

DEC 15 2023

Shirley A. Johnson-Leged
Clerk

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

) #30488
)
IN RE: THE REQUEST OF KRISTI)
NOEM GOVERNOR OF SOUTH) BRIEF IN SUPPORT OF REQUEST
DAKOTA FOR AN ADVISORY) FOR ADVISORY OPINION BY
OPINION) KRISTI NOEM GOVERNOR OF
) SOUTH DAKOTA

Original Proceeding
South Dakota Supreme Court

BRIEF OF GOVERNOR KRISTI NOEM

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Order Directing Briefing filed October 31, 2023

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JURISDICTIONAL STATEMENT

The Request for an Advisory Opinion on questions regarding Article III, § 12 of the South Dakota Constitution was filed by Governor Kristi Noem (Governor), by and through counsel, on October 20, 2023. The Request was submitted pursuant to the authority vested in the Governor by South Dakota Constitution Article V, § 5. For the reasons discussed *infra*, the Governor renews her Request for an advisory opinion.¹

STATEMENT OF ISSUES

The Request asks for interpretation of the interested contract clause of the South Dakota Constitution Article III, § 12. The Request contains nine interrogatories:

- May a vendor of the state receive a state payment if that vendor employs a legislator, and such legislator is not an owner of the vendor?
- May a vendor of the state receive a state payment if that vendor is a publicly traded company, and a legislator owns any shares or stock in such vendor?
- May a legislator be a state, county, city, or school district employee, either full time, part time, or seasonal, or an elected or appointed official?
- May a legislator receive retirement compensation from the South Dakota Retirement System for services rendered other than acting as a legislator?
- May a legislator or a business owned by a legislator subcontract for payment, goods, or services provided to or from the state?
- May a legislator or a business owned by a legislator receive Medicaid reimbursements administered by a state agency?

¹ In the Request, references to the “state” in each interrogatory should not be construed to include the authorities created by the Legislature. It is settled in South Dakota that the authorities have a separate and distinct status from the “state” for the purpose of constitutional analysis. *McFarland v. Barron*, 164 N.W.2d 607 (S.D. 1969) (holding that issuing bonds did not offend the constitutional debt limitation because the Building Authority was separate and distinct from the state). Any other suggested questions or considerations offered in the letters of support submitted with the Request may be provoking but answering would be outside the jurisdiction of the Court pursuant to S.D. Const. Art. V, § 5.

- May a legislator receive an expense reimbursement for foster children in their care administered by a state agency?
- May a legislator or a business owned by a legislator purchase or receive goods or services, including state park passes, lodging, and licenses, from the state when such goods or services are offered to the general public on the same terms?
- How do the instances detailed above apply to a legislator's spouse, dependent, or family member?

The Court entered an Order on October 31, 2023 directing briefing by the Governor, the Attorney General, and the Legislature. This Brief will contain authority and argument supporting why these are important questions relating to the Governor's executive power and are solemn occasions and address the merits of each interrogatory. As this is a Request to the Court for its advisory opinion, this Brief provides authority from South Dakota and other jurisdictions to aid the Court in its interpretation of Article III, § 12 and answering each question but takes no position regarding how this Court should answer the specific interrogatories.

STATEMENT OF THE CASE AND FACTS

The application of the interested contract clause of Article III, § 12 was addressed recently by this Court's October 2020 advisory opinion holding that Legislators could not receive COVID stimulus money through the state's small business grant program. *In re Noem*, 2020 S.D. 58, 950 N.W.2d 678. In August 2023, Senator Jessica Castleberry, who received COVID stimulus money through her closely held business, entered a settlement for her receipt of those moneys and resigned her position in the Senate. In the wake, inquiries hit a fervor of uncertainty as to how far or remote an indirect interest may go to run counter to Article III, § 12.

As analyzed in this Brief, the extent of what constitutes an *indirect* interest as contemplated by Article III, § 12 is impacting the Governor’s ability to appoint eligible Legislators to vacant seats who have no potential conflict of interest and are willing to serve without fear of inadvertently violating the interested contract clause. The lack of clear guidance for our state employees is troublesome for their duty to expend funds in accordance with the interested contract clause. Uncertainty is having an impact on all three branches of our state government.

Each of the nine questions posed in the Request involves an inquiry either made by Legislators or state employees to the Governor’s Office on the propriety of making payments in compliance with Article III, § 12. These questions are the ones most often asked or ones in which the Court’s interpretation of Article III, § 12 may impact current Legislators. Additional inquiries could be sought but clarity on these nine questions will provide guardrails for understanding the extent to which Article III, § 12 applies to other situations. Unless otherwise noted, each question presented assumes the relevant expenditure of funds was authorized by a state general appropriation bill or a special appropriation bill passed during the term for which that Legislator shall have been elected. *Pitts v. Larson*, 2001 S.D. 151, ¶ 7, 638 N.W.2d 254, 256 (holding that the general appropriation bill authorized payment for the employees of the state).

ANALYSIS

The Governor may “require opinions of the Supreme Court upon important questions of law involved in the exercise of [the governor’s] executive powers and upon solemn occasions.” S.D. Const. Art. V, § 5. Answering an advisory opinion request is

discretionary when one of these two situations are met. *In re Noem*, ¶ 8, 950 N.W.2d at 680 (citing *In re Daugaard*, 2011 S.D. 44, ¶ 4, 801 N.W.2d 438, 439).

A. The Governor’s Request raises an important question of law involving her exercise of executive power.

The Court may answer a request for an advisory opinion when the request raises an important question of law involved in the exercise of the Governor’s executive powers. S.D. Const. Art. V, § 5. The Court, on occasion, has answered such requests where the questions posed “will result in immediate consequences having an impact on the institutions of state government or on the welfare of the public and which involve questions that cannot be answered expeditiously through usual adversary proceedings.” *In re Daugaard*, 2016 S.D. 27, ¶ 9, 884 N.W.2d 163, 166 (quoting *In re Opinion of the Supreme Court Relative to the Constitutionality of Chapter 239, Session Laws of 1977*, 257 N.W.2d 442, 447 (1977) (Wollman, J., concurring specially)).

1. Governor’s Appointment Power

Article III, § 10 of the South Dakota Constitution grants the Governor appointment authority to fill Legislator vacancies.² The Governor now has two vacant legislative seats, House District 34 and Senate District 35, due to resignation. An appointment of a representative or senator by the Governor is different than the typical political selection process where voters vet candidate qualifications and elect their representative or senator. Here, the Governor exercises the authority delegated to her by the voters to make that selection. The Governor’s exercise of this unique constitutional

² *In re Opinion of Sup. Ct. Relative To Constitutionality of Ch. 239, Sess. Laws of 1977*, 257 N.W.2d at 443 (finding as one factor in answering a request for an advisory opinion that the power of the Governor to make appointments to the Bridge Authority involved the exercise of the Governor’s executive power).

appointment power ensures a representative democracy by equal representation in the Legislature.

However, the Governor should not make a constitutional appointment if doing so violates another constitutional provision. An appointment must be made in conformity with the interested contract clause of Article III, § 12; but, uncertainty in the application of Article III, § 12 is causing delays in making appointments. One candidate withdrew their application due to both potential concerns of a conflict under Article III, § 12 and the present delay. Additionally, it cannot be known how many interested, qualified citizens have not even applied because of uncertainty about their own perceived conflict, choosing not to risk unintentionally violating the Constitution.

Necessary to the Governor's consideration of any candidate must be an inquiry into whether the candidate is qualified and eligible for the appointment, possesses the skills to accomplish the job for their constituents, and whether a direct or indirect conflict of interest exists. *See Jones v. Howell*, 827 So.2d 691, 702 (Miss. 2002) (reasoning that qualified citizens should not be deterred from entering public service for fear of an inadvertent indirect conflict violation or not knowing whether they could have a remote indirect conflict). If these vacancies are maintained after legislative session begins on January 9, 2024, further impact to the Legislature will be felt as committee assignments are made, votes are taken, and policies are shaped, having an immediate impact on the legislative branch of state government. Answering the Request will provide necessary timely direction for the Governor to make appointments to vacant legislative seats. *See In re Daugaard*, ¶ 5, 801 N.W.2d at 440 (exercise of governor's power is affected by the Court's answer to these questions).

2. Administer and Supervise Spending

In addition to the Governor’s constitutional powers and duties, state law requires the Governor to “supervise the official conduct of all executive and ministerial officers” in the administration and expenditure of state and federal funds through her designated state agencies. SDCL 1-7-1(1); 4-7-3. Specifically, the Governor has a direct role in expending federal funds through her designated state departments and officers. SDCL 4-8-17; *see also, In re Noem*, ¶ 9, 950 N.W.2d at 680-81. While the State Treasurer and State Auditor are ultimately charged with disbursing funds on warrants presented to them, state officers and employees across state government account for invoices received, review for appropriateness and eligibility with program standards or federal guidance, and approve payments by signing warrants. SDCL 4-9-1; ARSD 3:05:01:03 (“The authorization signature of the agency official is required on every voucher. . .”).

The importance of properly expending federal and state funds cannot be overstated. Penalties exist for misappropriating state funds contrary to state law. SDCL 4-8-2. If an enforcement action must be taken due to the improper receipt of funds by a Legislator, it is the Governor, concurrent with the Attorney General, who “may, by appropriate action or proceeding brought in the name of the state, . . . restrain violation of any constitutional . . . power, duty or right by any officer, department or agency of the state or any of its civil divisions. . . .” S.D. Const. Art. IV, § 3; SDCL 1-11-1.

The Governor and the Attorney General recently exercised these powers when clear violations of Article III, § 12 occurred earlier this year. That clarity came from this Court’s advisory opinion precluding current state Legislators from directly or indirectly contracting with the State to receive funds from CRF Grant programs, and by extension,

all COVID relief stimulus programs funded by federal dollars. *See In re Noem*, ¶ 14, 950 N.W.2d at 682. The Governor must uphold Article III, § 12 but presently lacks the clarity whether the scenarios provided in the Request meet the interested contract clause’s prohibition or go further than what that section contemplates as an “indirect” interest.

Prudent use of state resources would not permit investigations into every single allegation or inquiry of remote indirect interest scenarios. Before the Governor orders and directs the Attorney General to investigate any particular transaction, clear guidance is needed to determine whether a transaction constitutes a prohibited direct or indirect interest in any state or county contract. *See*, SDCL 1-11-1(2), (4); SDCL 1-11-7. Should the Court answer the proposed questions in the Request, the Governor could reasonably understand when an allegation requires an investigation of an alleged Article III, § 12 violation. Then, it would be in that venue where the private rights of the impacted Legislator can be fairly considered in the usual adversary proceeding. For now, these are strictly legal questions.

B. Solemn Occasion

In addition to implicating the Governor’s executive powers, these questions also present a solemn occasion.

In determining whether a request for an advisory opinion presents a solemn occasion, the Court weighs whether an important question of law is presented, whether the question presents issues pending before the Court, whether the matter involves private rights or issues of general application, whether alternative remedies exist, whether the facts and questions are final or ripe for an advisory opinion, the urgency of the question, whether the issue will have a significant impact on state government or the public in general, and whether the Court has been provided with an adequate amount of time to consider the issue.

In re Noem, ¶ 10, 950 N.W.2d at 681 (quoting *In re Daugaard*, ¶ 13, 884 N.W.2d at 167).

Each question asked in the Request presents a solemn occasion due to the underlying need for guidance on how to apply Article III, § 12. Questions that implicate the Constitution are important questions of law. As found in *In re Noem*, these questions present broad conflict of interest inquiries involving Legislators' entitlement to appropriated funds. The lack of clarity is already having a significant impact on the legislative and executive branches of state government. There is great public interest in the unbiased distribution of state funds. The undersigned is not aware of any pending proceedings before any court on the interpretation or application of Article III, § 12; however, Legislators have made inquiries as to the scope of Article III, § 12 and could apply the Court's holding to their own situation. These questions posed will inform future Legislators and would give broad guidance while not presenting any specific facts. This is a matter of great public importance requiring a prompt answer. *See, supra*, Section A. Overall, the factors weigh in favor of concluding these are solemn occasions.

C. Analysis of Each Interrogatory

1. May a vendor of the state receive a state payment if that vendor employs a legislator, and such legislator is not an owner of the vendor?

a) This is an important question of law regarding the exercise of the Governor's executive power and is a solemn occasion.

In addition to the authority and arguments provided above, the Governor directs and controls the Commissioner of the Bureau of Administration, who is responsible for state procurement and contracting for goods and services. *See*, SDCL 1-14-3 ("under the general direction and control of the Governor, [the Commissioner of the Bureau of Administration] shall execute the powers and discharge the duties vested by law in the Bureau of Administration."). Those duties include the "procurement of supplies, services,

and public improvements as prescribed in chapters 5-18A, 5-18B, and 5-18D[.]” and “[c]ontract for such services as are required by multiple state agencies, if such a contract improves the efficiency of state government[.]” SDCL 1-14-12(2), (10). Illustrative of this duty, on August 11, 2023, the Governor issued Executive Order 2023-13 directing the Commissioner and all executive branch agencies to incorporate a provision in all contracts where feasible that requires the contractor to agree that the contract does not violate Article III, § 12. *App. 1.*

b) Addressing Merits of the Interrogatory

This question requires a determination as to how far the term “indirect” extends. Over a century ago, this Court said Article III, § 12 “is intended to preclude the possibility of any member deriving, directly or indirectly, any pecuniary benefit from legislation enacted by the legislature of which he is a member.” *Palmer v. State*, 75 N.W. 818, 819 (S.D. 1898) (prohibiting state contract between a state board and lawyer who was a Legislator). Similarly, this Court applied Article III, § 12 to prevent a state contract with a Legislator-owned company who would indirectly receive a pecuniary benefit to his business. *Asphalt Surfacing Co. v. S. Dakota Dep't of Transp.*, 385 N.W.2d 115, 117 (S.D. 1986) (prohibiting state contract between state agency and president and owner of stock certificates of company who were both Legislators).

This question is distinguishable from *Palmer* and *Asphalt Surfacing*, wherein the Legislators had direct personal ownership interest in the contracting vendor. Instead, the present question looks at whether the same suspicion of improper influence attaches to the receipt of public funds when a vendor employs someone who is also serving in the Legislature.

Legislators have a “fiduciary and trust relation towards the state” which supports Supreme Court Presiding Judge Whiting’s proffering that the intent and application of Article III, § 12 focuses on:

the time and [the legislator’s] relation to the state *when he should cast his vote*, and [the framers] sought to remove from his path an influence that might affect *his vote*. This constitutional provision was designed to prevent any legislator, while he should be serving the state in the enactment of laws, from being tempted and influenced, either consciously or unconsciously, by any selfish interests.

Norbeck & Nicholson Co., 142 N.W. 847, 849, 853 (S.D. 1913) (*Norbeck I*) (Whiting, P.J., concurring specially) (emphasis in original). Certainly, a Legislator-employee’s private interest “should not become antagonistic to his public duty.” *Id.* at 849. The Legislature’s duty is to appropriate funds “for ordinary expenses of the executive, legislative and judicial departments of the state, the current expenses of state institutions, interest on the public debt, and for common schools” and appropriate other funds to special purposes. S.D. Const. Art. XII, § 2. Our system of checks and balances separates those appropriations from the actual approval and expenditure of funds. *See generally*, SDCL Ch. 4-8. The State Auditor and State Treasurer issue vouchers and sign warrants for the expenditure of public funds. State officers and employees account for invoices received, review for appropriateness and eligibility with program standards or federal guidance, and authorize payments. Likewise, the Legislature neither negotiates nor executes contracts for goods or services, but state employees of the executive and judicial branches execute the procurement process and negotiate terms of thousands of contracts entered into every year.

Attorney generals in other states, applying similar interested contract clauses,³ have concluded differently. *See e.g., Okla. Att’y Gen. Op. No. 05-13, 2005 WL 1142206* (Apr. 25, 2005) (holding “when during the term of a legislator, the Legislature enacts an appropriation to a state agency or state board, and the agency or board uses part of that appropriation to match or acquire federal or private funds by which to employ the . . . legislator, when such appropriation does not have the effect of either authorizing the state agency or state board to enter into such a contract or employment relationship with the legislator or former legislator, or of giving ‘force and effect’ to the contract or employment relationship”); *Tex. Att’y Gen. Op. JM-782* (1987) (finding the Legislator’s pecuniary interest in the state contract consists of his salary as executive director for the contracting non-profit which was neither a direct nor indirect interest).

Under *Palmer* and *Asphalt Surfacing*, no company with ownership interest held by a Legislator may lawfully contract with the state. Does the same prohibition apply to a company that employs a Legislator? This is the situation which the Request wishes to be answered.

³ There are eight state constitutions which have the same or similar interested contract clause: Mich. Const. Art. IV, § 10 (prohibition applies only while serving); Miss. Const. Art. IV, § 109 (also applies to district, city, or town); Neb. Const. Art. III, § 16 (direct interest only and applies to cities too); N.M. Const. Art. IV, § 28 (applies to cities too but not counties); Okla. Const. Art. V, § 23 (two year prohibition and applies to political subdivisions); S.D. Const. Art. III, § 12; Tex. Const. Art. III, § 18 (prohibition applies only while serving); W. Va. Const. Art. VI, § 15 (prohibition applies only while serving).

2. May a vendor of the state receive a state payment if that vendor is a publicly traded company, and a legislator owns any shares or stock in such vendor?

a) This is an important question of law regarding the exercise of the Governor's executive power and is a solemn occasion.

In addition to authority and arguments provided above, this question raises a unique consideration for establishing this as a solemn occasion. During the week of December 4, 2023, a publicly traded financial institution questioned its ability to execute a contract with the state in compliance with Article III, § 12 when the financial institution did not know if any of its shareholders may be state Legislators or spouses of Legislators. This situation illustrates the potential significant impact this question may have on contracting within state government. Such ambiguity may be detrimental to the state's ability to contract with major publicly traded companies.

b) Addressing Merits of the Interrogatory

This question addresses the extent to which “indirect” interest may be interpreted. This Court previously interpreted Article III, § 12 as applied to closely held companies whose stocks were owned by Legislators. *See generally Norbeck I*, 142 N.W. 847 (holding that a contract between the state and a corporation whose stockholder was a Legislator was void); *Asphalt Surfacing*, 385 N.W.2d 115 (holding that a Legislator could not contract with the state for highway repairs when the Legislator was the president of the company). Similarly, situations in other states where a Legislator was a stockholder in small, closely held companies were also determined to be prohibited. *See e.g., Mich. Att’y Gen. Op. No. O-4451* (1945) (Legislator owned dairy company and could not sell product to the state). Under *Norbeck I* and *Asphalt Surfacing*, that question is settled.

This present inquiry, however, distinguishes those cases by questioning whether a Legislator may own shares or stock in large, publicly traded companies like Microsoft or

Apple from whom the state procures products or services without violating Article III, § 12. Direction is requested to establish a reasonable end to how indirect can an “indirect” interest be to violate Article III, § 12.

A contract with a Legislator-owned closely held business confers a clear pecuniary benefit to that Legislator. But contracts with a publicly traded company may be so far removed from benefiting a Legislator who owns shares or stock in that company, that it is not so clear Article III, § 12 prohibits it.

The Michigan Attorney General previously issued an analogous opinion on this subject. It considered whether the similar constitutional provision prohibited a contract with a large automobile dealership. Two important factors were weighed in that opinion: (1) the Legislator had less than a one percent interest in the company; and (2) the Legislator did not solicit or negotiate any contracts between the company or the state. *Mich. Att’y Gen. Op. No. 6151, 1983 WL 174693 (1983)*. It opined that this was not a violation of the interested contract clause.

3. May a Legislator be a state, county, city, or school district employee, either full time, part time, or seasonal, or an elected or appointed official?

a) This is an important question of law regarding the exercise of the Governor’s executive power and is a solemn occasion.

In addition to authority and arguments provided above in Section A regarding the Governor’s role in authorizing and spending funds, for paying employment salaries, the Governor “supervise[s] the official conduct of all executive and ministerial officers”. SDCL 1-7-1. Such official conduct includes the Governor’s department heads being authorized to sign payroll authorizations. ARSD 3:05:02:01.

b) Addressing Merits of the Interrogatory

Pitts is the controlling case for this question for state employees. *Pitts*, 2001 S.D. 151, 638 N.W.2d 254. Carol Pitts was employed by South Dakota State University when she was elected to the Legislature. She continued employment and challenged the state auditor who refused to pay her for her SDSU salary. This Court held that “[t]he 2001 General Appropriation Bill authorized payment for the employees of the SDSU CES.” *Id.* at 258. Therefore, the interested contract clause would be violated, and her SDSU employment contract was void. *Id.*

This question asks whether *Pitts* should be extended to county employees and officials. Some states’ persuasive authority indicate that their interested contract clause is not a broad prohibition. The Oklahoma Attorney General opined that “a state legislator cannot be employed by the State during the term of office . . . *when the source of funds for his or her salary was authorized by law or appropriated by the Oklahoma Legislature during the legislator's term of office.*” *Okla. Att’y Gen. Op. No. 04-25* (Aug. 11, 2004) (citing *State ex rel. Settles v. Board of Education*, 389 P.2d 356 (Okla. 1964)) (holding a Legislator could not have a teaching contract with a school district when the contract was funded with state aid dollars appropriated annually to school districts by the Legislature).

The following year, however, the same Attorney General issued an opinion when the state employment of a Legislator was funded by federal funds and concluded:

It cannot, however, be said that the appropriation act ‘authorizes’ employment of the legislator or former legislator. This is so because the appropriation act does not ‘give force and effect’ to the legislator's contract. . . . It is the federal funds that gave the contract ‘force and effect’ under the *Settles* test.

Okla. Att’y Gen. Op. No. 05-13, ¶ 10-11 (Apr. 25, 2005) (citing *Settles*, 389 P.2d at 360).

For county employees, a New Mexico Court of Appeals held that “the general appropriations bill increasing the salaries of public school employees did not authorize [a teacher’s] and [an administrator’s] employment contract[s];” therefore, there was no violation of New Mexico’s interested contract clause. *State ex rel. Stratton v. Roswell Indep. Sch.*, 806 P.2d 1085, 1096 (N.M. 1991).

Additionally, this question references elected or appointed officers.⁴ There is no South Dakota case analyzing the interested contract clause for elected or appointed state or county officials, yet the South Dakota Attorney General opined that a conflict of interest exists for a Legislator to be a county commissioner because, “a county commissioner elected to the Legislature would, perhaps, have the opportunity to vote on matters affecting his commission tenure and compensation while serving in the Legislature.” *S.D. Att’y Gen. Op.* 82-23 (1982). Indeed, county commissioners are compensated at rates set for per diem or salary by the board of county commissioners. SDCL 7-7-3. If the board of county commissioners does not set the salary, then state law sets a default amount for the county. SDCL 7-7-5. Perhaps there may be an opportunity to increase this default, but it has not been increased since 1992. *Id.*

No authority was located that would suggest there is any distinction between a full-time employee-legislator or one that is only employed temporarily. A plain reading of Article III, § 12 would not suggest a distinction either.

⁴ This question does not analyze that application of the emoluments clause, appointment clause, or lucrative office clause of the South Dakota Constitution that would apply to part of the question. S.D. Const. Art. III, § 12 (first and second clause); S.D. Const. Art. III, § 3.

4. May a Legislator receive retirement compensation from the South Dakota Retirement System for services rendered other than acting as a Legislator?

a) This is an important question of law regarding the exercise of the Governor's executive power and is a solemn occasion.

This question does not present any additional authority or arguments other than provided above.

b) Addressing Merits of the Interrogatory

The South Dakota Retirement System (SDRS) is a defined benefit retirement plan responsible for managing the state's financially sustainable retirement system for employees of the state and its political subdivisions⁵ and prepares its members for retirement by providing members the foundation to achieve financial security.⁶ SDRS provides retirement, disability, and survivor benefits.⁷ SDRS benefits are based on the member's final average compensation, the member's years of service, and a benefit multiplier.⁸ Retirement benefits are payable for the member's life.⁹ All covered members are required to contribute a percentage of their salary to SDRS.¹⁰ All participating employers are required to contribute an amount equal to the member's contributions.¹¹

⁵ See *SDRS About SDRS*, at https://www.sd.gov/sdrs?id=cs_kb_article_view&sys_kb_id=19e8f9ca1b3abd1045aba93ce54bcb7d&spa=1 (last visited December 15, 2023). Members of SDRS include full-time employees of public schools, the State, the Board of Regents, city and county governments, and other public entities. For purposes of participation, the definition of a full-time employee is any employee who is considered full-time by the participating unit and is customarily employed by the participating unit for 20 hours or more a week and at least 6 months a year, regardless of classification of employment as seasonal, temporary, leased, contract, or any other designation. *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

The right to receive retirement benefits vests after three years of contributory service.¹² A primary objective of establishing a state Retirement System for public employees “is to induce able persons to enter and remain in public employment, and to render faithful and efficient service while so employed.” *Chamber of Com. of E. Union Cnty. v. Leone*, 357 A.2d 311, 320 (Ch. Div. 1976), *aff’d*, 382 A.2d 381 (N.J. 1978) (citing 3 *McQuillin, Municipal Corporations*, 3d Ed.Rev.1963 § 12.141).

Retirement policy changes are recommended by the SDRS Board of Trustees to the Legislature, and such changes impact the membership as a whole, not an individual member. There are also intricate administrative rules promulgated by the Board of Trustees.¹³ There can be no change made to affect only a member-legislator’s interest in their retirement. A public employee who later became a Legislator would have, while employed by a participating employer, paid contributions and earned contributory service, all of which is required by law and not influenced by a legislative vote or an appropriation. The Legislature does not determine the annual cost of living adjustment (COLA). The process to determine the COLA considers affordability based on SDRS’s Fair Value Funded Ratio and the annual inflation rate as defined by the Consumer Price Index (CPI-W).¹⁴

In the end, “retirement benefits constitute as real and substantial a form of compensation as does a pay check” with the “significant difference [lying] in the time of payment”, “the right of payment in the future” was earned while public employment

¹² *Id.*

¹³ ARSD chapters 62:01, 62:03, and 62:04.

¹⁴ See *SDRS Cost of Living Adjustment* at https://www.sd.gov/sdrs?id=cs_kb_article_view&sys_kb_id=1cbeac22db5ce1904a395425f3961939&spa=1 (last visited December 15, 2023).

occurred and was paid only upon retirement. *See Leone*, 357 A.2d at 321. No South Dakota case or attorney general opinion has addressed this issue.

While there are cases which address the issue of a legislature creating its own pension and paying out benefits for legislative service, those authorities are distinguishable as this question focuses on retirement compensation for state service other than legislative service. *See Campbell v. Kelly*, 202 S.E.2d 369, 381 (W. Va. 1974) (holding the interested contracts clause did not prohibit the enactment of a legislative pension system). South Dakota does not have a pension plan for Legislators for legislative service.

5. May a Legislator or a business owned by a Legislator subcontract for payment, goods, or services provided to or from the state?

a) This is an important question of law regarding the exercise of the Governor’s executive power and is a solemn occasion.

This question does not present additional argument other than provided above.

b) Addressing Merits of the Interrogatory

This question asks whether the *Norbeck I* and *Asphalt Surfacing* rationale extends to subcontracts. Article III, § 12 prohibits a Legislator’s interest, “directly or indirectly, in any contract with the state” This question asks whether it is a prohibited “indirect” interest to be a subcontractor under a state contract but not contract directly with the state. For the Court’s application, the State’s consultant contract template contains the following requirement:

SUBCONTRACTING: Contractor may not use subcontractors to perform the services described herein without the express prior written consent of the State. Contractor 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 in a manner consistent with this

Agreement. Contractor will cause its subcontractors, agents, and employees to comply with applicable federal, tribal, state, and local laws, regulations, ordinances, guidelines, permits and other standards and will adopt such review and inspection procedures as are necessary to assure such compliance. The State, at its option, may require the vetting of any subcontractors. Contractor shall assist in the vetting process.

App. 1-2. This template provision is generally used in every contract for services with the state. Without the primary contract for services with the state, there can be no subcontract to which the State must consent or require indemnification.

6. May a Legislator or a business owned by a Legislator receive Medicaid reimbursements administered by a state agency?

a) This is an important question of law regarding the exercise of the Governor's executive power and is a solemn occasion.

To add to the arguments provided above, this question invokes the Governor's responsibility of acceptance, administration, or supervision of funds as obligated by SDCL 4-8-17. The Governor accepts federal funds, including the Federal Medical Assistance Percentage (FMAP), received through the Centers for Medicare and Medicaid Services (CMS), enhanced FMAP from the Children's Health Insurance Program (CHIP) block grant, and supervises the administration and expenditure of those federal funds to pay partner providers for services provided to eligible recipients through the state Medicaid or CHIP programs. *See In re Noem*, ¶ 9, 950 N.W.2d at 680 (finding administering and expending funds pursuant to SDCL 4-8-17 involved the exercise of the governor's executive power). The Department of Social Services (DSS) is the federally designated State Medicaid Agency. SDCL 28-6-1; 1-36-5.1; 1-36-7.1. At least five other state agencies also pay Medicaid reimbursement claims to providers, processed through DSS: Department of Human Services (for developmental disabilities and long-term care

services), Department of Corrections (for inmates who are temporarily eligible), Department of Veterans Affairs (for long-term care), Department of Education, and Department of Health. *See, e.g.*, SDCL 1-36A-1.16(3); 1-36A-25 *et. seq.*; 27B-1-15; 28-6-1 (DHS); SDCL 33A-4-4 (DVA); SDCL 13-1-23; 13-14-1; 13-37-1.1 (DOE); SDCL 34-1-18 (DOH).

This question also presents a solemn occasion in three unique ways. First, while it may impact private rights of a Legislator or their business to be a Medicaid provider, it also raises the broader conflict of interest question involving a Legislator's ability to receive state and federal funds for services rendered, not to the state, but to eligible individuals through this program. As such, whether a Legislator may be a Medicaid provider receiving rate reimbursements from the State Medicaid program for services provided to Medicaid eligible recipients is a question that impacts the institutions of state government.

Second, this issue also impacts eligible individuals' access to the medical providers from whom they choose to seek services. Third, some Legislators—former, current, and prospective—are Medicaid providers and have an ownership interest in the company for which they work.¹⁵ To require a case in controversy for each would expend more judicial resources than necessary, whereas an advisory opinion could establish consistent parameters for each affected Legislator, including prospective candidates for the Legislature, to identify whether a conflict exists. As such, whether a Legislator may be a Medicaid provider receiving reimbursements from the State Medicaid program for

¹⁵ Whether a Legislator can be an employee of a Medicaid provider without violating Article III, § 12 is part of the analysis in question #1.

services provided to Medicaid-eligible recipients also is a question not easily answered through the usual adversarial proceeding.

b) Addressing Merits of the Interrogatory

Whether a Legislator or his or her business can contract with the state through a Medicaid provider participation agreement triggers the question as to how connected or remote an “indirect” interest may be for the Legislator to run afoul of Article III, § 12. A similar question was presented in Mississippi which has a very similar interested contracts clause to South Dakota’s clause. Miss. Const. Art. IV, § 109. In *Jones v. Howell*, Howell was a Legislator and owned a pharmacy that participated in the state Medicaid program. *Jones*, 827 So.2d at 693. Another Legislator pharmacist, Read, was an employee of a Medicaid provider pharmacy. *Id.* The Court consolidated both cases and held, “Section 109 must only be interpreted by this Court to provide a rational prohibition against self-dealing and abuse of power. We find that the best analysis hinges upon whether an individual member of the Legislature was in a position to advance the rights and benefits for himself, his friends and family beyond common rights and responsibilities provided to other members of his professional class.” *Id.* at 702. To foster a similar analysis of what level of influence a Legislator may have in deciding their amount of reimbursement in South Dakota, the following facts are helpful.

South Dakota Medicaid is a federal- and state-funded program providing health coverage for people who meet certain eligibility standards. Standards for eligibility are based on requirements set forth in federal law and regulation and are established by the State Medicaid Plan as designed by DSS and approved by CMS. SDCL 28-6-1.

The State Medicaid program acts as an insurance company that pays for medically necessary services for eligible individuals. The Legislature generally does not determine covered services; those are set through the State Medicaid Plan determined by the DSS and approved by CMS, with some benchmarks set by federal law. *Id.* Conceivably, Legislators could have the ability to exercise control over Medicaid covered services through legislation, although this type of legislation has been historically unsuccessful. *See e.g.*, 2018 SB 190 (an act to require the approval of the Legislature before the state adopts certain changes to the Medicaid program); 2019 HB 1229 (an act to require optional services through Medicaid to be authorized through special appropriation).

Healthcare providers wishing to participate in the Medicaid program must sign a provider agreement with DSS. *App.* 3-8. The agreement reflects both federal and state program requirements. For instance, the agreement establishes provider licensure and qualifications, record-keeping requirements, and data access and security requirements. It also describes billing processes and other terms and conditions. Setting these parameters has been delegated by the Legislature to the DSS to promulgate rules pursuant to SDCL 28-6-1.

After covered services are provided to an eligible individual, the Medicaid provider bills the State Medicaid program, which reimburses at certain rates set for that service. *See* SDCL 28-6-1.1; 28-6-1.2. The reimbursement rates may be based on several different calculations or considerations: an equivalent or percentage of the rates established by CMS for Medicare Fee schedule where applicable; Indian Health Services rates where applicable; provider cost data; or a percentage of providers' usual and customary charge passed on to other payors. Generally, the Legislature does not vote on,

approve, or set the rates of reimbursement for services paid to a provider. However, Legislators may pursue legislation to influence or impact rates. *See e.g.*, 2022 HB 1103 (an act to provide a reimbursement schedule for dental services under the Medicaid program). Additionally, the Legislature may set funding levels or targets, may set a methodology for rate setting for a particular service provider type, or may appropriate increases to rates to account for mandatory or discretionary inflation.

State payments made on behalf of an eligible individual are remitted directly to the billing provider pursuant to a participation agreement that is not subject to negotiation by the provider or determined by the Legislature. No provider receives any state payment unless an eligible individual chooses to use their services. In that case, the state payment derives from appropriated general funds and appropriated federal fund spending authority in the general appropriation act or a special appropriation act at roughly 45 cents state general funds and 55 cents federal funds, adjusted annually by the federal government, though currently the ratio is closer to 40% state and 60% federal.

A Legislator has minimal authority to affect any increased pecuniary benefit to themselves as a provider in their role as a Legislator. The funds that provider-legislator receives from the state are payments for services provided to an eligible individual, analogous to an insurance payment. The state receives no direct services or benefits from the provider, other than seeing that eligible individuals can receive the healthcare they need from the provider they choose.

7. May a Legislator receive an expense reimbursement for foster children in their care administered by a state agency?

a) This is an important question of law regarding the exercise of the Governor's executive power and is a solemn occasion.

To add to the arguments provided above, this question invokes the Governor's responsibility of acceptance, administration, or supervision of funds as obligated by SDCL 4-8-17. The Governor accepts federal funds, including Title IV-E funds through the Administration for Children and Families with the U.S. Department of Health and Human Services and supervises the administration and expenditure of those federal funds to pay foster parents on behalf of eligible children for services provided to eligible children through the state Foster Care program. *See In re Noem*, ¶ 9, 950 N.W.2d at 680-81 (finding administering and expending funds pursuant to SDCL 4-8-17 involved the exercise of the governor's executive power). DSS provides child protective services and administers these funds.

This question also presents a solemn occasion. While it may impact private rights of a Legislator being able to receive financial assistance on the same terms as any other citizen licensed to provide foster care, it also raises the broader conflict of interest question involving a Legislator's ability to receive state and federal funds for child protective services rendered to children, not to the state. This issue also impacts the children in need of foster care from being temporarily cared for by a foster parent who is also a Legislator. As such, whether a Legislator may receive financial assistance or other eligible reimbursements from DSS child protective services for foster care is a question that impacts the institutions of state government.

While this question remains pending, Legislators may choose not to agree to a placement which evades creating a case in controversy, and Legislators may opt out of

serving as foster parents due to the uncertainty. As such, whether a Legislator may receive financial assistance or other eligible reimbursements from the foster care program also is a question not easily answered through the usual adversary proceeding.

b) Addressing Merits of the Interrogatory

Hundreds of families across the state are licensed with DSS to provide foster care placement for a child in their community when a separation from the child's family is necessary to keep that child safe. In an abuse and neglect situation, DSS is granted legal custody of a child who is temporarily placed with a safe and stable resource, including a kinship placement if available and appropriate, a therapeutic foster care placement if the child needs a higher level of care, or more typically, a licensed foster parent. *See* SDCL 26-8A-13; 26-8A-21; ARSD 67:14:31:21(5), (6), (7). This interrogatory is focused on the contractual nature and potential influence by a Legislator who may be a licensed foster parent on the financial aspects of this program.

DSS licenses foster parents annually through Child Protection Services. SDCL 26-6-13; 26-6-14(2); ARSD 67:42:01; 67:42:05. There could be state assistance to the foster parent for training needed to complete licensure, but any payment is provided solely at the discretion of DSS. ARSD 67:42:05:03.

A placement contract between the state and the licensed foster parent is only entered into when a child is needed to be placed, for either emergency care, specialized family treatment foster care, or basic family foster care. ARSD 67:14:31:21(5)-(7). That agreement contains conditions and obligations for care of the child. *App. 9-16*. By entering into this contract, the foster parent is entitled to payment for services provided to the foster child.

Under Title IV-E of the Social Security Act, South Dakota may use partial federal reimbursement for costs of providing foster care, adoption assistance, and kinship guardianship assistance to children who meet federal eligibility criteria. 42 U.S.C. § 673; SDCL 26-4-7. Besides the state's use of these federal funds, which require a state general fund match, for administrative needs such as training, data collection, background checks, and licensing, these federal funds also pass through the Title IV-E program to pay for a monthly payment to a foster parent made on behalf of a placed eligible child. 42 U.S.C. § 672; SDCL 26-4-7. A licensed foster parent may receive this monthly payment, which can also be referred to as a foster care maintenance payment or allowance.¹⁶ DSS has promulgated rules for the payment. SDCL 26-6-16; ARSD 67:14:31:26; 67:14:31:38. This allowance is paid to the foster parent on behalf of the child and is expected to cover clothing, food, shelter, and incidentals in support of the child. ARSD 67:14:31:38. If income is within eligibility, this allowance is funded at the same ratio as is set for the FMAP. 42 U.S.C. § 674(a). The amount of monthly payment is set annually by DSS. The Legislature does not generally set this amount but impacts the annual increase by adopting a discretionary inflation rate every year in the general appropriations act.

In addition to the allowance, a foster parent may seek approval for foster care support reimbursement of certain other expenses such as special transportation, daycare, special purchases like a prom dress or football camp, or behavioral health support expenses. SDCL 26-6-16; ARSD 67:14:31:51. These reimbursements are approved at the

¹⁶ By example, if a ten-year-old child is placed in basic, non-specialized, foster care, the allowance as of June 1, 2023 is \$672.70.

discretion of DSS to encourage as much normalcy as possible. The Legislature does not determine what expense is reimbursable.

8. May a Legislator or a business owned by a Legislator purchase or receive goods or services, including state park passes, lodging, and licenses, from the state when such goods or services are offered to the general public on the same terms?

a) This is an important question of law regarding the exercise of the Governor's executive power and is a solemn occasion.

This question does not present any additional arguments other than provided above.

b) Addressing Merits of the Interrogatory

While Legislators act as fiduciaries for the state by appropriating money, Legislators also use state roads, access state services, pay taxes, hold professional licenses, and enjoy our parks similar to other citizens. Although Article III, § 12 is interpreted “to include all kinds and all sorts of contracts, implied as well as express”, not all contracts or payments with the state are prohibited; the contract still must be “authorized by any law passed during the term for which he shall have been elected.” *Norbeck I*, 142 N.W. at 851; S.D. Const. Art. III, § 12; *see also Okla. Att'y Gen. Op. No. 05-13*, ¶ 1 (Apr. 25, 2005) (opining the interested contract clause does “not extend to all contracts, but [does] cover contracts authorized by law passed while the member was serving in the Legislature.”). As opposed to addressing the first seven questions in which a Legislator receives money from the state through a contract, this question analyzes the reverse, whereby the legislator-citizen pays money to the state, and in return, receives goods or services from the state on the same terms and conditions as any another citizen.

This question implicates the scope of the phrase “pecuniary benefit” the Court described in *Palmer*. *Palmer*, 75 N.W. at 819. The Court in *Palmer* held, “[t]he purpose of the provision is apparent. It is intended to preclude the possibility of any member

deriving, directly or indirectly, any *pecuniary* benefit from legislation enacted by the legislature of which he is a member.” *Id.* (emphasis added). Black’s Law Dictionary defines *pecuniary* to mean “[o]f, relating to, or consisting of money; monetary.” BLACK’S LAW DICTIONARY, *Pecuniary* (11th ed. 2019). If Article III, § 12 should be interpreted as only impacting direct or indirect *pecuniary* benefits to Legislators, then the receipt of the goods or services contemplated by this question to Legislators would not violate the interested contracts clause. By the *Palmer* Court adding to Article III, § 12 the requirement that the Legislator must derive a pecuniary benefit, the Court interpreted the clause as restricting the Legislator from directly or indirectly receiving money from the state. *Palmer*, 75 N.W. at 819. A Legislator paying taxes, licensing fees, park entrance fees, or lodging fees to use state services like other citizens does not create a monetary benefit to a Legislator.

The goods or services contemplated by this question are not new goods or services that the Legislature would authorize by the passage of a law. *See Asphalt Surfacing*, 385 N.W.2d 11, *see also S.D. Att’y Gen. Op. No. 08-03*, 2008 WL 2131608 (opining that a Legislator could participate in the GFP walk-in program and enter a contract for payment if that Legislator did not serve when the program was enacted or when substantive changes were made). Contemplated are ongoing programs and services.

A state park pass must be purchased to enter a state park and use those resources. SDCL 41-17-13. The fee amount is set by the GFP Commission in administrative rule, not by the Legislature. *Id.* The funds to operate the parks, including its facilities, are received into the GFP fund. SDCL 41-2-34. That fund is continuously appropriated to GFP, meaning that the funds are not within the general appropriations act and not

annually appropriated by the Legislature. SDCL 41-2-35; 41-2-35.1. The funds are set forth in an informational budget only subject to review by the Legislature. SDCL 41-2-35.1.

Apart from GFP goods or services, there are professional and occupational licensures where a legislator-professional receives services from the state that are offered to all other professionals on the same terms. For example, a nurse pays a license fee and enjoys the services the Board of Nursing provides to all nurses on no terms different than any other nurse licensee. A legislator-nurse has a direct interest in their implied contract with the Board but it is not pecuniary.

9. How do the instances detailed above apply to a Legislator's spouse, dependent, or family member?

a) This is an important question of law regarding the exercise of the Governor's executive power and is a solemn occasion.

This question does not present additional argument other than provided above.

b) Addressing Merits of the Interrogatory

This question asks each of the eight questions again but asks whether the “indirect” interest prohibits Legislators’ spouses from contracting with the state.

There is conflicting authority in other states which have considered their similar interested contract clauses. In four scenarios, the Oklahoma Attorney General opined that a spouse’s direct or indirect interest in a contract would also be a violation of the interested contract clause. *Okla. Att’y Gen. Op.* No. 81-129, ¶ 15 (1981) (spouse who owned a company in whole or in part could not contract with the state when the compensation derived by such company or the contract which generates such business was funded by an appropriation); *Okla. Att’y Gen. Op.* No. 87-40, ¶ 14 (1987) (spouse could not enter into a motor license agent contract with the Oklahoma Tax Commission);

Okla. Att’y Gen. Op. No. 72-292 (1973) (spouse could not lease property to the state department of corrections by relying on *Norbeck I*); *Okla. Att’y Gen. Op. No. 81-129* (the interested contract clause extends to a close family member of a Legislator).

However, Michigan would allow a contractual arrangement with a Legislator’s spouse. *Mich. Att’y Gen. Op. No. 5681 (1980)* (spouse owned stock in a corporation which leased land to another corporation which was issued a parimutuel horse racing track license by the State Racing Commission) (other examples cited within opinion). The Michigan Attorney General found another constitutional provision persuasive when it opined that because married women are entitled to own, retain, and dispose of their earnings, a husband could be a county commissioner and his spouse could be the social services director in the same county. *Mich. Att’y Gen. Op. No. 4869 (1975)*. South Dakota has the same constitutional protection for the property of married women. “The real and personal property of any woman in this state, acquired before marriage, and all property to which she may after marriage become in any manner rightfully entitled, shall be her separate property, and shall not be liable for the debts of her husband.” S.D. Const. Art. XXI, § 5.

CONCLUSION

This Court is presented with an historic opportunity to provide constitutional direction regarding the interested contract clause of Article III, § 12. Separate from the need for this advisory opinion to fill two vacant legislative seats, the Legislature and Attorney General support seeking this Court’s guidance as these questions greatly impact all institutions of the State. For the above reasons, the Governor respectfully requests that

this Court accept the Request for an advisory opinion and address the specific interrogatory questions.

Dated this 15th day of December, 2023.

Respectfully submitted,

/s/ Katie J. Hruska

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CERTIFICATE OF COMPLIANCE

Katie J. Hruska, attorney for the Office of the Governor, hereby certifies that the foregoing Governor's Brief meets the requirements for proportionally spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

- a. Governor's Brief does not exceed 31 pages.
- b. The body of Governor's Brief was typed in Times New Roman 12-point typeface; and
- c. The body of Governor's brief contains 8,622 words and 46,524 characters (no spaces), excluding the Table of Contents, Table of Authorities, Jurisdictional Statement, and Certificates of Counsel, according to the word and character counting system in Microsoft Word used by the undersigned.

Dated this 15th day of December, 2023.

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CERTIFICATE OF SERVICE

Katie J. Hruska, attorney for the Office of the Governor, State of South Dakota, hereby certifies that on December 15, 2023, an electronic copy of the Governor's Brief and Appendix in the above-entitled action was served via Odyssey File and Serve upon the following:

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Katie J. Hruska also hereby certifies that the original Governor's Brief and Appendix in the above-entitled action were hand delivered to the Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 and one electronic copy (in Word format) of the Governor's Brief was emailed to SCClerkBriefs@ujs.state.sd.us and also filed through Odyssey File and Serve on December 15, 2023.

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APPENDIX

APPENDIX

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STATE OF SOUTH DAKOTA
CONTRACT FOR SERVICES
Between

[NAME OF CONTRACTOR]
[ADDRESS]
[CITY, STATE, ZIP CODE]
[TELEPHONE NUMBER]

State of South Dakota
[NAME OF AGENCY]
[ADDRESS]
[CITY, STATE, ZIP CODE]
[TELEPHONE NUMBER]

Referred to as Contractor

Referred to as State

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

...

11. CERTIFICATIONS

...

D. CERTIFICATION OF NO STATE LEGISLATOR INTEREST:

Contractor (i) understands neither a state legislator nor a business in which a state legislator has an ownership interest may be directly or indirectly interested in any contract with the State that was authorized by any law passed during the term for which that legislator was elected, or within one year thereafter, and (ii) has read South Dakota Constitution Article 3, Section 12 and has had the opportunity to seek independent legal advice on the applicability of that provision to this Agreement. By signing this Agreement, Contractor hereby certifies that this Agreement is not made in violation of the South Dakota Constitution Article 3, Section 12.

...

19. SUBCONTRACTING:

Contractor may not use subcontractors to perform the services described herein without the express prior written consent of the State. Contractor 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 in a manner consistent with this Agreement. Contractor will cause its subcontractors, agents, and employees to comply with applicable federal, tribal, state, and local laws, regulations,

ordinances, guidelines, permits and other standards and will adopt such review and inspection procedures as are necessary to assure such compliance. The State, at its option, may require the vetting of any subcontractors. Contractor shall assist in the vetting process.

AUTHORIZED SIGNATURES:

In Witness Whereof, the parties signify their agreement effective the date below last written by the signatures affixed below.

STATE

CONTRACTOR

BY: _____
(Signature)

BY: _____
(Signature)

(Printed name)

(Printed name)

(Printed title)

(Printed title)

(DATE)

(DATE)

- State Agency Coding (MSA Center) _____.
- State Agency MSA Company for which contract will be paid _____.
- Object/sub-object MSA account to which voucher will be coded _____.
- Name and phone number of contact person in State Agency who can provide additional information regarding this contract _____.

SD MEDICAID PROVIDER AGREEMENT

The SD Medicaid Provider Agreement, hereinafter called Agreement, is executed by an eligible provider who desires to be a participating provider in the South Dakota Medicaid Program, hereinafter called Provider, and the State of South Dakota, acting by and through its Department of Social Services, Division of Medical Services, hereinafter called Medical Services. Collectively, the Provider and Medical Services are known as the "Parties."

As a participating Provider, the Provider agrees to the following:

1. Licensure and Certification.

- a. Provider is currently licensed, certified, or registered to practice and is in good standing in the State of South Dakota, the state where services are rendered, and/or in Provider's resident state, as required.
- b. Provider is and continues to be enrolled and in good standing with Medicare if Provider intends to enroll as a federally qualified health center, rural health clinic, home health agency, Indian Health Service, end stage renal disease center or unit, durable medical equipment supplier, or swing-bed services.
- c. Provider will update their electronic enrollment record to show continued good standing with licensure, certification, or registration within thirty (30) days of receiving notice of renewed or extended expiration date.
- d. Provider will update their electronic enrollment record and provide notice to Medical Services at SDMedicaidPE@state.sd.us within ten (10) days of receiving notice of an adverse change to a Provider's license, certification, or registration status. The notice will include the provider's NPI, effective date of the status change and the reason or cause of the change such as revocation, suspension, retirement, or death.

2. Ownership and Control.

- a. At the time the Provider enters into this Agreement, the Provider acknowledges that ownership and control information required by 42 C.F.R. § 455.104 has been fully and completely disclosed in the electronic enrollment record or other required forms.
- b. At the time the Provider enters into this Agreement, the Provider certifies that Provider and any of Provider's owners, officers, board of directors, agents, managing employees, and/or any person or entity with any ownership or controlling interest:
 - i. Has never been convicted, including any form of suspended sentence or settlement in lieu of conviction of any crime determined to be detrimental to the best interests of the SD Medicaid program; and
 - ii. Is not currently, and has never been, suspended, debarred, proposed for debarment, declared ineligible, or voluntarily or otherwise excluded from participation in this transaction by any state Medicaid program or any Federal department or agency.
- c. At all times during the course of this Agreement, the Provider agrees to update their electronic enrollment record with changes to their officers, board of directors, agents, managing employees, and any other person with a controlling interest.
- d. At all times during the course of this Agreement, the Provider agrees to notify Medical Services by certified mail within ten (10) days should the Provider or any of its owners, employees, agents, contractors, or any person or entity with any ownership or controlling interest become debarred, suspended, proposed for debarment, declared ineligible, or voluntarily or otherwise excluded from participating in Medicare or another state Medicaid program during the term of this Agreement.
- e. Provider agrees to provide at least thirty (30) days advance written notice to Medical Services at SDMedicaidPE@state.sd.us of a change of ownership.

3. Onsite Visits. Provider acknowledges and will grant access to Medical Services or their designees, and/or Medicaid Fraud Control Unit (MFCU), and/or U.S. Department of Health & Human Services (HHS) for unannounced site visits for the purpose of meeting requirements of 42 C.F.R. § 455.432, Section 5 below, and upholding the integrity of the Medicaid program.

4. Fingerprint-Based Criminal Background Checks. Pursuant to 42 C.F.R. Part 455, providers identified as high categorical risk upon request will submit fingerprints on the form and in the manner required by Medical Services, for Provider, Provider's owners, managing employees, and any person with a five (5) percent or more direct or indirect ownership interest, and authorizes Medical Services to complete state and Federal Bureau of Investigations (FBI) criminal history record checks.

5. Inspection and Maintenance of Records.

- a. Provider will keep their electronic enrollment record current and promptly make updates to changes including, but not limited to, Provider's name, locations and addresses, contact information, payment details, managing or controlling interests, license expiration, and additions, deletions, or replacements in entity association of servicing providers and their corresponding dates of participation and locations.
- b. Provider shall keep complete and accurate medical and fiscal records for a period of at least six years after the last claim is adjudicated or while an audit or investigation is pending that fully justify and disclose the extent of the services rendered and billings made under the SD Medicaid Program.
- c. Upon request, Provider agrees to utilize fiscal records to provide Medical Services with cost reports in the form and manner prescribed by Medical Services.
- d. Provider will maintain and supply all documentation necessary for the reimbursement of any outstanding claims upon termination from the SD Medicaid program.
- e. Provider agrees to provide Medical Services with copies of any care coordination agreement or subsequent addendums entered into with Indian Health Services or any other tribal program and notification of agreement termination.
- f. Providers eligible to render health care services under contracts implemented under the Indian Self-Determination and Education Assistance Act, as amended, often referred to as 638 contracts, will provide copies of the initiated contracts and addendums or modifications which outline the covered medical or health care services.
- g. Provider agrees to allow Medical Services, and/or MFCU and/or HHS immediate access to any and all materials which may be deemed confidential by any regulatory or licensing agency, board or commission.
- h. Upon request, Provider shall furnish Medical Services, MFCU, and/or HHS access and information regarding any payments claimed for providing services.
 - i. Requested information must be provided to Medical Services and/or MFCU within 30 days pursuant to ARSD 67:16:33:04.
 - ii. Requested information must be provided to HHS within 35 days pursuant to 42 C.F.R. § 455.105.

6. False Claims Act Education. If Provider meets the annual threshold of \$5 million in Medicaid payments, Provider will self-identify that they qualify as an "entity" and comply with the requirements of 42 U.S.C. § 1396a(a)(68).

7. Billing and Payment.

- a. Provider agrees to provide medically necessary goods and services as required by the recipient and only in the amount required by the recipient without discrimination on the grounds of age, race, color, sex, national origin, physical or mental disability, religion, marital or economic status, service utilization, or health status or need for services, except when that illness or condition can be better treated by another provider type.
- b. Provider acknowledges that by submitting a claim to the SD Medicaid Program, Provider certifies that the services and supplies were
 - i. Medically necessary;
 - ii. Rendered prior to the submission of the claim; and
 - iii. Rendered by Provider or incident to Provider's professional service by an employee, and in the case of an individual practitioner, under Provider's immediate personal supervision as permitted by the SD Medicaid Program.
- c. Provider agrees to submit claims:
 - i. In accordance with billing manuals and instructions, Companion Guides, and as required under any and all state regulations;
 - ii. That are timely, true, accurate, and complete; and
 - iii. With charges that do not exceed the usual, customary, and reasonable (UCR) amount which is an amount based on what providers in that area usually charge to the general public for the same or similar medical services and supplies. Provider further agrees to provide Medical Services and/or MFCU and/or HHS access to Provider's usual and customary billing practices and records.
- d. Provider acknowledges by Provider's signature on this Agreement that Provider understands that payment and satisfaction of each claim will be from Federal and State funds and that any false claims, statements or documents, or concealment of material fact, may be prosecuted under applicable Federal and State law.

- e. Provider agrees to be individually responsible and accountable for the completion, accuracy, and validity of all claims submitted, including claims submitted for Provider by other parties. Provider further agrees to not make or cause to be made a claim, knowing the claim to be false, in whole or in part, by commission or omission or in any other respect contrary to the provisions of SDCL 22-45.
- f. Provider agrees not to bill, charge, collect a deposit from, seek compensation from, seek remuneration from, surcharge, or have any recourse against a recipient or person acting on behalf of a recipient, except to the extent that Medical Services has authorized cost sharing such as a copayment. Provider will accept as payment in full the amounts paid in accordance with the reimbursement rates established by Medical Services, except where payment by the recipient is authorized by Medical Services including any authorized cost sharing. A provider may not bill a recipient for services that are allowable by Medical Services, but not paid due to the provider's lack of adherence to Medical Services' or other payer requirements.
- g. Provider understands that failure to submit or failure to retain adequate documentation for all services billed to the SD Medicaid Program may result in recovery of payments for medical services not adequately documented and may result in the termination or suspension of Provider from participation in the SD Medicaid Program, and may result in civil or criminal liability.
- h. Provider acknowledges that Medical Services is the payer of last resort (subject to certain exceptions) and acknowledges its obligation to pursue payment from all other liable parties. Provider further agrees that in the event Provider receives payment from the SD Medicaid Program in error or in excess of the amount properly due under the applicable rules and procedures, Provider will promptly notify Medical Services and arrange for the return of any excess money so received.
- i. Provider agrees to accept payment from the SD Medicaid Program via electronic funds transfer.

8. Electronic Data Interchange (EDI).

- a. Provider agrees that this Agreement, among other items, constitutes a trading partner agreement as defined by 45 C.F.R. § 160.103 and governs the exchange of electronic health information between the Parties by Health Insurance Portability and Accountability Act of 1996 (HIPAA) standard transactions and permits appropriate disclosure and use of such information as permitted by law.
- b. The Provider agrees to comply with all State and federal law, rule, regulation and applicable policy, including without limitation HIPAA, Sections 1171 through 1179 of the Social Security Act, Title 45 of the Code of Federal Regulation including Parts 160, 162, and 164, all applicable federal regulation, the electronic data transaction standards and code sets, the HIPAA Implementation Guides, and Medical Services' Companion Guides.
- c. Prior to EDI and throughout the life of the Agreement, the Provider's electronic enrollment record will correctly indicate their desire to participate in EDI.
- d. In the event that any billing agent or clearinghouse relationship exists, the Provider's enrollment record will capture the relationship and the standard transactions the billing agent or clearinghouse is authorized to participate in.
- e. Each party is responsible for all costs, charges, or fees it may incur by transmitting electronic transactions to, or receiving electronic transactions from, the other party.
- f. Provider shall not change the definition, data condition, meaning, intent or use of a data element or segment in a standard transaction;
- g. Provider shall not add any data elements or segments to the maximum defined data set, or use any code or data elements that are not in the standard transactions or are marked as "not used."
- h. Each party is solely responsible for the preservation, confidentiality, and security of data exchanged as well as data in its possession, including data in transmissions received from the other party and will establish processes to limit access to those who need it to perform their duties and safeguard unauthorized access.
- i. The Provider agrees and understands that there exists the possibility that Medical Services or others may request an exception from the Transaction and Code Set Regulations in whole or in part. If this occurs, Provider agrees that it will cooperate and fully participate in the testing, verification, and implementation of a modification to the standard.
- j. The Provider understands that the transaction standards and code sets may be modified and agrees that it will cooperate and fully participate in modifying, testing, verifying, and implementing the modifications or changes.
- k. The Provider understands that it is responsible for following the Implementation Guides and Addendums as well as the DSS Companion Guides which are subject to change and will ensure that prior to initiating any EDI, the format specifications in the most current Guides are met. Failure to comply with the format

specifications will result in the electronic claim or transaction being rejected and Medical Services will not be obligated to respond to the transaction.

- l. The data shall be and remain the property of Medical Services and the Provider agrees that it acquires no title, rights, or interest to the data furnished by Medical Services, including de-identified information, as a result of the Agreement.
- m. The Provider acknowledges that criminal and civil penalties may apply for unapproved use of disclosure data.
- n. Medical Services shall not be liable to the Provider for any damage or expenses for damages in any amount incurred as a result of inaccuracies in any of the information, data, electronic files, or documents supplied.

9. Security.

- a. Provider agrees to use appropriate safeguards and comply with Subpart C of 45 C.F.R. Part 164 with respect to electronic protected health information, to prevent the use or unnecessary or unlawful disclosure of protected health information.
- b. Provider agrees to report unnecessary or unlawful use or disclosure of protected health information of which it becomes aware, including breaches of unsecured protected health information as specified at 45 C.F.R. § 154.410, and any security incident of which it becomes aware within five (5) business days of receiving knowledge of such use, disclosure, breach, or security incident by contacting the Department of Social Services' Privacy Officer at DSSprivacyofficer@state.sd.us.

10. Termination. This Agreement can be terminated for:

- a. Failure to comply with any portion of this Agreement, addendums to this Agreement, conditions of participation, or requirements and limits of applicable rules and regulations;
- b. Improper submission of claims, or actions deemed an abuse of the SD Medicaid Program, or actions involving SD Medicaid Program abuse which result in administrative, civil or criminal liability;
- c. Conviction (including any form of suspended sentence) of any crime determined to be detrimental to the best interests of the SD Medicaid Program;
- d. Suspension, revocation, or termination from participation in Medicare or another state's Medicaid program;
- e. Provider's license or certification is surrendered, lapsed, suspended, revoked, or is otherwise not active and in good standing;
- f. The ownership, assets, or control of the Provider's entity are sold or transferred;
- g. A change in federal tax identification number;
- h. Thirty days elapse since Medical Services provided notice to the Provider of its intent to terminate the Agreement;
- i. Inactivity of paid claims for a period of twenty-four months or greater; or
- j. The matter of Provider convenience at the request of the Provider with thirty days of advance notice.

11. Payment Suspension.

- a. In the case that the Provider's eligibility status with Medical Services, Medicare, or another state's Medicaid program is not active and in good standing, including retroactive determinations and periods of time where the Provider has not yet exhausted appeal rights, Medical Services reserves the right to suspend payment for services rendered. In the case where the Provider's eligibility status is not returned to active and good standing, payment for services rendered during the determined period of ineligibility may be denied. Provider may not bill or have any recourse against a recipient or person acting on behalf of a recipient for services denied due to Provider ineligibility.
- b. In the case that the Provider has failed to maintain their electronic enrollment record with accurate information including, but not limited to payment details and pay-to address, Medical Services reserves the right to suspend payment for services rendered until the Provider has updated their enrollment record.
- c. Additional payment suspensions, such as those identified in 42 C.F.R. Part 455 may also apply.

12. Governing Law and Venue. This Agreement shall be governed and construed in accordance with the laws of the state of South Dakota. Venue for any lawsuit pertaining to or affecting this Agreement shall be in the Circuit Court, Sixth judicial Circuit, Hughes County, South Dakota. The Provider is subject to and shall comply with all Federal and State laws, regulations and rules applicable to Provider's participation in the SD Medicaid Program. Provider also agrees to abide by regulations and rules adopted during the term of the Agreement pursuant to SDCL Chapter 1-26 or 5 U.S.C. §553 in effect at the time the service is rendered.

13. Electronic Signatures. Provider and Medical Services agree that each may treat executed faxes, scanned images, or photocopies with signatures as original documents.

14. Effective Date. This Agreement is binding upon enrollment effective date.

15. Signature Block. If Provider is a legal entity other than a person, identify the organization as the Provider in the Provider Name field. The person signing the Agreement on behalf of the Provider warrants that he/she has legal authority to bind Provider.

TO BE COMPLETED BY PROVIDER

I declare and affirm under the penalties of perjury that this Agreement has been examined by me, and to the best of my knowledge and belief, is in all things true and correct. I further declare and affirm under the penalties of perjury that any claim to be submitted pursuant to this Agreement will be examined by me, and to the best of my knowledge and belief, will be in all things true and correct.

PROVIDER NAME: _____
(Legal Name of Individual Provider for Individual Enrollments or Legal Name of Organization for Other Enrollment Types)

BY: _____
Authorized Signature (Must be Provider for Individual Enrollments)

DATE: _____

NAME: _____
(Printed Name of Signatory)

SERVICING NPI: _____
(Only applies if Agreement for individual enrollment type)

BILLING NPI: _____

BILLING NPI: _____

BILLING NPI: _____

BILLING NPI: _____

BILLING NPI: _____

BILLING NPI: _____

BILLING NPI: _____

BILLING NPI: _____

BILLING NPI: _____

(Multiple Billing NPI fields are only acceptable when Agreement is for *individual* enrollment type)

TO BE COMPLETED BY MEDICAL SERVICES

APPROVED BY: _____

REFERENCE NUMBER: _____

DATE: _____

NEW _____ REVALIDATION _____

RISK LEVEL _____

INSTRUCTIONS FOR COMPLETING THE PROVIDER AGREEMENT

1. **Provider Name** – This field should be populated with the legal name of the individual health care practitioner who has a type 1 NPI and who is agreeing to the terms and conditions of the Agreement. SD Medicaid does not accept proxy or assignment of signatures on behalf of individual providers. In the case of an organizational provider who has a type 2 NPI, this field should be populated with the organization’s legal name as recognized by the IRS. A separate Agreement is required for each enrolled NPI.
2. **By** – This field is for the signature of the individual health care practitioner or in the case of an organization, the signature of the individual signing on behalf of the organization that has legal authority to bind the provider.
3. **Date** – the calendar date at the time the authorized signature in #2 is populated.
4. **Name** – This is the name of the individual who signed the agreement in readable print.
5. **Servicing NPI** – This field is only populated when the “Provider Name” field is for an individual health care practitioner who has a type 1 NPI.
6. **Billing NPI** – In the situation of an entity enrollment with a Type 2 NPI, there may be one and only one BNPI populated. Multiple occurrences of this field can be populated when the “Provider Name” is for an individual enrollment type to reflect the various NPI that the individual is associated to.
7. **Submitting Documentation** – The Agreement and all related documentation for a particular NPI should be uploaded to the enrollment record within the Provider Enrollment Portal (bottom of 1st enrollment record screen).

For additional assistance with SD Medicaid Provider Enrollment, please refer to the Provider Enrollment Portal User Guide, Provider Enrollment and Maintenance webpage (<https://dss.sd.gov/medicaid/providers/enrollment/enrollment.aspx>) or email SDMedicaidPE@state.sd.us with your NPI and applicable question.

CHILD PLACEMENT AGREEMENT

This "CHILD PLACEMENT AGREEMENT" will authorize the Placement Resource identified below to provide the service listed for the child(ren) and bill the Department of Social Services.

A. PLACEMENT RESOURCE INFORMATION:

Name _____
Address _____
City _____ State _____ Zip Code _____
Phone _____ Placement Resource # _____
Discussed the Reason for Removal with Placement Resource:

B. CHILD(REN) INFORMATION:

Child's Name: _____ DOB: _____ ID: _____
Clothing Monthly: _____
Incidentals Monthly: _____

Start Date:	Service Type	Unit Price	Max Units
_____ Date	_____ Choose an item.	_____	_____

Needs: _____
Behaviors: _____

(If only one child, remove red text and child information below. Otherwise, copy and paste the information below for each child. Remove red text when completed.)

Child's Name: _____ DOB: _____ ID: _____
Clothing Monthly: _____
Incidentals Monthly: _____

Start Date:	Service Type	Unit Price	Max Units
_____ Date	_____ Choose an item.	_____	_____

Needs: _____
Behaviors: _____

C. PARENT INFORMATION:

(If more than one parent, copy and paste. Remove red text when completed.)

Mother's Name: _____
Address: _____
City: _____ State: _____

Father's Name: _____

Address: _____

City: _____ **State:** _____

D. WHO TO CONTACT FOR QUESTIONS, CONCERNS OR IN AN EMERGENCY:

Family Services Specialist: _____

Office Phone: _____ **Ext.** _____ **Cell Phone:** _____

Supervisor: _____

Office Phone: _____ **Ext.** _____ **Cell Phone:** _____

After hours emergency phone number: _____ **Local Police Dept:** _____

Placing Office Address: _____

E. THE PLACEMENT RESOURCE AGREES:

1. To cooperate fully with the Department and its representatives in the development and implementation of a treatment plan designed for this child(ren), including any subsequent change of placement of this child(ren).
2. To cooperate fully with the Department and its representatives to comply with the placement preference requirements set forth in the Indian Child Welfare Act. When an Indian child is placed in foster care or adoption, a preference shall be given to placing the child with:
 - a. A member of the Indian child's extended family;
 - b. A foster home licensed, approved, or specified by the Indian child's tribe;
 - c. An Indian foster home licensed or approved by an authorized non-Indian licensing authority;
 - d. An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet an Indian child's needs.
3. To not consent to any arrangements for the child to be placed on psychotropic medications, to discontinue use of psychotropic medications, to increase or decrease the dosage of any prescribed psychotropic medications.
4. To maintain in confidence all information concerning the child(ren). Details of a child(ren)'s life or that of their family may not be shared with unauthorized individuals.
5. To not make any independent agreements with the child(ren)'s parents or guardian or to release the child(ren) to the care of anyone unless or until specific arrangements have been made or consented to by the Department. All phone calls are restricted until further notice from the Family Services Specialist.
6. To not consent to any arrangements for parental visitation, including vacation trips without the prior consent of the Department.
7. To report promptly to the Department:

- a. Any unplanned absence of the child(ren) from your care;
 - b. Any illness of the child(ren);
 - c. Any contemplated change in the child(ren)'s sleeping arrangements;
 - d. Any contemplated change of address or change in household members (including separation, divorce, or hospitalization);
 - e. Any conflict the child(ren) may have with legal, school or other persons in a position of authority;
 - f. Any emergency.
8. To refrain from initiating any steps leading toward the adoption of this child(ren) or contacting an attorney without the knowledge of the Family Services Specialist and/or supervisor.
 9. To incur no expenditure on behalf of this child(ren) without prior authorization from the Department with the expectations of reimbursement.
 10. To give prompt notice when a child(ren) is to be removed, except in the case of emergencies.
 11. To receive prior approval from the Department for transportation of the child(ren) that will require financial reimbursement except in emergencies.
 12. To discuss methods of discipline with the child(ren)'s Family Services Specialist. Physical discipline, such as spanking, is prohibited. It is essential that Resource Families not use any method of discipline that could be construed as abusive by the child(ren). The Department recommends the use of natural and logical consequences.
 13. To provide clothing for the child(ren) in accordance with the monthly allowance.
 14. To not physically or sexually abuse or emotionally abuse or neglect the child(ren).
 15. To be aware that there is always the possibility of sexual abuse to this child(ren) and must take precautions to protect individuals in their home.
 16. To follow the Internet Usage Agreement.
 17. To allow the child(ren) to participate in age appropriate activities, this will lead to normal growth and development.
 18. To have a valid driver's license and insurance, as well as ensure others who drive the child(ren) are also licensed and insured.

F. THE DEPARTMENT AGREES TO:

1. To provide consultation for the care, treatment and discipline of said child while under the care and supervision of the foster parent(s), and share a service agreement for the child, along with short term and long-range goals with the foster parents.
2. To give prompt notice when a child is to be removed except when the court, parent or best interest of the child, as determined by the Family Services Specialist, require immediate removal.
3. To provide the Placement Resource with notice of any periodic review or permanency planning hearing (dispositional hearing) relating to the child.

NOTICE: The State will pay only for actual services provided based on the number of units listed and the child's continued eligibility for those services. The necessary forms for the Provider to submit for payment are included with this agreement or may be obtained from your local office.

Signatures:

Placement Resource Signature

Date

Family Services Specialist Signature

Date

Supervisor Signature

Date

INDIAN CHILD WELFARE ACT PLACEMENT PREFERENCE

Indian Child Welfare Act is federal law which designates placement preference for Native American children who are members or eligible for membership in a federally recognized Indian Tribe.

ICWA establishes the placement preferences for foster care placement which are:

- o A member of the Indian child's extended family;
- o A foster home which is licensed, approved, or specified by the Indian child's Tribe;
- o An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- o An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

ICWA establishes the placement preferences for adoptive placement which are:

- o a member of the child's extended family;
- o other members of the Indian child's tribe;
- o or other Indian families.

Child Protection Services (CPS) will make ongoing efforts to comply with the ICWA placement preference throughout the child's case until permanency is established through reunification, guardianship, or adoption. A court must grant there is "good cause" to place outside the ICWA preference order.

RELATIVE PLACEMENT PREFERENCE

When a child is removed from their home to ensure safety, relatives and/or other adults with a close relationship to the child are given preference for placement. Children have more positive outcomes when they are cared for in a familiar environment by people they know and trust who will keep them connected to their family. Relative placement and connections preserve a child's identity and they are more likely to remain connected to their extended family and culture.

Relative search begins at intake and continues the moment Child Protection Services (CPS) is required to place the child and is an ongoing process throughout the life of a case. These efforts continue until reunification occurs or a guardian/adoptive resource is formally selected and approved as the child's permanent plan.

PLACEMENT OF SIBLINGS

Sibling relationships help children achieve developmental milestones as well as provide emotional support, companionship, and comfort in times of change. These relationships often provide needed continuity and family stability during a child's placement in foster care. The bond between siblings is important as they typically share the same history, heritage and biology, unlike any other relationship. Child Protection Services will foster the special relationship siblings share.

- Child Protection Services (CPS) will give preference to families who are able to care for brothers and sisters together on an ongoing basis until the child(ren) achieve permanency through reunification, guardianship, or adoption.
- The only reason siblings will not be placed together is when it is unsafe for the children to be placed in the same home. When safety is a barrier, efforts will be made to address the safety issue so the siblings can be reunited.
- When brothers and sisters are not placed together, a plan will be implemented to maintain close connections between the children.
- Separation of siblings will be re-evaluated throughout the case and siblings will be reunited whenever it is possible for them to be cared for together in the same home.

As a foster parent, I understand these policies will be followed if I accept children to be placed in my home.

Placement Resource Signature: _____ Date: _____
 Placement Resource Signature: _____ Date: _____
 Family Services Specialist Signature: _____ Date: _____
 Supervisor Signature: _____ Date: _____

**Authorization to Seek Treatment and Obtain Prescriptions
for Children in the Custody of the Department of Social Services**

The following child(ren) is/are in the custody of the Department of Social Services, Division of Child Protection Services:

Child Name: _____ **DOB:** _____ **TITLE 19 #** _____

Child Name: _____ **DOB:** _____ **TITLE 19 #** _____
(If more than one child, copy and paste. Remove red text when complete.)

The Department of Social Services, Division of Child Protection Services hereby authorizes all medical, dental, vision, mental health, and substance abuse providers and all third-party payers including the Medicaid Program to disclose the above-named child/children's Protected Health Information for the purpose of the provision and payment for health care for the child/children to the individual(s) listed below as the individual with whom the child has been placed in Foster or Kinship Care. The specific date of service should include all care ever provided to the child from prior to the placement of the child in Foster Care until such time as the placement is terminated.

The Department of Social Services, Division of Child Protection Services understands the information received may include information relating to drug and/or alcohol abuse or physical/sexual abuse. The South Dakota Department of Social Services, its employees, officers, and medical providers are hereby released from any legal responsibility or liability for release of the above information to the extent indicated and authorized herein.

This Authorization form may be revoked at any time except to the extent action has been taken upon it. If not revoked, this Authorization to release protected health information will terminate when the child /children are no longer placed in Foster or Kinship Care with the individual(s) listed below. The Department of Social Services, Division of Child Protection Services understand that this authorization may be revoked at any time. Such revocation must be done in writing.

The Department of Social Services, Division of Child Protection Services understands if this information is released to a third party, the information may be released by the person or entity that receives the information and may no longer be protected by federal or other applicable privacy regulations.

The Department of Social Services, Division of Child Protection Services understands that it is under no obligation to sign this authorization. The Department of Social Services, Division of Child Protection Services understands that the covered entity may not condition treatment, payment, enrollment or eligibility for benefits on whether the Department of Social Services, Division of Child Protection Services signs the authorization.

Placement of the child(ren) has/have been made with _____ in Foster or Kinship Care. They are hereby authorized by the Department of Social Services to seek treatment (medical, dental, vision, mental health, substance abuse) for the child(ren).

Signature of Child Protection Services

Date

Phone Number

Print Name

Foster Parent Communication Checklist

Expectations for visits are as follows: The next working day of the child entering care (unless there are special circumstances), within the next 14 days, and then once every calendar month.

THE NEXT WORKING DAY (for emergency placements)

FP FSS DATE

Car Seat

School Arrangements/Records

Child Care Arrangements/Assistance

Medicaid Card/Number

Any changes in staff or contact information

Any known medical/behavioral concerns

Clothing Needs/Purchase Approval Process

Long term placement plan for the child(ren)

Medical, Dental, Mental Health (Physical exam within 30 days)

THE NEXT 14 DAYS

FP FSS DATE

Visitation

Life Book

Transportation/Mileage Form

Reimbursement Process

WIC Transfer

Internet Usage Agreement

Cultural Information

Permanency Planning

Input Regarding Child's Case Plan

Involvement with Birth Parents

Child's Behavioral/Emotional Needs

Supports Needed for Placement Resource

Scheduled Appointments and Important Dates

Internet Usage Agreement for Youth in Care

When online using any device, be it viewing, downloading, updating, sharing, or forwarding, I _____ will always abide by the following rules.
If in doubt I will ask advice from my resource provider _____ or my Family Services Specialist.

1. I will not be online friends or have online conversations with people I have not met in real life.
2. I agree to keep personal conversations I need to have with friends for real life.
3. I will not bully, slander, or say anything hurtful towards anyone and I will not copy or forward any such messages written by anyone else.
4. I will not give away personal information such as my birthday, address, school information, or phone number without permission from my resource provider or my Family Services Specialist.
5. I will not respond to inappropriate requests from people online, including but not limited to requests for personal information, financial information, suggestive photos/images, or any other private information.
6. I will set my social networking sites privacy settings to private, restricting who can see my personal information.
7. I will not use a credit card or debit card for any purchase without my resource provider or my Family Services Specialist consent.
8. I agree to get permission from my resource provider or my Family Services Specialist before signing up for anything online.
9. I will not give my online passwords out to anyone besides my resource provider or my Family Services Specialist.
10. I understand in order to help me surf the net responsibly, my resource provider will occasionally check what I have been doing on the computer.
11. I agree to only go to acceptable web categories/areas, as determined by my resource provider.
12. I will not delete the browsing history on the computer I use, nor will I alter or change the settings on the Internet browser used. I will ask for permission if I wish to delete browsing history.
13. I will not download music, games or software without consent from my resource provider.
14. When pop-up or banner ads come up, I will not click on them but will close them with the "x" button.
15. I understand communicating with siblings on a regular basis on social networking sites will not replace in person visits.
16. I will work together with my placement resource or Family Services Specialist to contact relatives on the web.
17. If anything happens on the internet that makes me uncomfortable, scared, confused or anxious, I will tell a responsible adult, my resource provider, and/or my Family Services Specialist.
18. I agree to limit my use of the internet to _ hour(s) each day, or additional time if given permission by my resource provider or my Family Services Specialist.
19. When interacting with others online, I am aware that:
 - a. People are not always who they say they are
 - b. People do not always tell the truth
 - c. There is no such thing as privacy online

If I violate any of these agreements, I may be restricted from using the computer and/or the internet for a specified period of time that will be decided by my resource provider and my Family Services Specialist.

Youth printed name

Youth signature

Date

Resource provider printed name

Resource provider signature

Date