

**PERFORMANCE CONTRACT BY AND BETWEEN
THE STATE OF COLORADO DEPARTMENT OF HIGHER EDUCATION
AND THE UNIVERSITY OF DENVER**

This Performance Contract, entered into this 30th day of June 2005, and effective as of the date of approval by the Colorado Commission on Higher Education (hereinafter referred to as the "Commission") and the State Controller, is made by and between the State of Colorado, Department of Higher Education (hereinafter referred to as the "Department") and Colorado Seminary, which owns and operates the University of Denver, (hereinafter referred to as the "Institution").

RECITALS

WHEREAS, in its passage of the College Opportunity Fund legislation, the General Assembly has found that it is imperative that an increased number of Coloradans pursue education beyond high school; and

WHEREAS, the General Assembly has determined that a postsecondary educational experience for Coloradans is essential for the State to compete in the new global economy and to develop a new generation of leaders and active participants in state and local civic affairs; and

WHEREAS, the General Assembly has determined that it is appropriate to support programs that are designed to encourage participation in postsecondary education, that increase citizens' awareness of the value of and need for a postsecondary education, and that make citizens aware of the financial support provided by them through the General Assembly to students and institutions of higher education; and

WHEREAS, Title 23, Article 18, Section 201, Colorado Revised Statutes, provides that a student of a private institution of higher education shall be a beneficiary of the college opportunity fund and eligible to participate in the College Opportunity Fund program only if the private institution of higher education that the student attends has agreed to participate in the program by establishing a performance contract with the Department; and

WHEREAS, the Institution desires to enter into a performance contract with the Department in order to allow its students to participate in the College Opportunity Fund program; and

WHEREAS, authority exists in the law and funds have been budgeted, appropriated and otherwise made available and a sufficient uncommitted balance thereof remains available for encumbering and subsequent payment of this contract; and

WHEREAS, required approval, clearance and coordination has been accomplished from and with appropriate agencies.

NOW THEREFORE, in consideration of the foregoing and intending to be bound hereby, the Parties agree as follows:

1. Term of Contract. The term of this contract shall begin on July 1, 2005, or the date the State Controller, or designee, executes this contract, whichever is later, for a period of five (5) years, subject annually to available appropriations and subject to earlier termination as provided for herein.

2. Scope of Contract. This contract sets forth the terms under which the Institution shall participate in the College Opportunity Fund program.

3. Eligibility to Participate in the College Opportunity Fund Program.

a. Institution. The Department has determined that as of the effective date of this contract, the Institution meets all the requirements set forth in Title 23, Article 18, Section 102(9), Colorado Revised Statutes, for participation in the College Opportunity Fund program. The Institution agrees that in the event that it no longer satisfies any statutory requirements for participation in the College Opportunity Fund program, the Institution shall immediately notify the Department and the parties shall follow the procedures for termination of the contract set forth in Paragraph 10.

b. Students. The Institution agrees that it shall determine student eligibility based on the requirements set forth in Title 23, Article 18, Section 102(5)(a), Colorado Revised Statutes, and only request and accept stipends from the College Opportunity Fund for students who meet these requirements ("Eligible Undergraduate Student"). Further, the Institution shall maintain appropriate documentation for each student who it determines is eligible to participate in the College Opportunity Fund program and shall make these documents available to the Department or its representative(s) upon request. Such documentation shall include the revised Residency Classification for Tuition/Financial Aid Purposes state form for Colorado residency, high school, GED and home schooling eligibility and the Free Application for Federal Student Aid form (FAFSA) for Pell eligibility. The Institution agrees that it shall not request and/or accept a stipend from the College Opportunity Fund for more than one hundred forty-five credit hours for each Eligible Undergraduate Student as reported by the College Access Network, except as provided for in Title 23, Article 18, Section 202(5)(c) and (e), Colorado Revised Statutes. The Institution shall comply with the Commission's Policy on credit hours available under the College Opportunity Fund for continuing students. Pursuant to Title 23, Article 18, Section 202(2)(e), Eligible Undergraduate Students attending the Institution may receive financial assistance in the amount of fifty percent (50%) of the stipend amount set annually by the General Assembly and subject to available funding.

c. Credit Hour Conversion. The Institution's undergraduate programs are presently conducted on the basis of academic quarters. In calculating "credit hours" for the purposes of this contract, the parties agree that quarter hours of credit will be converted to semester hours of credit using the factor customary in making such conversions in higher education. Specifically, the Department shall treat 1.5 "academic quarter hours" as the equivalent of 1.0 "academic semester hour."

d. Course Location and Modality. The Department agrees that an Eligible Undergraduate Student under this contract includes all students meeting the conditions set forth in Title 23, Article 18, Section 102(5)(a), Colorado Revised Statutes. An Eligible Undergraduate Student may also include a student enrolled at the Institution while participating at a foreign institution of higher education under its Cherrington Global Scholars program, so long as such program is conducted substantially as presently conducted and approved by the Commission.

e. Courses. The Institution agrees that it shall not request and/or accept stipends from the College Opportunity Fund for students enrolled in those courses identified in Title 23, Article 18, Section 202(5)(d), Colorado Revised Statutes.

4. Performance Standards. The Institution agrees to provide educational services that are consistent with its mission to promote learning by engaging students, advancing scholarly inquiry, cultivating critical thought, and creating knowledge; by fostering productive synergies between intellectual and personal development, research and teaching, disciplinary and interdisciplinary perspectives, classroom and experience based learning, and theoretical knowledge and professional practice. The Institution shall also provide educational services that are consistent with the Commission's mission to provide access to high-quality, affordable education for all Colorado residents that is student-centered, quality driven and performance-based. Specifically, the Institution shall achieve the following performance goals during the term of this contract:

a. Access. The Institution agrees to expand and intensify its efforts to attract students who will fall within the definition of Eligible Undergraduate Students. The Institution further agrees to utilize its best efforts during the period of this contract to increase its enrollment of such Students by not less than three percentage points over its baseline average, which shall be the enrollment number for these students as calculated in the Fall of 2006 (e.g., 13% to 16%). Specifically, the Institution shall focus its efforts on increasing enrollment of underserved students, including low-income individuals, males and minorities.

b. Retention. The Institution agrees to expand and intensify its efforts to retain Eligible Undergraduate Students who receive a stipend from the College Opportunity Fund. The Institution further agrees to increase its fall-to-fall retention rate for first-time, full-time Eligible Undergraduate Students who receive a stipend from the College Opportunity Fund and are defined as

“underserved” pursuant to Title 23, Article 5, Section 129(2)(e), Colorado Revised Statutes, in accordance with the following provisions:

1. Low-Income Students: The Institution agrees that, by June 30, 2010, its retention rate of first-time, full-time Eligible Undergraduate Students who receive a stipend from the College Opportunity Fund will be within three percentage points of the Institution’s overall retention rate for first-time full-time students, excluding Eligible Undergraduate Students.

2. Low-Income, Underserved Male Students: The Institution agrees that, by June 30, 2010, its retention rate of first-time, full-time Eligible Undergraduate Students who receive a stipend from the College Opportunity Fund and who are males will be within three percentage points of the Institution’s overall retention rate for first-time, full-time students, excluding Eligible Undergraduate Students who are males.

3. Low-Income, Minority Students: The Institution agrees that, by June 30, 2010, its retention rate of first-time, full-time Eligible Undergraduate Students who receive a stipend from the College Opportunity Fund and who are members of a minority group will be within three percentage points of the Institution’s overall retention rate for first-time, full-time students, excluding Eligible Undergraduate Students who are members of a minority group.

c. Other State Needs. The Commission has determined that it is a highest State priority to ensure that highly qualified teachers are in every K-12 classroom. In furtherance of this goal, the Institution agrees to transmit to the Department on or before August 1st of each year, the student identification numbers and endorsement areas for all teacher candidates. The Department agrees that the information is provided for statistical purposes only and will not form the basis for a modification of this contract with respect to the content of the Institution’s teacher education programs.

5. Disclosure. The Institution agrees that pursuant to Title 23, Article 18, Section 202(5)(b), Colorado Revised Statutes, if it accepts a stipend payment on behalf of an Eligible Undergraduate Student, it shall note as a line item on the student’s account/bill that the moneys came from the College Opportunity Fund. Further, pursuant to Title 23, Article 18, Section 204, Colorado Revised Statutes, if the Institution advertises, in the form of direct mail, print, radio, television, or via the internet, a student’s ability to receive a stipend from the College Opportunity Fund, the Institution shall include in the advertisement the total cost of attending the institution, including a student’s total tuition cost, plus applicable fees.

6. Data Reporting Requirements. The Institution shall provide to the Department in accordance with the Student Unit Record Data System (SURDS) record layout methods and data collection calendar, the student unit record data for all currently enrolled students, including undergraduate applicant records, enrollment records, financial aid records

and degrees granted records. Further, as required by Title 23, Article 18, Section 201(2), Colorado Revised Statutes, the Institution shall reimburse the Department for any costs related to including the Institution in the SURDS system, which may include computer hardware, software, and staff time and charges. The Department shall notify the Institution of such costs, if any, at the end of each fiscal year. The Institution shall remit payment to the Department within thirty (30) days of receipt of notification thereof. The Department shall handle all data in accordance with Federal and State privacy laws.

7. Data Retention. The parties agree that College Access Network will maintain the central database containing the information required by Title 23, Article 18, Section 203, Colorado Revised Statutes. The Institution agrees that it will cooperate with College Access Network and the Department by providing the information, in the form and manner required by College Access Network, that reflects the number of credit hours taken at the Institution for which Eligible Undergraduate Students receive stipends from the College Opportunity Fund.

8. Payments.

a. The Department shall pay the Institution a stipend on behalf of all students determined to be eligible for the College Opportunity Fund as set forth in Paragraph 3, above. The Stipend amount shall be set by the General Assembly during the annual budget process. Stipend payments pursuant to this contract shall be made from such funds as appropriated by the General Assembly. For the period July 1, 2005 through June 30, 2006, the amount of the stipend paid on behalf of Eligible Undergraduate Students shall be forty dollars for each eligible semester credit hour. For the period July 1, 2005 through June 30, 2006, the amount that shall be paid to the Institution hereunder shall not exceed \$788,400. The liability of the Department, at any time, for such payment shall be limited to the unexpended amount remaining of such funds. This contract is subject to and contingent upon the continuing availability of State funds for the purposes hereof. The Department shall notify the Institution of the availability and amount of stipend payments for each subsequent fiscal year.

b. The Department shall pay the stipend to the Institution within ten (10) days of the invoice file date (as that date is defined by College Access Network). If for any reason a student is denied eligibility or the Department fails to pay the stipend to the Institution, the Institution shall be allowed to pursue collection of any amounts owing to it from the student, the Department or both in accordance with applicable law.

c. The calculation of an Eligible Undergraduate Student's credit hours shall be made by the Institution on the following basis for an Eligible Undergraduate Student who withdraws from courses:

1. Prior to the Institution's census date (add/drop period), the Institution will reimburse College Access Network on behalf of the Eligible Undergraduate Student any stipend received for any courses that

student withdraws from and the hours will not be counted against that student's life-time-credit-hour limitation .

2. During the Institution's refund period, the Institution will not reimburse any stipend received on behalf of the Eligible Undergraduate Student related to withdrawn courses and the hours related to those courses will be counted against that student's life-time-credit-hour limitation.

3. After the tuition refund period, the Institution will not reimburse any stipend received on behalf of the Eligible Undergraduate Student related to withdrawn courses and the hours related to those courses will be counted against that student's life-time-credit-hour limitation.

9. Legal Authority. The Institution warrants that it possesses the legal authority to enter into this contract and that it has taken all actions required by its procedures, by-laws, and/or applicable law to exercise that authority, and to lawfully authorize its undersigned signatory to execute this contract and to bind the Institution to its terms. The person(s) executing this contract on behalf of the Institution warrant(s) that such person(s) have full authorization to execute this contract.

10. Termination.

a. Failure to Perform. If at any time during the term of this contract, the Institution fails to comply with pertinent statutory requirements and/or substantially fails to satisfy or perform the duties and obligations under this contract, the Department shall notify the Institution of the failure to act or perform (a "Performance Failure"). The notice shall indicate the nature of the Performance Failure and request that the Institution take appropriate action(s) to address the Performance Failure. If the Institution refuses or fails to correct the Performance Failure or there is a lack of action by the Institution within a reasonable period of time, the Performance Failure shall first be referred to the chief financial officers of the Department and the Institution. Failing resolution by the chief financial officers, the dispute shall be referred to the chief executive officers of the Department and the Institution. Failing resolution by the chief executive officers, the Department may exercise the following remedial actions.

1. Withhold payment of stipends to the Institution until the necessary corrections in performance are satisfactorily completed; and/or

2. Terminate this contract for default.

The above remedies are cumulative and the Department, in its sole discretion, may exercise any or all of them individually or simultaneously.

b. Termination for Default/Cause. If, through any cause, the Institution shall fail to fulfill, in a timely and proper manner, its obligations under this contract, or

if the Institution shall violate any of the covenants, agreements, or stipulations of this contract, the Department shall thereupon have the right to terminate this contract for cause by giving written notice to the Institution of its intent to terminate and at least ten (10) days opportunity to cure the default or show cause why termination is otherwise not appropriate. In the event of termination, the Institution shall be obligated to return any payment advanced under the provisions of this contract. This provision shall in no way limit other remedies available to the State in this contract, or remedies otherwise available at law.

11. Force Majeure. Neither party shall be considered to have materially failed to perform its obligations under this agreement, including, for the Institution, its failure to meet a Performance Goal, to the extent that such failure arises out of causes beyond the reasonable control of a party. Such causes may include, but are not limited to, acts of God or of the public enemy, acts of the state or the United States in either its sovereign or contractual capacity, fires, floods, epidemics, strikes, and unusually severe weather, but, in every case, delay or failure to perform must be beyond the reasonable control of and without fault or negligence of the party.

12. Point of Contact and Notices. For purposes of this contract, the individuals identified below are hereby designated as the official representatives of the respective parties. Either party may from time to time designate in writing new or substitute representatives. All notices given hereunder shall be deemed given and sufficient if delivered in writing by (i) United States mail or (ii) overnight delivery such as Federal Express to:

For the Department:

Richard F. O'Donnell
Executive Director
Colorado Department of Higher Education
1380 Lawrence Street, Suite 1200
Denver, CO 80202

For the Institution:

Tom Willoughby
Vice Chancellor for Enrollment
University of Denver
2197 So. University Boulevard
Denver, CO 80208

with a copy to:

Paul Chan, Esq.
University Counsel
University of Denver
2199 So. University Boulevard
Denver, CO 80208

13. No Third-Party Beneficiary. It is expressly understood and agreed that the enforcement of the terms and conditions of this contract and all rights of action relating to such enforcement, shall be strictly reserved to the Department and the Institution. Nothing contained in this contract shall give or allow any claim or right of action whatsoever by any other third person. It is the express intention of the Department and the Institution that any such person or entity, other than the Department or the Institution, receiving services or benefits under this contract shall be deemed an incidental beneficiary only.

14. Severability. To the extent that this contract may be executed and performance of the obligations of the parties may be accomplished within the intent of the contract, the terms of this contract are severable, and should any term or provision hereof be declared invalid or become inoperative for any reason, such invalidity or failure shall not affect the validity of any other term or provision hereof.

15. Waiver. The waiver of any breach of a term, provision, or requirement of this contract shall not be construed or deemed as a waiver of any subsequent breach of such term, provision, or requirement, or of any other term, provision, or requirement.

16. Entire Agreement. This contract is intended as the complete integration of all understandings between the parties regarding performance contracts authorized by Title 23, Article 5, Section 129, Colorado Revised Statutes. No prior or contemporaneous addition, deletion or other amendment hereto shall have any force or effect whatsoever, unless embodied herein in writing. No subsequent novation, renewal, addition, deletion or other amendment hereto shall have any force or effect unless embodied in a writing executed and approved by both parties to this contract.

17. Survival of Certain Contract Terms. Notwithstanding anything herein to the contrary, the parties understand and agree that all terms and conditions of this contract and the exhibits and attachments hereto which may require continued performance, compliance, or effect beyond the termination date of this contract shall survive such termination date and shall be enforceable by the Department as provided herein in the event of such failure to perform or comply by the Institution.

18. Governmental Immunity/Limitation of Liability. Notwithstanding anything herein to the contrary, no term or condition of this contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions of the "Colorado Governmental Immunity Act", Section 24-10-101, *et seq.*, CRS, as now or hereafter amended. The parties understand and agree that the liability of the Department for claims for injuries to persons or property arising out of negligence of the State of Colorado, its departments, institutions, agencies, boards, officials and employees is controlled and limited by the provisions of Section 24-10-101, *et seq.*, CRS, as now or hereafter amended and the risk management statutes, Section 24-30-1501, *et seq.*, CRS, as now or hereafter amended. Any liability of the Department created under any other provision of this contract, whether or not incorporated herein by reference, shall be controlled by, limited to, and otherwise modified so as to conform with the above cited laws.

19. Assignment and Successors. The Institution agrees not to assign rights or

delegate duties under this contract without the express, written consent of the Department. Such consent may include, at the Department's sole discretion: (1) the execution by the Department, the Institution and the Assignee of a Novation Agreement in a form prescribed by the Department, which Novation Agreement will become effective upon State approval; or (2) verification by the Department of the assignment. Except as herein otherwise provided, this contract shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

20. Modification and Amendment. This contract is subject to such modifications as may be required by changes in Federal or State law, or their implementing regulations. Any such required modification shall automatically be incorporated into and be part of this contract on the effective date of such change as if fully set forth herein. Except as provided above, no modification of this contract shall be effective unless agreed to in writing by both parties in an amendment to this contract that is properly executed and approved in accordance with applicable law.

21. Cooperation of the Parties. The Institution and Commission agree to cooperate fully, to work in good faith, and to mutually assist each other in the performance of this contract. In connection herewith, the parties shall meet to resolve problems associated with this contract. Neither party will unreasonably withhold its approval of any act or request of the other to which the party's approval is necessary or desirable.

22. Compliance with Law. The Institution agrees to strictly adhere to and comply with all applicable Federal, State and Local laws, statutes, regulations, and executive orders, as they currently exist and may hereafter be amended, which are incorporated herein by this reference as terms and conditions of this contract.

23. Withdrawal. The Institution may terminate this contract and cease participation in the College Opportunity Fund upon sixty (60) days prior written notice to the Department.

24. Further Assurances. The parties expressly acknowledge that the College Opportunity Fund and the Performance Contracts being entered into as part of that legislation represent a fundamental and untested change in the way the state finances postsecondary education. As a result, the parties anticipate that modifications to this contract will or may be necessary, and agree to negotiate in good faith to address requests for amendments to this contract as may be necessary or appropriate to fulfill its spirit and intent.

25. Approval Required. Pursuant to Title 23, Article 5, Section 129(3), Colorado Revised Statutes, this contract and any modification or addition thereto shall not become effective until reviewed and approved by the Commission.

26. Special Provisions.

[Special Provisions Attached]

SPECIAL PROVISIONS

1. CONTROLLER'S APPROVAL. CRS 24-30-202 (1)

This contract shall not be deemed valid until it has been approved by the Controller of the State of Colorado or such assistant as he may designate.

2. FUND AVAILABILITY. CRS 24-30-202 (5.5)

Financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

3. INDEMNIFICATION.

The Contractor shall indemnify, save, and hold harmless the State, its employees and agents, against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees incurred as a result of any act or omission by the Contractor, or its employees, agents, subcontractors, or assignees pursuant to the terms of this contract.

4. INDEPENDENT CONTRACTOR. 4 CCR 801-2

THE CONTRACTOR SHALL PERFORM ITS DUTIES HEREUNDER AS AN INDEPENDENT CONTRACTOR AND NOT AS AN EMPLOYEE. NEITHER THE CONTRACTOR NOR ANY AGENT OR EMPLOYEE OF THE CONTRACTOR SHALL BE OR SHALL BE DEEMED TO BE AN AGENT OR EMPLOYEE OF THE STATE. CONTRACTOR SHALL PAY WHEN DUE ALL REQUIRED EMPLOYMENT TAXES AND INCOME TAX AND LOCAL HEAD TAX ON ANY MONIES PAID BY THE STATE PURSUANT TO THIS CONTRACT. CONTRACTOR ACKNOWLEDGES THAT THE CONTRACTOR AND ITS EMPLOYEES ARE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS THE CONTRACTOR OR THIRD PARTY PROVIDES SUCH COVERAGE AND THAT THE STATE DOES NOT PAY FOR OR OTHERWISE PROVIDE SUCH COVERAGE. CONTRACTOR SHALL HAVE NO AUTHORIZATION, EXPRESS OR IMPLIED, TO BIND THE STATE TO ANY AGREEMENTS, LIABILITY, OR UNDERSTANDING EXCEPT AS EXPRESSLY SET FORTH HEREIN. CONTRACTOR SHALL PROVIDE AND KEEP IN FORCE WORKERS' COMPENSATION (AND PROVIDE PROOF OF SUCH INSURANCE WHEN REQUESTED BY THE STATE) AND UNEMPLOYMENT COMPENSATION INSURANCE IN THE AMOUNTS REQUIRED BY LAW, AND SHALL BE SOLELY RESPONSIBLE FOR THE ACTS OF THE CONTRACTOR, ITS EMPLOYEES AND AGENTS.

5. NON-DISCRIMINATION.

The contractor agrees to comply with the letter and the spirit of all applicable state and federal laws respecting discrimination and unfair employment practices.

6. CHOICE OF LAW.

The laws of the State of Colorado and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution, and enforcement of this contract. Any provision of this contract, whether or not incorporated herein by reference, which provides for arbitration by any extra-judicial body or person or which is otherwise in conflict with said laws, rules, and regulations shall be considered null and void. Nothing contained in any provision incorporated herein by reference which purports to negate this or any other special provision in whole or in part shall be valid or enforceable or available in any action at law whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision will not invalidate the remainder of this contract to the extent that the contract is capable of execution.

At all times during the performance of this contract, the Contractor shall strictly adhere to all applicable federal and State laws, rules, and regulations that have been or may hereafter be established.

7. VENDOR OFFSET. CRS 24-30-202 (1) & CRS 24-30-202.4

Pursuant to CRS 24-30-202.4 (as amended), the State Controller may withhold debts owed to State agencies under the vendor offset intercept system for: (a) unpaid child support debt or child support arrearages; (b) unpaid balance of tax, accrued interest, or other charges specified in Article 21, Title 39, CRS; (c) unpaid loans due to the Student Loan Division of the Department of Higher Education; (d) owed amounts required to be paid to the Unemployment Compensation Fund; and (e) other unpaid debts owing to the State or any agency thereof, the amount of which is found to be owing as a result of final agency determination or reduced to judgment as certified by the controller.

8. SOFTWARE PIRACY PROHIBITION Governor's Executive Order D 002 00

No State or other public funds payable under this Contract shall be used for the acquisition, operation, or maintenance of computer software in violation of United States copyright laws or applicable licensing restrictions. The Contractor hereby certifies that, for the term of this Contract and any extensions, the Contractor has in place appropriate systems and controls to prevent such improper use of public funds. If the State determines that the Contractor is in violation of this paragraph, the State may exercise any remedy available at law or equity or under this Contract, including, without limitation, immediate termination of the Contract and any remedy consistent with United States copyright laws or applicable licensing restrictions.

9. EMPLOYEE FINANCIAL INTEREST. CRS 24-18-201 & CRS 24-50-507

The signatories aver that to their knowledge, no employee of the State of Colorado has any personal or beneficial interest whatsoever in the service or property described herein.

Effective Date: April 1, 2004

APPROVED:

Colorado Commission on Higher Education

By: Judy P. Weaver
Chair

Dated: 9-9-05