

MEMORANDUM

TO: Honorable Members, State Board of Education
Honorable Joy Hofmeister, State Superintendent of
Public Instruction

FROM: Brad Clark, General Counsel

DATE: August 30, 2018

RE: Executive Order 2017-39

On November 21, 2017, the Honorable Mary Fallin, Governor of the State of Oklahoma (the “Governor”), issued Executive Order 2017-39 (the “Executive Order”), and directed its attention to the Honorable Members of the Oklahoma House of Representatives, the State Senate, the State Board of Education (the “Board”), and State Superintendent Joy Hofmeister (the “Superintendent” and “Chair of the Board”). I have been requested to provide an analysis of the Executive Order, and though you have previously been provided with said Executive Order, a copy of it is attached here for your review and convenience. *See* Executive Order, attached as Exhibit “A.” Shortly after the Executive Order was issued and continuing thereafter, representatives of the Oklahoma State Department of Education (the “OSDE”) met with officials in the Governor’s Office to discuss the analysis and matters set forth herein. With the Executive Order’s September 1 request approaching, I am sharing this Memorandum to communicate the OSDE’s legal analysis of this matter.

Executive Order

At its outset, the Executive Order provides that, by September 1, 2018, and every year thereafter, the Board and the Superintendent “shall compile a list of every public school district that spends less than sixty percent (60%) of their budget on instructional expenditures.” *See* Executive Order, ¶1. Subsequent to compiling said list, the Executive Order directs the Board to “consider and make recommendations for administrative consolidation or annexation of school districts” on the aforementioned list. *Id.*, at ¶2. Finally, school districts that are designated by the Board for consolidation or annexation would then be required to submit plans for such action to the Board, and if no action is taken on the submitted plan, the Board shall determine a plan for said district(s). *Id.*, at ¶3. All consolidations and consolidation plans are to be implemented the following school year. *Id.*

As an initial matter, the intent of the Executive Order and its end goal to achieve the most effective and efficient expenditure of Oklahoma taxpayer dollars is commendable and widely supported. However, the Executive Order, as currently drafted, contains uncertainties that could foreseeably result in the Board and/or Superintendent acting in a manner that thwarts the goals set forth above, or being named defendants in litigation. Despite having met with representatives of the Governor’s staff to respectfully request clarification and modification of the Executive Order, to date these requests have not been entertained.

At or near the time of signing the Executive Order, the Governor’s Office publicly stated that the definitions of terms in the Executive Order, such as “instructional expenditure,” were yet to be determined. To date, and to the best of the undersigned’s knowledge, definitional terms have not been provided, in writing or otherwise. For example, the use of the term “instructional expenditures” has multiple definitions, meanings, and interpretations in state and federal laws and regulations. The National Center for Education Statistics (NCES) defines this term as “activities associated with teacher-student interaction, including teacher salaries and benefits, classroom materials and purchased instructional services.” The Governor’s Office appears to have relied on this definition in constructing the Executive Order. In using this definition, the Governor’s Office provided a spreadsheet to members of the media detailing that approximately ninety-one percent (91%) of public schools – traditional and charter schools – in the state are to be considered for administrative consolidation.¹ *See* Spreadsheet, attached as Exhibit “B.”

Though the Executive Order appears to utilize the NCES definition of “instructional services,” the Executive Order also confuses matters even more by later listing its own rendition of services that are to be considered “administrative.” Specifically, the Executive Order defines “administrative services” to “include but not [be] limited to” 1) functions of the school district superintendent; 2) budgeting for schools; 3) facility maintenance; 4) equipment; 5) nutrition programs; 6) curriculum and instruction; 7) textbooks; 8) professional development resources; 9) payroll; 10) legal; 11) human resources; 12) federal programs; 13) purchasing; 14) technology; and 15) federal and state reporting and bonding and infrastructure. *See* Executive Order, ¶4. Notwithstanding this confusion, it must be noted that the Legislature has previously defined “administrative services,”² and the Executive Order improperly contradicts and changes this

¹ For reasons unknown, in reaching this far sweeping conclusion, the Governor’s office has elected not to consider other factors such as academic outcomes, analyzing other states’ experiences, or retaining experts to assist in making recommendations relating to school consolidation.

² At 70 O.S. § 18-124, administrative costs are defined as:

1. Staff for the board of education;
2. The secretary/clerk for the board of education;
3. Staff relations;
4. Negotiations staff;
5. Immediate staff of the superintendent, any elementary superintendent or any assistant superintendent;
6. Any superintendent, elementary superintendent, or assistant superintendent;
7. Any employee of a school district employed as a director, coordinator, supervisor, or who has responsibility for administrative functions of a school district; and
8. Any consultant hired by the school district.

definition.³ Simply, assuming, arguendo, that the Executive Order is proper and lawful (which it is not), the Executive Order's use of conflicting, undefined, and ambiguous terms leads to great uncertainty with its interpretation and implementation.

Further, the Executive Order was issued prior to the Legislature amending the State's Minimum Salary Schedule for Teachers and thereby providing a substantial pay raise to teachers. This action is significant. When the OSDE receives the new school district's salary expenditures with the increased teacher salaries, "instructional services" will have increased significantly such that any defining list by the September 1, 2018, deadline purportedly imposed by the Executive Order would already be out of date and completely misleading.⁴ As such, and for the additional and complementary reasons set forth below, without modification, clarification, or withdrawal of the Executive Order, the well-intentioned goals of the Executive Order cannot be achieved without confusion and great potential to mislead stakeholders and Oklahoma citizens.

Oklahoma Law

The Executive Order expressly provides that it is issued pursuant to the power and authority vested by Sections 1 and 2 of Article VI of the Oklahoma Constitution. *See* Executive Order. The Oklahoma Constitution, at Article VI Section 1, provides that:

[t]he Executive authority of the state shall be vested in a Governor, Lieutenant Governor, Secretary of State, State Auditor and Inspector, Attorney General, State Treasurer, Superintendent of Public Instruction, Commissioner of Labor, Commissioner of Insurance and other officers provided by law and this Constitution, each of whom shall keep his office and public records, books and papers at the seat of government, and shall perform such duties as may be designated in this Constitution or prescribed by law.⁵

Initial attention is directed to the concluding phrase of Article VI Section 1, which provides that the Governor, "shall perform such duties as may be designated in the Constitution or prescribed by law." *See* Article VI, Section 1. In reviewing this section of the Constitution, Oklahoma courts are in accord with the view that the powers of the Governor are defined by the Constitution. More particularly, neither the Constitution nor the statutes of the State of Oklahoma expressly confers authority to issue executive orders carrying the force of law.⁶ Stated otherwise, though the executive authority of the state is vested with the Governor, the Governor has been held

³ This is in addition to the reality that there are expenditures outside of those formally categorized as instruction that are not administrative and impact instruction, such as counselors, speech pathologists, audiologists, psychologists, and instructional technology.

⁴ Provided, the only instance where this would not result in significant increases to "instructional services" is if one paragraph of the Executive Order is erroneously followed to include "teacher payroll" as an administrative cost.

⁵ Article VI, Section 2, similarly provides the, "Supreme Executive power shall be vested in a Chief Magistrate, who shall be styled "the Governor of the State of Oklahoma."

⁶ To be clear, this does not equate to a complete inability to issue an executive order, because the discharge of the Supreme Executive power entails the capacity to issue an executive order for the efficient administration within the executive branch.

to be powerless to act in absence of a constitutional or legislative mandate. *See* Oklahoma Atty. Gen. Opinion 77-191. To that end, Oklahoma law is well settled that no order, proclamation, or decree issued by the Governor of the state has the force of law. *See Russell Petroleum Co. v. Walker*, 1933 OK 75, 19 P.2d 582.⁷ In fact, the Governor is prohibited from issuing an executive order intended to accomplish a legislative effect, as the lawmaking power of the state is vested exclusively with the Legislature. *Id.*

In the instant matter, the Oklahoma Legislature has acted on numerous occasions to accomplish legislative effects relating, directly and indirectly, to the forum of public school consolidation and annexation. Most recently, in 2017, the Legislature passed and **Governor Fallin signed** Senate Bill 514 providing for the creation of a task force to do precisely what the Executive Order purports to do:

study and make recommendations to the Legislature on administrative costs, eliminating duplicative overhead costs and improving efficiency among school district operations.
See Senate Bill 514 (2017).

It is initially clear that in signing Senate Bill 514, Governor Fallin appropriately recognized the Legislature’s purview to determine public policy relating to consolidation and/or annexation of public schools, including administrative costs. Secondly, Senate Bill 514 overtly states that directives and recommendations pertaining to administrative consolidation and annexation – the very topic of the Executive Order – are to be made *by and to the Legislature*.

Moreover, when legislative measures have been introduced on the subject of school consolidation and annexation, thereby further demonstrating their rightful occupation of the matter, the Legislature has consistently not acted on any such measure. A cursory review of these matters reveals that no fewer than twenty (20) legislative measures have been introduced in the past three (3) years relating to public school consolidation and/or annexation. As part of the State of the State in 2016, the Governor called on the Legislature to pursue legislative measures for school consolidation. *See* 2016 State of the State; *see also* House Bill 2824 as Introduced (2016). House Bill 2824, conveniently but not coincidentally introduced after the Governor’s speech, in part would have required the OSDE to publish a list of all public school districts classified as a dependent or elementary school district, and to publish a list of all districts that have less than 350 students. *Id.* Further, similar to the Executive Order, House Bill 2824 would have required the Board to take necessary action to “assist” school districts on the published list to consolidate or annex. *Id.* In failing to obtain sufficient votes in a subcommittee, House Bill 2824 failed. In the following year, Senate Bill 920 was introduced and provided that administrative services in school

⁷ In *Russell Petroleum*, constitutional challenges were made to executive orders issued by then-Governor William H. Murray. Governor Murray had issued executive orders calling out the State Militia to take possession of oil wells to enforce laws relating to the prevention of waste. Similar to the commendable intents and efforts with the currently at issue Executive Order, the executive orders in that case were issued in an attempt to stabilize the price of crude oil. However, the Court ruled that the executive orders had no force and effect, for no order, proclamation, or decree of the Governor, as the chief executive and Governor of the state, has the force of law; the lawmaking power being vested exclusively elsewhere.

districts having fewer than 200 students during the 2017-2018 be administratively consolidated with a contiguous school district, and further that the Board take action to “assist” districts to reach an agreement on said consolidation or annexation. Similar to House Bill 2824 in 2016, Senate Bill 920 failed to obtain sufficient votes in an education subcommittee in the initial weeks of the 2017 legislative session. *See* Senate Bill 920, as Introduced (2017).

Further, in prior years, the Governor has also had occasion to recognize the legislative purview over administrative consolidation and annexation and administrative costs in schools. *See* 70 O.S. § 7-203. In 2013, the Oklahoma Legislature and Governor enacted House Bill 1385, amending the longstanding language at 70 O.S. § 3-118.1. The express language in this section of law provides the Office of Educational Quality and Accountability the authority to review the effectiveness and efficiency of school districts that have administrative costs in excess of the limits set forth in 70 O.S. § 18-124.⁸

Additionally, the Executive Order seeks to direct and control, modify, and/or amend the constitutional and statutory duties and powers of the Board. Without question, the Governor is prohibited from taking such action. In fact, numerous reviews of the Governor’s constitutional powers and duties, including those relied on in the Executive Order (Article VI, Sections 1 and 2), have held that the Governor may not, through an executive order, amend, repeal or modify statutory powers and duties of agencies, as these are reserved to the lawmaking authority exclusively vested in the Legislature. *See* 1995 OK AG 36; *see also* 1983 OK AG 139; *see also* 1988 OK AG 32; *see also* 1996 OK AG 31. In particular, and though it was not evidently relied on to issue the Executive Order, Article VI, Section 8 of the Constitution has been interpreted to authorize the Governor to require an executive branch officer to perform his or her statutory duties, but may not create duties in addition to those mandated by the Legislature.⁹ *See* 1988 OK AG 32.

In the instant matter, the Oklahoma Constitution establishes that the supervision of instruction in the public schools shall be vested in the Board, “whose powers and duties shall be prescribed by law.” As such, by the plain language of the aforementioned section of the Oklahoma Constitution, the Legislature has prescribed the powers and duties of the Board. *See* 70 O.S. § 3-104. A review of the statutory duties of the Board, contained in Title 70 of the Oklahoma Statutes, discloses an entire absence of the ability to mandatorily consolidate and/or annex public school districts, administrative or otherwise, outside the process authorized by 70 O.S. § 7-101.1. Specifically, pursuant to the *legislative* direction in these very limited situations, the Board has promulgated rules authorizing the mandatory annexation of a school district in the instances of: 1) a district being declared as “academically at risk” pursuant to 70 O.S. § 1210.541; 2) a district

⁸ As set forth herein, the Legislature has also defined and established thresholds for maximum allowable “administrative” costs in public schools. *See* fn. 2, *supra*.

⁹ A cursory review of the Executive Order evidences that it is not related to a member of the Board not performing his or her statutory duties. As such, and because the Executive Order pertains to school district functions and school districts that are outside of the executive branch, the Executive Order exceeds authority relating to the performance of an executive branch function as well.

being non-accredited by the Board; and 3) a district failing to open or maintain school. *See* Oklahoma Administrative Code 210:1-3-2(b); *see also* Senate Bill 514 (2017); *see also* 70 O.S. § 7-203, *supra*.¹⁰

Without question, through these laws and others, the Legislature has appropriately performed its lawmaking duties and occupied the field of school consolidation and annexation, administrative or otherwise. As such, and in light of the Executive Order being replete with uncertainties and the overwhelming Oklahoma statutory and case laws, the Executive Order is without basis and an unconstitutional attempt to accomplish a legislative effect through an executive order. While, again, the intentions are believed to be well grounded, at this time and without consideration having been given to modifying the Executive Order as requested in meetings with the Governor's Office, my professional opinion is that the Board and Superintendent should not move forward as purportedly directed to in the Executive Order.

I hope that this information and analysis is helpful. Should you have any questions or want to further discuss this matter, please do not hesitate to contact me.

cc: Chris Benge, Chief of Staff, The Honorable Governor Mary Fallin

¹⁰ Though it may be argued that the Board has certain implied and general powers, in light of the replete and demonstrable examples of legislative authority on the subject of consolidation and annexation, it does not appear that the Board has the authority to administratively consolidate or annex school district administrative costs.