BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
UPLAND UNIFIED SCHOOL DISTRICT,	OAH Case No. 2018120181
v.	ORDER FOLLOWING PREHEARING CONFERENCE AND CONTINUING DUE PROCESS HEARING
PARENT ON BEHALF OF STUDENT.	

On February 4, 2019, a telephonic prehearing conference was held before Administrative Law Judge Alexa J. Hohensee, Office of Administrative Hearings. Jonathan P. Reed, Attorney at Law, appeared on behalf of Upland Unified School District. There was no appearance for Student.[1] A Spanish language interpreter was included on the call. The PHC was recorded.

Based upon discussion with the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on February 21, 2019, and continuing day to day at the discretion of the ALJ. The hearing shall take place at Upland's located at 390 N. Upland Avenue, Upland, California 91786. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.[2]

[1] The ALJ attempted to contact Parent multiple times on February 4, 2019 at the telephone number of record, but Parent did not pick up the call. On the first call, the ALJ left an interpreted voicemail message that she would attempt to contact Parent for the PHC in another five minutes. On the second call, the ALJ left an interpreted voicemail message encouraging Parent to participate in the PHC, and notifying her that the ALJ would telephone her again at 1:20 p.m., and that the PHC would go forward without Parent at 1:20 p.m. if Parent could not be reached, unless Parent contacted OAH at (916) 263-0880 during the PHC and requested to participate. Parent did not contact OAH and request to participate. The PHC went forward at 1:20 pm., with a Spanish language interpreter on the call and available.

[2] By order dated January 17, 2019, this matter was consolidated with *Student v. Upland Unified School District*, OAH case number 2018120463 (Student's case). On January 28, 2019, Student filed a notice of withdrawal of Student's case, and Student's case was dismissed by OAH on January 29, 2019. Accordingly, this matter no longer proceeds as a consolidated case.

As ordered in the scheduling order, the named local educational agency shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. The named local educational agency certified that the facilities used for this case comply with the law. The local educational agency shall inform OAH within two days of the date of this order if it is unable to comply with this order.

Prior to the beginning of the hearing, Upland shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (1) a table for Student and his representatives; (2) a table for Upland's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Upland shall provide drinking water and tissue to all parties, witnesses and the ALJ. The same hearing room shall be used for each day of hearing and shall be available at least one hour prior to the commencement of the hearing each day. The hearing room shall be locked following the hearing each night. Upland shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing "good cause" to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

2. Issues and Proposed Resolutions. The sole issue at the due process hearing, and the proposed resolution, are listed below.

> Is Upland entitled to conduct the assessments proposed in the March 5, 2018 assessment plan without parental consent?

As a remedy, Upland seeks an order finding that Upland has the right to conduct the assessments proposed in the March 5, 2018 assessment plan, without parent consent, if Parent chooses to avail Student of a public education.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letters "S" or "D" in front of the exhibit to designate if it is a Student or school district exhibit (for example, "S-1" or "D-2"). Each exhibit shall be internally paginated, by exhibit, or all of a party's exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. Each party shall serve an exhibit binder containing its respective exhibits on the other party by February 13, 2019, in compliance with Education Code section 56505, subdivision (e)(7). At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Documents offered as evidence to support a request for reimbursement must be separated by vendor and should be internally chronological where possible. To the extent practicable, exhibits in the binders shall be in chronological order.

Excerpts of an audio record of an individualized education program team meeting, if any, must be transcribed and offered as documentary evidence; that portion of the audio record transcribed shall be provided to the opposing party with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcription need not be done by a certified court reporter. Electronic recording of the excerpts of the audio record shall be included with the transcript to allow the ALJ to listen to the recording as well as read the transcript. The parties may also be required to electronically transfer the audio recordings to OAH, at the ALJ's discretion.

The parties shall meet and confer by 5:00 p.m. on February 15, 2019, to eliminate duplicate exhibits from the exhibit binders. Duplicate exhibits and tabs should be removed from all binders prior to the first day of hearing. The parties shall not re-number exhibits after duplicates are removed. The parties are encouraged, if the total number of documents is not too large, to place the exhibits for both parties into one binder. Each exhibit shall consist of one document; separate documents may not be combined into one exhibit.

The parties shall include, as exhibits, resumes for each witness expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

Upland shall include as part of its exhibits the school calendar(s) for the years at issue.

If the parties intend to rely on individualized education programs, the parties shall attach all pages of the IEP(s), including copies of all actual signatures on the IEP(s) and any typewritten or handwritten notes or comments, if any, written on the IEP(s).

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible. Education Code section 56505, subdivision (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five days before the hearing.

4. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or out of order. Neither

party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement and listed below, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ. Education Code section 56505, subdivision (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five days before the hearing.

The parties are ordered to meet and confer by 5:00 p.m. on February 15, 2019, as to the schedule of witnesses. The parties shall coordinate the availability and order of testimony of witnesses to ensure that there is a witness available to testify at all times during the hearing, and to ensure that the hearing is completed as scheduled.

The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subdivision (h), empowers the ALJ presiding at a due process hearing to set a reasonable limit on the length of the hearing after consideration of all of the following: (i) issues to be heard, (ii) complexity of facts to be proven, (iii) ability of the parties or their representatives to present their respective cases, and (iv) estimates of the parties as to the time needed to present their respective cases.

On the first day of hearing before the first witness testifies, the parties shall provide the ALJ with one **joint** detailed hour-by-hour schedule of all witnesses expected to testify at hearing, which list shall also include an estimate of time for each party's direct and cross-examination. Upland shall have witnesses available in case agreement on a witness list is not reached.

The ALJ will finalize the witness schedule, and will revisit the schedule at the beginning and end of each hearing day. Counsel shall meet and confer each day of hearing to revise the witness schedule as needed.

5. Scope of Witness Examination. Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination. If a party intended to call a witness called first by the other party, that party shall complete their direct examination at the same time as their cross examination. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

6. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. The proponent of the witness shall provide the proposed witness with a complete physical set of

exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Electronic copies of the evidence binders will not be permitted. The witness must be on a clear telephone connection, and in a location that ensures the confidentiality of the proceedings. No witness will be heard by telephone unless all these requirements have been fulfilled.

7. Electronic Recording of Hearing.

a. Audio Recording. Neither party requested permission to make an audio recording of the hearing.

b. Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

8. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Upland is the petitioning party. Accordingly, Upland shall present its case-in-chief, followed by Student.

9. Motions. Student's Withdrawal. On January 28, 2019, Student filed a notice of withdrawal. As the respondent in this matter, Student has the right to present evidence, written argument and oral argument, and the right to confront, cross-examine and compel the attendance of witnesses, among many other rights. (Ed. Code, § 56505, subd. (e).) If Parent chooses not to attend the scheduled hearing and exercise Student's rights on his behalf, this matter will proceed as a default, and Upland will continue to bear the burden of proof. Accordingly, Upland is ordered to comply with all provisions of this PHC order, and shall exchange evidence and make good faith efforts to meet and confer with Parent regarding elimination of duplicate exhibits (if any) and the witness schedule, as though Student were an active participant in this due process matter.

Upland's Renewed Motion to Continue. At the PHC, Upland renewed its motion to continue the hearing to February 21, 2019 because an essential witness, Upland's director of special education, is not available to testify on February 20, 2019, due to a pre-paid, pre-planned training in Northern California. In light of Parent's notice of withdrawal and refusal to participate in the PHC, Upland estimates that it will need only one day to present its case-in-chief, and requests that the hearing go forward on the one scheduled day that the witness is available. Under these changed circumstances, the unavailability of one of Upland's essential witnesses due to excusable circumstance is good cause to continue the hearing in this matter to February 21, 2019. Any need for additional days will be discussed at the hearing.

No additional pretrial motions are pending or contemplated. Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause

as to why the motion was not made at least three business days prior to or during the PHC of February 1, 2019.

10. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

11. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

12. Special Needs and Accommodations. A Spanish language interpreter is required.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the mediation or hearing may contact the assigned calendar staff, identified in the scheduling order, at (916) 263-0880, as soon as the need is known. Additional information concerning requests for reasonable accommodation is available on OAH's website at https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

13. Hearing Closed To the Public. The hearing will be closed to the public unless Student requests it be open.

14. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. Each of the parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing, or if the petitioning party withdraws the request for due process. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED, OR THE PETITIONING PARTY WITHDRAWS THE DUE PROCESS HEARING REQUEST, AFTER 3:00 P.M. THE DAY PRIOR TO HEARING, EACH OF THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE FOR OAH REGARDING THE SETTLEMENT OR WITHDRAWAL AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. IN THE CASE OF SETTLEMENT, THE PARTIES SHOULD SIMULTANEOUSLY **EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT** https://www.applications.dgs.ca.gov/oah/oahsftweb.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall provide the date of the next board meeting. The hearing dates will not be cancelled without this information. The matter will be dismissed 30 days after the scheduled board meeting, unless the parties request otherwise to OAH in writing.

15. Failure to comply. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: February 4, 2019

DocuSigned by:
Alexa Hohensee
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ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings