



Participation Agreement

2019

Name of Participant	
Name of CEO or Individual Authorized to Sign on Behalf of Participant	Title

Introduction:

This Participation Agreement (Agreement) between South Dakota Health Link (SDHL) and Participant becomes effective upon signature by both parties. SDHL electronically connects Participants for the purpose of exchanging an agreed upon set of data.

South Dakota Health Link:

- Allows for secure consultations, sharing of test results, and other information with SDHL Participants.
- Administered by the South Dakota Department of Health (SD DOH), is guided by a statewide advisory council with the common goal: “Foster the sharing of information through a secure platform to improve the quality, safety and efficiency of care provided to South Dakota citizens”.
- Enables Participants to access and supply patient information.

Participant Options:

- Point of Care Exchange Membership
- Direct Secure Messaging (Webmail) Membership
- Notify Service Membership
- State Hub (Public Health)

Section 1 - Definitions

The following terms apply unless otherwise indicated in this Agreement:

- Agreement.** “Agreement” means this document and any exhibits or appendices attached hereto and incorporated herein.
- Authorized User.** “Authorized User” means an individual authorized by Participant and SDHL to access Data for a Permitted Use.
- Data.** “Data” means patient record elements relevant to the scope of work of SDHL and includes all written or electronic patient information relating to patient’s identity, medical history, diagnosis, treatment, tests or prognosis which is accessible to Participant through SDHL. Such information may also include, but not be limited to, any medical or laboratory services or prescription medications.
- Data Services.** “Data Services” means access to data elements provided to Participant pursuant to this Agreement.
- SDHL Subcontractor.** “SDHL Subcontractor” means vendor(s) with whom SDHL has subcontracted to assist it in meeting its obligations under this Agreement.
- Electronic Health Record System.** “Electronic Health Record System” and the abbreviation “EHR” mean an electronic data system that stores current and historical information about patient diagnosis and treatment, including test results, provider notes, treatment notes, medication history, problem lists and other information related to care of the patient such as billing, scheduling, and registration data.

- (g) **Health Insurance Portability and Accountability Act “HIPAA”.** “HIPAA Privacy and Security Regulations” means the Standards for Privacy of Individually Identifiable Health Information at 45 C.F.R. Parts 160 and 164 and the Security Standards for the Protection of Electronic Protected Health Information at 45 C.F.R. Parts 160 and 164, as amended by the Health Information Technology for Economic and Clinical Health Act §§ 13400-13424, 42 U.S.C. §§ 17921-17954 (2009).
- (h) **Master Patient Index.** “Master Patient Index” and the abbreviation “MPI” both mean an electronic data system that stores patient identifiers as well as location of other electronic patient information that may be stored in one or more provider’s EHR, and in other data systems.
- (i) **Participant.** “Participant” means a hospital, medical practice, physician practice, provider, health care provider, or other organization that has entered into this Agreement with SDHL.
- (j) **Participant Subcontractor.** “Participant Subcontractor” means a vendor(s) with whom Participant has subcontracted to the terms of this Agreement to assist it in meeting its obligations under this Agreement. Participant shall obtain adequate written assurances from such subcontractors that they will comply with this Agreement and all applicable laws including but not limited to the HIPAA Privacy and Security Regulations.
- (k) **Patient.** “Patient” means an individual who has received or will receive treatment or health care services from a Participant and whose health information is exchanged via SDHL.
- (l) **Permitted Use.** “Permitted Use” means the use of any Data available for query on SDHL only as allowed by the state or federal law pursuant to the Policies and Procedures of SDHL.
- (m) **Protected Health Information.** “Protected Health Information” and the abbreviation “PHI” shall have the same meaning as the term “protected health information” in 45 C.F.R. § 160.103, limited to the individually identifiable health information created or received by, from or on behalf of a Participant. Such term shall also include Electronic Protected Health Information.
- (n) **Treatment.** “Treatment” shall have the definition assigned to it by the HIPAA Privacy and Security Regulations at 45 C.F.R. § 164.501, namely the provision, coordination, or management of health care and related services by one or more health care providers, including the coordination or management of health care by a health care provider with a third party, consultation between health care providers relating to a patient, or the referral of a patient for health care from one health care provider to another.

Section 2 - Policies and Procedures of South Dakota Health Link – Patient Consent and Data Use

- (a) SDHL has established policies and procedures available at www.sdhealthlink.org/sdhlpolicy/ that govern SDHL’s and Participant’s use of SDHL including to but not limited to Patient Consent and Data Use. Participant’s use of SDHL constitutes acceptance of Policies and Procedures and failure to comply with such Policies and Procedures by either SDHL or Participant shall constitute a material failure to comply with the terms and conditions of this Agreement.
- (b) SDHL may change or amend Policies and Procedures at its discretion after consultation with Participants. SDHL shall provide Participant notice of such changes. Any changes will be effective 90

days following adoption by SDHL, unless SDHL determines that an earlier effective date is required to address a legal requirement, a concern relating to the privacy or security of Data or an emergency situation. Participant will have no ownership or other property rights in Policies and Procedures or other materials or services provided by SDHL.

- (c) SDHL, through its agreements with Data Subcontractors, shall accept and process Data from Participants. To best promote the technical and formatting accuracy of Data available to Participants, SDHL reserves the right to suspend additions and exchange of Data to SDHL by Participants until technical specifications are met. SDHL will work with Participants to resolve any such problems.

Section 3 - South Dakota Health Link (SDHL) Obligations

- (a) SDHL will make SDHL Data available only to Participants, Authorized Users and SDHL Subcontractor(s).
- (b) SDHL will make reasonable efforts to make SDHL available to Participants 24 hours a day, 7 days a week, and 365 days a year. SDHL availability may be temporarily suspended for maintenance or unscheduled disruptions. SDHL will use commercially reasonable efforts to provide Participant with advance notice of any suspension or interruption of SDHL and to restore availability. Participant is responsible for securing PHI through other means during any periods when SDHL is not available.
- (c) South Dakota Health Link through its affiliation with the Department of Health is a “covered entity” as defined in the Health Insurance Portability and Accountability Act (HIPAA), 45 CFR §160.103, and will abide by the rules and regulations set forth in 45 CFR Parts 160 and 164 (HIPAA), as amended by the Health Information Technology for Economic and Clinical Health (HITECH) Act §§ 13400-13424, 42 U.S.C. §§ 17921-17954 (2009). HIPAA exempts from the Business Associate Agreement requirement those disclosures between covered entities and health care providers concerning the treatment of an individual (45 CFR §164.502 (e)(1)(ii)).
- (d) SDHL may grant access to the audit trail of queries for the Participating Organizations own patients.

Section 4 – Participant Obligations

- (a) Participant may transmit and/or use Data through SDHL only for Permitted Use and in accordance with the terms of this Agreement.
- (b) Participant shall be responsible for the costs of supplying equipment necessary for operation of its EHR system in conjunction with this Agreement. Participant further assumes responsibility for all costs charged by vendors, internet service or telecommunications providers necessary to connect Provider’s computer network to SDHL.
- (c) Participant shall identify its Authorized Users and the level of access to SDHL.
- (d) User Names and Passwords for each Authorized User will be issued by SDHL that permits such Authorized User to access the system and use the application. If an individual is removed as an Authorized User by reason of termination of employment or otherwise, the Participant shall disable the user name and password of the individual within twenty-four hours.

- (e) Participant shall restrict access to the system(s) and, if applicable, use of application(s), only to the Authorized Users the Participant has identified and to whom the Participant has issued a user name and password in accordance with sections 5.a and 5.b.
- (f) Participant is a “covered entity” as defined in the Health Insurance Portability and Accountability Act (HIPAA), 45 CFR §160.103, and will abide by the rules and regulations set forth in 45 CFR Parts 160 and 164 (HIPAA), as amended by the Health Information Technology for Economic and Clinical Health (HITECH) Act §§ 13400-13424, 42 U.S.C. §§ 17921-17954 (2009). HIPAA exempts from the Business Associate Agreement requirement those disclosures between covered entities and health care providers concerning the treatment of an individual (45 CFR §164.502 (e)(1)(ii)). Participant may request SDHL to complete a Business Associate Agreement separate from this Participation Agreement if deemed necessary by the Participant.
- (g) Participant is solely responsible for all acts and omissions of the Participant and the Participant’s Authorized Users (if the acts or omissions of those Authorized Users were due to negligent or intentional failure of the Participant to comply with its obligations under this article or the HIPAA Security Rule) with respect to the System, the Applications, any confidential, and other information accessed in connection with in SDHL. In addition, Participant is solely responsible for acts or omissions of any individual who accesses the System(s) or uses the Application(s) either through the Participant or by use of any passwords or log-on received or obtained from the Participant if the access or use was due to the negligent or intentional failure of the Participant to comply with its obligations under this section of the HIPAA Security Rule.
- (h) Participant may request SDHL to initiate an audit regarding another Participant’s Authorized User for a good faith belief of improper use, access, or disclosure of information on the SDHL.
- (i) Participant may not re-sell or supply XDR Direct Addresses provided by SDHL to any other non-affiliated individual or organization.

Section 5 – Ownership of Exchange Equipment and Rights

- (a) Any equipment or communication lines supplied by the Participant shall remain the sole property of the Participant. Equipment, software, intellectual property, or communication lines supplied by SDHL shall remain the sole property of SDHL, respectively.
- (b) SDHL or its Data Subcontractors shall retain ownership of all software (including any intellectual property rights embodied in the software or related to it) and any intellectual property developed in connection with SDHL or during the course of performing services related to SDHL whether they are performed by SDHL or a Data Subcontractor. In addition, SDHL or its Data Subcontractors shall own all improvements, enhancements, and derivative works of any intellectual property owned or developed by them prior to the date of the commencement of this Agreement and in SDHL. Each Participant, if it participates in the development of intellectual property owned by SDHL or any of its Data Subcontractors, hereby waives and relinquishes all rights that it may have or has in such intellectual property owned or developed by SDHL or its Data Subcontractors prior to the date of the commencement of this Agreement and in SDHL and, to the extent it does have any such rights, hereby assigns them to SDHL and its Data Subcontractors, as the case may be. SDHL grants to each Participant a nonexclusive, nontransferable, non-sub licensable license to use the software solely for

participation in SDHL and subject to the limitations described in this Agreement. Participant agrees to provide reasonable assistance to SDHL or its Data Subcontractors in enforcing its rights to such software and intellectual property. Neither SDHL nor any of its Data Subcontractors will acquire any rights to any of Participant's confidential information which may be included in any software unless expressly agreed otherwise. This subsection shall not grant to SDHL or its Data Subcontractors any rights in clinical research related intellectual property developed by Participant or another organization as a result of having access to Data under this Agreement.

- (c) **No Warranties.** EACH PARTICIPANT EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES REGARDING THE PATIENT DATA OF THE PARTICIPANT THROUGH THE SYSTEM(S), INCLUDING, AND WITHOUT LIMITATION, ANY AND ALL WARRANTIES OF ACCURACY, COMPLETENESS, FITNESS FOR A PARTICULAR USE AND ANY OTHER EXPRESS OR IMPLIED WARRANTIES. EACH PARTICIPANT ACKNOWLEDGES AND AGREES THAT ANY DATA ACCESSED BY THE PARTICIPANT OR ITS AUTHORIZED USERS IS PROVIDED ON AN "AS-IS" AND "WHERE-IS" BASIS, AND SDHL AND EACH DATA PARTICIPANT SHALL TAKE ALL REASONABLE EFFORTS NECESSARY TO INFORM AUTHORIZED USERS OF THEIR RESPONSIBILITY TO REVIEW, UPDATE AND CONFIRM THE ACCURACY OF ANY INFORMATION ACCESSED THROUGH THE SYSTEM(S). USE OF THE SYSTEM(S) IS NOT A SUBSTITUTE FOR A HEALTH CARE PROVIDER'S STANDARD PRACTICE OR PROFESSIONAL JUDGMENT. ANY DECISIONS WITH RESPECT TO THE APPROPRIATENESS OF DIAGNOSES OR TREATMENTS OR THE VALIDITY OR RELIABILITY OF INFORMATION IS THE SOLE RESPONSIBILITY OF THE PATIENT'S HEALTH CARE PROVIDER. NOTHING IN THIS SECTION IS INTENDED TO LIMIT A PARTICIPANT'S OBLIGATIONS UNDER SECTION 4 OF THIS AGREEMENT.

Section 6 – Limited Warranties and Disclaimers

- (a) **Limited Warranty and Disclaimer of Other Warranties.** SDHL will use its best efforts to correctly transmit data between Participants on a timely basis. SDHL makes no representation nor will warranty that the data delivered to the Participant be correct or complete. SDHL makes no warranty or representation regarding the accuracy or reliability of any information technology system used for the transfer. SDHL disclaims all warranties regarding any product, services, or resources provided by it, or data transmitted, pursuant to this Agreement including, but not limited to, any warranty of merchantability or fitness for a particular purpose.

Section 7 – Fees and Costs

- (a) Current annual participation or membership fees will be available
- (b) SDHL is not responsible for any ongoing or reoccurring costs Participant may incur. SDHL shall not pay for any costs related to Participant's EHR maintenance, support and upgrades.
- (c) One-Time fees will be the participant's responsibility.
- (d) Participant agrees that, once paid, all Membership Fees are nonrefundable for any reason, including termination of participation in South Dakota Health Link services by either party.

Section 8 - Term and Termination

- (a) This Agreement may be terminated by either party upon sixty (60) days prior written notice, and may be terminated by SDHL for cause if participant materially breaches this Agreement and fails to substantially remedy its obligations under this Agreement within (30) days of receipt of notice of such a material breach. Upon the effective termination date of the Agreement, SDHL will cease providing Participant and its Authorized Users access to SDHL, and Participant and its Authorized Users will stop using SDHL.
- (b) Termination and Participant's User Agreement. Participant's User Agreement shall commence on the Effective Date and remain in force until terminated by either party. Any terms of this Agreement which by intent or meaning have validity beyond the termination shall survive termination of this Agreement.

Section 9 - Other Provisions

- (a) CHOICE OF LAW AND FORUM: The terms and conditions of this agreement are subject to and will be construed under the laws of the State of South Dakota. The parties further agree that any dispute arising from the terms and conditions of this agreement, which cannot be resolved by mutual agreement, will be tried in the Sixth Judicial Circuit Court, Hughes County, South Dakota.
- (b) INTEGRATION: This agreement is a complete version of the entire agreement between the parties with respect to the subject matter within this agreement and supersedes all prior or contemporaneous written or oral understandings, agreements and communications between them with respect to such subject matter. This agreement may be modified or amended only by a writing signed by both parties.
- (c) NOTICE: Any notice or other communication required under this agreement shall be in writing and sent to the address set forth below. Notices shall be given by and to the SDHL Contact Person on behalf of SDHL, and by and to the Participant Contact Person on behalf of Participant, or such authorized designees as either party may from time to time designate in writing. Notices or communications to or between the parties shall be deemed to have been delivered when mailed by first class mail, provided that notice of default or termination shall be sent by registered or certified mail, or, if personally delivered, when received by such party.
- (d) ASSURANCES: The Participant agrees to abide by all applicable provisions of the following assurances: Lobbying Activity, Byrd Anti Lobbying Amendment (31 USC 1352), Drug-Free Workplace, Executive Order 11246 Equal Employment Opportunity, Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, Drug Abuse Office and Treatment Act of 1972, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, Age Discrimination Act of 1975, Americans with Disabilities Act of 1990, Pro-Children Act of 1994, Hatch Act, Health Insurance Portability and Accountability Act (HIPAA) of 1996, Clean Air Act, Federal Water Pollution Control Act, Charitable Choice Provisions and Regulations, Equal Treatment for Faith-Based Religions at Title 28 Code of Federal Regulations Part 38, the Violence Against Women

Reauthorization Act of 2013, American Recovery and Reinvestment Act of 2009, and Section 106 (g) of the Trafficking Victims Protection Act of 2002, as amended (22 U.S.C. 7104) as applicable.

- (e) **CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY, AND VOLUNTARY EXCLUSION:** Participant agrees that neither Participant, nor any of Participant's principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in transactions by any Federal department or agency. Participant will provide immediate written notice to the Department of Health, Division of Administration (600 East Capitol Avenue, Pierre, SD 57501 (605) 773-3361), if Participant, or any of Participant's principals, becomes debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in transactions involving Federal funding. Participant further agrees that if this agreement involves federal funds or federally mandated compliance, then Participant is in compliance with all applicable regulations pursuant to Executive Order 12549, including Debarment and Suspension and Participants' Responsibilities, 29 C.F.R. § 98.510 (1990).
- (f) **NONASSIGNMENT/SUBCONTRACTING:** Participant shall not assign this agreement, or any portion thereof, without the prior written consent of SDHL. Participant's assignment or attempted assignment of this agreement, or any portion thereof, without SDHL's prior written consent constitutes a material breach of contract. The Participant may not use subcontractors to perform the services described herein without the express prior written consent of SDHL. Participant will include provisions in its subcontracts requiring its subcontractors to comply with the applicable provisions of this Agreement, to indemnify SDHL, and to provide insurance coverage in a manner consistent with this Agreement. Participant will cause its subcontractors, agents, and employees to comply with applicable federal, state and local laws, regulations, ordinances, guidelines, permits and requirements and will adopt such review and inspection procedures as are necessary to assure such compliance.
- (g) **FEDERAL AND STATE LAWS:** Participant agrees that it will comply with all federal and state laws, rules and regulations as they may apply to the provision of services pursuant to this agreement, including the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101-12213, and any amendment thereto, Section 306 of the Clean Air Act, and Section 508 of the Clean Water Act. Both parties further agree to provide services covered by this agreement without regard to race, color, national origin, sex, age or disability as prohibited by state or federal law.
- (h) **REPORTING OF PERSONAL INJURIES AND/OR PROPERTY DAMAGE:** Participant agrees to report promptly to SDHL any event encountered in the course of performance of this agreement which results in injury to the person or property of third parties, or which may otherwise subject Participant or SDHL to liability. Reporting to SDHL under this section does not satisfy Participant's obligation to report any event to law enforcement or other entities as required by law.
- (i) **SEVERABILITY:** In the event that any term or provision of this agreement shall violate any applicable law, such provision does not invalidate any other provision hereof.
- (j) **FORCE MAJEURE:** Neither Participant nor SDHL shall be liable to the other for any delay in, or failure of performance of, any covenant or promise contained in this agreement, nor shall any delay or failure constitute default or give rise to any liability for damages if, and only to the extent that, such delay or failure is caused by "force majeure". As used in this agreement, "force majeure" means acts of God, acts of the public enemy, acts of the State and any governmental entity in its sovereign

capacity, fires, floods, epidemics, quarantine restrictions, strikes or other labor disputes, freight embargoes, or unusually severe weather.

- (k) **RECORD RETENTION/EXAMINATION:** Participant agrees to maintain all records that are pertinent to this agreement and retain them for a period of three years following final payment against the agreement. SDHL agrees to assume responsibility for these items after that time period. These records shall be subject at all reasonable times for inspection, review or audit by SDHL, other personnel duly authorized by SDHL, and federal officials so authorized by law.
- (l) **LICENSING AND COMPLIANCE:** The Participant agrees to comply in full with all licensing and other standards required by Federal, State, County, City or Tribal statute, regulation or ordinance in which the service and/or care is provided for the duration of this agreement. The Participant will maintain effective internal controls in managing the federal award. Liability resulting from noncompliance with licensing and other standards required by Federal, State, County, City or Tribal statute, regulation or ordinance or through the Participant's failure to ensure the safety of all individuals served is assumed entirely by the Participant.
- (m) **CONFIDENTIALITY OF INFORMATION:** For the purpose of the sub-paragraph, "State Proprietary Information" shall include all information disclosed to the Participant by SDHL. Participant acknowledges that it shall have a duty to not disclose any State Proprietary Information to any third person for any reason without the express written permission of a SDHL officer or employee with authority to authorize the disclosure. Participant shall not: (i) disclose any State Proprietary Information to any third person unless otherwise specifically allowed under this agreement; (ii) make any use of State Proprietary Information except to exercise rights and perform obligations under this agreement; (iii) make State Proprietary Information available to any of its employees, officers, agents or consultants except those who have agreed to obligations of confidentiality at least as strict as those set out in this agreement and who have a need to know such information. Participant is held to the same standard of care in guarding State Proprietary Information as it applies to its own confidential or proprietary information and materials of a similar nature, and no less than holding State Proprietary Information in the strictest confidence. Participant shall protect confidentiality of SDHL's information from the time of receipt to the time that such information is either returned to SDHL or destroyed to the extent that it cannot be recalled or reproduced. State Proprietary Information shall not include information that (i) was in the public domain at the time it was disclosed to Participant; (ii) was known to Participant without restriction at the time of disclosure from SDHL; (iii) that is disclosed with the prior written approval of SDHL's officers or employees having authority to disclose such information; (iv) was independently developed by Participant without the benefit or influence of SDHL's information; (v) becomes known to Participant without restriction from a source not connected to the State of South Dakota. State's Proprietary Information shall include names, social security numbers, employer numbers, addresses and all other data about applicants, employers or other clients to whom SDHL provides services of any kind. Participant understands that this information is confidential and protected under applicable State law at SDCL 1-27-1.5, modified by SDCL 1-27-1.6, SDCL 28-1-29, SDCL 28-1-32, and SDCL 28-1-68 as applicable federal regulation and agrees to immediately notify SDHL if the information is disclosure, either intentionally or inadvertently. The parties mutually agree that neither of them shall disclose the contents of the agreement except as required by applicable law or

as necessary to carry out the terms of the agreement or to enforce that party’s rights under this agreement. Participant acknowledges that the State and its agencies are public entities and thus are bound by South Dakota open meetings and open records laws. It is therefore not a breach of this agreement for SDHL to take any action that SDHL reasonably believes is necessary to comply with the South Dakota open records or open meetings laws. If work assignments performed in the course of this Agreement require additional security requirements or clearance, the Participant will be required to undergo investigation.

- (n) CONFLICT OF INTEREST: Participant agrees to establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal organizational conflict of interest, or personal gain. Any potential conflict of interest must be disclosed in writing.
- (o) RECYCLING: SDHL strongly encourages Participant to establish a recycling program to help preserve our natural resources and reduce the need for additional landfill space.

Name of Participant			
Participants Membership Level may provide access to some or all the following Services: <ul style="list-style-type: none"> • Point of Care Exchange Membership • Direct Secure Messaging (Webmail) Membership • XDR Direct Service Messaging Subscription • Notify Service Membership • State Hub (Public Health) 			
Name of CEO or Individual Authorized to Sign on Behalf of Participant		Title	
Address	City	State	Zip Code
Email Address		Telephone Number	
Signature of CEO or Individual Authorized to Sign on Behalf of Participant		Date	

SOUTH DAKOTA HEALTH LINK			
Name of Authorized Representative		Title	
Address 820 N Washington Ave	City Madison	State SD	Zip Code 57042
Email Address		Telephone Number (605) 256-5687	
Signature of South Dakota Health Link Official		Date	