

Attachment A to Minutes for March 29, 2016 Meeting

AMP/SMMUSD Agreement for Payment of Consultant Fees, 3/29/2016

AGREEMENT FOR PAYMENT OF CONSULTANT FEES

This Agreement for Payment of Consultant Fees (this “Agreement”) is made and entered into as of _____, 2016, by and between Santa Monica Malibu Unified School District, a political subdivision of the State of California, (“SMMUSD”), and Advocates for Malibu Public Schools, a California unincorporated association, (“AMPS”). SMMUSD and AMPS are collectively referred to herein as the “Parties” and individually as “Party.” This Agreement is made with respect to the following facts and circumstances:

A. On June 7, 2012, the Board of Education for SMMUSD (the “Board”) accepted the recommendation of SMMUSD’s Financial Oversight Committee (the “FOC”) that the FOC “analyze all reports and research related to the proposed Malibu separation.”

B. In its annual report to the Board for 2012-2013, the FOC reported that a subcommittee of the FOC had reviewed a feasibility report prepared by West Ed, an educational consulting firm retained by AMPS (“WestEd”), discussed certain financial aspects relating to a proposed separation and concluded that it was premature to reach any conclusions regarding the financial viability of two separate districts. As a result of various legal and financial uncertainties, the FOC recommended, and the Board agreed, that this subcommittee be continued for at least another year. On June 6, 2013, the Board accepted this proposal.

C. On July 16, 2014, the FOC reported to the Board that the subcommittee had reviewed a revised feasibility report prepared by West Ed and that there were legal issues that needed to be addressed before the subcommittee would be able to make a recommendation to the full FOC. A legal memorandum from AMPS’s counsel was expected on these issues. The minutes of the Board meeting reflect the following Board discussion in response to the FOC’s recommendation that this subcommittee be continued for an additional year:

“Issues associated with split unification, including the allocation of existing Measure BB bond indebtedness between two districts, new Measure ES bonds, and future bonds; CEQA indemnification costs; the continuation of the Measure R parcel tax in Malibu; the potential role of state legislation in regards to the split unification process; a division of assets and workforce; and LCFF calculations. It was decided that the FOC could assist the district in developing a scope of work for an independent contractor to help the district answer many of these questions. Mr. Foster, FOC member and President of AMPS, said AMPS would cover the cost of such an independent contractor. [FOC Subcommittee Chair] Mr. Larmore suggested that the FOC return in October with a scope of work for the independent contractor for the board to consider and plan to move forward. [SMMUSD Board Member] Dr. Escarce suggested staff create a matrix identifying and prioritizing all of the district’s questions and issues regarding split unification and determine where the FOC and/or independent consultant could assist reduce uncertainty. It was also decided that [SMMUSD Chief Financial Officer] Ms. Maez, the independent contractor, and the FOC would report back to the board with findings. [SMMUSD Board Members]

Ms. Lieberman and Dr. Escarce, board liaisons to the FOC, will work with the FOC unification subcommittee.”

On or about September 23, 2014, AMPS provided to the FOC a memorandum from its counsel, the law firm of Nielsen Merksamer Parinello Gross & Leoni LLP.

D. The FOC reported to the Board on October 16, 2014 regarding, among other things, recommendations for activities by two separate subcommittees - one focusing on budget issues and another on bond-related issues. Shelley Slaugh-Nahass, Chair of the FOC, advised the Board in her presentation that both subcommittees recommended that SMMUSD retain legal and financial consultants and that it was the FOC’s understanding that all costs would be paid by AMPS. In response to a question from Board Member Mechur, SMMUSD’s Chief Financial Officer, Jan Maez, advised that SMMUSD would retain the consultants and that AMPS would reimburse SMMUSD for the fees incurred.

E. On June 11, 2015, SMMUSD Staff submitted a request that it be authorized to enter into an agreement with the law firm of Dannis Woliver Kelley in response to recommendations from the FOC relating to the retention of legal counsel in connection with bond issues associated with the Malibu separation. The Agenda item stated: “Expenses will be reimbursed by AMPS upon completion of a reimbursement agreement between SMMUSD and AMPS. DWK to provide legal support to SMMUSD related to the creation of a new Malibu Unified School district.” The Board, on a motion by SMMUSD Board Member Dr. Escarce and seconded by SMMUSD Board Member Mr. Foster¹, voted 6-0 to “postpone approval of the Dannis Woliver Kelley contract for the Business Services Department until the agreement with Advocates for Malibu Public Schools (AMPS) has been signed by AMPS and is ready for board approval.” AMPS has advised SMMUSD that it did not sign the agreement due to the scope of the proposal by Dannis Woliver Kelley, the form of the agreement for financial responsibility, and its objection to the selection of Dannis Woliver Kelley.

F. On July 15, 2015, the FOC reported to the Board that it believed:

1. Assuming a new parcel tax in Malibu, the proposed reorganization would not cause a substantial negative effect on the fiscal status of a new Malibu Unified School District (“MUSD”) or SMMUSD, then operating as Santa Monica Unified School District (“SMUSD”).
2. Allocation of assets and liabilities, including bond indebtedness, should not create a significant obstacle to the proposed reorganization. While the FOC subcommittee recommended what it believed to be equitable allocations of most categories of assets and liabilities, it was unable to reach a consensus on a few and

¹ In November 2014, Mr. Foster was elected to the SMMUSD Board, and shortly thereafter resigned his position with AMPS in order to avoid any conflict. Mr. Foster currently serves as a Trustee of SMMUSD, and has no leadership role with AMPS.

concluded that these would need to be worked out through further discussions. While the subcommittee attempted to apply relevant law to its allocations, SMMUSD should retain legal counsel to review the subcommittee's work to assist the Board in working through the various issues.

3. Any separation would need to be conditioned upon a release of any claim made in the lawsuit filed against SMMUSD, Board members and certain SMMUSD officials relating to compliance with the Toxic Substance Control Act with respect to certain Malibu classrooms to the extent that such claim might continue to apply to SMUSD, its Board members and officers. MUSD should be obligated to indemnify SMUSD for any exposure to future claims based upon any failure to properly remediate any existing conditions because responsibility to deal with the Malibu facilities would, following a separation, be under the sole jurisdiction of MUSD. However, it is not clear on what other exposure might remain to SMUSD, such as personal injury claims, and, if any, to what extent it is appropriate for MUSD to provide an indemnity and how a meaningful indemnity would be crafted.

4. SMMUSD should retain legal counsel experienced in the area of toxic contamination to advise it regarding the nature of any continuing exposure to SMUSD, the proper allocation of responsibility, and the appropriate means to achieve that allocation, including indemnifications.

G. In September, 2015, the FOC received new information regarding the manner in which the State of California provides funds to SMMUSD relevant to the opinion it expressed in its July 15, 2015 report to the Board regarding the effect on the fiscal status of the proposed reorganization. After studying the new information the FOC adopted the following motion on November 12, 2015:

“After careful analysis of updated operating budgets and projections provided by the District’s fiscal services department and WestEd, which now reflect the District’s new understanding about the effects of minimum state aid, the FOC concludes that the Santa Monica-only district financial picture would be significantly different than what was reported to the Board by the FOC in July 2015 and is significantly worse on a per-student basis, as compared with continued operation of the existing District. As part of the discussion, the FOC also considered other issues that could affect the overall financial change with a Malibu-only district and a Santa Monica-only district. These changes are outside of the operating budget but could include for a Santa Monica-only district some relief from ongoing legal fees related to facility-related litigation in Malibu and SMMEF funding that will no longer be required by a separate Malibu-only district.”

This motion was reported to the Board by the FOC on November 19, 2015. While the Board took no action at this meeting, each Board member present stated that he or she understood the desire of many Malibu residents for an independent school district and that they were in support

of a separate district as long as there was no materially negative financial impact to Santa Monica students, and the Board directed that its Malibu unification subcommittee (Ms. Lieberman, Dr. Escarce and Mr. Foster) meet and return to the full Board with recommendations regarding next steps.

H. On December 17, 2015, in furtherance of all of the foregoing events, the Board considered a Major Action Item Recommendation from the Board's Malibu unification subcommittee entitled "Process of Negotiations Between Santa Monica-Malibu Board of Education and Representatives of a Potential Malibu Unified School District Regarding Resolution of Issues and Concerns Pertinent to Unification of a Separate Malibu Unified School District." After discussion, the Board unanimously approved the Recommendation with modifications. (As adopted, the Recommendation is referred to herein as the "Action Item.") The Action Item, which was carefully negotiated between the Board members on the Malibu unification subcommittee, guides and controls the process by which the negotiating committee established by that Action Item (and discussed below) is to complete its task (defined by the Action Item).

1. The Action Item expresses the Board's concern about the negative financial consequences to the resulting SMUSD arising from unification, as identified by the FOC report and the Board's "unanimous desire for the co-existence of the Santa Monica Unified School District and the Malibu Unified School District as two excellent school districts serving their respective communities and providing the best educational opportunities for their respective students as long as it can be accomplished in a manner that does not have a negative impact on the financial condition of the remaining Santa Monica Unified School District."

2. To accomplish that end, the Action Item established a negotiating process "in an effort to resolve both the financial concerns raised by the FOC report and any other financial issues regarding unification of a separate [MUSD] that remain unresolved from previous discussions." Specifically, the Action Item called for the appointment of two teams of negotiators – a maximum of three to be appointed by the SMMUSD Superintendent and approved by the Board to represent the interests of a potential separate SMUSD, and a maximum of three to be appointed by the Malibu City Manager to represent the interests of a potential separate MUSD. The Action Item further instructed the negotiators "to work cooperatively with one another and with their counterparts, to develop and agree upon terms that promote the [stated] aspirations of the Board."

3. The Action Item (1) sets forth a series of objectives of the Board, (2) contemplates that "the negotiators will likely require access" to certain consultants "to address questions that arise during the negotiations," (3) encourages the negotiators to communicate with the staff of the Los Angeles County Office of Education, various elected representatives and other parties in the State Legislature to address such questions as well, (4) expresses the Board's expectation that "Advocates for Malibu Public Schools (AMPS) will agree to pay for all mutually agreed upon services provided to the

negotiators by” one or more educational consultants and legal consultants that may be necessary to address questions concerning “non-budgetary financial issues” and “environmental liability,” and directs the execution prior to the commencement of negotiations of appropriate agreements between SMMUSD and AMPS to ensure that AMPS is responsible for the payment of such mutually agreed upon services.

4. The Action Item listed four conditions that must be met before the negotiations will be determined to have been completed successfully:

- a. The negotiating teams collectively determine that negotiations have achieved the Board’s objectives and present the evidence for their determination in a Discussion Item during a regular meeting of the Board;
- b. Any technical and legal concerns regarding the negotiated agreements have been resolved satisfactorily;
- c. The Board determines that negotiations have achieved their objectives and formally approves the written report and the agreements therein as a Major Action Item during one of its regular public meetings; and
- d. The Malibu City Council formally approves the written report and the agreements therein during one of its regular public meetings.

I. Negotiators have been appointed consistent with the Action Item, and this Agreement is intended to comply with the Board’s direction to ensure payment by AMPS of mutually agreed upon services provided by consultants who are to be made available to the negotiators, and mutually agreed upon by those negotiators, that are in furtherance of establishing a Malibu Unified School District co-existing with the Santa Monica Unified School District as two excellent school districts serving their respective communities and providing the best educational opportunities for their respective students as long as it can be accomplished in a manner that does not have a negative impact on the financial condition of the remaining SMUSD.

Now, therefore, in view of the foregoing, the Parties make the agreements set forth herein.

II. AMPS PAYMENT FOR CONSULTANTS’ SERVICES

A. AMPS shall pay for the services of each of the consultants described in Section C below, each of whom shall be mutually agreed upon by the negotiators and after receipt of a scope of work proposal from said consultant(s) that has been approved by the negotiators.

B. Each consultant shall be (1) retained by SMMUSD pursuant to an engagement agreement approved by SMMUSD to support the negotiators. However, neither the negotiators, nor SMMUSD, nor The City of Malibu (“MALIBU”) shall be responsible for payment to such consultant(s) for said services. Rather, AMPS shall be responsible for all payments for said services provided by such consultant(s), and each engagement agreement shall be signed by AMPS to reflect its obligation to pay for all services provided to SMMUSD and the negotiators and shall provide that such consultant has no financial recourse to collect any money from SMMUSD, MALIBU or the negotiators for any such services.

C. It is contemplated that the following consultants may be retained pursuant to the Action Item and this Agreement, for the services and advice described below:

1. An educational consultant with respect to issues relating to (a) the extent and nature of any fiscal impact of separation on each of the districts and, if necessary, available methods to address any significant adverse financial impacts, (b) the allocation of assets and liabilities of SMMUSD between the two districts, and (c) any other financial issues which the negotiators agree should also be addressed as a part of the negotiations. The educational consultant will be made available by SMMUSD to the negotiators during the negotiation process.

2. A legal consultant, to provide legal advice as to the legality and enforceability of (a) any method selected by the negotiators to address any significant adverse financial impact of separation, and (b) methods selected by the negotiators to allocate assets and liabilities of SMMUSD between the two districts and to address issues relating to outstanding bonds and authorized but unissued bonds. The legal consultant will be made available by SMMUSD to the negotiators during the negotiation process.

3. An environmental law consultant, to provide legal advice with respect to all matters relating to the elimination of post-unification liability of SMMUSD (operating then as SMUSD) for environmental issues at Malibu schools, including, without limitation, assumption of responsibility for any remaining remediation work, a release from MUSD from any such liability, an indemnification for any future claims arising from such remediation work after separation or the failure to undertake appropriate work post-unification, resolution of the pending litigation against SMMUSD or an enforceable agreement from the plaintiffs that SMMUSD, then operating as SMUSD, the Board and all individuals will be dismissed from the lawsuit.

D. In addition, AMPS shall be solely responsible for payment of fees and costs incurred by SMMUSD for legal services rendered to SMMUSD by one or more law firms in connection with review by SMMUSD of any written report prepared and signed by the two negotiating teams at the conclusion of successful negotiations, if negotiations were completed successfully, and any modified written report prepared after negotiations have been reopened, all as described in the Action Item. Negotiations shall not be deemed to have been successful unless the report executed by the two negotiating teams includes a provision setting forth the manner in which AMPS is to make such payments, including any retainer deposits.

E. If SMMUSD determines, in its sole discretion, that it requires legal services in connection with its review of the status of negotiations as reported to the Board by the Santa Monica Team from time to time under the Action Item but prior to the submission of a written

report from the negotiators reflecting the conclusion of successful negotiations, AMPS shall not be required under this Agreement to pay fees and costs due to such counsel for such services but will, in good faith, consider doing so upon request of SMMUSD in a manner to be determined by AMPS and SMMUSD.

F. Notwithstanding the foregoing, AMPS shall have no obligation to execute any engagement agreement with, or pay any amounts which may become due to, the law firm of Pillsbury Winthrop Shaw Pittman, LLP if SMMUSD selects such firm to provide any of such services.

III. REPRESENTATIONS AND WARRANTIES OF AUTHORITY

Each person executing this Agreement represents and warrants that he or she has the full right and authority to enter into and consummate this Agreement.

IV. MISCELLANEOUS

A. This Agreement constitutes the entire agreement between and among the Parties with regard to the matters herein set forth.

B. This Agreement may not be amended, canceled, revoked or otherwise modified except by written agreement executed by all of the Parties.

C. This Agreement is the product of negotiation and preparation by and among the Parties and their respective attorneys. This Agreement shall be interpreted without regard to the drafter of this Agreement and shall be construed as though all Parties hereto participated equally in the drafting of this Agreement.

D. Nothing in this Agreement or any actions taken by SMMUSD in connection herewith shall be deemed to constitute an agreement by SMMUSD to approve, or participate in, any petition proposed to be filed by AMPS or any other person seeking approval of a school district separation. AMPS acknowledges that any decision by SMMUSD relating to such a petition will be subject to the consideration of a variety of factors, that SMMUSD must retain the unfettered right to decide whether, and to what extent, to support any such petition and to elect not to do so for any reason whatsoever. No decision by SMMUSD to refuse to support a petition shall give AMPS the right to be reimbursed by SMMUSD for any amounts paid by AMPS hereunder.

E. Nothing in this Agreement obligates SMMUSD to continue with any of the negotiations contemplated in the Action Item and the Board retains the right to terminate all such negotiations or modify instructions to the Santa Monica Team at any time for any reason in its sole discretion. Furthermore, nothing in this Agreement shall obligate the Board to accept the recommendations of the negotiators and the Board retains the right to modify or reject any such recommendations at any time for any reason in its sole discretion. No action by the Board to terminate or modify negotiations or amend or reject any recommendations of the negotiators shall give AMPS the right to be reimbursed by SMMUSD for any amounts paid by AMPS hereunder.

F. MALIBU and all members of the Malibu City Council are intended to be third-party beneficiaries of this Agreement.

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V. COUNTERPARTS

This Agreement may be executed in counterparts, and all so executed shall constitute an agreement which shall be binding upon all Parties, notwithstanding that the signatures of all Parties do not appear on the same page. This Agreement may also be enforced where the signature of any party is, or has been, transmitted by facsimile or electronic transmission, and the fact that a party has only provided its signature by facsimile or electronic transmission shall not prevent any other party from enforcing this Agreement.

IT IS SO UNDERSTOOD AND AGREED. IN WITNESS OF THEIR AGREEMENT TO THE FOREGOING TERMS, THE PARTIES HAVE EXECUTED THIS AGREEMENT AS OF THE DATE FIRST SET FORTH ABOVE.

SANTA MONICA-MALIBU UNIFIED
SCHOOL DISTRICT:

By: Sandra Lyon
Its: Superintendent

ADVOCATES FOR MALIBU PUBLIC SCHOOLS:

By:
Its: