

SOUTH DAKOTA BOARD OF REGENTS

Budget and Finance

**AGENDA ITEM: 8 – K
DATE: August 7-9, 2018**

SUBJECT

DSU Donation Agreement

THE BOARD OFFICE RECEIVED THIS BOARD ITEM REQUEST LATE AND HAS NOT HAD TIME TO CONDUCT A THOROUGH REVIEW OF THE DRAFT AGREEMENT. HOWEVER, DSU INDICATED TIME IS OF THE ESSENCE AND BOARD APPROVAL AT THIS MEETING IS ESSENTIAL. THE DRAFT MOTION WOULD AUTHORIZE DSU TO FINALIZE THE DRAFT AGREEMENT AND TO EXECUTE THE FINAL AGREEMENT UPON THE APPROVAL OF THE EXECUTIVE DIRECTOR.

CONTROLLING STATUTE, RULE, OR POLICY

[BOR Policy 5:3](#) – Agreements and Contracts
[BOR Policy 6:13](#) – Facilities Use by Private Parties

BACKGROUND / DISCUSSION

Dakota State University (DSU) requests authorization to proceed with finalizing and executing the Sanford Health Donation Agreement set forth in Attachment I (Donation Agreement). Pursuant to the terms of the Donation Agreement, Sanford Health will contribute \$5,000,000, payable in ten (10) annual installment payments to the DSU Foundation. Given the dollar amount involved and associated commitments, Board approval of this agreement is necessary. In exchange for the donation, Sanford Health would receive an exclusive “health care presence” (Section 2 of Attachment I) and exclusive “health care presence” advertising and signage recognition (Section 3 of Attachment I) at the DSU Memorial Fieldhouse and DSU Trojan Field for a term of ten (10) years, with a subsequent three (3) year right of first refusal (Section 4 of Attachment I) following the initial ten (10) year term. “Health care presence” includes, but is not limited to:

“...businesses and/or entities that operate a hospital and/or clinic, which provides any health care services of any kind including, without limitation, a clinic such as

(Continued)

DRAFT MOTION 20180807_8-K:

I move to authorize DSU to proceed with finalizing the draft agreement set forth in Attachment I and to execute the final agreement upon the approval of the Executive Director.

a “walkup”, “rapid care”, or “urgent care” clinic, which provide health care services and/or for the provision of dialysis, physical therapy, chiropractic care, occupational therapy, occupational health, oral surgery, audiology, psychiatry, dietetics, optometry, ophthalmology, laser surgery, plastic surgery, maxillofacial surgery services, the sale of health care accessories, the sale or operation of health care plans, weight loss management, pharmacy, and/or athletic training or strength conditioning services.”

Additionally, to obtain/maintain licensure as an athletic trainer in South Dakota you have to have a team/referring physician sign off on your licensure form. For well over twenty (20) years, DSU’s athletic trainers have operated under an agreement with the Orthopedic Institute. That arrangement has ended and Sanford Health has agreed to serve in that capacity moving forward. Consequently, the timely execution of this agreement is needed to avoid a lapse in licensure and ensure DSU’s athletic trainers are able to perform services for DSU athletes.

IMPACT AND RECOMMENDATION

DSU requests the Board of Regents authorize President Griffiths to finalize and execute the agreement set forth in Attachment I. The advancement of this relationship between DSU and Sanford Health will not only provide \$5,000,000 for the benefit of DSU over the next ten (10) years, but it will also facilitate the seamless transition of licensure for DSU’s athletic trainers.

ATTACHMENTS

Attachment I – Draft Donation Agreement with Sanford Health

DONATION AGREEMENT

THIS AGREEMENT is made this ____ day of _____, 2018 (the "Effective Date"), by and among SANFORD HEALTH ("Sanford"), DAKOTA STATE UNIVERSITY FOUNDATION ("Foundation"), and DAKOTA STATE UNIVERSITY ("DSU").

WHEREAS, the Foundation is a charitable foundation under §501(c)(3) of the Internal Revenue Code, providing support for various educational activities and objectives of DSU; and

WHEREAS, DSU, founded in 1881, offers doctorate, master's, bachelor's and associate degree programs in numerous fields of study. The work of DSU is carried out on a residential campus in Madison, South Dakota, through online courses and through The University Center in Sioux Falls, South Dakota; and

WHEREAS, Sanford is a part of an integrated health care system located in Sioux Falls, South Dakota, who, with its parent, subsidiaries and affiliates, delivers health care to patients primarily in South Dakota, North Dakota, Minnesota and Iowa; and

WHEREAS, Sanford, DSU and the Foundation desire to strengthen their relationship via the provision of funds for DSU projects, scholarships, faculty and the athletic department, and the desire to explore other projects of mutual interest that advance the respective missions of each organization and benefit the Madison, South Dakota community; and

WHEREAS, Sanford, the Foundation and DSU collectively desire to further develop the infrastructure for health care in the Madison community, which interests would be served via the terms and conditions of this Agreement; and

WHEREAS, Sanford desires to further its mission and the continued development of Sanford's health care services via its involvement in all the foregoing; and

WHEREAS, Sanford agrees to contribute to the Foundation, for the benefit of DSU, the sum of \$5,000,000; and

WHEREAS, the Foundation and DSU desire to recognize Sanford's commitment to the foregoing by granting certain exclusive rights to Sanford and other recognitions as more particularly described herein.

NOW THEREFORE, Sanford, the Foundation and DSU, in consideration of the mutual promises and covenants set forth herein, do hereby acknowledge and agree as follows:

1. During the term of this Agreement, Sanford agrees to contribute to the Foundation \$5,000,000, payable in ten (10) installments as set forth on Exhibit A attached hereto (collectively the "Contributions"). The first installment is subject to the following condition precedent:

- (i) Approval of Board and/or Legislature. Authorization in writing of approval for any obligation of DSU under this Agreement if required by

the South Dakota Board of Regents (the “BOR”) and/or the South Dakota Legislature or any other governmental entity required by law or policy to approve the terms and conditions of this Agreement.

Each of the remaining installments is subject to the following conditions precedent:

- (i) Compliance with Agreement. Neither DSU nor the Foundation is in material breach of any term or condition of this Agreement.
- (ii) Formal Evaluation. The parties agree to formally evaluate the DSU/Sanford relationship at least annually, such evaluation to be attended by DSU’s President and Athletic Director and Sanford’s Senior Executive Director – Orthopedic and Sports Medicine and/or their designees or invitees. The meeting will include discussions regarding terms and conditions of this Agreement.
- (iii) Board Approval. The Board of Trustees of Sanford authorizing said annual Contribution during such year.
- (iv) Annual Statement. The Foundation will send an annual invoice statement to Sanford thirty (30) days prior to the payment dates set forth in Exhibit A. All statements shall be addressed as follows:

Sanford Health
 PO Box 5039
 2301 E. 60th Street North
 Sioux Falls, SD 57117-5039
 Attn: Treasurer

The parties acknowledge and agree that the Contributions made to the Foundation shall be for the benefit of DSU for projects, scholarships, faculty and/or the athletic department as determined by the University.

2. Exclusive Health Care Presence Recognition. During the term of this Agreement, in recognition for the Contributions made hereunder, the Foundation and DSU acknowledge that Sanford shall have an exclusive 3rd Party Health Care Presence at the DSU Memorial Fieldhouse and DSU Trojan Field (the “DSU Athletic Facilities”). For the purposes of this Agreement, “Health Care Presence” shall include, but not be limited to, businesses and/or entities that operate a hospital and/or clinic, which provides any health care services of any kind including, without limitation, a clinic such as a “walkup”, “rapid care”, or “urgent care” clinic, which provide health care services and/or for the provision of dialysis, physical therapy, chiropractic care, occupational therapy, occupational health, oral surgery, audiology, psychiatry, dietetics, optometry, ophthalmology, laser surgery, plastic surgery, maxillofacial surgery services, the sale of health care accessories, the sale or operation of health care plans, weight loss management, pharmacy, and/or athletic training or strength conditioning services.

Traditional dentistry and orthodontics, however, shall not be deemed a Health Care Presence, so long as said dentistry and orthodontics is not associated or affiliated with any other hospital or health care entity. Notwithstanding the foregoing, DSU may seek an exception to this exclusive Health Care Presence provision upon written request to Sanford, which Sanford in its sole discretion may either grant or deny. DSU acknowledges that at the time of the execution of this Agreement, no agreements or informal arrangements exist that would conflict with Sanford's exclusive Health Care Presence as set forth in this Section, except for such naming rights as have been granted previously to Madison Community Hospital, d/b/a Madison Regional Health System and Sioux Falls Specialty Hospital, L.L.P. It is understood and agreed by the parties that in the event said rights expire or terminate during the term of this Agreement, including any options previously granted, DSU shall not extend the same.

3. Exclusive Advertising and Signage Recognition. DSU hereby covenants and agrees that Sanford shall have, and DSU irrevocably transfers, sets over and assigns to Sanford exclusive "Health Care Presence" signage recognition with respect to the exterior and interior of the DSU Athletic Facilities. In addition, DSU hereby agrees, covenants and promises during the term of this Agreement that it shall not, without the prior written consent of Sanford, which consent may be granted or withheld in the exercise of Sanford's sole discretion, directly or indirectly sell or lease, or solicit or market to sell or lease, or permit any naming or other advertising in any medium in, on or from any DSU Athletic Facility(ies) (or on the exterior of any vehicle or aircraft) in violation of Sanford's exclusive Health Care Presence (as defined in Section 2 above), except for such rights as have been granted previously to Madison Community Hospital, d/b/a Madison Regional Health System and Sioux Falls Specialty Hospital, L.L.P. DSU acknowledges that at the time of the execution of this Agreement, no agreements or informal arrangements exist that would conflict with Sanford's exclusive advertising and/or signage rights as set forth in this Section, except for such rights as have been granted previously to Madison Community Hospital, d/b/a Madison Regional Health System and Sioux Falls Specialty Hospital, L.L.P. It is understood and agreed by the parties that in the event Sioux Falls Specialty Hospital, L.L.P.'s rights expire or terminate during the term of this Agreement, including any options previously granted, DSU shall not extend the same. It is further understood and agreed by the parties that in the event Madison Community Hospital, d/b/a Madison Regional Health System desires to extend its agreement with DSU with respect to advertising and signage only, Sanford, without violating this Section 3, agrees that DSU may enter into an agreement with Madison Community Hospital, d/b/a Madison Regional Health System for the same.

With respect to the exclusive advertising and signage recognition rights set forth in this Section 3, DSU and Sanford agree to be bound by the measurement, weight, location and luminosity limits established by DSU for each DSU Athletic Facility and Sanford shall cooperate on the design, fabrication and installation of the signage contemplated hereunder, the cost of which shall be borne by Sanford; however in no event shall Sanford be responsible in any manner for any of DSU's costs to remove any other signage from the DSU Athletic Facilities and areas in which Sanford is granted the exclusive Health Care Presence signage recognition in accordance with this Agreement.

In addition, DSU covenants and agrees to include said exclusive Health Care Presence requirement in each of its own facility use agreements or leases and in any agreement or lease it

may enter into with owners or operators of adjacent facilities to the extent such facilities may reasonably be considered part of, or affiliated (meaning DSU owned or controlled) with the DSU Athletic Facilities. Sanford may, upon the written request of DSU and in the exercise of Sanford's sole discretion, waive the foregoing advertising rights with respect to lessees/users of the DSU Athletic Facilities on an event-specific basis. This section does not apply to the Madison Community Center.

4. Term; Right of First Refusal. The term of this Agreement shall commence as of the Effective Date and continue until the tenth (10th) anniversary thereof. During the term hereof, Sanford shall have the exclusive right to negotiate with DSU for an extension of this Agreement and/or any of the exclusive advertising or signage rights granted to Sanford hereunder. At least 12 months prior to the end of the term of this Agreement, the parties shall in good faith commence discussion as to terms and conditions of a proposed extension. In the event the parties are unable to agree to an extension of a term with respect to this Agreement and/or any of the exclusive sponsorship, advertising and/or signage rights granted to Sanford hereunder, (a) the exclusive sponsorship, advertising and/or signage rights granted to Sanford hereunder shall cease and terminate at the end of the term hereof and (b) Sanford shall, for an additional three-year period, have a right of first refusal with respect to any of the exclusive sponsorship, advertising or signage rights granted to Sanford hereunder. If at any time during said three-year period DSU receives a bona fide offer from a third party for the grant, sale, transfer or other disposition of any such exclusive sponsorship, advertising and/or signage rights, DSU shall give Sanford a first right of refusal with respect to such offer. Upon receipt of written notice and a copy of said offer from DSU that DSU has received an offer it is willing to accept, Sanford shall, within thirty (30) days after receipt of said notice, give written notice to DSU as to whether Sanford has elected to exercise its right to accept the same terms and conditions as contained in said offer. In the event Sanford does not exercise the right within said thirty day period, its rights hereunder shall be exhausted solely with respect to the rights conveyed to the third party offeror under the offer for the period stated in such offer and any such decision not to exercise shall not be deemed or construed as a waiver of its rights of first refusal with respect to any subsequent third party offers. The foregoing rights of first refusal shall survive termination of this Agreement for the period described above.

5. Material Breach, Ceasing of Use, Impairment of Rights.

A. Default by DSU or the Foundation. Upon (a) a material impairment by DSU or the Foundation of any exclusive rights or recognitions granted by DSU or the Foundation hereunder, which is not cured by DSU or the Foundation within thirty (30) days' written notice thereof, or (b) a material breach by DSU or the Foundation of any other of DSU's or the Foundation's obligations hereunder, which breach is not cured by DSU or the Foundation within thirty (30) days' written notice thereof, Sanford shall have the right to terminate any future installments set forth in this Agreement which become due and payable. If all payments have been made by Sanford and a default by DSU or the Foundation, as defined in this paragraph, has occurred and has not been remedied by DSU or the Foundation within the requisite time, Sanford shall have the right to elect any and all remedies

available under the law, equitable or legal, including, but not limited to, specific performance of this Agreement.

- B. Default by Sanford. Upon Sanford's default in making any installment due hereunder within thirty (30) days of its receipt of written notice that such installment is delinquent (except to the extent such payment by Sanford is disputed in good faith hereunder or payments are delayed as a result of the action or omission to act of the Foundation or DSU), the Foundation and DSU may declare this Agreement cancelled, forfeited and terminated by giving to Sanford thirty (30) days' notice in writing of its intention to cancel and terminate this Agreement and/or the Foundation and DSU may pursue any other appropriate legal or equitable remedy.

6. No Joint Venture. Nothing herein contained shall be construed to place the parties in a relationship of partners or joint venturers and neither party shall have the power to obligate or bind the other in any manner whatsoever.

7. Indemnity. To the extent permitted by the Laws and Constitution of the State of South Dakota and subject to available appropriation, DSU shall save and hold harmless Sanford from any liability for damages and litigation costs including attorney's fees which arise from DSU's activity, except for damages due to the fault or gross negligence of Sanford, its sub-contractors, officers, employees or agents. Nothing herein shall preclude DSU from asserting against any party any defenses to liability it may have under South Dakota law, nor is anything herein intended to extend DSU's liability beyond that provided by SDCL ch. 21-32.

8. Representations and Warranties of DSU and the Foundation. DSU and the Foundation hereby represent and warrant to Sanford the following:

- A. The execution, delivery and performance by DSU and the Foundation of this Agreement and the assignment of rights effectuated hereby have been or will be duly authorized by all necessary entities, including the BOR, if necessary. Notwithstanding the foregoing, this Agreement will not (i) require any authorization, consent or approval by, or registration, declaration or filing with, or notice to, any governmental department, commission, board, bureau, agency or instrumentality, or any third party, except such authorization, consent, approval, registration, declaration, filing or notice as has been obtained prior to the date hereof; (ii) violate any provision of any law, rule or regulation or of any order, writ, injunction or decree presently in effect having applicability to DSU or the Foundation; and (iii) result in a breach of or constitute a default under any material agreement, lease or instrument to which DSU or the Foundation is a party or by which they or their respective properties may be bound or affected.
- B. No material agreement, lease or instrument to which DSU or the Foundation is a party or by which its properties are bound or affected imposes upon the rights granted to Sanford hereunder any express or implied limitations on

the exercise of such rights, except as disclosed by DSU and the Foundation in writing contemporaneously herewith or except as disclosed herein.

- C. There is no litigation, proceeding or other investigation pending or, to the knowledge of DSU or the Foundation, threatened against DSU or the Foundation, which would prevent consummation of the transaction contemplated by this Agreement.

9. Representations and Warranties of Sanford. Sanford hereby represents and warrants to DSU and the Foundation the following:

- A. Sanford is a non-profit corporation duly organized, existing and in good standing under the laws of the State of South Dakota.
- B. The execution, delivery and performance by Sanford of this Agreement has been duly authorized by all necessary corporate action and does not and will not (i) require any consent or approval of Sanford's Board of Trustees, except as otherwise provided in this Agreement; (ii) require any authorization, consent or approval by, or registration, declaration or filing with, or notice to, any governmental department, commission, board, bureau, agency or instrumentality, or any third party, except such authorization, consent, approval, registration, declaration, filing or notice as has been obtained prior to the date hereof; (iii) violate any provision of any law, rule or regulation or of any order, writ, injunction or decree presently in effect having applicability to Sanford or its articles or by-laws; and (iv) result in a breach of or constitute a default under any material agreement, lease or instrument to which Sanford is a party or by which it or its properties may be bound or affected.

10. Injunctive Relief. The parties acknowledge that breach or nonperformance with respect to certain of the covenants of this Agreement could cause irreparable harm and significant injury which may be difficult to estimate or ascertain. Accordingly, both parties agree that each party shall have, in addition to any other rights or remedies afforded by law, the right to seek immediate injunctive relief or specific performance due to any existing or threatened breach of this Agreement.

11. Risk of Loss. The parties acknowledge and agree that the BOR will have title to the DSU Athletic Facilities (subject to the rights granted to Sanford hereunder) and bears the risk of damage, loss, theft, or condemnation of any and all portions of, or personal property located at, said facilities, and no repairs and replacements thereof shall be at the expense of Sanford. The foregoing notwithstanding, Sanford acknowledges that it shall bear the risk of damage, loss, theft or condemnation of any Sanford signage or other Sanford property located at or upon the DSU Athletic Facilities, unless such damage, loss, theft or condemnation is a result of or attributable to DSU's, the Foundation's, or their agents' fault, negligence or intentional act. The State of South Dakota, the BOR, or DSU shall, at all times during the term of this Agreement, maintain physical damage insurance, insuring against loss or damage to the DSU Athletic Facilities in an amount

specified by the State of South Dakota or the BOR, but in no event less than the full replacement value thereof. In the event of material casualty to the DSU Athletic Facilities, the State of South Dakota, the BOR, or DSU shall, subject to BOR approval, promptly repair or replace the DSU Athletic Facility.

12. Insurance. During the term of this Agreement, the State of South Dakota, the BOR, or DSU shall maintain, at its sole cost and expense, comprehensive general liability insurance and workers' compensation insurance against any liability arising out of injuries to or death of any person or damage to tangible property in any way connected with the ownership or operation of the DSU Athletic Facilities. DSU shall provide to Sanford a certificate evidencing such coverage.

13. Assignment. Neither DSU nor the Foundation shall assign or transfer their respective rights or obligations under this Agreement without the prior written consent of Sanford, which consent may be granted or withheld in the exercise of Sanford's sole discretion. Sanford may not assign or transfer its rights or obligations under this Agreement without the prior written consent of DSU and the Foundation, which consent may be granted or withheld in the exercise of DSU's and the Foundation's sole discretion; provided, however, that Sanford may, without the necessity of consent, assign or transfer its rights or obligations under this Agreement to any parent, subsidiary or affiliate corporation or entity, any corporation resulting in the consolidation or merger of Sanford into or with any other entity, or any person, firm, entity or corporation acquiring all or substantially all of Sanford's assets. In the event Sanford is acquired by, or converts to, a for-profit corporation, any assignment or transfer of Sanford's rights hereunder shall be subject to the prior written consent of DSU and the Foundation, which consent shall not be unreasonably withheld or delayed. Any assignment or transfer prohibited by this provision will be void.

14. Exclusive Sports Medicine Agreement. DSU, the Foundation and Sanford hereby acknowledge and agree that DSU and Sanford have concurrently herewith entered into a Exclusive Sports Medicine Agreement to provide exclusive sports medicine services to DSU and its student athletes. DSU, the Foundation and Sanford agree that in the event the Exclusive Sports Medicine Agreement terminates at any time during the term hereof, this Agreement shall also terminate with no further rights or obligations on the part of any party.

15. Miscellaneous.

- A. This Agreement shall be interpreted under and governed by the laws of the State of South Dakota. Any action arising out of or related to this Agreement, whether at law or in equity, shall be instituted in and litigated solely and exclusively in the state or federal courts in the State of South Dakota.
- B. This Agreement along with any other agreement referenced herein constitutes the entire agreement between the parties and supersedes all prior proposals and agreements, both written and oral, and all other written and oral communications between the parties regarding the subject matter herein.

- C. This Agreement may not be amended or altered in any manner except in a writing signed by both parties.
- D. No forbearance to exercise any rights or privileges under this Agreement or waiver of any breach of any of its terms shall be construed as a waiver of any such terms, rights, or privileges, but the same shall continue and remain in full force and effect the same as if no such forbearance or waiver had occurred.
- E. The parties agree that if any part, term, paragraph, or provision of this Agreement is in any manner held to be invalid, illegal, void, or in any manner unenforceable, or to be in conflict with any law, then the validity of the remaining portions or provisions of this Agreement shall not be affected, and such part, term, paragraph or provision shall be construed and enforced in a manner designed to effectuate the intent expressed in this Agreement to the maximum extent permitted by law.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed the day and year first above written.

SANFORD HEALTH

By _____
Name _____
Its _____

DAKOTA STATE UNIVERSITY
FOUNDATION

By _____
Its _____

DAKOTA STATE UNIVERSITY

By _____
José-Marie Griffiths, Ph.D., President

EXHIBIT A

Contributions

September 15, 2018 - \$500,000
September 15, 2019 - \$500,000
September 15, 2020 - \$500,000
September 15, 2021 - \$500,000
September 15, 2022 - \$500,000
September 15, 2023 - \$500,000
September 15, 2024 - \$500,000
September 15, 2025 - \$500,000
September 15, 2026 - \$500,000
September 15, 2027 - \$500,000