



# KERN HEALTH SYSTEMS

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### POLICY AND PROCEDURES

**SUBJECT: Medical Records and Other Protected Health Information – Privacy, Use, and Disclosure**

POLICY #: 2.28-P

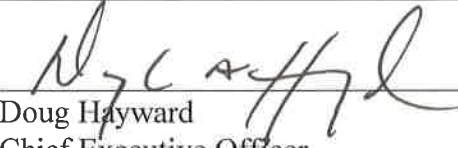


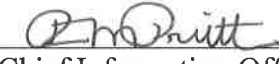




DEPARTMENT: Utilization Management – Quality Improvement

Effective Date:  
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Review/Revised Date:  
3/30/2016

DMHC  
DHCS  
BOD

PAC  
QI/UM COMMITTEE  
FINANCE COMMITTEE

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Approved		Date	3/30/16
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Approved		Date	3/22/16
	Director of Provider Relations		
Approved		Date	3/18/16
	Administrative Director Health Services		

**POLICY<sup>1</sup>:**

Confidential patient information shall only be disclosed in accordance with state and federal regulations.

Providers are required to comply with applicable portions of the Confidentiality of Medical Information Act (California Civil Code §56 through §56.37), the Patient Access to Health Records Act (California Health and Safety Code §123100, et seq), and the Health Insurance Portability and Accountability Act (Code of Federal Regulations Title 45 Parts 160 and 164).

Except to the extent expressly authorized by the patient or to the extent permitted or required by this Policy and Procedure and by applicable State and Federal regulations, neither KHS nor its contracted providers shall intentionally share, sell, or otherwise use any medical information for any purpose not necessary to provide health care services to the patient.<sup>2</sup>

**PURPOSE:**

To establish the policy and procedure for the privacy, use, and disclosure of medical records and other protected health information.

**DEFINITIONS:**

Breach <sup>3</sup>	A breach is, generally, an impermissible use or disclosure under the Privacy Rule that compromises the security or privacy of the protected health information such that the use or disclosure poses a significant risk of financial, reputational, or other harm to the affected individual. (Exceptions to a breach may exist).
Business Associate	<p>A person who:</p> <ul style="list-style-type: none"> <li>(1) performs or assists in the performance of a function or activity involving the use or disclosure of individually identifiable health information, including but not limited to claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, billing, benefit management, practice management</li> <li>(2) provides legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, or financial services where the provision of services involves the disclosure of individually identifiable health information</li> </ul> <p>KHS employees are not considered business associates of KHS. Other covered entities may also be considered business associates of KHS.</p>
Covered Entity <sup>4</sup>	Entities that must comply with HIPAA regulations. Covered entities include (1) health plans; (2) health plan clearinghouses; or (3) health care providers who transmit any health information in electronic form in connection with a transaction covered by HIPAA.
Covered Functions <sup>5</sup>	Those functions of a covered entity the performance of which makes the entity a health plan, health care provider, or health care clearinghouse.
Health Care Operations <sup>6</sup>	Any of the following activities of the covered entity to the extent that

the activities are related to covered functions:

- (1) Conducting quality assessment and improvement activities, including outcomes evaluation and development of clinical guidelines, provided that the obtaining of generalizable knowledge is not the primary purpose of any studies resulting from such activities; population-based activities relating to improving health or reducing health care costs, protocol development, case management and care coordination, contacting of health care providers and patients with information about treatment alternatives; and related functions that do not include treatment;
- (2) Reviewing the competence or qualifications of health care professionals, evaluating practitioner and provider performance, health plan performance, conducting training programs in which students, trainees, or practitioners in areas of health care learn under supervision to practice or improve their skills as health care providers, training of non-health care professionals, accreditation, certification, licensing, or credentialing activities;
- (3) Underwriting, premium rating, and other activities relating to the creation, renewal or replacement of a contract of health insurance or health benefits, and ceding, securing, or placing a contract for reinsurance of risk relating to claims for health care (including stop-loss insurance and excess of loss insurance), provided that the requirements of 45 CFR §164.514(g) are met, if applicable;
- (4) Conducting or arranging for medical review, legal services, and auditing functions, including fraud and abuse detection and compliance programs;
- (5) Business planning and development, such as conducting cost-management and planning-related analyses related to managing and operating the entity, including formulary development and administration, development or improvement of methods of payment or coverage policies; and
- (6) Business management and general administrative activities of the entity, including but not limited to:
  - (i) Management activities relating to implementation of and compliance with the requirements of this subchapter;
  - (ii) Customer service, including the provision of data analyses for policy holders, plan sponsors, or their customers, provided that PHI is not disclosed to such policy holder, plan sponsor, or customer
  - (iii) Resolution of internal grievances
  - (iv) The sale, transfer, merger, or consolidation of all or part of the covered entity with another covered entity, or an entity that following such activity will become a covered entity

	<p>and due diligence related to such activity; and</p> <p>(v) Consistent with the applicable requirements of 45 CFR §164.514, creating de-identified health information or a limited data set, and fundraising for the benefit of the covered entity.</p>
<b>Health Oversight Agency</b>	An agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant
<b>HIPAA</b>	The Health Insurance Portability and Accountability Act. United States Code of Federal Regulations Title 45 Parts 160 and 164.
<b>HITECH</b>	Health Information Technology for Economic and Clinical Health (HITECH) Act requiring HIPAA covered entities and their business associates to provide notification following a breach of unsecured protected health information.
<b>Individually identifiable health information<sup>7</sup></b>	Medical information that includes or contains any element of personal identifying information sufficient to allow identification of the individual, such as the patient's name, address, electronic mail address, telephone number, social security number, or other information that, alone or in combination with other publicly available information, reveals the individual's identity.
<b>Medical information<sup>8</sup></b>	Any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical company, or contractor, regarding a patient's medical history, or mental or physical condition, or treatment.

<b>Mental Health Records<sup>9</sup></b>	Patient records, or discrete portions thereof, specifically relating to evaluation or treatment of a mental disorder. This includes, but is not limited to, all alcohol and drug abuse records.
<b>Payment<sup>10</sup></b>	<p>(1) The activities undertaken by:</p> <ul style="list-style-type: none"> <li>(i) A health plan to obtain premiums or to determine or fulfill its responsibility for coverage and provision of benefits under the health plan; or</li> <li>(ii) A covered health care provider or health plan to obtain or provide reimbursement for the provision of health care; and</li> </ul> <p>(2) The activities in paragraph (1) of this definition relate to the individual to whom health care is provided and include, but are not limited to:</p> <ul style="list-style-type: none"> <li>(i) Determinations of eligibility or coverage (including coordination of benefits or the determination of cost sharing amounts), and adjudication or subrogation of health benefit claims;</li> <li>(ii) Risk adjusting amounts due based on enrollee health status and demographic characteristics;</li> <li>(iii) Billing, claims management, collection activities, obtaining payment under a contract for reinsurance (including stop-loss insurance and excess of loss insurance), and related health care data processing;</li> <li>(iv) Review of health care services with respect to medical necessity, coverage under a health plan, appropriateness of care, or justification of charges;</li> <li>(v) Utilization review activities, including precertification and preauthorization of services, concurrent and retrospective review of services; and</li> <li>(vi) Disclosure to consumer reporting agencies of any of the following PHI relating to collection of premiums or reimbursement: <ul style="list-style-type: none"> <li>(a) Name and address</li> <li>(b) Date of birth</li> <li>(c) Social security number</li> <li>(d) Payment history</li> <li>(e) Account number</li> <li>(f) Name and address of the health care provider and/or health plan</li> </ul> </li> </ul>
<b>Protected Health Information (PHI)</b>	Individually identifiable health information that is transmitted by electronic media; maintained in electronic media; or transmitted or maintained in any other form or medium. Protected health information excludes individually identifiable health information in employment records held by an employer.
<b>Psychotherapist</b>	A person who is both a psychotherapist as defined in Section 1010 of

	the Evidence Code <i>and</i> a “provider of health care” as defined in the Health and Safety Code. This means the provider must meet both tests. Section 1010 defines a psychotherapist to include psychiatrists, psychologists, clinical social workers, marriage, family and child counselor, and other professionals who provide mental health care or the person authorized or reasonably believed by the patient to be authorized to practice psychiatry.
<b>Psychotherapy Notes</b>	Notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual’s medical record. This excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.

**PROCEDURE:**

**1.0 REQUEST FOR PROTECTED HEALTH INFORMATION**

Providers must make reasonable efforts to limit requests for PHI to the minimum necessary to accomplish the intended purpose of the request.<sup>11</sup>

**2.0 SPECIALLY PROTECTED PHI**

Special protection is always afforded to psychotherapy notes<sup>12</sup>. Use and/or disclosure of PHI related to psychotherapy notes must always have individual authorization except in the following circumstances<sup>13</sup>:

- A. Use by the originator of the psychotherapy notes for treatment
- B. Use or disclosure by the covered entity for its own training programs in which students, trainees, or practitioners in mental health learn under supervision to practice or improve their skills in group, joint, family, or individual counseling
- C. Use to defend legal action or other proceeding brought against the covered entity by the individual
- D. Use or disclosure as required by law
- E. Use or disclosure for health oversight activities of the originator of the psychotherapy notes
- F. Disclosure to coroners or medical examiners as described in Section 5.6 of this procedure
- G. Use or disclosure as necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public as described in Section 5.10 of this procedure

Special protection from unauthorized disclosure is afforded to other types of PHI. Disclosure of the following types of PHI must always have individual authorization:

- A. Test results to detect the probable causative agent of acquired immune deficiency syndrome ("AIDS")
- B. Alcohol, narcotic, and drug abuse patient records

- C. Mental illness and developmental disabilities
- D. Confidential communications falling within the scope of the physician patient or psychotherapist patient privilege.
- E. Participation in outpatient treatment with a psychotherapist.<sup>14</sup> This exception does not apply to the disclosure or use of information by a law enforcement agency or a regulatory agency when required for an investigation of unlawful activity or for licensing, certification, or regulatory purposes, unless the disclosure is otherwise prohibited by law.<sup>15</sup>

### 3.0 PERSONAL REPRESENTATIVES

Providers must treat a personal representative as the individual. Personal representatives include the following:

- A. Persons with the authority to act on behalf of an adult or an emancipated minor in making decisions related to health care
- B. Parents, guardians, or other persons acting *in loco parentis* with the authority to act on behalf of a minor in making decisions related to health care except that such a person may not be a personal representative and the minor has authority to act as an individual in any of the following situations:
  - (i) The minor consents to such health care service; no other consent to such health care service is required by law; and the minor has not requested that such person be treated as the personal representative
  - (ii) The minor may lawfully obtain such health care service without the consent of a parent, guardian, or other person acting in loco parentis, and the minor, a court, or another person authorized by law contests to such health care service
  - (iii) A parent, guardian, or other person acting in loco parentis assents to an agreement of confidentiality between a covered health care provider and the minor with respect to such health care service
- C. Executors, administrators, or other persons who have the authority to act on behalf of a deceased individual or of the individual's estate

A covered entity may elect not to treat a person as the personal representative of an individual if:

- A. The covered entity has a reasonable belief that the individual has been or may be subjected to domestic violence, abuse, or neglect by such a person; or treating such person as the personal representative could endanger the individual; and
- B. The covered entity, in the exercise of professional judgement, decides that it is not in the best interest of the individual to treat the person as the individual's personal representative.

See sections 5.1 and 5.2 of this policy for guidelines regarding the release of PHI for treatment or payment purposes to an individual's relatives, close personal friends, or any other person identified by the individual.

### 4.0 USE OF PROTECTED HEALTH INFORMATION

PHI may be used without individual authorization for purposes of treatment, payment, health care operations, and as required by law.<sup>16</sup> No other use of PHI is permitted without explicit individual authorization as described in the *Individual Authorization* section of this procedure.<sup>17</sup>

- A. For the covered entity's own treatment activities
- B. For the treatment activities of a health care provider
- C. To any entity contracting with KHS to monitor or administer care of enrollees for purposes of disease management programs and services, provided that the disease management services and care are communicated to and/or authorized by a treating physician as required by California Civil Code §56.10(c)(17).

In cases where PHI is to be disclosed to an individual's relative, close personal friend, or any other person identified by the individual, the disclosure must be limited to that PHI which is directly relevant to such person's involvement with the individual's care. Prior to such disclosures, providers must do one of the following<sup>31</sup>:

- A. Obtain the individual's agreement
- B. Provide the individual with the opportunity to object, and the individual does not express an objection
- C. Reasonably infer from the circumstances, based on the exercise of professional judgement, that the individual does not object to the disclosure
- D. If the individual is not present, or the opportunity to agree or object cannot practicably be provided because of the individual's incapacity or an emergency circumstance, determine whether the disclosure is in the best interest of the individual and, if so, disclose only the PHI that is directly relevant to the person's involvement with the individual's health care

## 5.2 Payment<sup>32</sup>

With the exception of specially protected PHI as discussed in Section 2.0 of this procedure, PHI may be disclosed without individual authorization as follows:

- A. For the covered entity's own payment activities
- B. To another covered entity or a health care provider for the payment activities of the entity that receives the information

In cases where PHI is to be disclosed to an individual's relative, close personal friend, or any other person identified by the individual, the disclosure must be limited to that PHI which is directly relevant to such person's involvement with payment related to the individual's health care. Prior to such disclosures, providers must do one of the following<sup>31</sup>:

- A. Obtain the individual's agreement
- B. Provide the individual with the opportunity to object, and the individual does not express an objection
- C. Reasonably infer from the circumstances, based on the exercise of professional judgement, that the individual does not object to the disclosure
- D. If the individual is not present, or the opportunity to agree or object cannot practicably be provided because of the individual's incapacity or an emergency circumstance, determine whether the disclosure is in the best interest of the individual and, if so, disclose only the PHI that is directly relevant to the person's involvement with the individual's health care



### **5.3 Health Care Operations<sup>33</sup>**

With the exception of specially protected PHI as discussed in Section 2.0 of this procedure, PHI may be disclosed without individual authorization as follows:

- A. For the covered entity's own health care operations
- B. To another covered entity for health care operations activities of the entity that received the information, if each entity either has or had a relationship with the individual who is the subject of the PHI being requested, the PHI pertains to such a relationship, and the disclosure is:
  - (i) For a purpose listed in paragraph (1) or (2) of the definition of health care operations; or
  - (ii) For the purpose of health care fraud and abuse detection or compliance
- C. A covered entity that participates in an organized health care arrangement may disclose PHI about an individual to another covered entity that participates in the organized health care arrangement for any health care operations activities of the organized health care arrangement.

#### **5.3.1 Business Associates<sup>34</sup>**

PHI may be disclosed without individual authorization as follows:

- A. To a business associate that provides billing, claims management, medical data processing, or other administrative services for providers or for an insurer or other person responsible for paying for health care services rendered to the patient<sup>35</sup>
- B. To a business associate to create information that is not individually identifiable health information<sup>36</sup>

PHI may be disclosed without individual authorization to a business associate only upon assurance that the business associate will appropriately safeguard the information. The business associate may also be allowed to create or receive PHI on KHS behalf upon such assurance. This assurance is obtained through either a business associate contract or a Memorandum of Understanding (MOU).

Business associate contracts do not have to be received from entities performing enrollment/eligibility activities. MOUs, instead of business associate contracts, should be maintained with other governmental entities.

##### **5.3.1.1 Business Associate Contracts/ MOUs<sup>37</sup>**

Contracts/MOUs may not authorize business associates to use or disclose PHI in a manner that violates this policy and procedure. Business associate contracts/MOUs must contain all of the following elements:

- A. Establishment of the permitted and required uses and disclosures of PHI by the business associate
- B. Permission for the use and disclosure of PHI for the proper management and administration of the business associate and for the carrying out of legal responsibilities of the business associate.

- C. Prohibition of the use or further disclosure of PHI other than as permitted or required by the contract or as required by law
- D. Requirement to use of appropriate safeguards to prevent use or disclosure of PHI other than as provided for by the contract
- E. Requirement to report immediately to the covered entity upon discovery of any inappropriate use or disclosure of PHI (See Attachment C – Business Associate Amendment).
- F. Requirement that any agents, including a subcontractor, to whom PHI is provided must agree to the same restrictions and conditions that apply to the business associate
- G. Requirement to make PHI available to the covered entity in such a manner that the covered entity may comply with an individual's request for disclosure, amendment, or accounting
- H. Requirement to incorporate any amendments requested by the individual into the business associate's record
- I. Requirement to make its internal practices, books, and records relating to the use and disclosure of PHI available to HHS for purposes of determining the covered entity's compliance with HIPAA
- J. Requirement to, upon termination of the contract, return or destroy all PHI received from, or created, or received on behalf of the covered entity that the business associate still maintains in any form and retain no copies of such information or, if such return or destruction is not feasible, extend the protections of the contract to the PHI and limit further uses and disclosures to those purposes that make the return or destruction of the PHI infeasible
- K. Authorization for termination of the contract by the covered entity if the covered entity determines that the business associate has violated a material term of the contract

Upon knowledge of a pattern of activity or practice of a business associate that constitutes a material breach or violation of the business associate's obligation under the contract, the covered entity must take reasonable steps to cure the breach or end the violation, as applicable, and if such steps are unsuccessful will either terminate the contract or report the problem to the Secretary of the United States Department of Health and Human Services (HHS) if termination of the contract is not feasible.

### **5.3.2 Health Oversight Activities<sup>38</sup>**

With the exception of specially protected PHI as discussed in Section 2.0 of this procedure, PHI may be disclosed without individual authorization for the following health oversight activities:

- A. To any public or private entity responsible for licensing or accrediting the provider or health care service plan. However no PHI may be removed from the premises except as expressly permitted or required by law.

Covered entities may disclose PHI without individual authorization to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of any of the following:

- A. The health care system
- B. Government benefit programs for which PHI is relevant to beneficiary eligibility
- C. Entities subject to government regulatory programs for which PHI is necessary for determining compliance with program standards
- D. Entities subject to civil rights laws for which PHI is necessary for determining compliance

Health oversight activities do not include an investigation or other activity in which the individual is the subject of the investigation or activity and such investigation or other activity does not arise out of and is not directly related to any of the following:

- A. The receipt of health care
- B. A claim for public benefits related to health
- C. Qualification for, or receipt of, public benefits or services when a patient's health is integral to the claim for public benefits or services

Disclosures to government authorities regarding health oversight are not subject to accounting requirements as the oversight activities fall under the category "health care operations".

#### **5.4 Notification of Involved Parties<sup>39</sup>**

With the exception of specially protected PHI as discussed in Section 2.0 of this procedure, PHI may be disclosed without individual authorization for the purposes of notifying involved parties as follows:

- A. To notify, or assist in the notification of (including identifying or locating), a family member, a personal representative of the individual, or another person responsible for the care of the individual of the individual's location, general condition, or death
- B. To a public or private entity authorized by law or by its charter to assist in disaster relief efforts, for the purpose of the notifications described in letter (A).

For such disclosures the provider must do one of the following to the extent that the covered entity, in the exercise of professional judgement, determines that the requirements do not interfere with the ability to respond to the emergency circumstances:

- A. Obtain the individual's agreement
- B. Provide the individual with the opportunity to object, and the individual does not express an objection
- C. Reasonably infer from the circumstances, based on the exercise of professional judgement, that the individual does not object to the disclosure
- D. If the individual is not present, or the opportunity to agree or object cannot practicably

be provided because of the individual's incapacity or an emergency circumstance, determine whether the disclosure is in the best interest of the individual and, if so, disclose only the PHI that is directly relevant to the person's involvement with the individual's health care

### **5.5 Public Health Activities<sup>40</sup>**

PHI may be disclosed for research purposes only if such research meets the requirements of 45 CFR §164.512(i).

PHI may be disclosed without individual authorization to public health organizations as follows:

- A. A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or, at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority
- B. A public health authority or other appropriate government authority authorized by law to receive reports or child abuse or neglect
- C. A person subject to the jurisdiction of the Food and Drug Administration (FDA) with respect to an FDA-regulated product or activity for which that person has responsibility, for the purpose of activities related to the quality, safety or effectiveness of such FDA-regulated product or activity. Such purposes include:
  1. To collect or report adverse events (or similar activities with respect to food or dietary supplements), product defects or problems (including problems with the use or labeling of a product), or biological product deviations
  2. To track FDA-regulated products
  3. To enable product recalls, repairs, or replacement, or lookback (including locating and notifying individuals who have received products that have been recalled, withdrawn, or are the subject of lookback)
  4. To conduct post marketing surveillance
- D. A person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition, if the covered entity or public health authority is authorized by law to notify such person as necessary in the conduct of a public health intervention or investigation

All disclosures to public health organizations are subject to accounting requirements.

### **5.6 Activities Related to Decedents<sup>41</sup>**

With the exception of specially protected PHI as discussed in Section 2.0 of this procedure, PHI may be disclosed without individual authorization for the following activities related to a decedent:

- A. The County Coroner, when requested in the course of an investigation by the Coroner's office for the purpose of identifying the decedent or locating next of kin, or when

investigating deaths that may involve public health concerns, organ or tissue donation, child abuse, elder abuse, suicides, poisonings, accidents, sudden infant death, suspicious deaths, unknown deaths, or criminal deaths, or when otherwise authorized by the decedent's representative. Medical information requested by the coroner under this paragraph shall be limited to information regarding the patient who is the decedent and who is the subject of the investigation and shall be disclosed to the coroner without delay upon request. (Mandatory disclosure)

- B. To the County Coroner in the course of an investigation. (Permissive disclosure)
- C. To an organ procurement organization or a tissue bank processing the tissue of a decedent for transplantation, but only with respect to the donor, for the purpose of aiding the transplant. (Permissive disclosure)

### **5.7 Reporting of Abuse, Neglect, or Domestic Violence**

*See KHS Policy and Procedure #3.30-P – Abuse, Neglect and Other Criminal Act Reporting.*

### **5.8 Judicial and Administrative Proceedings<sup>42</sup>**

With the exception of specially protected PHI as discussed in Section 2.0 of this procedure, PHI may be disclosed without individual authorization in the course of any judicial or administrative proceeding that meets either of the following requirements:

- A. In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the PHI expressly authorized by such order
- B. In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal if one of the following conditions is met:
  - 1. The covered entity receives satisfactory assurance from the party seeking the information that reasonable efforts have been made by such part to ensure that the individual who is the subject of the PHI has been given notice of the request. This assurance must be in the form of a written statement and accompanying documentation demonstrating that (1) The requesting party has made a good faith attempt to provide written notice to the individual; (2) the notice included sufficient information about the litigation or proceeding to permit the individual to raise an objection to the court or administrative tribunal; and (3) the time for the individual to raise such objection has elapsed and either no objections were filed or all objections filed by the individual have been resolved and the disclosures being sought are consistent with such resolution.
  - 2. The covered entity received satisfactory assurance from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order. This assurance must be in the form of a written statement and accompanying documentation demonstrating that (1) the parties to the dispute have agreed to a qualified protective order and have presented it to the court or administrative tribunal; or (2) the party seeking the PHI has requested a qualified protective order from such court or administrative tribunal. A qualified protective order is an order of a court or an administrative

tribunal or a stipulation by the parties to the litigation or administrative proceeding that (1) prohibits the parties from using or disclosing the PHI for any purpose other than the litigation or proceeding for which such information was requested; and (2) Requires the return to the covered entity or destruction of the PHI (including all copies made) at the end of the litigation or proceeding.

3. The covered entity, in lieu of receiving satisfactory assurance from the party seeking the PHI, performs the actions outlined in items 1 and 2 above.

Any such disclosure is limited to the extent that it is required by law and it complies with and is limited to the relevant requirements of such law.

Prior to releasing medical records that have been subpoenaed, KHS should be notified of the subpoena, and if appropriate, a copy of the medical records and subpoena should be sent to KHS.

All disclosures to government authorities and/or law enforcement regarding judicial and administrative proceedings are subject to accounting requirements.

#### **5.9 Law Enforcement Activities<sup>43</sup>**

With the exception of specially protected PHI as discussed in Section 2.0 of this procedure, PHI may be disclosed without individual authorization for a law enforcement purpose to a law enforcement official in the following circumstances:

- A. As required by law including laws that require the reporting of certain types of wounds or other physical injuries
- B. In compliance with and as limited by the relevant requirements of a court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer
- C. In compliance with and as limited by the relevant requirements of a grand jury subpoena
- D. In compliance with and as limited by the relevant requirements of an administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law provided that all of the following conditions are met:
  1. The information sought is relevant and material to a legitimate law enforcement inquiry
  2. The request is specific and limited in scope to the extent reasonable practicable in light of the purpose for which the information is sought
  3. De-identified information could not reasonably be used
- E. In response to a law enforcement official's request for PHI for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person. The covered entity may not disclose any PHI related to the individual's DNA or DNA analysis, dental records, or typing, samples or analysis of body fluids or tissue. In such cases the covered entity may only disclose the following information:
  1. Name and address
  2. Date and place of birth

3. Social security number
  4. ABO blood type and rh factor
  5. Type of injury
  6. Date and time of treatment
  7. Date and time of death
  8. A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair, scars, and tattoos
- F. In response to a law enforcement official's request for PHI about an individual who is or is suspected to be a victim of a crime if the individual agrees to the disclosure, or the covered entity is unable to obtain the individual's agreement because of incapacity or other emergency circumstance, provided that all of the following circumstances are met:
1. The law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the victim
  2. The law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is unable to agree to the disclosure
  3. The disclosure is in the best interests of the individual as determined by the covered entity in the exercise of professional judgement
- G. To alert law enforcement of the death of an individual if the covered entity has suspicion that such death may have resulted from criminal conduct.
- H. In response to criminal conduct that occurred on the covered entity's premises, provided that disclosure is limited to only that PHI which the covered entity believes in good faith constitutes evidence of such conduct
- I. During the provision of emergency care, other than such emergency on the premises of the covered health care provider, for the purposes of alerting law enforcement of the commission and nature of a crime; the location of such crime or of the victim(s) of such crime; and the identity, description, and location of the perpetrator of such crime. This paragraph does not apply to emergencies resulting from abuse, neglect, or domestic violence of the individual in need of emergency health care.

Any such disclosure is limited to the extent that it is required by law and it complies with and is limited to the relevant requirements of such law. All disclosures to government authorities and/or law enforcement regarding law enforcement activities are subject to accounting requirements unless individual authorization is received.

#### **5.10 In Response to Serious Threats to Health and Safety**

With the exception of specially protected PHI as discussed in Section 2.0 of this procedure, a covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose without authorization PHI regarding serious threats to health or safety in the following circumstances:

- A. The covered entity, in good faith, believes the use or disclosure is (1) necessary to

prevent or lessen a serious and imminent threat to the health or safety of a person or the public and (2) to a person(s) reasonably able to prevent or lessen the threat, including the target of the threat.

- B. The covered entity, in good faith, believes the use or disclosure is necessary for law enforcement authorities to identify or apprehend an individual (1) because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim or (2) where it appears from all the circumstances that the individual has escaped from a correctional institution or from lawful custody<sup>44</sup>. Such disclosure is not allowed if the information is learned in the course of treatment to affect the propensity to commit the criminal conduct, counseling, therapy, or through a request by the individual for referral for such treatment, counseling, or therapy. Information that may be disclosed is limited to the individual's statement and the items outlined in Section 5.9 (E) of this policy.

All disclosures to government authorities and/or law enforcement regarding serious threats to health or safety are subject to accounting requirements.

#### **5.11 As Required by Law<sup>45</sup>**

PHI may be disclosed to the extent that such disclosure is required by law and the disclosure complies with and is limited to the relevant requirements of such law. The disclosure must comply with any applicable restrictions and limitations.

#### **5.12 Unauthorized Use or Disclosure**

Upon discovery of unauthorized disclosure of member PHI or PI, KHS shall immediately report and investigate the incident and make efforts to mitigate harm to the affected individual(s) as required by the DHCS Contract, and pursuant to HIPAA laws. A breach is considered discovered on the first day on which the breach is known, or would have been known, to any person who is an employee, officer or agent of KHS. Incidents are to be reported to the KHS Compliance Department immediately upon discovery. The Compliance Department is responsible for reviewing, logging and reporting all incidents.

1. KHS will **immediately** notify the DHCS by telephone plus e-mail or fax upon the discovery of a breach of unsecured PHI or PI in electronic media or in any other media if the PHI or PI was, or is reasonably believed to have been accessed or acquired by an unauthorized person.
2. KHS will notify the DHCS **within 24 hours** by email or fax of the discovery of any suspected security incident, intrusion or unauthorized access, use or disclosure of PHI or PI in violation of the DHCS Contract, or potential loss of confidential data affecting the DHCS Contract.
3. Notification will be made using the most current DHCS Privacy Incident Report (PIR) form and will be provided to the DHCS Program Contract Manager, the DHCS Privacy Officer and the DHCS Information Security Officer. If the incident occurs after business hours or on a weekend or holiday and involves ePHI, notice shall be provided by calling the DHCS ITSD Service Desk.



4. An updated DHCS PIR of the investigation will be provided to DHCS within seventy-two (72) hours of the discovery by KHS. Updated information will be marked with an asterisk (\*).
5. A complete PIR of the investigation will be provided to DHCS within ten (10) working days of discovery of the breach or unauthorized use or disclosure. The report shall include an assessment of all known factors relevant to a determination of whether a breach occurred under applicable provisions of state and federal law; a full detailed corrective action plan including measures taken to mitigate harm to the affected member(s).
6. DHCS will review and approve the CAP, the determination of whether a breach occurred, and if individual notifications are required, DHCS shall review and approve the notice prior to KHS sending the notice to the affected members.

<b>DHCS Program Contract Manager</b>	<b>DHCS Privacy Officer</b>	<b>DHCS Information Security Officer</b>
See the Scope of Work exhibit for Program Contract Manager information	Privacy Officer c/o: Office of HIPAA Compliance Department of Health Care Services P.O. Box 997413, MS 4722 Sacramento, CA 95899-7413 Email: <a href="mailto:privacyofficer@dhcs.ca.gov">privacyofficer@dhcs.ca.gov</a> Telephone: (916) 445-4646 Fax: (916) 440-7680	Information Security Officer DHCS Information Security Office P.O. Box 997413, MS 6400 Sacramento, CA 95899-7413 Email: <a href="mailto:iso@dhcs.ca.gov">iso@dhcs.ca.gov</a> Fax: (916) 440-5537 Telephone: ITSD Service Desk (916) 440-7000 or (800) 579-0874

### **To Employers<sup>46</sup>**

With the exception of specially protected PHI as discussed in Section 2.0 of this procedure, PHI that is subject matter of workers' compensation proceedings may be disclosed without individual authorization to an employer concerning health care services to an employee provided at the request and expense of the employer if that information is relevant to a law suit or other claim or challenge involving the employer and employee, in which the patient has placed his/her medical history, physical or mental condition, or treatment in issue.

### **5.13 To the Individual<sup>47</sup>**

Providers must provide PHI to the patient or the patient's representative for inspection within 5 working days of receipt of a written request and upon payment of reasonable clerical costs incurred in locating and making the PHI available.<sup>48</sup> A patient who is a minor shall be entitled to inspect patient records pertaining only to health care of a type for which the minor is lawfully authorized to consent. Inspection must be permitted during business hours and by the patient or the patient's representative who may be accompanied by one other person of his/her choosing.

Copies of PHI must be provided within 15 calendar days of receipt of a written request for

such copies and upon payment of a copying fee not to exceed 25 cents per page (50 cents per page copied from microfilm) and any additional reasonable clerical costs incurred in making the records available.<sup>49</sup> One copy must be provided at no charge upon proof that the records are needed to support an appeal regarding eligibility for a public benefit program. Such patients may be billed retroactively if the appeal is successful<sup>50</sup>

Covered entities must provide the requested PHI in the form or format requested by the individual, if it is readily available in such form or format; or, if not, in a readable hard copy form or such other form or format as agreed to by the covered entity and the individual.

If the covered entity does not maintain the PHI that is subject to the individual's request, and the covered entity knows where the requested information is maintained, the covered entity must inform the individual where to direct the request for access.

Covered entities must allow individuals to request and must accommodate reasonable requests by individuals to receive communications of PHI by alternative means or at alternative locations<sup>51</sup>.

#### **5.13.1 Denials of Access**

In general, an individual has a right of access to inspect and obtain a copy of PHI regarding his/herself. The individual does not have the right of access to the following types of PHI<sup>52</sup>:

- A. Information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding
- B. Information maintained by a covered entity that is subject to the Clinical Laboratory Improvements Amendments of 1988, 42 USC 263a to the extent the provision of access to the individual would be prohibited by law
- C. Information maintained by a covered entity that is exempt from the Clinical Laboratory Improvements Amendments of 1988, pursuant to 42 CFR 493.3(a)(2)

Covered entities may deny an individual access to the following types of PHI without providing the individual an opportunity for review:

- A. Information to which the individual does not have a right of access as described in the preceding paragraph
- B. Information regarding an inmate of a correctional institution if obtaining such information would jeopardize the health, safety, security, custody, or rehabilitation of the individual or of other inmates, or the safety of any officer, employee, or other person at the correctional institution or responsible for the transporting of the inmate
- C. Information regarding research that includes treatment for as long as the research is in progress, provided that the individual has agreed to the denial of access when consenting to participate in such research, and the provider has informed the individual that the right of access will be reinstated upon completion of the research

- D. Information contained in records that are subject to the Privacy Act, 5 USC §552a if the denial of access under the Privacy Act would meet the requirements of that law
- E. Information obtained from someone other than a health care provider under a promise of confidentiality if the access requested would be reasonably likely to reveal the source of the information

In certain situations, covered entities may also deny an individual access to PHI if the individual is given a right to have such denials reviewed. These situations include the following:

- A. A licensed health care professional has determined, in the exercise of professional judgement, that the access requested is reasonably likely to endanger the life or physical safety of the individual or another person
- B. The PHI makes reference to another person (unless such other person is a health care provider) and a licensed health care professional has determined, in the exercise of professional judgement, that the access requested is reasonably likely to cause substantial harm to such other person
- C. The request for access is made by the individual's personal representative and a licensed health care professional has determined in the exercise of professional judgement, that the provision of access to such personal representative is reasonably likely to cause substantial harm to the individual or another person.

If access is denied for the reasons above, the individual has the right to have the denial reviewed by a licensed health care professional who is designated by the covered entity to act as a reviewing official and who did not participate in the original decision to deny. Access must be provided or denied based on the decision of such health care professional.

Denials must be communicated to the individual in writing and include the following:

- A. The basis for the denial
- B. If applicable, a statement of the individual's review rights, including a description of how the individual may access such rights
- C. A description of how the individual may complain to KHS (including name/title and telephone number of the contact person) or the Secretary of the United States Department of Health and Human Services (HHS)

#### **5.14 Other Rarely Occurring Situations**

Federal regulations allow PHI to be disclosed in multiple circumstances that are not anticipated to apply to KHS or KHS providers. If these circumstances do occur, PHI should only be released as provided for in such federal regulations.

- A. For military and veterans activities as described in 45 CFR §164.512(k)(1)
- B. For national security and intelligence activities as described in 45 CFR §164.512 (k)(2)
- C. For protective services for the President and others as described in 45 CFR §164.512(k)(3)

- D. To correctional institutions and for other law enforcement custodial situations as described in 45 CFR §164.512 (k)(5)
- E. For fundraising as described in 45 CFR §164.514 (f)

### **5.15 Responding to an Individual's Request for an Accounting of Disclosures**

Providers must have a written process for responding to an individual's request for an accounting of disclosures. This documentation must include the titles of the persons or offices responsible for receiving and processing such requests<sup>53</sup>.

An individual has the right to receive an accounting of disclosures of PHI made in the six years prior to the date on which the accounting is requested, except for disclosures<sup>54</sup>:

- A. To carry out treatment, payment, and health care operations
- B. To individuals about their own PHI
- C. Pursuant to an authorization
- D. For the facility's directory or to persons involved in the individual's care or other notification purposes as provided in 45 CFR §164.510
- E. For national security and intelligence activities as described in 45 CFR §164.512(k)(2)
- F. To correctional institutions and for other law enforcement custodial situations as described in 45 CFR §164.512 (k)(5)
- G. That are part of a limited data set subject to the data and recipient restrictions outlined in 45 CFR §164.514 (e)
- H. Made prior to April 14, 2003

In certain circumstances, a health oversight agency or law enforcement official may request that an individual's right to receive an accounting of disclosures to such agency/official be temporarily suspended. Such requests are forwarded to the Privacy Official. The Privacy Official handles such requests in accordance with 45 CFR §164.528 (a)(2)

The accounting is provided in writing within 60 days<sup>55</sup> of the request and includes the following for each disclosure:

- A. The date of the disclosure
- B. The name (and address if known) of the recipient
- C. A brief description of the information
- D. A brief statement of the purpose of the disclosure that reasonably informs the individual of the basis for the disclosure

## **6.0 INDIVIDUAL AUTHORIZATION**

A valid patient authorization must be received prior to releasing confidential information or medical records that do not meet the requirements for disclosure without individual authorization. However, it is essential to note that the California Confidentiality of Medical Information Act permits health plans, like KHS, to receive and release medical information about its members without their written consent as necessary to administer the health plan (California Civil Code Section 56.10(c)). This authorization must be kept in the patient's medical records file for a minimum of six years from the date of creation or the last date the authorization was in effect, whichever is later.<sup>56</sup> A copy of the signed authorization must be provided to the individual.<sup>57</sup> The KHS authorization form is included as Attachment B.

A recipient of medical information pursuant to an authorization may not further disclose that information except in accordance with a new valid authorization or as specifically required or permitted by law.<sup>58</sup>

No provider of health care, health care service plan, or contractor may require a patient, as a condition of receiving health care services, to sign an authorization, release, consent, or waiver that would permit the disclosure of medical information that otherwise might not be disclosed under law.<sup>59</sup>

#### **6.1 Description of a Valid Patient Authorization<sup>60</sup>**

In order to be valid, an authorization for a provider, health care service plan, or contractor to release information must contain the following elements:

- A. A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion
- B. The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure
- C. The name or other specific identification of the person(s), or class of persons, to whom the provider may make the requested disclosure
- D. A description of each purpose of the requested use or disclosure including the specific uses and limitations on the use of medical information by the authorized recipient
- E. State a specific date after which the provider is no longer authorized to disclose the medical information<sup>61</sup>
- F. Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such person's authority to act for the individual must also be provided<sup>62</sup>
- G. A statement notifying the individual of his/her right to revoke the authorization in writing including any exceptions to the right to revoke and a description of how the individual may revoke the authorization
- H. A statement that the provider may not condition treatment or payment on receipt of the authorization
- I. A statement notifying the individual of the potential for information disclosed pursuant to the authorization to be subject to re-disclosure by the recipient and no longer be protected by HIPAA.
- J. A statement that the person signing the authorization has a right to receive a copy of it.

The authorization must also meet the following requirements:

- A. Handwritten by the person who signs it or typewritten in at least 8-point font
- B. Clearly separate from any other language present on the same page
- C. In plain language
- D. Executed by a signature that serves no purpose other than to execute the authorization

An authorization is not valid if the document submitted has any of the following defects<sup>63</sup>:

- A. The expiration date has passed
- B. The required elements section of the authorization has not been filled out completely

- C. The authorization is known by the covered entity to have been revoked
- D. Any material information in the authorization is known by the covered entity to be false

**6.1.1 Additional Requirements for Information Relating To Outpatient Psychotherapy<sup>64</sup>**

In addition to the elements described in the previous section, an authorization for information related to outpatient psychotherapy must include the following:

- A. Signature of the requestor
- B. Length of time during which the information will be kept before being destroyed or disposed of
- C. Statement that the information will not be used for other purposes and will be destroyed within the designated time frame.

The time frame may be extended, provided that the entity that supplied the information is notified of the extension, the reasons for the extension, the intended uses, and the expected date the information will be destroyed.

The person or entity requesting the information submits a copy of the written request to the patient within 30 days of receipt of the information requested, unless the patient has signed a written waiver.

**6.2 Cancellation or Modification of an Authorization<sup>65</sup>**

Upon receipt of a written notice from a potential signer of an authorization, the holder must modify or cancel the authorization in accordance with the potential signer's written instruction.

**7.0 ENFORCEMENT<sup>66</sup>**

Covered entities must have and apply appropriate sanctions against members of its workforce who fail to comply with privacy policies and procedures. Applied sanctions must be documented.

**8.0 TRAINING<sup>67</sup>**

Covered entities must train all members of its workforce on policies and procedures regarding PHI as necessary and appropriate for them to carry out their function within the covered entity. Such training must be provided according to the following schedule:

- A. To each new member of the workforce within a reasonable period of time after the person joins the covered entity's workforce
- B. To each member of the covered entity's workforce whose functions are affected by a material change in the policies or procedures regarding PHI within a reasonable period of the effective date of the change

All such training must be documented and maintained on file for six years.

**9.0 MEMBER NOTIFICATION<sup>68</sup>**

Covered entities must maintain a *Notice of Privacy Practices (NPP)* that meets the format and content requirements of 45 CFR §164.520.

A covered health care provider that has a direct treatment relationship with an individual must provide the notice no later than the date of the first service delivery, including service delivered electronically, to such individual after the compliance date for the covered health care provider; or as soon as reasonably practical in an emergency treatment situation. Covered providers must make a good faith effort to obtain written acknowledgement of receipt of the notice. If such acknowledgement cannot be obtained, the covered provider must document the good faith efforts to do so and reason for the failure.

The *NPP* must be available on site and posted in a clear and prominent location.

Whenever the *NPP* is revised, it must be made available upon request.

A covered provider must promptly revise and distribute the *NPP* whenever there is a material change to the uses or disclosures, the individual's rights, the provider's legal duties, or other privacy practices stated in the notice. Except when required by law, such changes may not be implemented prior to the effective date and distribution of the notice.

A contact person must be appointed who is able to provide further information about matters covered by the *NPP*.<sup>69</sup>

#### **10.0 AVAILABILITY OF MEDICAL RECORDS**

Appropriate medical records for KHS members must be readily available to authorized health care providers as needed.

#### **11.0 MEMBER COMPLAINTS**

Covered entities must designate a contact person or office who is responsible for receiving complaints related to PHI. Providers should forward all such complaints from KHS Plan members to the KHS Grievance Coordinator.

Complaints regarding PHI are subject to the policies and procedures outlined in *KHS Policy and Procedure #5.01 – Grievance Process*.

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#### **Attachments:**

- Attachment A – *Summary of PHI Disclosure Guidelines*
- Attachment B - *Authorization for Use or Disclosure of Medical Information*
- Attachment C – *Business Associate Amendment*

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**Revision 2016-03:** Updated BBA and reporting timelines. New language added that reporting incidents to the State is the responsibility of the Compliance Department. **Revision 2015-12:** Reviewed by QI Supervisor. Revisions made to signatories and DHCS contact information for notification in the event of a potential breach.

<sup>1</sup> **Revision 2012-08:** Changes made regarding breach notification. Definitions added for BREACH and HITECH. **Revision 2010-11:** Titles updated. No substantial revisions to policy. **Revision 2009-06:** Added DHCS Contract language that use or disclosure of PHI must be reported to KHS within 24 hours during a work week. KHS is responsible to report use or disclosure to DHCS within 15 days. **Revision 2007-05:** Revised per DHS/DMHC Medical Audit comments 5/13/07. Added language to comply with MMCD Letters 06001 and 06005. **Revision 2007-03:** Revised per DHS/DMHC Medical Audit Review Category 4.4.1 (YE 10/31/2006). **Revision 2005-04:** Attachment B-*Authorization for Use or Disclosure of Medical Information* enlarged to 14 font per Civil Code 56.11. **Revision 2003-10:** Revised to comply with HIPAA. **Revision 2001-06:** Changes made to comply with Confidentiality of Medical Information Act. Submission to DMHC. **Revision 2001-02:** changes made for 2000 Legislation submission - DMHC

<sup>2</sup> California Civil Code §56.10(d); although HIPAA allows for more, the CMIA standard is the more stringent. Comply with 56.10(d) only (per CalOHI).

<sup>3</sup> <http://www.hhs.gov/ocr/privacy/hipaa/administrative/breachnotificationrule/index.html>

<sup>4</sup> 45 CFR §160.103

<sup>5</sup> 45 CFR §164.501

<sup>6</sup> 45 CFR §164.501

<sup>7</sup> California Civil Code §56.05(f); similar definition in HIPAA (45 CFR §160.103)

<sup>8</sup> California Civil Code §56.05(f); similar definition in HIPAA (45 CFR §160.103)

<sup>9</sup> HSC 123105(b)

<sup>10</sup> 45 CFR §164.501

<sup>11</sup> 45 CFR §164.502(b)(1); §164.514(d)(4)(i)

<sup>12</sup> California Civil Code §56.104(a)

<sup>13</sup> 45 CFR §164.508(a)(2)

<sup>14</sup> California Civil Code §56.104(a)

<sup>15</sup> California Civil Code §56.104(d)

<sup>16</sup> 45 CFR Section 164.502(a)(1)(ii) and 164.506(c) and 164.512(a)

<sup>17</sup> 45 CFR 164.508(a)

<sup>18</sup> 45 CFR §164.522(a)

<sup>19</sup> 45 CFR §164.502(i)

<sup>20</sup> 45 CFR §164.502(b)(2)

<sup>21</sup> CCR Title 22 §75055(b)

<sup>22</sup> California Civil Code §56.37

<sup>23</sup> California Civil Code §56.10(e)

<sup>24</sup> 45 CFR §164.502(i)

<sup>25</sup> 45 CFR §164.502(b)(1)

<sup>26</sup> 45 CFR §164.522(a)

<sup>27</sup> 45 CFR §164.514(h)

<sup>28</sup> California Civil Code §56.14

<sup>29</sup> 45 CFR 164.508(a)(a)

<sup>30</sup> 45 CFR §164.506 and 164.508(a)(2) California Civil Code §56.10(c)(1) total preemption per CalOHI analysis.

<sup>31</sup> 45 CFR §164.510(b)

<sup>32</sup> 45 CFR § 164.506 and 164.508(a)(2). California Civil Code §56.10(c)(2) total preemption per CalOHI analysis.

<sup>33</sup> 45 CFR §164.506. California Civil Code §56.10(c)(4) and c(10) total preemption per CalOHI analysis.

<sup>34</sup> 45 CFR §164.502(e) and 164.512(k)(6); CMIA §56.10(c)(3)

<sup>35</sup> California Civil Code §56.10(c)(3) not preempted by HIPAA per CalOHI analysis.

<sup>36</sup> 45 CFR §164.502(d)(1). California Civil Code §56.10(c)(16) total preemption per CalOHI analysis.

<sup>37</sup> 45 CFR §164.504(e)

<sup>38</sup> Comply with both 45 CFR §164.512(d), 164.501(definition of health oversight agency), and California Civil Code §56.10(c)(5) per CalOHI analysis

<sup>39</sup> 45 CFR §164.510(b)(4). California Civil Code §56.10(c)(15) total preemption per CalOHI analysis.

<sup>40</sup> 45 CFR §164.512 (b) and (i). California Civil Code §56.10(c)(7) total preemption per CalOHI analysis.

<sup>41</sup> Per CalOHI analysis, comply with 45 CFR 164.512(g) and (h) and California Civil Code §56.10(b)(8), (c)(6), and (c)(13)

<sup>42</sup> Per CalOHI analysis, 45 CFR §164.512(a), (e) preempts California Civil Code § 56.10(b)(1), (b)(3), (b)(5), and (c)(12).

CCC §56.10(b)(2) is not preempted, but I did not include this language specifically because it is covered under the HIPAA

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language.

<sup>43</sup> 45 CFR §164.512(a), (e) and (f). California Civil Code §56.10(b)(4), and (6) total preemption per CalOHI analysis.

<sup>44</sup> as defined in 45 CFR §164.501

<sup>45</sup> California Civil Code §56.10 (b)(9) and (c)(14); 45 CFR §164.512(a)

<sup>46</sup> Per CalOHI analysis: Controlling law is CCC§56.10(c)(8)(A) and 45 CFR §164.512(l) if the subject matter is connected to workers' compensation proceedings. Otherwise 45 CFR §164.508(a)

<sup>47</sup> California Civil Code §56.10(b)(7); 45 CFR §106.502(g); 164.524; HSC §123100 et.seq. HSC §123110(c) total preemption per CalOHI analysis. Note that previously providers were allowed to provide a summary of medical records instead of the records. This is no longer allowed under HIPAA per CalOHI analysis.

<sup>48</sup> HSC 123110(a)

<sup>49</sup> HSC 123110(b)

<sup>50</sup> HSC 123110 (d) and (e)

<sup>51</sup> 45 CFR §164.522(b)

<sup>52</sup> HIPAA also includes psychotherapy notes in this list, but the State standard is stricter in that it does not contain such an absolute ground for denial of access (CalOHI analysis). HSC 123115(b)

<sup>53</sup> 45 CFR §164.528(d)

<sup>54</sup> 45 CFR §164.528. At this time, KHS does not foresee the need to impose fees. If deemed necessary, KHS will impose fees for accountings as allowed in 45 CFR §164.528 (c)(2)

<sup>55</sup> Regulations provide for a 30 day extension. KHS will provide the accounting with the original 30 day period. Any extensions must be under the direct supervision of the Privacy Officer and in accordance with 45 CFR §164.528 (c)(1)(ii)

<sup>56</sup> 45 CFR §164.508 (b)(6)

<sup>57</sup> California Civil Code §56.12 preempted per CalOHI analysis; 45 CFR §164.508(c)(4) more stringent

<sup>58</sup> California Civil Code §56.13

<sup>59</sup> California Civil Code §56.37

<sup>60</sup> California Civil Code §56.11 and §56.17; 45 CFR §164.508 (c)

<sup>61</sup> California Civil Code §56.11(h) prevails over 45 CFR §164.508 (c)(1)(v) per CalOHI analysis.

<sup>62</sup> California Civil Code §56.11(c) preempted by 45 CFR §164.508(c)(vi) per CalOHI analysis.

<sup>63</sup> 45 CFR §164.508 (b)(2)

<sup>64</sup> California Civil Code §56.104

<sup>65</sup> California Civil Code §56.15. 45 CFR §164.508(b)(5) not effective because CCC is more strict. (Per CalOHI analysis)

<sup>66</sup> 45 CFR §164.530(e)

<sup>67</sup> 45 CFR §164.530(b)

<sup>68</sup> 45 CFR §164.520 (b)(3) and (c)

<sup>69</sup> 45 CFR §164.530 (a)(1)(ii)

## Summary Of PHI Disclosure Guidelines Practitioners and Providers

The following table is only a summary of the guidelines for the disclosure of PHI. *KHS Policy and Procedure #2.28 – Medical Records and Other Protected Health Information - Privacy, Use, and Disclosure* should be consulted for any limitations on the information that may be disclosed and the specific circumstances and documentation required for disclosure.

Disclosures not described below may require authorization.

<b>Recipient</b>	<b>Purpose</b>	<b>Authorization</b>	<b>Accounting</b>
Business Associates	Treatment, payment, or health care operations	No	No
Government Authorities/ Law Enforcement	Reporting of abuse, neglect, or domestic violence	See KHS Policy #3.30 Abuse, Neglect and Other Criminal Act Reporting	See Policy #3.30 Abuse, Neglect and Other Criminal Act Reporting
Government Authorities/ Law Enforcement	Health oversight activities	No	No
Government Authorities/ Law Enforcement	Judicial and administrative proceedings	No, but certain documents are required	Yes
Government Authorities/ Law Enforcement	Law enforcement activities	Yes in certain circumstances	Yes unless authorization received
Government Authorities/ Law Enforcement	Reporting serious threats to health or safety	No	Yes
Government Authorities/ Law Enforcement	Reporting information regarding decedents	No	No
Individual or Personal Representative		No	No
Person directly involved in individual's care or payment for individual's care	Treatment, payment, notification of family, disaster relief	Yes unless certain conditions exist	No
Other Covered Entities	Treatment, payment, health care operations	No	No
Public Health Organizations	Specific public health activities. See policy for allowed disclosures.	No	Yes
Practitioners/providers	Treatment, payment, health care operations	No	No

## Authorization to Use or Disclose Protected Health Information

This authorization for use or disclosure of Protected Health Information is being requested of you to comply with the California Confidentiality of Medical Information Act and the Health Insurance Portability and Accountability Act (HIPAA). You do not have to sign this authorization in order to receive treatment. You have the right to receive a copy of this authorization.

This information will not be used for other purposes and will be destroyed within the designated timeframe.

If the person you authorize to receive the information is not bound to comply with HIPAA regulations, the information may be re-disclosed and no longer protected by HIPAA regulations.

You may revoke this authorization by sending a written request and a copy of the authorization to the person(s) authorized to make the requested use or disclosure.

<b>Description of the information to be used or disclosed</b>	
<b>Name or other specific identification of the person(s) authorized to make the requested use or disclosure</b>	Name/Identification: <hr/> Signature: <hr/>
<b>Name or other specific identification of the person(s) to whom the requested disclosure may be made</b>	
<b>Description of each purpose of the requested use or disclosure including the specific uses and limitations</b>	

<b>Length of Time during which the information will be kept before being destroyed or disposed of (<i>only required for PHI relating to outpatient psychotherapy</i>)</b>	
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This authorization expires on the following date: \_\_\_\_\_.

I, \_\_\_\_\_, authorize the use/disclosure of PHI as described in this authorization.

Signature of Individual: \_\_\_\_\_

Date: \_\_\_\_\_

Signature of Personal Representative (if applicable): \_\_\_\_\_ Date: \_\_\_\_\_

Description of Personal Representative's Authority:  
\_\_\_\_\_

## HIPAA BUSINESS ASSOCIATE ADDENDUM

WHEREAS, Contractor, hereinafter referred to in this Business Associate Addendum (this "Addendum") as "Business Associate," and Kern Health Systems, hereinafter referred to in this Addendum as "Covered Entity," have entered into an Professional Services Agreement, with an effective date of \_\_\_\_\_ <insert effective date of underlying agreement> (the "Underlying Agreement"); and

WHEREAS, Business Associate acknowledges Covered Entity has in its possession data that contain individual identifiable health information as defined by Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 ("HIPAA") and the regulations promulgated thereunder; and

WHEREAS, Business Associate and Covered Entity acknowledge that the fulfillment of the parties' obligations under the Underlying Agreement necessitates the exchange of, or access to, data including individual identifiable health information; and

WHEREAS, the parties desire to comply with federal and California laws regarding the use and disclosure of individually identifiable health information;

NOW, THEREFORE, in consideration of the mutual promises and covenants hereinafter contained, the parties agree as follows:

### **Definitions**

#### Catch-all definition:

The following terms used in this Addendum shall have the same meaning as those terms in the HIPAA Rules: Breach, Data Aggregation, Designated Record Set, Disclosure, Health Care Operations, Individual, Minimum Necessary, Notice of Privacy Practices, Protected Health Information, Required By Law, Secretary, Security Incident, Subcontractor, Unsecured Protected Health Information, and Use.

#### Specific definitions:

(a) Business Associate. "Business Associate" shall generally have the same meaning as the term "business associate" at 45 CFR 160.103, and in reference to the party to this Addendum, shall mean \_\_\_\_\_ <insert name of Contractor/Business Associate>.

(b) Covered Entity. "Covered Entity" shall generally have the same meaning as the term "covered entity" at 45 CFR 160.103, and in reference to the party to this Addendum, shall mean Kern Health Systems.

(c) HIPAA Rules. "HIPAA Rules" shall mean the Privacy, Security, Breach Notification, and Enforcement Rules at 45 CFR Part 160 and Part 164.

## **Obligations and Activities of Business Associate**

Business Associate agrees to:

- (a) Not use or disclose protected health information other than as permitted or required by the Underlying Agreement or as required by law;
- (b) Use appropriate safeguards, and comply with Subpart C of 45 CFR Part 164 with respect to electronic protected health information, to prevent use or disclosure of protected health information other than as provided for by the Underlying Agreement;
- (c) Report to Covered Entity any use or disclosure of protected health information not provided for by the Underlying Agreement of which it becomes aware, including breaches of unsecured protected health information as required at 45 CFR 164.410, and any security incident of which it becomes aware;
- (d) In accordance with 45 CFR 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, ensure that any subcontractors that create, receive, maintain, or transmit protected health information on behalf of Business Associate agree to the same restrictions, conditions, and requirements that apply to Business Associate with respect to such information;
- (e) Make available protected health information in a designated record set to Covered Entity as necessary to satisfy Covered Entity's obligations under 45 CFR 164.524;
- (f) Make any amendment(s) to protected health information in a designated record set as directed or agreed to by Covered Entity pursuant to 45 CFR 164.526, or take other measures as necessary to satisfy Covered Entity's obligations under 45 CFR 164.526;
- (g) Maintain and make available the information required to provide an accounting of disclosures Covered Entity as necessary to satisfy Covered Entity's obligations under 45 CFR 164.528;
- (h) Comply with the requirements of Subpart E that apply to Covered Entity in the performance of such obligation(s), to the extent Business Associate is to carry out one or more of Covered Entity's obligation(s) under Subpart E of 45 CFR Part 164; and
- (i) Make its internal practices, books, and records available to the Secretary for purposes of determining compliance with the HIPAA Rules.

## **Permitted Uses and Disclosures by Business Associate**

- (a) Business Associate may only use or disclose protected health information as necessary to perform the services set forth in the Underlying Agreement.
- (b) Business Associate may use or disclose protected health information as required by law.

(c) Business Associate agrees to make uses and disclosures and requests for protected health information consistent with Covered Entity's minimum necessary policies and procedures.

(d) Business Associate may not use or disclose protected health information in a manner that would violate Subpart E of 45 CFR Part 164 if done by Covered Entity, except for the specific uses and disclosures set forth below.

(e) Business Associate may disclose protected health information for the proper management and administration of Business Associate or to carry out the legal responsibilities of Business Associate, provided the disclosures are required by law, or Business Associate obtains reasonable assurances from the person to whom the information is disclosed that the information will remain confidential and used or further disclosed only as required by law or for the purposes for which it was disclosed to the person, and the person notifies Business Associate of any instances of which it is aware in which the confidentiality of the information has been breached.

(f) Business Associate may provide data aggregation services relating to the health care operations of Covered Entity.

#### **Provisions for Covered Entity to Inform Business Associate of Privacy Practices and Restrictions**

(a) Covered Entity shall notify Business Associate of any limitation(s) in the notice of privacy practices of Covered Entity under 45 CFR 164.520, to the extent that such limitation may affect Business Associate's use or disclosure of protected health information.

(b) Covered Entity shall notify Business Associate of any changes in, or revocation of, the permission by an individual to use or disclose his or her protected health information, to the extent that such changes may affect Business Associate's use or disclosure of protected health information.

(c) Covered Entity shall notify Business Associate of any restriction on the use or disclosure of protected health information that Covered Entity has agreed to or is required to abide by under 45 CFR 164.522, to the extent that such restriction may affect Business Associate's use or disclosure of protected health information.

#### **Permissible Requests by Covered Entity**

Covered Entity shall not request Business Associate to use or disclose protected health information in any manner that would not be permissible under Subpart E of 45 CFR Part 164 if done by Covered Entity, except for the specific uses and disclosures set forth set forth in paragraphs (e) and (f) above under "Permitted Uses and Disclosures By Business Associate."

#### **Term and Termination**

(a) Term. The term of this Addendum shall be effective as of \_\_\_\_\_ <insert effective date of underlying agreement>, and shall terminate on \_\_\_\_\_ <insert termination date of underlying agreement>, or on the date Covered Entity terminates for cause as authorized in paragraph (b) of this section, whichever is sooner.

(b) Termination for Cause. Business Associate authorizes termination of this Addendum by Covered Entity, if Covered Entity determines Business Associate has violated a material term of the Addendum 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. Upon termination of this Addendum for any reason, Business Associate, with respect to protected health information received from Covered Entity, or created, maintained, or received by Business Associate on behalf of Covered Entity, shall:

(a) Retain only that protected health information which is necessary for Business Associate to continue its proper management and administration or to carry out its legal responsibilities;

(b) Return to Covered Entity or, if agreed to by Covered Entity, destroy the remaining protected health information that Business Associate still maintains in any form;

(c) Continue to use appropriate safeguards and comply with Subpart C of 45 CFR Part 164 with respect to electronic protected health information to prevent use or disclosure of the protected health information, other than as provided for in this section, for as long as Business Associate retains the protected health information;

(d) Not use or disclose the protected health information retained by Business Associate other than for the purposes for which such protected health information was retained and subject to the same conditions set forth in paragraphs (e) and (f) above under "Permitted Uses and Disclosures by Business Associate," which applied prior to termination; and

(e) Return to Covered Entity or, if agreed to by Covered Entity, destroy the protected health information retained by Business Associate when it is no longer needed by Business Associate for its proper management and administration or to carry out its legal responsibilities.

(d) Survival. The obligations of Business Associate under this section shall survive the termination of this Addendum.

### **Miscellaneous**

(a) Regulatory References. A reference in this Addendum to a section in the HIPAA Rules means the section as in effect or as amended.



(b) Amendment. The parties agree to take such action as is necessary to amend this Addendum from time to time as is necessary for compliance with the requirements of the HIPAA Rules and any other applicable law. All amendments to this Addendum shall be in writing and signed by both parties through a formal amendment to the Addendum.

(c) Interpretation. Any ambiguity in this Addendum shall be interpreted to permit compliance with the HIPAA Rules.

(d) Indemnification.

1. Business Associate agrees to indemnify, defend and hold harmless Covered Entity and its respective officers, directors, board members, elected and appointed officials, employees, agents and authorized representatives from any and all losses, liabilities, charges, damages, claims, liens, causes of action, awards, judgments, costs, fines, penalties, and expenses (including, but not limited to, reasonable attorneys' fees of counsel retained by Covered Entity, expert fees, costs of staff time, and investigation costs) of whatever kind or nature, which arise out of or are in any way connected with any act or omission (including, but not limited to, any material breach of this Addendum) of Business Associate and its respective officers, directors, agents, employees, subcontractors of any tier, or authorized representatives.

2. With respect to any action or claim subject to indemnification herein by Business Associate, Business Associate shall, at its sole cost, have the right to use counsel of its choice, subject to the approval of Covered Entity, which shall not be unreasonably withheld, and shall have the right to adjust, settle, or compromise any such action or claim only with the prior consent of Covered Entity, which shall not be unreasonably withheld; provided, however, that any such adjustment, settlement or compromise in no manner whatsoever limits or circumscribes Business Associate's indemnification to Covered Entity as set forth herein. Business Associate's obligation to defend, indemnify and hold harmless Covered Entity shall be subject to Covered Entity having given Business Associate written notice within a reasonable period of time of the claim or of the commencement of the related action, as the case may be, and information and reasonable assistance, at Business Associate's expense, for the defense or settlement thereof. Business Associate's obligation hereunder shall be satisfied (if Covered Entity has no liability whatsoever for the claim) when Business Associate has provided to Covered Entity the appropriate form of dismissal relieving Covered Entity from any liability for the action or claim involved.

3. The specified insurance limits required in the Underlying Agreement shall in no way limit or circumscribe Business Associate's obligations to indemnify, defend and hold harmless Covered Entity herein from third party claims arising out of or in any way relating to this Addendum.

4. In the event there is a conflict between this indemnification clause and the indemnification clause contained in the Underlying Agreement, this indemnification clause shall only apply to the subject issues set forth in this Addendum.

(e) Injunctive Relief. Covered Entity retains all rights to seek injunctive relief to prevent the unauthorized use of disclosure of protected health information by Business Associate or any agent, contractor or third party that received protected health information from Business Associate.

(f) Third Party Beneficiary. Unless otherwise set forth herein, nothing contained herein is intended, nor shall it be construed, to create rights running of the benefit of third parties.

KERN HEALTH SYSTEMS

CONTRACTOR

By: \_\_\_\_\_  
Douglas A. Hayward  
Chief Executive Officer

By: \_\_\_\_\_  
<Name>  
<Title>

Date: \_\_\_\_\_

Date: \_\_\_\_\_

APPROVED AS TO FORM:  
OFFICE OF COUNTY COUNSEL

By: Devin W. Brown  
Deputy  
Counsel for Kern Health Systems

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## EXHIBIT "E" INSURANCE

With respect to performance of work under this Agreement, Contractor shall maintain and shall require all of its subcontractors, consultants, and other agents to maintain insurance as described below unless such insurance has been expressly waived in writing by KHS. Any requirement for insurance to be maintained after completion of the work shall survive the termination or expiration of this Agreement.

KHS reserves the right to review any and all of the required insurance policies and/or endorsements, but has no obligation to do so. Failure to demand evidence of full compliance with the insurance requirements set forth in this Agreement or failure to identify any insurance deficiency shall not relieve Contractor from, nor be construed or deemed a waiver of, its obligation to maintain the required insurance at all times during the performance of this Agreement.

### 1. Workers' Compensation and Employers Liability Insurance:

- (a) Required if Contractor has employees. If Contractor currently has no employees, Contractor agrees to obtain the specified Workers' Compensation and Employers Liability insurance should any employees be engaged during the term of this Agreement or any extensions thereof.
- (b) Workers' Compensation insurance with statutory limits as required by the Labor Code of the state of California.
- (c) Employers Liability with limits of \$1,000,000 per Accident; \$1,000,000 Disease per employee; \$1,000,000 Disease per policy.
- (d) Required Evidence of Insurance: Certificate of Insurance.

### 2. General Liability Insurance:

- (a) Commercial General Liability Insurance on a standard occurrence form, no less broad than Insurance Services Office (ISO) form CG 00 01.
- (b) Minimum Limits: \$1,000,000 per Occurrence; \$2,000,000 General Aggregate; \$2,000,000 Products/Completed Operations Aggregate. The required limits may be provided by a combination of General Liability Insurance and Commercial Umbrella Liability Insurance. If Contractor maintains higher limits than the specified minimum limits, KHS requires and shall be entitled to coverage for the higher limits maintained by Contractor.
- (c) Any deductible or self-insured retention shall be shown on the Certificate of Insurance. If the deductible or self-insured retention exceeds \$25,000 it must be approved in advance by KHS. Contractor is responsible for any deductible or self-insured retention and shall fund it upon KHS's written request, regardless of whether Contractor has a claim against the insurance or is named as a party in any action involving KHS.
- (d) KHS shall be named as an additional insured for liability arising out of operations by or on behalf of Contractor in the performance of this Agreement.

- (e) The insurance provided to KHS as an additional insured shall be primary to and non-contributory with any insurance or self-insurance program maintained by KHS.
- (f) The policy definition of "insured contract" shall include assumptions of liability arising out of both ongoing operations and the products-completed operations hazard (broad form contractual liability coverage including the "f" definition of insured contract in ISO form CG 00 01, or equivalent).
- (g) The policy shall cover inter-insured suits between KHS and Contractor and include a "separation of insureds" or "severability" clause which treats each insured separately.
- (h) Required Evidence of Insurance: (i) Copy of the additional insured endorsement or policy language granting additional insured status; and (ii) Certificate of Insurance.

3. Automobile Liability Insurance:

- (a) Minimum Limits: \$1,000,000 combined single limit per accident.
- (b) Insurance shall apply to all owned autos. If Contractor currently owns no autos, Contractor agrees to obtain such insurance should any autos be acquired during the term of this Agreement or any extensions thereof.
- (c) Insurance shall apply to hired and non-owned autos.
- (d) Required Evidence of Insurance: Certificate of Insurance.

4. Professional Liability Insurance:

- (a) Minimum Limits: \$1,000,000 per Occurrence; \$2,000,000 Annual Aggregate.
- (b) If the Professional Liability Insurance is written on a claims-made basis, Contractor, at Contractor's option, shall either (i) maintain said coverage for at least three (3) years following the termination of this Agreement with coverage extending back to the effective date of this Agreement; (ii) purchase an extended reporting period of not less than three (3) years following the termination of this Agreement; or (iii) acquire a full prior acts provision on any renewal or replacement policy.
- (c) Required Evidence of Insurance: Certificate of Insurance.

5. Standards for Insurance Companies: Insurers shall have an A.M. Best's rating of at least A;VII.

6. Documentation:

- (a) The Certificate of Insurance must include the following reference: <insert contract number or project name>.
- (b) All required Evidence of Insurance shall be submitted prior to the execution of this Agreement. Contractor agrees to maintain current Evidence of Insurance on file with KHS for the entire term of this Agreement and any additional periods if specified in sections 1, 2 or 3 above.
- (c) The name and address for Additional Insured endorsements and Certificates of Insurance is: Kern Health Systems, 9700 Stockdale Highway, Bakersfield, California 93311.

- (d) Required Evidence of Insurance shall be submitted for any renewal or replacement of a policy that already exists, at least 10 days before expiration or other termination of the existing policy.
  - (e) Contractor shall provide immediate written notice if: (i) any of the required insurance policies is terminated; (ii) the limits of any of the required policies are reduced; or (iii) the deductible or self-insured retention is increased.
  - (f) Upon written request, certified copies of required insurance policies must be provided to KHS within 30 days.
7. Policy Obligations: Contractor's indemnity and other obligations shall not be limited by the foregoing insurance requirements.
8. Material Breach: If Contractor fails to maintain the insurance required by this Agreement, it shall be deemed a material breach of this Agreement. KHS, at its sole option, may terminate this Agreement and obtain damages from Contractor resulting from said breach. Alternatively, KHS may purchase the required insurance, and without further notice to Contractor, KHS may deduct from sums due to Contractor any premium costs advanced by KHS for such insurance. These remedies shall be in addition to any other remedies available to KHS.

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