



**Exhibit D**

**PART 6: WISHIN GENERAL TERMS and CONDITIONS of PARTICIPATION (“Terms and Conditions”)**

**Wisconsin Statewide Health Information Network General Terms and Conditions of Participation**  
**(“Terms and Conditions”)**

1. Definitions.

For the purposes of the Agreement and these Terms and Conditions, capitalized terms shall have the meanings set forth below:

“Agreement” means the WISHIN Direct Secure Messaging Participant Agreement entered into by and between WISHIN and Participant, ~~together with any and all exhibits and attachments, including these Terms and Conditions, Parts 1-7.~~

“Applicable Law” means the applicable statutes, rules, and regulations of Wisconsin, as well as all applicable federal statutes, rules, and regulations such as HIPAA.

~~“Breach” means the unauthorized acquisition, access, disclosure, or use of Health Data through the Network; provided, however, that Breach does not include:~~

- ~~• unintentional acquisition, access, disclosure, or use of Health Data, if:
 
  - ~~— such acquisition, access, disclosure, or use was made in good faith and within the individual’s scope of work; and~~
  - ~~— such Health Data is not further acquired, accessed, used, or disclosed; or~~~~
- ~~• acquisition, access, disclosure, or use of information contained in or available through Participant’s System where such acquisition, access, disclosure or use was not directly related to transmission of Health Data through the Network.~~

~~“Business Associate” means WISHIN and any of its contractors that, pursuant to this Agreement:~~

- ~~• on behalf of Participant, but other than in the capacity of a member of its workforce, performs or assists in the performance of:
 
  - ~~— a function or activity involving the use or disclosure of PHI, or~~
  - ~~— any other function or activity regulated by the HIPAA Privacy Rule, or~~~~

~~— provides consulting, data aggregation (as defined in the HIPAA Regulations), management, administrative, or other services to or for Participant, where the provision of the service involves the disclosure of PHI from such Participant, or from another business associate of Participant to the Business Associate.~~

*Note: See note in Business Associate Section.*

“Common Network Resource” means software, utilities, and automated tools made available for use in connection with the Network and which have been designated as a “Common Network Resource” by WISHIN.

“Covered Entity” shall have the meaning set forth in the HIPAA Regulations.

~~“Designated Record Set” shall have the meaning set forth in the HIPAA Regulations.~~

“Direct Secure Messaging” means the service through which Participant’s System may be accessed and used by Participant Authorized Users to send Health Data and related information regarding an Individual to, or receive such data from, Participants and Wisconsin’s public health agency.

“Discloser” means Participant, a Participant Authorized User ~~or~~ WISHIN that discloses Proprietary Information to a Receiving Party.

“Dispute” means any controversy, dispute, or disagreement arising out of or relating to this Agreement.

~~“Health Care Operations” shall have the meaning set forth in the HIPAA Regulations.~~

“Health Data” means that information which is requested, disclosed, stored on, made available on, or sent through the Network, including, but



not limited to, Participant ~~Directory~~directory information, patient ~~directory~~ information, ~~Protected Health Information (“PHI”)~~PHI, individually identifiable health information, de-identified data (as defined in the HIPAA Regulations), Limited Data Sets as defined in the HIPAA Regulations, pseudonymized data, metadata, and schema.

“HHS Secretary” means the Secretary of the United States Department of Health and Human Services or a designee.

“HIPAA” means the Health Insurance Portability and Accountability Act of 1996, as amended and as implemented by the HIPAA Regulations.

~~“HIPAA Regulations” means the Standards for Privacy of Individually Identifiable Health Information and the Security Standards for the Protection of Electronic Protected Health Information (45 CFR Parts 160, 162 and 164) promulgated by the U.S. Department of Health and Human Services under the Health Insurance Portability and Accountability Act (HIPAA) of 1996, as amended or modified from time to time.~~

~~“Individual” shall have the meaning set forth in the HIPAA Regulations. “Individually Identifiable Health Information” shall have the meaning set forth in the HIPAA Regulations.~~

~~“Minimum Necessary” shall have the meaning set forth in the HIPAA Regulations.~~ “Network” means Wisconsin’s statewide health information network operated by WISHIN that allows for the network sharing of Health Data and information between and among Participants as described in this Agreement: users of Direct Secure Messaging.

~~*Note: WISHIN staff and counsel may want to consider whether to include prospective services to which these terms would apply at this time. This may require more time at this point, but may also reduce future workload related to future Participant Agreements or possibly help short cut the data use agreement if and when PHI is available through WISHIN.*~~ “Network Operating Policies and Technical Requirements” means WISHIN’s Network Operating Policies and Technical Requirements set forth in this Agreement and at

~~[INSERT WEB ADDRESS]~~www.wishin.org and as amended from time to time by WISHIN.

“Notice” means a written communication, unless otherwise specified in this Agreement, sent to the appropriate party’s representative at the address listed in this Agreement, in compliance with Section ~~insert~~20 of these Terms and Conditions.

“ONC Contract” means the terms and conditions that WISHIN is subject to as a result of its subaward under a federal grant from the Office of the National Coordinator for Health Information Technology to govern Health Information Exchange (“HIE”) and to provide state-level HIE services to assist medical professionals and hospitals in the achievement of meaningful use of electronic health records.

~~“Participant” means any organization, governmental body or individual~~the other party (other than WISHIN) to this Agreement that (i) meets the requirements for participation in the Network as contained in the applicable Network Operating Policies and Technical Requirements, and (ii) is accepted by WISHIN for participation, ~~and (iii) is a signatory to this Agreement.~~

“Participant Authorized User” means Participant’s employees, contractors, and agents authorized by Participant to use the Network.

~~“Payment” shall have the meaning set forth in the HIPAA Regulations.~~

“Permitted Purposes” means the reasons for which Participant and Participant’s Authorized Users may legitimately exchange or use Health Data through the Network as defined in Section ~~1~~2 of the Agreement.

“Proprietary Information” means proprietary or confidential materials or information of a Discloser in any medium or format that a Discloser labels as such or that is commonly understood to be proprietary information. Proprietary Information includes, but is not limited to (i) the Discloser’s designs, drawings, procedures, trade secrets, processes, specifications, source code, system architecture, processes and security measures, research and development, including, but not limited to,



research protocols and findings, passwords and identifiers, new products, and marketing plans; (ii) proprietary financial and business information of a Discloser; and (iii) information or reports provided by a Discloser to a Receiving Party pursuant to this Agreement. Notwithstanding any label to the contrary, Proprietary Information does not include Health Data or any information which is or becomes known publicly through no fault of a Receiving Party; is learned of by a Receiving Party from a third party entitled to disclose it is already known to a Receiving Party before receipt from a Discloser as documented by Receiving Party's written records; or, is independently developed by Receiving Party without reference to, reliance on or use of Discloser's Proprietary Information. Health Data is excluded from the definition of Proprietary Information because other provisions of the Agreement address the appropriate protections for Health Data.

"Protected Health Information" or "PHI" shall have the meaning set forth in the HIPAA Regulations.

"Psychotherapy Notes" shall have the meaning set forth in the HIPAA Regulations.

"Qualified Service Organization" or "QSO" shall have the meaning set forth at 42 CFR § 2.11. *Note: See note in QSO Section.*

"Receiving Party" means Participant, a Participant Authorized User, or WISHIN that receives Proprietary Information from a Discloser.

"Recipient" means a person or organization that receives Health Data through the Network for a Permitted Purpose. Recipients may include, but are not limited to, Participants, and Participant's Authorized Users.

~~"Required By Law" shall have the meaning set forth in the HIPAA Regulations.~~

"System" means software, portal, platform, or other electronic medium used by Participant to send, receive, disclose or use Health Data, whether Participant's use is through ownership, lease, license, or otherwise.

~~"Treatment" shall have the meaning set forth in the HIPAA Regulations.~~

"WISHIN" means the Wisconsin Statewide Health Information Network, ~~Incorporated Inc.~~, the entity which has been charged by the State of Wisconsin with administering, directly or through contractors, the Network.

~~Note: Definitions will need to be reviewed and honed by WISHIN staff or counsel to ensure they meet WISHIN's needs.~~

2. Subcontractors. WISHIN may delegate its responsibilities to one or more subcontractors; provided, however, that each ~~contractor shall execute a Business Associate Agreement as well as an agreement~~ subcontractor shall agree that: (i) only specifically authorized representatives of subcontractor shall be granted access to the Network in connection with subcontractor's responsibilities, (ii) ~~requires~~ subcontractor shall comply with the security and confidentiality provisions of this Agreement and Applicable Law and (iii) ~~requires~~ subcontractor to shall comply with all Applicable Law.

~~3. Accounting of Disclosures. Upon Participant's written request, WISHIN shall provide an accounting of disclosures of PHI made by Participant via the Network in order for Participant (or Participant's Users) to comply with HIPAA, the HIPAA Regulations and all Applicable Law. WISHIN shall not, and shall not be required to, accept and respond to direct inquiries from Participant, or Participant Authorized User's, patients or their legal representatives. WISHIN shall refer all inquiries from Authorized Users to their authorizing Participants for response. [Note: WISHIN Staff or Counsel should verify whether WISHIN has any obligation to provide an accounting.]~~

3. Use of Health Data and Network.

a. Agreement. Participant's use of Health Data and the Network shall be governed by this Agreement, ~~including any and all exhibits and these Terms and Conditions~~ as well as all Applicable Law.

b. Permitted Future Uses (Re-Disclosure). Subject to any rights or obligations at Termination, Recipients may retain, use and re-disclose Health Data received in response to a request facilitated by WISHIN in accordance with all Applicable Law and the Recipient's policies and procedures.



c. Access of Health Data by WISHIN.

WISHIN shall only access Health Data for the express purpose of connecting the Participants, facilitating the delivery of the Health Data on behalf of such Participants, and otherwise fulfilling its obligations under the Agreement. WISHIN does not claim any ownership in any of the content, including any text, data, information, images, sound, video or other material, that Participant may send, store or receive via the Network. ~~[NOTE: Will WISHIN have any ownership rights in the content, for revenue or other purposes?]~~

d. Impermissible Purposes. Participant

shall not use the Network or permit any Participant Authorized User to use the Network to conduct any business or activity, or solicit the performance of any activity, which is prohibited by or would violate any Applicable Law or legal obligation, or for purposes that may create civil or criminal liability, including but not limited to: (i) uses which are defamatory, deceptive, obscene, or otherwise inappropriate; (ii) uses that violate or infringe upon the rights of any other person, such as unauthorized distribution of copyrighted material; (iii) “spamming,” sending unsolicited bulk e-mail or other messages on the Network or sending unsolicited advertising or similar conduct; (iv) threats to or harassment of another; (v) knowingly sending any virus, worm, or other harmful component; (vi) attempt to gain unauthorized access to WISHIN’s or any Participant’s computer system and (vii) impersonating another person or other misrepresentation of source.

e. Other Prohibited Purposes. WISHIN,

Participants or Participant Authorized User may not access or use the Health Data or any Proprietary Information of another party to compare patient volumes, practice patterns, or make any other comparison.

~~4.~~ 5-Reports and Evaluations. WISHIN is required under the ONC Contract to arrange for certain reports and evaluations of the Network, and Participant shall permit WISHIN to generate such reports and provide such information for such evaluation, as required under any other federal grant or contract awarded to WISHIN, or

to the Wisconsin Department of Health. Any Health Data in such reports shall be deidentified, as defined in the HIPAA Regulations.

~~5.~~ 6-Requests by WISHIN. WISHIN may request information from Participant related to potential breach, security or technical issues, and Participant shall not unreasonably refuse to provide information for such purposes. Notwithstanding the preceding sentence, in no case shall Participant be required to disclose PHI to WISHIN in violation of Applicable Law. Any information, other than Health Data, provided by Participant to WISHIN shall be treated as Proprietary Information as set forth in these Terms and Conditions, unless agreed otherwise.

~~6.~~ 7-Requirements for Participants.

a. Compliance. All use of and interactions with the Network by Participant and Participant Authorized Users shall comply with this Agreement, including all applicable Network Operating Policies and Technical Requirements, these General Terms and Conditions and all Applicable Law. Nothing in this Agreement shall require a disclosure that is contrary to Applicable Law. Participant and Participant Authorized Users shall be solely responsible for their use of the Network and maintaining patient medical records, as applicable, in accordance with Applicable Law.

b. Confidentiality. Participant agrees to comply with all Applicable Law governing confidentiality, privacy, disclosure and sharing of PHI and other data in its use of ~~the~~ service Direct Secure Messaging. This includes, but is not limited to, Wisconsin privacy laws, ~~the Health Insurance Portability and Accountability Act (“HIPAA”)~~ HIPAA, the Health Information Technology for Economic and Clinical Health Act (“HITECH”) and the Gramm-Leach-Bliley Act of 1999.

c. Cooperation by Participants in Network Evaluations. Participant shall cooperate in studies conducted from time to time by WISHIN or its agent related to various issues surrounding the Network, including, but not limited to, the project evaluation required under the ONC Contract and the efficacy and usefulness of the Network. Such cooperation shall include, but



not be limited to, participation in interviews, the completion of surveys, and the submission of other written or oral evaluations.

7. ~~8.~~ Security.

a. Safeguards. Each of WISHIN and Participant shall be responsible for maintaining a secure environment that supports access to, use of, and the continued development of the Network, and shall use appropriate safeguards to prevent use or disclosure of ~~PHI~~ Health Data by such party other than as permitted by this Agreement ~~(including appropriate administrative, physical, and technical safeguards that protect the confidentiality, integrity, and availability of PHI through the Network).~~ ~~Appropriate safeguards for Participants shall be those identified in the HIPAA Regulations, regardless of whether Participant is subject to HIPAA Regulations.~~ Participants shall also be required to comply with any applicable Network Operating Policies and Technical Requirements that may define expectations for Participants with respect to enterprise security.

b. Malicious Software. Participant and WISHIN shall use ~~all~~ commercially reasonable efforts to ensure that the information and Health Data being transmitted and any method of transmitting such information and Health Data shall not introduce any viruses, worms, unauthorized cookies, Trojans, malicious software, “malware,” or other program, routine, subroutine, or data designed to disrupt the proper operation of a System, the Network or any part thereof, or any hardware or software used by Participant or WISHIN in connection therewith, or which, upon the occurrence of a certain event, the passage of time, or the taking of or failure to take any action, shall cause a System or the Network or any part thereof or any hardware, software or data used by Participant or WISHIN in connection therewith, to be improperly accessed, destroyed, damaged, or otherwise made inoperable.

8. ~~9.~~ Breach Notification. Each party shall report to the other any serious breach of confidentiality or security with respect to ~~protected health information~~ Health Data of which ~~they become~~ it becomes aware. This Section shall not be deemed to supersede or relieve a party’s obligations (if any) under relevant security

incident, breach notification or confidentiality provisions of Part 7 and Applicable Law, 9. ~~10.~~ Disclaimers.

a. Accuracy of Patient Record Matching. Participant acknowledges that there could be errors or mismatches when matching patient identities between disparate data sources, but WISHIN shall take commercially reasonable measures to help ensure accurate patient matching occurs, if WISHIN is involved in matching for the particular service to which Participant is subscribed. Participant is solely responsible for ensuring that any PHI obtained through the Network relates to a particular ~~Individual~~ individual as intended by Participant and for the immediate destruction of any PHI obtained inadvertently.

b. Accuracy of Health Data. Nothing in these Terms and Conditions shall be deemed to impose responsibility or liability on Participant or WISHIN related to the clinical accuracy, content or completeness of any Health Data provided pursuant to these Terms and Conditions.

c. Reliance on a System. Participant may not rely upon the availability of a particular Participant’s Health Data. Participant is responsible for developing and maintaining backup procedures to be used in the event of a failure or unavailability of the Network, and is responsible for implementing any such backup procedures, as determined necessary by Participant.

d. Incomplete Medical Record. Each Participant acknowledges that Health Data may not include the Individual’s full and complete medical record or history.

e. Carrier Lines. Participant acknowledges that the exchange of Health Data through the Network may be provided over various facilities and communications lines, and information shall be transmitted over local Network and Internet backbone carrier lines and through routers, switches, and other devices (collectively, “carrier lines”) owned, maintained, and serviced by third-party carriers, utilities, and Internet service providers, all of which may be beyond Participant’s or WISHIN’s control. Provided



Participant and WISHIN use security measures, no less stringent than those in these Terms and Conditions, Participants and WISHIN shall assume no liability for or relating to the integrity, privacy, security, confidentiality, or use of any information transmitted over such carrier lines, or any delay, failure, interruption, interception, loss, transmission, or corruption of Health Data or other information attributable to transmission over such carrier lines.

~~10.~~ 11. Proprietary Information. Each Receiving Party shall hold Proprietary Information in confidence and agrees that it shall not, during the term or after the termination of ~~these Terms and Conditions~~ this Agreement, redisclose to any person or entity, nor use for its own business or benefit, any information obtained by it in connection with ~~these Terms and Conditions~~ this Agreement, unless such use or redisclosure is permitted by the terms of these Terms and Conditions. Proprietary Information may be redisclosed under operation of law, provided that the Receiving Party immediately notifies the Discloser of the existence, terms and circumstances surrounding such operation of law to allow the Discloser its rights to object to such disclosure. If after Discloser’s objection, the Receiving Party is still required by law to redisclose Discloser’s Proprietary Information, it shall do so only to the minimum extent necessary to comply with the operation of the law and shall request that the Proprietary Information be treated as such.

~~11.~~ 12. Business Associate Provisions. ~~This Section 12 shall apply in~~ In the event that Participant is a Covered Entity, ~~WISHIN and each of its contractors~~ subcontractors furnishing services to Participant shall be a Business Associate of Participant and, along with Participant, shall be subject to ~~these Terms and Conditions~~ the terms and conditions of Part 7.

~~a. Limits on Use and Disclosure.~~

~~i. Use Under These Terms and Conditions. Business Associate shall not use or further disclose PHI other than as permitted or required by these Terms and Conditions or as Required By Law. Business Associate may use and disclose PHI to perform those functions, activities, or services that Business Associate performs for, or on behalf of,~~

~~Covered Entity as specified in these Terms and Conditions, provided that such use or disclosure would not violate HIPAA or the HIPAA Regulations if done by a Covered Entity, including but not limited to accessing and transmitting PHI on the Network and maintaining the Network, and making disclosures to Participants for Permitted Purposes. Any such use or disclosure allowed by this subsection shall be limited to those reasons and those individuals as necessary to meet the Business Associate’s obligations under these Terms and Conditions.~~

~~ii. Other Disclosures. Business Associate shall not make the following disclosures that are otherwise allowed to be made by a Covered Entity under the HIPAA Regulations unless compelled to do so by law or unless such a disclosure is specifically authorized or required by these Terms and Conditions:~~

- ~~1. About victims or abuse, neglect, or domestic violence;~~
- ~~2. For health oversight activities;~~
- ~~3. For judicial and administrative proceedings;~~
- ~~4. For law enforcement purposes;~~
- ~~5. About decedents;~~
- ~~6. For cadaveric organ, eye, or tissue donation purposes;~~
- ~~7. To avert a serious threat to health or safety;~~
- ~~8. For specialized government functions;~~
- ~~9. For workers’ compensation purposes;~~
- ~~10. For marketing purposes;~~
- ~~11. For fundraising purposes;~~

~~If Business Associate is requested to make a disclosure for one of the foregoing reasons, it shall forward such request to the relevant Covered Entity so that the Covered Entity can coordinate and prepare a timely response. Business Associate shall make PHI available to the Covered Entity for the foregoing reasons if requested to do so in writing by the Covered Entity for the Covered Entity to coordinate and prepare a timely response.~~

~~iii. Use of PHI for Management and Administration or Legal Responsibilities of Business Associate. Notwithstanding Section 12.a.i of these Terms and Conditions, Business Associate may use and disclose PHI received by the Covered Entity pursuant to these Terms and Conditions for: (1) the proper management and administration of the Business Associate; or (2) to carry out the legal responsibilities of the Business Associate. However, the Business Associate shall only be allowed to disclose PHI for the aforementioned uses if: (A) the disclosure is Required By Law; or (B) the Business Associate obtains reasonable assurances from the person to whom the PHI is disclosed that it shall be held confidentially and~~

~~used or further disclosed only as Required By Law and for the purpose for which it was disclosed to the person, and the person notifies the Business Associate of any instances in which the person is aware of a confidentiality breach of PHI.~~

~~iv. Data Aggregation Services. With respect to PHI received by the Business Associate in its capacity as the Business Associate of the Covered Entity, Business Associate may combine such PHI it has received from the Covered Entity with the PHI received by the Business Associate in its capacity as a business associate of another Covered Entity, to permit data analyses that relate to the Health Care Operations of the respective Covered Entities, if data analyses is part of the services that Business Associate is to provide under these Terms and Conditions, as permitted by the HIPAA Regulations.~~

~~b. Safeguards. Business Associate shall use reasonable and appropriate administrative, physical and technological safeguards to prevent use or disclosure of the PHI other than as provided for by these Terms and Conditions. In addition, Business Associate shall implement such safeguards and security measures as are necessary to comply with the HIPAA Regulations. Business Associate shall provide periodic reports to WISHIN related to the security measures implemented by Business Associate for the Network, including any material security incidents that have arisen since any prior report. Such report shall also be made available to any Participant, upon request. A material security incident is one that results in unauthorized access, use, disclosure, modification, destruction of PHI, or interference with system operations. Security incidents that do not result in such an outcome include, but are not limited to, pings on a firewall, attempts to log on to a system with an invalid password or username, and denial of service attacks that do not result in a server being taken off line. These Terms and Conditions constitute notice to the Covered Entity that such unsuccessful security incidents occur.~~

~~e. Report of Improper Use or Disclosure. Business Associate shall promptly report to a Covered Entity any use or disclosure of the Covered Entity's PHI not provided for by these Terms and Conditions of which Business Associate becomes aware. Business Associate is also subject to the requirements in Section 9 (Breach Notification) of these Terms and Conditions.~~

~~d. Agents and Subcontractors. Business Associate shall ensure that any agent, including a subcontractor, to whom it provides PHI received from, or created or received by the Business Associate on behalf of, a Covered Entity, shall the same restrictions and conditions that apply through these Terms and~~

~~Conditions to the Business Associate with respect to PHI.~~

~~e. Access to Records to Fulfill Request by Individual. Business Associate shall not respond directly to requests from Individuals for access to their PHI in a Designated Record Set. Business Associate shall refer such Individuals to the relevant Covered Entity so that the Covered Entity can coordinate and prepare a timely response to the Individual.~~

~~f. Access to Records by HHS Secretary. Business Associate shall make its records, books, agreements and policies, and procedures relating to the administrative, physical and technical safeguards and the use and disclosure of PHI received from, or created or received by Business Associate on behalf of Covered Entity, available to the HHS Secretary for purposes of determining Covered Entity's or Business Associate's compliance with HIPAA and the HIPAA Regulations.~~

~~g. Amendments to PHI. Business Associate shall have no obligation to initiate or make PHI amendments to other Participants of the Network. Business Associate shall not respond directly to requests from Individuals for amendments to their PHI. Business Associate shall refer such Individuals to the relevant Covered Entity so that the Covered Entity can coordinate and prepare a timely response to the Individual.~~

~~h. Accounting of Disclosures. See Section [insert] of these Terms and Conditions for Business Associate's obligations regarding accounting of disclosures under the HIPAA Regulations.~~

~~i. Mitigation. Business Associate shall mitigate, to the extent practicable, any harmful effect known to Business Associate of a use or disclosure by it in violation of the requirements of these Terms and Conditions.~~

~~*Note: We did not address this issue (Business Associate) in our original draft. Do we want to or need to address here? If so is there any way to shorten this up?*~~

12. 13-Qualified Service Organization Provisions. This Section shall apply in the event that: (i) Participant is, has a program subject to, or transmits Health Data from or other data about clients in a program subject to 42 CFR Part 2.2; and (ii) the particular service to which Participant is subscribed

a. makes WISHIN's Role. WISHIN is a Qualified Service Organization or QSO of Participant for the purpose of providing the services specified in these Terms and Conditions for Participant, which

include but are not limited to data processing, holding and storing information about program clients, receiving and reviewing requests for disclosures to third parties for Permitted Purposes under these Terms and Conditions, and/or facilitating the electronic exchange of clients' information through the Network, as applicable for the particular service to which Participant is subscribed such services.

a. b. Limits on Use and Disclosure.

i. ~~The QSO shall only access Health Data or other data about clients of Participant's Part 2 program to the extent needed by the QSO to provide services to the Part 2 program described in these Terms and Conditions.~~

ii. ~~The QSO agrees not to use or further disclose any Health Data or other Part 2 program client information other than as specified in these Terms and Conditions.~~

i. ~~iii.~~ The QSO acknowledges that in receiving, storing, processing, or otherwise using any information from the Part 2 program about the clients in the program, it is fully bound by the provisions of the federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records, 42 CFR Part 2.

ii. ~~iv.~~ The QSO undertakes to resist in judicial proceedings any effort to obtain access to information pertaining to Part 2 program clients otherwise than as expressly provided for in 42 CFR Part 2, and the QSO shall notify the appropriate Participant.

Any subcontractors or agents of the QSO may only access information from a Part 2 program if the subcontractor or agent has entered into an agreement with the QSO and has agreed to the same obligations stated in this Section ~~insert~~, 12, including but not limited to being bound by 42 CFR Part 2.

~~Note: We did not address this issue (QSOs) in our original draft. Do we want to or need to address here? If so is there any way to shorten this up?~~

~~13. 14. Limitation of Liability. NEITHER PARTY WILL BE LIABLE FOR ANY LOSS OF PROFITS, LOSS OF USE, LOSS OF GOODWILL, LOSS OF DATA, BUSINESS INTERRUPTION, LOSS OF OR DAMAGE TO PARTICIPANT, DATA, COST OF COVER OR ANY CLAIMS, DAMAGES, LIABILITIES OR INJURIES, INCLUDING DEATH, OR INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY KIND IN CONNECTION WITH OR ARISING OUT OF THE~~

~~FURNISHING, PERFORMANCE OR USE OF NETWORK OR OTHER DELIVERABLES PROVIDED OR SERVICES PERFORMED UNDER THIS AGREEMENT, WHETHER ALLEGED AS A BREACH OF CONTRACT OR TORTIOUS CONDUCT, INCLUDING NEGLIGENCE, EVEN IF PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ADDITION, NEITHER PARTY WILL BE LIABLE FOR ANY DAMAGES CAUSED BY DELAY IN DELIVERY OR FURNISHING SERVICES, OTHER DELIVERABLES OR OTHER SERVICES PERFORMED UNDER THIS AGREEMENT. EACH PARTY'S LIABILITY UNDER THIS AGREEMENT FOR ANY DIRECT DAMAGES OF ANY KIND WILL NOT EXCEED AN AMOUNT EQUAL TO THE FEES PAID OR PAYABLE BY PARTICIPANT TO WISHIN UNDER THIS AGREEMENT IN THE PRECEDING [INSERT NUMBER, TYPICALLY 12-24] MONTHS. Neither party will be liable to the other for indirect, special, incidental, exemplary or consequential (including but not limited to loss of profit or goodwill) damages of any kind in connection with or arising out of the furnishing, performance or use of network or other deliverables provided or services performed under this agreement, whether alleged as arising under a breach of contract, tort or other legal theory, even if party has been advised of the possibility of such damages. In addition, neither party will be liable for any damages caused by delay in delivery or furnishing services, other deliverables or other services performed under this agreement. Each party's liability under this agreement for any direct damages of any kind will not exceed an amount equal to the fees paid or payable by participant to WISHIN under this agreement in the preceding twelve (12) months.~~

~~14. 15. Termination.~~ In the event that: (a) Participant is fails to make any undisputed payment due to WISHIN hereunder within ten (10) days after written notice ~~for~~of non-payment is received from WISHIN to Participant; or (b) an involuntary petition in bankruptcy is filed against Participant or WISHIN and is not dismissed within ninety (90) days; or (c) Participant or WISHIN files a voluntary petition in bankruptcy or seeks other relief under the Federal bankruptcy laws; or (d) a receiver is appointed for Participant and such appointment





is not removed or discharged within ninety (90) days; then, all amounts payable hereunder shall become immediately due and payable and this Agreement shall terminate. ~~Further, in the event that WISHIN fails to provide the Services hereunder, Participant may immediately terminate this Agreement and Participant shall have no further obligation to pay WISHIN.~~

In the event that either party materially defaults in the performance of any of its obligations under this Agreement and does not substantially cure such default, ~~or commence a cure,~~ within thirty (30) days after being given written notice specifying the default, the non-defaulting party may, by giving written notice to the defaulting party, terminate this Agreement as of a date specified in such notice of termination. Either party shall have the right to terminate this Agreement upon ninety (90) days' written notice to the other. Participant shall pay WISHIN any amounts due and owing up to and until the time of termination.

*Note: When time allows further consideration it would be worth creating subheadings (Termination by WISHIN, Termination by Participant), as well as evaluating if there are other circumstances where WISHIN would want the ability to terminate a Participant and whether that should be addressed here or via other sections of the Agreement with a cross reference to this section.*

~~15. 16.~~ Warranty. WISHIN represents and warrants to Participant that: (i) WISHIN has the authority to enter into this Agreement; (ii) WISHIN will perform the Services required under the Agreement in a professional and workmanlike manner. WISHIN's ~~sole and~~ exclusive obligation, and Participant's exclusive remedy, in the event of a breach of the warranties in this Agreement will be for WISHIN to re-perform the applicable services not in compliance with the warranty, provided WISHIN receives written notice from Participant of such breach within thirty (30) calendar days after such services were originally performed.

~~OTHER THAN AS EXPRESSLY SET FORTH IN SECTION [INSERT] WISHIN MAKES NO EXPRESS OR IMPLIED WARRANTIES TO PARTICIPANT REGARDING THE SERVICES OR PRODUCTS PROVIDED HEREUNDER OR OTHERWISE REGARDING THIS AGREEMENT. ANY IMPLIED~~

~~WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE ARE EXPRESSLY DISCLAIMED. WISHIN DOES NOT WARRANT THAT THE SERVICE AND PRODUCTS WILL OPERATE ERROR FREE, THAT IT WILL OPERATE UNINTERRUPTED, THAT IT WILL OPERATE IN COMBINATION WITH OTHER SOFTWARE NOT LICENSED OR SUB-LICENSED BY WISHIN OR THAT ALL DEFECTS ARE CORRECTABLE. THE FOREGOING WARRANTIES ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, INCLUDING, BUT NOT LIMITED TO, THE WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INTERFERENCE WITH QUIET ENJOYMENT, ACCURACY OF THE DATA AND NON-INFRINGEMENT. WISHIN DOES NOT WARRANT THIRD PARTY SOFTWARE, PRODUCTS OR EQUIPMENT, BUT WILL TAKE COMMERCIALY REASONABLE STEPS TO PERMIT PARTICIPANT TO RECEIVE THE BENEFITS OF ANY WARRANTIES THAT MAY BE OFFERED BY THIRD PARTIES. IN NO EVENT SHALL WISHIN BE LIABLE FOR ANY LOSS OF PROFIT, GOODWILL OR OTHER CONSEQUENTIAL OR INCIDENTAL DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT.~~

Other than as expressly set forth in this section 15, WISHIN makes no express or implied warranties to participant regarding the network, the direct secure messaging services, the health data made available through the network and direct secure messaging or any other deliverables provided hereunder or otherwise regarding this agreement. Any implied warranty of merchantability or fitness for a particular purpose are expressly disclaimed. Wishin does not warrant that the network, the direct secure messaging services and the other deliverables will operate error free, that they will operate uninterrupted, that they will operate in combination with other software not licensed or sub-licensed by WISHIN or that all defects are correctable. The foregoing warranties are exclusive and in lieu of all other warranties, express, implied or statutory, including, but not limited to, any warranties of quiet enjoyment, accuracy of the data and non-infringement. Wishin does not warrant third party software, products or equipment, but will take commercially reasonable steps to permit



participant to receive the benefits of any warranties that may be offered by third parties.

~~NEITHER WISHIN NOR PARTICIPANT MAKE ANY OTHER REPRESENTATION, EXPRESS OR IMPLIED, ABOUT THE HEALTH DATA. MORE SPECIFICALLY, THE HEALTH DATA MADE AVAILABLE THROUGH THE NETWORK IS PROVIDED “AS IS” AND “AS AVAILABLE” WITHOUT ANY WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. IT IS EXPRESSLY AGREED THAT IN NO EVENT SHALL THE PARTICIPANT OR WISHIN BE LIABLE FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL, OR EXEMPLARY DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS OR REVENUES, LOSS OF USE, OR LOSS OF INFORMATION OR DATA, WHETHER A CLAIM FOR ANY SUCH LIABILITY OR DAMAGES IS PREMISED UPON BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, OR ANY OTHER THEORIES OF LIABILITY, EVEN IF THE PARTICIPANT OR WISHIN HAS BEEN APPRISED OF THE POSSIBILITY OR LIKELIHOOD OF SUCH DAMAGES OCCURRING. EACH PARTICIPANT AND WISHIN DISCLAIM ANY AND ALL LIABILITY FOR ERRONEOUS TRANSMISSIONS AND LOSS OF SERVICE RESULTING FROM COMMUNICATION FAILURES BY TELECOMMUNICATION SERVICE PROVIDERS, OR OTHER THIRD PARTIES OR DUE TO HARDWARE OR SOFTWARE FAILURES.~~  
The health data made available through the network is provided “as is” and “as available.” Each of participant and WISHIN disclaims any and all liability for erroneous transmissions and loss of service resulting from communication failures by telecommunication service providers, or other third parties or due to hardware or software failures.

16. 17-Insurance. WISHIN shall secure and maintain sufficient insurance coverage in an amount not less than \$2,000,000, in effect through the performance of its obligations under this Agreement and following termination of this Agreement arising from its obligations under this Agreement. Upon request, WISHIN shall

provide Participant with certificates of insurance evidencing the required insurance coverage.

~~*Note: WISHIN staff and/or counsel will need to review and clarify which types of insurance it will carry (e.g., general liability, network security, errors and omissions, professional liability, HIPAA disclosure). Information in this section should be consistent with what was required under HISP Vendor Agreement, as WISHIN will be a HISP. If WISHIN decides to require the Participant maintain specific insurance coverage this coverage should not be expected to be the same as the level maintained by the HISPs and should be reasonable for the type and size of individual Participant.*~~

17. 18-Indemnification. Each party shall indemnify and hold the other harmless for any losses, claims, damages, awards, penalties, or injuries incurred by any third party, including reasonable attorney's fees, which arise from any alleged breach of such indemnifying party's representations and warranties made under this Agreement, provided that the indemnifying party is promptly notified of any such claims. The indemnifying party shall have the sole right to defend such claims at its own expense. The other party shall provide, at the indemnifying party's expense, such assistance in investigating and defending such claims as the indemnifying party may reasonably request. This indemnity shall survive the termination of this Agreement.

18. 19-General Fee Terms for Services. Any fees payable for each service offered are set forth in this Agreement and may be amended from time to time. Unless expressly modified the following terms shall apply to Participant's payment of fees.

a. Taxes. All fees and other charges for a particular service shall be exclusive of all federal, state, municipal, or other government excise, sales, use occupational, or like taxes now in force or enacted in the future, and Participant shall pay any tax (excluding taxes on WISHIN's net income) that WISHIN may be required to collect or pay now or at any time in the future and that are imposed upon the sale or delivery of items or services provided pursuant to these Terms and Conditions.



b. Third-Party Fees and Charges.

Participant shall be solely responsible for any other charges or expenses Participant may incur to access or use the service.

c. Failure to Pay Fees.

i. Interest on Late Payments. Fees not paid for the service by the due date set in the Agreement(s) executed by Participant shall bear interest at the rate of 1.5% per month or the highest legal rate of interest, whichever is lower. The accrual of such interest shall not affect the rights and remedies of WISHIN under these Terms and Conditions.

ii. Suspension of Service. In the event fees are not paid by 30 days following the due date (or, in the event Participant disputes any portion of the fees due), WISHIN may suspend Participant's access to a service on 30 days' prior notice. WISHIN may charge a reasonable renewal fee to cover its costs and overhead associated with restoring a suspended service after suspension due to non-payment.

iii. Collection. In the event that payment due to WISHIN is collected at law or through an attorney-at-law, or under advice therefrom, or through a collection agency, Participant shall pay all costs of collection, including without limitation all court costs and reasonable attorneys' fees.

19. 20-Dispute Resolution. In the event that any matter or disagreement shall arise in connection with this Agreement, such disagreement shall be promptly settled by binding arbitration in the ~~State~~City of Madison, Wisconsin, in accordance with the rules then existing of the American ~~Arbitration~~Health Lawyers Association.

20. 21-Notices. All notices to be made under this Agreement shall be given in writing to the appropriate party's representative at the address listed in the ~~agreement~~signature blocks of Part 5 of this Agreement in which the Participant subscribes to an Network service and shall be deemed given: (i) upon delivery, if personally delivered; (ii) upon the date indicated on the return receipt, when sent by U.S. Postal Service Certified Mail, return receipt requested; or (iii) if by nationally recognized overnight courier

service that has the capability to track the notice, upon receipt. A party may change its address for receiving notices by written notice to the other party.

21. 22-Governing Law; Venue. The laws of the State of Wisconsin shall govern this Agreement. The venue of any action will be Dane County, Wisconsin.

22. 23-Changes to Applicable Law. Any new legislation or amendments to government regulations or administrative rules that become effective after the Effective Date of this Agreement shall be mutually agreed to by WISHIN and the Participant as to the applicability of the change to this Agreement. Upon mutual agreement of the parties, a written amendment will subsequently be made to this Agreement to incorporate the requisite change(s).

23. 24-Assignment. ~~Neither party shall be permitted to~~Participant may not assign this Agreement, in any respect, without the prior written consent of ~~the other~~WISHIN, which consent shall not be unreasonably withheld.

24. 25-Severability. If any term or condition of this Agreement shall to any extent be held invalid or unenforceable by a court of competent jurisdiction, the remainder of this Agreement shall not be affected and each term and condition shall be valid and enforceable to the fullest extent permitted by law.

25. 26-Force Majeure. A party shall not be deemed in violation of any provision of this Agreement if it is prevented from performing any of its obligations by reason of: (i) severe weather or storms; (ii) earthquakes or other disruptive natural occurrences; (iii) strikes or other labor unrest; (iv) power failures; (v) nuclear or other civil or military emergencies; (vi) terrorist attacks; (vii) acts of legislative, judicial, executive, or administrative authorities; or (viii) any other circumstances that are not within its reasonable control. This Section shall



not apply to obligations imposed under Applicable Law.

26. ~~27.~~ Waiver. Failure or delay by either party to enforce compliance with any term or condition of this Agreement shall not constitute a waiver of such term or condition.

27. ~~28.~~ Entire Agreement. ~~This~~ The Agreement and ~~theits~~ Exhibits ~~hereto~~ constitute the entire agreement between the parties with regard to the subject matter of ~~this~~ the Agreement and supersede all previous communications, whether oral or written, between the parties with respect to such subject matter.

28. ~~29.~~ Amendments Required by Law. WISHIN may amend or restate this Agreement ~~upon~~ at any time upon at least thirty (30) days prior written notice to Participant ~~at any time that~~ if WISHIN determines that such amendment is required to comply with Applicable Law. Such amendments shall become effective as of the dates and times described in WISHIN's notice thereof, subject to Participant's right to terminate the Agreement by written notice to WISHIN prior to the effective date specified by WISHIN.

29. ~~30.~~ Other Amendments. Except as set forth in Section 28 and for changes to any fees charged by WISHIN and changes to Network Operating Policies and Technical Requirements, this Agreement may be amended only by an instrument in writing signed by the party against whom the change, waiver, modification, extension, or discharge is sought, unless otherwise indicated in this Agreement.

30. ~~31.~~ Relationship of the Parties. The parties are independent contracting entities. Nothing in this Agreement shall be construed to create a partnership, agency relationship, or joint venture among the parties. No party hereto shall have any authority to bind or make commitments on behalf of one another, nor shall any such party hold itself out as having such authority.

31. ~~32.~~ Licenses. ~~WISHIN warrants that~~ WISHIN or its subcontractor ~~has the authority to~~ shall issue Direct accounts/addresses and digital certificates to the Participant for use of Direct Secure Messaging.

32. ~~33.~~ Survival. The terms and conditions contained in this Agreement that by their sense and context are intended to survive the performance by the parties shall so survive the completion of the performance, expiration, or termination of this Agreement.

~~34. — Enforceability. In the event that a court of competent jurisdiction shall hold any Section, or any part or portion of any Section of this Agreement, invalid, void or otherwise unenforceable, each and every remaining Section or part or portion thereof shall remain in full force and effect, as long as the original intent of the Agreement would not thereby be frustrated.~~

33. ~~35.~~ Counterparts. This Agreement may be executed in two or more counterparts, each of which shall constitute an original, but all of which together shall constitute one and the same agreement.

~~1. —~~



~~Notes to WISHIN/WISHIN staff/WISHIN counsel in dark Red~~  
~~Notes to Claudia/Michelle/Workgroup in Blue~~



Document comparison by Workshare Professional on Tuesday, November 22, 2011 11:26:46 AM

Input:	
Document 1 ID	file://F:/DOCS/WD/34092/1/DRAFT WISHIN PARTICIPANT AGREEMENT GENERAL TERMS AND CONDITIONS OF PARTICIPATION - JULY 7 2011.DOCX
Description	DRAFT WISHIN PARTICIPANT AGREEMENT GENERAL TERMS AND CONDITIONS OF PARTICIPATION - JULY 7 2011
Document 2 ID	file://F:/DOCS/WD/34092/1/A1302314.DOCX
Description	A1302314
Rendering set	standard

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Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
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Deletions	180
Moved from	2
Moved to	2
Style change	0
Format changed	0
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