

## OUTSIDE COUNSEL AGREEMENT

This is an agreement (“Agreement”) for legal services by and between Howard S. Marks (“Attorney”), a licensed member in good standing of the Florida Bar, for Burr & Forman LLP (“Law Firm”) and The School Board of Brevard County, Florida (“School Board”).

1. The School Board<sup>1</sup> retains and employs Attorney/Law Firm to provide legal services concerning a case styled *Moms for Liberty—Brevard County, FL, Amy Kneessy, Ashley Hall, Katie Delaney and Joseph Cholewa vs. Brevard Public Schools, Misty Haggard Belford, Chair, Brevard County School Board, in her official and individual capacities, Matt Susin, Vice Chair, Brevard County School Board, in his official and individual capacities, Cheryl McDougall, Member, Brevard County School Board, in her official and individual capacities, Katye Campbell, Member, Brevard County School Board, in her official and individual capacities, and Jennifer Jenkins, Member, Brevard County School Board, in her official and individual capacities, Case Number 6:21-cv-01849, filed in the United States District Court, Middle District of Florida, Orlando Division* (the “Litigation”).

2. Attorney/Law Firm accepts the terms outlined in this Agreement and will render to the best of Attorney/Law Firm’s ability the legal services described in this Agreement.

3. **Exhibit A** to this Agreement is the schedule of fees and costs which will be in effect throughout the term of this Agreement. Attorney/Law Firm will create and deliver itemized statements of fees and costs (Statement) to the School Board’s Legal Department each month. The Statements must include a complete description of the legal services rendered, a chronological summary referencing the date on which each service is rendered, and the time expended represented for each service, expressed as fractions of an hour. The Statement must include and describe activities of other law firm employees who may work on a particular matter, and such work must be billed according to the rates established in **Exhibit A**.

4. School Board agrees to pay our statements for services and expenses as provided in the attached **Exhibit A**. In addition, you agree to be candid and cooperative with us and keep us informed with complete and accurate factual information, documents and other communications relevant to the subject matter of our representation or

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<sup>1</sup> The Litigation in addition to naming the School Board as a Defendant has named all School Board Members in their official and individual capacities. Attorney/Law Firm believes that all named Defendants can be represented by the same attorneys, as there is a good faith and reasonable belief that the representation of all Defendants will not affect the Attorney/Law Firm’s responsibilities. To the extent a conflict arises during the course of the Litigation, Attorney/Law Firm will promptly notify the School Board and will resolve it as required by the Florida Rules of Professional Responsibility. It is agreed that the School Board shall be responsible for the payment of Defendants’ attorneys’ fees and costs.

otherwise reasonably requested by us. In particular, you agree be available to attend trial, hearings, depositions and discovery conferences, and other proceedings, and to commit the appropriate and sufficient resources to meet the School Board's discovery obligations.

5. School Board may at any time terminate our services and representation upon written notice to the firm. Such termination shall not, however, relieve the School Board of the obligation to pay for all services already rendered, including work in progress and remaining incomplete at the time of termination, and to pay for all expenses incurred on behalf of the School Board through the date of termination.

Law Firm reserves the right to withdraw from our representation as required or permitted by the applicable rules of professional conduct upon written notice to the School Board. In the event that we terminate the engagement, we will take such steps as are reasonably practicable to protect the School Board's interests in the above litigation, and the School Board agrees to take all steps necessary to free us of any obligation to perform further, including the execution of any documents necessary to perfect our withdrawal. We will be entitled to be paid for all services rendered and costs or expenses incurred on behalf of the School Board through the date of withdrawal. If permission for withdrawal is required by a court or arbitration panel, we will promptly request such permission, and the School Board agrees not to oppose our request.

6. The Attorney/Law Firm agrees that for a period of twelve (12) months after the termination of this Agreement, Attorney/Law Firm will not represent any client or take any action that, had Attorney/Law Firm taken it while this Agreement was in effect, would have constituted a conflict of interest.

7. The Attorney/Law Firm represents that Attorney/Law Firm currently maintains lawyer's professional liability insurance with a minimum limit of liability of five-hundred thousand dollars (\$500,000) per occurrence and one-million dollars (\$1,000,000) in the aggregate, with no more than a five-thousand dollars (\$5,000) deductible, and will furnish a copy of such policy to the School Board upon request. Attorney/Law Firm shall maintain said lawyer's professional liability insurance so long as this Agreement is in effect.

8. The Attorney/Law Firm will provide the School Board's Legal Department with quarterly written reports, which succinctly summarize all pending matters. Said quarterly written reports are due on or before January 1, April 1, July 1 and October 1 of each year.

9. The Attorney/Law Firm agrees to keep the School Board's Legal Department, timely and generally informed regarding all matters and agrees to email relevant pleadings, motions and substantive correspondence to ([Gibbs.Paul@brevardschools.org](mailto:Gibbs.Paul@brevardschools.org) and [Londono.Valerie@brevardschools.org](mailto:Londono.Valerie@brevardschools.org)) for retention in the School Board's Legal Department files.

10. Attorney/Law Firm may utilize the services of paralegals, law clerks, and associates under Attorney/Law Firm's direct supervision if Attorney/Law Firm reasonably believes such use is in the best strategic and financial interest of the School Board. The assignment of any legal matter to an Attorney/Law Firm: (i) not working directly under Attorney/Law Firm's supervision; or (ii) intending to bill at or above Attorney/Law Firm's rate set forth on Exhibit A is prohibited.

11. Attorney/Law Firm will use best efforts in representing the School Board but makes no promises or guarantees regarding the outcome(s) of said matters or the timeframe in which they may be resolved. The School Board acknowledges that Attorney/Law Firm's comments regarding outcomes of litigation matters are expressions of professional opinion.

12. The Attorney/Law Firm acknowledges that settlement of any matter requires prior School Board approval. Attorney/Law Firm must notify opposing counsel that settlement of any matter requires prior School Board approval at the time of any settlement discussions and will include such a statement in any settlement, resolution, or mediation agreement.

13. The Attorney/Law Firm agrees that during the term of this Agreement that Attorney/Law Firm shall maintain unrestricted membership in the Florida Bar, and further agrees to notify School Board in writing of any investigation or action initiated or finalized by the Florida Bar, or the bar of any other state or territory regarding Attorney/Law Firm's practice of law.

14. It is understood and agreed that this Agreement contains the complete understanding and agreement between the parties. No stipulation, agreement or understanding will be valid or enforceable unless contained in this Agreement. No representations or statements made by any employees, agents or representatives of either party will be binding on either party as a warranty or otherwise, except as expressly set forth herein. Any amendment or modification of this Agreement, or any waiver of its terms, to be binding, must be written, and signed by the parties hereto.

15. This Agreement may be amended only with the mutual consent of the parties, which must be in writing and approved by the School Board.

16. Neither Attorney/Law Firm nor School Board may assign or transfer any interest arising in or from this Agreement without the prior written consent of both parties. Should an authorized assignment occur, this Agreement will inure to the benefit of and be binding upon the parties hereto and their respective heirs, representatives, successors, and assigns.

17. All notices, requests, consents, and other communications required or permitted under this Agreement must be in writing and hand delivered by messenger or courier service; faxed; emailed; or mailed by Registered or Certified Mail (postage prepaid), Return Receipt Requested, addressed to:

**AS TO ATTORNEY/LAW FIRM:**

Howard S. Marks, Esquire  
Burr & Forman LLP 200 S. Orange Avenue, Suite 800 Orlando, Florida 32801  
Primary Email: [hmarks@burr.com](mailto:hmarks@burr.com)  
Secondary Email: [echaves@burr.com](mailto:echaves@burr.com)  
Telephone: (407) 540-6600

**AS TO SCHOOL BOARD:**

Paul D. Gibbs, General Counsel  
The School Board of Brevard County, Florida  
2700 Judge Fran Jamieson Way  
Viera, Florida 32940  
[gibbs.paul@brevardschools.org](mailto:gibbs.paul@brevardschools.org)  
Phone: (321) 633-1000

or to such other address(es) as the parties may mutually designate by notice complying with the terms of this Agreement. Each such notice will be deemed delivered:

- (a) On the date delivered, if by personal delivery,
- (b) On the date faxed or emailed, if by facsimile or email, and
- (c) On the date upon which the Return Receipt is signed, or delivery is refused, or the notice is designated by the postal authorities as not delivered if mailed.

18. This Agreement and all transactions contemplated hereunder are governed by, and construed and enforced by, the laws of the State of Florida without regard to principles of conflicts of laws. Venue for any litigation related to this Agreement will be in Brevard County, Florida.

19. If any legal action is brought for the enforcement of this Agreement, the prevailing party will be entitled to recover reasonable attorney's fees and costs, in addition to such other relief the party may lawfully be entitled.

20. Each party must comply with all applicable federal and state laws, local government licensing requirements, codes, rules, and regulations and written School Board policies in performing its duties, responsibilities, and obligations under this Agreement.

21. All covenants, agreements, representations, and warranties made herein or otherwise made in writing by any party pursuant hereto, shall survive the execution and delivery of this Agreement and the consummation of services contemplated hereby.

22. No remedy herein conferred upon any party is intended to be exclusive of any other remedy. No single or partial exercise by any party of any right, power or remedy hereunder shall preclude any other right or remedy or further exercise thereof.

23. Attorney/Law Firm will be deemed to be an independent contractor in the performance of this Agreement and will not be considered or permitted to be an agent, servant, joint venturer, or partner of School Board. All persons furnished, used, retained, or hired by or on behalf of Attorney/Law Firm shall be considered to be solely the employees of Attorney/Law Firm, and Attorney/Law Firm at all times shall maintain supervision and control over its employees as is necessary to preserve its independent contractor status. Attorney/Law Firm shall be responsible for payment of including, but not limited to, any and all benefits, worker's compensation coverage, unemployment tax, social security withholding, and other payroll taxes for its employees, as applicable, including any related assessments or contributions required by law.

24. Any party receiving funds paid by School Board under this Agreement must promptly notify School Board of any funds erroneously received upon the discovery of such erroneous funds receipt. Any excess funds must be refunded to School Board. Excess funds paid by School Board as the result of Attorney/Law Firm billing errors must be refunded with interest calculated from the date of the erroneous payment or overpayment at the interest rate for judgments under § 55.03, Fla. Stats. (2017), applicable at the time the erroneous payment or overpayment was made.

25. PUBLIC RECORDS.

A. To the extent that Attorney/Law Firm meets the definition of "contractor" under § 119.0701, Fla. Stats. (2020), and in addition to other contract requirements provided by law, the Attorney/Law Firm agrees that it is acting as a contractor on behalf of School Board as provided under § 119.0701(a) and as such it will comply with Florida's Public Records Law. Specifically, Attorney/Law Firm agrees that it will:

- i. Keep and maintain public records that ordinarily and necessarily would be required by School Board to perform the services performed by Attorney/Law Firm under contract;
- ii. Provide the public with access to such public records on request from School Board's custodian of public records;
- iii. Provide School Board with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in this chapter or as otherwise provided by law;
- iv. Ensure the public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the contract term and following completion of the contract if the Attorney/Law Firm does not transfer the records to the public agency;
- v. Upon completion of the contract, transfer, at no cost, to School Board all public records in possession of Attorney/Law Firm or keep and maintain public records required by the public agency to perform the service. If Attorney/Law Firm transfers

all public records to the public agency upon completion of the contract, Attorney/Law Firm shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If Attorney/Law Firm keeps and maintains public records upon completion of the contract, Attorney/Law Firm shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to School Board, upon request from School Board's custodian of public records, in a format that is compatible with the information technology systems of the public agency.

**B. IF ATTORNEY/LAW FIRM HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE CONTRACTOR'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS CONTRACT, CONTACT THE BPS CUSTODIAN OF PUBLIC RECORDS AT (321) 633-1000 ext. 11453, [recordsrequest@brevardschools.org](mailto:recordsrequest@brevardschools.org), BREVARD COUNTY PUBLIC SCHOOLS, RECORDS MANAGEMENT, 2700 Judge Fran Jamieson Way, Viera, Florida 32940.**

26. Attorney/Law Firm represents and warrants to School Board that Attorney/Law Firm shall comply with Title VI of the Civil Rights Act of 1964, Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Fair Labor Standards Act, the Americans with Disabilities Act, and related regulations, and that no person shall be subjected to discrimination because of age, race, color, disability, pregnancy, gender, marital status, national origin, or religion in the performance of the parties' respective duties, responsibilities, and obligations under this Agreement.

27. Attorney/Law Firm agrees that as a condition of entering into this Agreement, pursuant to §§ 1012.32 and 1012.465 or § 1012.467, Fla. Stats. (2020), whichever is applicable, any person entering school grounds or having direct contact with students on behalf of Attorney/Law Firm must meet Level 2 screening requirements as described in § 1012.32, Fla. Stat. (2020). Screening will be at Attorney/Law Firm's or employee's expense and must be completed and credentials issued by the School Board before the screened individual having access to students or to the school grounds.

28. Attorney/Law Firm and its subcontractors (if any), must comply and cooperate immediately with any inspections, reviews, investigations, or audits relating to this Agreement as deemed necessary by the Florida Office of the Inspector General or by any other Florida official with proper authority.

29. Neither party are obligated to perform any duty, requirement or obligation under this Agreement if such performance is prevented by fire, hurricane, earthquake, explosion, wars, sabotage, accident, flood, acts of God, strikes, or other labor disputes, riot or civil commotions, or by reason of any other matter or condition beyond the control of either party, and which cannot be overcome by reasonable diligence and without unusual expense ("Force Majeure"). In no event will a lack of funds on the part of either party be deemed Force Majeure.

30. Notwithstanding any provision to the contrary within this Agreement, any party contracting with School Board will fully comply with the applicable requirements of Sections 1002.22 and 1002.221, Fla. Stats. (2020); FERPA, and any other state or federal law or regulation regarding the confidentiality of student information and records. Each such party agrees, for itself, its officers, employees, agents, representatives, contractors or subcontractors, to fully indemnify and hold harmless School Board and its officers and employees for any violation of this section, including without limitation, defending School Board and its officers and employees against any complaint, administrative or judicial proceeding, payment of any penalty imposed upon School Board, or payment of any and all costs, damages, judgments or losses incurred by or imposed upon School Board arising out of a breach of this covenant by the party, or an officer, employee, agent, representative, contractor or sub-contractor of the party to the extent that the party or an officer, employee, agent, representative, contractor or sub-contractor of the party either intentionally or negligently violate the provision of this section or of Sections 1002.22 or 1002.221, Fla. Stats. (2020).

31. Nothing in this Agreement should be construed as consent by any agency or political subdivision of the State of Florida to be sued by third parties in any matter arising out of this Agreement, or to confer any rights on any third party.

32. Under no circumstances will this Agreement be construed or interpreted as an exclusive dealing agreement. School Board is free at any time to contract for similar services with any other party or to perform such services itself.

33. Nothing in this Agreement is intended to waive sovereign immunity by any agency or political subdivision to which sovereign immunity may be applicable, or of any rights or limits of liability existing under § 768.28, Fla. Stat. (2020). This term survives the termination of all performance or obligations under this Agreement and is fully binding until any proceeding brought under this Agreement is barred by any applicable statute of limitations.

34. By signing this Agreement, Attorney/Law Firm certifies, to the best of its knowledge and belief, that neither Attorney/Law Firm nor its principals:

A. Are debarred, suspended, proposed for debarment, declared ineligible from operating or voluntarily excluded from participation in covered transactions by any federal, state or local department or agency.

B. Have, within the five-year period prior to this Agreement, been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state or local) transaction or contract under public transaction; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements or receiving stolen property.

C. Are presently indicted or otherwise criminally charged by a government entity (federal, state or local) with commission of any of the offenses enumerated in the preceding paragraph B.

D. Have, within the five-year period before this Agreement had one or more public transactions terminated for cause or default.

Attorney/Law Firm agrees to notify School Board within thirty (30) days after occurrence of any of the events, actions, debarments, proposals, exclusions, convictions, judgments, indictments, or terminations as described in paragraphs (A-D) above, concerning Attorney/Law Firm or its principals.

35. If this Agreement involves Federal funds more than \$10,000, Attorney/Law Firm must be in compliance with Executive Order 11246 of September 24, 1965, entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor Regulations (41 C.F.R. Chapter 60).

36. If this Agreement is in excess of \$100,000, Attorney/Law Firm shall comply with all applicable standards, orders, or regulations, including but not limited to:

- A. Certification Regarding Lobbying pursuant to 31 U.S.C. 1352 (Appendix A: 7 C.F.R. Part 3018); and
- B. Disclosure of Lobbying Activities pursuant to 31 U.S.C. 1352 (Appendix A: 7 C.F. R. Part 3018).

37. Attorney/Law Firm represents and warrants to School Board under this Agreement that:

A. Attorney/Law Firm is not bound by any other contract, agreement, business relationship or another arrangement that would preclude it from entering into, or from fully performing, the services required under this Agreement;

B. Attorney/Law Firm affirms and certifies that none of Attorney/Law Firm's agents, employees or officers have ever had his or her professional license or certification in the State of Florida, or of any other jurisdiction, either denied, suspended, revoked, terminated or voluntarily relinquished under threat of disciplinary action, or restricted in any way;

C. Attorney/Law Firm affirms and certifies that it has not been convicted of a public entity crime as provided in § 287.133, Fla. Stats. (2020), to wit: A person or affiliate who has been placed on convicted vendor list following a conviction for public entity crime may not submit a bid, proposal, or reply on a contract to provide any goods or services to a public entity, may not submit a bid, proposal, or reply on a contract with a public entity for the construction or repair of a public building or public work, may not submit bids on leases of real property to public entity, may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a contract with any public entity, and may not transact business with any public entity in excess of the threshold amount

provided in § 287.017, for CATEGORY TWO for a period of thirty-six (36) months from the date of being placed on the convicted vendor list;

D. Attorney/Law Firm shall comply with all laws, rules, codes, ordinances, and licensing requirements that are applicable to the conduct of its business, including those of Federal, State, and local agencies having jurisdiction and authority over its business activities, including but not limited to Chapter 287, Florida Statutes (2020), and Fla. Admin. Code R. 60A. Attorney/Law Firm shall further comply with Section 274A [8 U.S.C. 1324a] of the Immigration and Nationality Act, the Americans with Disabilities Act, and all prohibitions against discrimination. Violation by Attorney/Law Firm of any laws, rules, codes, ordinances, or licensing requirements will constitute, on the date and time of any such violation, a material breach of this Agreement and serve as grounds for termination or nonrenewal of this Agreement;

E. The parties must comply with the code of ethics for public officers and employees, Chapter 112, Fla. Stats. (2020); and

F. By accepting this Agreement, Attorney/Law Firm expressly warrants, in addition to implied warranties that the materials furnished under this Agreement will be free from latent and patent defects and in full conformity with the specifications contained in Exhibit A.

38. Each person signing this Agreement on behalf of either party individually warrants that he or she has full legal power to execute this Agreement on behalf of the party for whom he or she is signing and to bind and obligate such party concerning all provisions contained in this Agreement.

39. Under Fla. Stat., Contractor shall use the U.S. Agency of Homeland Security's E-Verify system, <https://e-verify.uscis.gov/emp>, to verify the employment eligibility of all employees hired during the term of this Agreement. Contractor shall also require all subcontractors performing work under this Agreement to use the E-Verify system for any employees they may hire during the term of this Agreement. Contractor must provide evidence of compliance with 448.095, Fla. Stat upon request. Evidence may consist of, but is not limited to, providing notice of Contractor's E-Verify number. Failure to comply with this provision is a material breach of the Agreement, and BPS may choose to terminate the Agreement at its sole discretion.

**THE SCHOOL BOARD OF BREVARD  
COUNTY, FLORIDA**

**BURR & FORMAN LLP**

By: \_\_\_\_\_

By: \_\_\_\_\_

Howard S. Marks

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**ATTORNEY:**

By: \_\_\_\_\_  
Howard S. Marks

Date: \_\_\_\_\_

**EXHIBIT A  
FEE AND COST SCHEDULE**

Name	Hourly Rate
A. Hourly rate for all legal services for <u>Attorneys:</u>	<u>\$350.00</u>
This matter will be staffed by Partners and senior level attorneys.	

B. Other charges

Copy fee charges consistent with § 119.07(4), Fla. Stats. (2020)  
Postage standard U.S. Postal Rates  
Long distance telephone calls standard charges

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C. Travel – Rates per mile and reimbursements for meals and lodging will be paid in accordance with School Board Policy 6550:

1. Mileage will be reimbursed at the maximum Federal prescribed rate.
2. Travel by a common carrier will be reimbursed at the actual cost of travel based on standard fares.

The Attorney will charge for time traveling but not for time spent in another city that is not spent working.

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