

REQUEST FOR STATE BOARD WAIVER

THIS IS A PUBLIC DOCUMENT

Date: May 15, 2017

Name of Board Member or Former Board Member: Lori Wagner

Name of Board, Authority or Commission: South Dakota Board of Education

Brief explanation of your potential conflict of interest:

*I am employed by the E-Learning Center at Northern State University (NSU) as a master teacher of mathematics, in addition to my service on the state Board of Education. NSU has entered into a contract with the Department of Education, Division of Learning and Instruction, which potentially falls within the subject matter of the Board of Education (distance learning and virtual schools) and is administered by the E-Learning Center.*

Brief explanation of the current or anticipated business transaction with a State agency or with a political subdivision of the State and your role in the transaction:

*The contract is between my employer and the state agency with which the Board of Education is associated. The agreement provides that NSU and the E-Learning Center will manage virtual school college readiness coursework and monitor the coursework network (My Foundation Lab). As a teacher for the E-Learning Center, my role is to teach high school mathematics for schools without teachers in that content area. I do not manage college readiness coursework through the My Foundation Lab program and so do not play a direct role in performing NSU's obligations under this contract.*

Brief explanation of the essential terms of the contract or transaction:

*A copy of the contract is attached as Exhibit A. The agreement provides that NSU will manage the virtual school college readiness coursework and monitor the coursework network. The contract amount does not exceed \$50,000.*

Brief explanation of why you believe a waiver should be granted:

*In my position with the E-Learning Center, I do not approve of or administer contracts between NSU and other entities. In addition, this contract's term began prior to my appointment with the Board of Education. The Board of Education also does not award or administer contracts on behalf of the Department of Education. The services provided under the contract serve the public interest, as they provide increased learning opportunities to South Dakota students.*

Signature of Person Requesting Waiver: \_\_\_\_\_

*Lori J. Wagner*

DEPARTMENT OF EDUCATION  
STATE OF SOUTH DAKOTA  
LETTER OF AGREEMENT  
FOR CONSULTANT SERVICES BETWEEN

Northern State University  
1200 S. Jay Street  
Aberdeen, SD 57401

Division of Learning and Instruction  
South Dakota Department of Education  
800 Governors Drive  
Pierre, SD 57501-2294

Hereinafter referred to as Consultant

Hereinafter referred to as State

The State hereby enters into this Agreement for services with Consultant in consideration of and pursuant to the terms and conditions set forth herein.

1. The Consultant agrees to:

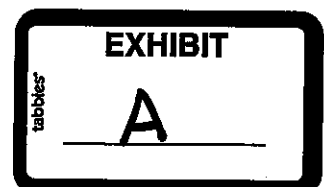
**Objective 1: Manage the Virtual School College Readiness Coursework**

- a) Provide access to online college ready coursework (My Foundation Lab) in mathematics, sentence skills, and reading.
- b) Manage the enrollment and payment for the courses.
- c) Provide a highly qualified teacher to monitor students' progress and provide additional support if needed.
- d) Contact the student's home district principal and/or school counselor to provide student progress updates at least two times a semester.
- e) Provide the student's home district principal and/or school counselor the final grade if the student is taking the coursework for elective credit.
- f) Provide payment to each teacher on a per student basis for course delivery (\$56 per student). Reward each teacher for each student that completes the program (\$56 per student that completes a course and takes the placement exam).
- g) Reimburse individual student or the district based on how the payment for the course was made after completion of the course.
- h) Submit a report to the State which includes the names, type of enrollment, ACT scores, and district for each student enrolling into the college ready coursework by the tenth of every month. Include an updated overview that shares the current number of: registrations, incompletes/withdrawals, placement assessment taken, placement assessments passed.
- i) Submit a final summary report to the State by July 16, 2017. Include by district the number of: registrations, incompletes/withdrawals, placement assessment taken, placement assessments passed, and other data as requested by the State.

**Objective 2: Monitor the Learning Management System and the MyFoundationsLab coursework provided by Pearson.**

- a) Provide to the State written recommendations and plan on how to improve the success rate of students completing the coursework no later than March 1, 2017.

2. The Consultant's services under this Agreement shall commence on July 22, 2016 and end on July 18, 2017, unless sooner terminated pursuant to the terms hereof.



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NSU is an agency of the State of South Dakota covered by PEPL fund.

3. ~~The Consultant agrees, at its sole cost and expense, to maintain the appropriate insurance required by the State during the period of this agreement.~~ 70311017

4. The State will make payment for services upon satisfactory completion of the services. The TOTAL CONTRACT AMOUNT is an amount not to exceed \$50,000.00. Payment for objective one will be made on monthly basis after an invoice is submitted if expenses are incurred at the rate of \$125.00 for a 10-week course, \$150.00 for 6-month course, and \$175.00 for 12-month course, per student that takes the placement exam. Payment for objective one will also include administrative costs of \$125 per student that enrolls in and completes each course. Payment for objective two will be made in a lump sum of \$1,000.00 upon receipt of the report, detailing the recommendations, timeline, and budget. The State's total liability for all services, including expenses, is limited to this total contract amount. This amount may only be increased upon the written agreement of Consultant and the State, and such agreement must specifically reference this paragraph.

5. The State will not pay Consultant's expenses as a separate item.

6. Any notice or other communication required under this Agreement shall be in writing and sent to the address set forth above. Notices shall be given by and to Becky Nelson, on behalf of the State, and by Mary Cundy on behalf of the Consultant, or such authorized designees as either party may from time to time designate in writing. Notices or communications to or between the parties shall be deemed to have been delivered when mailed by first class mail, provided that notice of default or termination shall be sent by registered or certified mail, or if personally delivered, when received by such party.

7. The Consultant is an agency performing professional services under SDCL § 5-18D-21(8).

8. Nothing in this Agreement shall be construed as an indemnification by one party or the other for liabilities of a party or third persons, arising out of and during this Agreement. Liability for actions from the conduct or omissions of the parties, their employees, agents, contractors, assigns or third persons, arising out of and during this Agreement shall be determined according to applicable law, subject to all available defenses and immunities.

9. Consultant agrees to report to the State any event encountered in the course of performance of this Agreement which results in injury to the person or property of third parties, or which may otherwise subject Consultant or the State to liability. Consultant shall report any such event to the State immediately upon discovery. Consultant's obligation under this paragraph shall only be to report the occurrence of any event to the State and to make any other report provided for by Consultant's duties or applicable law. Consultant's obligation to report shall not require disclosure of any information subject to privilege or confidentiality under law (e.g., attorney-client communications). Reporting to the State under this paragraph shall not excuse or satisfy any obligation of Consultant to report any event to law enforcement or other entities under the requirements of any applicable law.

10. The Consultant will comply with all federal, state and local laws, regulations, ordinances, guidelines, permits and requirements applicable to providing services pursuant to this Agreement, and will be solely responsible for obtaining current information on such requirements.

11. The Consultant may not use subcontractors to perform the services described herein without the express prior written consent of the State. The Consultant is solely responsible for the performance of any subcontractor. The Consultant will include provisions in its subcontracts requiring its subcontractors to comply with the applicable provisions of this Agreement, to indemnify the State, and to provide insurance coverage for the benefit of the State in a manner consistent with this Agreement. The Consultant will cause its subcontractors, agents, and employees to comply with applicable federal, state and local laws, regulations, ordinances, guidelines, permits and requirements and will adopt such review and inspection procedures as are necessary to assure such compliance.

**12.** This Agreement may not be assigned without the express prior written consent of the State. An assignment may not operate to relieve Consultant of any of its duties and obligations under this Agreement, nor may such assignment affect any remedies available to the State that may arise from any breach of the provisions of the Agreement, including but not limited to rights of setoff. Any attempted assignment, transfer or delegation in contravention of this paragraph shall be null and void. This Agreement shall inure to the benefit of and be binding on the parties hereto and their permitted successors and assigns.

**13.** The Consultant hereby acknowledges and agrees that all reports, plans, specifications, technical data, miscellaneous drawings, software system programs and documentation, procedures, or files, operating instructions and procedures, source code(s) and documentation, including those necessary to upgrade and maintain any software program, and all information contained therein provided to the State by the Consultant in connection with its performance of services under this Agreement shall belong to and is the property of the State and will not be used in any way by the Consultant without the written consent of the State. Papers, reports, forms, software programs, source code(s) and other material which are a part of the work under this Agreement will not be copyrighted without written approval of the State.

**14.** The Consultant certifies that neither Consultant nor its principals are presently debarred, suspended, proposed for debarment or suspension, or declared ineligible from participating in transactions by the federal government or any state or local government department or agency. The Consultant further agrees that it will immediately notify the State if during the term of this Agreement Consultant or its principals become subject to debarment, suspension or ineligibility from participating in transactions by the federal government, or by any state or local government department or agency. The Consultant further certifies that neither it nor its principals have, within a three (3) year period preceding the awarding of this Agreement, been convicted of or had a civil judgment rendered against it for commission of fraud or been convicted of a criminal offense in connection with obtaining, attempting to obtain, or performing a federal, state, or local transaction or contract or been convicted of a violation of federal or state antitrust statutes, embezzlement, theft, forgery, bribery, falsifications, destruction of records, making false statements, or receiving stolen property. Consultant further certifies that neither it nor its principals have, within a three (3) year period preceding this contract, had a federal, state, or local transaction terminated for cause or default.

**15.** The Consultant warrants that no relevant action is pending against the Consultant in any court or administrative agency the outcome of which could materially interfere with the Consultant's ability to perform the Consultant's obligations hereunder.

**16.** The award of this Agreement to Consultant is not in any way an endorsement of Consultant or Consultant's services by the State and may not be so represented by Consultant in any advertising or publicity materials. Consultant agrees to submit to the State all advertising, sales promotion, and other publicity relating to this Agreement wherein the State's name is mentioned or language is used from which the connection of the State's name therewith may, in the State's judgment, be inferred or implied. Consultant further agrees not to publish or use such advertising, sales promotion, or publicity without the prior written consent of the State. Consultant may not in any way contract on behalf of or in the name of the State, nor may Consultant release any informational pamphlets, notices, press releases, research reports, or similar public notices concerning this Agreement without obtaining the prior written approval of the State.

**17.** Payment will be made pursuant to itemized invoices submitted with a signed state voucher. Each invoice must reference the Agreement number and provide detailed information in a format as requested by the State. Payment will be made consistent with SDCL Ch. 5-26. Consultant acknowledges that it would be difficult or impracticable for the State to provide the notice of disagreement provided for by SDCL 5-26-5 within the ten days provided by that section. Accordingly, Consultant hereby waives the application of that section to this Agreement.

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18. The payment of any invoice by the State will not prejudice the State's right to object to or question that or any other invoice or matter in relation thereto. The Consultant shall promptly, but in all cases within thirty days of notification, pay to the State the full amount of any erroneous payment or overpayment upon notice of an erroneous payment or overpayment to which Consultant is not entitled. ~~If Consultant fails to make such a timely refund, the State shall charge Consultant one percent (1%) per month on the amount due until paid in full.~~ 7/3/10/17

19. The State is a sovereign entity, and shall not be liable for the payment of federal, state and local sales, use and excise taxes, including any interest and penalties from any related deficiency, which may become due and payable as a consequence of this Agreement.

20. Amounts due to the State by Consultant, including but not limited to damages, or claims for damages, may be deducted or set-off by the State from any money payable to Consultant pursuant to this Agreement.

21. Consultant shall maintain documentation for all work performed or money received under this Agreement for a period of five (5) full years following completion of this Agreement. This documentation may be subject to audit, at any reasonable time and upon reasonable notice, by State or federal authorities.

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22. Claims for payment must be submitted on an invoice within forty-five (45) days of the date upon which the Consultant knew or should have known of the claim or forty-five (45) days after the termination or expiration of this Agreement, whichever is earlier. If an invoice cannot be submitted within forty-five days, ~~then written notice and an explanation of need must be provided to the State for consideration of an extension, which shall be in the sole discretion of the State. Failure of the Consultant to abide by this paragraph shall relieve the State of any obligation to pay for such claim.~~ a revised due date will be established by mutual consent of the Consultant and the State.

23. This Agreement may be terminated by either party hereto upon thirty (30) days written notice. In the event the Consultant breaches any of the terms or conditions hereof, this Agreement may be terminated by the State at any time with or without notice. If termination for such a default is effected by the State, any payments due to Consultant at the time of termination may be adjusted to cover any additional costs to the State because of Consultant's default. Upon termination the State may take over the work and may award another party an agreement to complete the work under this Agreement. If after the State terminates for a default by Consultant it is determined that Consultant was not at fault, then the Consultant shall be paid for eligible services rendered and expenses incurred up to the date of termination.

24. This Agreement depends upon the continued availability of appropriated funds and expenditure authority from the Legislature for this purpose. If for any reason the Legislature fails to appropriate funds or grant expenditure authority, or funds become unavailable by operation of law or federal funds reductions, this Agreement will be terminated by the State. Termination for any of these reasons is not a default by the State nor does it give rise to a claim against the State.

25. This Agreement shall be governed by and construed in accordance with the laws of the State of South Dakota. Any lawsuit pertaining to or affecting this Agreement shall be venued in Circuit Court, Sixth Judicial Circuit, Hughes County, South Dakota.

26. All other prior discussions, communications and representations concerning the subject matter of this Agreement are superseded by the terms of this Agreement, and except as specifically provided herein, this Agreement constitutes the entire agreement with respect to the subject matter hereof.

27. This agreement may not be amended except in writing, which writing shall be expressly identified as a part hereof, and be signed by an authorized representative of each of the parties hereto.

28. In the event that any court of competent jurisdiction shall hold any provision of this Agreement unenforceable or invalid, such holding shall not invalidate or render unenforceable any other provision hereof.

29. No remedy conferred by any of the specific provisions of the Agreement is intended to be exclusive of any other remedy, and each and every remedy may be cumulative and may be in addition to every other remedy given under this agreement, not and hereafter existing at law or in equity or by statute or otherwise. The election of any one or more remedies by either party shall not constitute a waiver of the right to pursue other available remedies.

30. Except as otherwise specifically provided herein, any failure or delay by either party to exercise or partially exercise any right, power or privilege under this Agreement may not be deemed a waiver of any such right, power, or privilege under this Agreement. Any waivers granted by the State for breaches hereof shall not indicate a course of dealing of excusing other or subsequent breaches. The State's pursuit or non-pursuit of a remedy under this Agreement for Vendor's breach of its obligations will neither constitute a waiver of any such remedies or any other remedy that the State may have at law or equity for any other occurrence of the same or similar breach, nor prevent the State from pursuing such remedy.

31. The parties expressly agree that no provision of this Agreement is in any way intended to constitute a waiver by the State of any immunities from suit or from liability that the State may have by operation of law.

This Agreement is intended to govern only the rights and interest of the parties named herein. It is not intended to, does not and may not be relied upon to create any rights, substantial or procedural, enforceable at law by any third party in any matters, civil or criminal.

In witness hereto the parties signify their agreement by signature affixed below:

Veronica Paulson                      2/28/17  
Consultant Signature                      (Date)

[Signature]                                      1/18/17  
Authorized State Representative                      (Date)  
Department of Education

State Agency Coding: (Center/Company/Account)  
State Agency contact who can provide additional  
information regarding this contract:

1232910/1000/520414000

Becky Nelson 605-773-4681