

BUSINESS ASSOCIATE AGREEMENT

This Business Associate Agreement (this “**Agreement**”) is entered into between [**or among (as appropriate)**] [**ENTER APPROPRIATE UNM PARTIES**] (together referred to in this Agreement as the “Covered Entity”), and [**ENTER APPROPRIATE BUSINESS ASSOCIATE NAME**] (referred to in this Agreement as the “Business Associate”). The “Effective Date” of this Agreement is [**INCLUDE DATE**].

I. RECITALS

- A. Under one or more agreements between the parties (the “**Underlying Agreement(s)**”), Business Associate is receiving from, or creating or receiving, or maintaining or transmitting on behalf of, Covered Entity, certain data that would constitute “protected health information” within the meaning of the Standards for Privacy of Individually Identifiable Health Information and as further defined below (the “**Privacy Rule**”).
- B. The parties are committed to complying with the Privacy Rule and the Standards for Security of Electronic Protected Health Information (the “**Security Rule**”) in accordance with the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 (“**HIPAA**”), the Health Information Technology for Economic and Clinical Health (“**HITECH**”) Act, Title XIII of Division A and Division B of the American Recovery and Reinvestment Act of 2009 (ARRA), Public Law 111-5 (Feb. 17, 2009) and related regulations, the HIPAA Privacy Rule, 45 C.F.R. Parts 160 and 164, as amended, the HIPAA Security Rule, 45 C.F.R. Parts 160, 162 and 164, as amended, and other relevant laws, including subsequently adopted provisions applicable to use and disclosure of confidential information, and applicable agency guidance.
- C. This Agreement, in conjunction with the Privacy and Security Rules and the U.S. Department of Health and Human Services' final rule, effective March 26, 2013, modifying HIPAA and the Privacy and Security Rules (the “**New Rule**”), sets forth the terms and conditions pursuant to which PHI (electronic and non-electronic) that is created, received, maintained, or transmitted by, the Business Associate from or on behalf of Covered Entity, will be handled between the Business Associate and Covered Entity and with third parties during the term of their Underlying Agreement(s) and after its termination.
- D. Business Associate hereby acknowledges and agrees that Covered Entity is a Covered Entity and that Business Associate is a Business Associate of Covered Entity.
- E. This Agreement is intended to supersede all prior Business Associate or similar agreements between the parties and to restate the respective obligations of each party in light of the New Rule.

The parties agree as follows:

II. PERMITTED USES AND DISCLOSURES OF PHI

- A. Services.** Pursuant to the Underlying Agreement(s), Business Associate provides services (“**Services**”) for Covered Entity that involve the receipt, use and disclosure of PHI. Except as otherwise specified herein, the Business Associate may make any and all uses of PHI necessary to perform its obligations under the Underlying Agreement(s). All other uses not authorized by this Agreement are prohibited. Moreover, Business Associate may disclose PHI for the purposes authorized by this Agreement only: (i) to its employees, subcontractors and agents, in accordance with Section III.A.7 hereof; or (ii) as otherwise permitted by or as required by the Privacy or Security Rule.
- B. Business Activities of the Business Associate.** Unless otherwise limited herein and if such use or disclosure of PHI would not violate the Privacy or Security Rules if done by the Covered Entity, the Business Associate may:
1. Use the PHI in its possession for its proper management and administration and to fulfill any present or future legal responsibilities of the Business Associate provided that such uses are permitted under state and federal confidentiality laws;
 2. Disclose the PHI in its possession to third parties for the purpose of its proper management and administration or to fulfill any present or future legal responsibilities of the Business Associate, provided that the Business Associate represents to Covered Entity, in writing, that (i) the disclosures are required by law, as defined within 45 C.F.R. §164.501; or (ii) the Business Associate has received from the third party written assurances regarding its confidential handling of such PHI as required under 45 C.F.R. §164.504(e)(4) and §164.314, and the third party notifies the Business Associate of any instances of which it is aware in which the confidentiality of the information has been breached; and
 3. Business Associate may provide data aggregation services relating to the health care operations of the Covered Entity.

III. RESPONSIBILITIES OF THE PARTIES WITH RESPECT TO PHI

- A. Responsibilities of the Business Associate.** With regard to its use and/or disclosure of PHI, the Business Associate hereby agrees to do the following:
1. Not use or further disclose PHI other than as permitted or required by this Agreement, or the Underlying Agreement(s);

2. Not, without the prior written consent of Covered Entity, disclose any PHI on the basis that such disclosure is required by law without notifying Covered Entity so that Covered Entity shall have an opportunity to object to the disclosure and to seek appropriate relief. If Covered Entity objects to such disclosure, Business Associate shall refrain from disclosing the PHI until Covered Entity has exhausted all alternatives for relief. Business Associate shall require reasonable assurances from persons receiving PHI in accordance with Section II.B.2 hereof that such persons will provide Covered Entity with similar notice and opportunity to object before disclosing PHI on the basis that such disclosure is required by law;
3. Ensure the confidentiality, integrity, and availability of all electronic PHI created, received, maintained, or transmitted;
4. Use reasonable and appropriate safeguards to prevent the unauthorized use or disclosure of PHI other than pursuant to the terms and conditions of this Agreement, and comply with Subpart C of 45 C.F.R. Part 164 with respect to electronic PHI, to prevent use or disclosure of PHI other than as provided for by this Agreement;
5. Use appropriate administrative, physical and technical safeguards consistent with the HIPAA Security Rule that reasonably and appropriately protect the confidentiality, integrity, and availability of any Electronic PHI in accordance with the HIPAA Security Rule and the HITECH Standards;
6. Report promptly, in writing, to Covered Entity, but in no event later than within two (2) calendar days of which it becomes aware any use or disclosure of PHI not provided for by the Underlying Agreement(s), including breaches of unsecured PHI as required at 45 C.F.R. § 164.410, and any Security Incident of which it becomes aware, and cooperate with the Covered Entity in any mitigation or breach reporting efforts;
7. In accordance with 45 C.F.R. §§ 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, to ensure that any agents, including subcontractors, that create, receive, maintain, or transmit PHI on behalf of the Business Associate agree in writing to the same restrictions, conditions, and requirements that apply to the Business Associate with respect to such information; provided, however, that Business Associate shall not disclose or provide access to PHI to any subcontractor or agent without the prior written consent of Covered Entity;
8. Ensure that any agent or subcontractor to whom the Business Associate provides PHI, as well as Business Associate, not export PHI beyond the borders of the United States of America;

9. Have procedures in place to mitigate, to the maximum extent practicable, any deleterious effect from any use or disclosure of PHI in violation of this Agreement or applicable law;
10. Have and apply appropriate sanctions against any workforce member, subcontractor or agent who uses or discloses PHI in violation of this Agreement or applicable law;
11. Within five (5) business days' request of Covered Entity, make available PHI in a designated record set, if applicable, to Covered Entity, as necessary to satisfy Covered Entity's obligations under 45 C.F.R. §164.524;
12. Within five (5) business days, make any amendment(s) to PHI, if applicable, in a designated record set as directed or agreed to by the Covered Entity pursuant to 45 C.F.R. §164.526, or take other measures as necessary to satisfy Covered Entity's obligations under 45 C.F.R. §164.526;
13. As applicable, maintain and make available the information required to provide an accounting of disclosures as necessary to satisfy Covered Entity's obligations under 45 C.F.R. §164.528;
14. To the extent the Business Associate is to carry out one or more of Covered Entity's obligation(s) under Subpart E of 45 C.F.R. Part 164, comply with the requirements of Subpart E that apply to the Covered Entity in the performance of such obligation(s);
15. Upon request, make its internal practices, books, and records available to the Secretary and to the Covered Entity for purposes of determining compliance with the HIPAA Rules; and
16. Comply with minimum necessary requirements under the HIPAA Rules.

B. Responsibilities of Covered Entity. With regard to the use and/or disclosure of PHI by the Business Associate, Covered Entity hereby agrees to do the following:

1. Inform the Business Associate of any limitations in the form of notice of privacy practices that Covered Entity provides to individuals pursuant to 45 C.F.R. §164.520, to the extent that such limitation may affect Business Associate's use or disclosure of PHI.
2. Inform the Business Associate of any changes in, or revocation of, the permission by an individual to use or disclose PHI, to the extent that such limitation may affect Business Associate's use or disclosure of PHI.

3. Notify the Business Associate, in writing and in a timely manner, of any restriction on the use or disclosure of PHI that Covered Entity has agreed to or is required to abide by under 45 C.F.R. §164.522, to the extent that such restriction may impact in any manner the use and/or disclosure of PHI by the Business Associate under this Agreement, except if the Business Associate will use or disclose PHI for (and the Underlying Agreement(s) includes provisions for) data aggregation or management and administration and legal responsibilities of the Business Associate, Covered Entity will not request Business Associate to use or disclose PHI in any manner that would not be permissible under the Privacy and Security Rule if done by the Covered Entity.

IV. REPRESENTATIONS

A. Mutual Representations of the parties. Each party represents to the other party:

1. That all of its employees and members of its workforce, whose services may be used to fulfill obligations under this Agreement or the Underlying Agreement(s) are or shall be appropriately informed of the terms of this Agreement and are under legal obligation to each party, respectively, by contract or otherwise, sufficient to enable each party to fully comply with all provisions of this Agreement including, without limitation, the requirement that modifications or limitations that Business Associate has agreed to adhere to with regard to the use and disclosure of PHI of any individual that materially affects and/or limits the uses and disclosures that are otherwise permitted under the HITECH Standards will be communicated to the Business Associate, in writing, and in a timely fashion.
2. That it will reasonably cooperate with the other party in the performance of the mutual obligations under this Agreement.
3. That neither the party, nor its directors, regents, officers, agents, employees or members of its workforce have been excluded or served a notice of exclusion or have been served with a notice of proposed exclusion, or have committed any acts which are cause for exclusion, from participation in, or had any sanctions, or civil or criminal penalties imposed under, any federal or state healthcare program, including but not limited to Medicare or Medicaid, or have been convicted, under federal or state law (including without limitation a plea of nolo contendere or participation in a first offender deterred adjudication or other arrangement whereby a judgment of conviction has been withheld), of a criminal offense related to (a) the neglect or abuse of a patient, (b) the delivery of an item or service, including the performance of management or administrative services related to the delivery of an item or service, under a federal or state healthcare program, (c) fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a healthcare item or

service or with respect to any act or omission in any program operated by or financed in whole or in part by any federal, state or local government agency, (d) the unlawful, manufacture, distribution, prescription or dispensing of a controlled substance, or (e) interference with or obstruction of any investigation into any criminal offense.

4. That it will notify the other party immediately after it becomes aware that any of the foregoing representations may be inaccurate or may become inaccurate.

V. **TERM AND TERMINATION**

- A. **Term.** The term of this Agreement shall commence on the Effective Date, and shall terminate on the termination date of the relevant Underlying Agreement(s) or on the date Covered Entity terminates this Agreement for cause as authorized in Section V.B of this Agreement, whichever is sooner.
- B. **Termination for Cause.** Business Associate authorizes termination of this Agreement by Covered Entity, if Covered Entity determines Business Associate has violated a material term of this Agreement and Business Associate has not cured the breach or ended the violation within the time specified by Covered Entity.
- C. **Obligations of Business Associate upon Termination.** Business Associate agrees to return or destroy all PHI pursuant to 45 C.F.R. §164.504(e)(2)(ii)(J). Prior to doing so, the Business Associate further agrees to recover any PHI in the possession of its subcontractors or agents. If it is not feasible for the Business Associate to return or destroy said PHI, the Business Associate will notify Covered Entity in writing and the Covered Entity may disagree with the Business Associate's determination. Said notification shall include: (i) a statement that the Business Associate has determined that it is not feasible to return or destroy the PHI in its possession, and (ii) the specific reasons for such determination. Business Associate further agrees to extend any and all protections, limitations and restrictions contained in this Agreement to the Business Associate's use and/or disclosure of any PHI retained after the termination of this Agreement, and to limit any further uses and/or disclosures to the purposes that make the return or destruction of the PHI infeasible. If it is infeasible for the Business Associate to obtain, from a subcontractor or agent any PHI in the possession of the subcontractor or agent, the Business Associate must provide a written explanation to Covered Entity and require the subcontractors and agents to agree to extend any and all protections, limitations and restrictions contained in this Agreement to the subcontractors' and/or agents' use and/or disclosure of any PHI retained after the termination of this Agreement, and to limit any further uses and/or disclosures to the purposes that make the return or destruction of the PHI infeasible.

- D. Automatic Termination. This Agreement will automatically terminate without any further action of the parties upon the termination or expiration of the Underlying Agreement(s).

VI. CONFIDENTIALITY

- A. Confidentiality Obligations. In the course of performing under this Agreement, each party may receive, be exposed to or acquire the Confidential Information including but not limited to, all information, data, reports, records, summaries, tables and studies, whether written or oral, fixed in hard copy or contained in any computer data base or computer readable form, as well as any information identified as confidential (“Confidential Information”) of the other party. For purposes of this Agreement, “Confidential Information” shall not include PHI, the security of which is the subject of this Agreement and is provided for elsewhere. The parties including their employees, agents or representatives (i) shall not disclose to any third party the Confidential Information of the other party except as otherwise permitted by this Agreement or as required by law including, without limitation, the New Mexico Inspection of Public Records Act, Section 14-2-1 et seq. NMSA 1978, as amended, (ii) only permit use of such Confidential Information by employees, agents and representatives having a need to know in connection with performance under this Agreement, and (iii) advise each of their employees, agents, and representatives of their obligations to keep such Confidential Information confidential. Notwithstanding anything to the contrary herein, each party shall be free to use, for its own business purposes, any ideas, suggestions, concepts, know-how or techniques contained in information received from each other that directly relates to the performance under this Agreement. This provision shall not apply to Confidential Information: (a) after it becomes publicly available through no fault of either party; (b) which is later publicly released by either party in writing; (c) which is lawfully obtained from third parties without restriction; or (d) which can be shown to be previously known or developed by either party independently of the other party.

VII. INSURANCE, LIABILITY, AND INDEMNIFICATION

- A. Insurance. Business Associate will procure and maintain in effect during the term of this Agreement: (1) general liability insurance coverage with minimum limits of \$1 million per occurrence and \$3 million aggregate; and (2) as applicable, professional liability insurance coverage within minimum limits of \$1 million per occurrence and \$3 million in aggregate; and (3) workers’ compensation insurance coverage within statutory limits of the state in which Business Associate is located. Upon request, Business Associate shall provide evidence of continuous coverage to Covered Entity.
- B. Cyber Insurance. Business Associate will maintain in force during the term of this Agreement cyber information technology and cyber errors and omissions liability insurance with a combined single limit of not less than \$10,000,000.00 in

the aggregate. Such coverage shall include but not be limited to, third party liability coverage for loss or disclosure of data, including electronic data, network security failure, unauthorized access and/or use or other intrusions, infringement of any intellectual property rights (except patent infringement and trade secret misappropriation) unintentional breach of contract, negligence or breach of duty to use reasonable care, breach of any duty of confidentiality, invasion of privacy, or violation of any other legal protections for personal information, defamation, libel, slander, commercial disparagement, negligent transmission of computer virus, worm, logic bomb, or Trojan horse or negligence in connection with denial of service attacks, or negligent misrepresentation. Upon request, Business Associate shall provide evidence of continuous coverage to Covered Entity. Business Associate will notify Covered Entity immediately if Business Associate's insurance coverage is reduced or terminated.

- C. Liability. As between the parties, subject to VII.D of this Agreement, each party acknowledges that it will be responsible for claims or damages arising from personal injury or damage to persons or property to the extent they result from negligence of that party's employees. Business Associate understands that Covered Entity is not indemnifying Business Associate for the acts or omissions to act of Covered Entity or its employees. The liability of Covered Entity will be subject in all cases to the immunities and limitations of the New Mexico Tort Claims Act, Sections 41-4-1 et seq. NMSA 1978, as amended.
- D. Indemnification. The Business Associate agrees to indemnify, defend and hold harmless Covered Entity and Covered Entity's employees, directors, officers, subcontractors, agents or other members of its workforce from any costs, damages, expenses, judgments, losses, attorneys' fees, and all liability to third parties arising from or in connection with any breach of this Agreement or of any warranty hereunder by Business Associate, or arising from any negligent or wrongful acts or omissions of Business Associate, including failure to perform its obligations under the Privacy Regulations, the Security Regulations, the HITECH Act. Accordingly, on demand, Business Associate shall reimburse Covered Entity for any and all actual and direct losses, liabilities, fines, penalties, costs or expenses (including reasonable attorneys' fees) which may for any reason be imposed upon Covered Entity by reason of any suit, claim, action, proceeding or demand by any third party which results from Business Associate's breach hereunder. The Business Associate's indemnification obligation shall survive the expiration or termination of this Agreement for any reason.
- E. LIMITATION OF LIABILITY. THE PARTIES UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR PUNITIVE DAMAGES OF ANY KIND OR NATURE, WHETHER SUCH LIABILITY IS ASSERTED ON THE BASIS OF CONTRACT, TORT (INCLUDING NEGLIGENCE OR STRICT LIABILITY), OR OTHERWISE, EVEN IF THE OTHER PARTY HAS BEEN

ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGES.

VIII. MISCELLANEOUS

- A. Business Associate. For purposes of this Agreement, Business Associate shall include the named Business Associate herein. However, in the event that the Business Associate is otherwise a Covered Entity under the Privacy or Security Rule, that entity may appropriately designate a health care component of the entity, pursuant to 45 C.F.R. §164.504(a), as the Business Associate for purposes of this Agreement.
- B. Survival. The respective rights and obligations of Business Associate and Covered Entity under this Agreement, shall survive termination of this Agreement indefinitely.
- C. Amendments; Waiver. This Agreement may not be modified, nor shall any provision hereof be waived or amended, except in a writing duly signed by authorized representatives of the parties. A waiver with respect to one event shall not be construed as continuing, or as a bar to or waiver of any right or remedy as to subsequent events. The parties agree to take such action as is necessary to amend this Agreement from time to time as is necessary for compliance with the requirements of the HIPAA Rules and any other applicable law.
- D. Interpretation. Any ambiguity in this Agreement shall be interpreted to permit compliance with the HIPAA Rules.
- E. Changes in Law. The parties recognize that this Agreement is at all times subject to applicable state, local, and federal laws. The parties further recognize that this Agreement may become subject to amendments in such laws and regulations and to new legislation. Any provisions of law that invalidate, or are otherwise inconsistent with, the material terms and conditions of this Agreement, or that would cause one or both of the parties hereto to be in violation of law(s), shall be deemed to have superseded the terms of this Agreement and, in such event, the parties agree to utilize their best efforts to modify the terms and conditions of this Agreement to be consistent with the requirements of such law(s). In order to effectuate the purposes and intent of this Agreement the parties will set forth an executed written agreement within thirty (30) days of receipt of notice from one party to the other party setting forth the proposed changes, then either party may, by giving the other an additional sixty (60) days written notice, terminate this Agreement, unless this Agreement would terminate earlier by its terms. In the event amendments or changes in existing law(s), general instructions, or new legislation, rules, regulations, or decisional law preclude or substantially preclude a contractual relationship between the parties similar to that expressed in this Agreement, then, under such circumstances, where renegotiation of the applicable terms of this Agreement would be futile, either party may provide the other at least sixty (60) days advance written notice of termination of this Agreement,

unless this Agreement would terminate earlier by its terms. Upon termination of this Agreement as hereinabove provided, neither party shall have any further obligation hereunder except for (i) obligations occurring prior to the date of termination, and (ii) obligations, promises or covenants contained herein which are expressly made and intended to extend beyond the term of this Agreement.

- F.** Construction of Terms. The terms of this Agreement shall be construed in light of any applicable interpretation or guidance on HIPAA and/or the Privacy Rule issued by the U.S. Department of Health and Human Services of the Office for Civil Rights from time to time.
- G.** Contradictory Terms. Any provision of the Underlying Agreement(s) that is directly contradictory to one or more terms of this Agreement (“**Contradictory Term**”) shall be superseded by the terms of this Agreement as of the Effective Date of this Agreement to the extent and only to the extent of the contradiction, only for the purpose of the Covered Entity’s compliance with the Privacy Rule and only to the extent that it is reasonably impossible to comply with both the Contradictory Term and the terms of this Agreement.

IX. DEFINITIONS.

The following terms used in this Agreement shall have the same meaning as those terms in the HIPAA Rules: Breach, Data Aggregation, Designated Record Set, Health Care Operations, Individual, Minimum Necessary, Notice of Privacy Practices, Protected Health Information (“**PHI**”), Required By Law, Secretary, Security Incident, Subcontractor, Unsecured Protected Health Information, and Use. Specific definitions include:

- A.** Business Associate. “Business Associate” shall generally have the same meaning as the term “business associate” at 45 C.F.R. §160.103, and in reference to the party to this Agreement.
- B.** Covered Entity. “Covered Entity” shall generally have the same meaning as the term “Covered Entity” at 45 C.F.R. §160.103, and in reference to the party to this Agreement.
- C.** Disclosure. “Disclosure” shall mean the release, transfer, provision of access to, or divulging in any manner of information outside the entity holding the information.
- D.** Electronic Protected Health Information. “Electronic Protected Health Information” means Protected Health Information that is created, received, maintained, or transmitted by Electronic Media as defined at 45 C.F.R. §160.103.

- E.** HIPAA Rules. “HIPAA Rules” shall mean the Privacy, Security, Breach Notification, and Enforcement Rules at 45 C.F.R. Parts 160, 162 and 164, and as amended.
- F.** HITECH Standards. “HITECH Standards” shall mean the privacy, security, and Breach notification provisions applicable to a Business Associate under Subtitle D of the Health Information Technology for Economic and Clinical Health Act (“HITECH”) Act, which is Title XIII of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5), and any regulations promulgated.
- G.** Privacy Rule. “Privacy Rule” shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 C.F.R. Parts 160 and 164, Subpart A and Subpart E, as amended.
- H.** Protected Health Information or “PHI”. “Protected Health Information or PHI” shall mean any information, transmitted or recorded in any form or medium; (i) that relates to the past, present or future physical or mental condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual, and (ii) that identifies the individual or with respect to which there is a reasonable basis to believe that information can be used to identify the individual, and shall have the meaning given to such term under HIPAA, the HITECH Act and related regulations and agency guidance. Protected health information excludes individually identifiable health information: (i) in education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g; (ii) in records described at 20 U.S.C. 1232g(a)(4)(B)(iv); (iii) in employment records held by a covered entity in its role as employer; and (iv) regarding a person who has been deceased for more than 50 years.
- I.** Security Incident. “Security Incident” means the attempted or successful unauthorized access, use, disclosure, modification, or destruction of information or interference with system operations in an information system.
- J.** Security Rule. “Security Rule” shall mean the Standards for Security of Electronic Protected Health Information at 45 C.F.R. Parts 160, 162, and 164, and as amended.
- K.** A reference in this Agreement to a section in the HIPAA Rules means the section as in effect or as amended.
- L.** Any terms capitalized, but not otherwise defined, in this Agreement shall have the same meaning as those terms have under HIPAA, the HIPAA Privacy Regulations, the HIPAA Security Regulations, and the HITECH Standards.

BUSINESS ASSOCIATE: _____

By: _____

Date: _____

Printed Name: _____

Title: _____

COVERED ENTITY: [ENTER APPROPRIATE UNM PARTIES]

By: _____

Date: _____

Printed Name: _____

Title: _____

COVERED ENTITY: [ENTER APPROPRIATE UNM PARTIES, IF MORE THAN ONE UNM PARTY WHO IS A SEPARATE SIGNATORY]

By: _____

Date: _____

Printed Name: _____

Title: _____

*Approved as to form by
Diana L. Heider
Assistant University Counsel
02/19/18*