Make A Way, Child Placing Agency, fully Supports and Enforces the **FEDERAL HIPAA PRIVACY PROTECTION LAWS.** These laws were put in place to protect individuals’ privacy. This law applies to all persons including foster children who are in state custody.

Make A Way will ensure the **FEDERAL HIPAA PRIVACY PROTECTION LAWS** are being followed by all employees, foster parents and other staff members with the Agency. All employees, foster parents and other staff members will be required to attend yearly training that will provide laws that are governed by the **FEDERAL HIPAA PRIVACY PROTECTION LAWS** and **UPDATES** will be provided as received. All employees, foster parents and staff members will also be required to sign an agreement that states they will uphold the **FEDERAL HIPAA PRIVACY PROTECTION LAWS** for all foster children placed in their home.

Please see below for the **FEDERAL HIPAA PRIVACY PROTECTION LAWS as it pertains to all individuals including minors and children of the state, and any persons that are on Medicaid and/or CHIPS.**

**FEDERAL HIPAA PRIVACY PROTECTIONS**

Congress enacted the Health Insurance Portability and Accountability Act of 1996 (the “HIPAA statute”) to improve the portability and continuity of health insurance coverage and establish standards for administrative simplification. The HIPAA statute directs the U.S. Department of Health and Human Services (HHS) to promulgate standards for the electronic exchange, privacy and security of health information. Pursuant to that directive, in 2002, HHS issued modified regulations, known as the HIPAA Privacy Rule, that establish national minimum standards for the protection of certain health information, known as Protected Health Information or “PHI.” The HIPAA Privacy Rule is often referred to as simply “HIPAA” or “Privacy Rule.”

The HIPAA Privacy Rule is the first federal legislation to initiate uniform privacy standards for patient information. Prior to the enactment of the Privacy Rule, it was left up to each state to provide legislation to protect the privacy of patient information. The Privacy Rule sets a floor of ground rules for health care providers, health plans, health care clearinghouses and their business associates that conduct certain health care transactions electronically to follow for protecting individuals’ medical records and other personal health information. Moreover, it creates a framework of protection that can be strengthened by both the federal government and by states as health information systems continue to evolve. HIPAA’s provisions allow existing state laws that are more protective of privacy to stand, and permit states to make more protective laws in the future.

The Privacy Rule requires appropriate safeguards to protect the privacy of individuals’ identifiable health information (PHI), and sets limits and conditions on the uses and disclosures that may be made of such information without patient authorization. The Privacy Rule also gives patients rights over their health information, including rights to examine and obtain a copy of their health records, and to request corrections. Within

HHS, the Office for Civil Rights (“OCR”) has responsibility for implementing and enforcing the Privacy Rule through voluntary compliance activities and civil money penalties.

A major goal of the Privacy Rule is to assure that individuals’ health information is properly protected while allowing the flow of health information necessary to provide and promote high quality health care and to protect the public's health and well being. The Privacy Rule is intended to strike a balance that permits important uses of information while protecting the privacy of people who seek medical care.

Additionally, in 2003, HHS issued HIPAA Security regulations, known as the HIPAA “Security Rule,” which established minimum national standards to protect individuals’ electronic PHI that is created, received, used, or maintained by a covered entity and their business associates. The Security Rule requires appropriate administrative, physical and technical safeguards to ensure the confidentiality, integrity, and security of electronic PHI.

In 2009, Congress enacted HITECH, an integral component of the American Recovery and Reinvestment Act of 2009 (ARRA),with the intent to create a national infrastructure for the exchange of health information. HITECH’s privacy and security rules operate hand-in-hand with HIPAA, but provide broader individual rights and stronger protections in situations when third parties handle patients’ PHI, including obligations to notify individuals and HHS in the event of certain breaches of the HIPAA Privacy Rule. HITECH is further discussed in Section III below.

***Minors:***

In most cases, parents are the personal representatives for their minor children. Therefore, in most, but not all cases, parents can exercise individual rights, such as access to the medical record, on behalf of their minor children. In certain exceptional cases, the parent is not considered the personal representative. In these situations, the Privacy Rule defers to state and other law to determine the rights of parents to access and control the protected health information of their minor children. If State and other law is silent concerning parental access to the minor’s protected health information, a covered entity has discretion to provide or deny a parent access to the minor’s health information, provided that the decision is made by a licensed health care professional in the exercise of professional judgment.

***G. Enforcement and Penalties for Noncompliance***

The Privacy Rule provides processes for persons to file complaints with HHS concerning PHI use and disclosure violations and describes the responsibilities of covered entities to provide records and compliance reports and to cooperate with, and permit access to information for, investigations and compliance reviews.

As discussed in Section III below, HITECH enhances enforcement of HIPAA by adding new enforcement provisions, including a tiered system for imposing civil monetary penalties for HIPAA violations and empowering state attorneys general to bring civil suits to enforce HIPAA.

***Texas Medical Records Privacy Act:***

The Texas Medical Records Privacy Act (TMPRA), found in TEX. HEALTH & SAFETY CODE §§ 181.001- .205, was enacted in 2001 and incorporates and expands the protections mandated by HIPAA. The TMRPA is an example of a state law that provides more protection for patient privacy than is provided under the original HIPAA Privacy Rules. It incorporated the basic tenets of the HIPAA Privacy Rule while providing additional protections for Texas residents in areas where HIPAA, as originally passed, left gaps. HITECH has closed some of those gaps with respect to restrictions on the marketing and sales of PHI.

The TMRPA expands HIPAA privacy protections in essentially two areas. First, the TMRPA applies to a broader range of covered entities that include all persons and entities, and their employees, agents, and contractors, who engage in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting PHI. Covered entities include all business associates, health care payers, governmental units, information or computer management entities, schools, health researchers, health care facilities, clinics, health care providers, and persons maintaining internet sites that possess, obtain or store PHI. Second, the TMRPA prohibits a person from re- identifying or attempting to re-identify an individual who is the subject of any PHI without obtaining the individual's consent or authorization if required under the TMRPA, HIPAA, or any other state or federal law.

***Mental Health Records:***

Licensed and authorized professionals who treat mental health patients are subject to the mental health professional-patient communications privilege, which is similar in scope to the physician-patient communications statutory privilege. Chapter 611 of the Texas Health and Safety Code addresses the confidential nature of mental health records. Communications between mental health professionals and their patients are confidential and privileged and are prohibited from disclosure to third parties unless an exception applies. Moreover, the medical records the mental health professional creates and maintains are likewise confidential and privileged, with few exceptions. *Thaparv. Zezulka,* 994 S.W.2d 635, 638 (Tex.1999) (confirming the confidential nature of communications between patients and mental health professionals and the prohibition against disclosure of records and communications unless an exception applies). Written patient consent is required for disclosure, with certain other exceptions. Physicians may withhold their psychotherapy notes from a patient if the physician feels such disclosure to the patient is not in the patient’s best interest.

Moreover, there are statutory privacy protections for the records of individuals receiving services for intellectual disabilities (formerly persons with mental retardation) scattered throughout the Texas Health and Safety Code, as well as referenced in the federal Family Educational Rights and Privacy Act (FERPA) and the federal and Texas protection and advocacy statutes, as discussed further below.

***HIV/AIDS Records:***

Both the Texas Health & Safety Code § 81.103 and the Texas Insurance Code § 545.057 generally address the confidential nature of HIV-related test results. Persons who have knowledge or posses a test result may not release or allow the test result to become known except as required by law or by the individual’s authorization. Criminal penalties and civil remedies may result in the event of unlawful disclosure. Any statement that an identifiable individual has or has not been tested with a home collection kit for HIV- infection testing, including a statement or assertion that the individual is positive, is negative, or is at risk, or has or does not have a certain level of antigen or antibody, is confidential.

Further, each Texas state agency is required to develop and implement guidelines regarding confidentiality of AIDS and HIV- related medical information of employees of the agency and for clients, inmates, patients, and residents served by the agency. Each entity that receives funds from a state agency for residential or direct client services or programs must develop and implement guidelines regarding confidentiality of AIDS and HIV-related medical information for employees of the entity and for clients, inmates, patients and residents served by the entity. The confidentiality guidelines should be consistent with guidelines published by the Texas Department of State Health Services (DSHS) and with state and federal law and regulations.

***Minors:***

Numerous Texas statutes outline the confidential nature of health records of minors, in general, and including those minors who are in foster care, are under Child Protective Services, exhibit mental health and intellectual disabilities, or are offenders in state custody. Various restrictions are placed on disclosure of minors’ records.

***School Records:***

Generally, schools may maintain health records from other entities and must have written permission from the parent or eligible student in order to release any information from a student's education record. However, the Family Educational Rights and Privacy Act (FERPA) allows schools to disclose those records, without consent, to certain parties and under certain conditions. Texas regulates the disclosure of educational records of individuals receiving services for intellectual disabilities (formerly mental retardation).

***Medicaid Beneficiaries:***

Federal and Texas statutes and regulations govern the extensive restrictions placed on Texas state agencies’ use and disclosure of information, including health information, concerning Medicaid applicants and participants. For example, Texas must safeguard and restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan; and at Texas’ option, the exchange of information necessary to verify the certification of eligibility of children for free or reduced price breakfasts under the Child Nutrition Act of 1966 and free or reduced price lunches under the Richard B. Russell National School Lunch Act, in accordance with section 9(b) of that Act, using data standards and formats established by Texas.

***State Children's Health Insurance Program (SCHIP) Beneficiaries:***

Like Medicaid, SCHIP programs must restrict the use or disclosure of information concerning applicants and recipients to purposes directly related to plan administration*.* SCHIP is the federal/Texas partnership similar to Medicaid, that expands health insurance to targeted, low-income, uninsured children with family incomes too high to qualify for Medicaid, but who cannot afford private insurance.

***Texas Protection and Advocacy System Clients:***

The Texas protection and advocacy program, Texas Advocacy, Inc***.,*** was mandated and established pursuant to three federal statutes: the Developmental Disabilities and Bill of Rights Act (the DD Act), the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (the PAIMI Act), and the Protection and Advocacy of Individual Rights Act (the PAIR Act), collectively “the federal protection and advocacy statutes.” The statutes specifically authorize state protection and advocacy systems to investigate incidents of abuse or neglect of individuals when there is probable cause to believe an individual has been, or may be, subject to abuse or neglect. Such systems may also pursue administrative, legal and other appropriate remedies to ensure the protection of individuals with disabilities or mental illness in the state. The Texas Advocacy, Inc***.*** program has broad investigatory authority, including authority to access to certain records of individuals who fall within the protection of the program, but the program can only access an individual’s’ records if such individual or legal guardian, conservator, or other legal representative of such individual, has authorized the program to have such access, with limited exceptions."

**References:**

Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191 (1996) (HIPAA”), *codified in* 45 C.F.R. Parts 160 and 164. 45 C.F.R. Part 160 and Part 164, Subparts A and E. American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, H.R. 1 (2009) (*enacted as* the Health Information Technology for Economic and Clinical Health Act (HITECH) *in* Title XIII, Div. A, and Title IV, Div. B).

TEX. OCC. CODE §§ 151.000-167.011. TEX. HEALTH & SAF. CODE CHAP. 181. American Medical Association, *Patient Confidentiality, available through* http://www.ama- assn.org/ama/pub/physician-resources/legal-topics.  American Medical Association Council on Ethical and Judicial Affairs, *Code of Medical Ethics* (2010- 2011 ed.), *available at* http://www.ama-assn.org; TEX. OCC. CODE §§ 159.001, *et seq.* *Patient Confidentiality, supra* note 6; *see also Code of Medical Ethics,* HIPAA*,* Department of Health and Human Services (HHS), HHS, *The Privacy Rule, available at* http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/index.html.

http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/businessassociates.html.

http://www.hhs.gov/ocr/privacy/hipaa/understanding.

HIPAA “minimum necessary” standard. *See* HITECH, *supra,* note 3, at Title XIII, Subt. D, §13405(b)(1)(B), (C). *See also* Cynthia S. Marietta, *Deadline Here to Comply with HITECH Act’s Restrictions on Uses, Disclosures, and Requests for Protected Health Information,* Feb. 2010, http://www.law.uh.edu/healthlaw/perspectives/homepage.asp.

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