

**Board Office Use: Legislative File Info.**

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| File ID Number    | 13-1522           |
| Introduction Date | 6/26/13           |
| Enactment Number  | 13-1325           |
| Enactment Date    | 6/26/13 <i>es</i> |



OAKLAND UNIFIED  
SCHOOL DISTRICT

Community Schools, Thriving Students

# Memo

**To** Board of Education  
**From** Jacqueline Minor, General Counsel  
**Board Meeting Date** June 26, 2013  
**Subject** **MEMORANDUM OF UNDERSTANDING – OAKLAND UNIFIED SCHOOL DISTRICT – JOHNSTON, BALLWEG & MODRCIN**

**Action Requested** Approval of MEMORANDUM OF UNDERSTANDING AND ENGAGEMENT POLICY BETWEEN OAKLAND UNIFIED SCHOOL DISTRICT and Johnston, Ballweg & Modrcin

**Background** Johnston, Ballweg & Modrcin is a Kansas law firm. The firm is being retained to represent the District in a contract dispute case filed in Kansas by Digital Ally alleging it installed video recording equipment in one of Oakland Schools Police Department cars and that it was never paid. In order to represent the District, the attorney must be licensed in Kansas.

**Discussion** We seek approval of an MOU with Johnston, Ballweg & Modrcin, to provide legal services to the District in an amount not to exceed \$5,000 during 2013-2014.

**Recommendation** Approval by the Board of Education of the Agreement with Johnston, Ballweg & Modrcin to provide legal services

**Fiscal Impact** Funding resource name: General Purpose

**Attachments**

- Memorandum of Understanding

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**MEMORANDUM OF UNDERSTANDING AND ENGAGEMENT POLICY  
BETWEEN  
OAKLAND UNIFIED SCHOOL DISTRICT and  
JOHNSTON, BALLWEG & MODRCIN**

**1. INTENT**

**Intent of this Memorandum of Understanding.** This Memorandum of Understanding (hereinafter "MOU") authorizes the Oakland Unified School District Office of the General Counsel (hereinafter, "General Counsel") to establish professional services agreements in the form of Letters of Engagement with Johnston, Ballweg & Modrcin, a Kansas law firm (hereinafter "Counsel" or "Contractor") to provide legal services to Oakland Unified School District on a limited jurisdiction case in Kansas. The cumulative amount of Letters of Engagement under this MOU shall not exceed \$5,000 without the prior written agreement of the General Counsel in a fiscal year. The hourly billing rate shall not exceed \$280 per hour for attorney David Hughes time and \$80 per hour for paralegal time.

**2. TERMS AND CONDITIONS**

**2.1 Term of Agreement.** The term of this agreement shall be June 1, 2013 to June 30, 2014 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. 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 is governed by the laws of the State of California.

**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 Anti-Discrimination.** Consistent with the policy of OUSD in connection with all work performed under this MOU, 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 or sexual orientation. 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. In addition, Counsel agrees to require like compliance by all its subcontractor(s).

2.6 **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, partner, or joint venture 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 **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 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.

3.4 **Confidentiality.** The Counsel and all Counsel's agents, personnel, employee(s), and/or 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 indemnify and save harmless the District and its officers, State Trustee, agents and employees from, and, if requested, 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.~~

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## 5. INSURANCE

Professional Liability Insurance with limit not less than two-hundred and fifty thousand dollars (\$250,000) each claim, with a deductible of not greater than five thousand dollars (\$5,000) per claim, covering legal malpractice arising from any services provided under this Agreement.

## 6. 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 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 with 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.

## **7. IMPORTANT BILLING AND PAYMENT NOTES**

a. 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 should be addressed to:

General Counsel  
Office of the General Counsel  
Oakland Unified School District  
746 Grand Avenue, Portable 6  
Oakland, CA 94610  
Or emailed to  
Jacqueline.minor@ousd.k12.ca.us

b. The District will not pay for amounts not reflected on bills or invoices.

c. 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.

d. The District will pay only the actual costs for reasonable expenses without any premiums or markups.

e. 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 - 50¢ per page

f. 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.).

g. General administrative matters, such as budget preparation and discussion of invoices from the firm to the District for services are not billable.

h. Counsel's hourly rates shall be approved by General Counsel. Rate issues or request for adjustments should be raised directly with the General Counsel.

i. Pursuant to California 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, unless such court fees are required of the District in Kansas.

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

k. 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.

## **8. PERFORMANCE OF COUNSEL**

a. Except as otherwise agreed by the District, 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. In complex cases and matters, Counsel is authorized to staff cases as appropriate, including but not limited to the attendance of more than one attorney at trials, court appearances, depositions, interviews, conferences, and meetings with prior written approval by the General Counsel.

b. Except as otherwise agreed by the District, where media contact or exposure is anticipated, Counsel must immediately notify the General Counsel. The District may designate the appropriate spokesperson to respond to inquires. 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. A case report approved by lead counsel must be provided to the General Counsel 72 hours in advance of a scheduled conference call, mandatory settlement conference, or any other meeting where settlement authority will be requested. The report must contain all information pertinent to the District in evaluating settlement issues. In cases where there is no scheduled event providing opportunity for settlement, the report must be delivered to the General Counsel no later than 30 days before the scheduled trial date or, in any event, promptly upon request by the General Counsel.

e. 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 reimburse for electronic research costs, such as Lexis or Westlaw charges.

f. Specific to electronic discovery, Counsel shall immediately upon being retained, contact the General Counsel to ask whether a litigation hold notice/do not destroy has been issued. If the notice has been issued, Counsel shall do the following: obtain a copy, verify that all necessary persons have received it, and send electronic copies to the General Counsel. If the notice has not been issued, Counsel shall determine who will be issuing it. If Counsel is asked to issue the notice, coordinate with the appropriate District site to secure the necessary information (basic facts, persons with knowledge, contact information). During the pendency of the litigation, Counsel shall ensure that

supplemental notices are issued to any additional person identified as having relevant information. If the case continues for more than six (6) months, Counsel shall issue periodic reminder notices to all recipients of litigation holds.

g. Consulting with or retention of outside experts and for Independent Medical-Psychological Examinations requires prior authorization from the General Counsel. Requests for expert witnesses should 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 HIPAA. If appropriate, Counsel should have retained experts and consultants sign a HIPAA Business Associate Agreement.

h. It is Counsel's obligation to assess the advisability of early settlement and to make appropriate recommendations regarding settlement to the General Counsel. All settlement demands and offers to mediate or arbitrate must be immediately reported to the General Counsel.

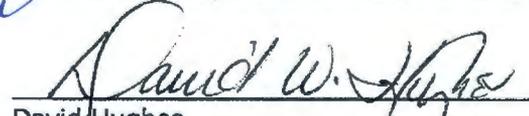
**Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion:**

The District certifies to the best of 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 this vendor does not appear on the Excluded Parties List. (<https://www.sam.gov/portal/public/SAM>)

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

  
\_\_\_\_\_  
Jacqueline P. Minor  
General Counsel, Oakland Unified School District

Date: 6/12/13

  
\_\_\_\_\_  
David Hughes  
Johnston, Ballweg & Modrcin Law Offices

Date: 6/11/13

  
\_\_\_\_\_  
President, Board of Education  
Oakland Unified School District

Date: 6/27/13

  
\_\_\_\_\_  
Secretary, Board of Education  
Oakland Unified School District

Date: 6/27/13

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By: o.s.