

SOUTH DAKOTA BOARD OF REGENTS

Budget and Finance
Consent

AGENDA ITEM: 5 – J
DATE: October 4-5, 2023

SUBJECT

Amendment to the SDSU Sanford-Jackrabbit Facility Use Agreement

CONTROLLING STATUTE, RULE, OR POLICY

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

BACKGROUND / DISCUSSION

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 for the exclusive right to provide sports medicine services to the University. Originally approved in August 2014, the Agreement was amended in [June 2017](#) to expand the permitted research and teaching-related activities in the Sanford Health Center for Excellence in Athletic Care and Sports Education Research at South Dakota State University.

South Dakota State University requests Board approval of the proposed amendments to the original Facility Operating and Use Agreement. The current amendments would:

- Extend the length of the Agreement. The Agreement term would be effective from its initial date of execution (November 19, 2015) through June 30, 2023, and thereafter automatically renew for one-year periods through June 30, 2036.
- Replace the existing Business Associates Agreement with updated language to ensure compliance with HIPAA privacy and security rules.
- Otherwise keep the terms and conditions of the Facility Use Agreement in full force and effect.

(Continued)

DRAFT MOTION 20231004_5-J:

I move to authorize South Dakota State University to finalize and execute the negotiated Amendment to the Sanford Jackrabbit Athletic Complex Facility Use Agreement in substantially similar form to that set forth in Attachment I.

IMPACT AND RECOMMENDATIONS

The proposed amendments would permit the SDSU SJAC to continue to offer sports medicine services, as well as the permitted research and teaching-related activities, for a period lasting through June 30, 2036. In addition, the updated language in the proposed Business Associates Agreement will ensure continued compliance with HIPAA privacy and security obligations. A draft of the proposed Amendment terms is attached.

Staff recommends approval.

ATTACHMENTS

Attachment I – Proposed Amendment to SDSU SJAC Facility Use Agreement

**AMENDMENT #1 TO FACILITY USE AGREEMENT
SANFORD HEALTH-JACKRABBIT ATHLETIC COMPLEX**

This first amendment to the Facility Use Agreement (the “Amendment”) is made this ___ day of October 2023 by and between South Dakota Board of Regents (“SDBOR”) for South Dakota State University, a public land grant university under the control and management of SDBOR (“University”) and Sanford Health (“Sanford”). SDBOR and Sanford may be referred to herein individually as a “Party” or collectively as the “Parties”.

WHEREAS, the Sanford-Jackrabbit Athletic Complex, authorized by chapter 83 of the 2013 Session Laws, included in its SDBOR approved Facility Design Plan dedicated sports medicine spaces;

WHEREAS Sanford and University entered into an “Facility Use Agreement” effective November 19, 2015 (the “Agreement”) pursuant to the "Exclusive Sports Medicine Agreement" of November 13, 2012, which was amended on June 21, 2017; all of which terms are incorporated herein reference; and

WHEREAS, the parties wish to update the length of the Agreement as well as update the incorporated Business Associates Agreement;

NOW THEREFORE for good and valuable consideration the parties agree as follows:

1. The terms and conditions of the Facility Use Agreement effective on November 19, 2015 are hereby agreed to in full except as otherwise amended by this Agreement.
2. Section I.c. of the Agreement shall be deleted in its entirety and replace with the following: “Term: This Agreement is effective for an initial term from the date of execution through June 30, 2023 and thereafter automatically renews for one (1) year periods through June 30, 2036, unless terminated with sixty (60) days written notice of a Party.
3. Exhibit D to the Amended and Restated Facility Use Agreement effective November 19, 2015 is hereby replaced in full by the new Exhibit D attached to this document and incorporated herein by this reference.
4. All other terms and conditions of the Agreement shall remain in full force and effect.

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

SOUTH DAKOTA BOARD OF REGENTS

SANFORD HEALTH

Signature_____

Title_____

Date:_____

Signature_____

Title_____

Date_____

SOUTH DAKOTA STATE UNIVERSITY

Signature_____

Title_____

Date:_____

DRAFT

Appendix D
Business Associate Agreement

This Business Associate Agreement (this “BAA”) is made as of the Effective Date of the Agreement which it is attached and made a part thereof. This BAA is made by and between Sanford Health, on behalf itself, its subsidiaries, affiliates, and all parties set forth in the Underlying Agreement (defined below), (the “Covered Entity”), and South Dakota Board of Regents for South Dakota State University (the “Business Associate”) (individually, a “Party” and collectively, the “Parties”).

RECITALS

1. Business Associate has agreed to provide its services under the Agreement to which this is attached (“Underlying Agreement”) on behalf of Covered Entity; and
2. The Parties now wish to enter into this BAA to ensure compliance with the Privacy and Security Rules of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA Privacy and Security Rules”) (45 C.F.R. Parts 160 and 164); the Health Information Technology for Economic and Clinical Health Act (“HITECH”) of the American Recovery and Reinvestment Act of 2009 (“ARRA”), Pub. L. 111-5, modified the HIPAA Privacy and Security Rules (hereinafter, all references to the “HIPAA Privacy and Security Rules” include all amendments thereto set forth in the HITECH and any accompanying regulations); and
3. Business Associate and Covered Entity wish to comply with the HIPAA Privacy and Security Rules and Business Associate wishes to honor its obligations as a Business Associate to Covered Entity.
4. Except as otherwise defined herein, any and all capitalized terms in this BAA shall have the definitions set forth in the HIPAA Privacy and Security Rules as interpreted under applicable regulations and guidance of general application published by The Department of Health and Human Services (“HHS”).

In consideration of the Parties’ new or continuing obligations under the Underlying Agreements, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree to the provisions of this BAA.

AGREEMENT

I. PERMITTED USES AND DISCLOSURES BY BUSINESS ASSOCIATE

1. Permitted Uses and Disclosures. Business Associate may use or disclose Protected Health Information (“PHI”) to perform the services described in the Underlying Agreement and any other functions, activities, or services for, or on behalf of, Covered Entity as described in this BAA or Underlying Agreement, provided that such use or disclosure would not violate the HIPAA Privacy and Security Rules if done by Covered Entity.
2. Use for Proper Management & Administration. Business Associate may use PHI in its possession for its proper management and administration and to fulfill any present or future legal responsibilities of Business Associate, provided that such uses are permitted under state and federal laws including HIPAA Privacy and Security Rules.
3. Disclosure to Third Parties. Business Associate may disclose PHI in its possession to third parties for the purposes of its proper management and administration or to fulfill any present or future legal responsibilities of Business Associate, provided that:

- a. the disclosures are required or permitted by law; and
 - b. Business Associate obtains reasonable assurances from the third parties to whom the PHI is disclosed that the information will remain confidential and only be used or further disclosed as described under this BAA or as required by law and that such third parties will promptly notify Business Associate of any instances of which they are aware in which the confidentiality of the information has been breached.
4. Data Aggregation. Business Associate may use PHI to provide Data Aggregation services to Covered Entity relating to its health care operations.

II. BUSINESS ASSOCIATE'S MITIGATION AND BREACH NOTIFICATION OBLIGATIONS

1. Mitigation. Business Associate agrees to mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of PHI by Business Associate in violation of the requirements of this BAA.
2. Notification of Breach. Following the discovery of a Breach, Business Associate shall promptly notify Covered Entity of such Breach without unreasonable delay and in no case later than three (3) calendar days after discovery of the Breach, and shall assist in Covered Entity's breach analysis process, including risk assessment, if requested. The Breach notification shall be provided to Covered Entity in the manner specified in 45 C.F.R. § 164.404(c) and shall include the information set forth therein to the extent known.
3. Notification of Security Incident. Business Associate will promptly, but in no case greater than three (3) calendar days after discovery, report to Covered Entity any Security Incident that does not rise to the level of a Breach of PHI, or any use or disclosure of PHI that is not provided for by this BAA but that does not rise to the level of a Breach, of which Business Associate becomes aware, with such report including at least the following information:
 - a. the identity of each individual whose information was accessed, acquired or disclosed during the improper use or disclosure;
 - b. a brief description of what happened, including the date of the breach;
 - c. the date of discovery of the Security Incident or other improper use or disclosure;
 - d. the nature of the PHI that was involved (e.g., social security numbers, date of birth, etc.);
 - e. any steps individuals should take to protect themselves from potential harm resulting from the Security Incident or other improper use or disclosure; and
 - f. a brief description of what the Business Associate is doing to investigate the Security Incident or other improper use or disclosure, to mitigate harm to individuals, and to protect against any further incidents.

Notwithstanding the foregoing, this BAA serves as Business Associate's notice to Covered Entity that attempted but unsuccessful Security Incidents, including pings and other broadcast attacks on a firewall, denial of service attacks, port scans, unsuccessful login attempts, or interception of encrypted information where the key is not compromised, or any combination of the above, regularly occur and that no further notice will be made by Business Associate so long as no such Security Incident results in the defeat or circumvention of any security control, or in the unauthorized access, use or disclosure of Covered Entity's PHI.

4. Discovery. A Breach, Security Incident, or other use or disclosure of PHI that is not provided for by this BAA shall be treated as discovered by Business Associate as of the first day on which such improper occurrence is known to Business Associate or, through the exercise of reasonable diligence, would have been known to Business Associate.
5. On-Going Notification. If, following a notification required under this section, Business Associate learns additional details about the improper occurrence, Business Associate shall notify Covered Entity promptly as such information becomes available. Business Associate shall provide any additional information reasonably requested by Covered Entity for purposes of investigating any Breach, Security Incident, or other improper use or disclosure and any other available information that Covered Entity is required to include in its notice to the individual under 45 C.F.R. § 164.404(c).
6. Breach Notification. Covered Entity shall determine whether Business Associate or Covered Entity will be responsible for providing notification of any Breach to affected individuals, the media, the Secretary, and/or any other parties required to be notified under the HIPAA Privacy and Security Rules or other applicable state or federal law. If Covered Entity determines that Business Associate will be responsible for providing such notification, Business Associate may not carry out notification until Covered Entity approves the proposed plan for notification and the content of the proposed notices in writing.
7. Cost of Notification. Business Associate shall bear all of Covered Entity's costs of any Breach and resultant notifications, if applicable, when the Breach, Security Incident or improper use or disclosure arises from any of Business Associate's actions or inactions.

III. OTHER OBLIGATIONS AND ACTIVITIES OF BUSINESS ASSOCIATE

1. Nondisclosure. Business Associate agrees not to use or further disclose Protected Health Information ("PHI") other than as permitted or required by this BAA or as required by law.
2. Safeguards. Business Associate agrees to use appropriate safeguards, and to comply, where applicable, with 45 C.F.R. Part 164, Subpart C with respect to Electronic Protected Health Information ("ePHI"), to prevent use or disclosure of PHI other than as provided for by this BAA. Specifically, Business Associate will:
 - a. implement the administrative, physical and technical safeguards set forth in 45 C.F.R §§ 164.308, 164.310, and 164.312 that reasonably and appropriately protect the confidentiality, integrity, and availability of any PHI that Business Associate creates, receives, maintains, or transmits on behalf of Covered Entity, and
 - b. implement and maintain reasonable and appropriate policies and procedures in accordance with 45 C.F.R. § 164.316.
3. Business Associate Agents. Business Associate shall contractually require each subcontractor that creates, receives, maintains, or transmits PHI on its behalf to agree to adhere to the same or substantially similar restrictions on access, use, and disclosure of PHI as those applicable to Business Associate under this BAA.
4. Restrictions on Disclosures. Business Associate agrees to comply with any requests for restrictions on certain disclosures of PHI to which Covered Entity has agreed in accordance with 45 C.F.R. § 164.522 of which Business Associate has been notified by Covered Entity.
5. Designated Record Sets. If Business Associate maintains a designated record set on behalf of Covered Entity at the request of Covered Entity and in a reasonable time and manner:

- a. but in no event later than ten (10) calendar days following Covered Entity's request, Business Associate agrees to make available PHI required for Covered Entity to respond to an individual's request for access to his or her PHI in accordance with 45 C.F.R. § 164.524. If Business Associate maintains PHI in an electronic designated record set, it agrees to make such PHI available electronically to Covered Entity or, upon Covered Entity's specific request, to the individual requesting it.
 - b. Business Associate agrees to make available PHI required for amendment by Covered Entity and shall make any amendment(s) to PHI that the Covered Entity directs or agrees to in accordance with the requirements of 45 C.F.R. § 164.526.
6. Accounting of Disclosures. Business Associate agrees to document any disclosures of PHI and information related to such disclosures as would be required for Covered Entity to respond to a request by an individual for purposes of accounting of disclosures, as required by 45 C.F.R. § 164.528. Business Associate shall provide to Covered Entity or an individual, in the time and manner designated by Covered Entity, information collected in accordance with this Section to permit Covered Entity to respond to a request by an individual for such account of disclosures. Except in the case of a direct request from an individual for an accounting related to treatment, payment, or operations disclosures, if the request for an accounting is delivered directly to Business Associate, such request will be provided to Covered Entity promptly upon receipt. Covered Entity shall either request that Business Associate provide such information directly to the individual, or it shall request that the information be promptly forwarded to Covered Entity for compilation and distribution to such individual.
7. Privacy of Individually Identifiable Health Information. If Business Associate is to carry out one or more of Covered Entity's obligations under 45 C.F.R. Part 164, Subpart E, Business Associate shall comply with the requirements of Subpart E that apply to Covered Entity in the performance of such obligation(s).
8. Audit by Secretary. Pursuant to 45 C.F.R. § 160.310, Business Associate agrees that it will make its internal practices, books, and records relating to the use and disclosure of PHI received from, or created or received by Business Associate on behalf of, Covered Entity, available to the Secretary, in a time and manner designated by the Secretary, to enable the Secretary to investigate, review, and/or determine Business Associate's or Covered Entity's compliance with the HIPAA Privacy and Security Rules.
9. Restrictions on Use. Unless expressly authorized in this BAA or Underlying Agreement, Business Associate shall not:
 - a. use PHI for marketing or fundraising;
 - b. use PHI to create a limited data set or to de-identify the information; or
 - c. use or disclose PHI in exchange for remuneration of any kind, whether directly or indirectly, financial or non-financial, other than such remuneration Business Associate receives from Covered Entity in exchange for Business Associate's provision of the services specified in the Underlying Agreement.
10. Assistance in Litigation or Administrative Proceedings. Business Associate shall make itself, and any subcontractors, employees or agents assisting Business Associate in the performance of its obligations under this BAA, available to Covered Entity, at no cost to Covered Entity, to testify as witnesses, or otherwise, in the event of litigation or administrative proceedings being commenced against Covered Entity, its directors, officers or employees based upon claimed violation of the HIPAA Privacy and Security Rules.
11. Privacy and Security Assessments. From time to time upon reasonable notice, Business Associate shall participate in security assessments conducted by Covered Entity or its contractors to assess whether

the systems used by Business Associate to store or transmit PHI comply with the privacy and security standards adopted by Covered Entity, as well as the privacy and security standards required under federal and state law.

IV. OBLIGATIONS OF COVERED ENTITY

1. Notice of Privacy Practices. Upon request of Business Associate, Covered Entity shall provide Business Associate with the notice of privacy practices that Covered Entity produces in compliance with 45 C.F.R. § 164.520.
2. Changes in Permission. Covered Entity shall provide Business Associate with any changes in, or revocation of, permission by an individual to use or disclose PHI, if such changes or revocation could reasonably be expected to affect Business Associate's permitted or required uses and disclosures.
3. Restrictions on Use or Disclosure. Covered Entity shall notify Business Associate of any restriction on the use or disclosure of PHI to which Covered Entity has agreed in accordance with 45 C.F.R. § 164.522. Covered Entity shall not request Business Associate to use or disclose PHI in any manner that would not be permissible under the HIPAA Privacy and Security Rules if done by Covered Entity.

V. TERM AND TERMINATION

1. Term. This BAA shall be effective as of the Effective Date, and shall terminate in accordance with Section V and when all of the PHI provided by Covered Entity to Business Associate or created or received by Business Associate on behalf of Covered Entity is returned to Covered Entity or destroyed (and a certificate of destruction is provided) or, if such return or destruction is infeasible, or by order of Court, when protections are extended to such information.
2. Termination for Cause. Except as otherwise set forth in Section VI.1., upon either Party's knowledge of a material breach by the other Party of its obligations under this BAA, the non-breaching Party shall, notify the breaching Party, and the breaching Party shall have thirty (30) calendar days from receipt of that notice to cure the breach or end the violation. If the breaching Party fails, at the non-breaching Party's discretion, to cure the breach or take reasonable steps to effect such a cure within such time period, the non-breaching Party may terminate this BAA without penalty. Where the Covered Entity has knowledge of a material breach by the Business Associate and reasonably determines that cure is infeasible, prior notice is not required and the Covered Entity may immediately terminate this BAA without penalty.
3. Effect of Termination.
 - a. Except as provided in paragraph b. of this subsection 3 (below), upon termination of this BAA or upon request of Covered Entity, whichever occurs first, Business Associate shall within ten (10) calendar days return or destroy all PHI received from Covered Entity or created or received by Business Associate on behalf of Covered Entity. This provision shall apply to PHI that is in the possession of subcontractors of Business Associate. Neither Business Associate nor its subcontractors shall retain copies of the PHI except as required by law.
 - b. If Business Associate determines that returning or destroying the PHI is infeasible, Business Associate shall provide within ten (10) calendar days of notice of termination to Covered Entity notification of the conditions that make return or destruction infeasible. Upon mutual agreement of the Parties that return or destruction of PHI is infeasible, Business Associate, and its applicable subcontractors, shall extend the protections of this

BAA to retained PHI and limit further uses and disclosures of such PHI to those purposes that make the return or destruction infeasible, for so long as Business Associate and its applicable subcontractors maintain such PHI.

VI. MISCELLANEOUS

1. Amendment. The Parties agree that this BAA will be amended automatically to conform to any changes in the HIPAA Privacy and Security Rules as are necessary for each of them to comply with the current requirements of the HIPAA Privacy and Security Rules, unless a particular statutory or regulatory provision requires that the terms of this BAA be amended to reflect any such change. In those instances where an amendment to this BAA is required by law, the Parties shall negotiate in good faith to amend the terms of this BAA within sixty (60) calendar days of the effective date of the law or final rule requiring the amendment. If, following such period of good faith negotiations, the Parties cannot agree upon an amendment to implement the requirements of said law or final rule, then either Party may terminate this BAA upon ten (10) calendar days written notice to the other Party. Except as provided above, this BAA may be amended or modified only in a writing signed by the Parties.
2. No Rights in Third Parties. Except as expressly stated herein or in the HIPAA Privacy and Security Rules, the Parties to this BAA do not intend to create any rights in any third parties.
3. Survival. The obligations of Business Associate shall survive the expiration or termination of this BAA, and/or the business relationship of the Parties, and shall continue to bind Business Associate, its agents, employees, contractors, successors, and assigns to the extent that PHI is retained pursuant to Section V.3.b. Furthermore, the Parties' indemnification obligations pursuant to Section VI.11. of this BAA shall survive the expiration or termination of this BAA, and shall continue to bind the Parties, their agents, employees, contractors, successors, and assigns.
4. Interpretation. Any ambiguity of this BAA shall be resolved in favor of a meaning that permits Covered Entity and Business Associate to comply with the HIPAA Privacy and Security Rules. In the event of an inconsistency between the provisions of this BAA and mandatory provisions of the HIPAA Privacy and Security Rules, the HIPAA Privacy and Security Rules in effect at the time shall control. Where provisions or permitted uses of this BAA are different than those mandated by the HIPAA Privacy and Security Rules but are nonetheless permitted by the HIPAA Privacy and Security Rules, the provisions of this BAA shall control. Covered Entity's and Business Associate's counsel have reviewed or have had an opportunity to review this BAA and the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting Party will not be employed in the interpretation of this BAA.
5. Severability. If any provision of this BAA is held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of the provisions of this BAA will remain in full force and effect.
6. Headings. The headings of the several sections of this BAA are inserted only as a matter of convenience and for reference, and they in no way define, limit, or describe the scope or intent of any provision of this BAA, nor shall they be construed to affect, in any manner, the terms and provisions hereof or the interpretation or construction thereof.
7. Assignment. Neither Party may assign its respective rights and obligations under this BAA without the prior written consent of the other Party.
8. Independent Contractor. None of the provisions of this BAA are intended to create, nor will they be deemed to create, any relationship between the Parties other than that of independent parties contracting with each other solely for the purposes of effecting the provisions of this BAA and any

other agreements between the Parties evidencing their business relationship. Nothing in this BAA creates or is intended to create an agency relationship.

9. Governing Law. To the extent this BAA is not governed exclusively by the HIPAA Privacy and Security Rules or other provisions of federal statutory or regulatory law, it will be governed by and construed in accordance with the laws of the state of South Dakota.
10. Notice. Any notification required in this BAA shall be made in writing to the address set forth in the Underlying Agreement and sent via email to privacyoffice@sanfordhealth.org.
11. Indemnification. To the extent allowed by applicable law, each Party shall indemnify and hold the other harmless from and against all claims, liabilities, judgments, fines, assessments, penalties, awards, or other expenses, of any kind or nature whatsoever, including, without limitations, attorneys' fees, expert witness fees, and costs of investigation, litigation or dispute resolution, relating to or arising out of any breach of this BAA, or any Breach, by that Party or its subcontractors or agents.
12. Insurance. Business Associate shall procure and maintain such policies as set forth in the Underlying Agreement.
13. Exclusion from Limited Liability. To the extent Business Associate has limited its liability under the terms of the Underlying Agreement, whether with a maximum recovery for direct damages or a disclaimer against any consequential, indirect or punitive damages, or other such limitations, such limitation shall not apply to the extent they arise from Business Associate's breach of this BAA, or any Breach, by that Party or its subcontractors or agents. This subsection shall survive termination or expiration of this BAA.
14. Entire Agreement. This BAA constitutes the entire understanding of the Parties with respect to the subject matter hereof and supersedes all prior agreements, oral or written. In the event of any inconsistency between this BAA and any other agreement between the Parties concerning the use and disclosure of PHI and the Parties' obligations with respect thereto, the terms of this BAA shall control.