

Board Office Use: Legislative File Info.	
File ID Number	21-1337
Introduction Date	6/9/2021
Enactment Number	21-0998
Enactment Date	6/9/2021 er



Memo

To Board of Education

From Josh Daniels, General Counsel

Board Meeting Date June 9, 2021

Subject Memorandum of Understanding and Engagement Policy – Cipriani & Werner, P.C.

Action Requested and Recommendation Approval by the Board of Education of Memorandum of Understanding and Engagement Policy between Oakland Unified School District and Cipriani & Werner, P.C., a Harrisburg, PA law firm, for the latter to provide legal services to the District for cybersecurity, information privacy and data security matters on an as needed basis, for the period of May 2, 2021 through June 30, 2022, in an amount not to exceed \$90,000 per fiscal year.

Background and Discussion From time to time the General Counsel needs to engage outside counsel with specialized expertise. Cipriani & Werner specializes in employment law, commercial litigation and cybersecurity, privacy & data protection.

The scope of this engagement is to represent the Oakland Unified School District in legal matters at the discretion of the General Counsel, for the period of May 2, 2021 through June 30, 2022.

Competitively Bid Was this contract competitively bid? No.
If no, exception: Specialized Services (legal services).

Fiscal Impact Funding resource: General Purpose – not to exceed \$90,000 in a fiscal year

Attachments

- Memorandum of Understanding and Engagement Policy

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**MEMORANDUM OF UNDERSTANDING AND ENGAGEMENT POLICY
BETWEEN
OAKLAND UNIFIED SCHOOL DISTRICT
AND
CIPRIANI & WERNER, P.C.**

1. INTENT

This Memorandum of Understanding (hereinafter “MOU” or “Agreement”) authorizes the Oakland Unified School District (“OUSD” or “District”) Office of General Counsel (hereinafter “General Counsel”) to establish professional services agreements in the form of Letters of Engagement with Cipriani & Werner, P.C. (hereinafter “Counsel” or “Contractor”), to provide legal services to Oakland Unified School District consistent with the Engagement Letter, which is attached hereto and incorporated herein by reference. The cumulative amount of Letters of Engagement under this MOU shall not exceed \$90,000, inclusive of any subcontracts by Counsel. Any exceptions to this MOU must be approved in writing by the General Counsel.

2. TERMS AND CONDITIONS

2.1 **Term of Agreement.** The Agreement is effective immediately and expires June 30, 2022 unless otherwise terminated early pursuant to this Agreement.

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. 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 the General Counsel.

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 thereof 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:

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.

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

Counsel invoices will be provided to Chubb and payment made subject to OUSD's billing processes and guidelines. To the extent that OUSD is responsible for direct payment for any Counsel invoices, the following provisions apply. Bills for work done without prior written authorization will not be processed for payment or paid unless approved by the General Counsel in writing. Under certain exigent circumstances, specifically described work may be commenced prior to the issuance of an engagement letter if expressly approved by the General Counsel. Only those lawyers authorized in advance or subsequently authorized by the General Counsel for a particular matter may work on the matter. Time spent by lawyers not approved on the matter will not be paid by the District. Time spent on Northern California Relief (NCR) matters by lawyers who are not Northern California Relief (NCR) Approved Panel Counsel will not be paid by the District.

7. CASE ANALYSIS AND BUDGET

Within 10 days of assignment of a claim, investigation and/or litigation matter, Counsel shall provide a proposed budget and preliminary case analysis (as to claims and litigation matters) upon request by the General Counsel or designee.

The analysis, if requested, shall include the following information:

- a. A brief summary of facts and plaintiff's legal theories;
- b. An assessment of the strengths and weaknesses of the case;
- c. An overview of counsel's strategy for handling the matter including whether counsel recommends filing dispositive motions and utilizing Alternative Dispute Resolution.

The General Counsel or designee shall approve or revise the proposed budget for claims, investigation and/or litigation matters within 10 days of receipt.

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 case-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 Office of General Counsel attorney 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 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 General Counsel 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. **SCHEDULE OF FEES**

See Engagement Letter

b. Bills for counsel fees and expenses must be submitted monthly and within 30 days of the end of the billing period unless otherwise agreed. Bills or legal invoices, unless otherwise instructed by the General Counsel or designee, should be addressed to:

General Counsel
Office of the General Counsel
Oakland Unified School District
1000 Broadway Suite 300
Oakland, CA 94607
ousdlegal@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, court filing and the like, unless approved in advance by the General Counsel. Unless approved in advance by the General Counsel, 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. The District shall reimburse Counsel for necessary photocopying and other expenses at cost, subject to the following limitation:

- i. Copying expense - 10¢ per page
- ii. Facsimile expense - 10¢ per page

g. Legal research in excess of three (3) hours on a discrete issue in the case must be pre-approved by the General Counsel. 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 General Counsel. Rate issues or request for adjustments must be raised directly with the General Counsel.

k. Pursuant to Government Code section 6103, as a public entity the District is exempt from paying court fees, including filing fees, and court reporter fees (except for the actual transcription fee of court testimony) ("court fees"). As a result, the District shall not reimburse any court fees since they do not need to be paid on the District's behalf.

l. If, at any time during the engagement, Counsel has any question regarding the meaning or implementation of the provisions of this policy, Counsel must immediately bring that issue to the attention of the General Counsel for resolution.

m. The General Counsel 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 the General Counsel may utilize its own personnel, an outside auditing service, or such other company or service as the General Counsel designates, to perform such audits.

10. PERFORMANCE OF COUNSEL

a. Except as otherwise agreed by the General Counsel or designee, the District will typically pay for only one attorney from a firm to attend trials, court appearances, depositions, 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 case.

b. Except as otherwise agreed by the General Counsel, where media contact or exposure is anticipated, Counsel must immediately notify the General Counsel. 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 General Counsel.

c. If, at any time during the defense of the case, a conflict of interest develops between or among any of the District's employees being represented, the conflict must be disclosed immediately to General Counsel.

d. Consulting with or retention of outside experts and for Independent Medical-Psychological Examinations requires authorization from the General Counsel. Requests for expert witnesses shall be discussed with and authorized by the General Counsel. 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. 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/>).

12. 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.

13. 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.

14. 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.

15. CALCULATION OF TIME

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

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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 CONTRACTOR 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.

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


Cipriani and Werner, P.C.



JORDAN MORGAN, ESQUIRE
ASSOCIATE ATTORNEY


Date: 4/27/21

OAKLAND UNIFIED SCHOOL DISTRICT




Joshua R. Daniels
General Counsel

Date: 5/2/2021



Shanthi Gonzales
President, Board of Education

Date: 6/10/2021



Kyla Johnson-Trammell
Superintendent and Secretary, Board of Education

Date: 6/10/2021