

BUSINESS ASSOCIATE AGREEMENT

WHEREAS, This Business Associate Agreement (“Agreement”) between The City of South San Francisco (“Plan Sponsor”) on behalf of the City of South San Francisco Retiree HRA Plan (the “Covered Entity”) and Educators Benefit Consultants, LLC (“EBC”) (the “Business Associate”) is effective upon execution.

WHEREAS, Business Associate and Covered Entity have an existing business relationship as a Health Reimbursement Arrangement (“HRA”) administrator and an employer sponsoring such benefit plan.

WHEREAS, the Business Associate regularly uses and comes into contact with Protected Health Information (as defined below) in its performance of contracted services for the Covered Entity.

WHEREAS, both parties are committed to complying with the requirements under the Privacy Rule and the Security Rule of the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 (“HIPAA”) and Health Information Technology for Economic and Clinical Health Act (“HITECH”), as enacted as part of the American Recovery and Rehabilitation Act of 2009, Pub. L. No. 111-5 (“ARRA”).

NOW THEREFORE, the parties hereby agree as follows:

I. Definitions

Terms used but not otherwise defined herein shall have the same meaning as those terms in the Privacy Rule and Security Rule.

- A. **Business Associate** – “Business Associate” shall mean EBC, as the HRA administrator and consultant for the Covered Entity, to the extent that health information received, maintained or created by EBC is PHI under the Privacy Rule.
- B. **Breach** – “Breach” shall mean the unauthorized acquisition, access, use or disclosure of PHI which compromises the security or privacy of such information, as defined in 45 CFR §164.402.
- C. **Covered Entity** – “Covered Entity” shall mean the Plan named above.
- D. **Data Aggregation** – “Data Aggregation” shall mean the combining of PHI created or received by Business Associate in its capacity as a business associate of the Covered Entity with the PHI received by Business Associate in its capacity as a business associate of another covered entity (as those terms are defined in 45 CFR §160.103), to permit data analyses that relate to the health care operations of the respective covered entities.
- E. **Designated Record Set** – “Designated Record Set” shall mean a group of records maintained by or for Covered Entity that is: (1) the medical records and billing records about Individuals maintained by or for Covered Entity; (2) the enrollment, payment, claims adjudication, and case or medical management record systems maintained by or for Covered Entity; or (3) used, in whole or in part, by or for Covered Entity to make decisions about Individuals. As used herein, the term “Record” means any item, collection or grouping of information that includes PHI and is maintained, collected, used or disseminated by or for Covered Entity.
- F. **Disclose** – “Disclose” shall have the same meaning as the term “disclose” in 45 CFR §160.103 and shall mean the release, transfer, provision of access to, or divulging in any manner of information outside the entity holding the information.

- G. **Discover** – “Discover” (or Discovery or Discovered) shall mean that Business Associate has discovered a breach or Security Incident as of the first day on which the breach or Security Incident is known to Business Associate or, by exercising reasonable diligence would have been known to Business Associate. Business Associate shall be deemed to have knowledge of a breach if such breach is known, or by exercising reasonable diligence would have been known, to any person, other than the person committing the breach, who is a workforce member, Subcontractor or agent of Business Associate.
- H. **Individual** – “Individual” shall have the same meaning as the term “individual” in 45 CFR §164.501 and shall include a person who qualifies as a personal representative in accordance with 45 CFR §164.502(g).
- I. **Plan** – “Plan” shall mean the HRA named above for which Business Associate provides services involving the use or disclosure of PHI.
- J. **Plan Sponsor** – “Plan Sponsor” shall mean the sponsor of the Covered Entity named above.
- K. **Privacy Rule** – “Privacy Rule” shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 CFR Part 160 and Part 164, subparts A and E as in effect or as amended.
- L. **Protected Health Information** – “Protected Health Information” or “PHI” shall mean the “protected health information” (as defined in 45 CFR §164.501) created or received by Business Associate from or on behalf of Covered Entity.
- M. **Required by Law** – “Required by Law” shall have the same meaning as the term “required by law” in 45 CFR §164.501.
- N. **Secretary** – “Secretary” shall mean the Secretary of the Department of Health and Human Services or his/her designee.
- O. **Security Incident** – “Security Incident” shall have the same meaning as the term “security incident” in 45 CFR §164.304.
- P. **Security Rule** – “Security Rule” shall mean the Security Standards and Implementation Specifications at 45 CFR Part 160 and Part 164, subpart C as in effect or as amended.
- Q. **Subcontractor** – “Subcontractor” shall have the same meaning as the term “subcontractor” in 45 CFR §160.103 and shall mean a person or entity to whom a Business Associate delegates a function, activity, or service, other than in the capacity of a member of the Business Associate’s workforce.
- R. **Unsecured Protected Health Information or Unsecured PHI** – “Unsecured Protected Health Information” or “Unsecured PHI” means PHI that is not rendered unusable, unreadable, or indecipherable to unauthorized individuals through the use of a technology or methodology specified by the Secretary in guidance.
- S. **Use** – “Use” shall have the same meaning as the term “use” in 45 CFR §160.103 and shall mean, with respect to individually identifiable health information, the sharing, employment, application, utilization, examination or analysis of such information within an entity that maintains such information.

II. Obligations and Activities of Business Associate

- A. **Generally.** Pursuant to the Service Agreement, Business Associate provides services (“Services”) for Covered Entity that involve the use and disclosure of PHI. In the provision of these Services, Business Associate agrees not to acquire, access, use or disclose PHI other than as permitted or required by this Agreement or as Required by Law. To the extent possible, all uses and disclosures of PHI under this Agreement on or after September 23, 2009, will be limited to the Limited Data Set (as defined in 45 CFR §164.514(e)(2)). In all cases, Business Associate agrees that its uses and disclosures of PHI under this Agreement will be limited to the minimum necessary PHI needed to perform the functions, activities or services provided for by the Agreement.
- B. **Permitted Uses and Disclosures by Business Associate.** 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 as described in the Service Agreement in effect between Business Associate and Plan Sponsor, provided that such use or disclosure would not violate the Privacy Rule or Security Rule, or any applicable state laws or regulations governing health information, if done by Covered Entity.
1. Except as otherwise limited in this Agreement, Business Associate may use PHI for the proper management and administration of Business Associate or to carry out the legal responsibilities of Business Associate.
 2. Except as otherwise limited in this Agreement, Business Associate may disclose PHI for the proper management and administration of Business Associate, provided that (a) disclosures are Required by Law, or (b) Business Associate obtains reasonable assurances from the person to whom the information is disclosed that the PHI will remain confidential, that it will be used or further disclosed only as Required by Law or for the purpose for which it was disclosed to the person, that effective February 17, 2010, the person will comply with all HIPAA Privacy and Security Rule requirements that are applicable to the person, that the person will notify Business Associate within seven (7) calendar days of any instances of which it is aware in which the confidentiality of the information has been or may have been improperly acquired, accessed, used or disclosed (“breached”) and that for any breach occurring on or after September 23, 2009, the person will cooperate with Business Associate and/or Covered Entity to investigate said breach and to provide all information in its possession to Covered Entity that Covered Entity requires to determine whether such breach is a Breach and to comply with the HITECH notification and documentation requirements.
 3. Except as otherwise limited in this Agreement, Business Associate may use PHI to provide Data Aggregation services to Covered Entity as permitted by 45 CFR §164.504(e)(2)(i)(B).
 4. Business Associate may use PHI to report violations of law to appropriate Federal and State authorities, consistent with 45 CFR §164.502(j)(1).
- C. **Mitigation.** Business Associate agrees to mitigate, to the extent practicable and in a manner acceptable to Covered Entity, any harmful effect that is known to Business Associate of the use or disclosure of PHI by Business Associate in violation of the requirements of this Agreement. For any such use or disclosure of PHI occurring on or after September 23, 2009, Business Associate will provide Covered Entity with written information regarding its mitigation efforts sufficient to meet Covered Entity’s obligations to document and report such efforts to the Secretary under HITECH.

- D. **Safeguards Against Misuse of Information.** Business Associate will implement appropriate administrative, physical and technical safeguards (including written policies and procedures) that reasonably and appropriately protect the confidentiality, integrity and availability of all PHI, including electronic PHI, that it creates, receives, maintains or transmits on behalf of Covered Entity as required by the Privacy and Security Rules. Business Associate will include in such safeguards procedures designed to identify Breaches or potential Breaches of PHI.
- E. **Reporting of Disclosures of PHI.** Business Associate agrees to report to Covered Entity any actual or probable use or disclosure of the PHI not provided for by this Agreement (“breach”) and/or any actual or probable Security Incident to Covered Entity.

For any such breach or Security Incident that occurs on or after September 23, 2009, Business Associate will fully comply with 45 CFR §164.410. Business Associate agrees to report any breach or Security Incident to Covered Entity within ten (10) calendar days of Business Associate’s Discovery of such breach or Security Incident. In addition, Business Associate agrees to promptly supplement any report of a breach or Security Incident to Covered Entity after the above period if Business Associate discovers additional relevant information regarding such breach or Security Incident.

- F. **Determination of Breach.** Business Associate agrees to fully cooperate with Covered Entity in the investigation of any breach or Security Incident. Business Associate agrees that Covered Entity’s determination as to whether a Breach under 45 CFR §164.402 has occurred, and whether notification of such Breach is required under 45 CFR §§164.404, 164.406 or 164.408 will be final and binding on both parties.

Business Associate agrees to conduct reasonable additional investigation at Covered Entity’s request and to provide relevant information in its possession regarding any applicable breach or Security Incident to Covered Entity to enable Covered Entity to provide notifications under 45 CFR §§164.404, 164.406 or 164.408.

Notwithstanding the foregoing, nothing in this Agreement shall require Business Associate to provide information to Covered Entity that could not reasonably be used by Covered Entity to determine whether a Breach has occurred under 45 CFR §164.402, to provide notifications under 45 CFR §§164.404, 164.406 and 164.408, to maintain adequate documentation of all breaches, Breaches and Security Incidents or that is otherwise required or provided for in this Agreement.

- G. **Subcontractors.** Business Associate agrees to ensure that any agent, including a Subcontractor, to whom it provides PHI received from, or created or received by Business Associate on behalf of Covered Entity agrees in writing to the same restrictions and conditions that apply through this Agreement to Business Associate with respect to such information, including but not limited to reporting any breaches of PHI or Security Incidents and cooperating with Business Associate and Covered Entity to investigate such breach or Security Incident. Moreover, Business Associate shall ensure that any such agent or Subcontractor agrees to implement reasonable and appropriate safeguards, including written policies and procedures, to protect Covered Entity’s PHI as required by HIPAA and HITECH.
- H. **Access to Information.** Business Associate agrees to provide access, within fifteen (15) days of a request by Covered Entity, to PHI in a Designated Record Set held or maintained by Business Associate, including in electronic form and format, to Covered Entity or, as directed by Covered Entity, to an Individual in order to meet the requirements under 45 CFR §164.524.

- I. **Availability of PHI for Amendment.** Within fifteen (15) days of receipt of a request from Covered Entity for the amendment of an Individual's PHI or a record regarding an Individual contained in a Designated Record Set for so long as the PHI is maintained in the Designated Record Set, Business Associate shall provide such information to Covered Entity for amendment and incorporate any such amendments in the PHI as required by 45 CFR §164.526. It shall be Covered Entity's responsibility to promptly notify Business Associate of the request for an amendment. Any denials, in whole or in part, of requested amendments shall be done in accordance with 45 CFR §164.526 and shall be the responsibility of Covered Entity.
- J. **Accounting of Disclosures.** Business Associate agrees to document such disclosures of PHI and information related to such disclosures 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 CFR §164.528. Within fifteen (15) days of receipt of notice from Covered Entity that it has received a request for an accounting of disclosures of PHI regarding an Individual during the six (6) years prior to the date on which the accounting was requested, Business Associate shall make available to Covered Entity such information as is in Business Associate's possession and is required for Covered Entity to make the accounting required by 45 CFR §164.528. At a minimum, Business Associate shall provide Covered Entity with the following information: (1) The date of the disclosure; (2) the name of the entity or person who received the PHI and, if known, the address of such entity or person; (3) a brief description of the PHI disclosed; and (4) a brief statement of the purpose of such disclosure which includes an explanation of the basis for such disclosure. It shall be Covered Entity's responsibility to promptly notify Business Associate of the request for an accounting, and to prepare and deliver any such accounting requested. Business Associate hereby agrees to implement an appropriate record keeping process to enable it to comply with the requirements of this section.
- Business Associate's obligations under this paragraph J include implementing a recordkeeping process to comply with HITECH §13405(c) to account for disclosures of electronic health records on or after January 1, 2011 (for all electronic health records acquired after January 1, 2009) or January 1, 2014 (for all electronic health records acquired as of January 1, 2009) unless the Secretary sets a later effective date.
- K. **Access Provided to Secretary.** 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, if necessary, for purposes of determining the Covered Entity's compliance with the Privacy Rule.
- L. **Access Provided to Covered Entity.** Upon fifteen (15) days advance written request, Business Associate will make available during normal business hours at Business Associate's offices all books, records, agreements, policies and procedures relating to the use and/or disclosure of PHI to Covered Entity for purposes of enabling Covered Entity to determine Business Associate's compliance with the terms of this Agreement.
- M. **Return of PHI.** Business Associate shall at the termination of this Agreement with Covered Entity, if feasible, return or destroy all PHI received from, or created or received by Business Associate on behalf of, Covered Entity that Business Associate still maintains in any form within fifteen (15) days of the end of the termination of this Agreement and retain no copies of such information. If such return or destruction is not feasible, Business Associate agrees to extend the protection of this Agreement to the information and limit further uses and disclosures to those purposes that make the return or destruction of the information infeasible.

III. Obligations of Covered Entity

- A. **Notice of Privacy Practices.** Covered Entity shall notify Business Associate of any limitation(s) in its notice of privacy practices of Covered Entity in accordance with 45 CFR §164.520, to the extent that such limitation may affect Business Associate's use or disclosure of PHI. Covered Entity may satisfy this requirement by providing Business Associate with the notice of privacy practices that Covered Entity produces in accordance with 45 CFR §164.520, as well as any changes to such notice.
- B. **Requests by Covered Entity.** Except as otherwise allowed in this Agreement, Covered Entity shall not request Business Associate to use or disclose PHI in any manner that would not be permissible under the Privacy Rules if done by Covered Entity. This includes, but is not limited to, requests for disclosure of PHI to Plan Sponsor as other than the entity acting on behalf of the Plan as the Covered Entity. To the extent a dispute or difference of opinion exists between Business Associate and Plan Sponsor acting on behalf of the Plan(s), Business Associate may disclose under objection pursuant to the specific, written direction of Covered Entity. Any disclosures made pursuant to such specific, written direction shall be subject to the indemnification provisions of the Agreement.
- C. **Changes in Permission.** Covered Entity shall notify Business Associate of any changes in, or revocation of, permission by Individual to use or disclose PHI, to the extent that such changes may affect Business Associate's use or disclosure of PHI.
- D. **Restrictions.** Covered Entity shall notify Business Associate of any restriction to the use or disclosure of PHI that Covered Entity has agreed to in accordance with 45 CFR §164.522, to the extent that such restriction may affect Business Associate's use or disclosure of PHI.

IV. Term and Termination

- A. **Term.** This Agreement shall become effective on the date set forth above and shall continue in effect until all obligations of the parties have been met, unless terminated as provided in this Section IV. In addition, certain provisions and requirements of this Agreement shall survive its expiration or other termination as set forth in Section V.C.
- B. **Termination for Cause.**
 - 1. **Termination by Covered Entity.** As provided under HIPAA, Covered Entity may immediately terminate this Agreement and any related agreements if Covered Entity makes the determination that Business Associate has breached a material term of this Agreement. Alternatively, Covered Entity may choose to: (i) provide Business Associate with ten (10) days written notice of the existence of an alleged material breach; and (ii) afford Business Associate an opportunity to cure said alleged material breach upon mutually agreeable terms. Nonetheless, in the event that mutually agreeable terms cannot be achieved within fifteen (15) days, Business Associate must cure said breach to the satisfaction of Covered Entity within fifteen (15) days. Failure to cure in the manner set forth in this paragraph is grounds for the immediate termination of this Agreement.

2. **Termination by Business Associate.** If Business Associate makes the determination that a material condition of performance has changed under the Service Agreement or this Agreement, of that Covered Entity has breached a material term of this Agreement, Business Associate may provide thirty (30) days notice of its intention to terminate this Agreement. Business Associate agrees, however, to cooperate with Covered Entity to find a mutually agreeable resolution to the matter prior to terminating the Agreement. Business Associate further agrees that, notwithstanding this provision, it shall not terminate this Agreement so long as the Service Agreement is in effect; provided that, however, failure to cure a breach of a material term of this Agreement is grounds for the immediate termination of this Agreement.
- C. **Automatic Termination.** This Agreement will automatically terminate without any further action of the parties upon the termination or expiration of the Service Agreement between the parties.
- D. **Effect of Termination**
 1. Except as provided in paragraph 2, below, upon termination of this Agreement for any reason, Business Associate shall return or destroy all PHI received from Covered Entity, or created, maintained or received by Business Associate on behalf of Covered Entity. This provision shall apply to PHI that is in the possession of Subcontractors or agents of Business Associate. Business Associate shall retain no copies of the PHI.
 2. In the event that Business Associate determines that returning or destroying the PHI is infeasible, Business Associate shall provide to Covered Entity notification of the conditions that make return or destruction infeasible. Upon Business Associate's determination that return or destruction of PHI is infeasible, Business Associate shall extend the protections of this Agreement to such PHI and limit further uses and disclosures of such PHI to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such PHI.
 3. If it is not feasible for Business Associate to obtain from a Subcontractor or agent any PHI in the possession of such Subcontractor or agent, Business Associate must provide a written explanation to Covered Entity and require the Subcontractors and agents to agree to extend any and all protections, limitations and restrictions contained in this Agreement to the Subcontractors' and/or agents' use and/or disclosure of any PHI retained after the termination of this Agreement, and to limit any further uses and/or disclosures to the purposes that make the return or destruction of the PHI infeasible.

V. Miscellaneous

- A. **Indemnification.** Each Party ("Indemnitor") shall indemnify, defend and hold harmless the other Party ("Indemnitee") from and against any and all of the following incurred by the Indemnitee: losses, damages, suits, causes of action, claims, liabilities, federal or state penalties, fines, costs including without limitation reasonable attorneys' fees, court costs, costs of notification to, or credit reporting protection for, individuals whose PHI was disclosed or alleged to have been disclosed in violation of the terms of this Agreement, HIPAA or any applicable state law (the "Losses") to the extent that such Losses arise out of or relate to Indemnitor's grossly negligent, intentional, willful, reckless or criminal acts or omissions or its breach of the terms of this Agreement. This Section V.A. shall survive termination of this Business Associate Agreement.

- B. **Amendment and Waiver.** The Parties agree to take such action as is necessary to amend this Agreement from time to time as is necessary for Covered Entity and Business Associate to comply with the Privacy Rule, the Security Rule and other HIPAA requirements. Notwithstanding the foregoing, this Agreement may not be modified, nor shall any provision hereof be waived or amended, except in writing, duly signed by authorized representatives of the parties. A waiver with respect to one event shall not be construed as continuing, or as a bar to or waiver of any right or remedy as to subsequent events.
- C. **Survival.** The respective rights and obligations of Business Associate under Sections IV.D. and V.A. of this Agreement shall survive the termination of this Agreement.
- D. **Interpretation.** Any ambiguity in this Agreement shall be resolved to permit Covered Entity and/or Business Associate to comply with the Privacy Rule and the Security Rule.
- E. **No Third Party Beneficiaries.** Nothing express or implied in this Agreement is intended to confer, nor shall anything in this Agreement confer, upon any person or entity other than the parties and their respective successors or assigns any rights, remedies, obligations or liabilities whatsoever.
- F. **Notices.** All notices shall be in writing and sent by registered mail, overnight mail, courier or transmitted by facsimile (if confirmed by such mailing) to the addresses indicated in the signature page of this Agreement or such other addresses as either party may indicate by at least ten (10) days prior written notice.
- G. **Limitation of Liability.** Neither party shall be liable to the other party for any incidental, consequential, special, or punitive damages of any kind or nature, whether such liability is asserted on the basis of contract, tort (including negligence or strict liability), or otherwise, even if the other party has been advised of the possibility of such loss or damages.

[Signatures on the following page]

VI. Signatures. In witness whereof, each of the undersigned has caused this Agreement to be duly executed in its name and on its behalf effective upon complete execution of this document.

BUSINESS ASSOCIATE – EDUCATORS BENEFIT CONSULTANTS, LLC (“EBC”)

Loni Morrow
Legal Counsel Aviben

Dated: _____

COVERED ENTITY – City of South San Francisco

Signature

Mike Futrell, City Manager

400 Grand Avenue
Address 1

South San Francisco, CA 94080
City, State, Zip Code

Dated: _____