

## ADDENDUM

### SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF SEPTEMBER 20, 2011 THROUGH NOVEMBER 7, 2011.

Presenting Written Testimony:

Association of Regional Center Agencies (ARCA)  
San Gabriel/Pomona Regional Center (SG/PRC)  
Disability Rights California (Disability Rights CA)

#### **1. Comment regarding the Local Mandate and Fiscal Impact Determination (ISOR) submitted ARCA:**

##### **Summary of Comment:**

ARCA reiterates the mandate statements and then comments that the regulatory action is clearly a mandate on the twenty-one regional centers by requiring thousands of hours of staff time to find and establish FMS-PDS service providers; inform and assist over 18 thousand consumers in the conversion process; and convert existing services to the new system, ending with the comment that no funding has been provided to current regional center budgets.

##### **Response:**

The Local Mandate and Fiscal Impact Determination was prepared in accordance with the guidelines established in the State Administrative Manual (SAM), including section 6602 which provides the following definitions:

Local Agency: Any city, county, special district, authority, or other political subdivision of the state.

School District: Any school district, community college district, or county superintendent of schools.

State Agency: Every office, officer, department, division, bureau, board, council, or commission in state government. A "state agency" does not include an agency in the judicial or legislative branches of state government.

Title 17 (T17), California Code of Regulations (CCR), section 54302(a)(54) defines a regional center as a diagnostic, counseling, and service coordination center for developmentally disabled persons and their families which is established and operated pursuant to the Welfare and Institutions Code (WIC), sections 4620 through 4669, by a private nonprofit community agency or corporation acting as a contracting agency.

Based on the SAM guidelines above, a regional center does not fall within the parameters of the Local Mandate and Fiscal Impact Determination.

**2. Comment regarding the feasibility of the October 1, 2011 implementation date submitted by ARCA:**

**Summary of Comment:**

ARCA submits that the workload associated with conversion to the new FMS-PD system is too heavy to allow implementation by the stated date of October 1, 2011.

**Response:**

The October 1, 2011, deadline was consistent with the date set in the Department's Home and Community-Based Services Waiver Application.

**3. Comment with suggestion for editing with additional wording Section 54355(i) submitted by Disability Rights CA:**

**Summary of Comment:**

ARCA states that 54355(i) is not clear that the option and choice remains with the adult consumer and/or family members to choose between these options and it appears some regional centers are placing families into models that were not of their choosing and suggests an amendment for clarification.

**Response:**

The intent of this new regulation is consistent with WIC, section 4648.12(c)(1)(B): Adopt emergency regulations to meet federal requirements applicable to vouchered services. This proposed amendment would change the intent of WIC section 4648 (a)(4) and pre-existing regulations:

Title 17, CCR, section 54355(a) which states in part: "A regional center may offer vouchers to family members..."

Title 17, CCR, section 54300 which states: "Use of the word "shall" denotes mandatory conduct; "may" denotes permissive conduct; and "should" denotes recommended conduct."

**4. Comment with suggestion for editing with additional wording Section 58884(a)(3) submitted by Disability Rights CA. Suggestion would modify definition of "Employer" by adding hiring and authorities to hire and terminate employees:**

**Summary of Comment:**

This section defines "Employer" but fails to specify the right to terminate employees. Two rights of an adult consumer or family member as an Employer are the independent authority to both hire and terminate employees. This section also fails to mention this authority rests solely with the employer.

**Response:**

Pursuant to the section 58886(d)(1) this is already stated: "(d) The Employer or Co-Employer has the following additional responsibilities:

(1) The adult consumer or family member in the capacity as an Employer pursuant to (b)(3)(A) above has independent authority to:

- (A) Hire workers; and
- (B) Terminate workers.”

**5. Comment with suggestion for editing with additional wording Section 58884(a)(4) submitted by Disability Rights CA. Suggestion would modify definition of “Co-Employer” by adding duties and responsibilities to the service:**

**Summary of Comment:**

This section does not accurately capture the duties and responsibilities of the FMS Co-Employer which go beyond assisting in hiring and paying employees, and include collecting and processing timesheets, verifying worker eligibility, processing payroll, and withholding payment of taxes and suggests an amendment.

**Response:**

As noted by the comment, these duties and responsibilities are already listed as service components in section 58887(a) & (c).

**6. Comment with suggestion for editing with additional wording Section 58884(a)(5) submitted by Disability Rights CA. Suggestion would modify definition of Financial Management Service Fiscal/Employer Agent (FMS F/EA):**

**Summary of Comment:**

This subsection does not fully capture services and supports that the FMS F/EA can provide and suggests an amendment to correct this.

**Response:**

As noted by the comment, these duties and responsibilities are already listed as service components in Title 17, CCR, 58887(a)&(b).

**7. Comment with questions regarding duties of “managing employee” submitted by SG/PRC:**

**Summary of Comment:**

What does “managing the employee mean? Do they have to follow disciplinary action regarding employees and keep records about those activities?

**Response:**

The functions of managing the employee are outlined in Title 17, CCR, section 58886 and include:

- Recruits workers
- Verifies worker qualifications
- Specifies additional worker qualifications based on consumer needs and preferences
- Determines worker duties
- Schedules workers
- Orients and instructs workers in duties
- Supervises workers
- Evaluates worker performance

- Verifies time worked by employees and approves time sheets
- Makes recommendations to the FMS Co-Employer for hiring and terminating workers

**8. Comment with suggestions for editing that would change requirement in section 58886(a) submitted by Disability Rights CA:**

**Summary of Comment:**

This subsection appears to give sole discretion to the regional center on whether to offer this service to adult consumers or family members and may inadvertently prevent individuals who are interested from participating which is inconsistent with the Lanterman Action. This subsection also appears to have not provided adult consumers and/or family members with the options of FMS F/EA and FMS Co-Employer and Disability Rights goes on to suggest amendment

**Response:**

As previously mentioned, the intent of this new regulation is consistent with WIC, section 4648.12(c)(1)(B): Adopt emergency regulations to meet federal requirements applicable to vouchered services. (See response #3).

**9. Comments (consolidated) and suggestions regarding consumer and family vendorization pursuant to section 58886(b)(4) submitted by ARCA and SG/PRC:**

**Summary of Comment:**

ARCA summarizes that this subsection is duplicative and unnecessary in that all required consumer/family information related to participation can be included in the IPP and the consumer file and recommends deletion of this subsection. SGPRC submits that consumer and family vendorization sets up a conflict of interest for the system and expresses general confusion over how the subsection is worded.

**Response:**

The intent of this new regulation is within the statutory authority of WIC, section 4648.12(c)(1)(B) and maintains the implementation of existing regulations in Title 17, CCR, section 54355, in which families will continue to have responsibilities as vendored entities and the vendorization of family members will provide regional centers with a mechanism for ensuring compliance with State and federal labor laws and regulations.

**10. Comment regarding editing subsection 58886(c) to change role of FMS roles submitted by Disability Rights CA :**

**Summary of Comment:**

Disability Rights suggests there is a lack of clarity in that it appears that individuals and/or family members may be responsible for the listed duties without clarifying that they do so with the assistance and support of the FMS F/EA or FMS Co-Employer and goes on to suggest an amendment.

**Response:**

The level of assistance and support given is inherent in the business model of FMS providers, and should be agreed upon as part of the vendorization process with the

regional center service. Once vendored, an FMS provider offers its services as it defines those services in the approved program design.

**11. Comment regarding payment for training and suggested editing subsection 58886(e)(3) submitted by Disability Rights CA :**

**Summary of Comment:**

Disability Rights suggests there is a clarity problem with who pays for first aid and CPR training and suggests an amendment.

**Response:**

The Department maintains that the proposed section is consistent with the statutory authority of WIC, section 4648.12(c)(1)(B) and with the current voucher regulations pursuant to Title 17, CCR, subsection 54355(g)(4)(C)1.b.

**12. Comment regarding sufficiency of rates pursuant to section 58886(f)(5) submitted by ARCA:**

**Summary of Comment:**

ARCA submits that as currently structured, rates would need to be adjusted to cover the cost of meeting labor and tax laws.

**Response:**

The requirement for vendors to meet costs of payroll is not a new provision and is present in the existing voucher regulations T17, CCR, section 54355(b):

“The regional center shall provide prospective voucher recipients with information to assist them in determining liabilities they may incur by participating in a voucher program. Information provided shall include, but need not be limited to:

- (1) Identification of the following areas of potential impact:
  - (A) Impact of vouchers on Supplemental Security Income (SSI) and/or other benefits;
  - (B) Voucher recipient's status as an employer and employer responsibilities;
  - (C) Impact of vouchers on personal taxes;
  - (D) Potential increase in insurance needs; and
  - (E) Voucher recipient's responsibility for worker's compensation; and
  - (F) Voucher recipient's responsibility to withhold and pay the appropriate Federal, State and local taxes; and
- (2) Identification of the appropriate agency(ies), including the Internal Revenue Service and the Employment Development Department, which the voucher recipient may contact to obtain information and/or technical assistance regarding the areas of potential impact specified in (1)(A) through (F) above.”

The respite voucher rate of \$10.71 per hour which was implemented in 2007, upon passage of Assembly Bill (AB) 1835, was calculated to meet federal and State wage requirements including a State minimum wage of \$8.00 per hour and mandated employer costs. The State minimum wage has not changed since the enactment of AB 1835.

Including the current statutory 1.25% payment reduction, there are currently vendored FMS providers that are able to compensate employees with a rates of approximately \$8.35 per hour which meets the State minimum wage requirement of \$8.00 per hour.

**13. Comment regarding the setting of wage, benefits and wage settlements and suggested edits to Subsection 58887(a) submitted by Disability Rights CA:**

**Summary of Comment:**

Disability Rights suggests there is a lack of clarity in assisting an adult consumer or family member with the setting of wages and benefits and wage settlements and suggests an amendment.

**Response:**

As previously mentioned, the respite voucher rate of \$10.71 per hour was implemented in 2007, upon passage of AB 1835, calculated to meet federal and State wage requirements, including a State minimum wage of \$8.00 per hour, and mandated employer costs. The minimum wage has not changed since the enactment. These are the factors that determined the wage paid to the employee. Wage settlements are determined by Labor Code requirements. Some rates used as reimbursements may not be applicable to wage settlements such the IRS mileage reimbursement for Transportation.

**14. Comment with regulation interpretation on the definition of vendorization (Section 54302) and general requirements of vendors and regional centers (Section 54326) submitted by SG/PRC:**

**Summary of Comment:**

By using the term “vendor” and “vendorization” for participant-directed service family members, or consumers, those individuals potentially become responsible for maintaining records and documents that would otherwise be required by all vendors.

**Response:**

These observational remarks are interpretive of existing regulation and do no comment on the proposed section 58888. However as outlined in this section, vendorization of family members allows for the identifying of expenditures in that the vendored family/consumer and the FMS provider are linked by the consumer’s identifying number. Additionally, as a vendored entity, family members/consumers have responsibility for source documentation that serves as verification of the units of service to be billed. This documentation is received by the FMS vendor for billing purposes. Without the vendorization of families/consumers, there would be no regulatory authority for this process. The requirement to verify units of service with source documentation is the

responsibility of the vendors pursuant to T17, CCR, section 54326(a), and without this documentation, the FMS vendor would not have any means to verify its regional center billing.

Vendorization of family members will provide regional centers with a mechanism for ensuring compliance with State and federal labor laws and regulations. The Department contends that Title 17, CCR, section 54310 does not require the vendored family member or consumer to be the specific vendored entity that submits the bill.

**15. Comment regarding the regional center payment system is set up with the service code of the service provider for purposes of payment, assignment of service codes, and regional center payments submitted by SG/PRC:**

**Summary of Comment:**

The FMS is not set up with a service code that corresponds to the respite, day care, nursing or transportation service. Apparently, the regional centers are to assign a service code or subcode that by definition must be a family member or consumer.

**Response:**

The provisions in Title 17, CCR, section 58888(c) have been successfully implemented at most regional centers in which the purchase of service contains not only the FMS service fee, but also lists the rates for individual vouchered services directly on the purchase of service.

**16. Comment with suggestion for editing Section 58888 to add new subsection(b) regarding distinct FMS payment rate submitted by Disability Rights CA:**

**Summary of Comment:**

Disability Rights submits that it is not clear that the cost of FMS services are not to be included as part of the rate of payment for other services and suggests an amendment.

**Response:**

The Department maintains that the vouchered services described in Title 17, CCR, section 58888(a) have a set rate with established parameters in WIC and current regulation and is consistent with existing regulation. Each service code is assigned a rate pursuant to this section. Statute set forth in WIC, section 4688.21(c)(7) establishes a new distinct service description to be implemented in these proposed regulations, and was not a pre-established vouchered service.

**17. Comment regarding the assignment of service codes in section 58888(c) to the FMS submitted by SG/PRC:**

**Summary of Comment:**

58888 describes rates to be assigned to service codes 455, 460, 465, 470 and 475 however payment to the family member vendor or consumer vendor is prohibited through the intent of these regulations.

**Response:**

The wording in Title 17, CCR, section 58888(c) was developed in conjunction with comments received from regional center administrators during the development of the proposed emergency regulations. Consistent with the requirements for federal billing, the regional center would write an authorization for the FMS services including applicable Participant-Directed Services. The authorization would name the FMS entity as the vendor for each service and include the applicable service code for the Participant-Directed Service(s), including the rate and total dollar amount authorized for each service. Technical assistance about how to set up authorizations utilizing the service codes can be obtained from the Department's Regional Center Technology Support Section (RCTSS) Help Desk.

**18. Comment regarding prohibiting regional center payments to families or consumers submitted by SG/PRC:**

**Summary of Comment:**

58888 describes rates to be assigned to service codes 455, 460, 465, 470 and 475 however payment to the family member vendor or consumer vendor is prohibited through the intent of these regulations.

**Response:**

These observational remarks do not directly comment on the proposed section 58888. However, the rates proscribed in Title 17, CCR, section 58888 are for the services described in section 58886 and do not imply payment to families.

**19. Comments (consolidated) regarding linking consumers to the purchase of service for FMS submitted by SG/PRC:**

**Summary of Comment:**

There is no mechanism to link the FMS service vendor to the family member/consumer "vendor" for whom it is intended. It appears that a participant0directed service vendor is required to be in place so that an FMS can be set up but how can one determine that through the POS system?

**Response:**

The Participant-Directed Services for which the family member is vendored and the FMS vendor are linked by UCI number. Pursuant to T17, CCR, section 58888(c) the regional center shall name the FMS Co-Employer -- Service Code 491, and/or the FMS F/EA -- Service Code 490, as the vendor of record for the purchase of service authorizations of the Participant-Directed Services identified in the consumer's IPP. The Department has received feedback from regional centers that this system is working.

**20. Comments (consolidated) regarding linking the the FMS service codes to the services submitted by SG/PRC:**

**Summary of Comment:**



It is important to link the 455-475 service code vendors to the FMS vendor because the regional center needs to know if the family is the employer vs. the co-employer to justify the use of the 490 vs. the 491 FMS.

**Response:**

These observational remarks do not directly comment on the proposed section 58888. The link between Participant-Directed Services and the FMS, as described in Title 17, CCR, sections 58886 and 58887, is based on the employment functions, not necessarily the service type. For example, respite services require a payroll function, so either type of FMS could be utilized, depending on the vendored service available.

**21. Comments regarding regional centers knowledge of the employment relationship of vendored families and applicable service codes submitted by SG/PRC:**

**Summary of Comment:**

If the family member/consumer is the employer, the regional center should be assuring that the family member/consumer has the proof that the employee has the legal right to work in the US and has the administrative skills to implement the provisions of these regulations yet how are regional centers supposed to differentiate between participant-directed vendors who are employers vs. co-employers? The regulations as written do not provide any support to the regional centers in tracking the differences in the “participants” responsibilities.

**Response:**

As with the current voucher services described in Title 17, CCR, section 54355, the regional center should ensure that participating family members, or consumers, are willing and capable of complying with applicable federal and State employment law, tax requirements, and labor code before and after vendorization. The proposed regulations do not change this requirement.

Title 17, CCR, section 58887 provides for service components and service codes for the two distinct FMS services. Payroll services may be handled with either FMS Co-Employer or FMS F/EA as described in Title 17, CCR, sections 58884, 58886, and 58887.

**22. Comment regarding IRS rulemaking submitted by SG/PRC :**

**Summary of Comment:**

The proposed regulations appear to be in conflict with IRS Section 3504.

**Response:**

The provisions of the proposed rulemaking in IRS REG - 137036-08 for Section 3504 Agent Employment Tax Liability are to modify the existing regulations under section 3504 to be consistent with the organizational structure of the IRS and to update the citation to the Internal Revenue Code of 1986. The provisions of section 3504, as referenced in the proposed T17, CCR, section 58887(b)(1)(a) are in effect and applicable.

**23. Comment regarding responsibility for mandated employer costs submitted by SG/PRC:**

**Summary of Comment:**

A number of regional centers are very unclear about who has responsibility for employer taxes and workers' compensation.

**Response:**

Pursuant to the provisions of WIC, section 4690.2, the Department established the voucher respite rate of \$10.71 per hour. This rate was implemented in 2007, upon passage of Assembly Bill 1835, and was calculated to meet federal and State wage requirements including the State minimum wage of \$8.00 per hour and mandated employer costs such as employer taxes and workers compensation. This is consistent with existing voucher regulations.

Pursuant to WIC, section 4688.21(c), the vouchered day service rate of \$13.47 per hour includes mandated employer related costs and is not part of the FMS fee.

Pursuant to Title 17, CCR, section 58887(a)(3), the FMS F/EA and the FMS Co-Employer to process payroll, withholding, filing and payment of applicable federal, state and local employment related taxes and insurance for authorized Participant-Directed Services.

**24. Comment regarding attracting providers due to 4.25% payment discount submitted by SG/PRC:**

**Summary of Comment:**

What is the regional center supposed to do if they can't attract an FMS to do the service for the rate indicated, especially because the 4.25% discount have to be applied?

**Response:**

The current payment discount is 1.25%. Regional centers have secured a number of FMS vendors and providers. These vendors, now placed on the Statewide Vendor Panel, may be utilized.

**25. Comment on "zero authorizations for family members submitted by SG/PRC: Summary of Comment:**

If the family member/consumer has to be vendored, does the regional center have to set up a "zero authorization" for that service, ie, how can there be assurances that the family member vendor does not get paid with this arrangement?

**Response:**

There are no provisions in the proposed regulations that indicate the need to establish a purchase of service authorization for a vendored family member or consumer. As stated in Title 17, CCR, section 58888(c) “the regional center shall name the FMS Co-Employer -- Service Code 491, and/or the FMS F/EA -- Service Code 490, as the vendor of record for the purchase of service authorizations for the Participant-Directed Services identified in the consumer’s IPP.” This effectively prohibits a family vendor member from being paid. The authorization shall name the FMS provider as the vendor for the Participant-Directed Services (response to SG/PRC comment on page 16).

There are no provisions in the proposed regulations that indicate the need to establish a purchase of service authorization for a vendored family member or consumer.

**26. Comment with question regarding type of FMS service for adult day service submitted by SG/PRC:**

**Summary of Comment:**

Is there an unspoken expectation that the one type of FMS would be used for the new adult day service rather than the other FMS service?

**Response:**

This observational remark makes no comment on the amendments notated by ~~strikeout~~/underline. However, the parameters for the adult day service are provided by WIC, section 4688.21(c).

**27. Comments with questions related to FMS billing and corresponding services submitted by SG/PRC:**

**Summary of Comment:**

Could the FMS provider bill for months when the participant-directed services are not being utilized? Technically, the FMS providers are still monitoring the case and the rate is not direct services but management.

**Response:**

This observational remark makes no comment on the amendments notated by ~~strikeout~~/underline. Once the FMS provider begins any of the functions of an FMS provider as described in §58887, the FMS service has begun. The FMS provider is paid for this ongoing service, as stated in the purchase of service authorization.

**SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF OCTOBER 26, 2011 THROUGH DECEMBER 3, 2011**

Presenting Written Testimony:

Association of Regional Center Agencies (ARCA)  
Developmental Disabilities Area Board 10

**1. Comment regarding the Local Mandate and Fiscal Impact Determination (ISOR) submitted ARCA:**

**Summary of Comment:**

ARCA reiterates the mandate statements and then comments that the regulatory action is clearly a mandate on the twenty-one regional centers by requiring thousands of hours of staff time to find and establish FMS-PDS service providers; inform and assist over 18 thousand consumers in the conversion process; and convert existing services to the new system, ending with the comment that no funding has been provided to current regional center budgets.

**Response:**

The Local Mandate and Fiscal Impact Determination was prepared in accordance with the guidelines established in the State Administrative Manual (SAM), including section 6602 which provides the following definitions:

Local Agency: Any city, county, special district, authority, or other political subdivision of the state.

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Title 17 (T17), California Code of Regulations (CCR), section 54302(a)(54) defines a regional center as a diagnostic, counseling, and service coordination center for developmentally disabled persons and their families which is established and operated pursuant to the Welfare and Institutions Code (WIC), sections 4620 through 4669, by a private nonprofit community agency or corporation acting as a contracting agency.

Based on the SAM guidelines above, a regional center does not fall within the parameters of the Local Mandate and Fiscal Impact Determination.

**2. Comment regarding consumer and family vendorization pursuant to section 58886(b)(4) submitted by ARCA:**

**Summary of Comment:**

ARCA summarizes that this subsection is duplicative and unnecessary in that all required consumer/family information related to participation can be included in the IPP and the consumer file and recommends deletion of this subsection.

**Response:**

This comment was submitted in the previous notice period (See page 7 for comment and response) The intent of this new regulation is within the statutory authority of WIC, section 4648.12(c)(1)(B) and maintains the implementation of existing regulations in Title 17, CCR, section 54355, in which families will continue to have responsibilities as vendored entities and the vendorization of family members will provide regional centers with a mechanism for ensuring compliance with State and federal labor laws and regulations.

**3. Comment regarding vendoring family member to also be the direct nursing service worker pursuant to section 58886(e)(2) submitted by ARCA:**

**Summary of Comment:**

ARCA also suggests that allowing the employer/vendor to also be the employee/worker presents a conflict of interest per IRS standards.

**Response:**

Department staff are unaware of any specific IRS prohibition against family member reimbursements for the provision of direct nursing services. Under the effective emergency regulations, there are FMS vendors providing for family reimbursements.

**4. Comments regarding utilizing the existing voucher rate structure for the Participant-Directed Services submitted by ARCA:**

**Summary of Comments:**

ARCA submits that the current rates are not sufficient to cover the costs of wages, taxes, and insurances and does not take into account the varying city/county minimum wages around the state.

**Response:**

The requirement for vendors to meet costs of payroll is not a new provision and is present in the existing voucher regulations T17, CCR, section 54355(b). Additionally, the Legislature has not specifically appropriated funds for rate increases for family member provided respite.

**5. Comment regarding the sufficiency of the FMS provider rate submitted by Area Board 10:**

**Summary of Comment:**

The rates of payment for a financial management service are too low and may cause difficulty for families to obtain such services.

**Response:**

Under the effective emergency regulations, the rates have been sufficient to interest 28 entities to be vendored as one or both types of FMS providers.