

FINAL INITIAL STATEMENT OF REASONS

Title 17, California Code of Regulations Division 2, Department of Developmental Services Chapter 3 - Community Services

Description of the Public Problem, Administrative Requirement or Other Condition or Circumstance the Regulations are Intended to Address

Currently, the Department offers voucher services to consumers and/or to their families. The federal government is requiring the use of a financial management service (FMS) provider when participating in the funding of voucher services. These voucher services, along with the new Community-based Training Program for Adults, will be known as Participant-Directed Services.

The Department proposes to amend sections 50604, 54355, 58543 of Title 17, California Code of Regulations (CCR) and add new sections 58884, 58886, 58887, and 58888 in order to give regional centers authority to vendor family members and consumers for Participant-Directed Services.

The adoption of these regulations are necessary in order for the State to continue to receive federal financial participation funding through the Home and Community-Based Services (HCBS) Waiver and to receive funds for the 1915(i) State Plan Amendment.

Specific Purpose and Rationale for Necessity

Section 50604. Service Provider Record Maintenance Requirements.

Section 50604(d)(3)(E) as amended

Specific Purpose

This proposal will add the Participant-Directed Services as a type of vendored service required to maintain records pursuant to the current regulations.

Rationale for Necessity

This amendment is necessary to ensure record maintenance requirements for vendors of voucher services are applied to the proposed Participant-Directed Services.

Section 54355. Vouchers.

Section 54355(i)

Specific Purpose

This proposal will amend the current section to add new subsection (i) which requires regional centers to vendor consumers and/or family members receiving voucher services funded with federal financial participation (Medicaid) as Employers or Co-Employers in conjunction with an FMS Fiscal/Employer Agent (F/EA) or FMS Co-Employer, effective October 1, 2011, or use another vendored service provider.

Rationale for Necessity

This amendment is necessary to comply with the federal requirements of the HCBS Waiver, in which participants in self-directed services such as vouchers, must be linked with a financial management services provider for payroll and reimbursements.

Section 58543. Standard Rate Schedule.

Section 58543(a) as amended

Specific Purpose

This proposal amends the current section to add Participant-Directed Services - Transportation to be an applicable service for the Standard rate schedule.

Rationale for Necessity

This amendment is needed in order to include the Participant-Directed Services - Transportation, the new service code, and align it with the rate-setting methodology currently applicable to voucher Transportation service.

Section 58884. Definitions.

Specific Purpose

This proposal of new section 58884, under subsection (a), adds new definitions for the "Participant-Directed Services" that will be utilized in the proposed sections that follow, such as "Employer" and "Co-Employer." The definitions correlate the "Financial Management Service "Co-Employer" to the "Co-Employer," and the Financial Management Service Fiscal/Agent" to the "Employer." Subsection (b) reinstates definitions currently existing within CCR, Title 17, as applicable to this section.

Rationale for Necessity

This section is needed to enhance the common meanings of these words in order to associate the participant's status as an employer (Co-Employer or Employer) with the appropriate type of Financial Management Service (Co-Employer or Fiscal/Agent).

Section 58886. General Requirements for Participant-Directed Services

Specific Purpose

This proposal of new section 58886 allows for regional centers to offer the Participant-Directed Services (subsection (a)). Subsections (b), (c), and (d) describe the general requirements for participants that may be vendored as "Employers" and "Co-Employers" and will describe the voucher services to be available as Participant-Directed Services and their relationship to the type of FMS. Subsection (e) proposes service descriptions that are consistent with the service descriptions for the existing voucher services designated in section 54355 of Title 17. The new voucher service of Community-Based Training for Adults is also described. Sub-section (f) allows for the "grandfathering in" of existing participants vendored for voucher services to the new Participant-Directed Services on September 30, 2011.

Rationale for Necessity

This section is needed to include basic guidelines and requirements for participants that may be vendored as Employers or Co-Employers and also delineates specific requirements specific to the corresponding FMS. It transitions the current voucher services to new service codes needed to associate the services with federal funding. And it further links the vendored Employer or Co-Employer to the appropriate type of FMS provider.

Section 58887. Service Components for Participant-Directed Services

Specific Purpose

This proposal of Section 58887 (a) outlines general requirements for the FMS F/EA and FMS Co-Employer. Subsection (b) provides service components, responsibilities, and service codes specific to the FMS F/EA and subsection (c) for the FMS Co-Employer. Additionally, this section links the two types of FMS providers to the two types of employment relationships as defined in the preceding section 58886.

Rationale for Necessity

This section is needed to include basic guidelines and requirements for vendors of FMS Co-Employer and FMS F/EA, including descriptions of the duties, related new service codes for FMS vendors, the FMS F/EA and FMS Co-Employer, and basic payment parameters.

Section 58888. General Provisions for Rate-Setting and Reimbursements

Specific Purpose

This proposal of new section 58888 subsection (a) provides the basic provisions for rate-setting and reimbursements for the new Participant-Directed Services, and assign their new service codes. Subsection (b) provides rate-setting provisions and service codes for FMS F/EA and FMS Co-Employer Service Codes. Subsection (c) instructs the regional center on the assignment of service codes to the authorizations.

Rationale for Necessity

This section is needed to extend the general provisions for rate-setting and reimbursements for voucher services to the proposed Participant-Directed Services and the FMS Co-Employer and FMS F/EA, including rates for the new service code 475. Also, the proposed section establishes a mechanism for directing related reimbursements through the FMS vendors by means of purchase of service authorization.

BENEFITS OF THE REGULATION

California residents with developmental services benefit from the preservation of federal funding of their services that help maintain these persons in community settings in lieu of institutionalization. The proposal provides additional protections for families and consumers by providing assistance with meeting employment law and payroll tax requirements. Additionally, the proposed changes will provide opportunities to families and consumers by allowing them to customize day services in order to meet their individualized needs; have opportunities to further the development or maintenance of employment and volunteer activities; direct their day services; and increase their ability to lead integrated and inclusive lives.

IMPACT OF REGULATORY ACTIONS

The proposed changes are necessary for the preservation of federal funding for current services, and therefore the prevention of adverse economic impacts. Relying upon the Economic Impact Analysis Document/Report, the proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The proposed regulations provide requirements to 21 non-profit regional centers under contract with the Department, however, these non-profits are not considered "small businesses" as defined in Government Code Section 11342.610 (b)(6).

There is no significant impact on the creation or elimination of jobs within the state, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses in California.

CONSIDERATION OF ALTERNATIVES

The Department has determined that the only alternative would be not to pursue this regulation adoption. This alternative is not reasonable given that continuance of federal funds for voucher services is contingent upon the utilization of FMS. The Centers for Medicare & Medicaid Services (CMS) sets requirements in order for the Department to receive funding and this regulation will implement federal requirements in order to receive federal matching funds. Pursuant to CMS's "Instructions, Technical Guide and Review Criteria" used for the State's HCBS Waiver, the use of an FMS is required when providing services under the HCBS Waiver program.

There has been no reasonable alternative to the regulatory proposal that would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

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:

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:

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:

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:

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:

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):

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:

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:

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:

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 :

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 :

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:

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:

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:

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:

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:

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:

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:

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:

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:

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:

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 :

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:

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:

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:

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:

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:

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:

Response:

This comment was submitted by ARCA in the previous notice period. Based on the SAM guidelines (see page 5 for previous response), 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:

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:

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:

Response:

Similar comments were submitted in the previous notice period (see pages 8-9 for previous comments and responses). 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:

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.