

MEMORANDUM OF UNDERSTANDING
between
KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT
DIVISION OF HEALTH CARE FINANCE
and
<QUALIFIED ENTITY>
for
PRESUMPTIVE ELIGIBILITY DETERMINATIONS

This Memorandum of Understanding is entered into by and between the Kansas Department of Health and Environment, Division of Health Care Finance, hereinafter referred to as "KDHE-DHCF" and **<Qualified Entity>**, hereinafter referred to as Entity, and is issued to allow the Entity to accept KanCare applications for KDHE-DHCF and to determine and authorize presumptive KanCare coverage for individuals who meet Presumptive Eligibility (PE) criteria.

I. PURPOSE OF MEMORANDUM

The purpose of this Memorandum is to set forth the roles, responsibilities, and other terms for the Entity to conduct Medicaid and CHIP presumptive eligibility determinations and facilitate enrollment in ongoing coverage, as well as KDHE-DHCF's role and responsibilities in supporting and overseeing the activities.

Under this Agreement, the Entity can make PE determinations for children under the age of 19, pregnant women, low-income parents or caretakers, former foster care recipients, and individuals with breast and cervical cancer who have been screened through the Early Detection Works program. Applicants can be patients, family members of patients.

Under this Agreement, any employee of the hospital who is properly trained and certified can make presumptive determinations. This includes employees in hospital-owned physician practices or clinics, including off-site locations provided they are included in section IV of this agreement. Entities cannot delegate PE determinations to non-hospital staff, such as contractors or other third-parties.

The Entity must be enrolled as a Kansas Medicaid provider.

II. KDHE-DHCF RESPONSIBILITIES

KDHE-DHCF will support the Entity in conducting presumptive eligibility determinations by providing training, oversight, and other services required for such determinations. It will provide Medicaid and/or CHIP coverage to individuals based on the Entity's preliminary determination of eligibility as long as it was conducted in accordance with KDHE-DHCF policies and procedure. KDHE-DHCF will not hold the Entity financially responsible if an individual is found ineligible for Medicaid and/or CHIP based on a full eligibility determination.

A. Training and Assistance

KDHE-DHCF will provide initial and ongoing training and technical assistance to the Entity, including responding to the Entity's questions regarding the appropriate policies and procedures to use when conducting presumptive eligibility determinations.

Follow-up training will be provided to the Entity at periodic intervals, when significant policy changes occur, or when requested by the Entity.

KDHE-DHCF will provide a Presumptive Eligibility Manual which shall include the presumptive eligibility policies and procedures along with all necessary forms for conducting presumptive eligibility determinations.

B. Performance Standards and Oversight

KDHE-DHCF will identify performance standards that the Entity is expected to meet. These are as follows:

1. 95% of PE determinations are completed accurately,
2. 98% of PE determinations and KanCare applications are submitted to the KanCare Clearinghouse within 5 days of the PE determination, and
3. 60% of the PE applicants ultimately achieve eligibility through the KanCare process.

The performance standards are waived for the first year of this Agreement.

KDHE-DHCF will conduct an annual, or more frequent, evaluation of the Entity to determine that performance standards are being met. If the Entity fails to meet KDHE-DHCF's performance standards, KDHE-DHCF will notify the Entity; provide the Entity with additional training if deemed necessary; and assist the Entity in developing and implementing corrective action plan. In collaboration with the Entity, KDHE-DHCF will identify a timeline within which to achieve improved results that meet the performance standards. If the Entity is unable to meet performance standards after being given the opportunity, time, and assistance it needs to do so, KDHE-DHCF may terminate this Agreement, as described in Section VII.

C. KDHE-DHCF Services and Support

KDHE-DHCF will provide the Entity with a web-based electronic Presumptive Eligibility Tool that shall be used to complete PE determinations. Secured access will be granted to individual staff members of the Entity upon completion of the required training.

KDHE-DHCF will maintain records of all Presumptive Eligibility determinations and will process these applications in a timely manner to ensure client access to services.

KDHE-DHCF will identify one staff member to serve as the point of contact for the Entity and will update the Entity if this staff member changes. This point of contact will be utilized for general questions and oversight of the Presumptive Eligibility program. In addition, KDHE-DHCF will designate a representative from the KanCare Clearinghouse to serve as a resource for case-specific presumptive eligibility determination questions. KDHE-DHCF will provide access to the KEES Help Desk for use when there are technical difficulties with the Presumptive Eligibility Tool.

III. ENTITY RESPONSIBILITIES

The Entity will conduct presumptive eligibility determinations for Medicaid based on information provided by applicants. As part of conducting such determinations, the Entity will interview individuals for completion of the presumptive eligibility application, make presumptive eligibility determinations, provide applicants with their eligibility results, and help individuals complete the KanCare application for ongoing coverage. The Entity will conduct these activities in accordance with all applicable laws, rules, regulations, and policies for Medicaid presumptive eligibility determinations.

A. Procedures for Presumptive Eligibility Determinations

1. The Entity will conduct Presumptive Eligibility determinations for uninsured individuals in the following categories:
 - a. children under the age of 19
 - b. pregnant women
 - c. low-income parents and caretakers
 - d. children formerly in foster care
 - e. breast and cervical cancer patients who have been screened through Early Detection Works.
2. Prior to completion of the Presumptive Eligibility Tool, the Entity will confirm through the MMIS that Presumptive Eligibility applicants are not currently covered by existing Medicaid or CHIP programs;
3. When conducting presumptive eligibility determinations, the Entity will rely on information provided by applicants. It will not require or request any documentation or verification of the information, nor will it require any information that is not needed for a presumptive eligibility determination.
4. The Entity will determine presumptive eligibility based on the information entered into the PE Determination Tool in accordance with Presumptive Eligibility training material and the Resource Manual;
5. The Entity will provide the applicant with the appropriate documentation following their Presumptive Eligibility determination; this will include a copy of the PE determination letter and a copy of the applicant's signed Release of Information, if applicable.
6. The Entity will assist families in the completion of a KanCare application, which includes providing assistance in obtaining required verification for application processing. Individuals denied Presumptive Eligibility shall still receive assistance in completion of the KanCare application;
7. The Entity will educate the applicant that future communication on his or her KanCare application will be from the KanCare Clearinghouse and provide the parent/guardian with the KanCare Clearinghouse contact information;
8. The Entity will provide the individual with comprehensive assistance to ensure a successful completion of their KanCare application. This may include contacts with individuals and/or families prior to appointments to encourage them to bring necessary documentation at the time of service, follow-up contacts with the family, assistance in obtaining documentation, and agreeing to photo-copy and submit documents to KanCare;
9. The Entity will maintain a record of Presumptive Eligibility determinations for a minimum of one year from the date of the determination and make them available for a state or federal review or audit.

B. Training

The Entity will require all presumptive eligibility staff to attend KDHE-DHCF approved training, including ongoing training. The Entity will ensure that all new employees complete all KDHE-DHCF required training sessions prior to making any presumptive eligibility decisions. The Entity will require all staff attend recertification training if mandated by KDHE-DHCF; the Entity will keep a record of training attendance and provide to KDHE-DHCF upon request.

C. Complying with Performance Standards

The Entity agrees to meet the performance standards outlined below:

1. 95% of PE determinations are completed accurately,
2. 98% of PE determinations and KanCare applications are submitted to the KanCare Clearinghouse within 2 days of the PE determination, and
3. 60% of the PE applicants ultimately achieve eligibility through the KanCare process.

The Entity will submit data to KDHE-DHCF upon request to be used by KDHE-DHCF to monitor the Entity's compliance with the performance standards.

If KDHE-DHCF determines that the Entity is not meeting the specified standards, KDHE-DHCF will notify the Entity and initiate a process to assist the Entity in meeting the standards. As noted in section II. B., KDHE-DHCF will provide the Entity with additional training, assist the Entity in developing and implementing a corrective action plan, and provide the Entity with a reasonable period of time to come into compliance with the standards. If the Entity remains unable to meet the standards after being given a reasonable and appropriate opportunity to do so, KDHE-DHCF may terminate this Agreement, as described in Section VII.

IV. ENTITY LOCATIONS

This Agreement extends to trained and certified Entity staff employed at the following Entity locations:

(Entity Location Name and Physical Address)

V. MANAGED CARE ORGANIZATIONS

It is strongly encouraged that the Entity be contracted as a provider with each KanCare Managed Care Organization.

VI. POTENTIAL FOR DISQUALIFICATION

KDHE-DHCF may disqualify the Entity from conducting presumptive eligibility determinations only if KDHE-DHCF determines: 1) that the Entity is not making, or is not capable of making presumptive eligibility determinations in accordance with federal and state law and regulations; 2) the Entity remains unable to meet the performance standards established by KDHE-DHCF after following the process described above in Section III; or 3) the Entity no longer participates in Medicaid.

If the Entity is disqualified from making presumptive eligibility determinations, it will not have any bearing on whether the Entity can participate in Medicaid or on any agreements other than this one between the Entity and KDHE-DHCF.

VII. TERMINATION OF THIS MEMORANDUM OF UNDERSTANDING

The Entity may withdraw from conducting presumptive eligibility determinations and terminate this Agreement upon 30 days written notice to KDHE-DHCF.

KDHE-DHCF may terminate this Agreement with 30 days written notice if it disqualifies the Entity from conducting presumptive eligibility determinations in accordance with Section VI, or Termination for Breach.

This Agreement may be terminated by either Party if the other Party materially breaches this Contract, and such breaching Party has been provided with a written notice that identifies the breach with reasonable specificity, and such breach is not thereafter timely cured. The breaching Party will have thirty (30) calendar days following mailing of such notice in which to cure the alleged "cause" or to bring an appropriate appeal under the Kansas Administrative Procedures Act.

VIII. TERM

The duration of this Agreement is for a period beginning **DATE** and ending **DATE**.

IX. CONFIDENTIALITY

Contractor may have access to private or confidential data maintained by State ("Confidential Information") to the extent necessary to carry out its responsibilities under this contract. If any Confidential Information could be deemed protected health information ("PHI") under HIPAA, Contractor's access, use and disclosure of such information is governed by the provisions of the Business Associate Agreement attached hereto as Attachment C. Confidential Information shall be submitted to Contractor in writing and clearly labeled "Confidential." If orally transmitted, Confidential Information shall be reduced to writing within thirty (30) days of disclosure. No private or confidential data collected, maintained or used in the course of performance of this contract shall be disseminated by either party except as authorized by statute, either during the period of the contract or thereafter. Contractor must agree to return any or all data furnished by the State promptly at the request of State in whatever form it is maintained by Contractor. On the termination or expiration of this Agreement, Contractor will not use any of such data or any material derived from the data for any purpose and, where so instructed by State, will destroy or render it unreadable. In addition, Contractor shall comply with 45 C.F.R.

§205.50, Safeguarding Information for the Financial Assistance and Social Service Program, as well as 42 C.F.R. §431 Subpart F. Notwithstanding the foregoing, Contractor must comply with all the requirements of the Kansas Open Records Act with reference to any records specifically identified to this Agreement. Contractor shall accept full responsibility for providing adequate supervision and training to its agents and employees to ensure compliance with the Act.

X. NOTICES

Notices to KDHE-DHCF shall be sent via U.S. mail and/or electronic mail, addressed as follows:

Debbie Whitaker
Presumptive Eligibility Program Manager
KDHE, Division of Health Care Finance
1430 SW Topeka BLVD, 2nd floor
Office - (785) 296-4361
Email: Debbie.Whitaker@ks.gov

Notices to Entity shall be sent via U.S. mail and/or electronic mail, addressed as follows:

Contact Name
Street Address
City, State, Zip
Phone
Email address

XI. OTHER

The provisions found in Attachments A, Contractual Provisions Attachment (DA 146a), B (Compliance With The Enhancement of Contractor Protection from Reprisal For Disclosure of Certain Information and Non-Debarment Certification and Warranty form), C, (Business Associate Agreement) and D (Policy Regarding Sexual Harassment) which are attached hereto, are hereby incorporated in this contract and made a part thereof.

IN WITNESS WHEREOF, Entity and KDHE-DHCF hereto affix their signatures to this Memorandum of Understanding

Qualified Entity

KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

Chief Executive Officer

Janet Stanek
Acting Secretary

Date

Date

State of Kansas
 Department of Administration DA-146a
 (Rev. 07-19)

**ATTACHMENT A
 CONTRACTUAL PROVISIONS ATTACHMENT**

Important: This form contains mandatory contract provisions and must be attached to or incorporated in all copies of any contractual agreement. If it is attached to the vendor/contractor's standard contract form, then that form must be altered to contain the following provision:

The Provisions found in Contractual Provisions Attachment (Form DA-146a, Rev. 07-19), which is attached hereto, are hereby incorporated in this contract and made a part thereof.

The parties agree that the following provisions are hereby incorporated into the contract to which it is attached and made a part thereof, said contract being the ____ day of _____, 20__.

1. **Terms Herein Controlling Provisions:** It is expressly agreed that the terms of each and every provision in this attachment shall prevail and control over the terms of any other conflicting provision in any other document relating to and a part of the contract in which this attachment is incorporated. Any terms that conflict or could be interpreted to conflict with this attachment are nullified.
2. **Kansas Law and Venue:** This contract shall be subject to, governed by, and construed according to the laws of the State of Kansas, and jurisdiction and venue of any suit in connection with this contract shall reside only in courts located in the State of Kansas.
3. **Termination Due to Lack of Funding Appropriation:** If, in the judgment of the Director of Accounts and Reports, Department of Administration, sufficient funds are not appropriated to continue the function performed in this agreement and for the payment of the charges hereunder, State may terminate this agreement at the end of its current fiscal year. State agrees to give written notice of termination to contractor at least thirty (30) days prior to the end of its current fiscal year and shall give such notice for a greater period prior to the end of such fiscal year as may be provided in this contract, except that such notice shall not be required prior to ninety (90) days before the end of such fiscal year. Contractor shall have the right, at the end of such fiscal year, to take possession of any equipment provided State under the contract. State will pay to the contractor all regular contractual payments incurred through the end of such fiscal year, plus contractual charges incidental to the return of any such equipment. Upon termination of the agreement by State, title to any such equipment shall revert to contractor at the end of the State's current fiscal year. The termination of the contract pursuant to this paragraph shall not cause any penalty to be charged to the agency or the contractor.
4. **Disclaimer of Liability:** No provision of this contract will be given effect that attempts to require the State of Kansas or its agencies to defend, hold harmless, or indemnify any contractor or third party for any acts or omissions. The liability of the State of Kansas is defined under the Kansas Tort Claims Act (K.S.A. 75-6101, et seq.).
5. **Anti-Discrimination Clause:** The contractor agrees: (a) to comply with the Kansas Act Against Discrimination (K.S.A. 44-1001, et seq.) and the Kansas Age Discrimination in Employment Act (K.S.A. 44-1111, et seq.) and the applicable provisions of the Americans With Disabilities Act (42 U.S.C. 12101, et seq.) (ADA), and Kansas Executive Order No. 19-02, and to not discriminate against any person because of race, color, gender, sexual orientation, gender identity or expression, religion, national origin, ancestry, age, military or veteran status, disability status, marital or family status, genetic information, or political affiliation that is unrelated to the person's ability to reasonably perform the duties of a particular job or position; (b) to include in all solicitations or advertisements for employees, the phrase "equal opportunity employer"; (c) to comply with the reporting requirements set out at K.S.A. 44-1031 and K.S.A. 44-1116; (d) to include those provisions in every subcontract or purchase order so that they are binding upon such subcontractor or vendor; (e) that a failure to comply with the reporting requirements of (c) above or if the contractor is found guilty of any violation of such acts by the Kansas Human Rights Commission, such violation shall constitute a breach of contract and the contract may be cancelled, terminated or suspended, in whole or in part, by the contracting state agency or the Kansas Department of Administration; (f) Contractor agrees to comply with all applicable state and federal anti-discrimination laws and regulations; (g) Contractor agrees all hiring must be on the basis of individual merit and qualifications, and discrimination or harassment of persons for the reasons stated above is prohibited; and (h) if it is determined that the contractor has violated the provisions of any portion of this paragraph, such violation shall constitute a breach of contract and the contract may be canceled, terminated, or suspended, in whole or in part, by the contracting state agency or the Kansas Department of Administration.
6. **Acceptance of Contract:** This contract shall not be considered accepted, approved or otherwise effective until the statutorily required approvals and certifications have been given.
7. **Arbitration, Damages, Warranties:** Notwithstanding any language to the contrary, no interpretation of this contract shall find that the State or its agencies have agreed to binding arbitration, or the payment of damages or penalties. Further, the State of Kansas and its agencies do not agree to pay attorney fees, costs, or late payment charges beyond those available under the Kansas Prompt Payment Act (K.S.A. 75-6403), and no provision will be given effect that attempts to exclude, modify, disclaim or otherwise attempt to limit any damages available to the State of Kansas or its agencies at law, including but not limited to, the implied warranties of merchantability and fitness for a particular purpose.
8. **Representative's Authority to Contract:** By signing this contract, the representative of the contractor thereby represents that such person is duly authorized by the contractor to execute this contract on behalf of the contractor and that the contractor agrees to be bound by the provisions thereof.
9. **Responsibility for Taxes:** The State of Kansas and its agencies shall not be responsible for, nor indemnify a contractor for, any federal, state or local taxes which may be imposed or levied upon the subject matter of this contract.

10. **Insurance:** The State of Kansas and its agencies shall not be required to purchase any insurance against loss or damage to property or any other subject matter relating to this contract, nor shall this contract require them to establish a "self-insurance" fund to protect against any such loss or damage. Subject to the provisions of the Kansas Tort Claims Act (K.S.A. 75-6101, et seq.), the contractor shall bear the risk of any loss or damage to any property in which the contractor holds title.

11. **Information:** No provision of this contract shall be construed as limiting the Legislative Division of Post Audit from having access to information pursuant to K.S.A. 46- 1101, et seq.

12. **The Eleventh Amendment:** "The Eleventh Amendment is an inherent and incumbent protection with the State of Kansas and need not be reserved, but prudence requires the State to reiterate that nothing related to this contract shall be deemed a waiver of the Eleventh Amendment."

13. **Campaign Contributions / Lobbying:** Funds provided through a grant award or contract shall not be given or received in exchange for the making of a campaign contribution. No part of the funds provided through this contract shall be used to influence or attempt to influence an officer or employee of any State of Kansas agency or a member of the Legislature regarding any pending legislation or the awarding, extension, continuation, renewal, amendment or modification of any government contract, grant, loan, or cooperative agreement.

SAMPLE

**ATTACHMENT B
COMPLIANCE WITH THE
"ENHANCEMENT OF CONTRACTOR PROTECTION FROM REPRISAL FOR DISCLOSURE OF CERTAIN
INFORMATION"
and
NON-DEBARMENT CERTIFICATION AND WARRANTY**

Congress has enacted a law, found at 41 U.S.C. 4712, which encourages employees to report fraud, waste, and abuse. This law applies to **all** employees working for contractors, grantees, subcontractors and subgrantees on federal grants and contracts [for the purpose of this document, "Recipient of Funds"].

This program requires all grantees, their subgrantees and subcontractors to:

- Inform their employees working on any Federal award they are subject to whistleblower rights and remedies;
- Inform their employees in writing of employee whistleblower protections under 41 U.S.C. 4712 in the predominant native language of the workforce; and,
- Contractors and grantees will include such requirements in any agreement made with a subcontractor or subgrantee.

Employees of a contractor, subcontractor, grantee [or subgrantee] may not be discharged, demoted, or otherwise discriminated against as reprisal for "whistleblowing." In addition, whistleblower protections cannot be waived by any agreement, policy, form or condition of employment.

Whistleblowing is defined as making a disclosure "that the employee reasonably believes is evidence of any of the following:

- Gross mismanagement of a federal contract or grant;
- A gross waste of federal funds;
- An abuse of authority relating to a federal contract or grant;
- A substantial and specific danger to public health or safety; or,
- A violation of law, rule, or regulation related to a federal contract or grant (including the competition for, or negotiation of, a contract or grant).

To qualify under the statute, the employee's disclosure must be made to:

- A Member of Congress or a representative of a Congressional committee;
- An Inspector General;
- The Government Accountability Office;
- A federal employee responsible for contract or grant oversight or management at the relevant agency;
- An official from the Department of Justice, or other law enforcement agency;
- A court or grand jury; or,
- A management official or other employee of the contractor, subcontractor, grantee, or subgrantee who has the responsibility to investigate, discover, or address misconduct.

For all grants, contracts, sub-grants, and subcontracts funded directly or indirectly and in part or totally by federal funds, the Contractor shall inform all of its employees in writing of employee whistleblower rights and protections stated by 41 U.S.C. 4712.

NON-DEBARMENT CERTIFICATION AND WARRANTY

The Recipient of Funds acknowledges that KDHE is required to verify that the Recipient of Funds has not been suspended, debarred or otherwise excluded from receiving federal funds. Verification may be accomplished by 1) checking the Excluded Parties List System (EPLS) maintained by the General Services Administration; 2) obtaining a certification from the entity; or 3) by adding a clause or condition to the transaction.

The Recipient of Funds, as a condition of receiving funds, certifies and warrants that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency, or by any department or agency of the State of Kansas

ATTACHMENT C
BUSINESS ASSOCIATE AGREEMENT

THIS AGREEMENT is made and entered into by and between the Kansas Department of Health and Environment (hereinafter referred to as “KDHE”) and <Name of Entity> (hereinafter referred to as “Business Associate”).

Notwithstanding Section V of this Business Associate Agreement (hereinafter referred to as “BAA”), the term of this BAA shall run concurrently with the Underlying Contract between the parties and shall have the same effective date and termination date as the Underlying Agreement.

RECITALS

The Parties to this BAA have a relationship whereby KDHE may provide Business Associate access to Protected Health Information (hereinafter referred to as “PHI”), which may include electronic Protected Health Information, that Business Associate will use to fulfill its contractual obligations to KDHE.

KDHE and Business Associate acknowledge that each party has certain obligations under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), as amended, including those provisions of the American Recovery and Reinvestment Act of 2009 (“ARRA”), specifically the Health Information Technology for Economic and Clinical Health Act (“HITECH”), and the statutes implementing regulations to maintain the privacy and security of PHI, and the parties intend this BAA to satisfy those obligations including, without limitation, the requirements of 45 CFR 164.504(e).

KDHE is a Hybrid Entity under HIPAA, specifically the Division of Health Care Finance within KDHE containing the Covered Entity functions. Therefore Business Associate is not permitted to use or disclose health information in ways that KDHE could not. This protection continues as long as the data is in the hands of Business Associate. Business Associate acknowledges that for the purposes of this BAA, Business Associate is a “business associate” as that term is defined in 45 CFR § 160.103, and therefore the requirements of HIPAA apply to Business Associate in the same manner that they apply to KDHE pursuant to 42 USC § 17931(a).

NOW THEREFORE, in consideration of the mutual promises below and other good and valuable consideration the parties agree as follows:

I. DEFINITIONS

- a. “Administrative Safeguards” shall mean the administrative actions, policies and procedures to manage the selection, development, implementation and maintenance of security measures to protect PHI and to manage the conduct of Business Associate’s workforce in relation to the protection of that PHI.
- b. “Business Associate” shall have the same meaning as the term “Business Associate” as defined in 45 CFR 160.103.
- c. “Data Aggregation Services” shall mean, with respect to PHI created or received by Business Associate in its capacity as a Business Associate of KDHE, the combining of such PHI by the Business Associate with the PHI received by the Business Associate in its capacity as a business associate of another covered

entity, to permit data analyses that relate to the health care operations of the respective covered entities, as defined in 45 CFR § 164.501 and as such term may be amended from time to time in this cited regulation.

- d. “Designated Record Set” shall mean a group of records maintained by or for KDHE that consists of the following: (a) medical records and billing records about Individuals maintained by or for a health care provider; (b) enrollment, payment, claims adjudication, and case or medical management record systems maintained by or for a health plan; or (c) records used in whole or in part, by or for KDHE to make decisions about Individuals. For these purposes, the term “record” means any item, collection, or group of information that includes PHI and is maintained, collected, used, or disseminated by or for KDHE.
- e. “Disclosure” shall mean the release, transfer, provision of, access to, or divulging in any other manner of PHI outside the entity holding the information.
- f. “HIPAA” shall mean the Health Insurance Portability and Accountability Act of 1996, the implementation regulations promulgated thereunder by the U.S. Department of Health and Human Services, the HITECH (as defined below) and any future regulations promulgated thereunder, all as may be amended from time to time.
- g. “HITECH Act” shall mean the Health Information Technology for Economic Clinical Health Act, Title VIII of Division A and Title VI of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub.L.111-5).
- h. “Individual” shall have the same meaning as the term “individual” as defined in 45 CFR 160.103, and any amendments thereto, and shall include a person who qualifies as a personal representative in accordance with 45 CFR 164.502(g).
- i. “Physical Safeguards” shall mean the physical measures, policies and procedures to protect KDHE’s electronic information systems and related buildings and equipment from natural and environmental hazards and unauthorized intrusion.
- j. “Privacy Rule” shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 CFR Part 160 and Part 164.
- k. “Protected Health Information” shall have the same meaning as the term “protected health information”, as defined in 45 CFR 160.103 and any amendments thereto, limited to the information created or received by Business Associate from or on behalf of KDHE.
- l. “Required by Law” shall have the same meaning as the term “required by law” in 45 CFR 164.103.
- m. “Secretary” shall mean the Secretary of the United States Department of Health and Human Services or his/her designee.
- n. “Security Incident” shall mean the attempted or successful unauthorized access, use, disclosure, modification or destruction of information or interference with system operations in an information system.

- o. "Security Rule" shall mean the Standards for Security of Electronic Protected Health Information at 45 CFR Parts 160, 162 and 164.
- p. "Technical Safeguards" shall mean the technology and the policy and procedures for its use that protect PHI and control access to it.
- q. "Underlying Contract" means any written contract for services between KDHE and or the Kansas State Employees Health Care Commission and Business Associate.
- r. "Use" shall mean, with respect to PHI, the sharing, employment, application, utilization, examination, or analysis of such information within any entity that maintains such information.
- s. Capitalized terms used, but not otherwise defined, in this BAA shall have the same meaning ascribed to them in HIPAA, the Privacy Rule, the Security Rule, or HITECH or any future regulations promulgated, or guidance issued by the Secretary.

II. OBLIGATIONS AND ACTIVITIES OF BUSINESS ASSOCIATE

- a. Use and Disclosure. Business Associate agrees to not use or disclose PHI other than as permitted or required by this BAA or as Required by Law.
- b. Safeguards to be in Place. Business Associate agrees to use appropriate safeguards to prevent the use or disclosure of PHI other than as provided for by this BAA. Additionally, Business Associate shall implement Administrative, Physical and Technical Safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of the PHI that it creates, receives, maintains or transmits on behalf of KDHE as required by the Security Rule.
- c. HIPAA Training. Business Associate agrees to ensure all members of its workforce, including subcontractor workforce members, that will or potentially will provide services pursuant to the Underlying Agreement will be appropriately trained on the requirements of HIPAA.
- d. Duty to Mitigate. Business Associate agrees to mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of PHI by Business Associate in violation of the requirements of this BAA or the Privacy Rule and to communicate in writing, such procedures to KDHE.
- e. Business Associate's Agents and Subcontractors. Business Associate agrees to ensure that any agent, including a subcontractor, to whom it provides PHI received from, or created or received by Business Associate on behalf of KDHE agrees, in writing in the form of a Business Associate Agreement, to the same restrictions and conditions that apply through this BAA to Business Associate with respect to such information, including implementation of reasonable and appropriate safeguards to protect PHI. Business Associate agrees that it is directly liable for any actions of its subcontractors that results in a violation of this Agreement. Business Associate also agrees to make available to KDHE any contracts or agreements Business Associate has with any subcontractors Business Associate provides PHI under this BAA.

- f. Duty to Provide Access. To the extent Business Associate has PHI in a Designated Record Set, Business Associate agrees to provide access, at the request of KDHE, to the PHI in the Designated Record Set to KDHE or, as directed by KDHE, to the Individual, in order to meet the requirements under 45 CFR 164.524. Any denial by Business Associate of access to PHI shall be the responsibility of, and sufficiently addressed by, Business Associate, including, but not limited to, resolution of all appeals and/or complaints arising therefrom.
- g. Amendment of PHI. Business Associate agrees to make any amendment(s) to PHI in its possession contained in a Designated Record Set that KDHE directs or agrees to pursuant to 45 CFR 164.526 at the request of KDHE or an Individual, and within a reasonable time and manner.
- h. Duty to Make Internal Practices Available. Business Associate agrees to make its internal practices, books and records, including policies and procedures relating to the use and disclosure of PHI, and any PHI received from, or created or received by Business Associate on behalf of KDHE, available to the Secretary, in a time and manner designated by the Secretary, for purposes of the Secretary determining KDHE's compliance with the Privacy Rule.
- i. Documenting Disclosures/Accounting. Business Associate agrees to document any disclosures of PHI and information in its possession related to such disclosures as would be required for KDHE to respond to a request by an individual for an accounting of disclosures of PHI in accordance with 45 CFR 164.528. Business Associate agrees to provide to KDHE information collected in accordance with Section II(h) of this BAA, to permit KDHE to respond to a request by an Individual for an accounting of disclosures of PHI in accordance with 45 CFR 164.528.
- j. Reporting Disclosures to KDHE. In addition to the duty to mitigate under Section II(c), Business Associate agrees to report to KDHE any use or disclosure of the PHI not provided for by this BAA or the Privacy Rule of which it or its officers, employees, agents or subcontractors become aware, including any Security Incident of which it becomes aware, as soon as practicable but no longer than three (3) business days after the discovery of such disclosure. Notice to KDHE shall consist of notifying the KDHE Privacy Officer by phone or email of the occurrence of an unauthorized use, disclosure or security incident.
- k. Notification of Breach. Business Associate shall notify Covered Entity within three (3) business days after it, or any of its employees, subcontractors, or agents, reasonably suspects that a breach of unsecured PHI as defined by 45 CFR 164.402 may have occurred, irrespective of any occurrence or non-occurrence of harm. Notice to KDHE shall consist of notifying the KDHE Privacy Officer by phone or email of the occurrence of a Breach or suspected occurrence of a Breach. Business Associate shall exercise reasonable diligence to become aware of whether a breach of unsecured PHI may have occurred and, except as stated to the contrary in this Section, shall otherwise comply with 45 CFR 164.410 in making the required notification to Covered Entity. Business Associate shall cooperate with Covered Entity in the determination as to whether a breach of unsecured PHI has occurred and whether notification to affected individuals of the breach of unsecured PHI is required by 45 CFR 164.400 *et seq.*, including continuously providing the Covered Entity with additional information related to the suspected breach as it becomes

available. In the event that Covered Entity informs Business Associate that (i) Covered Entity has determined that the affected individuals must be notified because a breach of unsecured PHI has occurred and (ii) Business Associate is in the best position to notify the affected individuals of such breach, Business Associate shall immediately provide the required notice (1) within the time frame defined by 45 CFR 164.404(b), (2) in a form and containing such information reasonably requested by Covered Entity, (3) containing the content specified in 45 CFR 164.404(c), and (4) using the method(s) prescribed by 45 CFR 164.404(d). In addition, in the event that Covered Entity indicates to Business Associate that Covered Entity will make the required notification, Business Associate shall promptly take all other actions reasonably requested by Covered Entity related to the obligation to provide a notification of a breach of unsecured PHI under 45 CFR 164.400 *et seq.* Business Associate shall indemnify and hold Covered Entity harmless from all liability, costs, expenses, claims or other damages that Covered Entity, its related corporations, or any of its or their directors, officers, agents, or employees, may sustain as a result of a Business Associate's breach, or Business Associate's subcontractor or agent's breach, of its obligations under this Agreement.

III. PERMITTED USES AND DISCLOSURES BY BUSINESS ASSOCIATE

- a. General Use and Disclosure Provisions. Except as otherwise limited in this Agreement, Business Associate may use or disclose PHI on behalf of, or to provide services to, Covered Entity for the purposes set forth in III(b), if such use or disclosure of PHI would not violate the Privacy Rule if done by Covered Entity.
- b. Specific Use and Disclosure Provisions.
 1. Business Associate may use and disclose PHI to perform services for Covered Entity, including specific services, as set out in the Underlying Agreement, and any additional services necessary to carry out those specific services in the Underlying Agreement.
 2. Business Associate may use PHI in its possession for the proper management and administration of Business Associate and to carry out the legal responsibilities of Business Associate.
 3. Business Associate may disclose PHI in its possession for the proper management and administration of Business Associate, provided that disclosures are Required By Law.
 4. Business Associate may only de-identify PHI in its possession obtained from Covered Entity with Covered Entity's prior written consent, in accordance with all de-identification requirements of the Privacy Rule.
 5. Business Associate may use PHI to report violations of law to appropriate federal and state authorities, consistent with 45 CFR 164.502(j)(1). Covered Entity shall be furnished with a copy of all correspondence sent by Business Associate to a federal or state authority.

6. Except as otherwise limited in this Agreement, Business Associate may use PHI to provide Data Aggregation Services to Covered Entity.
7. Any use or disclosure of PHI by Business Associate shall be in accordance with the minimum necessary policies and procedures of Covered Entity and the regulations and guidance issued by the Secretary on what constitutes the minimum necessary for Business Associate to perform its obligations to Covered Entity under this Agreement and the Underlying Agreement.

IV. OBLIGATIONS OF COVERED ENTITY

- a. Covered Entity shall notify Business Associate of any limitation(s) in its Notice of Privacy Practices of Covered Entity in accordance with 45 CFR 164.520, to the extent that such limitation may affect Business Associate's use or disclosure of PHI.
- b. Covered Entity shall notify Business Associate in a timely manner of any changes in, or revocation of, permission by an Individual to use or disclose PHI to the extent that such change may affect Business Associate's permitted or required use or disclosure of PHI.
- c. Covered Entity shall notify Business Associate in a timely manner of any restriction to the use and/or disclosure of PHI, which the Covered Entity has agreed to in accordance with 45 CFR 164.522, to the extent that such restriction may affect Business Associate's use or disclosure of PHI.
- d. Covered Entity shall not request Business Associate to use or disclose PHI in any manner that would not be permissible under the Privacy Rule if done by Covered Entity.

V. TERMINATION

- a. Term. The term of this Agreement shall run concurrently with the Underlying Contract with Covered Entity and shall terminate upon termination of the Underlying Contract and when all of the PHI provided by Covered Entity to Business Associate, or created or received by Business Associate on behalf of Covered Entity, is destroyed or returned to Covered Entity, or, if it is infeasible to return or destroy the PHI, protections are extended to such information, in accordance with the termination provisions of Section (V)(c)(2).
- b. Termination for Cause. Upon either party's knowledge of a material breach by the other party, such party shall either:
 1. Provide an opportunity for the breaching party to cure the breach, end the violation, or terminate this Agreement if the breaching party does not cure the breach or end the violation within five (5) business days;
 2. Immediately terminate the Agreement if the breaching party has breached a material term of this Agreement and cure is not possible; or
 3. If neither termination nor cure is feasible, the non-breaching party shall report the violation to the Secretary.

- c. Effect of Termination.
1. Except as provided in paragraph V(c)(2) of this Agreement, upon termination of this Agreement, for any reason, Business Associate shall return or destroy all PHI received from Covered Entity or created or received by Business Associate on behalf of Covered Entity. This provision shall apply to PHI that is in the possession of subcontractors or agents of Business Associate. Business Associate shall retain no copies of the PHI.
 2. In the event that Business Associate determines that returning or destroying the PHI is infeasible, Business Associate shall provide to Covered Entity notification in writing of the conditions that make return or destruction infeasible. Upon verification that return or destruction of PHI is infeasible, Business Associate shall extend the protections of this Agreement to such PHI and limit further uses and disclosures of such PHI to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such PHI. If it is infeasible for Business Associate to obtain, from a subcontractor or agent, any PHI in the possession of the subcontractor or agent, 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. Judicial or Administrative Proceedings. Notwithstanding any other provision herein, Covered Entity may terminate the applicable Underlying Agreement, effective immediately, upon a finding or stipulation that Business Associate violated any applicable standard or requirement of the Privacy Rule or the Security Rule or any other applicable laws related to the security or privacy of PHI, relating to the Underlying Agreement, in any criminal, administrative or civil proceeding in which the Business Associate is a named party.

VI. MISCELLANEOUS

- a. Regulatory References. A reference in this Agreement to a section in the Privacy Rule or Security Rule means the section as in effect or as amended and for which compliance is required.
- b. Amendment. No change, amendment, or modification of this Agreement shall be valid unless set forth in writing and agreed to by both parties, except as set forth in Section VI(l) below.
- c. Indemnification. Business Associate shall indemnify Covered Entity for any and all claims, inquiries, costs or damages, including but not limited to any monetary penalties, that Covered Entity incurs arising from a violation by Business Associate, or a subcontractor or agent of Business Associate, of its obligations hereunder.
- d. Survival. The respective obligations of Business Associate under this Agreement shall survive the termination of this Agreement.

- e. Interpretation. Any ambiguity or inconsistency in this Agreement shall be resolved in favor of a meaning that permits Covered Entity to comply with the Privacy Rule, the Security Rule, and the ARRA.
- f. No Third-Party Beneficiaries. Nothing express or implied in this Agreement is intended to confer, nor shall anything herein confer, upon any person other than Covered Entity and its respective successors or assigns, any rights, remedies, obligations or liabilities whatsoever.
- g. Notices. Any notices to be given to either party under this Agreement shall be made in writing and delivered via e-mail at the address given below:
- Business Associate: <QE Individual>, <email>
Covered Entity: Michael Smith, Michael.Smith@ks.gov
- h. Headings. The section headings are for convenience only and shall not be construed to define, modify, expand, or limit the terms and provisions of this Agreement.
- i. Governing Law and Venue. This Agreement shall be governed by, and interpreted in accordance with, the internal laws of the State of Kansas, without giving effect to its conflict of law provisions.
- j. Binding Effect. This Agreement shall be binding upon, and shall inure to the benefit of, the parties hereto and their respective permitted successors and assigns.
- k. Effect on Underlying Agreement. If any portion of this Agreement is inconsistent with the terms of the Underlying Agreement, the terms of this Agreement shall prevail. Except as set forth above, the remaining provisions of the Underlying Agreement are ratified in their entirety.
- l. Modification. The parties acknowledge that state and federal laws relating to electronic data security and privacy are rapidly evolving and that amendment of this Agreement may be required to ensure compliance with such developments. The parties specifically agree to take such action as may be necessary to implement the standards and requirements of HIPAA and other applicable state and federal laws relating to the security or confidentiality of PHI as determined solely by Covered Entity.
- m. In the event that a federal or state law, statute, regulation, regulatory interpretation or court/agency determination materially affects this Agreement, as is solely determined by Covered Entity, the parties agree to negotiate in good faith any necessary or appropriate revisions to this Agreement. If the parties are unable to reach an agreement concerning such revisions within the earlier of sixty (60) days after the date of notice seeking negotiations or the effective date of the change in law or regulation, or if the change in law or regulation is effective immediately, the Covered Entity, in its sole discretion, may unilaterally amend this Agreement to comply with the change in law upon written notice to Business Associate.

VII. OBLIGATIONS OF BUSINESS ASSOCIATE PURSUANT TO HITECH

- a. Access to PHI in an Electronic Format. If Business Associate uses or maintains PHI in an Electronic Health Record, Business Associate must provide access to such information in an electronic format if so requested by an Individual. Any fee that Business Associate may charge for such electronic copy shall not be greater than Business Associate's labor costs in responding to the request. If an Individual makes a direct request to Business Associate for access to a copy of PHI, Business Associate will promptly inform the Covered Entity in writing of such request.
- b. Prohibition on Marketing Activities. Business Associate shall not engage in any marketing activities or communications with any individual unless such marketing activities or communications are allowed by the terms of the Underlying Agreement and are made in accordance with HITECH or any future regulations promulgated thereunder. Notwithstanding the foregoing, any payment for marketing activities should be in accordance with HITECH or any future regulations promulgated thereunder.
- c. Application of the Security Rule to Business Associate. Business Associate shall abide by the provisions of the Security Rule and use all appropriate safeguards to prevent use or disclosure of PHI other than as provided for by this Agreement. Without limiting the generality of the foregoing sentence, Business Associate shall:
 1. Adopt written policies and procedures to implement the same administrative, physical, and technical safeguards required of the Covered Entity; and
 2. Abide by the most current guidance on the most effective and appropriate technical safeguards as issued by the Secretary.

If Business Associate violates the Security Rule, it acknowledges that it is directly subject to civil and criminal penalties.

VIII. ADDITIONAL OBLIGATIONS OF BUSINESS ASSOCIATE

Business Associate shall not receive any remuneration, directly or indirectly, in exchange for any PHI, unless so allowed by the terms of the Underlying Agreement and in accordance with HITECH and any future regulations promulgated thereunder.

IX. ENFORCEMENT

Business Associate acknowledges that, in the event it, or its subcontractor or agent, violates any applicable provision of the Security Rule or any term of this Agreement that would constitute a violation of the Privacy Rule, Business Associate will be subject to and will be directly liable for any and all civil and criminal penalties that may result from such violation.

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement as of the date reflected below.

<QUALIFIED ENTITY>
(BUSINESS ASSOCIATE)

**KANSAS DEPARTMENT OF
HEALTH AND ENVIRONMENT**

<Name>
<Title>

Janet Stanek
Acting Secretary

Date

Date

SAMPLE

ATTACHMENT D
Policy Regarding Sexual Harassment

WHEREAS, sexual harassment and retaliation for sexual harassment claims are unacceptable forms of discrimination that must not be tolerated in the workplace; and

WHEREAS, state and federal employment discrimination laws prohibit sexual harassment and retaliation in the workplace; and

WHEREAS, officers and employees of the State of Kansas are entitled to working conditions that are free from sexual harassment, discrimination, and retaliation; and

WHEREAS, the Governor and all officers and employees of the State of Kansas should seek to foster a culture that does not tolerate sexual harassment, retaliation, and unlawful discrimination.

NOW THEREFORE, pursuant to the authority vested in me as Governor of the State of Kansas, I hereby order as follows:

1. All Executive Branch department and agency heads shall have available and shall regularly review and update at least every three years or more frequently as necessary, their sexual harassment, discrimination, and retaliation policies. Such policies shall include components for confidentiality and anonymous reporting, applicability to intern positions, and training policies.
2. All Executive Branch department and agency heads shall ensure that their employees, interns, and contractors have been notified of the state's policy against sexual harassment, discrimination, or retaliation, and shall further ensure that such persons are aware of the procedures for submitting a complaint of sexual harassment, discrimination, or retaliation, including an anonymous complaint.
3. Executive Branch departments and agencies shall annually require training seminars regarding the policy against sexual harassment, discrimination, or retaliation. All employees shall complete their initial training session pursuant to this order by the end of the current fiscal year.
4. Within ninety (90) days of this order, all Executive Branch employees, interns, and contractors under the jurisdiction of the Office of the Governor shall be provided a written copy of the policy against sexual harassment, discrimination, and retaliation, and they shall execute a document agreeing and acknowledging that they are aware of and will comply with the policy against sexual harassment, discrimination, and retaliation.
5. Matters involving any elected official, department or agency head, or any appointee of the Governor may be investigated by independent legal counsel.
6. The Office of the Governor will require annual mandatory training seminars for all staff, employees, and interns in the office regarding the policy against sexual harassment, discrimination, and retaliation, and shall maintain a record of attendance.
7. Allegations of sexual harassment, discrimination, or retaliation within the Office of the Governor will be investigated promptly, and violations of law or policy shall constitute grounds for disciplinary action, including dismissal.

8. This Order is intended to supplement existing laws and regulations concerning sexual harassment and discrimination and shall not be interpreted to in any way diminish such laws and regulations. The Order provides conduct requirements for covered persons and is not intended to create any new right or benefit enforceable against the State of Kansas.
9. Persons seeking to report violations of this Order, or guidance regarding the application or interpretation of this Order, may contact the Office of the Governor regarding such matters.

**Agreement to Comply with the Policy Against Sexual Harassment,
Discrimination, and Retaliation.**

I hereby acknowledge that I have received a copy of the State of Kansas Policy Against Sexual Harassment, Discrimination, and Retaliation established by Executive Order 18-04 and agree to comply with the provisions of this policy.

Signature and Date

Printed Name