

**SOUTH DAKOTA BOARD OF REGENTS**

**Budget and Finance**

**AGENDA ITEM: 10 – O**

**DATE: June 27-29, 2017**

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**SUBJECT: First Amendment to the SDSU Sanford-Jackrabbit Facility Use Agreement**

**THE BOARD OFFICE RECEIVED THIS BOARD ITEM REQUEST LATE AND HAS NOT HAD TIME TO SUFFICIENTLY VET IT. THE DRAFT MOTION WOULD DELEGATE APPROVAL AUTHORITY TO THE EXECUTIVE DIRECTOR.**

The privately-funded Sanford-Jackrabbit Athletic Facility, authorized by [chapter 83 of the 2013 Session Laws](#), included in its Facility Design Plan dedicated sports medicine spaces. By two agreements of November 13, 2012, Sanford Health committed donations of \$10 million towards the Sanford-Jackrabbit Athletic Complex and payment to the University of a series of annual cash flows for ten (10) years in exchange for the exclusive right to provide sports medicine services to the University.

South Dakota State University requests Board authorization to complete the negotiation of the First Amendment to the Facility Use Agreement, which original agreement was approved by the Board at the August 2014 meeting ([Item 11-W](#)) and executed on November 19, 2015, which enabled Sanford physicians and associated personnel to provide sports medicine services to SDSU. This First Amendment to the Facility Use Agreement establishes the *Sanford Health Center for Excellence in Athletic Care and Sports Education Research at South Dakota State University* (“Center”). In the Center, Sanford Health and SDSU would collaborate to identify healthcare-related teaching, research, and outreach projects within the designated premises.

The Permitted Uses in the original Facility Use Agreement would be expanded to include three additional research and teaching-related activities:

- Level 1: Research and teaching-related activities related to providing medical services to Student Athletes (outside the scope of the services provided under the Exclusive Sports Medicine Agreement).

(Continued)

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**DRAFT MOTION 20170627\_10-O:** I move to (1) authorize SDSU to complete negotiation of the First Amendment to the Sanford-Jackrabbit Facility Use Agreement with Sanford Health, and (2) authorize the Executive Director to review, approve, and execute the negotiated First Amendment to the Sanford-Jackrabbit Facility Use Agreement after the General Counsel has approved the agreement as to matters of style and form.

- Level 2: Research and teaching related activities for non-athlete University enrolled students not provided medical services pursuant to the Exclusive Sports Medicine Agreement may occur in the Center, subject to all applicable SDBOR and University policies and procedures, and state and federal law.
- Level 3: Research and teaching-related activities for non-University students or student athletes, such as community members, may occur in the Center, subject to all applicable BOR and University policies and procedures, and state and federal law.

Consideration for these expanded Permitted Uses is based on a percentage of the shell construction cost of the designated premises. Annual rent upon commencement of Level 1 activities is \$26,000, payable in monthly installments of \$2,166.67.

SDSU requests that the Board authorize the Executive Director to review, approve, and execute the negotiated First Amendment to the Facility Use Agreement after the General Counsel approves the agreement as to matters of style and form. The latest draft of the First Amendment to the Agreement can be found in Attachment I.

### **First Amendment to Facility Use Agreement**

This First Amendment to Facility Use Agreement is made this \_\_\_\_\_ day of \_\_\_\_\_, 2017 is by and between the South Dakota Board of Regents (“SDBOR”) for South Dakota State University (“University” or “SDSU”), a public institution of higher education under the control and management of the South Dakota Board of Regents (“SDBOR”) and Sanford Health (“Sanford Health”).

WHEREAS, the University is South Dakota’s designated Land-Grant University established under South Dakota Codified Laws Ch. 13-58 and the mission of the University defined by South Dakota Board of Regents Policy 1:10:2 is to serve students and clients through teaching, research and extension activities;

WHEREAS, the University and Sanford Health entered into a Facility Use Agreement – Sanford Health Jackrabbit Athletic Complex on November 19, 2015 (“Facility Use Agreement”) for the provision of defined Sports Medicine Services pursuant to the Exclusive Sports Medicine Services Agreement of November 13, 2012 for Student Athletes and the University mission; and

WHEREAS, Sanford Health and the University desire to collaborate to identify healthcare-related teaching, research, and outreach projects that are made possible by Sanford Health’s provision of medical services in connection with the Facility Use Agreement; and

WHEREAS, Sanford Health and the University wish to amend the Facility Use Agreement in order to expand the Permitted Uses set forth in Section II.b. therein to enable such collaboration and services as approved in accordance with this Amendment;

NOW THEREFORE, in consideration of the promises hereof and the mutual covenants and agreements contained herein, the parties hereto agree as follows:

- I. The Facility Use Agreement is hereby modified by this Amendment pursuant to Section II.g. of the Facility Use Agreement to the extent set forth herein.
- II. The Parties hereby establish the Sanford Health Center for Excellence in Athletic Care and Sports Education Research at South Dakota State University (“Center”) in the Designated Facility identified in the Facility Use Agreement and amendments thereto.
- III. Term: This Amendment is for the period of one (1) year beginning the last date of execution of this Amendment and will automatically renew for subsequent one (1) year periods. Renewal periods shall not to extend beyond the expiration or termination of the Facility Use Agreement. Renewal periods shall not occur if this Amendment is terminated pursuant to the Section V.c. of this Amendment or notice of non-renewal is provided in writing by a Party sixty (60) days prior to the first day of the subsequent renewal period.
- III. Center Management and Use:
  - a. The Center’s University mission-related activities will be operated and managed as mutually agreed by the parties, as part of the University’s College of Education

& Human Sciences, and in a manner that supports the mission of the University. Appropriate individuals from Sanford Health and the University will collaborate for Center activities as appropriate and as mutually determined by the parties. Sanford Health, by and through its providers, subsidiaries and/or affiliates, shall have sole control over the delivery of medical services in connection with the Facility Use Agreement.

- b. The Parties will enter into cooperative endeavors in the Center between the University and Sanford Health for graduate and undergraduate research and clinical experience activities, as well as other research, collaboration, and outreach opportunities as further agreed in writing by the parties, and which will be in conformity with SDBOR and University policy and applicable law. In connection with the foregoing, the Parties agree that they will use best efforts to cooperate and promptly proceed with the research criteria and program levels identified in this Amendment.
- c. The University and Sanford Health will enter into agreements for Sponsored Research, Collaborative Research, Sponsored Service agreements and other agreements for activities in the Center for which the University is authorized by, and in conformity with, SDBOR and University policy and applicable law.
- d. Center program levels and level threshold transition criteria:
  1. Level 1: Research and teaching-related activities related to providing medical services to Student Athletes (outside the scope of the services provided under the Exclusive Sports Medicine Agreement) may occur in the Center, subject to all applicable SDBOR and University policies and procedures, and state and federal law.
    - i. Level 1 activities may begin immediately upon SDBOR approval and appropriate final execution of this First Amendment to the Facility Use Agreement.
    - ii. Level 1 activities may continue, as long as the threshold criteria are continually met, until expiration or termination of this First Amendment or the Facility Use Agreement. In the event the threshold criteria are not met at any time, the University and Sanford Health shall diligently and in good faith work to cure the failure to meet such threshold criteria. In connection with the foregoing, the Parties will be permitted not less than sixty (60) days to cure the same. If, following the expiration of such period, the Parties have failed to meet the threshold criteria, then this Amendment may be terminated.
  2. Level 2: Research and teaching related activities for non-athlete University enrolled students not provided medical services pursuant to the Exclusive

Sports Medicine Agreement may occur in the Center, subject to all applicable SDBOR and University policies and procedures, and state and federal law.

- i. Level 2 activities may begin immediately after SDBOR approval and appropriate final execution of this First Amendment of the Facility Use Agreement and occurrence of all the following criteria:
  1. Establishment of a mutually agreed S-JAC Clinic Research and Education Committee (the “Clinic Research and Education Committee”) to integrate Sanford Health and the University objectives and centralize coordination efforts. The University and Sanford Health will be permitted to appoint an equal number of members to said committee, the initial appointment of which shall be within thirty (30) days following the execution of this Amendment. Thereafter, either party may replace their respective members of the Clinic Research and Education committee at any time by providing written notice to the other party;
  2. Establishment of education infrastructure for athletic training clinical experiences in place (i.e. ready for student rotations), which consists of the following steps;
    - a. Preceptors for athletic training students have been identified;
    - b. Preceptor training has been completed and preceptor agreements signed (volunteer preceptor process - training to take a few hours, covers student interaction expectations, evaluation, contacts etc., will be modeled after existing programs, agreement acknowledges the process and responsibilities); and
    - c. Dedicated space utilization time for academic purposes (To be determined semesterly by Clinic Research and Education Committee); and
  3. Preparation of at least one collaborative research study approved by the Institutional Review Board and data share agreement completed.
- ii. Level 2 activities may continue, as long as the threshold criteria are continually met, until expiration by its terms or termination of this First Amendment or the Facility Use Agreement. In the event the threshold criteria are not met at any time, the University and Sanford Health shall diligently and in good faith work to cure the failure to meet such threshold criteria. In connection with the foregoing, the Parties will be permitted not less than sixty (60) days to cure the same. If, following the expiration of such period, the Parties have failed to meet the threshold criteria, then this Amendment may be terminated.

3. Level 3: Research and teaching-related activities for non-University students or student athletes, such as community members, may occur in the Center, subject to all applicable SDBOR and University policies and procedures, and state and federal law.
  - i. Level 3 activities may begin immediately after SDBOR approval and appropriate final execution of this First Amendment of the Facility Use Agreement and occurrence of all the following criteria:
    1. Threshold criteria of Level 3 is continuously met;
    2. Education criteria:
      - a. Athletic training rotations have been integrated into the curriculum and implemented (i.e. rotations advertised as part of the curriculum);
      - b. Student experiences coordinator has been identified (which identification is a SDSU responsibility, and the student experiences member will be added as member of Clinic Research and Education Committee as an SDSU designee); and
      - c. Inter-professional education (IPE) opportunities relating to clinic activities have been identified by the Parties, which activities enable inclusion of students from other health science disciplines at SDSU.
      - d. The above-referenced IPE experiences are ready for implementation (Ready for expansion to other degree programs, e.g. Physical Therapy, Dietetics, Nursing, etc.); and
    3. Research criteria:
      - a. Research study coordinator has been identified (which identification is a SDSU responsibility, and the research study coordinator will be added as a member of Clinic Research and Education Committee);
      - b. Dedicated space utilization time for research study activities (i.e. study enrollment visits, data collection visits, etc.) (To be determined each academic semester by Clinic Research and Education Committee); and
      - c. Three collaborative research studies have commenced with a need to expand study enrollment capability.

ii. Level 3 activities may continue, as long as the threshold criteria are continually met, until expiration by its terms or termination of this First Amendment or the Facility Use Agreement. In the event the threshold criteria are not met at any time, the University and Sanford Health shall diligently and in good faith work to cure the failure to meet such threshold criteria. In connection with the foregoing, the Parties will be permitted not less than sixty (60) days to cure the same. If, following the expiration of such period, the Parties have failed to meet the threshold criteria, then this Amendment may be terminated.

e. Sports and Orthopedic Medicine Services:

Sanford Health may provide sports and orthopedic medicine services, together with other medical services, to the individuals identified in Sections II.d.2., II.d.3., II.d.4. herein in an effort to establish clientele for research and teaching programs in accordance with: 1) this Amendment to the Facility Use Agreement, 2) the Facility Use Agreement, 3) the Parties' cooperative endeavors for graduate and undergraduate research and clinical experience activities, as well as other research, collaboration, and outreach opportunities as agreed in writing; and 4) agreements for Sponsored Research, Collaborative Research, Sponsored Service agreements and other agreements for which the University is authorized by SDBOR policy and state law.

f. The Parties hereby agree that Sanford Health may, in the course of providing medical services, submit bills and other documentation to Medicare, Medicaid, governmental programs and other third party payors as reimbursement for the medical services provided, regardless of which Level the parties are operating under. The University and SDBOR hereby agree to reasonably cooperate with Sanford Health as it relates to setting up the Facility for such purposes, which may include, without limitation, providing documentation that may be required as a result of such reimbursement. Sanford Health shall, in its sole discretion, determine the fees to be charged for its medical services, consistent with the provisions of applicable law and this Agreement. The University assigns to Sanford Health the exclusive right to bill and collect all fees for such services. Sanford Health warrants it will bill for and collect such amounts in conformity with applicable laws, rules and regulations and agrees to indemnify and hold the University, its parent, subsidiaries and affiliates and the respective officers, directors, agents and employees harmless from any claims concerning alleged billing errors or irregularities.

III. Payment:

a. Each of the additional uses articulated in Section II.d.2., II.d.3., II.d.4, and II.e. of this Agreement are subject to fair market value analysis of the use pursuant to Section VI.c. of the Facility Use Agreement. The parties have undertaken a fair

market value analysis and agree to the following fair market payments for said additional uses.

- b. Upon commencement of Level 1 activities, Sanford Health shall remit rental payments to the University, which first payment will be due on the first day of the month following the commencement of such activities. In connection with the foregoing, upon commencement of Level 1 activities, annual rent shall be \$26,000, payable in monthly installments of \$2,166.67. In the event Level 1, Level 2, or Level 3 activities are no longer taking place in the Designated Facility, then no further rental payments shall be due under this Amendment.
- c. The rental payment referenced above shall be increased by the lesser of (i) 2%, or (ii) the increase in CPI All Urban Consumers, which CPI adjustment shall be calculated as compared to the prior year. Such increase shall take place every three years.
- d. Payments shall be invoiced by University monthly and Sanford Health will pay amounts due for Center within thirty (30) days of invoice. Sanford Health will be assessed and pay interest of 5% per year and collection costs associated with late payments in accordance with South Dakota law.

#### IV. Signage and Attribution:

- a. Attribution of the Center will be provided throughout the lifespan of the Center.
- b. Termination of Signage and Attribution. In addition to any rights and remedies available at law, the SDBOR may terminate this Amendment and all rights and benefits hereunder, including terminating the Attribution:
  1. In the event of any default in payment of the funds as provided in this Agreement, or in the event the SDBOR or University determines in its reasonable and good faith opinion that circumstances have changed such that the attribution chosen would adversely impact the reputation, image, mission or integrity of the State, University or the SDBOR, or if the SDBOR or University determine that performance of University mission-related activities are not occurring in the Center.
  2. Upon any such termination of this Amendment and/or the attribution hereunder, the SDBOR, and University shall have no further obligation or liability and shall not be required to return any portion of amounts already paid.
- c. Modification of Naming. If, during the useful life of the facility or Center and during the term of this Agreement, the facility or Center is transferred or conveyed from the University, closed, deconstructed, destroyed or severely damaged, significantly renovated, upgraded, or modified; relocated, or replaced,



then the attribution and signage will cease. In such event, however, Sanford Health, if available, and in consultation with and as mutually agreed by the SDBOR and University, will have the right, for no additional payment, to have another available and equivalent University Center named after Sanford Health.

- d. Publicity. For purposes of publicizing the sponsorship and the attribution and signage, University will have the right, without charge, to use the logos of Sanford Health and photograph the individuals representing Sanford Health and use the names, likenesses, and images of the individuals in photographic, audiovisual, digital or any other form of medium (the "Media Materials") and to use, reproduce, distribute, exhibit, and publish the Media Materials in any manner and in whole or in part, including in brochures, website postings, informational and marketing materials, and reports and publications worldwide in any medium describing University's development, educational, research, and outreach activities.
- e. The parties agree that nothing in this section or this Amendment shall modify, alter, or amend that certain Gift Agreement, dated November 13, 2012 by and between the parties.

V. Terms and Conditions:

- a. Relationship of Parties. The University shall have control over the Center and any activities performed under this Agreement, provided, however, that Sanford Health, by and through its providers, subsidiaries and/or affiliates shall have sole control over the delivery of medical services.
- b. Reporting:
  - 1. The Dean of the College of Education & Human Science and a designated representative of Sanford Health shall work collaboratively and develop an annual report on the research and teaching-related activities occurring in the Center pursuant to this Amendment. Sanford Health shall report on the number of clientele and load of sports and orthopedic medicine services and other medical services provided pursuant to this Amendment and specifically, Section II.e. of this Amendment.
  - 2. Annual reports of Center activities shall be delivered to the parties in conformity with Section V.d. of this Amendment ninety (90) days prior to the end of each Amendment annual term.
  - 3. Sanford Health and University shall review Center annual reports within thirty (30) days of their receipt and determine the scope and continuance of this Amendment and the Center activities.

- c. Termination. In addition to the rights and remedies set forth in the Facility Use Agreement, this Amendment may be terminated by the SDBOR or University should Sanford Health not use Center for Level 1, Level 2, or Level 3 collaborated and reported mission purposes for a period of greater than six (6) months without penalty or liability of any kind accruing to the SDBOR or University, except to the extent such non-use is a result, in whole or in part, of any University or the SDBOR action or inaction contributing to said non-use. The SDBOR or University may terminate this Amendment with or without cause with three (3) months' notice. When this Amendment is terminated without cause, University will return the portion of the payment made for the period to from the date of termination through the end of the term for which paid minus any actual other associated costs required to be paid by Sanford Health.
- d. Notices: Whenever under this Amendment a provision is made for notice or report of any kind, such notice shall be in writing and shall be deemed sufficient if actually delivered to Sanford Health or the University if sent by registered or certified mail, return receipt requested, postage prepaid at the address furnished for such purpose:

1. University hereby designates its address as:

South Dakota State University  
 Dean of the College of Education & Human Science  
 Box 2275A University Station  
 Brookings, SD 57007

With copies required to:

South Dakota State University  
 Attn: Athletic Director  
 Intercollegiate Athletics – Box 2820  
 Brookings, SD 57007

South Dakota State University  
 Attn: University Counsel  
 President's Office – Box 2201  
 Brookings, SD 57007

Sanford Health hereby designates its address as:

Sanford Health  
 Attn: Kevin Lampe  
 1305 W. 18<sup>th</sup> Street  
 Sioux Falls, SD 57105

With copy to:

Sanford Health  
Attn: Kim Patrick, Chief Legal Officer  
1305 W. 18<sup>th</sup> Street  
Sioux Falls, SD 57105

- e. All other terms and conditions of the Facility Use Agreement not modified by this Amendment shall remain in full force and effect and shall apply to performance of the terms and conditions of this Amendment.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by the duly authorized officers effective as of the date of the last signature affixed below.

SOUTH DAKOTA BOARD OF REGENTS

\_\_\_\_\_ DATE: \_\_\_\_\_

SOUTH DAKOTA STATE UNIVERSITY:

\_\_\_\_\_ DATE: \_\_\_\_\_

SANFORD HEALTH:

\_\_\_\_\_ DATE: \_\_\_\_\_

Reviewed by SDBOR General Counsel for Form:

\_\_\_\_\_ DATE: \_\_\_\_\_