

ARKANSAS REGISTER

Proposed Rule Cover Sheet



Secretary of State
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Name of Department _____

Agency or Division Name _____

Other Subdivision or Department, If Applicable _____

Previous Agency Name, If Applicable _____

Contact Person _____

Contact E-mail _____

Contact Phone _____

Name of Rule _____

Newspaper Name _____

Date of Publishing _____

Final Date for Public Comment _____

Location and Time of Public Meeting _____

QUESTIONNAIRE
FOR FILING PROPOSED RULES WITH THE
ARKANSAS LEGISLATIVE COUNCIL

DEPARTMENT/AGENCY _____
DIVISION _____
DIVISION DIRECTOR _____
CONTACT PERSON _____
ADDRESS _____
PHONE NO. _____ FAX NO. _____ E-MAIL _____
NAME OF PRESENTER AT COMMITTEE MEETING _____
PRESENTER E-MAIL _____

INSTRUCTIONS

- A. Please make copies of this form for future use.
- B. Please answer each question completely using layman terms. You may use additional sheets if necessary.
- C. If you have a method of indexing your rules, please give the proposed citation after "Short Title of this
- D. Rule" below.
- E. Submit two (2) copies of the Questionnaire and Financial Impact Statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:

Jessica C. Sutton
Administrative Rules Review Section
Arkansas Legislative Council
Bureau of Legislative Research
One Capitol Mall, 5th Floor
Little Rock, AR 72201

1. What is the short title of this rule?

2. What is the subject of the proposed rule?

3. Is this rule required to comply with a federal statute, rule, or regulation? Yes No

If yes, please provide the federal rule, regulation, and/or statute citation.

4. Was this rule filed under the emergency provisions of the Administrative Procedure Act?

Yes No

If yes, what is the effective date of the emergency rule? _____

When does the emergency rule expire? _____

Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act? Yes No

5. Is this a new rule? Yes No If yes, please provide a brief summary explaining the rule.

Does this repeal an existing rule? Yes No If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does.

Is this an amendment to an existing rule? Yes No If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. Note: The summary should explain what the amendment does, and the mark-up copy should be clearly labeled “mark-up.”

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation.

7. What is the purpose of this proposed rule? Why is it necessary?

8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b).

9. Will a public hearing be held on this proposed rule? Yes No If yes, please complete the following:

Date: _____

Time: _____

Place: _____

10. When does the public comment period expire for permanent promulgation? (Must provide a date.)

11. What is the proposed effective date of this proposed rule? (Must provide a date.)

12. Please provide a copy of the notice required under Ark. Code Ann. § 25-15-204(a), and proof of the publication of said notice. _____

13. Please provide proof of filing the rule with the Secretary of State as required pursuant to Ark. Code Ann. § 25-15-204(e). _____

14. Please give the names of persons, groups, or organizations that you expect to comment on these rules? Please provide their position (for or against) if known.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT _____
DIVISION _____
PERSON COMPLETING THIS STATEMENT _____
TELEPHONE NO. _____ FAX NO. _____ EMAIL: _____

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two (2) copies with the Questionnaire and proposed rules.

SHORT TITLE OF THIS RULE

1. Does this proposed, amended, or repealed rule have a financial impact? Yes No
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule?
Yes No
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes No

If an agency is proposing a more costly rule, please state the following:

- a) How the additional benefits of the more costly rule justify its additional cost;
- b) The reason for adoption of the more costly rule;
- c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and
- d) Whether the reason is within the scope of the agency's statutory authority, and if so, please explain.

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Total _____

b) What is the additional cost of the state rule?

Current Fiscal Year

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Total _____

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

Current Fiscal Year

Next Fiscal Year

\$ _____

\$ _____

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

Current Fiscal Year

Next Fiscal Year

\$ _____

\$ _____

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes No

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
 - (a) justifies the agency's need for the proposed rule; and
 - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
 - (a) the rule is achieving the statutory objectives;
 - (b) the benefits of the rule continue to justify its costs; and
 - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

Notice of Rulemaking

Pursuant to Arkansas Code Annotated § 25-15-201 et seq., notice is hereby given that the Commission for Arkansas Public School Academic Facilities and Transportation is considering revisions to the following CAPSAFT Rules and are releasing them for public comment: Rules Governing the Academic Facilities Partnership Program, Sections 5.00 and 7.00 only. A public hearing regarding these rules will be held on Monday, November 14, at 2:00 p.m. at the Arkansas Department of Education, Four Capitol Mall, Little Rock, AR 72201.

Written comments regarding these proposed rules may be mailed to the Office of Legal Services at Four Capitol Mall, Room 302A, Little Rock, AR 72201. Comments also may be emailed to ADE.RulesComments@ade.arkansas.gov. A copy of the proposed rules can be found on the Department's website at: <http://www.arkansased.org/divisions/legal/rules/pending>. Copies also may be obtained by contacting ADE's Office of Legal Services at the above address or via phone at (501) 682-4227.

Agency #: 203.00

**COMMISSION FOR ARKANSAS PUBLIC SCHOOL ACADEMIC FACILITIES
AND TRANSPORTATION RULES GOVERNING THE ACADEMIC
FACILITIES PARTNERSHIP PROGRAM**

Effective: ~~December 3, 2021~~

5.00 DIVISION'S EVALUATION AND APPROVAL OF SCHOOL DISTRICT'S APPLICATION

5.01 The Division shall use criteria to evaluate a school district's application for state financial participation in a new construction project, pursuant to Ark. Code Ann. § 6-20-2507, which shall include, without limitation, the following:

5.01.1 How the school district's facilities master plan and current academic facilities do not address the following:

- (i) Student health and safety, including, without limitation, but not limited to, critical health and safety needs;
- (ii) Compliance with current academic facilities standards, including, without limitation, appropriate space utilization of existing academic facilities in the district;
- (iii) Conformance with sound educational practices;
- (iv) Curriculum improvement and diversification, including, without limitation, the use of instructional technology, distance learning, and access to advanced courses in science, mathematics, language arts, and social studies;
- (v) Multischool, multidistrict, and regional planning to achieve the most effective and efficient instructional delivery system;
- (vi) Reasonable travel time and practical means of addressing other demographic considerations; and
- (vii) Scheduled and unscheduled maintenance, repair, and renovation as documented in the state-provided Computerized Maintenance Management System;

5.01.2 How the school district's facilities master plan and any new construction project under the facilities master plan address the following:

- (i) Student health and safety, including, without limitation, critical health and safety needs;
- (ii) Compliance with current academic facilities standards, including, without limitation, appropriate space utilization of existing academic facilities in the district;
- (iii) Conformance with sound educational practices;
- (iv) Curriculum improvement and diversification, including, without limitation, the use of instructional technology, distance

learning, and access to advanced courses in science, mathematics, language arts, and social studies;

- (v) Multischool, multidistrict, and regional planning to achieve the most effective and efficient instructional delivery system;
- (vi) Reasonable travel time and practical means of addressing other demographic considerations; and
- (vii) Scheduled and unscheduled maintenance, repair, and renovation as documented in the state-provided Computerized Maintenance Management System (CMMS);

5.01.3 How the new construction project supports the prudent and resourceful expenditure of state funds and improves the school district's ability to deliver an adequate and equitable education to public school students in the district;

5.01.3.1 The Division may perform on-site inspections of the school district facilities during the evaluation of project applications.

5.01.4 How the new construction project has been prioritized by the school district; and

5.01.5 The allocation and expenditure of funds in accordance with this subchapter and the Arkansas Public School Academic Facility Program Act, Ark. Code Ann. § 6-21-801 et seq.

5.01.6 In evaluating a school district's application for state financial participation in a new construction project, the Division may resolve any internal inconsistency in or conflict among the application components and supporting documentation by giving precedence to the application components in the following order:

- (i) The resolution adopted by the board of directors of the school district;
- (ii) The narrative application contents submitted electronically through the Master Plan Web Tool;
- (iii) Schematic drawings;
- (iv) Other supporting documents submitted with the application; and
- (v) Application consistency and accuracy.

5.02 The Qualified Cost shall be limited to the cost for an alternative project if

the Division determines that an alternative project meets facility standards and addresses the suitability and warm, safe, and dry needs expressed by the district in its master plan and project application. The alternative project may consist of replacement of the original facility or component to the original configuration of construction at the most current state standard.

- 5.03 If a school district fails to comply with any of the requirements set forth in state law or these Rules concerning the Division's evaluation of its application, the Division and Commission may deny the application for state financial participation.

5.04

- (i) The Division shall review all projects submitted to determine their suitability for state financial participation, pursuant to the suitability criteria set forth in Section 3.35 of these Rules.
- (ii) No project that is determined by the Division to go beyond "suitable" will be approved for state financial participation.

5.05 Statewide Needs Lists, Project Ranking, and Project Funding

5.05.1 The following process will be used to develop the Statewide Warm, Safe, and Dry Needs List:

- (i) First, the Division shall numerically rank each campus based on campus value. The lowest value will be ranked first and the highest value will be ranked last.
- (ii) Second, the Division will numerically rank campuses based on the facilities condition index. The highest value will be ranked first and the lowest value will be ranked last. "Facilities condition index" has the same meaning as in the Commission for Academic Facilities and Transportation Rules Governing the Facilities Master Plan.
- (iii) Third, the Division will rank campuses by campus value ranking weighted fifty percent (50%) and facility condition index ranking weighted fifty percent (50%). Once each campus is ranked, the Division shall publish a list with the campus with the lowest score being ranked first and the campus with the highest score being ranked last.

5.05.2 The following process will be used to develop the Statewide Space/Growth needs List:

- (i) First, the Division will rank districts on five (5) year projected enrollment growth percentage based on Division projections. The highest value will be ranked first and the lowest value will be

ranked last.

- (ii) Second, the Division will rank districts on five (5) year projected student enrollment growth based on Division projections. The highest value will be ranked first and the lowest value will be ranked last.
- (iii) Third, the Division will rank districts on school district suitability based on academic gross square feet needed minus academic gross square feet present. The highest value will be ranked first and the lowest value will be ranked last.
- (iv) Fourth, the Division will rank districts on school district suitability percentage based on suitability divided by academic gross square feet present. The highest value will be ranked first and the lowest value will be ranked last.
- (v) Fifth, the Division will rank districts by five (5) year projected student enrollment percentage ranking weighted twenty-five percent (25%); five (5) year projected student enrollment growth ranking weighted twenty-five percent (25%); school district suitability ranking twenty-five percent (25%); and school district suitability percentage ranking twenty-five percent (25%). Once each district is ranked, the Division shall publish a list with the district with the lowest score being ranked first and the district with the highest score being ranked last.

5.05.3 Ranking of Projects: For the 2023-2025 and subsequent project funding cycles, all approved new construction projects shall be entitled to receive state partnership assistance in the following ranked order in two separate categories: (1) Warm, Safe, and Dry (Systems Replacement and Space Replacement) projects; and (2) Space/Growth projects.

- (i) First, the Division will rank all school projects based on the academic facilities wealth index of the school district. The district with the lowest wealth index shall be ranked first and the district with the highest wealth index shall be ranked last.
- (ii) Second, the Division will rank each project according to the Statewide Facilities Needs Lists (as calculated in Sections 5.05.1 and 5.05.2 of these Rules).
- (iii) Third, the Division will rank each project according to the percentage of district expenditures spent on maintenance of academic facilities for the last five (5) fiscal years ~~as reported in accordance with Section 4.05.10 of these Rules~~. The district with the highest percentage spent on maintenance shall be ranked first, and the district with the lowest percentage spent on

maintenance shall be ranked last.

- (iv) Fourth, the Division will rank projects by academic facility wealth index ranking weighted thirty percent (30%); Statewide Facility Needs List ranking weighted at fifty percent (50%); and percentage of district expenditures spent on maintenance of academic facilities for the last five (5) fiscal years ranking weighted twenty-percent (20%). The project with the lowest score will be ranked first, and the project with the highest score will be ranked last.
- (v) The Division will ensure that all required district preventive maintenance inspections are completed and documented for the previous fiscal year. Supporting documentation shall include completed CMMS work orders and uploaded inspection documents. Projects from districts that have not completed and documented all required preventive maintenance inspections shall be moved to the bottom of the project ranking list, in the order the project was ranked under Section 5.05.3(i) through (iv).

5.05.5 Commission Funding of Projects

For each of the two years of a Partnership Program funding cycle there will be two (2) categories of funds from which to fund projects: one for Warm, Safe, and Dry System Replacement and Space Replacement projects; and one for Space/Growth projects. Projects will be funded as follows for each year of a funding cycle:

- (i) Fifty percent (50%) will be allocated to each category to fund projects in ranked order on the respective project ranking list.
- (ii) Warm, Safe, and Dry projects will be funded in ranked order from the Warm, Safe, and Dry category until either all funds are allocated or until all of those projects are funded. ~~If in Year 2 of a funding cycle~~ any funds remain after all Warm, Safe, and Dry projects are funded, and if there are any unfunded Space/Growth projects remaining, the remaining funds will be transferred to the Space/Growth category.
- (iii) Space/Growth projects will be funded in ranked order from the Space/Growth category until either all funds are allocated or until all of those projects are funded. ~~If in Year 2 of a funding cycle~~ funds remain after all Space/Growth projects are funded, and if there are any unfunded Warm, Safe, and Dry projects remaining, the remaining funds will be transferred to the Warm, Safe, and Dry category.
- (iv) If funds become available during the funding cycle year due to rescinded projects, unfunded projects remaining in the

appropriate category will be funded in ranked order.

- (v) ~~Any funds remaining after Year 1 of a funding cycle will carry over into the same category for Year 2 of the funding cycle.~~ Any funds remaining after Year 2 will carry over into the next funding cycle and will not be designated as belonging to one category or the other.

- 5.06 If a school district's new construction project is approved for funding in the current funding cycle, the district must execute the Partnership Agreement, which is Appendix "B" to these Rules. If the Partnership Agreement is not executed within the time period set forth in Section 7.06 of these Rules, unless there is an approved waiver, the state's financial participation in part or in whole may be deemed null and void by the Commission.
- 5.07 In accordance with Ark. Code Ann. § 6-21-114(d) and the Commission's Rules Governing Property Insurance Requirements, every academic facility must be insured and remain insured for one hundred percent (100%) of replacement cost to be eligible for state financial participation. If, as of the date of application or at any point thereafter, an academic facility involved in a project is not sufficiently insured as required, as indicated in the district's current Statement of Values, the application shall be denied by the Division and any state financial participation shall cease.

7.00 AGREEMENT BETWEEN THE DIVISION AND THE SCHOOL DISTRICT
CONCERNING STATE FINANCIAL PARTICIPATION

7.01 If the Division determines that the new construction project is eligible for state financial participation, the Division and the school district shall enter into an agreement specifying the terms of the state's financial participation and the conditions that must be satisfied by the school district.

7.02 At a minimum, the agreement shall:

- (i) Identify the estimated amount of local financial participation and state financial participation in the new construction project. The estimated amount of the state's financial participation, as stated in the agreement, will be arrived at after the schematic drawings and any variances to the Arkansas Public School Academic Facilities Manual are considered for new facilities, new additions to facilities, or renovations or conversions. The final amount of the State's financial participation will be specified upon receipt of the final contract amount and determined as specified in Section 6.03 of these Rules;
- (ii) Define the method of and schedule for transferring state financial participation funds to the school district;
- (iii) Identify whether the new construction project includes any improvements that are classified as maintenance, repair, and renovation, and how the project costs will be allocated between new construction activities and maintenance, repair, and renovation activities;
- (iv) Define the detailed scope of work for which the agreement applies;
- (v) Provide that changes to the plans for the new construction project shall be made in consultation with the Division;
- (vi) Provide the areas of project responsibility of both parties during the course of the project;
- (vii) Provide that the district shall be in compliance with all state laws concerning bidding and construction;
- (viii) Provide that the Division or any person acting on behalf of the Division may conduct on-site inspections of the new construction project as frequently as the Division deems necessary to assure the prudent and resourceful expenditure of state funds with regard to public school academic facilities;
- (ix) Determine how risk will be allocated between the school district and the state if the new construction project is not completed;

- (x) Describe how changes in the school district's wealth index over the course of the new construction project will be treated; and
 - (xi) Specify that the agreement is void and the state will have no further obligation to provide state funds to the school district for the new construction project that is the subject of the agreement if the school district does not raise local resources and apply local resources toward the project as provided under the agreement; and
 - (xii) Specify that any facility built with Partnership Program funds must be used only for academic purposes as described in Section 3.01 of these Rules.
- 7.03 The agreement specified above and required by Ark. Code Ann. § 6-20-2507 and Section 5.06 of these Rules is Appendix “B” to these Rules.
- 7.04 All funding agreements under these Rules are contingent upon the prudent and resourceful expenditure of state funds as determined by the Division.
- 7.05 A district may *at its own expense and risk* begin developing construction plans and specifications and begin seeking all required state agency approvals before the Commission approves and funds the project. The Division and State of Arkansas are not obligated to pay an expenditure until the project has been approved and funded by the Commission. The Division will not review project plans/agency approvals until the project has been approved and funded by the Commission absent an early construction start waiver approved by the Division.
- 7.05.1 The district shall not begin construction on a project before the Commission approves and funds the project except in unusual and limited circumstances ~~an emergency situation that threatens the safety of students and faculty, or that creates a learning environment that is not warm, safe, or dry.~~ If the district believes unusual and limited circumstances ~~such an emergency situation exists~~ exist, the district shall contact the Division explaining these unusual and limited circumstances and ~~request~~ requesting a written early construction start waiver from the Division allowing the district to begin construction *at its own expense and risk*.
- 7.05.2 Upon receipt of an early construction start request, the Division may:
- (i) Grant the early construction start request. All project expenses may be reimbursed pending Commission approval and funding;
 - (ii) Grant a partial early construction start request in which the district shall pay for and not be reimbursed for any construction activities prior to the project funding date (the Division will recalculate the qualified project cost to

subtract costs already incurred; or

(iii) Deny the early construction start request completely.

- 7.06 Before the district is allowed to proceed and start construction on a project, the district must submit, and the Division must approve, its final plans and specifications, as well as all required state agency approvals.
- 7.07 Within sixty (60) days of the Commission's final approval and funding of the district's partnership project, the agreement referenced in Sections 7.02 and 7.03 of these Rules must be executed by the district and the Division. The Division shall have the right to grant a waiver from this provision if the district has unusual and limited circumstances which prevent it from executing the agreement within the sixty (60) day timeframe.
- 7.08 If the Partnership Agreement is not executed within the time period set forth in Section 7.07 of these Rules, unless there is an approved waiver request or appeal pending before the Academic Facilities Review Board or Commission, the state's financial participation in whole or in part may be deemed null and void by the Division.
- 7.09 Construction of the project, as evidenced by a signed construction contract, must begin within eighteen (18) months from the date of the final approval of the project by the Commission.
- 7.10 The district must obtain the Division's approval of the completion of all district project requirements within four (4) years from the date of final approval of the project by the Commission.
- 7.11 For the purpose of Section 7.00, the phrase "signed construction contract" includes construction management contracts specific to the approved and funded project.
- 7.12 For the purpose of these Rules, "completion" is defined as successful inspection by the Division and the Division's receipt from the district of a copy of the certificate of occupancy from the appropriate code authority.
- 7.13 Districts must complete all construction activities, successfully complete a "punch" list, make final retainage payments to the contractor, and submit its final pay request to the Division within five (5) years of funding of the project by the Commission.
- 7.14 Absent a written waiver or variance, the Division shall rescind, recapture, or both, Partnership funds if the project is found not to have been built to approved plans and specifications.
- 7.15 A district may request a waiver of timelines in Section 7.07 through 7.13 of these Rules if the district believes it can show unusual and limited

circumstances which prevent it from meeting the timelines. State financial participation in a district's project is contingent upon the district meeting all timelines and deadlines set forth in these Rules.

- 7.16 Absent an approved appeal or waiver, the Division shall render the state's financial participation in a district's project null and void in whole or in part for failure to meet all of the timelines and deadlines set forth in these Rules and may recapture any state partnership funding assistance funds already paid to the district.
- 7.17 Payment of an incentive awarded pursuant to Section 10.0 of these Rules shall not be made to a district until the new facilities project is completed and the appropriate third-party certification entity or assessor has awarded final certification for the project.

SUMMARY OF AMENDMENTS

COMMISSION FOR ARKANSAS PUBLIC SCHOOL ACADEMIC FACILITIES AND TRANSPORTATION RULES GOVERNING THE ACADEMIC FACILITIES PARTNERSHIP PROGRAM

(Sections 5.00 and 7.00 only)

These rules were amended to allow the Commission to transfer funds remaining in one project category (i.e., Warm, Safe, and Dry System Replacement and Space Replacement versus Space/Growth projects) to the other category in Year 1 of a funding cycle if funds remain in either category after all projects in that category are funded. Currently, funds remaining in one category cannot be transferred to the other until Year 2 of a funding cycle. Amendments also give the Division flexibility to grant school district requests for early construction starts in the case of “unusual and limited circumstances,” assuming the district is willing to assume the risk if the project ultimately is not funded. A technical correction also was made in Section 5.05.3(iii).