BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2016070651
v.	ORDER TO SHOW CAUSE WHY EXPENSES SHOULD NOT BE SHIFTED FROM THE OFFICE OF ADMINISTRATIVE HEARINGS
FREMONT UNIFIED SCHOOL DISTRICT.	

On July 5, 2016, Student filed a request for a due process hearing with the Office of Administrative Hearings naming Fremont Unified School District. Student is represented by Brett Allen, attorney at law. On July 7, 2016, Fremont sent in a notice that it is being represented in this case by Jan Tomsky, attorney at law. On July 20, 2016, a scheduling order was sent to the attorneys setting the mediation in this matter for August 9, 2016 at 9:30 a.m. On August 3, 2016, OAH contacted the parties to confirm mediation. Student's attorney confirmed the mediation, but said that Ms. Tomsky may cancel the mediation. Ms. Tomsky's office did not return a call from OAH asking her to confirm the mediation. No requests to cancel the mediation were received by OAH and no motions to continue the mediation date were received by OAH.

On August 9, 2016, the assigned mediator traveled more than one hundred miles to Fremont's office, and, upon her arrival, was informed by Fremont's staff that the special education director was not in the office and that the mediation had been removed from their calendar for August 9 and rescheduled for sometime in October. They were unable to substantiate that OAH had been notified of any cancellation of the August 9, 2016 mediation. Neither Ms. Tomsky nor Mr. Allen appeared for the mediation.

APPLICABLE LAW

Under certain circumstances, an administrative law judge presiding over a special education proceeding is authorized to shift expenses from one party to another, or to OAH. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; see *Wyner ex rel. Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly, [California Code of Regulations] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."].) A party may be order to pay expenses of a party, or OAH as a result of "bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. . . . " (Cal. Code Regs. tit. 5, § 3088, subd. (a).) A party may also be ordered to pay costs for failure or refusal, without substantial justification, to comply with an

order of the presiding officer. (Govt. Code § 11455.10.) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

ORDER TO SHOW CAUSE

The parties and their attorneys did not contact OAH to cancel or reschedule mediation and failed to appear for the scheduled mediation on August 9, 2016. Therefore, Mr. Allen and Ms. Tomsky are ordered to show cause they should not be required to pay OAH's costs in connection with the August 9, 2016 mediation, which includes OAH travel expenses and the hourly rate for the mediator. **Mr. Allen and Ms. Tomsky are ordered to file a written response with OAH by no later than 5:00 p.m. on August 12, 2016,** by facsimile transmission to (916) 376-6319. A copy of the response shall be served upon the other party.

Mr. Allen and Ms. Tomsky's responses shall address why they did not appear at the scheduled mediation and did not inform OAH that they were not intending to appear. **The written responses shall address why OAH should not order Mr. Allen and Ms. Tomsky to pay OAH's expenses for sending a mediator to the scheduled August 9, 2016 mediation and OAH travel expenses related to this mediation, and for this order to show cause.**

The order to show cause hearing shall take place telephonically on August 15 2016, at 11:00 a.m. Failure of Mr. Allen or Ms. Tomsky to appear telephonically at the order to show cause hearing on August 5, 2016, may result in additional sanctions.

ORDER

1. An Order to Show Cause as to Why Parties Should Not be Ordered to Pay Expenses is hereby issued. Mr. Allen and Ms. Tomsky must file a response no later than 5:00 p.m. on Friday, August 12, 2015.

2. A telephonic order to show cause hearing shall be convened at 11:00 a.m. on Monday, August 15, 2016.

DATE: August 9, 2016

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Margaret Broussard
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MARGARET BROUSSARD
Presiding Administrative Law Judge
Office of Administrative Hearings