

**SOUTH DAKOTA BOARD OF REGENTS**

**Academic and Student Affairs**

**AGENDA ITEM: 7 – F**  
**DATE: August 3-5, 2021**

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**SUBJECT**

**Capital University Center Agreement**

**CONTROLLING STATUTE, RULE, OR POLICY**

[BOR Policy 5:3](#) – Agreements and Contracts

**BACKGROUND / DISCUSSION**

The Board of Regents has a long history of engagement with Capital University Center (“CUC”) in Pierre. At the Board’s [May 2017](#) meeting, it reviewed and discussed a detailed report regarding CUC and the pathway forward. One of the action items identified in that discussion was the need for a new agreement between the Board of Regents and the CUC Foundation Advisory Board.

Various iterations of models and approaches have been discussed between the parties since 2017. The proposed agreement set forth in Attachment I reflects the approach ultimately deemed to be the most prudent by CUC, Board staff and institutional representatives. In short, the proposed agreement wipes the slate clean and starts fresh, voiding and/or replacing any and all prior agreements and/or understanding between the parties.

The proposed agreement is structured to provide the necessary framework applicable to all offerings at or through CUC by our institutions, while also allowing flexibility at the institutional/CUC level to adjust offerings and tailor delivery to address the specific needs of CUC and its constituents. In that sense, the proposed agreement doesn’t commit our institutions to anything, it simply provides the structure under which they can operate at or through CUC, outlining the core responsibilities of CUC and those of the Board and/or it’s participating intuitions, with the details of the individual offerings, programming, etc. to be spelling out and attached as exhibits to the master agreement, which would be approved, priced, etc. in accordance with applicable BOR policy. The Board’s financial commitment is unchanged, and remains at \$84,768 annually, which is tied to an appropriation to the Board for such purposes, and in the event the appropriation ceases, the Board would have the ability to terminate the agreement without penalty.

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**DRAFT MOTION 20210803\_7-F:**

I move to authorize the Executive Director to finalize and execute the CUC Agreement in substantially similar form to Attachment I.

**IMPACT AND RECOMMENDATION**

The attached Agreement provides a flexible framework through which our institutions can provide offering at or through CUC, allowing both CUC and our institutions to adjust and respond to the changing market conditions in timely fashion.

Staff recommends approval.

**ATTACHMENTS**

Attachment I – Proposed CUC Agreement

## Memorandum of Agreement – Capital University Center (“CUC”) Operations

This Memorandum of Agreement (“AGREEMENT”) is by and between the South Dakota Board of Regents (“SDBOR”), as the Constitutional Governing Board for Black Hills State University, Dakota State University, Northern State University, South Dakota School of Mines and Technology, South Dakota State University and the University of South Dakota (collectively “SDBOR Institutions” and individually “SDBOR Institution”) and the Capital University Center Foundation, Inc. (“FOUNDATION”).

### PREMISES

WHEREAS, from 1982 until 2003, SDBOR contracted with Capital University Center, Inc., administered by FOUNDATION, to offer postsecondary education in central South Dakota; and

WHEREAS, SDBOR and FOUNDATION entered into a Memorandum of Agreement for a Merger on October 9, 2003, to merge Capital University Center, Inc. into SDBOR, attached hereto as “Exhibit A” and incorporated herein by this reference as if set forth in full; and

WHEREAS, prior to the Merger, in 1989, The University of South Dakota entered into a Memorandum of Agreement with Capital University Center, Inc. (“CUC”) attached hereto as “Exhibit B”, on or about August 11, 1989 to “... enhance educational opportunities for residents of central South Dakota...”

WHEREAS, since entering into the Merger, FOUNDATION serves as an independent, non-profit organization in support of CUC’s operations and offers non-credit, personal interest or personal development instruction; and

WHEREAS, since the Merger, SDBOR has administered and operated CUC via South Dakota State University, while offering credit-bearing postsecondary education through multiple SDBOR institutions; and

WHEREAS, in August 2009, FOUNDATION and SDBOR entered into a Lease Agreement (Lease) wherein FOUNDATION leased to SDBOR the Wallace R. Halverson Education Center and grounds for the purpose of “post-secondary classroom and administrative facilities and customarily associated activities” for an initial twenty-five (25) year term ending in December 2034, with the option to renew, attached hereto as “Exhibit C” and incorporated herein by this reference as if set forth in full; and

WHEREAS, FOUNDATION, SDBOR, and South Dakota State University entered into a Memorandum of Understanding (“MOU”) as a result of SDBOR action on April 1, 2015, with the intent of developing targeted resources and an administrative blueprint to stabilize CUC operations and make it self-sustaining, attached hereto as “Exhibit D” and incorporated herein by this reference as if set forth in full; and

WHEREAS, a report was presented to the SDBOR on May 9, 2017, in which the postsecondary education needs of central South Dakota were analyzed alongside the CUC's current ability to meet those needs and be financially viable, and recommendations were offered to potentially broaden the CUC mission to include student support, brokering of educational services, and facilitating a community approach to postsecondary education; and

WHEREAS, FOUNDATION and SDBOR, in keeping with the May 9, 2017 report, recognize the need to re-clarify their own, respective obligations established in the Merger and all other documents referenced herein regarding CUC operations, in order to position CUC for continued success into the future.

NOW, THEREFORE, in consideration of these premises, the following terms and conditions, and the mutual benefits to be received and valuable consideration, the receipt of which is acknowledged, FOUNDATION and SDBOR enter into the following AGREEMENT:

## **1. AGREEMENT**

- 1.1 Supersession. This AGREEMENT supersedes and replaces all of the documents expressly called out above, having the effect of making Exhibits A, B, C and D null and void or otherwise terminated pursuant to and upon the execution of this AGREEMENT.
- 1.2 Entire Agreement. There are no agreements, representations, or warranties between or among SDBOR and FOUNDATION, other than those set forth in, or authorized by, this AGREEMENT.
- 1.3 Funding. In consideration of the services and facilities provided by FOUNDATION and the agreements otherwise contained herein, SDBOR is supportive of the outreach efforts afforded by this AGREEMENT and shall be obligated for the annual payment of \$84,768 to FOUNDATION, which is to be paid in equal installments on the first day of each quarter, or as otherwise agreed by the parties. The parties acknowledge that a portion of this funding was explicitly authorized for the general purposes contained herein and that the continued appropriation of funding for the purposes set forth herein is critical to the continuance of this AGREEMENT.

## **2. TERM AND TERMINATION**

- 2.1 Effective Date. This AGREEMENT shall have an Effective Date of \_\_\_\_\_, 2021, or the day on which the last required signature to this AGREEMENT is obtained, whichever is later.
- 2.2 Initial Term. This AGREEMENT shall have an Initial Term of ten (10) years, beginning on the Effective Date.

2.3 Subsequent Terms and Auto-Renewal. This AGREEMENT shall automatically renew at the end of the above Initial Term for additional, Subsequent Terms of five (5) years, unless this AGREEMENT has otherwise been terminated in accordance with the terms hereof or in the event notice of non-renewal is given by either party at least 180 days prior to the expiration of the then current term.

2.4 Termination. This AGREEMENT may be terminated at any time upon mutual consent of the parties, or in the event either party notifies the other of its intent to terminate based on a breach of this AGREEMENT and the breach is not cured within ninety (90) days, or as set forth in Section 5.5 below. In the event this AGREEMENT is terminated for any reason, the parties understand and agree that certain teach out or other requirements associated with the cessation of the course or program offerings delivered at CCC by SDBOR Institutions may exist, and the parties will work in good faith to effectuate any necessary transition(s) or adjustment(s) associated therewith.

### **3. PERFORMANCE OF FOUNDATION**

#### **3.1 Facilities Maintenance, Repair, Operating Expenses**

3.1.1 FOUNDATION shall be solely responsible for all Capital University Center (dba Capital City Campus "CCC") facility and grounds maintenance, repair, improvement, and operating efforts and expenses, including utilities.

3.1.2 FOUNDATION shall be responsible for all maintenance, repair, and the cost of the replacement of furnishings and equipment located on the premises of the CCC, including without limitation, any IT infrastructure necessary in the classroom for remote or hybrid course delivery at or through the CCC. In the event SDBOR maintains title to any furnishings and instructional equipment at CCC pursuant to Article 3, Section 2 of the Lease, that has not been previously removed or disposed of and is currently in place at the time this AGREEMENT is executed, title to the same shall revert back to Foundation.

#### **3.2 Administrative Staffing, Employees**

3.2.1 FOUNDATION shall be responsible for hiring, compensating, and benefiting CCC's administrative and support staff, including any Director of the CUC, or equivalent functionary.

3.2.2 FOUNDATION agrees to the ceasing of operations of the CCC Bookstore and shall refer students for book purchases to the campus offering the course.

3.2.3 FOUNDATION agrees to develop in conjunction with SDBOR and SDBOR Institutions, policies regarding weather emergencies, building access and card services, room usage, snow removal and custodian services, food in the building at various locations including common areas and classrooms, etc.

3.3 Test Proctoring Services. FOUNDATION shall offer test proctoring services to SDBOR Institutions at CCC.

3.4 Promotional Services. FOUNDATION shall market and promote the course and/or programmatic offerings authorized at or through CCC pursuant to this AGREEMENT in a manner consistent with the authorizations and restrictions set forth herein.

#### 4 PERFORMANCE OF SDBOR

##### 4.1 Offering Educational Coursework.

- 4.1.1 SDBOR Institutions shall continue to offer general education courses at or through CCC dependent upon demand. Program offerings may be added or removed as appropriate based on the request of Foundation or SDBOR Institutions, in accordance with applicable BOR Policy (“Authorized Offerings”).
  - 4.1.1.1 The parameters and specifics pertaining to any Authorized Offerings provided by SDBOR Institutions at or through CCC shall be described, agreed to and set forth in separate delivery engagements, attached hereto as Exhibits E through Z, as applicable (“Delivery Engagements”).
  - 4.1.1.2 The Delivery Engagements shall be authorized pursuant to and are subject to the terms and conditions of this AGREEMENT.
  - 4.1.1.3 SDBOR shall establish the tuition rates for Authorized Offerings at or through CCC, which shall be reflected in the applicable Delivery Engagement.
  - 4.1.1.4 The funding provided by SDBOR to Foundation hereunder shall serve as the sole remuneration for the provision of Authorized Offerings by SDBOR Institutions at or through CCC. Except where expressly agreed to in a Delivery Engagement, as applicable, and approved by SDBOR, no SDBOR Institution shall be charged or expected to pay any additional fee or other compensation to FOUNDATION for the provision of Authorized Offerings at or through CCC.
  - 4.1.1.5 The FOUNDATION will provide faculty and administrative office space, as well as all classroom, laboratories, and classroom computer equipment necessary to deliver Authorized Offerings at or through CCC at no additional cost to SDBOR Institutions.

##### 4.2 Student Support Services.

- 4.2.1.1 The CCC will have onsite support staff to provide basic student support responses to general student inquiries and various other immediate onsite and facility related requests. All other student support services will be provided by the SDBOR Institution and program in which the student is enrolled.
- 4.2.1.2 SDBOR Institutions will be responsible for providing access to counseling services for their students at the CCC, which may be achieved through telehealth counseling or other remote services available through SDBOR

Institutions. Students will be expected to adhere to the Student Code of Conduct for the institution in which they are enrolled. Suspected violations will be reported to the home institution for further investigation, including enforcement and potential sanctions.

4.2.1.3 Information technology accounts and services will be provided by the students' home SDBOR Institution. All students will have access to wireless internet services and standard classroom technology supported by the CCC. The CCC will provide wireless connectivity assistance and event and classroom support. The CCC will control and manage the hardware and software available onsite, unless alternative arrangements are made and agreed to in writing by the CCC and the requesting SDBOR Institution. The students' SDBOR Institution will also provide technology support resources related to access to a 24x7 remote Help Desk, laptop checkout, and other personal computer support where applicable.

#### 4.3 Faculty.

- 4.3.1 SDBOR Institutions shall hire qualified faculty as defined by the Higher Learning Commission's Guidelines.
- 4.3.2 SDBOR Institution faculty teaching general education coursework and coursework as part of Authorized Offerings at CCC will fall under one of these categories: Full-time instructors employed by the SDBOR Institution, or Part-Time/Temporary instructors hired directly by the SD BOR Institution.
- 4.3.3 SDBOR Institution faculty will be administered, compensated, and evaluated with established SDBOR and SDBOR Institution policies.
- 4.3.4 CCC will provide and support wireless internet services and standard classroom technology for SDBOR Institution faculty. The CCC will control and manage the hardware and software available onsite, unless alternative arrangements are made and agreed to in writing by the CCC and the requesting SDBOR Institution.
- 4.3.5 Information technology accounts and services will be provided by the faculties' SDBOR Institution. The faculties' SDBOR Institution will also provide technology support resources through access to a 24x7 remote Help Desk and other personal computer support where applicable.

## 5 GENERAL PROVISIONS

### 5.1 Compliance.

- 5.1.1 SDBOR and FOUNDATION agree to be bound by applicable federal and state rules governing Equal Employment Opportunity and Non-Discrimination, and to similar SDBOR and SDBOR Institution policy requirements.
- 5.1.2 FOUNDATION shall be bound by all applicable federal, state, and local laws, rules, and regulations, as well as SDBOR policies, in the performance of its obligations hereunder.
- 5.1.3 FERPA. FOUNDATION, its agents, and its contractors shall also maintain the confidentiality of student records in accordance with the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g; 34 CFR Part 99) (“FERPA”). Confidential student records and information (“Student Information”) includes hard copy, and any other format or medium, student education record information and personally identifiable information contained therein as defined by FERPA. FOUNDATION agrees to abide by the limitations on re-disclosure of personally identifiable information from education records set forth by FERPA and with the terms set forth herein. 34 CFR 99.33(a)(2) states that the officers, employees and agents of a party that receives Student Information may use the information only for the purpose(s) for which the disclosure was made. FOUNDATION shall not use or disclose Student Information received from or on behalf of SDBOR/SDBOR Institutions (or its students) except as permitted or required by this AGREEMENT, as required by law, or as otherwise authorized in writing by SDBOR/SDBOR Institutions. FOUNDATION agrees not to use Student Information for any purpose other than the purpose for which the disclosure was made. Upon termination, cancellation, expiration or conclusion of this AGREEMENT, FOUNDATION shall return all Student Information to the SDBOR home institution(s) of each student, or, if return is not feasible, destroy all Student Information. FOUNDATION shall develop, implement, maintain and use appropriate administrative, technical and physical security measures to preserve the confidentiality, integrity and availability of all electronically maintained or transmitted Student Information received from, or on behalf of SDBOR/SDBOR Institutions or its students. These measures will be extended by agreement to all subcontractors used by FOUNDATION. FOUNDATION shall report to SDBOR/SDBOR Institutions any use or disclosure of Student Information not authorized by this AGREEMENT or in writing by SDBOR/SDBOR Institutions.
- 5.2 License. SDBOR hereby grants a general, non-exclusive, royalty free license to Foundation to use name(s) and associated logo(s) and trademark(s) of SDBOR and SDBOR Institutions (“SDBOR Marks”) in all activities conducted in association with or in furtherance of carrying out this AGREEMENT. Use of the SDBOR Marks must be in a manner that clearly identifies the parties as separate entities, and Foundation may not use the SDBOR Marks to imply approval or action of SDBOR or an SDBOR Institution. This license does not extend to any other names or marks held by SDBOR or SDBOR



Institutions, and prior written approval must be obtained before using any other names or marks of SDBOR or SDBOR Institutions.

- 5.2 Governing Law. The laws of the state of South Dakota shall govern the validity, performance and enforcement of this AGREEMENT.
- 5.3 Unenforceability. The unenforceability of any provision contained in this AGREEMENT shall not affect or impair the validity of any other provision of this AGREEMENT, and should any provision of this AGREEMENT be declared by a court of proper jurisdiction to be illegal or unenforceable, the remaining terms shall be construed and enforced as if the AGREEMENT did not contain the provision.
- 5.4 Relationship of Parties. Nothing contained herein shall be deemed or construed by anyone as creating the relationship of principal and agent or of partnership or of joint venture between SDBOR or an SDBOR Institution and FOUNDATION. SDBOR and FOUNDATION agree that their respective employees and agents are not agents or employees of the other party.
- 5.5 Funding Out. SDBOR and FOUNDATION acknowledge that, even despite best efforts put forth by SDBOR, legislative action, including the failure of the Legislature to appropriate funds, may require curtailment or termination of some or all of SDBOR programming and support, which in turn may impact the availability of the provision of services and support by SDBOR and/or SDBOR Institutions as anticipated under this AGREEMENT. SDBOR and FOUNDATION acknowledge further that they are obligated to respond to such legislative action and may determine that it is necessary in the public interest to curtail this AGREEMENT based on these considerations, and that accordingly, termination of this AGREEMENT in response to a failure of appropriations shall not be deemed a breach of this AGREEMENT.
- 5.6 Waiver. If SDBOR or FOUNDATION waives a breach of one of this AGREEMENT's provisions by the other party, that waiver shall not operate or be construed as a waiver of any other of this AGREEMENT's provisions or as a waiver of a subsequent similar breach.
- 5.7 Force Majeure. Whenever a period of time is herein provided for SDBOR or FOUNDATION to do or perform any act or thing, that party shall not be liable or responsible for any delays, and applicable periods for performance shall be extended accordingly, due to strikes, lockouts, riots, acts of God, pandemic disease, shortages of labor or materials, national emergency, acts of a public enemy, governmental restrictions, laws or regulations, or any other cause or causes, whether similar or dissimilar to those enumerated, beyond its reasonable control.
- 5.8 Amendment. This AGREEMENT may not be amended or revised without the written consent of SDBOR and FOUNDATION.

5.9 Assignment. This AGREEMENT may not be assigned by SDBOR or FOUNDATION without the written consent of the other.

5.10 Notice. Whenever under this lease provision is made for notice of any kind, such notice shall be in writing and shall be deemed sufficient if actually delivered to the SDBOR Office or FOUNDATION Office, or if sent by registered or certified mail, return receipt requested, postage prepaid, to the SDBOR or FOUNDATION Office at the below addresses.

IN WITNESS WHEREOF, the parties, by the signatures below, signify agreement to all of the terms and conditions described above, their complete reading and understanding of the same, and their signatories' authorization to act on their behalf to so lawfully bind their respective institutions to these terms and conditions.

**FOUNDATION**  
**Capital University Center Foundation**  
**925 E. Sioux Avenue**  
**Pierre, SD 57501**

**SDBOR**  
**S.D. Board of Regents**  
**306 E. Capitol Ave., Ste. 200**  
**Pierre, SD 57501**

By: \_\_\_\_\_  
(signature) (date)

By: \_\_\_\_\_  
(signature) (date)

Name: \_\_\_\_\_  
(print or type)

Brian Maher  
Executive Director & CEO, S.D. Board of Regents

Title: \_\_\_\_\_  
(print or type)