

Board Office Use: Legislative File Info.	
File ID Number	22-1998
Introduction Date	9/28/22
Enactment Number	22-1697
Enactment Date	9-28-2022 CJH



Board Cover Memorandum

To Board of Education

From Sondra Aguilera, Acting Superintendent
Tadashi Nakadegawa, Deputy Chief, Facilities

Meeting Date September 28, 2022

Subject Memorandum of Understanding and Engagement Policy
Contractor: Fagen Friedman & Fulfroost, LLP
Services For: Facilities Dept.

Ask of the Board Approval by the Board of Education of a Memorandum of Understanding and Engagement Policy by and between District and Fagen Friedman & Fulfroost., LLP retaining the latter to provide legal services on facilities and construction matters to the District on an as needed basis, for the period of July 1, 2022 to June 30, 2023, in an amount not to exceed \$250,000.00 in a fiscal year.

Background Fagen, Friedman & Fulfroost, LLP (“F3”) is being retained to provide legal services to the District for facilities and construction law matters on an as needed basis, with the exception of facilities or construction related claims and litigation defense.

Discussion In previous years, the Legal Department prepared one agreement with F3 to cover three departments: Facilities, Special Education and Legal. Going forward, the District will enter into different contracts with F3, with each contract corresponding to the budget that is paying for the legal services. The change will allow for more accurate and streamlined budgeting and invoicing.

Fiscal Impact Funding resource: General Purpose, Measure Y and Measure J - not to exceed \$250,000 in a fiscal year.

Attachment(s) Memorandum of Understanding and Engagement Policy

Board Office Use: Legislative File Info.	
File ID Number	22-1998
Introduction Date	9/28/22
Enactment Number	22-1697
Enactment Date	9-28-2022 CJH



**MEMORANDUM OF UNDERSTANDING AND ENGAGEMENT POLICY BETWEEN
OAKLAND UNIFIED SCHOOL DISTRICT AND
FAGEN, FRIEDMAN & FULFROST LAW FIRM**

1. INTENT

This Memorandum of Understanding (hereinafter “MOU” or “Agreement”) authorizes FAGEN, FRIEDMAN & FULFROST LAW FIRM (hereinafter "Counsel" or “Contractor”), to provide legal services to Oakland Unified School District for facilities and construction law matters on an as needed basis, with the exception of facilities- or construction-related claims and litigation defense. The cumulative amount of legal services under this MOU shall not exceed \$250,000 in a fiscal year.

This MOU is effective immediately and shall govern the engagement of Counsel for the Oakland Unified School District (“District” or “OUSD”) on or after July 1, 2022.

2. TERMS AND CONDITIONS

2.1 **Term of Agreement.** The term of this agreement shall be July 1, 2022 through June 30, 2023 and may be extended by written agreement of both parties.

2.2 **Notice of Termination.** OUSD may at any time terminate this Agreement upon not less thirty (30) days written notice to Counsel. OUSD shall compensate Counsel for services satisfactorily provided through the date of termination. In addition, OUSD may terminate this agreement for cause should Counsel fail to perform any part of this Agreement. In the event of termination for cause, OUSD may secure the required services from another contractor. If the cost to OUSD exceeds the cost of providing the services pursuant to this Agreement, Counsel shall pay the additional cost. OUSD’s right to terminate this Agreement is not its exclusive remedy but is in addition to all other remedies available to the OUSD by law, in equity, or under the provisions of this Agreement. Upon any termination of this Agreement, Counsel shall immediately provide OUSD with complete and accurate copies or originals - where appropriate - of all documents in its possession belonging to OUSD. Counsel further agrees to do all other things reasonably necessary to cause an orderly transition of services without detriment to the rights of OUSD.

2.3 **Choice of Laws.** This Agreement shall be performed in Oakland, California and is governed by the laws of the State of California, but without resort to California’s principles and laws regarding conflict of laws. The Alameda County Superior Court shall have jurisdiction over any litigation initiated to enforce or interpret this Agreement.

2.4 **Licenses and Permits.** Counsel shall obtain and keep in force all licenses, permits, and certificates necessary for the performance of this Agreement.

2.5 **Conflict of Interest.** Counsel shall not hire any officer or employee of OUSD to perform any service by this Agreement. Counsel affirms to the best of his/her/its knowledge, there exists

no actual or potential conflict of interest between Counsel's family, business or financial interest and the services provided under this Agreement, and in the event of change in either private interest or services under this Agreement, any question regarding possible conflict of interest which may arise as a result of such change will be brought to OUSD's attention in writing. Counsel has undertaken a conflicts check within its firm and certifies that it has no conflict of interest with respect to its assistance to OUSD or has obtained a written conflicts waiver from OUSD's Legal Department.

2.6 Drug-Free / Smoke Free Policy. No drugs, alcohol, and/or smoking are allowed at any time in any buildings and/or grounds on OUSD property. No students, staff, visitors, Counsel, or subcontractors are to use drugs on these sites.

2.7 Non-Discrimination. It is the policy of OUSD that in connection with all work performed under Contracts there be no discrimination because of race, color, ancestry, national origin, religious creed, physical disability, medical condition, marital status, sexual orientation, gender, age, or any other legally protected class; therefore, Counsel agrees to comply with applicable Federal and California laws including, but not limited to, the California Fair Employment and Housing Act beginning with Government Code Section 12900 and Labor Code Section 1735 and OUSD policy. Counsel shall not engage in unlawful discrimination in employment on the basis of actual or perceived race, color, national origin, ancestry, religion, age, marital status, pregnancy, physical or mental disability, medical condition, veteran status, gender, sex, sexual orientation, or other legally protected class. In addition, Counsel agrees to require like compliance by all its subcontractor(s).

2.8 Limitation of OUSD Liability. Other than as provided in this Agreement, OUSD's financial obligations under this Agreement shall be limited to the payment of the compensation provided in this Agreement. Notwithstanding any other provision of this Agreement, in no event shall OUSD be liable, regardless of whether any claim is based on contract or tort, for any special, consequential, indirect or incidental damages, including, but not limited to, lost profits or revenue, arising out of or in connection with this Agreement for the services performed in connection with this Agreement.

3. AREAS OF AUTHORITY

3.1 Independent Contractor. This is not an employment contract. Counsel is an independent contractor or business entity, and will be responsible for operations and management of its employees to sufficiently carry out the agreed upon Scope of Work. Counsel understands and agrees that it and all of its employees shall not be considered officers, employees, agents, partners, or joint ventures of OUSD, and are not entitled to benefits of any kind or nature normally provided or entitled to employees of OUSD, including, but not limited to, State Unemployment Compensation or Worker's Compensation. Counsel shall assume full responsibility for payment of all Federal, State, and local taxes or contributions necessary to do business in the State of California, including unemployment insurance, social security and income taxes with respect to Counsel's employees. In the performance of the work herein contemplated, Counsel is an independent contractor, with the sole authority for controlling and directing the performance of the details of the work, OUSD being interested only in the results obtained.

3.2 **No Rights in Third Parties.** This agreement does not create any rights in, or inure to the benefit of, any third party except as expressly provided herein.

3.3. **Assignment.** The obligations of Counsel under this Agreement shall not be assigned by Counsel without the express prior written consent of OUSD.

3.4 **Ownership of Documents.** Except as agreed to by the Parties, all documents created by Counsel pursuant to this Agreement, including but not limited to reports, designs, schedules, and other materials prepared, or in the process of being prepared, for the services to be performed by Counsel, are and shall be at the time of creation and thereafter the property of the OUSD, with all intellectual property rights therein vested in the OUSD at the time of creation. Except as agreed to by the Parties, OUSD shall be entitled to access to and copies of these materials during the progress of the work. Except as agreed to by the Parties, any such materials in the hands of Counsel or in the hands of any subcontractor upon completion or termination of the work shall be immediately delivered to the OUSD. Counsel may retain a copy of all materials produced under this Agreement for its use in its general business activities.

3.5 **Copyright/Trademark/Patent/Ownership.** Except as agreed to by the Parties, Counsel understands and agrees that all matters produced under this Agreement shall become the property of OUSD and cannot be used without OUSD's express written permission. Except as agreed to by the Parties, OUSD shall have all right, title and interest in said matters, including the right to secure and maintain the copyright, trademark, and/or patent of said matter in the name of OUSD.

3.6 **Confidentiality.** Counsel and all Counsel's agents, personnel, employee(s), and subcontractor(s) shall maintain the confidentiality of all information and documents received. Counsel understands that student records are confidential and agrees to comply with all state and federal laws concerning the maintenance and disclosure of student records. This requirement to maintain confidentiality shall extend beyond the termination of this Agreement.

4. INDEMNIFICATION

Counsel shall defend, indemnify and save harmless the District and its officers, State Trustee, agents, and current and former employees from and shall defend them against any and all loss, cost, damage, injury, liability, and claims including but not limited to claims for injury to or death of a person, including employees of Counsel or loss of or damage to property, arising directly or indirectly from Counsel's performance of this Agreement, except where such loss, damage, injury, liability or claim is the result of the active negligence or willful misconduct of the District and is not contributed to by any act of, or by any omission to perform some duty imposed by law or agreement on Counsel, its agents or employees. The foregoing indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs and the District's costs of investigating any claims against the District.

In addition to Counsel's obligation to indemnify the District, Counsel specifically acknowledges and agrees that Counsel has an immediate and independent obligation to defend the District from any claim which actually or potentially falls within this indemnification provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to Counsel by the District and continues at all times thereafter.

5. INSURANCE

Without in any way limiting Counsel's liability pursuant to the "Indemnification" section of this Agreement, throughout the term of the MOU Counsel shall pay for and maintain in full force and effect with an insurance company(s) admitted by the California Insurance Commissioner to do business in the State of California and rated not less than A-, VIII or higher in Best Insurance Rating Guide, the following policies of insurance:

Workers' Compensation, in statutory amounts, with Employer's Liability Limits not less than one million dollars (\$1,000,000) for each accident, injury, or illness; and

Comprehensive Automobile Liability Insurance with limits not less than one million dollars (\$1,000,000) for each occurrence, combined single limits for bodily injury and property damage, including coverage for owned and non-owned and hired auto coverage, as applicable; and

Comprehensive General Liability Insurance with limits not less than one million dollars (\$1,000,000) for each occurrence, combined single limit for bodily injury and property damage, including contractual liability, personal injury, products and completed operations coverages.

Professional Liability Insurance with limit not less than one million dollars (\$1,000,000) each claim, with a deductible of not greater than one hundred thousand dollars (\$100,000) per claim, covering legal malpractice arising from any services provided under this Agreement.

Except for Professional Liability Insurance, all liability policies that this Section requires Counsel to maintain shall provide for the following: (i) name as additional insureds the District, the School Board, the State Trustee, and the District's officers, agents, and current and former employees; and (ii) specify that such policies are primary insurance to any other insurance available to the additional insureds, with respect to any claims arising out of this Agreement and that insurance applies separately to each insured against whom claim is made or suit is brought.

Within thirty (30) days of approval of this Agreement, Counsel shall deliver to the Deputy Chief of Facilities a certificate of insurance for each required policy with insurers and additional insured policy endorsements for the comprehensive general liability insurance and comprehensive automobile liability insurance. Each policy and certificate shall provide that no cancellation, major change in coverage or expiration shall become effective or occur until at least thirty (30) days after receipt of written notice by the Deputy Chief of Facilities.

The above policies of insurance shall be written on forms acceptable to the Risk Manager of the OUSD. If at any time said policies of insurance lapse or become canceled, this Agreement shall become voidable at the complete discretion of the District. The acceptance by OUSD of the above-required insurance does not serve to limit the liability or responsibility of the insurer or Counsel to OUSD.

6. PRIOR AUTHORIZATION

Bills for work done without prior written authorization will not be processed for payment or paid unless approved by the Deputy Chief of Facilities (which in all references to Deputy Chief of Facilities includes any person designated by the Deputy Chief of Facilities to monitor the matter) in writing.

7. [Intentionally Blank]

8. BILLING AND INVOICES

All Counsel representing the District are to provide the following information on bills or invoices submitted to the District for payment of legal services provided:

- a. Name of the project or matter;
- b. The matter or number or other designation contained in the engagement letter;
- c. Description of the services sufficient for the District to understand what matter-related task was performed by each attorney or paralegal on a daily basis;
- d. The name of each attorney or paralegal working on the matter;
- e. The hours worked by each billing person for each task described (task billing) daily to the nearest .1 of an hour;
- f. The hourly rate for each billing person;
- g. An itemization of any cash or cost disbursements;
- h. The name of the Deputy Chief of Facilities designee authorizing the work or to whom Counsel reports;
- i. Total fees and costs billed to date; and
- j. Total fees and costs paid by the District to date.

A one-page summary shall accompany each statement or invoice indicating (a) the firm name submitting the invoice/statement; (b) the OUSD assigned matter number and firm matter reference number; (c) total hours billed and corresponding fees and costs for the current billing period; (d) payments credited during the current billing period; (e) any past-due amount; and (f) total amount due. Do not include any description of services performed on this one-page summary.

All invoices shall be accompanied by the following verification statement signed by the lead attorney assigned to the matter:

I personally reviewed this invoice dated _____. All entries are in accordance with the Letter of Engagement or other agreements and instructions pursuant to which this invoice is submitted. I have ensured that the statement of services and the fees, costs and any other items on the invoice are correct and that the services and costs were incurred in compliance with all agreements between me and/or my firm and the Deputy Chief of Facilities of the Oakland Unified School District.

Invoices or bills not containing all the information required above shall be returned unpaid with a request for resubmission in the proper form.

9. IMPORTANT BILLING AND PAYMENT NOTES

- a. The hourly billing rate shall not exceed: \$330 - \$365 per hour for partners, senior

counsel and of-counsel, except designated partners, senior counsel and of-counsel (whom are Namita S. Brown, Roy A. Combs, Elizabeth (Lisa) Mori, Laurie E. Reynolds, Lenore A. Silverman, Jan E. Tomsy, and Mark S. Williams), which rate shall not exceed \$385 per hour; \$265 - \$295 per hour for associates; \$210 per hour for paralegals; \$260 for communication services and education consultant services; \$265 per hour for law clerk(s); and \$295 per hour for Next Level Client Services.

- b. Bills/invoices for attorney fees and expenses must be submitted monthly within 30 days of the end of the billing period unless otherwise agreed. Bills or legal invoices should indicate "OUSD Department of Facilities" at the top. They should be sent via email to: tadashi.nakadegawa@ousd.org and linda.nieves@ousd.org.
- c. The District will not pay for fees/costs not reflected on bills or invoices.
- d. The District shall not reimburse for time spent for filing, file indexing, proofreading, typing, filing fees, and the like, unless approved in advance by the Deputy Chief of Facilities. Unless approved in advance by the Deputy Chief of Facilities, the District shall not pay for secretarial overtime or associated expenses, office supplies, local telephone calls and/or invoice preparation.
- e. The District will pay only the actual costs for reasonable expenses without any premiums or markups.
- f. Counsel does not charge for the following: in office photocopying; facsimile charges; U.S. First Class Postage (excludes overnight or express charges); on-line legal research subscriptions; administrative overhead.
- g. Legal research in excess of three (3) hours on a discrete issue on a matter must be pre-approved by the Deputy Chief of Facilities. The District shall not be charged or reimburse Counsel for electronic research costs, such as Lexis or Westlaw charges.
- h. The District shall be billed and shall pay for services computed by tenths of an hour. The District will not pay "flat rate" charges such as "X" for all telephone calls under a set duration or "Y" for a review of documents (correspondence/emails/etc.).
- i. General administrative matters, such as budget preparation and discussion of invoices from the firm to the District for services are not billable.
- j. Counsel's hourly rates shall be approved by Deputy Chief of Facilities. Rate issues or request for adjustments must be raised directly with the Deputy Chief of Facilities.
- k. If, at any time during the engagement, Counsel has any question regarding the meaning or implementation of the provisions of this engagement, Counsel must immediately bring that issue to the attention of the Deputy Chief of Facilities and OUSD's Legal Department for resolution.
- l. OUSD retains the right to audit all bills or files that are or have been the subject matter of any billing in the past. Such an audit will require Counsel to produce any and all documentation that would support the billing submitted by Counsel. Counsel will produce any individual who has submitted billing on behalf of the firm, as well as any

firm personnel who would have knowledge or information regarding any billing, and the firm shall produce such persons to answer any and all questions regarding the billings. Counsel acknowledges that OUSD may utilize its own personnel, an outside auditing service, or such other company or service as OUSD designates, to perform such audits.

10. PERFORMANCE OF COUNSEL

- a. Except as otherwise agreed by the Deputy Chief of Facilities (or designee), the District will typically pay for only one attorney from a firm to attend interviews, conferences, and meetings. The attorney making the appearance shall be the attorney approved for that function, and must possess a working knowledge of the matter.
- b. Except as otherwise agreed by the Deputy Chief of Facilities (or designee), where media contact or exposure is anticipated, Counsel must immediately notify the Deputy Chief of Facilities. The District may designate the appropriate spokesperson to respond to inquiries. Counsel will not make comments to the press and will do so only with the prior input and approval of Deputy Chief of Facilities.
- c. If, at any time during the handling of the matter, a conflict of interest develops between or among any of the District’s employees being represented, the conflict must be disclosed immediately to Deputy Chief of Facilities and OUSD’s Legal Department.
- d. [Intentionally blank]
- e. Upon request from the Deputy Chief of Facilities or designee, Counsel shall provide matter updates and drafts of any written work product before it is finalized.
- f. Consulting with or retention of outside experts requires authorization from the Deputy Chief of Facilities. Counsel are reminded that they are responsible for ensuring their compliance with the requirements of federal and state confidentiality statutes, including FERPA and HIPAA. If appropriate, Counsel should have retained experts and consultants sign a HIPAA Business Associate Agreement.

11. CORONAVIRUS/COVID-19

Counsel agrees to immediately adhere to and follow any District directives regards health and safety protocols including, but not limited to, providing District with information regarding possible exposure of OUSD employees by any employee, subcontractor, agent, or representative of Counsel, and information necessary to perform contact tracing.

12. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION

Counsel certifies to the best of his/her/its knowledge and belief, that it and its principals are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency according to Federal Acquisition Regulation Subpart 9.4, and by signing this contract, certifies that Counsel does not appear on the Excluded Parties List (<https://www.sam.gov/>).

13. SEVERABILITY

If any term, condition or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions will nevertheless continue in full force and effect, and shall not be affected, impaired or invalidated in any way.

14. PROVISIONS REQUIRED BY LAW DEEMED INSERTED

Each and every provision of law and clause required by law to be inserted in this Agreement shall be deemed to be inserted herein and this Agreement shall be read and enforced as though it were included therein.

15. CAPTIONS AND INTERPRETATIONS

Section and paragraph headings in this Agreement are used solely for convenience, and shall be wholly disregarded in the construction of this Agreement. No provision of this Agreement shall be interpreted for or against a party because that party or its legal representative drafted such provision, and this Agreement shall be construed as if jointly prepared by the Parties.

16. CALCULATION OF TIME

For the purposes of this Agreement, “days” refers to calendar days unless otherwise specified.

17. W-9 FORM

If Counsel is doing business with OUSD for the first time, complete and return with the signed MOU a W-9 form.

18. INCORPORATION OF RECITALS AND EXHIBITS

Any recitals and exhibits attached to this MOU are incorporated herein by reference. Counsel agrees that to the extent any recital or document incorporated herein conflicts with any term or provision of this MOU, the terms and provisions of this MOU shall govern.

19. INTEGRATION/ENTIRE AGREEMENT OF PARTIES

This MOU constitutes the entire agreement between the Parties and supersedes all prior discussions, negotiations, and agreements, whether oral or written. This MOU may be amended or modified only by a written instrument executed by both Parties.

20. COUNTERPARTS

This MOU and all amendments and supplements to it may be executed in counterparts, and all counterparts together shall be construed as one document.

21. CONTRACT PUBLICLY POSTED

This MOU, its contents, and all incorporated documents are public documents and will be made available by OUSD to the public online via the Internet.

22. CONTRACT CONTINGENT ON OUSD GOVERNING BOARD APPROVAL

OUSD shall not be bound by the terms of this Agreement until it has been formally approved or ratified, as applicable, by OUSD’s Governing Board, and no payment shall be owed or made to Counsel absent that formal approval or ratification. This Agreement shall be deemed approved or ratified

when it has been signed by the Board of Education and/or the Superintendent as its designee.

REST OF PAGE INTENTIONALLY LEFT BLANK

IN WITNESS WHEREOF, the parties hereto agreed to be bound and have executed this Agreement on the day first mentioned above.

FAGEN, FRIEDMAN & FULFROST LAW FIRM

Name: Namita S. Brown Signature: 

Position: Managing Partner Date: 9/14/2022

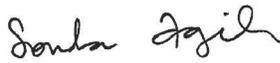
One of the terms and conditions to which Counsel agrees by its signature is not to expect or demand payment for any Services performed prior to the parties, particularly OUSD, validly and properly executing this MOU until this MOU is validly and properly executed and shall not rely on verbal or written communication from any individual, other than the President of the OUSD Governing Board, the OUSD Superintendent, or the OUSD Chief Governance Officer, stating that OUSD has validly and properly executed this Agreement. Counsel specifically acknowledges and agrees to this term/condition on the above date.

OUSD

Name: Gary Yee Signature: 

Position: President, Board of Education Date: 9-29-2022

- Board President
- Superintendent
- Chief/Deputy Chief/Executive Director

Name: Sondra Aguilera Signature: 

Position: Acting Superintendent & Acting Secretary, Board of Education Date: 9-29-2022

Approved as to form by OUSD Legal Department