

**DEPARTMENT OF HUMAN SERVICES, DIVISION OF DEVELOPMENTAL
DISABILITIES SERVICES**

SUBJECT: ADDT-1-20; SPA#2020-0020; Rules for DDS ADDT

DESCRIPTION:

Statement of Necessity

The Adult Developmental Day Treatment Medicaid Provider Manual and the Arkansas Medicaid State Plan are being updated and the Rules for the Division of Developmental Disabilities Adult Developmental Day Treatment are being created to facilitate billing for ADDT services, bring language used up-to-date with current industry language, clarify available ADDT services, and establish the new rules relating to ADDT licensure and monitoring.

Rule Summary

Effective January 1, 2021, the Adult Developmental Day Treatment (ADDT) Medicaid Provider Manual will be revised as follows:

- Removes duplicate and unnecessary information, revises section arrangement for clarity, and clarifies available services.
- Removes recoupment and appeal sections, which are covered in other sections of the Medicaid Manual.
- Removes codes from the manual based on Act 605 of 2017 to allow for faster updates when national code changes occur.
- Changes the term “Speech Therapy” to “Speech-Language Therapy” to mirror current language in the field.
- Removes definitions of “unit”.

Effective January 1, 2021, the Arkansas Medicaid State Plan will be revised as follows:

- Reflects that the evaluation and treatment plan development services are now combined into one (1) service for billing purposes.
- Clarifies that Speech-Language Therapy evaluations are limited to four (4) units per State Fiscal Year.
- Provides that Physical Therapy and Occupational Therapy evaluations are limited to two (2) units per State Fiscal Year.
- Changes the term “Speech Therapy” to “Speech-Language Therapy to mirror current language in the field.
- Removes definitions of “unit”.

Effective January 1, 2021, the Rules for the Division of Developmental Disabilities Adult Developmental Day Treatment will serve as the new set of minimum standards for ADDT programs covering all topics related to ADDT licensure and monitoring.

Effective January 1, 2021, the following standards and policies will be repealed and superseded by the Rules for the Division of Developmental Disabilities Adult Developmental Day Treatment:

- The DDS Standards for Certification, Investigation, and Monitoring for Center-Based Community Services
- DDS Policy 1090 Certification Policy for Non-Center Based Services
- DDS Policy 1091 Licensing Policy for Center-Based Community Services

PUBLIC COMMENT: A public hearing was held on this rule on October 16, 2020. The public comment period expired on October 29, 2020. The agency provided the following summary of the public comments it received and its responses to those comments.

Commenter's Name: Larry Stang

COMMENT 1: There is no mention of an annual employee evaluation requirement. We are in the "people helping people" business, and to not require at least an annual employee evaluation, which allows supervisors to interact with employees regarding their work performance, is a recipe for disaster. This requirement should be considered a "minimum standard". Thank you for this opportunity to comment on these proposed rules.

RESPONSE: Thank you for your comment. DDS does not consider an annual employee evaluation a required minimum standard. An ADDT provider in compliance with the proposed rules can deliver safe and effective ADDT services to beneficiaries without conducting annual employee evaluations for each employee. An annual employee evaluation may be a very beneficial and perhaps even best business practice; however, for the above reason DDS believes whether or not to conduct annual employee evaluations is an individual business decision to be made by each ADDT provider and not a required minimum standard.

COMMENT 2: UPDATED DRAFT – 10/26/20

DDPA Comments on ADDT Medicaid Manual and ADDT Rules Promulgated
September 30, 2020

ADDT Medicaid Manual 212.100 Age Requirement

This language is too restrictive for certain individuals. Some referrals are individuals 17 years of age who had a diploma or a letter of completion from their high school. They need to be able to access services. Also, some individuals are referrals who dropped out of high school prior to receiving a diploma or letter of completion and who were between the age of 18 and 21. Will these individuals be considered if there is no possibility of them returning to high school? In the past, with several calls, we have been able to get the two above scenarios approved and would not want the new rules to preclude that.

RESPONSE: Thank you for your comment. The age requirements applicable to ADDT eligibility were not changed as part of this promulgation. These age requirements are aligned with the release of special education obligations, which is when Medicaid can be billed. Additionally, ADDT is an adult program and should therefore be limited to beneficiaries 18 years and older.

COMMENT 3: 212.200 Prescription

B. Please clarify that it will be acceptable to obtain a faxed or scanned/emailed copy of the prescription for services.

RESPONSE: Thank you for your comment. Section 212.200(B) does not require an original signature, so a scanned/emailed and faxed prescription would comply so long as it meets the other requirements of the section.

COMMENT 4: 214.110 ADDT Evaluation and Treatment Planning Services

All these required elements cannot be accomplished within the one hour of reimbursement.

RESPONSE: Thank you for your comment. This was not changed during this promulgation.

COMMENT 5: 214.220 Nursing

Thank you for adding cecostomy or ileostomy tube.

RESPONSE: Thank you for your comment.

COMMENT 6: ADDT Licensure Rules

General Comments

These rules do not match the statutory language that requires licensed providers to be a “nonprofit community program.” As written the rules would appear to allow a for-profit entity to be licensed, and indeed, the rules talk about change of “ownership” and other for-profit language. Also, the rules do not require accreditation for new programs, as the statute does under Ark. Code 20-48-105. If the statute is changed in the future the rules should be changed at that time. But the current rules should match the current statutory requirements. Otherwise, it invites confusion and litigation. We request the following definitions from Ark. Code 20-48-101 be added to the definitions and incorporated into the context of these rules:

(5)(A) “Nonprofit community program” means a program that provides only nonresidential services to persons with developmental disabilities or provides

nonresidential and residential services to persons with developmental disabilities and is licensed by the division.

(B) A nonprofit community program serves as a quasi-governmental instrumentality of the state by providing support and services to persons who have a developmental disability or delay and would otherwise require support and services through state-operated programs and facilities; and

(6)(A) “Qualified nonprofit community program” means a nonprofit community program that holds a valid nonprofit community program license issued by the division.

(B) “Qualified nonprofit community program” includes:

(i) A nonprofit community program that holds a license that was issued by the division on or before February 1, 2007; and

(ii) An accredited nonprofit entity that is awarded a license as a nonprofit community program by the division after February 1, 2007.

We request the underserved Sections 203 and 204 reflect the statutory requirement for accreditation.

RESPONSE: Thank you for your comment. All statutory requirements applicable to ADDT programs are unaffected by these rules. DPSQA would have to adhere to any statutory authority pertaining to ADDT programs as part of its review of any application. If there is any aspect of an applicant which is not in compliance with applicable statutes, then the application would be rejected by DPSQA. It would be duplicative to copy all statutory requirements into the proposed rules.

COMMENT 7: The rules do not sync with the “DDS Standards for Certification, Investigation and Monitoring for Center-Based Community Services”? How does DHS intend to handle that issue? Note also that the Center-Based Standards apply to group homes as well as ADDT.

RESPONSE: Thank you for your comment. These proposed rules will supersede and replace the DDS Standards for Certification, Investigation and Monitoring for Center-Based Community Services, which will be repealed on the effective date of these proposed rules. Any references to group homes in the DDS Standards for Certification, Investigation and Monitoring for Center-Based Community Services are incorrectly included since group homes do not provide a center-based service, and those standards were specifically limited to EIDT and ADDT programs.

COMMENT 8: 101 Authority

(b)(2) It seems this list also should include Ark. Code Ann. 20-48-105 (how DDS will make a determination on underserved status).

RESPONSE: Thank you for your comment. Ark. Code Ann. § 20-48-105 is already included as part of the first statutory reference in Section 101(a).

COMMENT 9: 103 Definitions

(j) “Employees” – Employees and independent contractors are different legally and ideally should not encompassed in the same definition. While we understand it is easier to include independent contractors in the definition, and some provisions should apply to contractors, other provisions, such as background checks should not apply to ALL contractors, such as vendors and professionals who do not have contact with beneficiaries. You have explained in the text when certain sections apply to independent contractors, so it doesn’t seem necessary to blur the distinction.

RESPONSE: Thank you for your comment. Section 103(h) will be broken into subsection (1) and (2). Section 103(h)(1) will remain as currently written. Section 103(h)(2) will be added stating:

(2) “Employee” does not mean an independent contractor if:

(i) the independent contractor does not assist in the day-to-day operations of the ADDT; and

(ii) the independent contractor has no beneficiary contact.”

COMMENT 10: (r) “underserved” – please reference the statutory criteria at 20-48-105.

RESPONSE: Thank you for your comment. The phrase “...in accordance with 20-48-105 of the Arkansas Code” will be added to the end of Section 103(q).

COMMENT 11: 202 Licensure Application

203 Licensure Process

See General Comments above.

RESPONSE: Thank you for your comment.

COMMENT 12: 301 Organization and Ownership

In (c)(3), please reword so that a name change requires “notice” to DPSQA, not approval.

RESPONSE: Thank you for your comment. Section 301(c)(3) only requires notice to DPSQA as currently written.

COMMENT 13: 303 Employee Training

New hire and annual topics with specific categories has been added back -we appreciate flexibility to make determinations on most needed trainings.

RESPONSE: Thank you for your comment. These are basic health and safety trainings for employees that have direct contact with beneficiaries and will be required for such employees in all Medicaid program provider certification manuals.

COMMENT 14: 304 Employee Records

(5) Drug screen results. Those should be in medical files not personnel files (as required by DOL). We have no opposition to providing a copy to DPSQA, but they should be segregated.

RESPONSE: Thank you for your comment. The current Section 304(b) will become Section 304(c) and a new Section 304(b) will be added that states:

(b)(1) An ADDT must ensure that each personnel record is kept confidential and available only to:

(A) Employees who need to know the information contained in the personnel record;

(B) Persons or entities who need to know the information contained in the personnel record;

(C) DPSQA and any governmental entity with jurisdiction or other authority to access the personnel record;

(D) The employee; and

(E) Any other individual authorized in writing by the employee.

(2)(A) An ADDT must keep personnel records in a file cabinet or room that is always locked.

(B)(i) An ADDT may use electronic records in addition to or in place of physical records to comply with these standards.

(ii) An ADDT provider that uses electronic records must take reasonable steps to backup all electronic records and reconstruct a personnel record in the event of a breakdown in the ADDT's electronic records system.

COMMENT 15: 305 Beneficiary Service Records

Recommend add "attributed PASSE information, if applicable."

RESPONSE: Thank you for your comment. Section 305(b)(12) will be changed to add, "or managed care organization information, if applicable."

COMMENT 16: 310 Infectious Diseases

This should be changed to “contagious” diseases or similar term. Not all infectious diseases, such as HIV, are contagious or easily transmittable. This may violate the ADA and Rehab Act as written. The EEOC guidance and court cases do not allow discrimination against individuals with diseases not transmitted through casual contact.

RESPONSE: Thank you for your comment. Section 309 is labeled “Infection Control” as opposed to Infectious Diseases, and is used because it is the term of art used by the Arkansas Department of Health.

COMMENT 17: Facility Requirements

401. General Requirements

Please grandfather in those providers whose centers do not meet new physical plant requirements. It would not be fair to impose new standards on them.

RESPONSE: Thank you for your comment. DDS believes the limited number of new physical plant requirements are important for beneficiary safety and welfare and should not be subject to grandfathering.

COMMENT 18: (6) requires an emergency alarm system throughout the building to alert employees and beneficiaries when there is an emergency. Does this have to be a systemwide alert or can this be foghorn or other system? Please use “alert” instead of “alarm.”

RESPONSE: Thank you for your comment. As written, any system would comply that is able to alert employees and beneficiaries throughout the facility when there is an emergency.

COMMENT 19: (7) requires that each site have that each site have “at least one (1) toilet and one (1) sink for every ten (10) beneficiaries with running hot and cold water, toilet tissue, liquid soap, and paper towels or air dryers.” Was 15 not 10 in the last version. And in CSSP it is 12. The current standards just require adequacy to meet client needs. It is unfair to impose structural changes on centers already licensed.

RESPONSE: Thank you for your comment. Section 401(7) will be changed to reflect one (1) sink and toilet for every fifteen (15) beneficiaries.

COMMENT 20: (20) requires “an emergency power system to provide lighting and power to essential electrical devices throughout the center, including without limitation power to exit lighting and fire detection, fire alarm, and fire extinguishing systems.” Many centers do not have this in place, so it could be a costly change if they are not grandfathered in.

RESPONSE: DDS believes the requirements in Section 401(20) are an appropriate best practice for the safety and welfare of beneficiaries at any facility and should not be subject to grandfathering. Section 401(20) does not require anything in and of itself to be installed. The proposed rule only requires the essential electrical devices located in an ADDT to have emergency power source in the event of a power outage. The examples listed in Section 401(20) are types systems and devices that run on electricity that would be considered essential electrical devices if located in an ADDT.

COMMENT 21: Subchapter 5 Programs and Services

There is no mention of ratios. Please insert that language to safeguard beneficiaries.

RESPONSE: Thank you for your comment. A new Section 302(e) will be included which will set a 10:1 minimum beneficiary to staff ratio. What is currently Section 302(e) will become Section 302(f).

COMMENT 22: 501 Transportation

We suggest transportation provisions be handled for both EIDT and ADDT in a separate Transportation Manual.

RESPONSE: Thank you for your comment. This is not possible at this time. DDS is actively working to provide one mechanism for transportation.

COMMENT 23: 502 Exits

D says: "An ADDT shall remain responsible for the health, safety, and welfare of the exiting beneficiary until all transitions to new service providers are complete." Please remove. A day program does not provide services 24/7 as waiver can. We cannot remain responsible for an individual's welfare in that manner. We can coordinate with another provider if they are transitioning to a different program.

RESPONSE: Thank you for your comment. Section 502 (d) will be removed.

COMMENT 24: 504 Nutrition

With COVID, we need more flexibility. Some individuals are bringing their own lunch now, but if they do not, we provide them a lunch for free. However, it is difficult under these conditions to maintain USDA compliance in terms of strict dietary and portion requirements, and then we have to address allergy, puree, and other restrictions. With the fluctuating census due to COVID we need flexibility on this standard.

RESPONSE: Thank you for your comment. This change aligns the ADDT nutrition requirements with that of child care centers and EIDTs.

COMMENT 25: 601 Arrivals, Departures, and Transportation

601(a)(2) requires: “(B) Documentation of arrivals to and departures from an ADDT must include without limitation the beneficiary’s name, age, and date of birth, date and time of arrival and departure, name of the person or entity that provided transportation, and method of transportation” Why is the DOB and age necessary for ADDT? It may be for EIDT but this is unnecessary for ADDT. Also, we may not know the name of the person that provided transportation when it is a transportation broker/subcontractor or family dropping off individuals. It would be more appropriate in those situations to notate the transportation company or family?

RESPONSE: Thank you for your comment. The age requirement will be removed from Section 601(a)(2)(B).

COMMENT 26: 601(d)(2) says, “Any vehicle designed or used to transport more than seven (7) passengers and one (1) driver must have a safety alarm device.

(B) The safety alarm device must:

Always be in working order and properly maintained;
Installed so that the driver is required to walk to the very back of the vehicle to reach the switch that deactivates the alarm;

Be installed by a certified technician or mechanic employed by a recognized electronics or automotive business in accordance with the device manufacturer’s recommendations;
and (iv) Sound the alarm no longer than one (1) minute after the activation of the safety alarm device.

This is a new mandate without funding. Reimbursement rates are not sufficient to cover this added cost and were not included when rates were last adjusted.

RESPONSE: Thank you for your comment. This change aligns ADDT transportation requirements with all other types of Medicaid funded transportation. Section 601(d)(2)(B)(iii) will be revised to state, “Be installed in accordance with the device manufacturer’s recommendations.” Section 601(d)(2)(B)(iv) will be revised to state, “Sound the alarm for at least one (1) minute after the activation of the safety alarm device.

COMMENT 27: 601(f)(2) says:

The walk-through inspection for any vehicles designed or used to transport more than seven (7) passengers and one (1) driver must be conducted in one (1) of the following ways:

An employee unloads all beneficiaries from the vehicle, walks or otherwise moves through the interior of the vehicle to ensure that no beneficiaries remain on board, and deactivates the safety alarm device.

This option can only be used if all beneficiaries are able to unload from the vehicle in less than one (1) minute.

The one-minute rule is not realistic for individuals with disabilities; in many centers, it would make the option unusable.

RESPONSE: Thank you for your comment. This change aligns ADDT transportation requirements with all other types of Medicaid funded transportation.

COMMENT 28: 602 Medications

Most ADDTs do not “administer” medications. It is possible that a nurse may administer some under the nursing service, but non-nursing staff generally are not allowed to “administer” medications.

RESPONSE: Thank you for your comment.

COMMENT 29: 603 Behavior Management Plans

(c)(1) says the plan must be evaluated quarterly. Unless the plan is not working, there is no need to review more than annually.

RESPONSE: Thank you for your comment. Since behavior management plans would only be implemented for beneficiaries exhibiting challenging behaviors on a chronic basis, DDS believes quarterly review to be appropriate.

COMMENT 30: 701 Incidents to Be Reported

(7) includes interruptions in service for more than one hour. If a beneficiary arrives later or leaves early is that considered an “interruption.” We would suggest that the other categories of incidents encompass any concerns from negative events that interrupt services.

RESPONSE: Thank you for your comment. Section 701(7) will be changed to any “unanticipated” situation where services to a beneficiary are interrupted for more than two (2) hours.

COMMENT 31: 805 Transfer of Beneficiaries

says “An ADDT must continue providing services until the beneficiary is transferred to his or her new service provider of choice.” It is not within the ADDT’s control as to when another provider the beneficiary has chosen will accept the individual. If the individual

chooses to remain, and is complying with health and safety requirements, it is not an issue, but it should not be mandated.

RESPONSE: Thank you for your comment. Section 805(b) will be revised to insert “If directed by DPSQA,…” at the beginning.

COMMENT 32: 901 Reconsideration of Adverse Regulatory Actions
(a)(1) Reconsiderations should be handled by someone not involved in the original determination nor reporting to someone who was.

RESPONSE: Thank you for your comment. A reconsideration request under Section 901 is required to be addressed to and will be conducted by the DPSQA Office of the Director, which means it would not be conducted by an individual involved in the original determination or anyone reporting to an individual that was involved in the original determination.

COMMENT 33: (d) Can you make it clear that DHS will not proceed with allowing an expansion based on underserved determination until any appeal is resolved. Otherwise, an appeal becomes pointless.

RESPONSE: Thank you for your comment. An appeal right would exist only when DDS declines a request for a county to be declared underserved. There is no appeal right if DDS were to grant a request to declare a county underserved.

COMMENT 34: I have a question as to whether the CSSP providers perform services in-home, or only at "CSSP Locations" as defined by Section 103(k). Or in other words, do CSSP providers only operate at CSSP locations?

Thank you for your assistance and I hope to hear from you soon.

RESPONSE: Thank you for your comment. This comment does not pertain to ADDT.

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

1. What is the status on CMS approval on the SPA? **RESPONSE:** It was approved by CMS on October 26, 2020.

2. Where does the new definition of “serious injury” come from (Rule 103(o))?
RESPONSE: This is a new definition.

3. Where does the new definition of “solicitation” come from (Rule 103(p))?
RESPONSE: This is a new definition.

4. The new rules regarding the licensure process set forth conditions that must be met in order for DPSQA to issue a license (Rule 203). Where do the requirements in Rule 203(a)(4)(B)-(C) come from? **RESPONSE:** DDS Policy #1089-A
5. Is the age requirement for ADDT employees statutorily mandated or is it a policy decision? **RESPONSE:** It is NOT statutorily mandated.
6. Are the required training topics (Rule 303(a)) statutory, required by federal regulation, taken from somewhere else, or compiled for these rules? **RESPONSE:** Primarily compiled for these rules based upon feedback from stakeholders.
7. Where does the five-year timeframe for record retention come from? **RESPONSE:** Nothing statutory, common timeframe used for DHS policy purposes.
8. The proposed rules require beneficiary service records to be kept in a file cabinet or room that is always locked. Are there any comparable security requirements for electronic records? **RESPONSE:** As written, the locked room requirement would apply to where any computer is used for accessing/storing electronic records.
9. The proposed rules require an ADDT facility to have at least one toilet and one sink for every ten beneficiaries. Where does this ratio come from? **RESPONSE:** Based upon feedback from stakeholders.
10. Where does the one-year timeframe for storing beneficiary arrival and departure documentation come from? **RESPONSE:** Regulatory experience based on typical investigatory timeframe for transportation incidents.
11. Section 601(d)(2)(A) sets forth the required staff/beneficiary ratio in a transportation vehicle. Where does this ratio come from? **RESPONSE:** Requirement was intended to apply to multi-passenger vans used primarily for business purposes, and not to sedans and other personal vehicles.
12. Section 601(d)(2)(B) requires every vehicle used to transport seven or more passengers to have a safety alarm device. What is the purpose of this alarm? **RESPONSE:** To ensure staff complete a walk-through of the entire vehicle after drop-off and make sure no beneficiaries have been left on vehicle.
13. Where do the insurance coverage requirements for transportation vehicles come from? **RESPONSE:** Mimics Minimum Licensing Requirements for Child Care Centers, NET broker contracts and our NET-like EIDT and ADDT contracts.
14. Rules 701(a) and 702(a) list events/incidents that an ADDT must report. Were these lists compiled for these rules or do they come from somewhere else? **RESPONSE:** The list is primarily a carryover from prior standards with some minor additions based upon program experience.

15. Rule 803(b)(5) and Rule 806 both state that DPSQA may impose monetary penalties on a noncompliant ADDT. What is the specific statutory authority for these penalties?

RESPONSE: Ark. Code Ann. §25-15-217

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

LEGAL AUTHORIZATION: The Department of Human Services has the responsibility to administer assigned forms of public assistance and is specifically authorized to maintain an indigent medical care program (Arkansas Medicaid). *See* Ark. Code Ann. §§ 20-76-201(1), 20-77-107(a)(1). The Department has the authority to make rules that are necessary or desirable to carry out its public assistance duties. Ark. Code Ann. § 20-76-201(12). The Department and its divisions also have the authority to promulgate rules as necessary to conform their programs to federal law and receive federal funding. Ark. Code Ann. § 25-10-129(b). “The [B]oard [of Developmental Disabilities Services] may make rules regarding the care, custody, training, and discipline of individuals with intellectual and developmental disabilities in the human development centers or receiving services for individuals with intellectual and developmental disabilities[.]” Ark. Code Ann. § 20-48-205(b).

As an agency with the authority to suspend, revoke, or deny licenses, the Department may, as an alternative sanction, impose a monetary penalty up to \$500 on persons or entities under its jurisdiction. Ark. Code Ann. § 25-15-217(a)-(b).

This rule implements Act 605 of 2017, sponsored by Representative Justin Boyd, which codified the process for the review of rules impacting state Medicaid costs and exempted medical codes from the rulemaking process and legislative review and approval.