IN THE CIRCUIT COURT OF PULASKI COUNTY
CIVIL DIVISION

BRADLEY LEDGERWOOD,
LOUELLA JONES, PEGGY SANDERS,
MARCUS STROPE, WINNIE WINSTON,
DANA WOLF, and MICHAEL YARRA **PLAINTIFFS**

v. **Case No. 60CV-17-442**

ARKANSAS DEPARTMENT OF HUMAN SERVICES **DEFENDANT**

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This suit alleges that documents filed by DHS in the rule-making process to adopt a new methodology for allocating attendant care for ARChoices beneficiaries were inadequate. The parties agree on what the essential documents are and do not contest their authenticity or contents. (*Plaintiffs' Statement of Undisputed Facts*, ¶¶ *35-42*). Rather, the parties disagree on whether these documents satisfy the rule-making requirements of Ark. Code Ann. § 25-15-204 with respect to the assessment methodology, a question of law for the Court.

On February 3, 2017, after a seven-hour hearing in which the Court reviewed the relevant documents and heard sworn testimony from one plaintiff and the top two DHS officials in charge of the ARChoices program, the Court granted the Plaintiffs a temporary restraining order and extended its duration to five months. The Court held that the Plaintiffs had demonstrated a likelihood of success on the merits, overruled DHS's intertwined arguments that the Plaintiffs lacked standing and would not suffer irreparable harm in the absence of a TRO, and concluded that administrative exhaustion was not required in this case. (*TRO, p. 1-7*). Faced with the agency's rehashed arguments, the Arkansas Supreme Court unanimously affirmed this Court's decision to grant the order. *Ark. Dep't of Human Servs. v. Ledgerwood*, 2017 Ark. 308, 530

S.W.3d 336, 338. The evidence from that initial hearing is part of the trial record and need not be repeated. Ark. R. Civ. P. 65(a)(2).

Discovery subsequent to the TRO hearing has not presented any genuine issues of material fact requiring a trial with respect to the agency's compliance with the Ark. Code Ann. § 25-15-204 or the agency's recalcitrant braying that the Plaintiffs will not suffer irreparable harm. Accordingly, this Court should enter summary judgment in favor of the Plaintiffs.

STANDARD

Summary judgement is not a drastic remedy, but rather is "one of the tools in a trial court's efficiency arsenal." *Wallace v. Broyles*, 332 Ark. 189, 195, 961 S.W.2d 712, 723 (1998). To that end, a circuit court will grant summary judgment when it is apparent that no genuine issues of material fact exist requiring litigation and that the moving party is entitled to judgment as a matter of law. *Quarles v. Courtyard Gardens Health & Rehab., LLC*, 2016 Ark. 112, at 7-8, 488 S.W.3d 513, 519**.** With respect to burden, the moving party must first establish a prima facie entitlement to summary judgment, after which "the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact." *Id.*

Here, the rule-making provisions of the Administrative Procedure Act are at issue. In relevant part, this section requires that the agency:

(1) provide public notice that includes "a statement of the terms or substance of the intended action or a description of the subjects and issues involved," Ark. Code Ann. § 25-15-204(a)(1)(B)(i);

(2) afford interested parties an opportunity to submit data, views, and arguments, s*ee* Ark. Code Ann. § 25-15-204(a)(2)(A); and

(3) submit the final rule to the Legislative Council for approval in accordance with Ark. Code Ann. § 10-3-309. *See* Ark. Code Ann. § 25-15-204(f).

Thus, the material facts are the contents of the documents DHS issued during rule-making. Since no rule is valid "unless adopted and filed in substantial compliance" with Ark. Code Ann. § 25-15-204, the legal question is simply whether these documents establish substantial compliance. Ark. Code Ann. § 25-15-204(h).

In analyzing "substantial compliance," the Arkansas Court of Appeals rejected the notion that the statute's requirements are "mere technicalities," instead underscoring the importance of notice and comment in rule-making with three rationales. *Wagnon v. State Health Servs. Agency*, 73 Ark. App. 269, 274, 40 S.W.3d 849, 852-53 (2001). First, "notice improves the quality of agency rulemaking by insuring that the agency regulations will be tested by exposure to diverse public comment. The notice and comment procedure assures that the public and the persons being regulated are given an opportunity to participate, provide information and suggest alternatives, so that the agency is educated about the impact of a proposed rule and can make a fair and mature decision." *Id.* (citing 2 Am. Jur. 2d *Administrative Law* § 166 (1994)). Second, "notice and the opportunity to be heard are essential components of fairness to affected parties." *Id.* Third, "by giving affected parties an opportunity to develop evidence in the record to support their objections to a rule, notice enhances the quality of judicial review." *Id.* Unsurprisingly in light of the importance of notice and comment, the Court of Appeals concluded that "an opportunity to comment granted after a rule is promulgated cannot substitute for notice and an opportunity to comment beforehand." *Wagnon*, 73 Ark. App. at 274. This judicial emphasis on the timing of public participation is mirrored in the Administrative Procedure Act, which requires the agency to "*fully consider* all written and oral submissions respecting the proposed

rule *before* finalizing the language…and filing the proposed rule." Ark. Code Ann. § 25-15-204(a)(2)(C) (emphasis added).

Given the unforgiving burden placed upon the agency in rule-making, judgment as a matter of law is appropriate. DHS did not substantially comply with the requirements of Ark. Code Ann. § 25-15-204 where (1) neither the rule-making notice nor proposed rule contained any mention of a change in assessment methodology; (2) the proposed rule lacked critical information about the new assessment methodology; and (3) where the Legislative Council was not presented either orally or in writing with notice of a change in methodology or critical information about the new assessment methodology.

The remaining question, then, is just one of remedy. Where DHS's algorithm-based assessment methodology is invalid for having been adopted in violation of rule-making procedures, the Plaintiffs ask the Court to cure the invalidity by issuing a permanent injunction that (1) enjoins DHS from using the RUGs methodology to allocate attendant care hours for any ARChoices beneficiary; (2) orders DHS to use the methodology for allocating attendant care hours in place as of December 31, 2015, which was based on DHS nurse discretion, unless and until the RUGs methodology is adopted in accordance with Ark. Code Ann. § 25-15-204 pursuant to a new rule-making initiative; and (3) orders DHS to restore the attendant care hours to the amounts allocated as of December 31, 2015 for all present ARChoices beneficiaries (a) who were beneficiaries of the AAPD or ElderChoices programs as of December 31, 2015; (b) who have maintained continuous eligibility for ARChoices from December 31, 2015 to present; and (c) whose hours were reduced under the RUGs methodology. *(Complaint, p. 34-35).* Such an injunction would leave unchanged until the next assessment the attendant care hours of any

beneficiary whose hours were increased from the allocation under AAPD or ElderChoices and any beneficiary whose participation in the program started after January 1, 2016.

There are two independent bases for this injunctive relief. First, the Supreme Court has long held that "a state agency may be enjoined if it can be shown that the agency's pending action is *ultra vires* or outside the authority of the agency." *Ark. Dep't of Envtl. Quality v. Oil Producers of Ark.*, 2009 Ark. 297, at 6-7, 318 S.W.3d 570, 573-74. Second, injunctive relief is appropriate as "a means to enforce the judgment" when a rule is declared unlawful pursuant to the declaratory judgment provisions of either Administrative Procedure Act or the Declaratory Judgment Act. *Ark. Dep't of Human Servs. v. Fort Smith Sch. Dist*., 2015 Ark. 81, at 8, 455 S.W.3d 294, 300; Ark. Code Ann. § 16-111-108.[1]

Accordingly, the Court must also consider whether the Plaintiffs meet the grounds for a permanent injunction. An injunction may be granted if the petitioner shows (1) success on the merits; (2) that it is threatened with irreparable harm; (3) that this harm outweighs any injury which granting the injunction will inflict on other parties; and (4) that the public interest favors the injunction. *United Food & Commer. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 2014 Ark. 517, at 5, 451 S.W.3d 584, 586-87.

Given success on the merits, the Court should reiterate its previous holdings that the Plaintiffs are threatened with irreparable harm and newly hold that the harm outweighs injuries to other parties and that the public interest favors the injunction.

A. SUCCESS ON THE MERITS

[1] Later, *infra* at 23, this brief addresses the recent Supreme Court decision that raises the possibility that sovereign immunity bars the Administrative Procedure Act and Declaratory Judgment Act claims. *Bd. of Trs. of the Univ. of Ark. v. Andrews*, 2018 Ark. 12. Regardless of these statutory claims, the *Andrews* decision cannot be construed to bar the Plaintiffs' claim for injunctive relief for *ultra vires* agency action. *(Complaint, ¶ 164-165*).

I. The new assessment methodology is a rule within the meaning of the Administrative Procedure Act.

A "rule" is "an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice of an agency and includes, but is not limited to, the amendment or repeal of a prior rule." Ark. Code Ann. § 25-15-202(9)(A). Although mere administrative tasks of an agency, including "statements concerning the internal management of an agency and that do not affect the private rights or procedures available to the public," do not fall within the definition of a rule, Ark. Code Ann. § 25-15-202(9)(B)(i), the agency's formulation of "provisions having legal consequences" does. *See Eldridge v. Bd. of Corr*., 298 Ark. 467, 471, 768 S.W.2d 534, 536 (1989).

The algorithm-based assessment methodology involving Resource Utilization Groups ("RUGs") constituted a departure from prior practice having both general applicability and future effect. The ARChoices program renewed and combined two similar programs known as ElderChoices and Alternatives for Adults with Physical Disabilities ("AAPD") that had been in existence for at least 17 years. (*Pl. Undisputed Facts, ¶ 4).* Under ElderChoices and AAPD, DHS used the ArPath assessment tool to evaluate an individual's eligibility for the program,[2] but actually allocated the amount of attendant care hours available to a beneficiary according to the absolute discretion of the Division of Aging and Adult Services ("DAAS") registered nurse who conducted the assessment. (*Id., ¶¶ 11-12).* RUGs methodology played no role in determining the amount of attendant care to allocate at any time prior to 2016. *(Id.)*

[2] The use of the ArPath in decisions about program eligibility is not at issue in the present case. Eligibility decisions are wholly independent of the RUGs-based methodology at issue here. (*Pl. Undisputed Facts, ¶ 13).*

Starting January 1, 2016, DHS ended the 17-year methodology of allocating attendant care hours according to nurse discretion and implemented an algorithm-based system that takes information from the ArPath assessment and sorts a beneficiary into one of 23 RUGs (sometimes called tiers). (*Id.,* ¶ *13*). Each tier is associated with a particular number of attendant care hours, and it is impossible for a beneficiary to be allocated a number of hours that differs from the amount attached to the 23 RUGs. (*Id.,* ¶¶ *15-16*). Out of 286 questions on the ArPath assessment, the algorithm includes only 61 in the process of sorting a beneficiary's into a RUG, excluding from consideration questions about an individual's ability to complete activities of daily living such as bathing, dressing, personal hygiene, walking, shopping, and maintaining bladder and bowel continence—the very activities for which attendant care is provided. (*Id.,* ¶ *14*). The 61 items material to RUG placement have specific definitions of terms unique to the assessment that are found in assessment-specific training guides. (*Id.,* ¶ *9*). This algorithm applies to all 7,500 ARChoices beneficiaries (*Id.,* ¶ *4*) and is the sole factor in determining each person's RUG placement. (*Id.,* ¶ *17).* The agency characterizes the algorithm as binding and insists that it cannot deviate from the algorithm's determination. (*Id.*) These features of the methodology are all hallmarks of formal policy prescription included in the definition of "rule."

Additionally, the legal consequences of the algorithm-based methodology are stark. As of the last date for which DHS produced statistics, 90% of all ARChoices beneficiaries experienced a change in hours once the algorithm was implemented, most of those experiencing reductions. *(Id.,* ¶ *19).* Since DHS's practice is that any determination—increase, decrease, or no change—about RUG placement made by the algorithm gives rise to notice and appeal rights for beneficiaries, the introduction of the RUGs methodology meant that all of the program's

beneficiaries would have had the right to a hearing. *(Id., ¶ 18)*. These are the very "rights and procedures available to the public" that the definition of "rule" contemplates.

DHS's understanding that RUG placement triggers individualized notice and hearing rights reflects accepted law establishing that the assessment methodology implicates property interests protected under the Due Process Clause of the Fourteenth Amendment. In general, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents v. Roth*, 408 U.S. 564, 576 (1972). Specifically with respect to Medicaid, it is well-established that recipients have a statutory entitlement to benefits. *O'Bannon v. Town Court Nursing Ctr*., 447 U.S. 773, 787 (1980) (holding Medicaid recipient has right protected by due process to continued Medicaid benefits to pay for services from the qualified provider of his choice). To that end, the Honorable Price Marshall of the Eastern District of Arkansas has held that DHS attempts to reduce ARChoices beneficiaries' attendant care allocations triggers constitutional due process requirements. *See Jacobs v. Gillespie*, 3:16-cv-119 (E.D. Ark. Nov. 1, 2016). Similarly, an applicable state statute and federal Medicaid regulations characterize a reduction in attendant care hours as an "adverse action" that requires notice and hearing. *See* Ark. Code Ann. § 20-77-121(a)(1); 42 C.F.R. §§ 431.201 (definition of "action" includes "reduction of covered services"), 431.206(c)(2) (requirement of notice), 431.210 (content of notice).

In light of its broad impact on beneficiaries and their protected property interests, the RUGs methodology cannot fairly be characterized as an excluded administrative duty, *see Eldridge*, 298 Ark. at 471, or as a statement "concerning the internal management of an agency." *See* Ark. Code Ann. § 25-15-202(9)(B). Being applicable to all ARChoices recipients and, at the

time of its implementation, being of future effect, the algorithm-based RUGs methodology falls squarely within the definition of "rule," and, therefore, is subject to the APA's rule-making requirements.

II. The failure of public notice renders substantial compliance impossible as a matter of law because adequate notice is the foundation to valid rule-making.

DHS's notice of rule-making must contain "a statement of the terms or substance of the intended action or a description of the subjects and issues involved." Ark. Code Ann. § 25-15-204(a)(1)(B)(i). On August 3, 2015, DHS issued a notice of rule-making relating to the ARChoices program with the following text:

> Effective January 1, 2016, the Arkansas Department of Human Services is renewing the ElderChoices 1915(c) HCBS waiver. The renewal combines the ElderChoices and Alternatives for Adults with Physical Disabilities (AAPD) waivers into one waiver to be called the ARChoices in Homecare waiver covering participants 21 and old with a physical disability and individuals aged 65 and older. Effective January 1, 2016, the Department is also increasing the rate for Personal Care Services from $4.19 to $4.50 per 15 minute unit. The estimated annualized budget impact of the rate increase for the State Plan Personal Care Services is $11,439,689.

(*Pl. Undisputed Facts, ¶ 35)*. The notice stated that the public comment period closed on September 1, 2015. *(Id.)*.

As this Court noted when granting the TRO, "that notice states that DHS would renew the ElderChoices 1915(c) HCBS Waiver, but does not make mention of RUGs, or the specific nature and significance of the change in the Waiver's assessment methodology." (*TRO, p. 3*).

Such a dramatic failure of notice alone is sufficient to prevent substantial compliance. The Arkansas Supreme Court signaled as much in its ruling on the present case. *Ledgerwood*, 2017 Ark. 308, at 13-14. Presented with this Court's grant of the TRO—premised on the deficient notice—the Supreme Court stated that the Plaintiffs "have demonstrated a substantial likelihood of success on the merits that, by failing to provide proper notice, DHS did not

substantially comply with section 25-15-204 in promulgating the new RUGs methodology." The Supreme Court did not redeem the notice's inadequacy by looking for substantial compliance in, for example, the information in the proposed rule or alleged compliance with other rule-making requirements. Thus, this Court and the Supreme Court agree that adequate notice is a necessary precondition for compliance to have any chance of being considered substantial.

The determination that deficient notice is enough to invalidate the RUGs methodology makes sense. As the *Wagnon* court noted, insufficient notice undermines the quality of the rule-making process by narrowing the range of public comments, depriving affected parties of fairness, and leaving an emaciated record of the agency's decision-making process. *See Wagnon,* 73 Ark. App. at 274. Thus, even if the proposed rule contained the required information about the RUGs methodology—which it does not—members of the public would not have had notice about a change in methodology so that they might even look to the substance of the proposed rule to comment.

Although the agency received two public comments mentioning RUGs from Superior Senior Care during the promulgation process (*Pl. Undisputed Facts, ¶ 47),* this Court previously rejected the agency's argument that such comments demonstrate the adequacy of the notice:

> …[T]he statute does not save a rule that is promulgated by inadequate notice based upon comments from interested persons that go to the inadequacy. If the notice is not adequate, the fact that a provider comments about an area of the notice that is not covered does not save the flaw in the notice. The Administrative Procedures Act obligates an agency to afford…all interested persons reasonable opportunity to submit written data, views, or arguments, orally or in writing and specifically, with regard to the specific nature and significance of the problem the agency addresses with the proposed rule. If the proposed rule…is going to effect a change in the methodology the agency would use…, it's incumbent on the agency to make [it] apparent in its notice…

(*TRO Hearing Trans., p. 202-203).* The statutorily-protected interests of the general public are not sacrificed just because professional providers, having access to regular weekly and quarterly

meetings with DHS officials, commented on something hidden from the broader public. (*Pl. Undisputed Facts, ¶ 48).*

The insider knowledge furnished to the paid providers contrasts with the agency's lone communication to program beneficiaries promising continuity in services in the transition from ElderChoices and AAPD to ARChoices. On December 1, 2015, Craig Cloud, director of DAAS, issued a letter to program beneficiaries stating:

> Effective January 1, 2016, the ElderChoices waiver program will be renamed ARChoices in Homecare. Your services and provider will remain the same way. When your reassessment is due, the DAAS Nurse will explain how your services will have a new name and will explain new options and choices available to you under ARChoices. For now, just know that the name of your current services is being changed to ARChoices in Homecare. You will continue to receive the same services; and the DAAS Nurse will provide more information at your next reassessment.

(Id.,¶ 43). The statements that "[y]our services…will remain the same way" and that "[y]ou will continue to receive the same services" are words of fiction in light of the actual upheaval wreaked by the unmentioned RUGs methodology. DHS directed no other correspondence to beneficiaries regarding program changes. *(Id.,¶ 44*). Of course, a letter to beneficiaries sent after the public comment period closed, even if it had been accurate, would not substitute for a proper notice of rule-making required by the APA. However, it is another example of the agency's obfuscation of the algorithm-based methodology, a pattern that runs throughout the rule-making process, from the issuing of the notice to submission of the final rule.

Returning to the notice itself, the parties agree on its content. No reading of that content could reasonably meet the statute's requirement for "the terms or substance of" or "a description of" a change in assessment methodology. Summary judgment was built for issues this clear.

III. DHS denied interested parties a reasonable opportunity to submit data, views, and arguments by failing to identify that it sought a change in assessment methodology and by omitting vital information about the way the RUGs methodology works.

Nonexistent notice means that interested parties, including the Plaintiffs (*Id.*, ¶ *50)*, were not even aware that there was a proposed methodology change such that they could have "a reasonable opportunity to submit data, views, or arguments, orally or in writing." Ark. Code Ann. § 25-15-204(a)(2)(A). Furthermore, the substance of the proposed rule fails the statute's requirements.

The phrase "data, views, or arguments" presumes the availability of facts upon which to base a position on a proposed rule. Yet, the 242-page proposed rule of August 3, 2015[3] fails to provide critical information about the RUGs methodology. In its answer to the complaint, DHS admitted that the proposed rule does not (1) contain the algorithm used in the RUGs methodology (*Id.*, ¶ *39);* (2) specify the amount of hours allocated to each RUG (*Id.*, ¶ *40)*; (3) include any information about the reasons DHS chose to switch to the RUGs methodology (*Id.*, ¶ *41)*; or (4) include any studies, statistics, or other data the agency relied on in deciding to switch to the RUGs system (*Id.*, ¶ *42).* Further, the proposed rule does not identify that a change in the means of allocating services was proposed, even in a section titled "Major Changes," *see* Proposed Rule 016.06.15-006, at 85, and it does not discuss the anticipated impact of the change in the assessment methodology on beneficiaries.

The six references the proposed rule makes to RUGs are similarly bereft of the kind of information needed to formulate "data, views, or arguments." *See* Proposed Rule 016.06.15-006, at 48, 60, 130, 131, 154, 177. The first two mentions are contained in the proposed ARChoices

[3] Proposed Rule 016.06.15-006, *available at* www.sos.arkansas.gov/rules_and_regs/index.php. The date and contents of the Proposed Rule are not disputed, and it is already in the record through incorporation by reference (*Complaint*, ¶ *46)* and judicial notice. (*Pl. Undisputed Facts*, ¶ *37).* A physical copy has not been included because of its size.

Provider Manual, the definitive state regulatory guide for the operation of the program. *See* Proposed Rule 016.06.15-006, at 39-84. The first is in § 212.300(C)(5):

> There will not be a frequency ordered with Attendant Care. The monthly hours will be established using the RUG score. The provider and client will establish the frequency.

Proposed Rule 016.06.15-006, at 48. The acronym RUG is left undefined. Next, the proposed ARChoices Provider Manual unhelpfully offers § 213.210:

> Benefit limits will be determined on a client basis based on the assessed level of need by the DAAS RN. The highest RUG level allows a maximum allocation of 81 hours per week, 359 hours per month, or 4,212 hours per year.

Proposed Rule 016.06.15-006, at 60. Notably, the section states that benefits will be based on "the assessed level of need by the DAAS RN." DAAS nurses had been assessing level of need for at least 17 years, so the language does not indicate any change in methodology.

In addition to the proposed ARChoices Provider Manual, the proposed rule included the waiver request that DHS submitted to the federal Center for Medicare and Medicaid Services ("CMS"). Proposed Rule 016.06.15-006, at 85-242. This "Application for a §1915(c) Home and Community-Based Services Waiver" contains four references to RUGs. The most robust is a generalized description of a process that includes, but is not defined by, RUGs:

> The electronic interRAI home care instrument, called ArPath, is the instrument/tool used to collect information to determine the initial and continuing level of care and medical need eligibility for home and community-based services (HCBS) waiver participants. Based on the information that the participant and/or parties on behalf of the participant provide during the assessment, ArPath uses algorithms to evaluate and categorize participant information into scales, Client Assessment Protocols (CAPs), Resource Utilization Groups (RUGs) and levels of care, which correspond to the eligibility criteria listed in this section.

Proposed Rule 016.06.15-006, at 130. The eligibility criteria referenced by "in this section" include only an individual's ability to eat, toilet, and transfer or locomote. *Id.* Nearly the same language is repeated on the next page:

> ArPath, the electronic interRAI home care instrument is used to evaluate level of care for the ARChoices program…ArPath applies algorithms in the system that automatically determine functional eligibility and where assistance is needed. Based on the information provided during the assessment, ArPath uses algorithms to evaluate and categorize participant information into scales, Client Assessment Protocols (CAPs), Resource Utilization Groups (RUGs) and levels of care, which correspond to the eligibility criteria [of eating, toileting, and transferring/locomotion].

Proposed Rule 016.06.15-006, at 131. The other two mentions of RUG in the waiver application are threadbare. One merely repeats the provision of proposed ARChoices Provider Manual § 213.210 described above:

> Benefit limits will be determined on a client basis based on the assessed level of need by the DAAS RN. The highest RUG level allows a maximum allocation of 81 hours per week, 359 hours per month, or 4,212 hours per year

Proposed Rule 016.06.15-006, at 154. The other simply states:

> The DAAS RN uses ArPath, the electronic interRAI home care instrument, to complete the assessment and establish RUG level.

Proposed Rule 016.06.15-006, at 177.

At the TRO hearing, Plaintiffs' counsel presented DAAS assistant director Stephenie Blocker with the proposed rule and identified these six references to RUGs. *(TRO Hearing Trans., p.93-99).* She could not identify any other places in the proposed rule where RUGs is mentioned. *(Id., p. 98).* She further testified that she did not know of any place within DHS promulgated policy that provides any more detail about the RUGs system than the proposed rule. *(Id., p. 99).*

Critically, these six references to RUGs, even where DHS mention algorithms and "categoriz[ing] participant information," do not connect to the core concept that a person's attendant care hours are to be determined solely by an algorithm-based methodology. And, they do not offer any insight into the criteria on which the algorithm works, an important omission where beneficiaries will be asked to provide 286 questions worth of information and where the

algorithm categorizes an individual into a RUG on the basis of only 61. (*Pl. Undisputed Facts*, ¶ *14*).

The lack of useful information provided to the public about the RUGs methodology reflects the agency's own internal lack of understanding. As of the date the proposed rule was issued on August 3, 2015—right up through the date of the TRO hearing on February 3, 2017—no full-time DHS employee was capable of explaining how the RUGs algorithm works. (*Id.*,¶ *51*). Indeed, if Craig Cloud and Stephenie Blocker, the two highest ranking administrators of the ARChoices program, could not explain the RUGs methodology *over a year after implementation*, the public cannot have understood it well enough to offer comment *several months before implementation*. *(TRO Hearing Trans., p.99, 128-129).*

In the end, then, the public was left with little basis on which to ask legitimate policy questions and offer appropriate comments. How would beneficiaries' hour allocations be impacted by the change in methodologies? Are the hours allocated by the algorithm enough to meet the purposes of the program and allow an individual to remain in his or her community instead of in a nursing home? Will the new methodology disproportionately help or hurt particular segments of beneficiaries? Should there be some sort of agency discretion to fix absurd-seeming hour allocations? Do those questions that the algorithm considers correspond to an individual's actual need for attendant care services? What data exist to support the new methodology and are such data open to different interpretations? What are the risks of the new methodology?

Contemplating that public comment can actually influence an agency's decision about a rule, the APA requires the agency to "*fully consider* all written and oral submissions respecting the proposed rule *before* finalizing the language…and filing the proposed rule." Ark. Code Ann.

§ 25-15-204(a)(2)(C) (emphasis added). Yet, here, by failing to mention the implementation of a new assessment methodology and by obscuring details about its operation, DHS deprived the public of "a reasonable opportunity to submit data, views, or arguments, orally or in writing" that might change the agency's predetermined decision.

Just as no further evidence can redeem the failure of the notice, no further evidence can redeem the absence of written information in the proposed rule. Accordingly, there is no dispute of material fact here.

IV. DHS failed to comport with the APA's requirements for legislative review in accordance with Ark. Code Ann. § 10-3-309 because DHS's written and verbal representations to the legislative review body materially failed to identify that the agency sought a change in assessment methodology and omitted vital information about the way the RUGs methodology works.

Ark. Code Ann. § 25-15-204(f) provides that "[a]n agency shall not file a final rule with the Secretary of State for adoption unless the final rule has been approved under § 10-3-309." With Ark. Code Ann. § 10-3-309, the General Assembly established a legislative process to review agency rules to protect against "abuses of rulemaking authority." Specifically, the proposed rule "shall be reviewed by the Administrative Rules and Regulations Subcommittee of the Legislative Council," which must allow members of the public a "reasonable opportunity to comment on the proposed rule." Ark. Code Ann. § 10-3-309(c)(3)(A)(i)-(ii).

DHS admitted that the only documents it filed with the Arkansas Legislative Council that mention any aspect of the RUGs methodology were the proposed and final rules. *(Pl. Undisputed Facts., ¶ 46*). For the reasons elaborated above regarding notice and the proposed rule's substance, the legislative review body lacked any information that identified that DHS sought to change its assessment methodology and lacked any relevant details about how the new

methodology would work. The legislative review body was thus left in the same position as the general public, unaware of the impending sea-change.

At the TRO hearing, DAAS director Cloud stated that, despite the lack of information in the written submission, the legislative body was made aware of the assessment methodology changes through oral testimony he made on December 15, 2015, the date the waiver was scheduled before the Administrative Rules and Regulations Subcommittee. *(Id.,¶ 45*). This Court, after reviewing the report from that meeting and hearing a recording of Cloud's testimony, concluded that "no reference was made, either by members of the Committee or the Defendant, about RUGs or changes in the ARChoices assessment methodology." (*TRO, p. 3).*

Ark. Code Ann. § 10-3-109 invests the Legislative Council with two roles during rule-making—reviewer of the proposed rule and guarantor of the public's reasonable opportunity for comment pursuant to that review. DHS's written and oral representations to the Legislative Council were insufficient to allow the body to adequately fulfill either of those roles. Such brashness exemplifies the "abuses of rulemaking authority" that the APA's requirement for legislative review is meant to prevent.

V. Conclusion on the Merits

Summary judgment for the Plaintiffs is proper here. The first question of law is whether the RUGs methodology is "an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy." There are no material factual disputes about how the RUGs algorithm-based methodology works. *(Pl. Undisputed Facts.,¶¶ 9-19*). It was a change from the previous methodology of absolute nurse discretion. It applies to all ARChoices beneficiaries. It is the sole factor in determining attendant care allocations. The agency considers itself bound by the algorithm's determinations. And, those determinations give

rise to individualized due process rights. If, on these facts, the RUGs methodology is not a rule, it must be a quacking duck that DHS shot with a lucky bullet from a blind on the White River.

The second question of law is whether the documents filed during the rule-making process substantially comply with the requirements of Ark. Code Ann. § 25-15-204. There are no material factual disputes about the timing of the documents required by the rule-making process or what they contain. (*Id.*,¶¶ *34-49*). Testimony at another hearing would not help the court decide whether a document says something or does not; the written words speak for themselves. They say nothing of a change in assessment methodology, nothing of how the methodology works, and nothing of how the methodology will impact the people who are subject to it. Thus, they pronounce only one word—invalidity.

B. IRREPARABLE HARM

Harm is irreparable when it cannot be adequately compensated by money damages or redressed in a court of law. *Potter v. City of Tontitown*, 371 Ark. 200, 214, 264 S.W.3d 473 (2007).

In concluding at the TRO hearing that "Plaintiffs have suffered harm to their physical and emotional well-being from the reduction in Attendant Care services," this Court elaborated that:

> The Court received testimony of Plaintiff Jones who contends that she will undergo assessment for care under RUGs within the coming week. Jones testified that in 2016 she underwent RUGs reassessment which resulted in a decrease in her Attendant Care hours from 40 hours per week to 19 hours per week. Jones testified that she is not able to pay out of pocket for additional care, and does not have family or friends residing nearby. Jones, who suffers from cerebral palsy, multiple sclerosis, a heart condition, bladder incontinence, and has trouble walking, further testified that when her Attendant Care hours were reduced she suffered difficulties with cleanliness, she had to remain in her urinary waste, soiled clothing and diapers, and that she suffered skin irritation as a result of that. Jones also stated that she had an increased fear of falling during that time, and that she went without food because she was unable to prepare her own meals.
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> Affidavits of the remaining Plaintiffs mirror Jones' experience and concerns. The remaining Plaintiffs contend that the new RUGs system has reduced their Attendant Care

> hours by an average of 43%, and that they have been forced to go without food, remain in soiled clothes or go without bathing, miss key exercises, treatments, or turnings, face increased risk of falling, be more isolated in their homes, suffer worsened medical conditions directly due to the lack of care, and consider moving into nursing homes. The affidavit of Plaintiffs Ledgerwood, Strope and Wolf assert that they will undergo reassessment pursuant to RUGs within the next thirty (30) days. Plaintiffs Winston and Yarra are currently experiencing a reduction in Attendant Care hours, due to RUGs reassessment. Plaintiffs Sanders and Winston are likely to undergo RUGs reassessment in February or March 2017.

(TRO, p.4-6). The Supreme Court agreed "with the circuit court's finding that appellees have suffered and will continue to suffer irreparable harm in the absence of a TRO." *Ledgerwood*, 2017 Ark. 308, at 10.

Since the TRO hearing, DHS deposed all of the plaintiffs except for Jones, who testified at the hearing. Their deposition testimony echoes their affidavits that the reductions in attendant care hours pursuant to the RUGs methodology caused them various forms of physical and emotional harm, including aggravated anxiety, increased risk of falling, decreased access to food, reduced ability to clean up after episodes of incontinence, lying in feces, going without bathing, not being repositioned in bed often enough, having more skin problems or pressure ulcers due to not being repositioned, losing significant amounts of weight, feeling unsafe, being unable to shop, failing to complete range of motion exercises due to lack of assistance, missing medications, missing bowel suppository treatments, and remaining in soiled bed linens or clothes from not having special laundry needs met. *(Pl. Undisputed Facts, ¶ 23-28).* There can be no material dispute that the Plaintiffs' unmet care needs increased due to hour reductions caused by the RUGs methodology.

DHS previously argued that this harm was speculative because the outcome of the next assessment was uncertain such that there was no guarantee that the Plaintiffs' hours would be reduced. *(DHS Response to TRO Motion, p. 2).* The deposition of DHS employee Mitchell

Harlan, designated in response to Plaintiffs' Ark. R. Civ. P. 30(b)(6) notice, exposes DHS's argument as specious.

As of December 31, 2015, Plaintiffs Ledgerwood, Strope, and Wolf were all receiving 243 monthly attendant care hours, and Sanders was receiving 204. *(Pl. Undisputed Facts, ¶ 20).* Only one RUG, "SE3," which is allocated 352 monthly hours, has more hours than this. *(Id., ¶ 15).* Placement in any other RUG would result in a decrease in hours for these four plaintiffs. *(Id., ¶ 29).*

As of December 31, 2015, Plaintiffs Yarra, Winston, and Jones were receiving 182, 177, and 173 monthly attendant care hours, respectively. *(Id., ¶ 20).* Only two RUGs, "SE3" and "SE2," which is allocated 201 monthly hours, have more hours than this. *(Id., ¶ 15).* Placement in any other RUG would result in a decrease in hours for these three plaintiffs. *(Id., ¶ 30).*

Placement in RUGs "SE3" and "SE2" is restricted to individuals who have tracheostomy care, suctioning, a ventilator or respirator, IV medication, or parenteral or IV feeding. *(Id., ¶ 31).* Without at least one of these, it is impossible to be placed into "SE3" or "SE2," no matter what other diagnoses an individual has or how limited an individual might be. *(Id.).* Indeed, placement in "SE3" is nearly impossible. As of December 31, 2016, the last date for which DHS provided data, only one of the approximately 7,500 ARChoices beneficiaries was placed in "SE3." *(Id., ¶ 33).*

The Plaintiffs, in sworn interrogatory responses, affirmed that none of them requires tracheostomy care, suctioning, a ventilator or respirator, IV medication, or parenteral or IV feeding. *(Id., ¶ 32).* In addition, six of the seven stated they have no reason to believe that they will require any of these treatments in the next six months. *(Id.)* Thus, present placement in

"SE3" or "SE2" is impossible, and future placement is unrealistic in light of the Plaintiffs' current conditions.

The last RUGs placement for each plaintiff adds context to changes each would have to experience to receive increased hours under the RUGs methodology. Jones was placed in RUG "PB," assigned only 81 monthly hours. Winston and Sanders were placed in "CB," assigned 94 monthly hours. Ledgerwood was placed in "PD", assigned 137 monthly hours. Yarra and Strope were placed in "CC," assigned 143 monthly hours. Wolf was placed in "SSB," assigned 161 monthly hours. *(Id., ¶ 21)*. From where the Plaintiffs sit, an increase in hours is as far, far away as the Star Wars galaxy.

In light of this evidence, DHS would need to call Yoda as a witness to establish any sort of material factual dispute about the harm to the Plaintiffs. Simply, the RUGs methodology will reduce their hours. And, that reduction will result in various forms of physical and emotion harm that a permanent injunction will prevent.

C. BALANCE OF HARMS

The harm the Plaintiffs have suffered and will suffer again in the absence of a permanent injunction outweighs any injury which granting the injunction will inflict on DHS.

First, if the Court invalidates the RUGs methodology, DHS has the option of instituting the RUGs methodology or a new methodology through compliance with the rule-making process. Second, in the interim—or if it chooses not to reinstitute the RUGs methodology—the agency will simply revert to the system of nurse discretion that was in place only two years ago and had been used for at least 17 years. The Division of Aging and Adult Services is still led by Craig Cloud and Stephenie Blocker, both of whom were leading the division in 2015 when nurse discretion was used. (*TRO Hearing Trans., p.* 72-73; *114*). In particular, Ms. Blocker has been

with the division since 1995, was formerly a nurse who performed assessments, and actually determined the amount of hours to give to program beneficiaries. *(Id.)*. She has the experience and knowledge to ensure that nurses exercise their discretion appropriately. More trenchantly, any administrative burdens needed to remedy blatantly unlawful agency action should be no bar to the issuance of an order guaranteeing the fix.

DHS is likely to invoke as a possible harm the loss of hours for the 43% of ARChoices beneficiaries who experienced an increase in hours once the RUGs methodology was implemented. *(Pl. Undisputed Facts, ¶ 19)*.[4] Importantly, the injunction sought does not immediately affect the hour allocations of individuals who were beneficiaries of AAPD or ElderChoices, who have maintained continuing eligibility, and whose hours have increased under the RUGs methodologies. Their hours will remain the same until the next assessment. If DHS does not elect to re-promulgate the RUGs methodology, those people will be assessed under the previous methodology of DHS nurse discretion. There is no obvious reason that the nurse could not just continue the last RUGs-based allocation if he or she thought it appropriate in light of the beneficiary's needs.

The only other group to consider would be those individuals who only started receiving attendant care services under the ARChoices program pursuant to the RUGs methodology. For these individuals, there is no pre-2016 amount of hours to use as a baseline, and, as above, nurses could continue the RUGs-based allocation if appropriate for the beneficiary's needs. Thus, the injunction cannot be said to harm or help them.

[4] This data is from May 19, 2016. Data for the full 2016 calendar year is not available from DHS. *(Pl. Undisputed Facts, ¶ 19).*

In summary, then, the injunction would prevent harm to the seven Plaintiffs here and ameliorate the harm caused to the 47% of ARChoices beneficiaries who experienced a reduction in hours due to the RUGs methodology. (*Id.).* While DHS may be inconvenienced by having to remedy unlawful conduct, no party will necessarily experience any harm from the injunction sought.

D. PUBLIC INTEREST

With regards to the public interest, the starting point is the legislature's proclamation that the 7,500-plus ARChoices beneficiaries are "among the state's most vulnerable citizens," Act of Apr. 12, 2013, No. 1036, § 2, 2013 Ark. Acts 1180. Accordingly, the Court should exercise a heightened regard for their interests and protection.

Here, the state has neglected the interests of ARChoices beneficiaries by implementing a new assessment methodology in clear violation of the rule-making requirements and, in so doing, has caused immense harm to the Plaintiffs and, presumably, other ARChoices beneficiaries who were reduced pursuant to RUGs. There is no public interest in letting an executive agency govern by *fiat*, especially where its actions prove so harmful.

The injunction would remedy this wrong. And, the injunction would not strip DHS of its ability to implement the RUGs methodology, provided that it does so in accordance with proper rule-making. As emphasized in *Wagnon*, a notice and public comment promotes quality and fairness in policymaking and informs judicial review. *See Wagnon*, 73 Ark. App. at 274. To this end, the injunction would actually help DHS form better policy by allowing it to receive and consider important input that was missed in the first unlawful round.

E. RECENT SOVEREIGN IMMUNITY DEVELOPMENTS

On January 18, 2018, the Arkansas Supreme Court issued a decision about the sovereign immunity of state agencies implicating three of the four claims present in this case. *Bd. of Trs. of the Univ. of Ark. v. Andrews*, 2018 Ark. 12. In *Andrews*, the Supreme Court concluded that "the General Assembly cannot waive the State's immunity pursuant to article 5, section 20." *Id.*, at 11-12. Thus, here, the claims premised on Ark. Code Ann. §§ 25-15-207, 16-111-102, and 25-15-214 could be impacted by *Andrews*.[5] However, the Court need not even reach that issue because the non-statutory *ultra vires* claim for injunction undoubtedly survives.

The Arkansas Supreme Court has "long recognized that a state agency may be enjoined if it can be shown that the agency's action is *ultra vires*..." *Fitzgiven v. Dorey*, 2013 Ark. 346, at 14, 429 S.W.3d 234, 241-42. While *Andrews* does not address *ultra vires* claims,[6] at least two of the cases cited by the *Andrews* majority for recitations of sovereign immunity holdings recognized the *ultra vires* claim for injunctive relief. *See Ark. State Med. Bd. v. Byers*, 2017 Ark. 213, at 4, 521 S.W.3d 459, 462 (citing *Fitzgiven*); *Bd. of Trs. v. Burcham*, 2014 Ark. 61, at 3-4.

Moreover, the *ultra vires* claim is a well-established part of the sovereign immunity jurisprudence to which the *Andrews* majority purports to return, namely that of 1935 to 1996. *See, e.g., Cammack v. Chalmers*, 284 Ark. 161, 680 S.W.2d 689 (1984) (upholding a chancellor's order obligating the University of Arkansas Trustees to disgorge property gifted to the University when it failed to develop the property in accordance with the terms of the conveyance); *Fed. Compress & Warehouse Co. v. Call*, 221 Ark. 537, 540-41, 254 S.W.2d 319, 321-22 (1953) (reversing the dismissal of a complaint to enjoin the Employment Security

[5] Since DHS has not yet raised such an argument under *Andrews*, the Plaintiffs do not here address whether those three specific causes of action survive and do not concede the claims.

[6] The only issue before the *Andrews* court was whether the Arkansas Minimum Wage Act abrogated the sovereign immunity of the Board of Trustees of the University of Arkansas.

Division from enforcing an administrative ruling that the plaintiffs alleged to be at variance with relevant statutes). Indeed, the Supreme Court has held that *ultra vires* claims "are not considered suits against the state" for purposes of sovereign immunity. *Solomon v. Valco, Inc.*, 288 Ark. 106, 108, 702 S.W.2d 6, 7 (1986). Thus, the Plaintiffs claim proceeds.

An act is *ultra vires* if is "beyond the agency's or the officer's legal power or authority." *Id.* The Supreme Court has held that an agency's adoption of rules in violation of its statutory grant of rule-making power constitutes action outside of the agency's authority. *See Weiss v. Maples*, 369 Ark. 282, 288-89, 253 S.W.3d 907, 913 (2007) (holding that the adoption of an emergency rule in conflict with a statute was beyond the Department of Finance and Administration's rule-making authority because the legislature allowed the agency to make only rules "not inconsistent with the law").

DHS admits that its authority to promulgate rules relating to the ARChoices program is based on Ark. Code Ann. § 20-77-107, which gives DHS authority "to establish and maintain an indigent medical care program," and § 25-10-129, which gives DHS authority to promulgate rules to conform to federal requirements. *(Pl. Undisputed Facts, ¶ 34).* While the legislature grants DHS broad authority to adopt rules under these statutes, it restricts any such rule-making to that which is lawfully promulgated through the APA.

Ark. Code Ann. § 20-77-107(e) provides that "[n]othing in this subchapter shall be construed to permit the department or any entity with whom it contracts to enforce any rules or regulations that are not lawfully promulgated pursuant to federal or state law." Ark. Code Ann. § 25-10-129(c) provides that "[a]ll rules promulgated pursuant to this section shall be promulgated in conformity with the Arkansas Administrative Procedure Act, § 25-15-201 et seq., and after legislative review and approval as required by § 10-3-309." Thus, DHS's authority to

take any action with respect to the ARChoices program is limited to those rules that are lawfully promulgated according to § 25-15-204, fully analyzed above.

Because the legislature expressly requires DHS to promulgate rules in accordance with the APA and DHS failed to do so with respect to the RUGs methodology, the situation mirrors that in *Weiss* where the agency neglected the legislature's requirements for rule-making. Consequently, every assessment and reduction made pursuant to the RUGs methodology is beyond the agency's authority.

CONCLUSION

Rule-making is a document-based process. An agency complies with the requirements by issuing an adequate written notice and by putting enough information in the proposed rule to allow the public to "submit data, views, and arguments." Evidence about what agency officials meant to do or thought they did or usually do cannot redeem flawed documents. And, to the extent that their testimony is relevant, the Court has already heard it in a lengthy TRO hearing. Afterwards, the parties conducted full discovery, and, in that process, DHS furnished no proof that would generate a material factual dispute. Thus, the only question before the Court is whether the Plaintiffs are entitled to judgment as a matter of law on the established facts.

DHS completely overhauled its methodology for allocating attendant care, switching from a system based entirely on nurse discretion to one where an algorithm sorts people into tiers with a specified number of hours assigned to each one. Despite this radical shift, DHS did not once identify in any rule-making document that it was making any change in methodology. The only mentions of Resource Utilization Groups or algorithms are scattered throughout the 242-page proposed rule, and those six mentions do not make it plain that the algorithm will be determining attendant care hour allocations or explain how the new methodology operates. As a

result, the public was denied any effective notice of and opportunity to comment on the change in violation of Ark. Code Ann. § 25-15-204. Therefore, the methodology is invalid.

All past and present use of the methodology constitutes *ultra vires* state action for which injunctive relief is available, even after the recent *Andrews* decision. The Plaintiffs meet the requirements for a permanent injunction. First, as a result of the new RUGs algorithm-based methodology, the seven plaintiffs suffered irreparable harm in the form of deprivations of care offensive to any reasonable sense of human dignity, whether it was going without food or lying in their own waste. Second, this harm far outweighs any harm to DHS that an injunction would entail by being forced to comply with the law. And, the Plaintiffs' propose injunction language takes care to avoid imposing reductions on individuals who received increased hour allocations once the RUGs methodology was implemented. Third, the injunction would serve the public interest, both by aiding the thousands more ARChoices beneficiaries who lost care hours under the RUGs methodology and by demanding that an administrative agency operate within the bounds of its statutorily-granted authority.

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Respectfully Submitted,

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Certificate of Service

I hereby certify that, on January 26, 2018, I filed this Brief in Support of Motion for Summary Judgment with the Court through its electronic filing system, which electronically notifies the following counsel of record of the filing:

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