SUMMARY OF NEW RULES
(Includes revisions following first, second, and third public comment periods)

COMMISSION FOR ARKANSAS PUBLIC SCHOOL ACADEMIC FACILITIES AND TRANSPORATION RULES GOVERNING RIGHT OF ACCESS TO UNUSED OR UNDERUTILIZED PUBLIC SCHOOL FACILITIES AND THE SALE OR LEASE OF PUBLIC SCHOOL FACILITIES

These new rules implement Act 542 of 2017, which provides that a "public charter school" (as defined in the Act) has a right of access to a "public school facility or other real property" owned by a (traditional) school district when that property is identified by either the school district or the Arkansas Division of Public School Academic Facilities and Transportation as being "unused or underutilized." Act 542 also provides a school district with a right to appeal any Division "unused or underutilized" identification to the Commission. (The process for this appeal is set forth in the proposed CAPSAFT Rules Governing Appeals from Determinations of the Division, which are being promulgated simultaneously with the present rules).

If the charter school and school district cannot reach agreement on the terms of a sale or lease of property identified as unused or underutilized, the charter school may petition the Commission for an order directing the school district to lease the property to it for fair market value. These rules provide a petition procedure, as well as a standard lease form.

These rules also incorporate by reference provisions of Act 542 that regulate a school district's sale/lease/transfer of public school facilities, including waiting periods during which the school district may not sell/lease/transfer property (to an entity other than a public charter school), a process for the school district to petition to the Division to waive the waiting period, and the opportunity for either a school district public charter school to appeal the Division's waiver decision to the Commission. (The process for this appeal to the Commission is set forth

in the proposed CAPSAFT Rules Governing Appeals from Determinations of the Division, which are being simultaneously promulgated with the present rules).

Changes Made Following First PC Period

As a result of public comments received, several changes were made to the proposed rules. Following is a summary:

- Definitions added in Section 2.00: "academic," "administrative," "educational," "extracurricular," "regular basis," and "significant portion." The definition of "unusued or underutilized public school facility" was revised.
- In Section 3.01, a "Note" was included to notify public charter schools that they may contact the Division if they consider a traditional public school facility to be unused or underutilized, and that the Division would then consider that assertion.
- Language in Section 3.03 was clarified to provide that a traditional public school district's filing of a notification of intent to file an appeal (of the Division's determination that it has an unused or underutilized facility) tolls the 60 days period set forth in 4.03 of the rules the same as filing an appeal does.
- In Section 6.02, "Note" was added to caution traditional public school districts to be mindful of IRS restrictions and processes concerning the sale or lease of a facility financed with tax-exempt debt that still exists on the date of the sale or lease of property.
- Section 6.06 clarifies that the Lease Agreement attached to the rules as Appendix "A" is merely a guide and not mandatory.
- Section 6.07 was added to clarify that for the duration of a traditional public school's lease of a facility to a public charter school, that facility is not considered a traditional

public school facility for purposes of the Arkansas Public School Academic Facilities Program Act.

- Section 7.00 was added to clarify that vacant public school facilities must be properly secured.

Changes Made Following Second PC Period

As a result of public comments received, a few grammatical and typographical changes were made, as well as changes to enhance clarity (*see* 2.08, 2.12.2, 2.14, and 2.15.5). Section 2.12.1 also was revised to define "regular basis" (of use) as a facility used fewer than ten times per year (to reflect the regular school year when students are present) as opposed to twelve times per year.

Change Made Following Second PC Period

Section 3.02.4 added to provide that Division may correct the March 1 list if the Division possessed information that a traditional public school facility was unused or underutilized prior to March 1 but did not include it on the list.

Correct Section 2.12.1 add the word "no" prior to "fewer than ten times per year."

COMMISSION FOR ARKANSAS PUBLIC SCHOOL ACADEMIC FACILITIES AND TRANSPORTATION RULES GOVERNING RIGHT OF ACCESS TO UNUSED OR UNDERUTILIZED PUBLIC SCHOOL FACILITIES AND THE SALE OR LEASE OF PUBLIC SCHOOL FACILITIES

Effective _____

1.00 REGULATORY AUTHORITY

1.01 The Commission for Arkansas Public School Academic Facilities and Transportation (CAPSAFT) enacts these Rules pursuant to its authority set forth in Ark.~~ansas~~ Code Ann. §§ 6-21-114, 6-21-804, 25-15-201 *et seq.*, and Act 542 of 2017.

2.00 DEFINITIONS

2.01 "Academic" means any activity, objective, or purpose that is reasonably necessary for and related to a school district's provision of instruction to students permitted or required by state or federal law.

~~*2.01*~~*2.02* "Academic Facilities Master Plan" has the same meaning as in the CAPSAFT Rules Governing the Facilities Master Plan.

~~*2.02*~~*2.03*"Academic facility" has the same meaning as in the CAPSAFT Rules Governing the Facilities Master Plan.

2.04 "Administrative" means an activity, objective, or purpose that is reasonably necessary for and related to the suitable and efficient operation of a school district in its provision of an adequate education to each of its students.

~~*2.03*~~*2.05*"Charter school authorizer" has the same meaning as *"authorizer"* in Ark. Code Ann. § 6-23-103.

~~*2.04*~~*2.06*"Division" means the Arkansas Division of Public School Academic Facilities and Transportation.

2.07 "Educational" means an activity, objective, ~~activity,~~ or purpose that is reasonably necessary for and related to a school district's provision of an education to students as permitted or required by state or federal law.

2.08 "Extracurricular" means an activity sponsored by the school district or the Arkansas Activities Association for the district's students that falls outside the realm of the normal curriculum.

~~2.05~~2.09 "Fair market value" means the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

~~2.06~~2.10 "Public charter school" means:

~~2.06.1~~2.10.1 An open-enrollment public charter school as defined in Ark. Code Ann. § 6-23-103.

~~2.06.2~~2.10.2 An eligible entity as defined in Ark. Code Ann. § 6-23-103 that applies to authorize, amend, or renew a charter for an open-enrollment public charter school; and

~~2.06.3~~2.10.3 A legal entity that is affiliated with or acting on behalf of an open-enrollment public charter school or eligible entity.

~~2.07~~2.11 "Public school facility" has the same meaning as in the CAPSAFT Rules Governing the Facilities Master Plan.

2.12 "Regular basis" means:

2.12.1 For public school facilities that by their nature are ordinarily characterized by intermittent use, such as auditoriums, gymnasiums, and athletic facilities, the facility is used no fewer than ~~twelve (12)~~ ten (10) times per school year; and

2.12.2 For all other public school facilities, the facility is used on no fewer than ninety (90) days per school year.

~~2.08~~2.13 "School district" has the same meaning as in the CAPSAFT Rules Governing the Facilities Master Plan.

2.14 "Significant portion": ~~means~~ A school district must use at least forty percent (40%) or more of the gross square footage of a public school facility on a regular basis to be using a "significant portion." ~~is used by the school district for public educational, academic, extracurricular, or administrative purposes on a regular basis.~~

2.~~09~~15 "Unused or underutilized public school facility" means a public school facility or other real property owned by a public school that:

2.~~09~~15.1 As a whole or in significant portion is not being used for a public educational, academic, extracurricular, or administrative purpose; and

2.~~09~~15.2The nonuse or underutilization threatens the integrity or purpose of the public school facility or other real property as a public education facility; and

2.~~09~~15.3As of August 1, 2017, is not subject to a lease to a third party for fair market value or an executed offer to purchase by a third party for fair market value.

2.15.4 A public school facility shall not be considered underutilized if the district does not have other available school district spaces in which it can reasonably satisfy the educational, academic, extracurricular, or administrative activities being conducted in the facility.

2.15.5 Use of a public school facility solely for commercial purposes or for generating revenue for the district shall not constitute an educational, academic, extracurricular, or administrative purpose.

~~*2.09.4 A public school facility shall be considered underutilized if it in whole or significant part is being used only irregularly or intermittently by the school district for educational, academic, extracurricular, or administrative purposes, and the district reasonably could satisfy those needs by using other available school district spaces.*~~

~~*2.09.5 "Administrative" activities do not include use of a public school facility or other real property as a whole or in significant portion for storage for a period of longer than one full school year.*~~

3.00 REPORTING AND IDENTIFICATION OF UNUSED OR UNDERUTILIZED PUBLIC SCHOOL FACILITIES

3.01 By February 1 of each year, each school district shall submit to the Division a report that identifies:

3.01.1 All unused or underutilized public school facilities in the school district; and

3.01.2 The unused or underutilized public school facilities, if any, that are designated in the district's facilities master plan to be re-used, renovated or demolished as part of a specific committed project or planned new construction project.

3.01.3 The annual report shall be submitted in a format prescribed by the Division through the Master Plan tool.

Note: If a public charter school believes that a particular public school facility is unused or underutilized, the public charter school may bring this to the

Division's attention by notifying the Division Director by email on or before February 1 to afford the Division sufficient time to consider the assertion. The public charter school has no right of appeal from the Division's determination, however, as the applicable law does not provide an appeal right.

3.02 ~~By~~ *On or before* March 1 of each year, the Division shall:

3.02.1 Identify any public school facility or other real property as unused or underutilized if a facility or other real property falls within the definition in Section ~~2.08~~ *2.15* of these rules and the school district fails to identify it in the district's annual report; and

3.02.2 Publish a list on its website identifying all unused or underutilized public school facilities *on or before March 1 of each year;* and

3.02.3 ~~notify~~ Notify any affected school district in writing *(via email or otherwise)* of the identification *prior to the publication of the list required in Section 3.02.2.*

3.02.4 If the Division is in possession of information prior to March 1 that a public school facility is unused or underutilized but fails to place the facility on the list, it shall place the facility on the list within ten (10) working days after the Division discovers the error.

3.03 A school district may appeal an identification made by the Division under section 3.02 of these rules to the Commission for *Arkansas Public School* Academic Facilities and Transportation pursuant to the procedures set forth in the CAPSAFT Rules Governing Appeals from Determinations of the Arkansas Division of Public School Academic Facilities and Transportation.

3.03.1 If a school district *submits to the Division a written appeal or written notification of intent to file* ~~files~~ an appeal, the Division will indicate on its website that ~~the~~ *an* appeal is pending.

3.03.2 The ~~filing~~ *submission* of ~~an~~ *a written appeal or written notification of* intent to file an appeal by a school district under this section will toll the sixty (60) day period set forth in Section 4.03 of these rules until the appeal is resolved.

3.03.3 A written appeal or written notification of intent to file an appeal will be considered submitted by the school district upon receipt by the Arkansas Department of Education Office of General Counsel, with a copy to the Division.

3.03.4 The submission of a written notification of intent to appeal does not alter the timeline for appealing an identification under the CAPSAFT Rules Governing Appeals from Determinations of the Arkansas Division of Public School Academic Facilities and Transportation.

4.00 RIGHT OF ACCESS

4.01 Except as otherwise provided in this section, a school district shall make unused or underutilized public school facilities available for lease or purchase for no more than fair market value to any public charter school located within the geographical boundaries of the school district.

4.02 Once the Division identifies a public school facility or other real property as an unused or underutilized public school facility, a public charter school may give notice of its intent to purchase or lease the public school facility or other real property from the school district no earlier than the later of:

4.02.1 The date the public school facility or other real property is first identified by the Division as an unused or underutilized public school facility; or

4.02.2 If the public school facility or other real property has already been designated in the school district's facilities master plan to be reused, renovated, or demolished as part of a specific committed project or planned new construction project, two years from the date the public school facility or other real property is first identified by the Division as an unused or underutilized public school facility.

4.03 If the public charter school and school district are unable to agree on terms and execute the sale or lease within sixty (60) days of the notice of intent, unless the school district has appealed the Division's identification under section 3.03 of these rules (which tolls the 60 days period until the appeal is resolved), the public charter school may petition the Commission for an order directing the school district to lease the public school facility to the public charter school for fair market value in accordance with Section 5.00 of these rules.

4.04 If a public school facility or other real property has been identified by the Division of Public School Academic Facilities and Transportation as an unused or underutilized public school facility, or if a school district decides to sell, lease, or otherwise transfer ownership of an academic facility, the school district may sell, lease, or otherwise transfer ownership to a third party other than an open-enrollment public charter school only in a manner consistent with Ark. Code Ann. § 6-21-816.

4.05 Nothing in these rules shall be construed to delay or limit the authority of a school district to sell, lease, or otherwise transfer a public school facility or other real property to a public charter school on terms agreed to by the school district and public charter school in a manner consistent with Ark. Code Ann. § 6-21-816.

5.00 PETITIONS TO THE COMMISSION

5.01 Any petition by a public charter school under section 4.03 shall:

5.01.1 Be submitted in writing to the *Arkansas Department of Education* Office of General Counsel ~~*of the Arkansas Department of Education*~~ by certified mail, with a copy by certified mail to the school district that owns the public school facilities or other real property at issue;

5.01.2 Contain a brief written statement of no more than fifteen (15) pages, explaining in clear and express terms the facts of the case and the terms sought by the public charter school;

5.01.3 Identify the specific public school facility or other real property that the public charter school seeks to lease;

5.01.4 Include a copy of the notice of intent furnished by the public charter school to the school district;

5.01.5 Identify the amount that the public charter school contends is a fair market value lease payment for the public school facility or other real property, and include a copy of any supporting documentation;

5.01.6 Identify a desired lease term of between (5) and thirty (30) years;

5.01.7 Include any other evidence or information deemed relevant; and

5.01.8 Indicate whether the public charter school seeks a formal hearing before the Commission.

5.02 Within thirty (30) days of receiving a petition, the school district may submit a response to the petition to the *Arkansas Department of Education* Office of General Counsel ~~*of the Arkansas Department of Education*~~ via certified mail, with a copy by certified mail to the public charter school, to include:

5.02.1 A brief written statement of no more than fifteen (15) pages, explaining in clear and express terms the facts of the case and the terms sought by the school district, or the reasons why the school district contends the petition should be denied;

5.02.2 A statement of the amount the school district contends is a fair market value lease payment for the public school facility or other real property, along with any supporting documentation;

5.02.3 Any other evidence or information deemed relevant; and

5.02.4 A statement of whether the school district seeks a formal hearing before the Commission.

5.03 Upon receipt of a petition and school district response, the Commission will consider the petition at the call of its chair. Except for good cause shown, the chair will schedule the petition to be heard within thirty (30) calendar days of receipt of the school district's written response. Notice of the date, time, and location of the meeting shall be sent to the parties. If requested by either party or if the Commission determines that a hearing is necessary, a hearing concerning the petition will be held during the meeting.

5.04 If a hearing is conducted, the petitioner and school district each shall have up to ten (10) minutes to present an opening statement, beginning with the petitioner. Each party then shall have up to fifteen (15) minutes to present their cases-in-chief and up to five (5) minutes to present a closing statement in that same order. The Commission chair may allow either party additional time.

5.04.1 Members of the Commission may ask questions of either party at any time throughout the proceedings.

5.04.2 Documents offered during the hearing shall be marked in sequential, numeric order, and in a manner identifying the party offering the document.

5.05 After hearing all testimony and evidence presented, the Commission shall deliberate and may announce its decision at the close of the hearing or may take the matter under advisement.

5.06 The Commission shall render a written decision to approve or deny the petition within thirty (30) calendar days of the hearing.

5.07 The Commission may deny the petition if the school district makes an affirmative showing by a preponderance of the evidence that:

5.07.1 The public school facility, or the property to which the public school facility is attached, will be needed by the school district to accommodate future growth of the school district; or

5.07.2 Use of the public school facility or other real property by a public charter school would have a materially negative impact on the overall education of an educational campus located within five hundred feet (500') of the public school facility or other real property sought to be leased.

5.08 If the Commission grants the petition, it shall issue an order:

5.08.1 Directing the school district to lease the public school facility or other real property to the public charter school for fair market value, determining fair market value if it is not agreed to by the parties; and

5.08.2 Setting the term of the lease for a period of between five (5) and thirty (30) years as determined by the public charter school.

6.00 DUTIES OF PUBLIC CHARTER SCHOOL AND SCHOOL DISTRICT ~~*UNDER*~~ *UPON SALE OR* LEASE

6.01 Upon execution of a lease, whether voluntarily or by order of the Commission, the public charter school shall be responsible for all direct expenses related to the public school facility or real estate, including without limitation:

6.01.1 Utilities;

6.01.2 Insurance;

6.01.3 Maintenance;

6.01.4 Repairs; and

6.01.5 Renovation.

6.02 The school district shall remain responsible for any bonded debt incurred or mortgage liens that attached to the public school facility or other real property prior to a sale or lease.

Note: If the public school facility at issue was financed with tax-exempt debt and that tax exempt debt remains allocated to the public school facility as of the date of sale or lease of the property, the school district should be mindful of Internal Revenue Service Code restrictions/processes concerning the sale or lease of the property.

6.03 The public charter school shall take no actions that have a materially negative impact on:

6.03.1 Any bond rights attached to the public school facility or other real property; or

6.03.2 Any tax-exempt financing related to the public school facility or other real property.

6.04 The public charter school shall indemnify the school district for any mortgages, liens, or debt that attach to the public school facility or other real property by the public charter school's action or inaction.

6.05 The terms of a lease executed under this section shall provide that the lease shall be void, cancelled, and of no effect if:

6.05.1 The public charter school fails to use the public school facility or other real property for direct student instruction or administrative purposes within two (2) years of the effective date of the lease;

6.05.2 The public charter school closes, has its charter revoked, or has its charter application denied by the *charter school* authorizer; or

6.05.3 The public charter school initially uses the public school facility or other real property, but then leaves the public school facility or other real property unused for more than one hundred eighty (180) days.

6.06 A standard lease form, *which may be used to guide or assist in negotiations but which is not intended to provide specific requirements or responsibilities of the parties,* is attached to these rules as Appendix "A~~,~~" *and* ~~also~~ will be placed on the Division's website in ~~*a fillable*~~ *an editable* format.

6.07 For the duration of a lease of a public school facility to a public charter school, the facility shall be:

6.07.1 Exempt from the provisions of the Arkansas Public School Academic Facilities Program Act, Ark. Code Ann. § 6-21-801 to 814, and the Commission's rules governing those sections, to the same extent that other public charter school facilities are exempt; and

6.07.2 Excluded from gross square footage calculations for the school district's campus value, program of requirements, and suitability analysis under the Academic Facilities Partnership Program.

7.00 SECURING VACANT PUBLIC SCHOOL FACILITIES

7.01 Vacant public school facilities must be secured:

7.01.1 To prevent unauthorized entry through doors, windows, or any other means; and

7.01.2 In accordance with state and local fire prevention codes or other applicable law.

~~7.00~~8.00 ENFORCEMENT

~~*7.01*~~*8.01 The* Division may ~~*classify*~~ *identify* a school district that fails to comply with the above provisions as being in academic facilities distress under Ark. Code Ann. § 6-21-811.

~~*7.02*~~*8.02* The charter school authorizer may take action under Ark. Code Ann. § 6-23-105 on the charter of a public charter school that fails to comply with the above provisions.

AUTHOR'S NOTES

(1) Please assume that all language in this mark-up version of the Standard Lease Agreement is underlined. Author did not underline because it likely would result in a confusing document.

(2) No changes were made to this Standard Lease Agreement following the first public comment period.

STANDARD LEASE AGREEMENT

THIS LEASE AGREEMENT ("Agreement") is entered into this ____ day of _____, 20___, by and between the _____ School District ("Lessor") and the _____ ("Lessee"). This Lease in entered into in accordance with Ark. Code Ann. § 6-21-815 and is governed by that section.

The parties hereto hereby agree as follows:

1. Property. Lessor agrees to lease to Lessee the following described property in _____ County, Arkansas, to wit:

[Legal Description]

2. Term. The term of this Agreement shall be a period of _____ years beginning on the date hereof, at a monthly rental fee of _____ Dollars ($_____.00) per month to be paid in monthly installments beginning on _____, and ending on _____.

3. Improvements/Renovation. All improvements to or renovation of the leased property by Lessee must be approved by the Lessor in writing before the improvements are made.

4. Condition of Premises. Lessee accepts said premises in its current condition as of the beginning of the Lease and agrees to take good care of the premises and keep same in a good clean condition; to refrain from loud or unnecessary noise or other disturbances such as may disturb others; to make no alteration or additions to the same without written agreement between the parties; to commit no waste thereon; to obey all laws and ordinances affecting said premises;

and not to use the premises in violation of any laws; to replace all glass broken or cracked; to repay the Lessor the cost of all damage to the premises caused by Lessee, its employees or guests. Lessee will permit no nuisance to exist on the premises.

5. Delivery of Possession. It is understood that if the Lessee shall be unable to enter to and occupy the premises leased at the time above provided by reason of said premises not being ready for occupancy, or by reason of the holding over of any previous occupant of said premises, or as a result of any other cause or reason beyond the direct control of the Lessor, the Lessor shall not be liable in damages to the Lessee therefore, but during the period the Lessee shall be unable to occupy said premises as hereinafter before provided, the rental therefore shall be abated.

6. Insurance. Lessee will be responsible for fully insuring the premises upon the execution of this Lease. This includes but is not limited to property, fire, extended coverage, and liability insurance, as well as any other insurance deemed necessary by the Lessee. The Lessee shall be solely responsible for all costs associated with any damage to the property or any injury to its employees or guests. Upon request of Lessor, Lessee shall provide proof of such insurance, including the types and amounts.

7. Utilities. Lessee will pay direct to the utility companies all statements and deposits for utility services rendered or charged to the property during the term of the Lease Agreement, and will pay any tax assessment by an improvement district made against the property during the term of the Lease Agreement.

8. Destruction of Premises. In case of partial or total destruction or injury to said premises by fire, windstorm, lightning, the elements, or any other casualty of a type insurable by usual fire and extended coverage insurance, the Lease shall not terminate, and Lessee shall bear responsibility for payment of any insurance deductible, as well as for any costs above and beyond that covered by insurance up to and including the fair market value of the premises in the event that restoration or rebuilding is necessary.

9. Assignment or Subletting. Lessee further covenants that Lessee will not allow anyone to share said premises, keep roomers or boarders, nor assign, sublet or transfer said premises or any part thereof without the Lessor's consent endorsed in writing.

10. Condemnation. It is agreed by and between the Lessor and the Lessee that if the whole or any part of said premises hereby leased shall be taken by any competent authority for any public or semi-public use or purpose, then for that event, the term of this Lease shall cease and terminate from the date when the possessions of the part so taken shall be required for such use or purpose. All damages awarded for such taking shall belong to and be the property of the Lessor.

11. Liability of Lessor. Lessee agrees that Lessor shall not be liable for injury or damage to person or property of Lessee, its guests, employees, or invitees, occurring in, on or about the leased premises or occurring anywhere in or on the building in which the leased premises

are located or in or upon the grounds in which the building is located or in any building or structure on said grounds, howsoever caused or arising.

12. Manner of Payment. All payments of rents shall be made to the Lessor via automatic check draft or at such other places Lessor may designate in writing.

13. Surrender. Lessee further covenants and agrees that upon the expiration of said term, or upon the termination of the Lease for any cause, it will at once peacefully surrender and deliver up the whole of the above described premises together with all improvements thereon to the Lessor, its agents and assigns.

14. Holdover Tenant. Lessee covenants that its occupancy of the said premises beyond the term of this Lease shall not be deemed as a renewal of this Lease for the whole term or any part thereof, but that the acceptance by the Lessor of rent accruing after the expiration of this Lease shall be considered as a renewal of this Lease for one month only and for successive periods of one month only.

15. Prohibited Use. Lessee will not do or permit anything to be done, in, upon, or about the leased premises that increases the fire hazard beyond that which exists by reason of the ordinary use or occupancy of the premises for the purpose described hereinabove. Lessee will not do or permit to be done anything in, about, or upon the leased premises that interferes with the rights or tends to annoy other tenants or Lessor, or that conflicts with state or local laws, or that violates regulations of the local fire department or state board of health, or that otherwise creates a nuisance that is dangerous to persons or property.

16. Maintenance. Lessee agrees to maintain the property in good repair and not to permit any nuisance to be maintained thereon. Lessee will maintain the premises, including all buildings, equipment, fixtures and appurtenances, in as adequate and usable condition as they are in at the commencement of the term of this Lease except for fair wear and tear, and will provide such protection of the property from damage by vandalism and trespass, and promptly repair and restore any property damaged thereby. The Lessee will perform the necessary repairs and remodeling, including but not limited to repairs to the roof, to make and maintain the premises suitable for an educational facility. Lessee shall assume the cost of maintaining the heating and cooling system. All other maintenance costs also shall be the responsibility of the Lessee. Lessee shall not make alterations, additions, changes, or improvements to the leased premises without the prior written consent of Lessor.

17. Fee Simple. Lessor warrants that it is the owner in fee simple absolute of the premises and may lease said premises as provided within this Agreement. Upon rental payments by Lessee as provided for within this Agreement, as well as the observance and performance of all of the other terms and conditions stated within this Agreement by Lessee, Lessee shall be entitled to peaceably and quietly hold and enjoy the leased premises without hindrance or interruption by the Lessor or any other person as to any claims subject to the terms and conditions of this Lease.

18. Default. In the event Lessee should fail to pay any one of the aforesaid installments of rent or any part thereof pursuant to the provisions of this Agreement set forth in paragraph 2 hereof, or in the event Lessee should fail to perform or observe any of the covenants, agreements, terms or conditions herein made, assumed or agreed to by Lessee, or in the event Lessee abandons or vacates the leased premises, or in the event of the insolvency of Lessee, then in any of the said events, at the option of Lessor (to be exercised within ninety (90) days after the occurrence of any one of the said events), Lessor may (a) immediately forfeit this Lease and terminate the same and repossess the premises, removing therefrom all goods and chattels not belonging thereto and expelling Lessee and any other person in possession thereof and hold Lessee liable for all accrued rent and for any and all damages caused by or thus arising from Lessee's breach; or (b) immediately repossess the premises and collect same for the account of Lessee, hold Lessee liable monthly for any deficiencies resulting for the residue of the term; or (c) may declare due and payable all unpaid rentals for the entire residue of the term or (d) produce any other right or remedy available in law or equity. All such rights and remedies are in addition to and not to the exclusion or exhaustion of any other rights, remedies or causes of action which Lessor may have at law or in equity (including the right to collect past due rent and distraint), and the exercise or pursuit by Lessor or any of the rights, remedies or cause of action accruing hereunder shall not be in exhaustion or exclusion of any other rights, remedies or cause of action Lessor might otherwise have. In the event Lessee abandons the premises, nothing herein shall require Lessor to release same for Lessee's account and there shall be no duty so to do. The failure of Lessor to exercise the options herein available to Lessor in any one or more instances shall not be a waiver of the right to exercise such options for any future breach of the same or any other covenant, agreement or condition. Lessee further covenants to pay a reasonable attorney's fee should Lessor find it necessary to employ an attorney by reason of default by Lessee.

20. Cancellation of Lease. This Lease shall be canceled and be of no effect if the Lessee fails to use the public school facility or other real property for direct student instruction or administrative purposes within two (2) years of the effective date of the Lease, if the Lessee has its charter revoked or closes its school, has its charter revoked, or has its charter application denied by the authorizer, or if the Lessee initially uses the public school facility or other real property, but then leaves the public school facility or other real property unused for more than one hundred eighty (180) days.

19. No Waiver. The failure the parties to insist upon the performance of any of the covenants, agreements or conditions herein in any one or more instances shall not be a waiver of the right thereafter to insist upon full and complete performance of the same or any other covenant, agreement or condition. Receipt by the Lessor of rent with knowledge of the breach of any of the conditions, covenants or agreements hereof shall not be deemed and shall not be a waiver of such breach.

20. Care of Premises. It shall be the duty of the Lessee to properly care for the lawn, shrubbery, and trees on the premises.

21. Taxes. Lessee will pay any taxes assessed against the real property and the improvements thereon.

22. Bonded debt/mortgage liens. The Lessor shall remain responsible for any bonded debt incurred or mortgage liens that attached to the public school facility or other real property prior to the execution of the Lease. Lessee shall take no actions that have a materially negative impact on any bond rights attached to the public school facility or other real property, or any tax-exempt financing related to the public school facility or other real property by the public charter school's action or inaction.

23. Notices. Any notice or document required or permitted to be delivered by this Lease shall be deemed to be delivered (whether or not actually received) when deposited in the United States Mail, postage prepaid, certified mail, return receipt requested, addressed to the parties at the respective addresses set out below, or by delivering the same in person to Lessor or Lessee as set out below:

IF TO LESSOR:

_____ School District

ATTN: _____

[Address]

[City, State Zip Code]

(501) _____

IF TO LESSEE:

_____

ATTN: _____

[Address]

[City, State Zip Code]

(501) _____

24. Governing Law. This agreement shall be governed by, construed, and enforced in accordance with the laws of the State of Arkansas.

25. Effect of Partial Invalidity. The invalidity of any part of this agreement will not and shall not be deemed to affect the validity of any other part. In the event that any provision of this agreement is held to be invalid, the parties agree that the remaining provisions shall be deemed

to be in full force and effect as if they had been executed by both parties subsequent to the expungement of the invalid provision.

26. Entire Agreement. This agreement shall constitute the entire agreement between the parties. Any prior understanding or representation of any kind preceding the date of this agreement shall not be binding on either party except to the extent incorporated in this agreement.

27. Modification of Agreement. Any modification of this agreement or additional obligation assumed by either party in connection with this agreement shall be binding only if evidenced in writing signed by each party or an authorized representative of each party.

IN WITNESS WHEREOF, the parties hereto have executed this Lease Agreement on this _____ day of _____, 20___.

LESSOR:

_____ SCHOOL DISTRICT

By:_____

[Name]

Title: Superintendent

LESSEE:

_____

By:_____

[Name]

Title: _____

STATE OF ARKANSAS)

) ss. ACKNOWLEDGMENT

COUNTY OF PULASKI)

On this _____ day of _____, 20___, before me, the undersigned, a Notary Public, duly commissioned, qualified and acting, within and for said County and State, appeared in person the within named _____, to me personally well known, who stated that he was the Superintendent of the _____ School District and was duly authorized in that capacity to execute the foregoing instrument for and in the name and behalf of the _____ School District, and further stated and acknowledged that he had so signed, executed and delivered the foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this _____ day of _____, 20___.

_____

Notary Public

My commission expires:

(S E A L)

_____

STATE OF ARKANSAS)

) ss. ACKNOWLEDGMENT

COUNTY OF PULASKI)

On this _____ day of _____, 201__, before me, the undersigned, a Notary Public, duly commissioned, qualified and acting, within and for said County and State, appeared in person the within named _____, to me personally well known, who stated that he was the _____ of the _____ public charter school and was duly authorized in that capacity to execute the foregoing instrument for and in the name and behalf of the _____ public charter school, and further stated and acknowledged that he had so signed, executed and delivered the foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this _____ day of _____, 201__.

_____

Notary Public

My commission expires:

(S E A L)

_____

CAPSAFT Rules Governing Right of Access To Unused Or Underutilized Public School Facilities And The Sale Or Lease Of Public School Facilities

PUBLIC COMMENTS AND RESPONSES OF THE DIVISION FOR ARKANSAS PUBLIC SCHOOL ACADEMIC FACILITIES AND TRANSPORTATION

(Includes first, second, and third public comment period)

First Public Comment Period

Commenter Name: Rebecca Miller-Rice, Bureau of Legislative Research (12/19/17).

Comment (1): Section 2.03. Is this to be the same as the definition for "Authorizer" as in Ark. Code Ann. § 6-23-103? I'm not seeing the term "charter school authorizer" in that statute.

Division Response: Comment considered. Section 2.03 (now Section 2.05) has been changed to clarify that "charter school authorizer" has the same meaning as "authorizer" in Ark. Code Ann. § 6-23-103. The term "authorizer" also was changed in Section 6.05.2 to "charter school authorizer" for consistency. **Non-substantive changes made.**

Comment (2): Section 3.03. Should the Commission's name include "Commission for *Arkansas Public School* Academic Facilities and Transportation"?

Division Response: Comment considered. Yes it should. **Non-substantive changes made.**

Commenter Name: David Tollett; Superintendent, Barton-Lexa School District (1/3/18)

Comment: I would like to see these rules state that all public charter schools with underutilized facilities will be available to public schools for use, especially as charter schools expand, relocate, or disband in communities. These facilities should be treated the same way as public schools are treated under these rules. Also any furniture, buses, equipment, etc. being underutilized by public charter schools should be included especially if tax dollars (especially local) are used to buy them. Again the nearest public schools should have the first right of refusal for all of this. I would like to see this language incorporated into these rules for fairness reasons.

Division Response: Comment considered. A legislative change would be required. **No changes made.**

Commenter Name: Lucas Harder, Policy Services Director, Arkansas School Boards Association (1/3/18)

Comment (1): Transportation is misspelled in the title

Division Response: Comment considered. **Non-substantive change made.**

Comment (2): In Section 2.09.4, the language appears incredibly broad to the extent that superintendents may not accurately be able to know when it would be triggered. In particular, "significant part" would appear to provide a fair amount of subjectivity to the Division and the Commission on when the building would be considered to be underutilized. It would provide a much more objective and put superintendents on better notice as to what the Division and Commission will be looking at if this could be better set forth in some kind of formula or examination rubric. A formula or rubric would also aid in the appeal process, as it would allow all sides to be more focused in their briefs.

Also, the language referring to a building being used irregularly or intermittently has the potential to bring in those building that a district only has need to use intermittently, such as an auditorium, which may be used a couple of times per semester or even per year but is continuing to serve its purpose.

Division Response: Comment considered. "Significant portion" and "unused or underutilized public school facility" are further defined; threshold of use included in definition. Section containing terms "irregularly or intermittently" removed. **Substantive changes made.**

Comment (3): Section 2.09.5: Because this section covers all public school facilities, the section has the probability to pull in district buildings unnecessarily. If a district has a building that was specifically designed for storage rather than for academic or extracurricular purposes, then this language would require the district to either declare it to be unused or underutilized after the first year or appeal the placement of the building on the unused or underutilized list every year after the first year.

We would recommend combining an objective rubric, as suggested in comments to 2.09.4, with review of the CMMS submissions on the building and an in person review as necessary to make sure that the integrity of the building was being maintained and to prohibit the building from simply sitting empty with no plan for future use or replacement

Division Response: Comment considered. Section referring to one-year storage period removed. **Substantive changes made.**

Comment (4): "Underutilized" is misspelled in Section 3.00.

Division Response: Comment considered. **Non-substantive changes made.**

Comment (5): In Section 3.02.1, Section 2.08 is referenced instead of Section 2.09.

Division Response: Comment considered. **Non-substantive changes made.**

Comment (6): In Sections 5.01.1 and 5.02, "Arkansas Department of Education" should be moved in front of "Office of General Counsel" to match the revisions in the Rules Governing Appeals from Determinations of the Arkansas Division of Public School Academic Facilities and Transportation.

Division Response: Comment considered. **Non-substantive changes made.**

Commenter Name: Mark Lowery, Arkansas Representative (1/4/18—Public Comment Hearing)

Comment (1): Commenter was the lead House sponsor of the bill that ultimately became Act 542 of 2017, and spoke on behalf of himself and the Senate sponsor of the bill (Sen. Clark). This process has been in the works for four years. Previous law mandated that school districts give a right of first refusal to a charter school if one of the school district's buildings was available. Some school districts were "gaming" the process and not making buildings available for sale. Act 542 enables available public school buildings to could continue to be used in a public education capacity by charter schools. Commenter concerned that although stakeholder input was sought prior to the drafting of the proposed rules, there was no attempt to contact the lead sponsors of the bill to ascertain legislative intent.

Division Response: Comment considered. Sponsors contacted by Division, meeting held with Representative Lowery. **Substantive changes made.**

Comment (2): Commenter concerned about the late submittal of the proposed rules, considering that the Act sets a February 1 deadline for districts to notify the ADE of which buildings they have that are unused or underutilized. This date is fast approaching and school district do not have proper guidance. "Underutilized" and "unused" need better definitions than are currently contained in the proposed rules. It is a problem that there are not definitions in place for these rules, and commenter is concerned that districts might err in applying the current definitions. Additionally, terms "irregularly" and "intermittently" have been added in the rules, and they are not defined in Arkansas Code. This has compounded the problem. "Underutilized" needs to be defined to set forth a threshold of use. For example, if a district only is using 10% of a building, is that underutilized? There should be a 50% threshold for underutilization, and commenter notes that other stakeholders will propose the same.

Division Response: Comment considered. *See* Division Response to Harder Comment (2) above. (In summary, terms defined, section containing "irregularly" and "intermittently" removed, a threshold of use added). **Substantive changes made.**

Comment (3): Commenter is concerned with securing school district properties. For example, the PCSSD did not properly secure the Oak Grove High School building. This resulted in dramatic vandalism and use of the building for cooking methamphetamine and other drug use,

and the building was dramatically stripped. The non-profit that purchased it had to "recover" the building at significant cost. Commenter discussed the "broken glass theory," which provides that when a facility undergoes disrepair, be it by vandalism or broken glass, the surrounding community suffers the ill effects. School districts must be held responsible for making sure that they maintain the fair market value of a building.

Division Response: Comment considered. New Section (7.00) added to clarify vacant buildings must be secured to prevent unauthorized entry in a manner in accordance with state and local fire prevention codes and other laws. **Substantive changes made.**

Comment (4): The proposed rules specifically give a right of appeal to school districts if the Division identifies one of its buildings as unused or underutilized; the school district can appeal to the CAPSAFT. The proposed rules should contain a reciprocal right of appeal to charter schools or other interested entities to the CAPSAFT if they know a building is unused or dramatically underutilized and has not been identified by the Division as such.

Division Response: Comment considered. Legislative change would be required, as statute contains no provision allowing for public charter school appeal to the Commission in this circumstance (although it does expressly provide for a school district appeal). A note was added in Section 3.00 to notify that a public charter school may contact the Division if it believes that a particular facility is unused/underutilized. **Non-substantive changes made.**

Comment (5): Commenter does not want to rush promulgation of the rules merely because the February 1 deadline is approaching. Rather, he wants to get them right. This doesn't undermine or negate Act 542, but commenter doesn't want to implement rules not properly thought out and for which there has not been input from all stakeholders, including legislators who voted on Act 542 and sponsored Act 542 (in order to ascertain legislative intent). Recognizes school districts still must comply with the February 1 deadline, but must do so without guidance of rules.

Division Response: Comment considered. Sponsors have been contacted for input following public comment hearing. All General Assembly members may submit public comments through the Administrative Procedures Act process. Division will contact any school district that fails to identify what Division records show to be an unused or underutilized facility. **No changes made.**

Commenter Name: Scott Smith, Executive Director, Arkansas Public School Resource Center (1/4/18—Public Comment Hearing).

Comment: Commenter echoes Rep. Lowery's comments about the need for clarification of definitions of "unused" and "underutilized," as well as for the need for additional definitions. Act 542 turns in large part on the definitions of these terms, and they have not been sufficiently defined in the proposed rules.

Division Response: Comment considered. *See* response to Harder Comment (3) above. Also, many additional terms have been defined in response to various public comments. **Substantive changes made.**

Comment: Commenter has concerns about how time constraints contained in proposed rules will work practically (e.g., school district may use building for eleven months and two days, but then the building goes unused until the next school year).

Division Response: Comment considered. Definition of "regular basis" added. **Substantive changes made.**

Comment: Commenter concerned with space considerations in the proposed rules (e.g., if school district has a large building and are using only a broom closet, are they using the building). Would like to see space considerations.

Division Response: Comment considered. *See* Responses above. Threshold set at 40%, and language added establishing that if space in another building is available to satisfy the purpose (if the facility is used at less than 40% threshold), the building will be considered underutilized. **Substantive changes made.**

Comment: Commenter has concerns about the standard lease agreement; considers it ultra vires as it goes beyond the scope and purpose of Act 542. Concerned that proposed lease agreement does not leave arrangements up to the parties themselves.

Division Response: Comment considered. Act 542 mandates that these rules (governing what is codified as § 6-21-815) contain a "standard lease form." The rules thus contain as Appendix "A" a Standard Lease Form. Language added to clarify that the form is intended to assist the parties in negotiations but not bind them to specific terms. **Non-substantive changes made.**

Comment: Overall, feels there needs to be more detail in place to help everyone understand what their obligations are.

Division Response: Comment considered. *See* responses to comments above. **Substantive changes made.**

Commenter Name: Scott Beardsley, Crews & Associates, First Security (1/4/18—Public Comment Hearing)

Comments: Commenter has concerns about Section 6.03. Although he likes the section, he wants to ensure that if a school district has tax exempt debt, there will be no action taken that will adversely impact the tax exempt status of the debt. There are agreements with bond holders and the federal Internal Revenue Service regarding the debt, which apply until such time that the debt is extinguished. Noted that a lot of schools refinance their debt every five to seven years, extending the debt, and there is a pro-rata when the debt is extended (and it is very important that

financial advisors for a school district do the calculation). Often, there is debt on a school building 30-35 years after a building is constructed. School districts need to ensure that fair market value is taken into consideration, regardless of who is purchasing the asset. This applies also when a school district borrows money for addition or repairs that are tax exempt. The research needs to be done and the debt needs to be properly extinguished before a sale or lease of the building.

Division Response: Comment considered. Regulatory note added to Section 6.00 to caution school districts in this regard. **Non-substantive changes made.**

Commenter Name: Bob Beach; Friday, Eldridge, and Clark (1/4/18—Public Comment Hearing)

Comments: School district facilities were financed with tax exempt debt, and the federal Internal Revenue Code applies. The Code does not allow a change in the use of property most times. A public facilities often may not be used by a private organization or even a 501(c)(3) entity unless parties go through a certain procedure. The school district would have to comply with these IRS procedures to change the use of the building. Once it does that, even then, school districts are limited with what they can do with the proceeds they receive from a sale or lease of the facility. Districts need to be mindful of this when selling or leasing. They must be careful, or this can become and Internal Revenue Code issue.

Division Response: Comment considered. *See* Response to Beardsley above. **Non-substantive changes made.**

Commenter Name: Harvie Nichols (1/15/18)

Comment (1): Section 2.09.4. The language in this section is vague since "irregularly or intermittently" are not defined. Having made that comment, I am not sure that a rule can define those terms in a manner that would cover all the potential situations that occur. Perhaps the responsibility for carving out those definitions will be left to the Commission as they hear appeals from districts or charter schools. Failure to fully define the terms in 2.09 leaves school districts in a quandary about how to report those buildings or real property.

Division Response: Comment considered. *See* Response to Harder Comment (2) above. Section containing "irregularly or intermittently removed," and other terms defined. **Substantive changes made.**

Comment (2): Section 2.09.5. I have failed to find that this language exists in Act 542. As written it appears to negate a district having storage facilities that would be used for more than one year. Districts must have storage facilities that are used to store paper, cleaning supplies, food, rarely used instructional materials, bus parts, extra educational items like desks, chairs etc.

I can't see where this part of the rule is required or supports good public policy. In the alternative I would argue that storage is an educational purpose since that is not clearly defined.

Division Response: Comment considered. *See* Response to Harder Comment (3) above. The section containing the storage language has been removed. **Substantive changes made.**

Comment (3): Sections 5.05 & 5.06. The same argument is advanced here that was stated in the rule for appeals. Section 5.05 allows the Commission to take the matter under advisement and then in Section 5.06 it says that the Commission may render a written decision. My contention is that having taken it under advisement that the Commission must reconvene and take action (and hopefully discuss) before they can issue their written decision. There should not be communication between commissioners outside a legally called meeting so they couldn't arrive at a decision without meeting again.

Division Response: Comment considered. The CAPSAFT is undoubtedly a "governing body" under the Arkansas Freedom of Information Act and is subject to the open meeting provisions set forth in § 25-19-106 of the Act. Thus, if the CAPSAFT takes a matter under advisement, it must reconvene in an open meeting to further discuss the matter or issue its opinion. **No changes made.**

Comment (4): Section 6.02. While this section is in the law and therefore needs to be included, I would concur with the testimony offered in the public hearing about bond sales and use of the facilities. I believe taxpayers committed to a bond issue and taxation for a specific purpose which did not include providing those facilities to other entitles.

Division Response: Comment considered. *See* Response to Scott Beardsley above. **Non-substantive change made.**

Comment (5): Section 6.04. How would a district seek recovery from a charter school or other entity that operates the charter school should they lose their charter or no longer exist? Again, the law is clear but there are concerns that exist. I believe that before a public charter school is allowed to incur debt using the leased facility as collateral, some surety through bond or otherwise be issued by the charter school and placed on file with a state agency.

Division Response: Comment considered. Act 542 contains no provisions concerning recovery; general law would apply. The Act does not authorize a leased facility to be used as collateral, so again, applicable property/real estate law would apply. **No changes made.**

Comment (6): Section 7.01. Since there is not clarity in the law and as a result in the rules that can be developed I would suggest that the language here be changed to read "The Division may classify a school district that willfully fails to comply with the above provisions as being in academic distress under ACA 6-21-811." Or in the alternative allow the district to offer an affirmative defense that there was no willful intent in any conduct that fails to comply with the rules.

Division Response: Comment considered. This language mirrors that in Act 542. Changing it to add a "willfully" component would require a legislative change. **No changes made.**

Commenter Name: Mike Mertins, Arkansas Association of Educational Administrators (1/15/18).

Comment (1): Section 2.09.4 provides that "[a] public school facility shall be considered underutilized if it in whole or significant part is being used only irregularly or intermittently by the school district for educational, academic, extracurricular, or administrative purposes, and the district reasonably could satisfy those needs by using other available school district spaces." **Recommendation is that this section of the proposed rules is not necessary and should be removed.** Rationale for this recommendation is:

1. Act 542 includes a meaning for "unused or underutilized public school facilities" and sections 2.09 through 2.09.3 of these proposed rules already address this meaning.
2. The use of terms such as "significant," "irregularly," "intermittently," and "reasonably" makes this section vague and confusing.
3. Furthermore, the concept proposed by some of using a percentage of utilization to determine "underutilized" public school facilities is not reasonable due to the fact that certain school facilities, such as athletic complexes, are seasonal in nature and not used on a regular basis. Other facilities, such as cafeterias, media centers, and CTE labs, may only be used periodically during the school day or week.
4. District administration and elected school boards are charged with making decisions regarding the best use of existing school facilities in meeting the needs of students. They have detailed knowledge of student needs, available resources, and existing facilities in their districts. This proposed section appears to limit this authority and is unclear on what entity will assume the oversight responsibilities of determining what other school district spaces could be used for educational, academic, extracurricular, and administrative purposes.

Division Response: Comments considered. *See* Responses above. (Prior) sections 2.09.4 and 2.09.5 removed, which contained the terms "significant," "irregularly," and "intermittently." Term "significant" in (previous) section 2.09.1 (now 2.15.1) mirrors language of Act 542. Definitions and provisions added to establish thresholds for amount of space used and duration of use, recognizing that certain facilities by their nature are ordinarily used intermittently (e.g., auditoriums, gymnasiums, and athletic facilities), and also recognizing that a facility will not be considered "underutilized" if a school district does not have other available spaces in which it can reasonably satisfy the educational, academic, extracurricular, or administrative purposes for which the space is being used. **Substantive changes made.**

Comment (2): Section 2.09.5 provides that "Administrative" activities do not include use of a public school facility or other real property as a whole or in significant portion for storage for a period of longer than one full school year. **Recommendation is that this section of the**

proposed rules is confusing and needs to be completely removed. Storage, per say, is not addressed at all in Act 542. Rationale for this recommendation is that facilities used for storage are essential to school district operations. These facilities can be classified as either education, extracurricular, or administrative facilities based on use. A facility or significant portion could easily be used for storage for a period of longer than one full school year (i.e. storage facilities for surplus instructional materials and supplies, district warehouse for maintenance and custodial supplies/equipment, financial/student records storage, athletic equipment storage for seasonal sports, etc.).

Division Response: Comment considered. The section addressing storage has been removed. **Substantive change made.**

Comment (3): Section 3.01 provides that "[b]y February 1 of each year, each school district shall submit to the Division a report that identifies . . ." **Recommendation is that Section 3.01 should state, "By February 1 of each year, each school district and open-enrollment charter school should submit to the Division a report that identifies. . ." (NOTE: This change would require other sections of the proposed rules to be amended to reflect this recommended change).** The rationale for this recommendation is that open-enrollment charter schools may very well own unused or underutilized facilities that could better serve the needs of students in public school districts. With the renewed emphasis on career and technical programs, additional facilities could be used to house these programs.

Division Response: Comment considered. Legislative change would be necessary, as Act 542 contains no provision requiring reporting by open-enrollment charter schools. **No changes made.**

Comment (4): Section 3.02 reads that "[b]y March 1 of each year, the Division shall . . . 3.02.2 Publish a list on its website identifying all unused or underutilized public school facilities, and notify any affected school district in writing of the identification." **Recommendation is that Section 3.02.2 should include the following statement at the end of the sentence: "prior to March 1."**

Division Response: Comment considered. Intent of this comment apparently is to ensure that a traditional public school will be on notice that one or more of its facilities will be included on the March 1 report. Language was added in 3.02.3 providing that prior notification will be made to the school districts by the Division. **Non-substantive changes made.**

Comment (5): Section 3.03.1 provides that "If a school district files an appeal, the Division will indicate on its website that the appeal is pending." **Recommendation is that Section 3.03.1 should be changed to say, "If a school district indicates intention to file an appeal, the Division will not identify the facilities as unused or underutilized on its website until the appeal process is completed."**

The rationale for the two changes recommended in Comments 4 and 5 is that since Act 542 mentions the appeal process prior to the section dealing with the March 1 deadline, it is reasonable to assume that the intent of the law was for the appeal process to be completed before

a facility is identified by the Division as being available. Also, since the law allows for a public charter school to give notice of its intent to purchase or lease the unused or underutilized facility once it is identified by the Division, the facility should not be identified as available until the district has the opportunity to appeal and the appeal has run its course.

Division Response: Comment considered. Because Act 542 mandates that the Division post the list of unused or underutilized public school facilities annually by March 1 (clarified in rule to provide "on or before March 1"), a legislative change would be necessary in order for the Division *not* to post on or before that date. However, Act 542 clearly contemplates that districts may appeal the identification. For this reason, language was included in the proposed rules that an appeal tolls the sixty-day period in Section 4.03 until such time that an appeal is resolved, and also requires the Division to indicate on its website that an appeal is pending. As noted above, language was added to require the Division to notify a traditional public school *prior* to March 1 if it has a facility or facilities that will be listed on March 1. Language also added to allow a school district to submit a "notification of intent" to file an appeal (which notification will toll the 60-day period but will not modify the timing to file the actual appeal). **Substantive changes made.**

Commenter Name: Mark White, Arkansas Public School Resource Center (1/15/18).

Comment (1): The proposed rules fail to include definitions for a number of key terms that, on their own, are ambiguous. The rules should be revised to add definitions for the terms "academic purpose," "administrative purpose," "educational purpose," "extracurricular purpose," and "irregularly or intermittently."

Division Response: Comment considered. Definitions of "academic," "administrative," "educational," and "extracurricular" added. Section removed that included the language "irregularly or intermittently." **Substantive changes made.**

Comment (2): Because the purpose of Act 542 of 2017 was to preserve and maximize the efficient use of public educational facilities for public educational purposes, the definition of "fair market value" in section 2.05 should be revised to recognize that the fair market value of a public school facility should be based on its value as a *public* facility intended to be used for *public* purposes, rather than by reference to the value of private facilities or private transactions.

Division Response: Comment considered. The language in Act 542 reads "fair market value." A legislative change would be needed to limit the meaning of this unambiguous term. **No changes made.**

Comment (3): The proposed rules should be revised to add a definition of "underutilized" that incorporates specific thresholds of use by time and space, for determining when a facility is deemed to be underutilized. For example, "underutilized" could be defined to include any facility that meets one or more of the following conditions:

a. Less than fifty percent (50%) of the gross square footage of the facility is used for the combined public educational, academic, extracurricular, and administrative purposes of the facility;

b. The facility is used for public educational, academic, extracurricular, or administrative purposes on fewer than ninety (90) days per school year;

c. For facilities that by their nature are ordinarily characterized by intermittent use, such as auditoriums, gymnasiums, and athletic facilities, the facility is used for public educational, academic, extracurricular, or administrative purposes fewer than twelve (12) times per school year;

d. The facility has been leased to a third party for less than fair market value for more than twelve (12) consecutive months, unless the leased facility is used exclusively for public educational, academic, extracurricular, or administrative purposes, including without limitation pre-kindergarten or adult education; or

e. The combined public educational, academic, extracurricular, and administrative uses of the facility are insufficient to preserve the integrity or purpose of the public school facility or other real property as a public education facility.

Division Response: Comments considered. *See* responses above. Also, (a) threshold set at 40%. Language in (b) and (c) included in proposed rule. Because Act 542 does not authorize the language in the first clause of (d), a legislative change would be necessary, and Act 542 already allows the uses in the second clause. Concerning language proposed in (e), Act 542 reads that "nonuse or underutilization threatens the integrity or purpose of the public school facility or other real property as a public education facility," which language is mirrored in Section 2.15.2. **Substantive changes made.**

Comment (4): The definition of "unused or underutilized public school facility" in section 2.09 should be revised to:

a. Clarify that although storage may be a permissible administrative purpose under section 2.09.5, it is not a permissible educational, academic, or extracurricular purpose;

b. Clarify that using a public school facility in whole or in part for commercial purposes or for generating revenue for the district does not constitute an educational, academic, extracurricular, or administrative purpose; and

c. Provide that a facility leased to a third party for less than fair market value is *per se* unused or underutilized unless the leased facility is used for a public educational, academic, extracurricular, or administrative purpose, including without limitation as a pre-kindergarten or adult education facility.

Division Response: Comments considered. Concerning (a), *see* responses above; (previous) Section 2.09.5 removed. Act 542 does not support the proposition that storage is not a permissible academic, educational, academic, or extracurricular purpose. Concerning (b), language added to proposed rules. Regarding (c), *see* Responses to Comment (4)(d) above. **Substantive changes made.**

Comment (5): Section 3.02 of the proposed rules should be revised to provide a procedure for a public charter school or other interested entity to request that the Division classify a public school facility or other real property as unused or underutilized.

Division Response: Comment considered. *See* responses above. If a public charter school believes that a public school facility is unused or underutilized, the public charter school may bring this to the Division's attention within sufficient time to enable the Division to investigate prior to the March 1 identification date. Act 542 contains no provision authorizing an appeal by a public charter school, however, in the event that the Division disagrees. **Non-substantive changes made.**

Comment (6): Every public school district has an implied obligation under existing law to secure, protect, and preserve the condition of its facilities. The proposed rules should make this obligation explicit, by requiring school districts to take reasonably necessary steps to secure, protect, and preserve the condition of any facility or other real property identified as unused or underutilized, and by prohibiting school districts from removing or disabling improvements, fixtures, or systems so as to render the facility unusable as a public education facility.

Division Response: Comment considered. New Section (7.00) added to clarify vacant buildings must be secured to prevent unauthorized entry in a manner in accordance with state and local fire prevention codes and other laws. Act 542 contains no language prohibiting a school district from reasonably removing its own property from an unused or underutilized building for reuse or sale, and does not contain language requiring that a district must preserve the condition of any facility. **Substantive changes made.**

Comment (7): The proposed rules should clarify that once a public school facility is sold or leased to a public charter school, the facility shall be, for the duration of the lease or ownership by the charter school:

a. Exempt from the provisions of the Arkansas Public School Academic Facilities Program Act, Ark. Code Ann. §§ 6-21-801 to 814, and the Commission's rules and regulations to the same extent that other public charter school facilities are exempt; and

b. Excluded from gross square footage calculations for the school district's campus value, program of requirements, and suitability analysis under the Academic Facilities Partnership Program.

Division Response: Comment considered. Language added, but reference to sale excluded due to fact that once a building is sold, it no longer belongs to the school district. **Non-substantive changes made.**

Comment (8): The proposed standard lease agreement is in part *ultra vires* in that it goes far beyond the Commission's statutory authority in terms of the obligations and restrictions it purports to impose on public charter schools. Though it may be permissible for the standard lease agreement to include suggested language or topics to be addressed, these terms and conditions should be determined by negotiation between the school district and public charter school, except for those provisions explicitly required by statute. The proposed agreement should be substantially revised to remove all of the prescriptive or mandatory components that are not explicitly authorized by statute.

Division Response: Comment considered. Act 542 requires that the Division develop a Standard Lease Form. The form does not contain mandatory provisions, but rather is intended to guide or assist in negotiations. Language has been included in the rules to make this clear. **Non-substantive changes made.**

Comment (9): In addition to the broad lack of statutory authority, the specific provisions of the proposed Standard Lease Agreement ("Agreement") are problematic in a number of specific ways:

a. The Agreement cannot and should not require that payment be made monthly. Paragraph 2 should be revised to empower the school district and charter school to negotiate a mutually-agreeable payment schedule.

b. The Agreement cannot and should not give the public school district unilateral authority to approve or deny the public charter school's ability to improve, renovate, alter, or add to the facility. All such restricting language in paragraphs 3, 4, and 16 should be deleted.

c. The Agreement cannot and should not impose arbitrary restrictions on the charter school's use of the facility, such as the prohibition of "loud" noise in paragraph 4; the prohibition on "sharing" the facility or allowing "roomers or boarders" in paragraph 9; and the prohibition on activities that "tend to annoy other tenants or Lessor" in paragraph 15.

d. The Agreement cannot and should not require the public charter school to purchase liability insurance, in derogation of the charter school's statutory immunity to tort claims, nor should the Agreement give the school district discretionary authority to dictate the types and amount of insurance to be purchased by the charter school. All such language in paragraph 6 should be deleted.

e. Similarly, the Agreement cannot and should not attempt to defeat the public charter school's statutory immunity by requiring the charter school to assume liability for injury to the district's employees or guests, as contained in paragraph 6.

f. Although it may be appropriate in paragraph 8 of the Agreement to require the charter school to assume the risk of partial or total destruction of or injury to the facility, any required lease payments should abate during any term of non-occupancy caused by such partial or total destruction or injury.

g. Paragraph 11 of the Agreement is unnecessary and potentially confusing given that school districts already possess tort immunity by statute. This paragraph should be deleted entirely.

h. The Agreement should allow for the addition of other terms or conditions negotiated and agreed to by the participating school district and public charter school, as well as the modification or deletion of any standard terms not otherwise explicitly required by statute.

Division's Response: *See* response to Comment 8 above.

Second Public Comment Period

Commenter Name: Rebecca Miller-Rice (Bureau of Legislative Research, 4/2/18).

Comment: Section 2.14—I'm a bit confused by the definition of "significant portion" in terms of "less than" a percentage of use. When I substituted the definition for the term as used in Section 2.15, it seems to repeat certain language, i.e., [A public school that] As a whole or less than forty percent (40%) of the gross square footage of a public school facility is used by the school district for public educational, academic, extracurricular, or administrative purposes on a regular basis is not being used for a public educational, academic, extracurricular, or administrative purpose[.] I see the difficulty presented in defining the term, but I was curious as to whether there was a particular reason the Commission chose to define it in those terms, rather than just a straight percentage such as less than 100%, but at least 60%, or at least 60%?

Division Response: Language in 2.14 has been changed for enhanced clarity. **Non-substantive change made.**

Commenter Name: Roy Hester, Director, Guy Fenter Educational Service Cooperative (4/2/18).

Comment (1): How will they determine underutilized in "significant part"? How much is considered significant: one classroom in a building, 30% of the total square footage of a building. Will it be related to the POR (which doesn't tell the whole story)? Current working seems general and arbitrary for a rule that could lead to a loss of public property. I believe it needs to be more detailed/specific.

Division Response: "Significant portion" is defined in 2.14. **No changes made.**

Comment (2): What happens if the charter authorizer forces a school to lease or sell property to a charter, and years later, the public school experiences an increase in enrollment that requires more space? Can that be addressed?

Division Response: The charter authorizer has no authority under Act 542. If a public school facility is identified by the Division as unused or underutilized, a public charter school may give notice of its intent to purchase or lease it (at which point the traditional public school district may appeal to the *Commission*). Act 542 does not authorize the type of reversion to which you refer (due to increased enrollment); a legislative change would be required. **No changes made.**

Comment (3): Why do we (public schools) have to advertise excess property exclusively to open enrollment charter schools for two years before we can sell it to a third party, but we are not given the same two year consideration with excess charter property? Along those lines, why are we (public schools) not offered "right of first refusal" on excess charter property that is in our zone prior to the charter school selling to another charter school first?

Division Response: A legislative change would be necessary to afford traditional public schools the same right to purchase or lease unused or underutilized public charter school property. Also, please note that Ark. Code Ann. § 6-22-816(d)(1) authorizes a traditional public school to petition the Division for a waiver of the two-year requirement. **No changes made.**

Comment (4): Why doesn't the charter school have to submit the same facilities report and all excess charter school property be placed on a list for public schools to purchase or lease (if this is somewhere in the law or rules, I didn't notice it)?

Division Response: Such a provision is not contained in the law, and thus a legislative change would be required.

Commenter Name: Lucas Harder, Arkansas School Boards Association (4/3/18).

Comment (1): Section 1.01. "Arkansas Code Ann." should be "Ark. Code Ann." to match the other Commission rules.

Division Response: Comment considered. **Non-substantive change made.**

Comment (2): Section 2.07. Activity is included twice.

Division Response: Comment considered. **Non-substantive change made.**

Comment (3): Section 2.08. "Arkansas Athletic Association" should be "Arkansas Activities Association."

Division Response: Comment considered. **Non-substantive change made.**

Comment (4): Section 2.09. I would recommend changing the definition to read something more along these lines to assist in legibility: "Fair market value" means the price a property would change hands between a buyer and seller if: 2.09.1 Neither party is under any compulsion either to buy or to sell; and 2.09.2 Both parties have reasonable knowledge of relevant facts concerning the state of the property in question.

Division Response: Comment considered. Proposed language limits scope of term "relevant facts." **No changes made.**

Comment (5): Section 2.12.1. I would recommend changing this from twelve (12) times during the school year to be less than ten (10) times during the school year. If the district only has use for the building once a month when students are present and generally doesn't use it during the summer months when school is not in session, then it is possible that the building may only be used from August through May for a total of ten (10) times instead of twelve.

Division Response: Comment considered. **Non-substantive change made.**

Comment (5): The Act prohibits the school district from entering into a covenant that prohibits that property from being sold/leased for a charter school; however, the Act is silent on how any reversionary interest is to be handled in the event the school district received the titled to the property in fee simple determinable or subject to a condition subsequent that was worded in such a way that any reversionary interest in the deed is triggered.

Division Response: Comment considered. Commenter is correct that Act did not provide guidance in this regard. Both parties to any transaction should consult with local counsel on a case-by-case basis.

Commenter Name: Harvie Nichols (4/27/18).

Comment (1): Section 2.08; I believe the correct term is Arkansas Activities Association. To my knowledge there is no Arkansas Athletic Association that sponsors student activities.

Division Response: Comment considered. **Non-substantive change made.**

Comment (2): Section 2.12. I must admit that the language here confused me. We are defining regular basis as used fewer than 12 or 90 times a year? Would that not mean that if used more than that many times annually the facility would not be used on a regular basis? Perhaps I am misreading the definition but the plan language seems to be contradictory with the normal expectation of what "regular basis" would be.

Division Response: Comment considered. **Non-substantive change made.**

Comment (3): Section 2.14. Does the definition take into account the overall needs of a district? While the attempt to define "significant portion" at 40% is well intended, it concerns me that the definition could create problems for some districts. For example, a district has two elementary schools. One is being used 100% for required purposes. However, the second elementary school is at 35% capacity because the district can't place all the students in the one elementary school, or as is often the case, the second elementary school is the result of a consolidation and those students are being educated at a remote location that is necessary because of negative impact of transportation time to the campus. This appears to be covered in Section 2.15.4.

Division Response: Comment considered. Commenter is correct that Section 2.15.4 addresses the situations set forth in Comment 3. **No changes made.**

Commenter Name: Mike Mertens, Arkansas Association of Educational Administrators (4/27/18).

Comment (1): Proposed change in Section 2.12.2: Add the word "no" right before the word "fewer" in this section. Rationale: Since this statement is part of the meaning for "regular basis," it appears that this change would make more sense than the existing word.

Division Response: Comment considered. **Non-substantive change made.**

Comment (2): Proposed change in Section 2.15.5: Add the "solely" right after the word "facility" in this section. Rationale: School districts may rent facilities such as auditoriums and gymnasiums. They also charge admission for athletic and other events. This generates revenue for districts. Districts should be allowed to do this periodically as deemed appropriate or necessary without affecting the status of the facility under these rules.

Division Response: Comment considered. **Non-substantive change made.**

Commenter Name: Tripp Walter, Arkansas Public School Resource Center; Gary Newton, Arkansas Learns (4/27/18).

Comment (1): The rules should be revised to add a definition for the term "irregularly or intermittently."

Division Response: Terms "irregularly" and "intermittently" are not contained in Act 542. Initial draft of rules used these terms, which were removed as a result of public comment. They were replaced in Section 2.12 by definition of "regular basis," which term is then used in Section 2.14 as part of the definition of "significant portion." **No changes made.**

Comment (2): Because the purpose of Act 542 of 2017 was to preserve and maximize the efficient use of public educational facilities for public educational purposes, the definition of "fair market value" in section 2.09 should be revised to recognize that the fair market value of a public school facility should be based on its value as a *public* facility intended to be used for *public* purposes, rather than by reference to the value of private facilities or private transactions.

Division Response: Comment considered. This same comment was made by Mark White of the Arkansas Public School Resource Center on 1/15/18 (see above, Division response to Comment (2)). **No changes made.**

Comment (3): The language in Section 2.14 should be revised to change the words "less than forty percent (40%) to "more than forty percent."

Division Response: See Response to Rebecca Miller-Rice Comment above. Language has been changed to read "at least forty percent (40%)." **Non-substantive change made.**

Comment (4): The proposed rules should be revised to add a definition of "underutilized" that incorporates specific thresholds of use by time and space, for determining when a facility is deemed to be underutilized. For example, "underutilized" could be defined to include any facility that meets one or more of the following conditions:

a. The facility has been leased to a third party for less than fair market value for more than twelve (12) consecutive months, unless the leased facility is used exclusively for public educational, academic, extracurricular, or administrative purposes, including without limitation pre-kindergarten or adult education; or

b. The combined public educational, academic, extracurricular, and administrative uses of the facility are insufficient to preserve the integrity or purpose of the public school facility or other real property as a public education facility.

Division Response: Comments considered. These same comments were made by Mark White of Arkansas Public School Resource Center on 1/15/18 (see above, Division responses to Comment 3, items (d) and (e)). **No changes made.**

Comment (5): The definition of "unused or underutilized public school facility" in section 2.15 should be revised to:

a. Indicate that storage is not a permissible educational, academic, or extracurricular purpose; and

b. Provide that a facility leased to a third party for less than fair market value is *per se* unused or underutilized unless the leased facility is used for a public educational, academic, extracurricular, or administrative purpose, including without limitation as a pre-kindergarten or adult education facility.

Division Response: Comments considered. Regarding (a), a substantially similar comment was made by Mark White of the Arkansas Public School Resource Center on 1/15/18 (*see* above, Division Response to Comment 4(a)). Regarding (b), the same comment was made by Mr. White on 1/15/18 (*see* above, Division Response to Comment 4(c)).

Comment (6): The language in Section 7.01 should be strengthened in accord with the following language: Every public school district has an implied obligation under existing law to secure, protect, and preserve the condition of its facilities. The proposed rules should make this obligation explicit, by requiring school districts to take reasonably necessary steps to secure, protect, and preserve the condition of any facility or other real property identified as unused or underutilized, and by prohibiting school districts from removing or disabling improvements, fixture, or systems so as to render the facility unusable as a public education facility.

Division Response: Comment considered. A substantially similar comment was made by Mark White of the Arkansas Public School Resource Center on 1/15/18 (*see above,* Division Response to Comment 6).

Third Public Comment Period

Commenter: Tripp Walter, Arkansas Public School Resource Center (8/22/18).

Comment (1): Remove the "Note" following Subsection 3.01.3.

Division Response (1): Comment considered. This was one of the changes proposed to the Commission by the APSRC during the Commission's July 31, 2018 meeting in which these rules were before the Commission for final approval. After much discussion, the Commission voted that one of APSRC's suggestions should be incorporated into the rules, which was added as Section 3.02.4. No changes made.

Comment (2): Add a new Section 3.02 to read as follows: "A public charter school may notify the Division at any time of a public school facility that is unused or underutilized."

Division Response (2): Comment considered. This was one of the changes proposed to the Commission by the APSRC during the Commission's July 31, 2018 meeting in which these rules were before the Commission for final approval. After much discussion, the Commission voted that one of APSRC's suggestions should be incorporated into the rules, which was added as Section 3.02.4. No changes made.

Comment (3): Add new Subsection 3.02.1 to read as follows: "A public school facility reported to the Division under Section 3.02 shall be reviewed and placed on the list within thirty (30) calendar days of the Division's receipt of the information, if the property meets the requirements of Section 2.15."

Division Response (3): Comment considered. This was one of the changes proposed to the Commission by the APSRC during the Commission's July 31, 2018 meeting in which these rules were before the Commission for final approval. After much discussion, the Commission voted that one of APSRC's suggestions should be incorporated into the rules, which was added as Section 3.02.4. No changes made.

Comment (4): Amend proposed Subsection 3.02.4 to read as follows: "If the Division was in possession of information prior to March 1 that showed a public school facility to be unused or underutilized, but failed to place the facility on the list, it shall place the facility on the list within ten (10) calendar days after the information is discovered."

Division Response (4): Comment considered. Proposed language is closely analogous to that currently contained in Section 3.02.3. Verb tense changed; "calendar" days changed to "working" days; current language clarifies that the ten days begins to run once the Division learns of the error.

Comment (5): Add new Subsection 3.02.3 to read as follows: "If a school district fails to provide information to the Division concerning an existing unused or underutilized public school facility by February 1, and the Division fails to place the facility on the list on or before March 1, the Division shall place the facility on the list within ten (10) calendar days after discovering or being notified of the existence of the facility."

Division Response (5): Comment considered. This was one of the changes proposed to the Commission by the APSRC during the Commission's July 31, 2018 meeting in which these rules were before the Commission for final approval. After much discussion, the Commission voted that one of APSRC's suggestions should be incorporated into the rules, which was added as Section 3.02.4. No changes made.