

Board Office Use: Legislative File Info.	
File ID Number	23-1286
Introduction Date	6/7/2023
Enactment Number	23-1133
Enactment Date	6/7/2023 os



# Board Cover Memorandum

**To** Board of Education

**From** Kyla Johnson-Trammell, Superintendent  
Josh Daniels, Chief Governance Officer

**Meeting Date** June 7, 2023

**Subject** Memorandum of Understanding and Engagement Policy  
Contractor: Keller Rohrback Law Firm  
Services For: Legal Department

**Ask of the Board** Ratification by the Board of Education of a Memorandum of Understanding and Engagement Policy (MOUEP) by and between District and Keller Rohrback Law Firm, authorizing the District's Legal Department, in the form of Letters of Engagement, to retain the latter to provide legal advice, counsel, and civil litigation related to social media, as requested by the Legal Department on an as needed basis, for the period of May 1, 2023 through June 30, 2025, in an amount to be paid on a contingency basis as described in Section 8 of the MOUEP.

**Background and Discussion** From time to time the Chief Governance Officer needs to engage outside counsel with specialized expertise. Keller Rohrback have specialized expertise in civil litigation matters related to social media and will be providing those services on an as needed basis.

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

**Fiscal Impact** Funding resource: General Purpose fund, not to exceed \$99,100 per fiscal year.

**In-Kind Contributions** N/A

**Attachments** Memorandum of Understanding and Engagement Policy

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**MEMORANDUM OF UNDERSTANDING AND ENGAGEMENT POLICY BETWEEN  
OAKLAND UNIFIED SCHOOL DISTRICT AND  
KELLER ROHRBACK LAW FIRM**

**1. INTENT**

This Memorandum of Understanding (hereinafter “MOU” or “Agreement”) authorizes the Oakland Unified School District Legal Department (hereinafter “Legal Department”) to establish professional services agreements in the form of Letters of Engagement with KELLER ROHRBACK LAW FIRM (hereinafter “Counsel” or “Contractor”), to provide the following legal services to the Legal Department: legal advice, counsel, and civil litigation related to social media, as requested by the Legal Department on an as needed basis on a contingency basis as described below.

This MOU is effective immediately and shall govern the engagement of Counsel for the Oakland Unified School District (“District” or “OUSD”) on or after May 1, 2023. Any exceptions to this MOU must be approved in writing by the Chief Governance Officer. All references to “General Counsel” herein includes any person designated by the General Counsel to monitor legal matters governed by this engagement.

**2. TERMS AND CONDITIONS**

**2.1 Term of Agreement.** The term of this agreement shall be May 1, 2023 through June 30, 2025, 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 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 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 General Counsel 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 General Counsel.

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**

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.

## **7. MATTER ANALYSIS**

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

The matter 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 matter;
- c. An overview of counsel's strategy for handling the matter including whether counsel recommends filing dispositive motions and utilizing Alternative Dispute Resolution.

## **8. ATTORNEYS' FEES**

Other than as set forth in Paragraph 11, below, the fees that OUSD agrees to pay Counsel ("Attorneys' Fee" or "Attorneys' Fees") will depend on the outcome of the Lawsuit, as set forth here:

- a. "Sums Recovered" means all monies (and the value of any other property) actually paid in settlement of or judgment on the Lawsuit's claims (including the settlement of any demand made by Counsel on OUSD's behalf before initiation of the Lawsuit), including any monies paid in settlement or judgment as an award of attorneys' fees, costs, or interest.
- b. If the Sums Recovered is an amount less than or equal to \$10 million, the Attorneys' Fee shall be 20% of the recovery;
- c. If the Sums Recovered is an amount greater than \$10 million but less than or equal to \$20 million, the Attorneys' Fee shall equal the amount specified in Section 8(b) above, plus 18% of any Sums Recovered in the \$10 million to \$20 million range.
- d. If the Sums Recovered is an amount greater than \$20 million but less than or equal to \$25 million, the Attorneys' Fee shall equal the amount specified in Sections 8(b) and 8(c) above, plus 13% of any Sums Recovered in the \$20 million to \$25 million range.
- e. If the Sums Recovered is an amount in excess of \$25 million, the Attorneys' Fee shall equal the amount specified in Sections 8(b), 8(c), and 8(d) above, plus 10% of any Sums Recovered in excess of \$25 million.

- f. If the Lawsuit proceeds to trial, Counsel will be entitled to an additional 2% of Sums Recovered specified in 8(a)-8(e).
- g. If the Lawsuit proceeds to trial and the court awards OUSD a monetary judgment and an attorneys' fee, and the attorneys' fee is greater than the percentage Counsel would be entitled to under Section 8(a)-(f), then Counsel will be entitled to the full attorneys' fee awarded by the Court.
- h. Bills/invoices for attorney fees, and expenses due pursuant to this agreement must be submitted to Chief Governance Officer for final approval before any attorneys' fees payment is made from the sums recovered.

**NO ATTORNEYS' FEES SHALL BE PAID IF NO RECOVERY IS MADE.**

**9. ADVICE CONCERNING ATTORNEYS' FEE**

OUSD has been informed of the alternative of employing Counsel on an hourly fee bases. This alternative would require the payment of a \$25,000 retainer at commencement of the representation, payment of costs as incurred, and payment of legal fees each month for legal services. In deciding to engage Counsel on a contingency fee basis, OUSD has considered the risks involved in this case, the experience and reputation of Counsel, and the uncertainty regarding the number of hours required to prosecute the case.

**10. COSTS**

Counsel will advance all "out-of-pocket" costs, fees, and expenses incurred by Counsel in pursuing the Lawsuit ("Costs"). Notwithstanding the foregoing, Counsel agree to notify and obtain OUSD's consent, in writing, before incurring Costs aggregating more than \$10,000 in any single month.

OUSD understands that Counsel shall seek reimbursement from defendants for all Costs actually expended, but that there is no guarantee that Costs will be reimbursed by the defendants to Counsel. Counsel will be reimbursed for all Costs out of any settlement or recovery in addition to any Attorneys' Fees they receive under Paragraphs 8 or 11 as the case may be. Counsel shall be reimbursed for Costs first, from any monies paid by a defendant on account of Cost reimbursement and, if such monies are insufficient, from any monies paid as part of the Sums Recovered.

Counsel may, with OUSD's prior consent which shall not unreasonably be withheld, hire any expert or consultant whose services Counsel advises OUSD is necessary for the evaluation or prosecution of any of the claims within the scope of the Lawsuit.

Counsel will provide an itemization of costs, fees and expenses upon request by OUSD General Counsel.

**NO COSTS SHALL BE PAID IF NO RECOVERY IS MADE**

## **11. WITHDRAWAL OR DISCHARGE**

Subject to Court rules and other applicable laws, Counsel shall have the right to withdraw from representation of OUSD upon giving reasonable notice of the intention to withdraw. In the event of withdrawal of Counsel or discharge of Counsel by OUSD, Attorneys may seek reasonable fees for services rendered according to the terms of Paragraph 8, above. OUSD shall have the right to discharge Counsel at any time. If OUSD discharges Counsel, Counsel retain the right to seek reasonable fees for services rendered according to the terms of Paragraph 8, above.

## **12. RIGHT TO AUDIT**

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.

## **13. PERFORMANCE OF COUNSEL**

- a. Except as otherwise agreed by the General Counsel (or designee), 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.
- b. 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 General Counsel and OUSD's Legal Department.
- c. A case report must be provided to the General Counsel or designee 72 hours in advance of any meeting or appearance where settlement authority will be requested. If the matter requires Governing Board approval of settlement authority, said case report must be received in sufficient time to meet OUSD Governing Board agenda deadlines. The report must contain all information pertinent to the District in evaluating settlement issues.
- d. Upon request from the General Counsel or designee, Counsel shall provide matter updates and drafts of any written work product (e.g., court filing) before it is finalized.
- e. 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 hasn't been issued, OUSD shall determine who will be issuing it. If Counsel is asked to issue the notice, Counsel shall coordinate with the appropriate District site to get 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 persons 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.

- f. 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.
- g. 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.

#### **14. 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.

#### **15. 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/>).

#### **16. 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.

#### **17. 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.

**18. 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.

**19. CALCULATION OF TIME**

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

**20. 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.

**21. 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.

**22. 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.

**23. 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.

**24. 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.

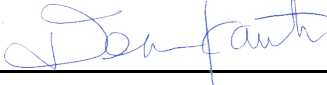
**25. CONTRACT CONTINGENT ON OUSD GOVERNING BOARD APPROVAL**

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.


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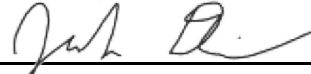
IN WITNESS WHEREOF, the parties hereto agreed to be bound and have executed this Agreement on the day first mentioned above.

**KELLER ROHRBACK LAW FIRM**

Name: \_\_\_\_\_ Signature:   
Dean Kawamoto  
Position: \_\_\_\_\_ Partner \_\_\_\_\_ Date: 05/02/2023

*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: Mike Hutchinson Signature:   
Position: Board President Date: 6/8/2023  
 Board President  
 Superintendent  
 Chief/Deputy Chief/Executive Director

Name: Joshua R. Daniels Signature:   
Position: Chief Governance Officer Date: May 5, 2023

**Approved as to form by OUSD Legal Department.**