

HIPAA BUSINESS ASSOCIATE AGREEMENT

Approved March 6, 2014

This Business Associate Agreement (“***Agreement***”) is made and entered into to be effective as of _____, 20__ (the “***Effective Date***”), by and between _____ (“***Covered Entity***”) and South Carolina Health Information Partners, Inc., d/b/a South Carolina Health Information Exchange or SCHIEx (“***Business Associate***”).

Covered Entity and Business Associate are parties to that certain Participation Agreement (“***Participation Agreement***”) whereby Business Associate performs functions and/or provides services to or on behalf of Covered Entity. In connection with the Participation Agreement, Covered Entity may disclose to Business Associate certain information subject to the Health Insurance Portability and Accountability Act of 1996 and its implementing regulations at 45 C.F.R. Parts 160, 162 and 164 (“***HIPAA***”); and the Health Information Technology for Economic and Clinical Health Act, enacted as part of the American Recovery and Reinvestment Act of 2009, and its attendant regulations and guidance (the “***HITECH Act***”). Covered Entity and Business Associate desire to enter into this Agreement to ensure that their disclosure and use of such information is done in compliance with HIPAA and the HITECH Act.

In consideration of the foregoing, and the mutual promises contained herein and other valuable consideration, the legal sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. Definitions

- 1.1. Unless otherwise specified herein, all terms used in this Agreement have the meaning established by HIPAA and the HITECH Act.

2. Business Associate Obligations

- 2.1. **Permitted Uses and Disclosures.** Business Associate shall not, and shall ensure that its directors, officers, employees, contractors and agents do not, further use or disclose Protected Health Information (“***PHI***”) received from or created for the Covered Entity in any manner that would violate HIPAA or the HITECH Act. Business Associate agrees to abide by HIPAA with respect to the use or disclosure of PHI it creates, receives from, maintains, or electronically transmits for the Covered Entity as if the Business Associate were considered a health care provider under HIPAA. Business Associate further agrees that it will not use or disclose PHI other than as permitted or required by this Agreement or as required by law. Except as otherwise limited in this Agreement, Business Associate may use or disclose PHI to perform functions, activities, or services for, or on behalf of, Covered Entity pursuant to the Participation Agreement, provided that such use or disclosure would not violate the HIPAA Privacy Rule if done by Covered Entity or the “minimum necessary” policies and procedures of the Covered Entity. Notwithstanding the foregoing, Business Associate shall have no liability to Covered Entity under this Agreement for disclosure or use of PHI by Business Associate in compliance with instructions from Covered Entity.

2.2. Prohibited Uses.

- 2.2.1. *Audit Trails.* Unless required by law or authorized in writing by the User, Business Associate will not disclose to any third party the size, recipient, sender, or time of sending of a SCHIEEx DIRECT message to or from any User via SCHIEEx DIRECT.
- 2.2.2. *Content of Message.* Business Associate will not access the content of a SCHIEEx DIRECT message.
- 2.2.3. *Referral Patterns.* Business Associate will not use information obtained from Covered Entity to compare referral or practice patterns.

2.3. **Compliance with Business Associate Agreement and the HITECH Act.** Business Associate may use and disclose PHI that is created or received by Business Associate from or on behalf of Covered Entity if such use or disclosure complies with each applicable requirement of 45 C.F.R. § 164.504(e) and the HITECH Act.

2.4. **Use/Disclosure for Administrative Activities.** Notwithstanding Section 2.2, Business Associate may use and/or disclose PHI for management and administrative activities of Business Associate or to comply with the legal responsibilities of Business Associate; provided, however, such disclosure is (i) required by law, or (ii) Business Associate obtains reasonable assurances from the third party that receives the PHI that the third party (x) will treat the PHI confidentially and will only use or further disclose the PHI as required by law or in a manner consistent with the purposes thatfor which the PHI was provided by Business Associate, and (y) will promptly report any breach of the confidentiality of the PHI to Business Associate.

2.5. **Notification of Disclosure Required by Law.** If Business Associate believes it has a legal obligation to disclose any PHI, it will notify Covered Entity as soon as reasonably practicable after it learns of such obligation, and in any event at least ten (10) business days prior to the proposed release, as to the legal requirement pursuant to which Business Associate believes the PHI must be released. If Covered Entity objects to the release of such PHI, Business Associate will allow Covered Entity to exercise any legal rights or remedies Covered Entity might have to object to the release of the PHI. Business Associate agrees to provide such assistance to Covered Entity, at Covered Entity's expense, as Covered Entity may reasonably request.

2.6. **Subcontractors and Agents of Business Associate.** Business Associate agrees to enter into written contracts with any of its agents or independent contractors (collectively, "***Subcontractors***") who receive PHI from Business Associate or create, receive, maintain, or transmit electronically PHI from or on behalf of Covered Entity as a Subcontractor of Business Associate. Such contracts shall obligate Subcontractor to abide by the same conditions and terms as are required of Business Associate under this Agreement, including but not limited to the provisions related to Safeguards, Security, and Notification Obligations. Should Business Associate become aware of a pattern of activity or practice of a Subcontractor that constitutes a material breach or violation of the Subcontractor's obligations stated herein, Business Associate shall either terminate

the business associate relationship with Subcontractor or take steps to cure or end the violation and terminate the relationship if these attempts to cure or end the violation are not successful. Upon request, Business Associate shall provide Covered Entity with a copy of any written agreement entered into by Business Associate and its Subcontractors to meet the obligations of this Section. Business Associate shall be responsible for, and liable to, Covered Entity for any breach by a Subcontractor of the obligations under this Agreement or of any such required written agreement between Business Associate and Subcontractor.

- 2.7. **Minimum Necessary.** Business Associate and Subcontractors, if any, shall only request, use and disclose the minimum amount of PHI necessary to accomplish the purpose of the request, use or disclosure. Business Associate agrees to comply with the Secretary's guidance on what constitutes "minimum necessary".
- 2.8. **Restriction.** Notwithstanding 45 C.F.R. § 164.522(a)(1)(ii), Business Associate must comply with an Individual's request under 45 C.F.R. § 164.522(a)(1)(i)(A) that Business Associate restrict the disclosure of PHI of the Individual if (i) except as otherwise required by law, the disclosure is to a health plan for purposes of carrying out payment or health care operations (and is not for purposes of carrying out treatment); and (ii) the PHI pertains solely to a health care item or service for which the health care provider involved has been paid out of pocket in full.

2.9. Individual Requests

- 2.9.1. **Access and Amendment.** Business Associate shall notify Covered Entity within five (5) days of receipt of a request received by Business Associate for access to, or amendment of, PHI. Covered Entity shall be responsible for responding or objecting to such requests in accordance with Covered Entity's HIPAA privacy policies.
- 2.9.1.1. **Access.** Upon request, Business Associate agrees to furnish Covered Entity with copies of the PHI maintained by Business Associate in a Designated Record Set in the time and manner designated by Covered Entity to enable Covered Entity to respond to an Individual request for access to PHI under 45 C.F.R. § 164.524.
- 2.9.1.2. **Amendment.** Upon request and instruction from Covered Entity, Business Associate shall amend PHI in a Designated Record Set that is maintained by, or otherwise within the possession of, Business Associate as directed by Covered Entity in accordance with procedures established by 45 C.F.R. § 164.526. Any request by Covered Entity to amend such information shall be completed by Business Associate within fifteen (15) business days of Covered Entity's request.
- 2.9.2. **Accounting.** Business Associate agrees to document disclosures of PHI as would be required for Covered Entity to respond to a request by an Individual for an

accounting of disclosures of PHI in accordance with 45 C.F.R. § 164.528 and, if required by and upon the effective date of, Section 13405(c) of the HITECH Act and related regulatory guidance; and provide to Covered Entity or an Individual upon Covered Entity's request, information collected in accordance with this Section, within ten (10) days of receipt of written request by Covered Entity. In the event an Individual delivers the initial request for an accounting directly to Business Associate, Business Associate shall within ten (10) days forward such request to Covered Entity.

2.10. **Miscellaneous Uses and Disclosures**

2.10.1. **Fundraising.** Any written fundraising communication occurring on or after February 17, 2010, that is a health care operation shall, in a clear and conspicuous manner and consistent with guidance to be provided by the Secretary, provide an opportunity for the recipient of the communications to elect not to receive any further such communication. An election not to receive any further such communication shall be treated as a revocation of authorization under 45 C.F.R. § 164.508. However, no communication pursuant to this Section may be made by Business Associate without prior written authorization by Covered Entity.

2.10.2. **Sale of PHI.** Upon the effective date of Section 13405(d) of the HITECH Act, Business Associate shall not directly or indirectly receive remuneration in exchange for PHI that is created or received by Business Associate from or on behalf of Covered Entity unless: (1) pursuant to an authorization by the Individual in accordance with 45 C.F.R. §164.508 that includes a specification for whether the PHI can be further exchanged for remuneration by the entity receiving PHI of that Individual; or (2) as provided in Section 13405(d)(2) of the HITECH Act and regulations to be issued by the Secretary, upon the effective date of such regulations. However, in no instance may Business Associate receive remuneration pursuant to this Section without Covered Entity's written authorization.

2.10.3. **Marketing.** A communication occurring on or after February 17, 2010, by Business Associate that is described in the definition of "marketing" in 45 C.F.R. §164.501(1)(i), (ii) or (iii) for which Covered Entity receives or has received direct or indirect payment (excluding payment for treatment) in exchange for making such communication, shall not be considered a health care operation unless: (1) such communication describes only a drug or biologic that is currently being prescribed for the recipient of the communication and any payment received in exchange for making such a communication is reasonable in amount; or (2) the communication is made by Business Associate on behalf of Covered Entity and the communication is otherwise consistent with this Agreement. However, no communication pursuant to this Section may be made by Business Associate without prior written authorization by Covered Entity.

2.11. **Safeguards.** Business Associate shall utilize physical, administrative and technical safeguards to ensure that PHI is not used or disclosed in any manner inconsistent with

this Agreement or the purposes for which Business Associate received PHI from, or created PHI for, Covered Entity. Business Associate shall implement administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of any PHI that Business Associate creates, receives, maintains or transmits electronically on behalf of Covered Entity under the Agreement and also to protect against reasonably anticipated threats or hazards to the security or integrity of electronic PHI. Upon request, Business Associate shall provide Covered Entity with a written description of the physical, administrative and technical safeguards adopted by Business Associate to meet its obligations under this Section.

2.12. Security Obligations

2.12.1. **Security Rule Obligations.** Business Associate acknowledges that 45 C.F.R. §§ 164.308, 164.310, 164.312 and 164.316 apply to Business Associate in the same manner that such sections apply to covered entities, and are incorporated into this Agreement by reference. The additional requirements of the HITECH Act that relate to security and that apply to covered entities also apply to Business Associate and are incorporated into this Agreement by reference. Business Associate agrees to implement the technical safeguards provided in guidance issued annually by the Secretary of the U.S. Department of Health and Human Services (“**HHS**”) for carrying out the obligations under the Code of Federal Regulation sections cited in this Section and the security standards in 45 C.F.R. Part 164 Subpart C.

2.12.2. **Encryption for Portable Devices.** PHI stored, transmitted or retained on portable devices for or on behalf of Covered Entity shall be rendered unusable, unreadable, or indecipherable to unauthorized individuals through the use of a technology or methodology specified by the Secretary in guidance issued under Section 13402(h)(2) of the HITECH Act on the HHS website. The term “portable device” shall include transportable devices that perform or facilitate computing, storage or transmission, including but not limited to CDs, DVDs, USB flash drives, laptops, PDAs, and portable audio/video devices.

2.13. **Access by Secretary of Health & Human Services.** Business Associate shall make its internal practices, books and records relating to the use and disclosure of PHI received from, or created or received by Business Associate on behalf of, Covered Entity available to the Secretary for purposes of determining Covered Entity's compliance with the HIPAA Privacy Rule. Business Associate shall promptly notify Covered Entity that Business Associate has received such a request. Upon Business Associate's receipt of written directive to do so from Covered Entity in a form reasonably acceptable to Business Associate, Business Associate will make its internal practices, books, and records relating to the use and disclosure of PHI received from, or created or received by Business Associate on behalf of, Covered Entity available to the Secretary for purposes of determining Covered Entity's compliance with the HIPAA Privacy Rule.

3. **Notification Obligations.** Business Associate agrees to implement response programs and record-keeping systems to enable Business Associate to comply with the requirements of this

Section, HIPAA and the HITECH Act, when Business Associate detects or becomes aware of unauthorized access to information systems or documents that contain PHI. Business Associate agrees to mitigate any effects of the unlawful use or disclosure of PHI by Business Associate.

- 3.1. Business Associate agrees to immediately notify Covered Entity, by electronic mail or telephone, of any breach or suspected breach of its security related to areas, locations, systems, documents or electronic systems which contain Unsecured PHI, any Security Incident, instance of theft, fraud, deception, malfeasance, or use, access or disclosure of PHI which is inconsistent with the terms of this Agreement (an “**Incident**”) upon having reason to suspect that an Incident may have occurred, and typically prior to beginning the process of verifying that an Incident has occurred or determining the scope of any such Incident, and regardless of the potential risk of harm posed by the Incident.
- 3.2. In the event of any such Incident, Business Associate shall further provide to Covered Entity, in writing, such details concerning the Incident as Covered Entity may request, and shall cooperate with Covered Entity, its regulators and law enforcement to assist in regaining possession of such Unsecured PHI and prevent its further unauthorized use, and take any necessary remedial actions as may be required by Covered Entity to prevent other or further Incidents.
- 3.3. If Covered Entity determines that it may need to notify any Individual(s) as a result of an Incident that is attributable to Business Associate’s breach of its obligations under this Agreement, Business Associate shall bear all reasonable direct and indirect costs associated with such determination including, without limitation, the costs associated with providing notification to the affected Individuals, providing fraud monitoring or other services to affected Individuals, and any forensic analysis required to determine the scope of the Incident.
- 3.4. In addition, Business Associate agrees to update the notice provided to Covered Entity under this Section to include, to the extent possible and as soon as possible working in cooperation with Covered Entity, any of the following information that Covered Entity is required to include in its notice to the Individuals pursuant to 45 C.F.R. §164.404(c):
 - 3.4.1. The identification of each Individual whose Unsecured PHI has been, or is reasonably believed by Business Associate to have been, accessed, acquired, used or disclosed during the Incident;
 - 3.4.2. A brief description of what happened, including the date of the Incident, if known, and the date of discovery of the Incident;
 - 3.4.3. A description of the types of Unsecured PHI that were involved in the Incident (such as whether the full name, social security number, date of birth, home address, account number, diagnosis, disability code, or other types of information were involved);

- 3.4.4. Any steps the Individual should take to protect themselves from potential harm resulting from the Incident;
 - 3.4.5. A brief description of what is being done to investigate the Incident, mitigate the harm and protect against future Incidents; and
 - 3.4.6. Contact procedures for Individuals to ask questions or learn additional information, which shall include a toll-free number, an e-mail address, Web site, or postal address, if Covered Entity specifically requests Business Associate to establish contact procedures.
- 3.5. Business Associate shall have an ongoing duty to submit updated information to Covered Entity promptly after the information becomes available to Business Associate.

4. Term and Termination

- 4.1. **Term.** The term of this Agreement shall commence on the Effective Date and shall terminate upon the assignment or termination of the Participation Agreement.
- 4.2. **Termination Upon Material Breach.** Covered Entity may, in its sole discretion, terminate the Participation Agreement and this Agreement, upon determining that Business Associate violated a material term of this Agreement. If the Covered Entity makes such a determination, it shall inform Business Associate in writing that the Covered Entity is exercising its right to terminate under this Section and such termination shall take effect immediately.
- 4.3. **Reasonable Steps to Cure Material Breach.** At the Covered Entity's sole option, the Covered Entity may, upon written notice to Business Associate, allow Business Associate an opportunity to take prompt and reasonable steps to cure a violation or breach of any material term of this Agreement to the complete satisfaction of the Covered Entity within ten (10) days of the date of written notice to Business Associate. Business Associate shall submit written documentation reasonably acceptable to the Covered Entity of the steps taken by Business Associate to cure any material violation. If Business Associate fails to cure a material breach within the specified time period, then the Covered Entity shall be entitled to terminate this Agreement, if feasible; or, if it is not feasible to terminate this Agreement, to report Business Associate's material breach to the Secretary.
- 4.4. **Return or Destruction of PHI Upon Termination.** Within thirty (30) days of termination of this Agreement, Business Associate will return to Covered Entity all PHI received from Covered Entity or created or received by Business Associate on behalf of Covered Entity which Business Associate maintains in any form or format, and Business Associate will not maintain or keep in any form or format any portion of such PHI. Alternatively, Covered Entity may request that Business Associate destroy all such PHI upon termination of this Agreement rather than returning PHI to the Covered Entity. Business Associate shall provide written documentation of such destruction. The

requirement to return or destroy such PHI will apply to all Subcontractors of Business Associate. Business Associate will be responsible for recovering and returning to Covered Entity, or destroying, any PHI from such Subcontractors. If Business Associate cannot obtain the PHI from any Subcontractor, Business Associate will so notify Covered Entity and will require that such Subcontractors directly return PHI to Covered Entity or otherwise destroy such PHI, subject to the terms of this Section.

4.5. **Alternative Measures.** If Business Associate believes that returning or destroying PHI at the termination of this Agreement is infeasible, it will provide written notice to Covered Entity within five (5) business days of the effective date of termination of this Agreement. Such notice will set forth the circumstances that Business Associate believes make the return or destruction of PHI infeasible and the alternative measures that Business Associate recommends for assuring the continued confidentiality and security of the PHI. Covered Entity, within a commercially reasonable timeframe, will notify Business Associate of whether it agrees that the return or destruction of PHI is infeasible. If Covered Entity agrees that return or destruction of PHI is infeasible, Business Associate agrees to extend all protections, limitations and restrictions of this Agreement to Business Associate's use or disclosure of PHI retained after termination of this Agreement, and to limit further uses or disclosures to those purposes that make the return or destruction of the PHI infeasible. In such instances, all obligations of Business Associate shall survive termination of this Agreement, including but not limited to indemnification provisions of this Agreement. Any such extended protections, limitations and restrictions, including but not limited to indemnification provisions, will apply to any Subcontractors of Business Associate for whom return or destruction of PHI is determined by Covered Entity to be infeasible. If Covered Entity does not agree that the return or destruction of PHI from Business Associate or its Subcontractors is infeasible, Covered Entity will provide Business Associate with written notice of its decision, and Business Associate and its Subcontractors will proceed with the return or destruction of the PHI pursuant to the terms of this Section within fifteen (15) days of the date of Covered Entity's notice.

5. **Modification and Amendment of Agreement.** This Agreement contains the entire understanding of the parties regarding the privacy and security obligations of Business Associate under HIPAA and the HITECH Act and will be modified only by a written document signed by each party, except as otherwise provided in this Section. The parties acknowledge and agree that HIPAA and the HITECH Act may be amended and additional guidance and/or regulations may be issued after the date of execution of this Agreement and may affect the parties' obligations under this Agreement ("***Future Directives***"). The parties agree to abide by such Future Directives as these Future Directives may affect the obligations of the parties. If Future Directives affect the obligations of the parties, then Covered Entity shall notify Business Associate of Future Directives in writing no less than thirty (30) days before Future Directives become effective. The notification of Business Associate by Covered Entity of Future Directives that affect the obligations of the parties related to the business associate relationship shall be considered amendments to this Agreement binding on both parties. Upon any amendment to HIPAA and/or the HITECH Act, or upon receipt of a

notice of Future Directives, Business Associate shall have the option to terminate the Participation Agreement and this Agreement upon written notice to Covered Entity.

6. **Relationship of the Parties.** The Parties hereto acknowledge that Business Associate shall be and have the status of independent contractor in the performance of its obligations under this Agreement as to Covered Entity. Nothing in this Agreement shall be deemed or construed to create a joint venture or partnership or agency relationship between Covered Entity and Business Associate.
7. **Hold Harmless.** Neither party shall be liable for any claims, demands, expenses, liabilities and losses (including reasonable attorney's fees) which may arise out of any acts or failures to act by the other party, its employee or agents, in connection with the performance of services pursuant to this Agreement or the Participation Agreement, including the SCHIEX Policy Manual.
8. **Exception to Limitations and Exclusions.** Business Associate's obligations under this Agreement and any breach by Business Associate or its Subcontractors of the obligations in this Agreement shall not be subject to any limitations on damages that may be specified in any agreement, invoice, statement of work or similar document setting forth the services Business Associate is providing to Covered Entity.
9. **Injunctive Relief.** Business Associate expressly acknowledges and agrees that the breach, or threatened breach, by it of any provision of this Agreement may cause Covered Entity to be irreparably harmed and that Covered Entity may not have an adequate remedy at law. Therefore, Business Associate agrees that upon such breach, or threatened breach, Covered Entity will be entitled to seek injunctive relief to prevent Business Associate from commencing or continuing any action constituting such breach, without having to post a bond or other security and without having to prove the inadequacy of any other available remedies. Nothing in this paragraph will be deemed to limit or abridge any other remedy available to Covered Entity at law or in equity.
10. **Assistance in Litigation or Administrative Proceedings.** Business Associate shall make itself, and any Subcontractors, employees or agents assisting Business Associate in the performance of its obligations under this Agreement, available to Covered Entity to testify as witnesses, or otherwise, in the event of litigation, administrative proceedings or investigations being commenced against Covered Entity, its directors, officers, or employees based upon a claimed violation of this Agreement, HIPAA, the HITECH Act, or other laws relating to security and privacy.
11. **Notice.** Except as otherwise provided in this Agreement, any notice permitted or required by this Agreement will be considered made on the date personally delivered in writing or mailed by certified mail, postage prepaid, to the other party at the address set forth below or as either party may designate in writing:

Covered Entity: _____

Business Associate: South Carolina Health Information Partners, Inc.
1919 Blanding Street
Columbia, SC 29201

12. Miscellaneous

- 12.1. **Conflicts.** The terms and conditions of this Agreement will override and control over any conflicting term or condition of other agreements between the parties. All non-conflicting terms and conditions of such agreements shall remain in full force and effect.
- 12.2. **Severability.** If any provision of this Agreement is held by a court of competent jurisdiction to be illegal, invalid or unenforceable under present or future laws effective during the term of this Agreement, the legality, validity and enforceability of the remaining provisions shall not be affected thereby.
- 12.3. **Waiver.** The waiver by Business Associate or Covered Entity of a breach of this Agreement will not operate as a waiver of any subsequent breach. No delay in acting with regard to any breach of this Agreement will be construed to be a waiver of the breach.
- 12.4. **Assignment.** This Agreement may not be assigned by either party without the prior written consent of the other party. This Agreement will be for the benefit of, and binding upon, the parties hereto and their respective successors and permitted assigns.
- 12.5. **Governing Law.** The interpretation and enforcement of this Agreement will be governed by the laws of the State of South Carolina.
- 12.6. **No Third Party Beneficiary Rights.** Nothing express or implied in this Agreement is intended or shall be interpreted to create or confer any rights, remedies, obligations or liabilities whatsoever in any third party.
- 12.7. **Headings.** The section headings contained in this Agreement are for reference purposes only and will not affect the meaning of this Agreement.
- 12.8. **Counterparts.** This Agreement may be executed in counterparts, each of which will be deemed to be an original, but all of which together will constitute one and the same instrument.

IN WITNESS WHEREOF, Business Associate and Covered Entity execute this Agreement to be effective as of the Effective Date.

COVERED ENTITY:

[Name]

By: _____
Name: _____
Title: _____
Date: _____

BUSINESS ASSOCIATE:

**South Carolina Health Information
Partners, Inc.**

By: _____
Name: Kelly Jolley
Title: Interim Executive Director
Date: _____