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*California's protection and advocacy system*

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## MEMORANDUM

TO: All Interested Individuals

FROM: Disability Rights California

RE: Financial Management Services/Participant-Directed Services

DATE: December 7, 2011

**1. What is the historical background regarding the introduction of Financial Management Services and Participant Directed Services to the service delivery system for consumers of regional centers in California?**

Historically, consumers of regional centers could receive day care, nursing, respite, and transportation services in one of two ways. The consumer or family member could receive the services from a provider who was vendorized and paid directly by the regional center to provide these services to its consumer. In the alternative, the consumer or family member could receive a voucher from the regional center for these services and purchase them from a provider.

The latter means of obtaining these services is being replaced with Participant-Directed Services (PDS). Cal. Welf. & Inst. Code Sec. 4648.12(c)(1)(B); Title 17 Cal. Code Regs. Sections 54355(i)(1) and 58883-58888. The PDS are day care, nursing, respite, and transportation, and, as of June 2011, community-based training services [W&I Code 4688.21(a)]. 17 Cal. Code Regs. Sections 58884(a)(1) and 58886(a). PDS is more than a list of services. PDS also involves consumers or family members exercising a degree of decision-making

authority over these services. 17 Cal. Code Regs. Sec. 58884(a)(1). That authority includes, among other things, recruitment of providers, determining their duties and schedules, supervising and evaluating them, and, in some cases, hiring and firing service providers. 17 Cal. Code Regs. Sec. 58886(c) and (d). However, PDS also requires the consumer or family member to be vended for the PDS program and to use a Financial Management Services (FMS) provider in the process of obtaining and/or managing these services. 17 Cal. Code Regs. Sections 54355(i)(1) and 58886(b)(3)(A)&(B) and (e)(1)-(5).

Under the PDS system, consumers of these services must engage one of two FMS entities. 17 Cal. Code Regs. Sec. 58886(b). The FMS entities will be vendorized by the regional center primarily to handle payroll and accounting responsibilities, including tax and insurance withholdings and payments, and reimbursements. One of the two entities will also participate in the hiring and firing of service providers.

## **2. Why was this change in state law and regional center practice made?**

Some regional center consumers are on the Medicaid (Medi-Cal) Home and Community Based Services-Developmental Disabilities (DD) Waiver. If you don't know whether you are on the DD waiver, look to see if your IPP says, "waiver" at the top, or ask your regional center. The waiver is often called the "DD waiver" or "regional center waiver" or "HCBS waiver." Some regional center consumers receive some or all of the services in their IPPs through the DD waiver. This allows California to receive federal funds to help pay for those services. The five PDS services listed above can be paid for through the DD waiver. The federal government does not permit DD waiver funds to be paid directly to recipients of the services or their families as occurs in the voucher alternative described above. If an FMS is used in the process of obtaining these services, however, federal funds may be accessed to finance these services while still allowing for some degree of consumer or family-member-directed provider control.<sup>1</sup>

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<sup>1</sup> It is Disability Rights California's understanding that the need for FMS services may be extended beyond DD waiver services in the future. For example, the proposed 1915(i) State Plan Amendment, if approved, may extend the requirements for FMS services.

The Legislature enacted Senate Bill 74 to conform California law to federal requirements and to require the utilization of FMS entities. Cal. Welf. & Inst. Code Sec. 4648.12.

### **3. What is the basic substance of Senate Bill 74 and its implementing regulations?**

Senate Bill 74 required (at W&I Code Sec. 4648.12(c)(1)(B)) that the Department of Developmental Services (DDS) adopt emergency regulations to conform state practice to federal rules concerning the prohibition on vouchered service payments being made directly from recipients to providers and to require the use of FMSs in the provision of these services.

DDS adopted emergency regulations which became effective August 29, 2011. The regulations provide that, beginning on October 1, 2011, when these services are funded with federal Medicaid funds, regional center consumers and family members must either: receive the services from a vendored provider who is paid directly by the regional center, or become vendored to act as either an employer or co-employer of the service provider, together with either an FMS Fiscal/Employer Agent (FMS F/EA) or FMS Co-Employer (FMS CE), respectively, which handles the payroll, tax withholding, reimbursement, and other responsibilities that are part of employing the service provider. 17 Cal. Code Regs. Sections 54355(i)(1) and 58886(a)&(b).

### **4. What is not changing for consumers of the regional centers and their families regarding these services?**

Nothing is changing for consumers and families who receive these services from vendors of the regional centers who are paid directly by the regional center. 17 Cal. Code Regs. Sec. 54355(i)(2).

Even for consumers and families who do not use regional center vendors, the regional centers will continue to issue purchase of service authorizations which identify the type and amount of service needed by the consumer or family and authorized by the regional center.

Vouchered consumers or family members who are already vendored to secure day care, respite, nursing, or transportation services will not

need to be re-vendorized if they elect to become the employer or co-employer of a service provider under the new system. 17 Cal. Code Regs. Sec. 58886(f).

**5. How does the role of the regional center consumer or family member change under the new system?**

Consumers and families who do not use vendors who are paid directly by the regional center must choose whether they wish to be the “employer” or “co-employer” of the service provider. 17 Cal. Code Regs. Sec. 58886(b).

As the employer, the consumer or family member hires and fires providers and is the sole employer of the provider. 17 Cal. Code Regs. Sec. 58886(c)&(d). As the employer, the consumer or family member must engage the services of a FMS Fiscal/Employer Agent (FMS F/EA) to handle the payroll, withholding, reimbursement and other administrative duties concerning the provider. 17 Cal. Code Regs. Sec. 58886(b)(3)(B).

As the co-employer, the consumer or family member makes recommendations to a FMS Co-Employer (FMS CE) regarding the hiring and firing of providers and the two share this responsibility. 17 Cal. Code Regs. Sec. 58886(d)(2). The FMS CE handles the provider payroll, withholding and other administrative responsibilities. 17 Cal. Code Regs. Sec. 58887(a).

**6. What responsibilities in relation to the service providers does a consumer or family member have whether he/she is the sole employer or a co-employer?**

Whether the consumer or family member is the employer or a co-employer, he/she must recruit providers, verify their qualifications, determine their duties and schedules, orient and train them, supervise them, evaluate their performance, and verify their time worked. 17 Cal. Code Regs. Sec. 58886(c).

**7. What must the regional center do in helping consumers and families transition to the new system, and what other**

**responsibilities does the regional center have in the new system?**

The regional center must explain to the consumer and family the requirement to engage an FMS F/EA and FMS CE and the differences between becoming an employer and a co-employer. The regional center must assist the consumer and family in identifying and choosing an FMS F/EA or FMS CE. The regional center must vendorize the consumer or family member to act as the employer or co-employer for purposes of obtaining these services. The regional center must also vendorize FMS F/EAs and FMS CEs to provide the services which those entities must be capable of providing. 17 Cal. Code Regs. Sections 58886(b)(e) & (f) and 58887(a).

**8. What, specifically, must the FMS F/EA and FMS CE be capable of doing for the consumer and family member employer or co-employer?**

Both of these entities must:

- collect and process timesheets,
- assist the consumer or family member in verifying a provider's eligibility for employment,
- process payroll, withholding, filing and payment of federal, state, and local taxes and insurance,
- prepare monthly expenditure reports for the employer or co-employer and regional center,
- maintain all records related to services and reimbursements,
- maintain a separate accounting of funds used for each regional center consumer it is serving, and
- make sure that payments to providers do not exceed authorized rates.

17 Cal. Code Regs. Sec. 58887(a).

In addition, FMS F/EAs must: get IRS approval to act as the agent for the consumer or family member, pay upfront all federal, state and local taxes and insurance which are due until it receives IRS approval to act as agent for the consumer or family member, and process payment for reimbursements to entities providing goods and services. 17 Cal. Code Regs. Sec. 58887(b).

The FMS CEs must also be capable of assisting the consumer or family member in hiring providers and must perform any other employer-related supports that are specified in the consumer's IPP. 17 Cal. Code Regs. Sec. 58887(c).

**9. What are the rates for the FMS F/EA and FMS CE entity services?**

The rates for FMS F/EAs depend on how many PDS services the entity is administering. For one PDS, the rate is \$45 per consumer per month. For two to three PDS, the rate is \$70 per consumer per month. For four or more PDS, the rate is \$95 per consumer per month. 17 Cal. Code Regs. Sec. 58888(b)(1).

For FMS CEs, the rate is \$95 per consumer per month for performing one to four co-employer services. 17 Cal. Code Regs. Sec. 58888(b)(2).

**10. Can regional centers terminate voucher-financed services for consumers and families beginning October 1, 2011, even if no FMS F/EA or FMS CE can be found to act as agent or co-employer for/with the consumer or family member under the new system?**

The regulations require regional centers to assist consumers and family members to identify and choose an FMS F/EA or FMS CE. 17 Cal. Code Regs. Sections 58886(b)(3) and (f)(3). The regulations also provide that by August 29, 2011, FMS F/EAs and FMS CEs shall be vendored to provide the financial and administrative services necessary to supporting the consumers' and family members' receipt of Participant Directed Services. 17 Cal. Code Regs. Sec. 58887(a). If there are no vendored FMS F/EAs or FMS CEs for consumers and families to engage, IFSP and IPP services cannot be terminated on the grounds that one of them has not been engaged as agent or co-employer for the procurement of PDS services. Consumers and family members must engage a vendored FMS F/EA or FMS CE. 17 Cal. Code Regs. Sections 58886(b)(3)(A)&(B) and 58884(a)(4)&(5). If regional centers were allowed to terminate services due to a consumer's or family

member's failure to select an FMS F/EA or FMS CE when no such entity exists due to a regional center's failure to vendorize one, the new system would be vulnerable to abuse, because it would allow regional centers to profit, through purchase of service savings, from their own failure to implement the regulations.

- 11. If a regional center cannot offer consumers and families a choice between becoming an employer and engaging an FMS F/EA or becoming a co-employer and engaging an FMS CE, because only one type of vendor is available to the consumer or family member, can the regional center force the consumer or family to engage the only available option or terminate services due to the consumer's or family member's failure to do so?**

The regional center has failed in its regulatory duty to assist the consumer and family member to identify and choose either an FMS F/EA or an FMS CE, pursuant to 17 Cal. Code Regs. section 58886(b)(3), and has failed in its duty to vendorize, by August 29, 2011, both FMS F/EAs and FMS CEs, pursuant to 17 Cal. Code Regs. section 58887(a). The consumer or family member cannot exercise their options as specified by the regulations. In lieu of these options, their services cannot be dictated by the regional center and should not be terminated until the regional center has fully complied with its obligations under the regulations and the consumer or family member continues to refuse to transition to the new system.

Moreover, Participant-Directed Services are defined as including the adult consumer or family member exercising decision-making authority over specified services. 17 Cal. Code Regs. Sec. 58884(a)(1). If a regional center decides, by making only one service model available, which service model the consumer or family member will use for receipt of PDS services, the regional center has not complied with the definition of PDS services.

- 12. Must the regional center send consumers and family members a notice and offer an opportunity for them to appeal this service model change, or the lack of availability of both**

**employer and co-employer service model options, before PDS services may be terminated?**

SB 74 did not change the laws concerning the due process rights of recipients of regional center services. Welf. & Inst. Code Section 4710(a)(1) still provides that notice must be sent to a service recipient at least 30 days prior to any regional center decision to change services set forth in the IPP. The same is true for services set forth in a child's IFSP. 17 Cal. Code Regs. Sec. 52161(a)(2). The change from vouchered services to employer or co-employer status and the corresponding necessary use of an agent or co-employer, and any other changes which resulted, would constitute a "change" for purposes of due process procedures and give rise to the duty of the regional center to give prior notice.

For the same reason, because SB 74 did not amend Welf. & Inst. Code Sec. 4715, if an appeal of a proposed change was filed within 10 days after receipt of the required notice, vouchered services should continue uninterrupted pending the outcome of the appeal.