

DisabilityRights

ARKANSAS

Tom Masseau, Executive Director

May 16, 2018

Members of the Executive Subcommittee
Arkansas Legislative Council
Via E-mail

RE: ARChoices 1-18 – Resource Utilization Groups (RUGS) Overview

Dear Distinguished Members:

We are reaching out to you today to protest the request for emergency rulemaking by the Department of Human Services (DHS) with respect to the above-referenced rule. Our concern is that DHS is asking the Arkansas Legislative Council Executive Subcommittee to deprive the citizens of the State of Arkansas, your constituents, of a meaningful opportunity to review and comment on agency regulations through its attempt to use the emergency rulemaking process.

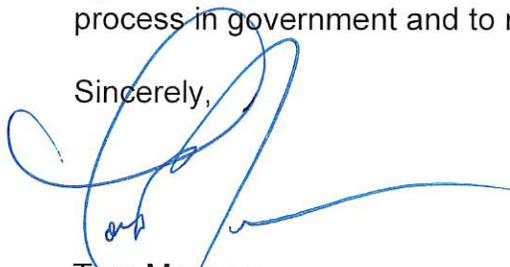
The rulemaking at issue concerns the method in which attendant care hours are determined for persons with physical disabilities and elderly persons under the State's ARChoices Medicaid waiver program. This is an important issue for the impacted persons as attendant care hours are necessary to the ability of program beneficiaries to live and receive appropriate care in their homes, as opposed to an institution. As a result of the RUGS, thousands of elderly Arkansans with disabilities and elderly Arkansans lost attendant care hours, compromising their health, safety, and welfare.

In January 2017, a lawsuit was filed against DHS challenging the use of the RUGS, which changed the method for determining attendant care hours for beneficiaries of the ARChoices program, on the basis that it was not lawfully promulgated. On May 14, 2018, the Pulaski County Circuit Court issued a Memorandum Order in which it determined that DHS had violated the Arkansas Administrative Procedure Act by failing to lawfully promulgate the RUGs rule, specifically because DHS failed to provide both the citizens of our state and the Arkansas Legislature with adequate notice to meet its obligations under the Arkansas Administrative Procedure Act. The Court permanently enjoined DHS from using the RUGs system "to determine attendant care hours unless or until it is properly promulgated." A copy of the Court's Memorandum Order is enclosed herewith.

DHS has been aware of the problem with its initial rulemaking on the RUGs system since at least January 2017, when the lawsuit was filed in the Pulaski County Circuit Court. DHS had ample time to properly promulgate the proposed rule, including by providing adequate public notice and an opportunity to comment. Disability Rights Arkansas, in fact, suggested that DHS properly promulgate the RUGs rule when the lawsuit was first filed, which DHS representatives acknowledged that it was considering. However, instead of taking prompt action to do this, DHS proceeded to fight a losing battle in the lawsuit, even after losing on the issues presented in an interlocutory appeal to the Arkansas Supreme Court.

Now, DHS is seeking to once again circumvent the public notice and comment provisions of the Administrative Procedure Act and the transparency required by the rulemaking process in that Act by asking for approval of an emergency rule. There is no emergency, except that created by DHS's own actions and its recalcitrance in the face of clear law. Passage of an emergency rule would undermine the court's decision and will allow DHS to continue to disregard the law. It also deprives citizens of the important rights of public notice and comment. We urge you to insist on transparency and due process in government and to reject DHS's emergency rulemaking attempt.

Sincerely,



Tom Masseur
Executive Director

Cc: Arkansas General Assembly
Cindy Gillespie, Director, DHS
Governor Asa Hutchinson

Enclosure