem to have no record of it. Two offices gave me different instructions about applying, and I found out just this week attendant care applications are not being processed. He might qualify for personal care hours, but that's only 4.75 hours per day. He is a 24/7 care person, literally, can't roll himself over in the bed. They expect to plug in this information into an algorithm without nurse discretion and come up with these hours for these people? That's nuts. These people matter, and this is just such a small group of the big picture of the people in our state that need our help, need our assistance. They want to live lives, they have families, they have children. Please consider this rule and to change this rule, any other rules that we need to change to make it better for these people, for our loved ones.

Agency Response: Comment considered. The agency understands the commenter's frustration. Because of recent court orders and the limitations of the currently-approved Medicaid waiver, the agency is currently prohibited from allocating attendant care hours for new applicants. This has resulted in delays in the initiation of service for both beneficiaries seeking care through an agency, and

beneficiaries seeking self-directed care. The agency attempted to quickly implement this rule in June by using the emergency promulgation process as permitted under state law, which would have made it effective immediately. That emergency promulgation process would have been followed by a regular rulemaking process because emergency rules are only valid for 120 days. But the agency was then prohibited by a court order from enacting this proposed rule through an emergency promulgation; therefore, the agency is required to go through a 30-day public comment period, then consider and respond to public comments, and then seek legislative review, before the agency may implement the proposed rule. These timeframes and requirements are established by state law. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours. The agency is not proposing changes to waiver eligibility requirements or processes in this promulgation, but the agency can consider these comments for future promulgations.

Thomas Nichols, Disability Rights Arkansas, comment received 7/26/2018

Comment Summary: After reductions in attendant care hours, one of our clients had to relocate to a trailer without air control, one suffered numerous infections, and one died. If DHS' aim was to save money, it will be very successful by gradually strangling individuals in this program with lack of services. We are not here because of a court case, we are not here because of a ruling. We are here because when DHS implemented this program in 2016, it acted in secret. It willfully concealed from the public how live-saving attendant care would be allocated to individuals with serious physical disabilities. These hours of attendant care determine when somebody can use the toilet, when they can eat, and when they can be moved. DHS could have at any time in the last year and a half promulgated this rule in a way that is transparent, clear, and meaningful. They were told by our office, you were on notice when Legal Aid sued you in January of 2017, you were notified by the Circuit Court days later, you were told again by the Supreme Court in November of 2017, and then you were twice told again by the Circuit Court in April and May of 2018. It was not enough that you were told you were wrong by the highest court in the state, you had to have sanctions levied against you to follow the law that allows you to create rules in the first place. So, now we have a more detailed rule finally submitted for

public comment, but it is the same rule, one that is rife with problems, one that fails to provide adequate care, one that has zero data to support its hour allocations, and has been criticized in both local and national media. Even the author of the algorithm on which this is based thinks we should utilize nurse discretion for exceptions. And yet, after all the complaints, we see no variance in the rule that is being proposed now. We see no exception for special circumstances when a person's hours are medically inadequate to provide them care. Instead, we hear from Hearing Officers and even from OHS' own letter to its beneficiaries that perhaps the individuals who are not receiving an adequate number of hours should go to a nursing home. An absurd statement about a program that is meant to provide care that is adequate to keep someone at home in the community as is their choice, and as is required by Olmstead. But unless DHS alters this program to ensure adequate care is provided to individuals with disabilities, this is merely the appearance and perception of a public comment.

Agency Response: Comment considered. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Gary Kevin Hoover, comment received 7/26/2018

Comment Summary: I have pressure sores. And my caregiver has been dealing with pressure sores for nine years, doing the same job that an RN would be doing, but getting paid just a little above minimum wage. Now, you tell me what is up with that. That's something wrong. And she is doing the same job as our RN, who is making over $40,000.00 a year doing nothing. With the algorithm, she is cut completely out. I have to take part of my little measly check that I get to help her pay car insurance, which we had to go get a car for me. They are cutting our hours, but the head of DHS just got a $100,000.00 raise. Who can justify that? Algorithms, you can't tell me – you can't put a mathematician in front of that and start figuring up, "Well, this, this, this, and that, that, that," that I'm going to get the same amount of hours as what you get, or they are going to cut your hours and bump mine up.

Agency Response: Comment considered. The purpose of having an objective methodology for allocating attendant care hours is to ensure that each beneficiary receives a sufficient number of hours based on that individual beneficiary's assessed needs for assistance with activities of daily living (ADLs), and that the hours allocated are consistent across the state for similarly-situated beneficiaries. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours.

Kevin De Liban, Legal Aid of Arkansas, comment received 7/26/2018

Comment Summary: Legal Aid of Arkansas has been litigating this issue with DHS two and a half years now, and Legal Aid of Arkansas led the lawsuit that resulted in the invalidation of the algorithm. Legal Aid of Arkansas has made repeated overtures to speak with DHS to resolve our clients' concerns, and has been rebuffed at every point, which is part of the reason that we are here and having to discuss the merits of the algorithm in this public forum. It's better for people's dignity to be at home; it's also better for the state's bottom line. Nationally, states, on average, spend about half of their long term care dollars on nursing home care and half on home and community-based care. The really good states spend about 35 percent on nursing home care and 65 percent of their dollars on home and community-based care. Arkansas is the opposite. Arkansas spends 65 percent of its long term dollars on nursing home care and only 35 percent of its long term care dollars on home and community-based care. The Stevens group, were consultants hired by the state to review the Medicaid program, concluded that Arkansas should re-balance this. There has been no evidence that the state has made any advancements in that regard, and, the cuts through the RUGS algorithms actually promote the opposite, which is increased institutionalization. The maximum number of hours somebody can effectively get under the algorithm is five and a half hours of care per day. Five and a half hours of care per day. For individuals with Cerebral Palsy, Multiple Sclerosis, Quadriplegia, histories of broken hips, and other advanced ailments five and a half hours a day of care has been nowhere near enough to cover folks' needs. People have gone without food, people lie in their own filth, people end up being socially isolated. If you have a trach, IV meds, IV feeding, suctioning, or a ventilator or respirator, and only in those situations, there is a chance, not a guarantee, that you can get six

and a half hours a day of care, which is still woefully inadequate based on our clients' experiences to meet their care needs. The highest RUG would allow around 11 and a half to 12 hours a day of care. But in the two and a half years that this program has been in existence, one person has been placed in that RUG. So, five and a half hours is the effective maximum, six and a half if you have one of those few treatments, either of which is a reduction from the maximum amount of care that was available under the AAPD program or the Elders Choice program. For those on Elders Choice, the maximum was roughly seven hours a day of care, and for AAPD, the maximum was eight hours a day of care. Many people get even less who have similar severity of needs. One of our clients who has been the plaintiff in the lawsuit, Bradley Ledgerwood, was put in a category that gets 32 hours a week of care, or four and a half hours a day. He has Cerebral Palsy. He can't functionally move and operate any of his limbs. In addition to just providing insufficient care, the RUGS methodology cut the hours of care of people who demonstrated no medical improvement. When RUGS was introduced, DHS did not show that somebody actually improved their condition and needed fewer hours of care. DHS justified this by saying that people who were receiving more hours under the system of nurse discretion were receiving too many hours, that the algorithm was correcting for over-allocations. Eight hours a day of care that Bradley Ledgerwood was receiving was not too many, or the eight for Shannon Brumley, or the eight for Dana Wolfe, or any of the other hundred plus clients that we have represented over the last two and a half years. Before the algorithm, we had zero cases about the number of hours people were getting. Half of the program beneficiaries have been reduced as of May 2016, which is the last time that DHS generated any data. DHS has not done any sort of analytics to determine who has been hurt, who has been benefited. They couldn't tell you how big the average increase was for those 43 percent of people who received an increase, and they can't tell you how big the cut on average was for those 47 percent of people who have been decreased. Anecdotally, based on our clients' experiences, it seems that the cuts have been much larger than whatever increases have occurred, and that the cuts have hit the people at the highest levels of need the hardest. The RUGS methodology has not been meaningfully validated or verified in Arkansas. The only validations that took place were in Ontario, Canada and Michigan. I don't know that they are that much familiar with Arkansas. DHS says that it used a one-year span of historical paid claims data to come up with the number of hours

somebody should get in a RUG. DHS admitted in federal court filings that they don't have that data. Nobody within the agency understood how the algorithm worked at all until over a year into litigation. They did no meaningful projections about who would be affected and how while they were considering adoption of the RUGS algorithm, none. Doctor Fries, the founder of the RUGs, has a set of recommendations that people who have been existing before the algorithm should be grandfathered in. Doctor Fries says it's not fair that somebody who was evaluated by a nurse is going to get drastically cut by an algorithm. Some of the internal staff at DHS advocated that nurses have some discretion to change the hours upwards or downwards. The agency overruled them. Now, the so-called reason for switching to the algorithm is that it is objective, less biased and more fair than the system of nurse discretion that existed beforehand. However, there was not one single documented report that a nurse was giving too many or too few hours before the algorithm. DHS' implementation of RUGS was filled with software errors the agency did not catch. We got data from DHS that showed that 150 individuals with Cerebral Palsy had been denied an average of 25 hours a month of care. DHS did nothing to fix that until a KARK report came out. And DHS did nothing to try to address all the care that the people went without before. There is still an error in DHS' software that was identified in October of 2016. Doctor Fries developed the algorithm to account for the diagnosis of diabetes. We learned in 2016, October, that DHS' software was not picking up diabetes. Doctor Fries ran a statistical report after that that determined that almost one-fifth of all people on ARChoices were affected by that software error. To-date, DHS has done nothing to fix the software error with regards to diabetes. Next is the issue of fairness and understanding. The algorithm is 21 pages of computer code. Clients have often come to us after they lost their appeal, or after they decided it wasn't even worth appealing, because they couldn't understand how it worked. They didn't know what they had to prove. The algorithm doesn't operate according to what individuals like you and me might think are important. It looks at certain disease diagnoses, and then it looks at certain functional limitations. So, if somebody is paralyzed, the algorithm doesn't give somebody any more hours or less hours based on your ability to get around the house. It doesn't give anybody more or less hours based on your ability to prepare food for yourself or to do household chores. So, the algorithm excludes many factors that a nurse previously took into account to decide if a particular number of hours were correct. Because the algorithm hasn't been

intelligible to folks, people haven't had a fair chance to fight, and many people got cut through administrative hearings. DHS' statistics on administrative hearings were dismal. In October of 2016, there were nearly 100 people who had hearings, seven won. Nobody unrepresented during the year of 2016 prevailed in an administrative hearing. The other issue with not being able to understand how the algorithm works is that you can't plan your care. Now, the last thing I would like to close on is the idea that the RUGS algorithm is somehow necessary for DHS to operate the ARChoices program. That is factually incorrect. CMS guidelines said, "We expressly decline to," quote, "'specify the instruments or techniques that should be used to secure the information necessary to determine an individual's functional need, person-centered service plan, or service budget.'" CMS does not require in any regulation that a state agency like DHS use an algorithm. There is an available alternative which is the system of nurse discretion that had existed prior to the use of the algorithm. DHS is not forced to adopt an algorithm. And even if it chooses to adopt an algorithm, it is not forced to defer totally to what the algorithm says. Legal Aid of Arkansas filed a lawsuit on June 29th to force DHS to resume providing attendant care to people who were seeking to be on the program. That lawsuit states that DHS has multiple duties to continue operating the program, that DHS can't just suspend a key part of the program, the allocation of attendant care. Since OHS has suspended the provision of that attendant care, starting on May 14th when the algorithm was invalidated, there is a backlog now of 2,700 assessments that have to be done. Nothing has forced DHS to suspend care allocation.

Agency Response: Comment considered. The RUGs algorithm itself was not invalidated in the litigation referred to and pursued by the commenter, but rather the underlying rule that was intended to implement it. An injunction sought by the commenter is what forced the agency to stop allocating attendant care hours for ARChoices beneficiaries. The agency attempted to quickly implement this rule in June by using the emergency promulgation process as permitted under state law, which would have made it effective immediately. That emergency promulgation process would have been followed by a regular rulemaking process with public notice and comment because emergency rules are only valid for 120 days. But the agency was then prohibited by a court order from enacting this proposed rule through an emergency promulgation; therefore, the agency is required to go through a 30-day public comment period, then consider and respond to public

comments, and then seek legislative review, before the agency may implement the proposed rule. These timeframes and requirements are established by state law. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. Because of the court orders and the limitations of the waiver approval, the agency is currently prohibited from allocating attendant care hours for new applicants. This has resulted in delays in the initiation of service for both beneficiaries seeking care through an agency, and beneficiaries seeking self-directed care. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized. The fact that the RUGS methodology was subjected to studies in other regions of the county does not mean those studies were not applicable to Arkansans. An individual who has needs with activities of daily living like toileting, bathing, or transferring in the northern United States or Canada is similar to an individual living anywhere else. The commenter asserts that the RUGs methodology has an "error" regarding how diabetes is accounted for in the algorithm. Yet documentation submitted by the commenter shows that the founder of the RUGs methodology explicitly determined that the treatment of diabetes in the methodology is not an "error." Some states use a RUGs methodology that takes diabetes into account as a factor; other states, including Arkansas, have modified the methodology so that diabetes is not taken into account, since the functional impairments related to diabetes are already measured elsewhere in the algorithm. This difference is a matter of a policy choice by different states using slightly different variations of the RUGs methodology. It is not a software error.

Cathy Cagle, comment received 7/26/2018

Comment Summary: I have taken care of my grandson since he was born. He has something called schizencephaly with septa optic dysplasia. My fear is that there is no category in this algorithm where he will fit. Doctors told me I should just put him away, but I never did and I never gave up. Right before he turned 18, we got him on a Medicaid waiver, and Central Arkansas Disabilities has helped me do things for him that I could never do. There is just such a lack of humanity in this algorithm. You know, how can you put somebody in a system and have a computer spit out and decide

whether or not you need help? And what if you don't fit in that box? It takes a human with compassion to make that diagnosis about care.

Agency Response: Comment considered. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized. Nothing in the proposed rule will affect benefits provided to developmentally disabled beneficiaries under other waiver programs outside of ARChoices.

Sandra Mancell, comment received 7/26/2018
Comment Summary: while I appreciate that you need to come up with some form to determine what kind of hours that someone needs at home, you have taken the RUGS system that CMS developed and we have been dealing with in long term care for almost 30 years. The problem of what you are trying to do is take those assessments and put it from a congregate setting and use it in the home setting. You need to build in some extra times that are available for not everybody needs to do their ADLs all in the exact same moment.

Agency Response: Comment considered. Arkansas does not use the RUGs methodology in nursing homes or other long-term care facility settings. The version of the RUGs methodology used by Arkansas was developed specifically for use in home- and community-based settings.

Shelley Muscovalley, comment received 7/26/2018
Comment Summary: I have been a registered nurse for 44 years. When we talk about nurse discretion, we are talking about something that we think we need to take away because it's subjective. We need to keep it because it's subjective. There is some intuitive ability that we don't even have to think words on, and certainly not numbers, that comes with an aggregate of experience. There are all kinds of settings where we are going to identify something that a list of questions on the algorithm cannot. The people that these programs serve seem like other people to us. Nobody is exempt. These programs, ARChoices, serves people

who are often in the last days, weeks, months, years of their lives. Nobody is exempt. We all have that to do; right? So, if it's not good for all of us, it's not good for any of us. Right now, we need to listen, keep the nursing in there, we can save you money down the line. We can preserve the humanity. I think taking all of that out, it kind of it diminishes the value of having an RN, it almost seems to be under the guise of an RN assessment when we really aren't seeing that experience and knowledge and critical thinking being used.

Agency Response: Comment considered. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Bradley Ledgerwood, comment received 7/27/2018
Comment Summary: Caregiving for a total care patient is a 24/7 job and we are just asking for one eight-hour shift, in my opinion we are just asking for the bare minimum of the state. If you paid for even two shifts it would be cheaper than nursing home care and much better personal care. One of the criteria for more hours is being on a respirator and what they are telling me is the life of somebody on a respirator is worth more than mine because the respirator could quit anytime, but if left alone and there was a fire I could die because I cannot get out of a house by myself. That would seem to be discrimination. It is highly offensive to the disabled community that the DHS Director got a major pay raise after being there just three months when you cut services to individuals who desperately need the services. With the cost of in-home care being so much cheaper, is the reason you are cutting services is to force people into nursing homes? Could it be that nursing homes are greasing your palms? Because DHS states that ARChoices is a cheaper program to stay on and you get better care, and nursing home care costs 2.34 times more on average than in-home services.

Agency Response: Comment considered. Because of recent court orders and the limitations of the currently-approved Medicaid waiver, the agency is currently prohibited from allocating attendant

care hours for new applicants. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. Reports of suspected waste, fraud, or abuse in this or any area of the Medicaid program can be made to the Arkansas Medicaid Inspector General Hotline at (855) 527-6644 or https://omig.arkansas.gov/fraud-form, or to the Attorney General's Medicaid Fraud Control Unit at https://arkansasag.gov/forms/medicaid-fraud-reporting/. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Richard Braughton, comment received 7/29/2018
Comment Summary: At my personal care agency, we have had 3 RNs leave our employment to take lucrative employment with the state. Now the DHS RNs no longer have to think by creating plans of care, they just input information into the RUG and see what comes out. They no longer have to travel to the home and evaluate the patient. The impacts of the RUGs are increased pay for DHS RNs; decreased hours for the patient; decreased money for caregivers; decreased money for the agency employing the caregivers; and overall decreased employment in the state. DHS should replace the RNs that are now doing nothing other than data entry with LPNs; increase the rate paid to personal care agencies; allow personal care agencies to provide catheter care and wound care; create a standardized unit of measurement based on ADLs; understand that toileting for one person is not the same as toileting for another person; allow 4-, 6-, and 8-hour daily increments as an alternative; choose hours based on a yearly maximum, not a weekly or monthly maximum; and eliminate respite care.

Agency Response: Comment considered. DHS RNs are still responsible to personally visit each ARChoices beneficiary and create a care plan for that beneficiary. DHS RNs are paid on the basis of the statewide pay plan. Nothing in this promulgation changes or relates to nurse responsibilities or pay. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to

adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized. The agency is not proposing changes in this promulgation to reimbursement rates, units of service, or waiver services other than attendant care, but the agency can consider these comments for future promulgations.

Donnita Acuff, Prairie Grove, AR, comment received 7/30/2018
Comment Summary: No one could ever make me believe that a computer can feel a person's pain. I believe the algorithm was set up to save the state oodles of money by not having to pay nurses and caregivers for as much time. Nurses are human, and many have experience with patients with diseases like my mom. This program not only hinders my mother's care and quality of life, but it also messes things up for me. I have to spend much more time away from my mom working or trying to find work outside the home and cannot give her the care she needs. When I am gone, she holds her bladder much too long because she is afraid to try to walk by herself. She eats stuff like crackers, Vienna Sausage, and stuff that is not refrigerated. If I cannot take care of my mother, I do not what she will do. She cannot go in a home because she cannot breathe odors. When making your decision, please consider that software cannot smell, feel, hear, or see, so how in thunder can it diagnose how much care my mom needs, or how repetitious sounds drive her insane, or odors stop her from breathing, or how can it feel the pain she experiences? How could it possible know what it is like to fight for your breath? It cannot! It is simply saying what it was programmed to say about a disease.

Agency Response: Comment considered. Because of recent court orders and the limitations of the currently-approved Medicaid waiver, the agency is currently prohibited from allocating attendant care hours for new applicants. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Donna Cornett, Prairie Grove, AR, comment received 7/30/2018
Comment Summary: I do not believe the RUGs algorithm is a good method, nor is it fair to use software of any kind to diagnose

what is wrong with someone, or how much pain they are in, or how many hours of care they need. That is what doctors are supposed to do. I know for a fact that pain from one disease will not act the same with one person as it does when another person as that same disease. Therefore, I know that the RUGs algorithm is not accurate. I do not understand it enough to know how it works but I do know it is not accurate. To let a software program diagnose how sick we are and how much care we need is totally ridiculous, not fair, and not accurate. I believe the RUGs program should be done away with for good.

Agency Response: Comment considered. The purpose of having an objective methodology for allocating attendant care hours is to ensure that each beneficiary receives a sufficient number of hours based on that individual beneficiary's assessed needs for assistance with activities of daily living (ADLs), and that the hours allocated are consistent across the state for similarly-situated beneficiaries. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours.

Ann Ledgerwood, comment received 7/30/2018
Comment Summary: It is difficult to understand why DHS is cutting services for clients who depend on someone for all aspects of daily living. Someone insinuated that it was budget cuts, but we know about the audits and the money that was unaccounted for, and the money that has been wasted on computer programs, as well as the large raise the director received; the focus should be there. We were told because nurses were showing favoritism; if that were the case, why lower total care patients to a lower level that causes hardships? We have been told care givers were trying to live off the government; I have had a government job with all the perks, I've done this caregiving job with no benefits, the government job was much easier and paid lots better. I believe any job in DHS would be living off the government if that were the case. Just put these clients in a category that would give them adequate hours to continue to live in their homes. I don't think 8 hours a day for a 24 hour a day job is asking too much, considering they receive one-on-one care for lots less cost than a nursing home.

Agency Response: Comment considered. When the agency first implemented the RUGs methodology, it also increased the cap on the number of participants younger than 65, and it ended waitlists

for services that were in effect prior to ARChoices. As a result, several hundred waitlisted individuals immediately became eligible for waiver services and began receiving services shortly thereafter. Because of recent court orders and the limitations of the currently-approved Medicaid waiver, the agency is currently prohibited from allocating attendant care hours for new applicants. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Ed Holman, Retirement Services of Arkansas, LLC, Little Rock, AR, comment received 7/31/2018

Comment Summary: As a provider of services for the elderly and handicapped, our entire business model is at risk every time a change is discussed. The trend recently has been to reduce payments to providers despite rising labor costs, insurance costs, utility costs and virtually every commodity and supply we use going up as well. What is the rationale or goals for going to a new computerized system such as an algorithm? I do not see this as a Federal requirement. Before a system is implemented we need to know the experience of its use elsewhere. If clear answers and data are not available, then I have to question the validity of the system for use with our fragile patients/residents. In any computer program or algorithm, all aspects of the supplier's recommendations should be followed. In the case of this algorithm, it seems essential that the doctor's recommendation for extra hours at the nurse's discretion be followed. Provider input must be a factor in determining the time for tasks. Since we are dealing with humans with varying skills and abilities, the time for tasks have to have flexibility for providing services. There is no "cookie cutter" approach to saying how long a med pass, a bath, dressing, meal prep, or other task should take. The person doing an assessment can do their interview, but they also need to seek input from the people actually doing the work, the beneficiary, and the family if they are involved. Only after the above input is processed, can a fair estimate of time be made.

Agency Response: Comment considered. Because of recent court orders and the limitations of the currently-approved Medicaid

waiver, the agency is currently prohibited from allocating attendant care hours for new applicants. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

June Pike, Bella Vista, AR, comment received 7/31/2018
Comment Summary: In my assessment last year my hours were cut back to 99 hours a month, and my respite hours were completely taken away. Because my husband is ninety years old, I get up during the night to assist him. My sleep is interrupted so that I seldom, if ever, have a full night's sleep, yet my respite hours were taken away. I would disagree with the continuation of the RUGs methodology.

Agency Response: Comment considered. The agency is developing plans to propose a new attendant care hour allocation method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized. Nothing in the proposed rule would modify or restrict the availability of respite services. Respite services are not allocated using the RUGs methodology.

James Grable, Manila, AR, comment received 7/31/2018
Comment Summary: I received six hours per week of home aid before the new RUG, but two days after the nurse from my agency told me I was approved, I got a letter from Optum saying I needed zero hours per week and terminated me. The RUG program tested up north has nothing to do with health programs in the south. I need assistant with bathing as well as sundry other help at home. I don't drive, so my caregiver is the only way I have to get anything I need from the store or pay my bills. I am 100% disabled but according to the RUG program I should be able to go dancing. I have never heard of any program not going through a complete testing procedure before implementing it. Please reconsider your plans to start all this mess again.

Agency Response: Comment considered. The RUGs methodology and the proposed rule relate only to attendant care services under the ARChoices waiver. They do not relate to personal care services or to the assessments administered by Optum. The fact that the RUGS methodology was subjected to studies in other regions of the county does not mean those studies were not applicable to Arkansans. An individual who has needs with activities of daily living like toileting, bathing, or transferring in the northern United States or Canada is similar to an individual living anywhere else. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Kent Schroeder, Arkansas Residential Assisted Living Association (ARALA), comment received 7/31/2018

Comment Summary: We have been concerned about the amount of care allocated to the disabled persons under the AR Choices program and their inability to function with that care. We understand that a computer assessment that was RUG based was being used to cut the care given and that a different one is being put in its place. We were told we would be given information to show how one compared to the other, and we requested that information but did not receive it. We are especially concerned that the same or similar algorithms will be applied to the Living Choices Waiver as well. When there is a disagreement between a recipient's caregiver or doctor and the amount of care determined by the computer algorithm, is there some method of getting to a workable solution? We were told this method is used in another state. Has there been an attempt to determine the adequacy of the program in that state and its applicability to Arkansas? I am assuming that the result of this program is intended to save the state money by reducing the amount of care being delivered. Was this the experience in the home state of the program?

Agency Response: Comment considered. The methodology in the proposed rule for allocating attendant care hours is the same methodology used by DHS prior to May 14, 2018. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to

adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized. Nothing in the proposed rule affects the Living Choices Medicaid waiver.

Robert Wright, Arkansas Residential Assisted Living Association (ARALA), comment received 7/31/2018

Comment Summary: We have been concerned about the amount of care allocated to the disabled persons under the AR Choices program and their inability to function with that care. We understand that a computer assessment that was RUG based was being used to cut the care given and that a different one is being put in its place. We were told we would be given information to show how one compared to the other, and we requested that information but did not receive it. We are especially concerned that the same or similar algorithms will be applied to the Living Choices Waiver as well. When there is a disagreement between a recipient's caregiver or doctor and the amount of care determined by the computer algorithm, is there some method of getting to a workable solution? We were told this method is used in another state. Has there been an attempt to determine the adequacy of the program in that state and its applicability to Arkansas? I am assuming that the result of this program is intended to save the state money by reducing the amount of care being delivered. Was this the experience in the home state of the program?

Agency Response: Comment considered. The methodology in the proposed rule for allocating attendant care hours is the same methodology used by DHS prior to May 14, 2018. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Betty Bullock, comment received 7/31/2018

Comment Summary: I lost hours, and I am in worse shape than I was. I feel it is in the best interest of the clients and the state to go back to how it was. The new way is wrong; each person's needs are different and should be looked at with a nurse who has an idea

of the needs of the people. I feel the Judge was in his rights to call it as he saw it. Please let it be known the new way is not working.

Agency Response: Comment considered. Because of recent court orders and the limitations of the currently-approved Medicaid waiver, the agency is currently prohibited from allocating attendant care hours for new applicants. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Melissa Harville, comment received 7/31/2018
Comment Summary: This Algorithm is nothing more than a bullying attempt by DHS and a big pain in the rear as well as a slap in the face of the elderly, disabled, and their caregivers who provide the care they need. The purpose of the AR Choices program in to help these people stay in their homes and get the care they need and be an active part of society instead of being confined to a Nursing Home or other type of facility. I have been a caregiver for 9 years and have never seen something as crazy as this is. My client/boyfriend is paralyzed from the waist down and his condition has not changed other than a pressure sore reopening. When we received the new plan of care his hours dropped from 172 down to 137. After an appeal, the hearing officer ordered a new assessment and stated the hours should be increased to 161. I don't get to just work 6 hours and go home or to another job, because I live here and am on call 24/7 to take care of his needs. There is no one to come in and take over and there are some nights I'm up every 2 hours. I have had regular jobs with benefits, and they were not as stressful as it is being a caregiver and the pay was even better. You cannot just group people into categories and make each group get the same amount of hours, because each person is different and no two or the same. The algorithm does just that, it puts everyone that's in a wheelchair in the same category and assigns the same hours no matter their limitations. Computers cannot decide what's right for someone much less what they need or how long it will take for each task to be completed. Putting time limits on how long it takes a for things to get done causes unwanted stress on both the client and caregiver and causes them to rush and puts the client at risk of injury. Some of the questions

the algorithm asks are nothing more than stupid and unnecessary. Asking someone who is paralyzed if they have walked in the last 3 days is a slap in the face. If anything, make the questions fit the diagnosis because everyone is different. Don't put people in a one size fits all box and also think about increasing the pay caregivers receive and bring back nurse discretion because it does work.

Agency Response: Comment considered. Because of recent court orders and the limitations of the currently-approved Medicaid waiver, the agency is currently prohibited from allocating attendant care hours for new applicants. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Pam Johnson, Sources for Community Independent Living Services, Fayetteville, AR, comment received 7/31/2018
Comment Summary: I have been working with individuals in waiver programs for about 6 years now as a case manager, so I have seen how the assessments and re-evaluations have evolved during that time. Many of the clients I serve have difficulty answering questions due to cognitive impairments, lack of communication skills, and/or inability to recall instances that attribute to the answers which affect the hours of support. As a result, individuals have had their hours cut after the algorithm was implemented. The cuts in hours after the implementation of the algorithm have been detrimental to many clients. There seems to be no room for extenuating circumstances to affect the computerized outcome. I understand that there needed to be a consistent evaluation tool for client needs, but there has to be a human element to augment the algorithm. Two examples I can share about the negative impact of reduced hours: One client has anoxic brain damage and is non-responsive with spastic quadriplegia. Her mother is her primary caregiver who attends the client during the night time hours and utilizes agency aides for daytime and evening. Originally, she had a total of 70 hours per week (10 hours per day). She also was able to access respite occasionally. This was manageable, but in 2016 her hours were cut. There are no other family members available to help. To make up for the loss of hours, Mom has exhausted her savings and

monthly social security to pay for help. The client is not elderly and her living in a nursing home for many more years would surely be a greater expense to taxpayers than her remaining at home with a few more hours per week. Example Two: Client's hours were cut to less than 4.5 hours per day. Because he must be transferred with a patient lift (Hoyer), his hours are split between morning and evening to get him out of bed into his motorized wheel chair and then back into bed. With about 2 hours per shift, it is difficult to meet his needs. Most of the time is used up with transferring, dressing, and making him a meal. He is able to use his motorized wheelchair to go to doctor appointments, make the short trip to a nearby grocery store by himself using public and Medicaid transit, pay bills, and visit neighbors in his apartment complex. He isn't able to shower, toilet, or cook meals, clean, dress, or transfer by himself. It is difficult to get aides to come for only two hours so sometimes no one comes. He has no family nearby and actually the apartment manager called Adult Protective Services because of the reduced hours leading to his being in one position for so long. He didn't want to tell his support team about this situation because he was afraid that he would be sent to a nursing home. With proper caregiver assistance, he can do very well living in an apartment as he did for years prior to the cut. I am asking that the algorithm be replaced with an appropriate method of evaluation that doesn't negatively affect individuals' health, safety, and quality of life.

Agency Response: Comment considered. Because of recent court orders and the limitations of the currently-approved Medicaid waiver, the agency is currently prohibited from allocating attendant care hours for new applicants. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Gregory A. Hunter, El Dorado, AR, comment received 7/31/2018
Comment Summary: I am a stroke survivor and on dialysis. I have had my hours cut from 72 every two weeks to 28 every two weeks. I am now down to nothing, because I am waiting on a background check since March 12, 2018. I am still not physically able to take care of myself and am in need of the home care assistance.

Agency Response: Comment considered. The methodology in the proposed rule for allocating attendant care hours is the same methodology used by DHS prior to May 14, 2018. Adoption of the proposed rule will not reverse or modify any allocation decision made prior to May 14, 2018. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours.

Bobbie Riffle, Sherwood, AR, comment received 7/31/2018
Comment Summary: My daughter has been on ARChoices since its inception, and on the Alternative Waiver program since 2002. We have changed to the DDS Waiver to get more service and help. My comments are not for us to get more hours under the RUG program, but to ask that use of the RUG program be eliminated for the sake of other disabled families in need of help. You cannot take the caring human factor out of this process and do a good job! A robot cannot see, hear, and make decisions that only humans can make, and neither can this computer program do that from a few questions. It is my hope that this RUG methodology will be trashed and you will go back to nurse and doctor evaluation of need; and that personnel will be trained to care about their work and the needs of the client or be fired. It is also my hope that hearing officers for appeals will not be DHS employees.

Agency Response: Comment considered. Because of recent court orders and the limitations of the currently-approved Medicaid waiver, the agency is currently prohibited from allocating attendant care hours for new applicants. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized. Nothing in the proposed rule relates to appeal procedures or the qualifications of

hearing officers, although this comment may be considered in future promulgations.

Kevin De Liban, Legal Aid of Arkansas, comment received 7/31/2018

Comment Summary: DHS's proposed rule uses an algorithm-based methodology known as RUGs, which is short for Resource Utilization Groups, for allocating attendant care services under the ARChoices program. DHS first implemented the RUGs methodology to allocate attendant care in 2016, marking a departure from the 17-year practice of using the professional judgment of the agency's registered nurses. RUGs takes about 60 questions from a 286-question assessment survey and sorts an individual into one of 23 tiers (or "resource utilization groups") with a fixed number of hours set for each group. No variation from the fixed number of hours is allowed. (I) RUGs provide insufficient care to meet the care needs of the ARChoices beneficiaries who have come to Legal Aid. Prior to 2016, individuals under age 65 could receive a maximum of 56 attendant care hours per week, and individuals age 65 or over could receive a maximum of 48 attendant care hours per week. As DHS has implemented RUGs, an individual is limited to a monthly maximum of 161 hours unless she requires IV medication, suctioning, tracheostomy care, a ventilator or respirator, or parenteral/abdominal feeding. This effective maximum—roughly 37 hours per week or 5.5 hours per days—is insufficient to meet the care needs of many individuals who lack the treatments needed to qualify for more hours. There is no variation allowed from the fixed number of hours. In those rare circumstances where an individual qualifies for placements in a RUG with more hours, the care is still insufficient for most care needs. (II) Reductions in Home and Community-Based Services through use of the RUGs methodology may increase costs to the state. DHS's own estimates show that, on average, institutional care in a nursing facility is 2.76 times more expensive than community-based care. Use of the RUGs methodology runs counter to recommendations to re-balance DHS's spending on Medicaid long-term care from institutions to community-based care. (III) RUGs cuts the attendant care hours of people who have demonstrated no medical improvement. Upon introduction, RUGs resulted in cuts to 47% of program beneficiaries. There were no adjustments made to accommodate these individuals or grandfather them in to the new system to lessen the shock of drastic care cuts. (IV) DHS did not meaningfully validate RUGs in Arkansas and lost key data. To the

extent that the RUGs methodology was subjected to studies to determine its validity, such studies happened in Ontario, Canada, and Michigan. These studies are not inherently applicable to Arkansas, and DHS did not independently verify the validity of the RUGs sorting process in Arkansas. DHS did not investigate any other case mix systems prior to adopting RUGs. To the extent DHS did any data-driven analysis in initially determining the amount of attendant care to associate with each RUG, the data has been lost. DHS apparently did not develop any internal capacity to meaningfully evaluate the efficacy of the RUGs methodology. (V) There is no documented evidence of problems with the pre-existing system of nurse discretion. Prior to implementing RUGs, DHS did not conduct a single study regarding hour allocation imbalances, did not conduct any budgetary analysis showing that nurses were giving too many or too few hours, and did not give any written instructions to nurses to change their allocation practices. (VI) DHS's implementation of RUGs has been filled with software errors that the agency did not catch. Although the RUGs algorithm is supposed to consider diagnoses of cerebral palsy, septicemia, and diabetes in making its decisions, DHS's software failed to take any of these into account. As a result, roughly 150 individuals with cerebral palsy were denied an average of 25 care hours per month for a period of nearly two years. These software errors—especially the fact that DHS did not catch them on its own—demonstrate the problem of running a highly complex, algorithm-based system that the agency itself does not fully understand or have the skills to monitor. (VII) DHS's implementation of the RUGs methodology runs counter to best practices advanced by its founder. Brant Fries originally developed the RUGs to predict the expected burden of care of new admissions to nursing facilities. Eventually, he expanded the RUGs to the home-care setting. Even then, though, he did not develop the RUGs methodology to be used as a definitive methodology for allocating care, but rather as a tool for predicting the relative burden of caring for individuals with various characteristics. (VIII) Clients have found the complicated RUGs algorithm to be unfair. The algorithm itself is 21 pages of computer code. Though Legal Aid has shown the algorithm to clients, they are unable to understand it. Thus, people on the program cannot understand the criteria by which they are judged, cannot fight reductions, and cannot plan for the future. The algorithm excludes a doctor's opinion about the amount of care someone needs. (IX) An algorithm is not required by CMS. CMS does not require states to use any particular method for allocating attendant care. Indeed,

CMS has expressly declined to "specif[y] the instruments or techniques that should be used to secure the information necessary to determine an individual's functional need, person-centered service plan, or service budget." Nothing would prevent DHS from using the system of nurse discretion that had been used for at least 17 years before RUGs was implemented. CMS approved the use of nurse discretion under the same regulations that are in still in effect. DHS has the capacity and knowledge on staff to make allocation decisions using the system of nurse discretion.

Agency Response: Comment considered. The RUGs algorithm itself was not invalidated in the litigation referred to and pursued by the commenter, but rather the underlying rule that was intended to implement it. An injunction sought by the commenter is what forced the agency to stop allocating attendant care hours for ARChoices beneficiaries. The agency attempted to quickly implement this rule in June by using the emergency promulgation process as permitted under state law, which would have made it effective immediately. That emergency promulgation process would have been followed by a regular rulemaking process with public notice and comment because emergency rules are only valid for 120 days. But the agency was then prohibited by a court order from enacting this proposed rule through an emergency promulgation; therefore, the agency is required to go through a 30-day public comment period, then consider and respond to public comments, and then seek legislative review, before the agency may implement the proposed rule. These timeframes and requirements are established by state law. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. Because of the court orders and the limitations of the waiver approval, the agency is currently prohibited from allocating attendant care hours for new applicants. This has resulted in delays in the initiation of service for both beneficiaries seeking care through an agency, and beneficiaries seeking self-directed care. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized. The fact that the RUGS methodology was subjected to studies in other regions of the county does not mean those studies were not applicable to Arkansans. An individual who has needs with activities of daily living like toileting, bathing, or transferring

in the northern United States or Canada is similar to an individual living anywhere else. The commenter asserts that the RUGs methodology has an "error" regarding how diabetes is accounted for in the algorithm. Yet documentation submitted by the commenter shows that the founder of the RUGs methodology explicitly determined that the treatment of diabetes in the methodology is not an "error." Some states use a RUGs methodology that takes diabetes into account as a factor; other states, including Arkansas, have modified the methodology so that diabetes is not taken into account, since the functional impairments related to diabetes are already measured elsewhere in the algorithm. This difference is a matter of a policy choice by different states using slightly different variations of the RUGs methodology. It is not a software error.

Jane Grey, Rogers, AR, comment received 7/31/2018
Comment Summary: It was wrong to take away the nurses' discretion of deciding attendant care and using a computer. I have a client who is a quadriplegic, and his hours were reduced from 47 hours per week to only 37 hours per week. He could not get respite as he lived alone. Another client who is up walking around got more attendant care hours than he did simply because she went to doctors more and went to the ER a lot. The quadriplegic client's caregiver stays with him 24 hours a day even though he is only paid for 37 hours per week. The old system where the DHS nurses used paper and made their own assessments on what they actually saw worked much better. I wonder if DHS is trying to force these clients to go into a nursing home. The majority of people want to stay in their homes. I hope you will make the necessary changes to the ARChoices Program where they can.

Agency Response: Comment considered. Because of recent court orders and the limitations of the currently-approved Medicaid waiver, the agency is currently prohibited from allocating attendant care hours for new applicants. The RUGs methodology is currently the only method permitted, under the terms of the ARChoices Medicaid Waiver as approved by CMS, to allocate attendant care hours for beneficiaries. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied waiver services while the new method is finalized.

Robert Wright, Arkansas Association of Area Agencies on Aging (5A), comment received 7/31/2018

Comment Summary: There is no question that older people have been impacted by the change to the ARPath Assessment Tool. When the conversion occurred, we observed that some older waiver recipients had total allocated hours reduced, and a few gained a small number of hours. Unlike the physically-disabled community that accesses waiver services for many years, the average older consumer has waiver services for approximately 28 months. As a result, the majority of active aged ARChoices consumer have only been assessed by the ARPath tool and have no other methodology with which to compare. Illustrating the dire necessity of this program, a full one-third of those departing the program are due to death, with another one-third entering a long-term care facility. We agree that errors detected in the software should be immediately corrected upon discovery, and that DHS staff should have a working knowledge of the algorithm and be able to explain how results are arrived at in layman terms. Assessments and reassessments should be accomplished in a timely manner that provides ready access to services. While the current ARPath tool may not be the best mechanism to assess older Arkansans in a home- and community-based setting, it is the tool that has been in place for 30 months. Stopping the usage of the tool now when it has been announced that yet another tool will be implemented soon is simply a disserve to all affected older persons. We agree that the proposed rule should be approved so that reassessments and new assessments can resume and provide access to all critical services under ARChoices to keep older people in the community in a setting of their own choosing. This favorable view should not be taken as support for the tool that has reduced hours for many clients, it is predicated on DHS moving to a new tool based on consumer and provider input. We recommend that when this transition occurs, that ARChoices RN's have discretion in adjusting services for any current active ARChoices consumers that receive a reduction in hours because of the new tool.

Agency Response: Comment considered. The agency agrees that these services are critically needed by older Arkansans. The agency is unaware of any current software errors affecting the RUGs methodology. The agency is developing plans to propose a new method and to seek CMS approval of that method; in the meantime, the agency proposes to adopt the RUGs methodology as a short-term measure to ensure that no eligible Arkansan is denied

waiver services while the new method is finalized. The agency can take this comment into consideration in future promulgations that may change or replace the assessment instrument. The agency intends to conduct another round of public hearings around the state to discuss the new method when it is proposed.

Amanda Smith, comment received 8/8/2018
Comment Summary: I am in total agreement with an immediate revamping of the current assessment process. Public hearings will provide caregivers the means to express their dire needs and concerns. Many resource needs go unmet due to some local DHS staff not being knowledgeable of resources available within the agency or other community resources. A greater level of accountability is also necessary for those who serve in supervisory capacities. Caregiving is a labor of love. Many individuals, such as myself, have to depend on state resources due to lack of family support. Frustration sets in when it seems the "run-around" is ever so present when seeking DHS assistance via in person or on the telephone. Additional state funding should be allocated to ensure the new program will be strictly geared toward a client-centered approach versus a staff-centered approach.

Agency Response: Comment considered. In July 2018, the agency conducted public hearings on the proposed rule in Jonesboro, Fort Smith, Monticello, Hope, and Little Rock. The agency also provided notice to all existing ARChoices beneficiaries and solicited comment from those beneficiaries. The agency is proposing this rule as a short-term measure to ensure that all eligible Arkansans are able to receive the full range of waiver services while the agency finalizes a new method to allocate attendant care hours. The agency intends to conduct another round of public hearings around the state to discuss the new method when it is proposed. The agency does not anticipate a need for additional funding to implement a new method, but any appropriation or authorization of additional funding is dependent on legislative action.

The proposed effective date of the rules is October 1, 2018.

CMS approved the Home and Community-Based Waiver ARChoices program administered by DHS for persons 21 through 64 years of age and older who require an intermediate level of care in a nursing facility, and also for persons 65 years of age and older who require an intermediate level of care in a nursing facility.

FINANCIAL IMPACT: There is no financial impact. The expenditures currently being incurred by DHS related to the use of the tool under question is in the order. The promulgation seeks to properly place the tool in the rules, thus maintaining the current programs.

LEGAL AUTHORIZATION: Under state law, 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). DHS may promulgate rules as necessary to conform to federal rules that affect its programs as necessary to receive any federal funds. *See* Ark. Code Ann. §25-10-129(b).

To protect the health and welfare of the beneficiaries of these specific services, federal regulations require states to make certain assurances to CMS in order to grant a waiver. DHS must provide an initial evaluation and periodic reevaluations of the need for the level of care required for each beneficiary. *See* 42 CFR 441.302(c). Additionally, DHS must provide CMS with an annual report providing information on the waiver's impact on the type, amount, and cost of services provided under the state plan and the health and welfare of the beneficiaries. *See* 42 CFR 441.302(h).

F. Adjournment.