BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN DIEGO COUNTY OFFICE OF EDUCATION.	OAH Case No. 2018040382 ORDER FOLLOWING ORDER TO SHOW CAUSE HEARING AND IMPOSING SANCTIONS

On May 10, 2018, the Office of Administrative Hearings issued an Order to Show Cause why costs should not be shifted to the parties and/or the parties' attorneys for their failure to appear for the expedited due process hearing on May 8, 2018, or to clearly notify OAH that the expedited hearing was not necessary due to settlement of the expedited claims in the case. On June 2, 2018, Administrative Law Judge Kara Hatfield conducted the OSC hearing. Meagan Nunez and Jennifer Varga, Attorneys at Law, appeared on behalf of Student. Sundee Johnson, Attorney at Law, appeared on behalf of San Diego County Office of Education. The hearing was recorded.

APPLICABLE LAW AND PROCEDURAL HISTORY

In certain circumstances, an ALJ 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."].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

Expenses may be ordered to be reimbursed either to OAH or to another party. With prior approval from the General Counsel of the California Department of Education, the ALJ presiding over the hearing may "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel" to 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, subds. (a) & (e); see Gov. Code, § 11455.30, subd. (a).) Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, or employees. (Code Civ. Proc., § 128.5, subd. (f)(1)(C).)

An order of sanctions shall be limited to what is sufficient to deter repetition of the action or tactic or comparable action or tactic by others similarly situated. (Code Civ. Proc., § 128.5, subd. (f)(2).) If warranted for effective deterrence, an order may direct payment of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the action or tactic. (*Id*.) The courts shall vigorously use their sanction authority to deter improper actions or tactics. (Code Civ. Proc., § 128.5, subd. (g).)

"Actions or tactics" is defined as including, but not limited to, making or opposing motions or filing and serving a complaint. (Gov. Code, §11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(1).) "Frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party. (Gov. Code, § 11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(2).)

A finding of "bad faith" under section 128.5 does not require a determination of evil motive, and subjective bad faith may be inferred. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702 (*West Coast*).) An attorney may be sanctioned because he or she fails to call the court and opposing counsel to alert them to his or her inability to attend a hearing. (*Ibid*.) Such conduct is "discourteous . . . and not in good faith" and Section 128.5 "does not require willfulness to be an aspect of the [improper] actions or tactics." (*Id*., at p. 702-703, citing *In Re Marriage of Gumabao* (1984) 150 Cal.App.3d 572, 577 (*Gumabao*).)

Multiple California cases have found the failure to notify the court and opposing counsel of the intent not to appear to be sanctionable conduct. In *Mungo v. UTA French Airlines* (1985) 166 Cal.App.3d 327, an attorney requested a trial continuance that was denied. He appeared at trial and again requested a continuance, and when that was denied, he dismissed the case. The appellate court found that counsel had the responsibility not to lead the court and opposing counsel to believe that there would be a trial on the day scheduled, and such conduct indicated bad faith. (*Id*. at p. 333.)

Similarly, in *West Coast*, attorneys for one party engaged in an "inadvised series of events" that culminated in requiring opposing counsel to prepare for and travel to the courthouse for trial when they knew or should have known that the matter would not go to trial. The appellate court noted that the attorneys' actions abused not only the opposing party, but the courts as well. (*West Coast, supra*, 2 Cal.App.4th at p. 704.) It found the attorneys' conduct in bad faith and for the sole purpose of harassing the other party, and sanctionable under section 128.5. (*Ibid*.) It also quoted from the Second Circuit as a parting observation that:

> It is perhaps time that the courts, both trial and appellate, begin to speak and react more forcefully . . . . It is not fair to the opposing litigant who is victimized by such tactics and it is not fair to the greatly overworked judicial system itself and those citizens with legitimate disputes waiting patiently to use it. In those cases where abuse is present, an award of substantial sanctions

is proper.

(*West Coast, supra*, 2 Cal.App.4th at p. 708, quoting *National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 526.)

In *Gumabao*, the attorney had a trial scheduled to begin, but had not completed an ongoing trial. He left a note for his secretary to notify the other court on the morning of trial that he would appear at 11:00 a.m. rather than 9:00 a.m. as scheduled. The ongoing case continued into the afternoon, and the attorney notified the other court that he would appear by 2:30 p.m. The pending trial was trailed to 2:00 p.m. and then continued to another day. The trial court imposed section 128.5 sanctions on the attorney, consisting of the costs of opposing counsel's appearance on the day of trial. The appellate court upheld the award, finding that section 128.5 empowers a trial court to award attorney's fees as sanctions against an attorney who was aware of his inability to appear at the time set for trial, had an opportunity to but failed to take appropriate steps to notify opposing counsel of such inability, and failed to adequately inform the court of the reasons for his or her delay in appearance. (*Gamabao, supra*, 150 Cal.App.3d at pp. 573-574.)

The Court of Appeal in *Gumabao* rejected the attorney's contention that his actions were not willful, and found that his failure to notify the court and opposing counsel that he would not be able to appear, or the reasons for the nonappearance, were properly construed by the trial court as a delaying tactic. (*Id.* at p. 577.) It reasoned that even if being engaged in another trial was a valid excuse for not appearing, his discourteous act of not notifying opposing counsel and the court was not in good faith, was frivolous and caused unnecessary delay, and justified being held responsible for the attorney's fees of the opposing party. (*Ibid.*) The appellate court held that sanctions may be imposed under section 128.5 even where actions are not willful since that section does not require willfulness to be an aspect of actions or tactics. (*Ibid*.)

The State Bar Act and the Rules of Professional Conduct apply to proceedings before the Office of Administrative Hearings. OAH is a "court" within the meaning of Business and Professions Code section 6103, which authorizes sanctions for an attorney's dereliction of duties. (*In the Matter of Moriarity* (Review Dept. 2017)(No. 15–O–10406) __ Cal. State Bar Ct. Rptr. ___, 2017 WL 1424407 at pp. 7-8.)

Under rule 3-110(a) of the Rules of Professional Conduct, "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." An attorney has a fiduciary duty to her clients to "maintain adequate management and accounting procedures for the proper operation of a law office . . . ." (*In re Valinoti* (Review Dept. 2002) (No. 96–O–08095) __ Cal. State Bar Ct. Rptr. __, 2002 WL 31907316 at p. 15.) "At a minimum, respondent was required to develop and maintain procedures for . . . calendaring court hearings and filing deadlines [and] tracking court hearing dates and filing deadlines to insure they are not missed . . . ." (*Ibid*.) This duty includes avoiding an excessive caseload and having adequate support staff. (*Id.* at pp. 15-16.)

In the matter of this expedited due process hearing case, pursuant to a discussion with the parties by ALJ Sabrina Kong at the April 30, 2018 expedited prehearing conference, the expedited due process hearing was scheduled to proceed at 9:30 a.m. on May 8, 2017, and continuing day to day at 9:00 a.m. Expedited matters must, by federal and state statutes, begin within 20 school days after the request for expedited due process hearing is filed. May 8, 2018, was the 20th school day after Student filed his complaint and was the last day on which to begin the expedited due process hearing. OAH calendared the expedited due process hearing and scheduled an ALJ for the expedited hearing on May 8, 9, and 10, 2018. At Student's request, OAH also scheduled a Spanish language interpreter for those three days.

During the April 30, 2018 expedited PHC, the ALJ discussed with the parties the issues for the expedited due process hearing. Based on that discussion and articulation of the issues as they were understood at that time, the ALJ made the following order, reflected in the Order Following Expedited Prehearing Conference (Expedited PHC Order), served on the parties on April 30, 2018:

> Student will file a brief with OAH, and serve on County Office of Education's attorney, by May 1, 2018 at 3:00 p.m. addressing whether the rest of the issues set forth in his PHC statement are duplicative of the two issues herein by May 1, 2018 at 3:00 p.m. County Office of Education will file a response with OAH, and serve on Student's attorney, by May 2, 2018 at 3:00 p.m. Both Student's brief and County Office of Education's response shall be no longer than five pages, double-spaced, 12 point font.

Student failed to file the required brief.

During the April 30, 2018 expedited PHC call, the ALJ expressly reviewed the settlement notification section of the Expedited PHC Order with Student's attorney, Jennifer Varga, and County's attorney, Sundee Johnson. The ALJ emphasized the importance of complying with the PHC order in the event of an after-hours settlement the day before the hearing, particularly as to leaving a message on the OAH settlement hotline and submitting the signature page of any settlement agreement and a letter withdrawing the expedited, or all, claims, as applicable. The PHC order served on the parties on April 30, 2018, stated in pertinent part (capital letters in original, bold italics added):

> [ ] Settlement. . . . ***The parties shall inform OAH in writing immediately*** should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. 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 ***AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE***

PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY **EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT** https://www.dgsapps.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.

. . .

[ ] Failure to Comply with this order may result in . . . sanctions.

The PHC order also required County to assist the ALJ to ensure that the hearing room was configured into a courtroom setting.

On Friday, May 4, 2018, OAH called the parties' attorneys to inquire if the expedited due process hearing would go forward. Both attorneys' offices stated the case had settled and they were working on obtaining signatures on the agreement. Student's attorney's assistant stated Student's attorney would submit the required paperwork on Monday, May 7, 2018. OAH reminded her that the hearing was scheduled to begin on Tuesday, May 8, 2018. OAH notified the parties' attorneys the case was reassigned to ALJ Judith Pasewark.

On Monday, May 7, 2018, before 11:30 a.m., OAH notified both parties' attorneys any dismissal needed to be filed by 2:30 p.m. because the ALJ needed to travel to San Diego. At 4:45 p.m., Presiding ALJ Peter Paul Castillo informed the parties' attorneys that ALJ Kara Hatfield was assigned the case and the parties needed to appear on the morning of Tuesday, May 8, 2018, at 9:30 a.m. as scheduled. County's attorney indicated she believed the case had settled and would track down what was going on.

Neither party called the settlement hotline on the evening of May 7, 2018, or the morning of May 8, 2018, to alert the ALJ that a fully executed written settlement agreement had been reached, or that despite the Presiding Judge's instruction to appear at 9:30 a.m., no party or attorney would appear at the scheduled hearing. Student's attorney did not contact OAH in writing or by telephone before the expedited hearing began at 9:30 a.m. on May 8, 2018.

County's attorney's assistant called OAH at 8:30 a.m. on May 8, 2018, and asked if OAH had received signature pages of the settlement agreement. OAH had not received any signature pages of a settlement agreement or a request by Student to withdraw the expedited claims, or the entire case. OAH reminded County's attorney's assistant the parties had been directed to file papers by 2:30 p.m. the day before and still nothing had been filed, and the ALJ was en route to the hearing location. County's attorney's assistant stated she would file the signature pages she had at her office. At 8:41 a.m., County submitted copies of the signature pages of a settlement agreement, in counterparts. The signature page included the following paragraph of the agreement: "DISMISSAL WITH PREJUDICE: Upon full execution of this Agreement Petitioner hereby withdraws OAH Case No. 2018040382 in its entirety and requests that OAH dismiss this matter with prejudice." All of the signatures on the settlement agreement were dated May 7, 2018. Yet Student did not contact OAH to report the settlement, or withdraw the expedited claims or entire case.

ALJ Hatfield arrived at County's offices at 8:45 a.m., located the special education office (site maps on the property incorrectly identify the building and room number for the Special Education office), and requested access to the hearing room to set up for the hearing. County's Executive Director of Special Education, Cara Schukoske, was offsite and, when contacted by her assistant, did not believe the hearing was going forward due the settlement agreement. She offered to provide the ALJ the signature pages of the executed agreement. County did not have a room available for the hearing. County offered ALJ Hatfield a small conference room in which to set up the recording equipment for the hearing. The room could not be configured into a courtroom setting, and ALJ Hatfield set up the audio recording equipment.

Because OAH was not timely notified of the settlement agreement in accordance with the Expedited PHC Order and further instructions provided to the parties by OAH on May 7, 2018, the ALJ was required to: do a cursory preparation for hearing after hours on May 7, 2018 (0.5 hrs); travel to the hearing site on May 8, 2018 (0.5 hrs[1]); locate the correct building and room for Special Education, wait for County personnel to locate the Executive Director for information about where to set up for the expedited due process hearing, for which Presiding ALJ Castillo had directed the parties to appear, and set up the audio recording equipment (0.75 hrs). The California Department of Education is billed for the ALJ's time at $276 per hour. Also, the requested interpreter appeared for the expedited hearing, and OAH was charged for her appearance and cancellation fees for the next two days, at a total cost of $448 more than OAH would have been charged if the parties had complied with instructions to notify OAH immediately upon settlement and if the necessary paperwork had been submitted by 2:30 p.m. as instructed, or even by 5:00 p.m., on May 7, 2018.

[1] OAH exercised cost containment measures by reassigning the case to an ALJ who had already traveled to the San Diego area for another due process hearing, but about which OAH timely received notice of settlement. The ALJ avoided the State incurring hotel and meal expenses by staying overnight in San Diego with a relative.

By 9:30 a.m. on May 8, 2018, neither party had appeared for hearing. ALJ Hatfield opened the record for purposes of setting an Order to Show Cause re sanctions, with written order to follow, re-packed the audio recording equipment, and left County's premises at 10:25 a.m. (1.0 hr). ALJ Hatfield then drafted an order to show cause why the parties and their attorneys should not be ordered to pay expenses was prepared, reviewed and finalized (3.5 hrs). ALJ Hatfield spent additional time reviewing the parties' responses to the OSC and preparing for the OSC hearing (4.75 hrs), and conducting the OSC hearing and preparing this Order (5.5 hrs).

Because Student and County did not comply with the Expedited PHC Order regarding notification of settlement, did not comply with OAH's instruction to submit the required paperwork by 2:30 p.m. to avoid the ALJ traveling to the hearing, did not comply with the Presiding ALJ's instruction to appear at the expedited hearing on the morning of May 8, 2018, and did not in any other manner communicate to OAH the parties' intention not to appear at and go forward with the expedited due process hearing as scheduled on the morning of May 8, 2018, OAH issued on May 10, 2018, an Order to Show Cause why the parties, Student's attorneys Megan Nunez and Jennifer Varga, and County's attorney Sundee Johnson should not be required to pay OAH's costs of the expedited due process hearing on May 8, 2018, including OAH travel expenses and interpreter costs related to that hearing. Student and County were ordered to each file a written response with OAH by no later than 5:00 p.m. on May 29, 2018.

The parties' attorneys were ordered to address why they did not comply with the Expedited PHC Order regarding notification of settlement, did not comply with OAH's instruction to submit the required paperwork by 2:30 p.m. to avoid the ALJ traveling to San Diego, did not comply with the Presiding ALJ's instruction to appear at the expedited hearing on the morning of May 8, 2018 at 9:30 a.m., and did not in any other manner communicate to OAH the parties' intention not to appear at and go forward with the expedited due process hearing as scheduled on the morning of May 8, 2018.

County timely filed a response to the Order to Show Cause, supported by declarations and exhibits.

Just as Student failed to file the brief required by the PHC Order regarding the issues for the expedited hearing, Student also failed to file a response to the OSC. After the 5:00 p.m. deadline passed, Student e-filed a two-page response that echoed summary comments in County's response regarding lack of bad faith. Separately, after-hours, Student e-filed two declarations, each with the case caption including an additional respondent, Literacy First Charter School, which had not been named in Student's complaint. Student untimely submitted a declaration by Student's attorney's assistant regarding leaving work early on May 7, 2018, to collect an ill child from preschool and forgetting to inform "office staff" that this case had not been dismissed because signatures on the settlement agreement had not yet been received from "Respondents." The assistant did not attend to the case status until she checked her email at approximately 9:15 a.m. on the morning of May 8, 2017, and

saw she had received the settlement agreement with signatures from "the Respondent"; she then filed a dismissal. Student's attorney Megan Nunez also submitted a declaration stating she sent to an attorney for a third participant to the dispute who was not named in the OAH case, Literacy First Charter School, a revised settlement agreement including terms to which County and Charter had not yet agreed; but the unapproved agreement had been executed by Parent, and, presumably, Ms. Nunez. Ms. Nunez did nothing further to determine the status of the case on May 7, 2018, and she had no further contact with the attorney for Charter, or for County, or OAH. She learned her assistant was leaving the office at 3:30 p.m. to retrieve her ill child from preschool, and then she herself left the office at an undisclosed time without checking "office voicemail." Ms. Nunez returned to her office at 9:30 a.m. on May 8, 2018, and at that time she checked the office voicemail and heard the May 7, 2018 voicemail from OAH instructing her to appear for hearing as scheduled on May 8, 2018.

On May 30, 2018, shortly before noon, Student filed a "supplement" to his response to the OSC, revealing that Student's attorney failed to recognize the OSC when it was served on May 10, 2018, and admitting that it was only when Students' attorney received County's timely response to the OSC on May 29, 2018, that Student's attorney became aware of the Order issued by OAH; Student's attorney then attempted to submit the required response. Through an additional declaration of Ms. Nunez, Student again blamed Student's attorney's assistant for failure to properly process documents related to this case. And through an additional declaration of Student's attorney's assistant, she attributed failure to recognize the OSC to attempting to work from home while being preoccupied by caring for the ill preschooler and a second child who also became ill, and she was home alone because her "husband, who is active military, was on duty and not at home."

As for County's response to the OSC, County's attorney provided information regarding how an unnamed third participant in the dispute, Charter, was involved and necessary to a full resolution of the case. The settlement agreement was, in reality, between Charter and Student, and Charter's attorney agreed in an email to "include the County in the settlement" because Student named County, not Charter, in the OAH complaint. On May 7, 2018, at 11:42 a.m., Student's attorney sent Charter's attorney a revised settlement agreement including terms to which County and Charter had not yet agreed; but the unapproved agreement had been executed by Parent, and presumably also Ms. Nunez. Neither Student nor County explained how or when County received a copy of the unapproved settlement agreement Parent had signed and Ms. Nunez sent only to Charter's attorney. But at 5:17 p.m., County's attorney Ms. Johnson emailed the settlement agreement containing Parent's signature, Ms. Johnson's signature, and the signature of County's Director of Special Education to Charter's attorney for Charter's signatures. Charter's attorney acknowledged receipt of the agreement two minutes later and stated she would send the agreement to Charter to be signed. Early on the morning of May 8, 2018, Charter's attorney emailed County's and Student's attorneys that Charter had "some technical problems yesterday" and would be sending the signature of Charter's executive director first thing in the morning. Forty-five minutes later, at 7:38 a.m., Charter emailed the fully executed agreement to Charter's attorney, and at 7:41 a.m., Charter's attorney emailed the

fully executed agreement to Student's and County's attorneys, and the assistant of each attorney.

LEGAL CONCLUSIONS

This case was filed by Student and while both parties had been ordered in the PHC order to notify OAH of a settlement, only Student could withdraw the case; Student had the responsibility to notify OAH of a settlement of his case prior to the scheduled expedited hearing.

Because OAH conducts its hearings at school sites, school district, and county offices of education offices for the convenience of parents, OAH must be notified of a settlement no later than the evening before the hearing to avoid the expenditure of judicial resources on unnecessary travel and hearing preparation. The PHC order required Student's attorney to immediately file a withdrawal or notice of settlement and call the after-hours settlement hotline for precisely that purpose. Counsel were reminded of the importance of immediately notifying OAH of any after-hours settlement at the PHC on April 30, 2018, and by the written order that followed the PHC.

While Student argued there was not actually a settlement of the case until 7:41 a.m. on May 8, 2018, the signatures on the settlement agreement were dated by all participants to the dispute, and their attorneys, May 7, 2018. The only respondent Student named in the case, County, had executed the agreement by 5:17 p.m., mere minutes after close of business for OAH (and possibly during business hours for Ms. Nunez's and Ms. Johnson's law firms). Ms. Nunez had ample opportunity during the following 16 hours to be in communication with Ms. Johnson and Charter's attorney to confirm the settlement was complete, file a withdrawal, and leave a message on the settlement hotline to give OAH sufficient notice to avoid having ALJ Hatfield and an interpreter make an unnecessary trip to County's office.

Ms. Nunez offered no explanation for her own failure to communicate with the attorneys for Charter and County to determine whether they agreed to the additional term inserted into the final settlement agreement Parent and Ms. Nunez signed, and when the other participants' signatures would be returned to her. Ms. Nunez blamed her assistant for failing to inform her that the case had not been dismissed before the assistant left the office to retrieve her ill child. Ms. Nunez determined she would not attend the hearing based on an assumption the case was settled, and did not inform OAH she and Parent would not appear on May 8, 2018. Ms. Nunez also blamed her assistant, and relied on the sympathy-inducing circumstances of a military spouse left home alone to care for not just one but two young and sick children for her failure to notice the receipt of an Order to Show Cause regarding sanctions and Ms. Nunez's failure to timely file a response. Although Ms. Nunez stated in her declaration that she "take[s] full responsibility" for overlooking the Order to Show Cause, the tenor of her filings in response to the OSC and comments during the OSC hearing reflected a perception that both the failure to timely notify OAH of settlement and Ms. Nunez's decision not to appear for hearing on May 8, 2018, and to timely respond to the

OSC, was her assistant's fault due to "unforeseen events" and "unintentional error." The only manner in which Ms. Nunez takes full responsibility is in not blaming Student's other attorney, Ms. Varga, for failing to notify OAH that Ms. Nunez had decided not to come to the expedited hearing. Although Ms. Varga appeared for the PHC and was aware of the order to notify OAH in the event of settlement, Student's filings in response to the OSC are silent regarding any role Ms. Varga had in the settlement negotiations or ongoing case management matters. For purposes of evaluating the impact Student's attorneys' conduct had on the administration of justice, OAH will accept Ms. Nunez's assumption of sole liability.

Sometime on May 7, 2018, Ms. Johnson decided not to appear on May 8, 2018, and did not notify OAH that she and a representative of County would not appear on May 8, 2018. However, Ms. Johnson's office contacted OAH at 8:30 a.m. on May 8, 2018, and inquired about the status of the case; further, upon confirmation that Student had not sent in a notice of settlement and withdrawal of the expedited claims, Ms. Johnson's assistant sent OAH the fully executed signature pages of the settlement agreement including Student, Charter, and County. By the time County sent that document, the ALJ was already in County's office and setting up for the expedited hearing.

Ms. Nunez delayed notifying OAH of the settlement of Student's case until after the time set for the hearing to begin on the morning of May 8, 2018. This bad faith conduct resulted in an unnecessary delay in OAH becoming aware of the final resolution of the case, and in the unnecessary expenditure of scarce judicial resources for a hearing at which neither attorney intended to appear. Such an abuse of California's system of due process for children with exceptional needs warrants the imposition of section 128.5 sanctions.

OAH does not require parties to proceed to hearing if they have reached a final settlement or a fully executed settlement subject to board approval.[2] Rather, OAH provides the parties with an opportunity to obtain final signatures that could not be obtained before the hearing on the morning of the hearing, when all persons critical to the due process proceeding are present. If a party files a withdrawal or notice of settlement subject to board approval with a fully executed signature page, and leaves a message on the settlement hotline that such settlement paperwork has been filed, the ALJ assigned to the hearing will receive the message, and based upon the representation on the settlement hotline, can avoid unnecessary travel to a hearing site. However, the ALJ cannot avoid unnecessary travel, and OAH cannot assign the ALJ to other matters, if parties who settle the night before the hearing fail to file the appropriate paperwork or notify OAH on the after-hours hotline.

Both counsel for Student and County had been ordered to and had a separate responsibility to comply with the PHC order and notify OAH of the settlement of this case.

[2] The dates of an expedited due process hearing cannot be vacated pending approval of a settlement agreement by a school board; only a withdrawal of expedited claims allows OAH to vacate expedited due process hearing dates.

However, only Student could withdraw the expedited claims and vacate the expedited due process hearing dates. Therefore, Student's attorney Meagan Nunez shall bear the full sanction imposed by OAH as a result of her bad faith conduct. Section 128.5 sanctions of $1,552.50 are imposed on Ms. Nunez, reflecting a portion of the cost to the California Department of Education for the ALJ's and interpreter's time wasted by Ms. Nunez's failure to notify OAH she would not appear for hearing on May 8, 2018, and this OSC process. Law Office of Meagan Nunez is jointly and severally responsible for the violations committed by its attorney, and will be held jointly and severally liable for the sanctions imposed.

The amount of these fees, which were the result of Ms. Nunez's bad faith actions, should be sufficient to deter Ms. Nunez, or other attorneys similarly situated, from repeating of such conduct.

This order has been approved by the General Counsel of the California Department of Education.

ORDER

1. Within 30 days, Meagan Nunez and the Law Office of Meagan Nunez shall pay the Office of Administrative Hearings, 2349 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833, Attn: Alicia Boomer, by certified check the sum of $1,552.50 as cost sanctions. These sanctions are imposed on Meagan Nunez and the Law Office of Meagan Nunez jointly and severally. Neither Ms. Nunez nor the Law Office of Meagan Nunez shall pass these costs on to Student or either of his parents.

2. Failure to comply with this order may result in a civil judgment or finding of contempt.

3. A copy of this order shall be provided to the State Bar of California as required by subdivision (a)(3) of Business and Professions Code section 6086.7.

IT IS SO ORDERED.

DATE: June 11, 2018

DocuSigned by:
Kara Hatfield
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KARA HATFIELD
Administrative Law Judge
Office of Administrative Hearings