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MEMORANDUM

To: Individuals Who Commented on Regulation 11-19/BF  
Requirements for Payment to Birth Centers

From: Roderick L. Bremby, Commissioner *RLB*  
Department of Social Services  
25 Sigourney Street  
Hartford, CT 06106

Date: June 27, 2012

Re: Response to Comments on Regulation 11-19/BF

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The Department of Social Services (“the Department”) responds to public comments received concerning the proposed regulation referenced above. The Notice of Intent for this regulation was published in Connecticut Law Journal on April 17, 2012. A copy of the regulation with revisions based on public comments and the Department’s own revisions is attached.

**1. Section 17b-262-957 (definitions)**

Comment: Add new definition of “birth attendant” as follows: “‘Birth attendant’ means a physician, nurse-midwife, or other health professional, whose state-licensed scope of practice includes ante-partum, intra-partum, and post-partum care of pregnant women, and the care of newborns.”

Response: The Department understands the purpose of the comment to enable flexibility in implementing this regulation if, at some point in the future, Connecticut licenses other categories of practitioners to care for pregnant women and newborns. In order to keep the definitions internally consistent (both within this regulation and with other Connecticut Medicaid regulations), avoid duplicative definitions, and preserve clarity, the Department has made comparable revisions to the existing definition of “licensed practitioner.”

**2. Section 17b-262-957 (definitions)**

Comment: Revise the definition of “low-risk delivery” as follows: “‘Low-risk delivery’ means a delivery following a low-risk pregnancy that is anticipated to be normal and uncomplicated and in which the mother is in good health and has no complicating factors; as determined by the

mother's birth attendant, acting within his or her state-licensed scope of practice."

Revise the definition of "low-risk pregnancy" as follows: "'Low-risk pregnancy' means a pregnancy that is anticipated to be normal ~~and uncomplicated~~ and in which the mother is in good health ~~and has no complicating factors~~, as determined by the mother's birth attendant, acting within his or her state-licensed scope of practice."

Response: The Department agrees with the purpose of the comments and has made similar revisions to both definitions, as these revisions reduce redundancy and improve the clarity of the language. However, the Department replaced the commenter's term of "birth attendant" with "licensed practitioner" for the reasons discussed in Response # 1 above.

### **3. Section 17b-262-958(b)(1)**

Comment: Delete the requirement for birth centers to be accredited by the Commission for the Accreditation of Birth Centers. The comment raised three legal arguments in support of this position, each of which is discussed below.

Response: The Department declines to make the requested deletion because requiring birth centers to be accredited is necessary to protect Medicaid patients' health and safety. Licensure as a maternity hospital (the only current Connecticut licensure category applicable to birth centers) is insufficient to ensure a birth center has been fully evaluated, particularly because there are no Department of Public Health regulations specifically governing birth centers. Even if such regulations existed, accreditation provides additional protections unlikely to be included in licensure. These requirements are appropriate because in administering Medicaid, a joint federal-state program, states have wide discretion establish more specific requirements than federal statutes or regulations, so long as the state requirements are reasonable, are not inconsistent with federal requirements, and do not frustrate the purpose of federal requirements. Additionally, the federal statute requiring birth center Medicaid coverage authorizes states to adopt "such other requirements relating to the health and safety of individuals furnished services by the facility as the State may establish." 42 U.S.C. § 1396d(l)(3)(B)(iv). That provision does not specify the method or agency through which the state may establish "other requirements," instead deferring such judgments to the state, "as the State shall establish." Requiring birth centers to be accredited is such a requirement and is therefore authorized by statute.

The comment raised three legal arguments against requiring accreditation. First, the comment claims that 42 U.S.C. § 1396d(l)(3)(B)(iii), the element of the birth center definition "licensed or otherwise approved by the State to provide prenatal labor and delivery or postpartum care...", somehow precludes states from establishing any requirements beyond licensure. However, this provision does not contain any limiting language and merely provides that birth centers must be licensed under state requirements as one of the conditions for Medicaid payment. In addition, the separate provision at § 1396d(l)(3)(B)(iv) authorizes states to establish other "requirements relating to the health and safety" of patients. The Department requires accreditation as such a health and safety requirement, not as a purported change to health licensing requirements. Because statutes should be construed to give each provision a different meaning, that further

confirms that states have separate authority to establish requirements beyond licensure. *See Scheidler v. National Org. of Women, Inc.*, 547 U.S. 9, 29 (2006) (citations omitted).

Second, the comment claims that a CMS informational bulletin precludes states from establishing requirements beyond licensure.<sup>1</sup> CMS briefly summarized, but did not interpret, the statute in that bulletin. Rather, it simply “wanted to provide States with information.” Thus, the CMS informational bulletin does not affect a state’s authority to require accreditation as a health and safety requirement under provision (iv).

Finally, the comment claims that Section 1865 of the Social Security Act (42 U.S.C. § 1395bb) precludes a state Medicaid agency from mandating accreditation. That statute, in Title XVIII (Medicare) of the Social Security Act, allows providers accredited by accrediting organizations approved by CMS to be exempt from routine surveys by state survey agencies to determine compliance with Medicare conditions. 42 U.S.C. § 1395bb; *see also* 42 C.F.R. Pt. 488. This provision only applies to Medicaid to the extent a provider type must comply with Medicare conditions to be a Medicaid provider. There is no indication that birth centers must comply with Medicare criteria to be Medicaid providers. *See* 42 C.F.R. §§ 431.108 & 488.6(b). Moreover, these federal regulations anticipate that providers may be subject to additional state Medicaid requirements. *See* 42 C.F.R. § 431.108. Thus, § 1395bb does not preclude a state from requiring provider accreditation as a separate condition for participation in the state’s Medicaid program.

Even if § 1395bb gave CMS exclusive authority to require providers to be accredited (which the Department believes it does not), § 1396d(l)(3)(B)(iv) trumps § 1395bb because it specifically authorizes states to establish requirements to protect patient health and safety at birth centers, while § 1395bb gives CMS general guidelines for approving accrediting bodies. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (citations omitted). In addition, § 1395bb was enacted on July 30, 1965 and was most recently amended on July 15, 2008, while § 1396d(l)(3) was enacted on March 23, 2010. Because a “later-enacted statute controls to the extent it conflicts with the earlier-enacted statute,” that further shows that § 1396d(l)(3) trumps § 1395bb. *Miccosukee Tribe of Indians v. U.S. Army Corps of Engineers*, 619 F.3d 1289, 1299 (11th Cir. 2010) (citation omitted). For all the reasons discussed above, the Department declines to delete the requirement for birth centers to be accredited.

#### **4. Sections 17b-262-958(b)(2) and (3)**

Comment: Amend sections 17b-262-958(b)(2) and (3) to avoid specifically requiring that birth centers be licensed as a maternity hospital and comply with the maternity hospital regulations. Specifically, amend those sections to allow birth centers to be licensed either as maternity hospitals or as birth centers, if the Department of Public Health adopts regulations in the future that specifically govern birth centers.

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<sup>1</sup> The comment references a May 20, 2011 guidance letter from Barbara Edwards as director of the CMS Center for Medicaid, CHIP and Survey & Certification (CMCS). The Department is not aware of a letter on this topic with that date and author and could not locate such a letter. Accordingly, the Department assumes the comment intended to reference the March 25, 2011 Informational Bulletin from Cindy Mann, Director, CMCS.

Response: The Department agrees with the comment and has made the requested revisions, so that a birth center may meet the licensure and compliance requirements either by being licensed as a maternity hospital (and complying with applicable regulations) or by being licensed as a birth center (and complying with applicable regulations specifically governing birth centers that the Department of Public Health may adopt in the future).

#### **5. Section 17b-262-959**

Comments: Revise section 17b-262-959(a) as follows: “Birth center maternal patients shall be limited to women determined to have a low-risk pregnancy after careful and periodic prenatal screening during the pregnancy by one or more licensed practitioners. A licensed practitioner shall document risk assessments on risk forms established by the provider and maintained in the medical record., as defined in section 17b-262-957(12) of these rules.”

Revise section 17b-262-959(b) as follows: “Service in a birth center shall be limited to maternal patients who have had a low-risk pregnancy and anticipate a low-risk delivery, as defined in section 17b-262-957(11) and (12) of these rules. ~~do not show symptoms of any condition identified prenatally by one or more licensed practitioners as having the potential for adverse effects on the maternal patient or infant.~~”

Response: The Department agrees with the comments and has made the requested changes. The Department has made small technical changes to the requested revisions because defined terms are specifically identified in the definitions section as applying throughout the proposed regulations and do not need to be cross-referenced.

#### **6. Section 17b-262-961(a)(3)**

Comment: Revise section 17b-262-961(a)(3) as follows: “other ambulatory services within the provider’s scope of practice services, established by the Department of Public Health that are offered by the provider and that are otherwise covered by Medicaid.”

Response: The Department has made the requested revision, as it is more accurate within the grammar and context of the provision (since provider is a defined term in the proposed regulations that refers to certain birth centers, which are entities and not individual practitioners).

#### **7. Section 17b-262-962(b)**

Comment: Revise section 17b-262-962(b) as follows: “The department’s payment to the provider includes all birth center charges, including, but not limited to: charges for labor, delivery, anesthesia, laboratory, radiology, pharmacy, and nursing, and other clinical staff care. The department shall not pay any other charges to the provider.”

Response: The Department has made the requested revisions, which more comprehensively describe the scope of services provided by a birth center.

## **8. Comment on Statement of Purpose**

Comment: Revise section (B) of the statement of purpose as follows: “(1) establish requirements for birth center provider participation, including licensure ~~and accreditation~~; (2) ensure that the birth center ~~uses prenatal screening and performs only low-risk deliveries~~; (3) describes the birth center services to be covered; and (4) sets payment methodologies for determining fee schedules and amounts.”

Response: For the reasons discussed in Response # 3 above, the Department has declined to make the first requested deletion.

For the reasons discussed in Response # 2 above, the Department has made the second requested deletion.