

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

WESTERN HEIGHTS INDEPENDENT
SCHOOL DISTRICT NO I-41 OF
OKLAHOMA COUNTY and MANNIX BARNES,
Superintendent,

Petitioners/Appellants,

vs.

THE STATE OF OKLAHOMA ex rel.
OKLAHOMA STATE DEPARTMENT OF
EDUCATION, OKLAHOMA STATE BOARD
OF EDUCATION, and JOY HOFMEISTER,
State Superintendent of Public Instruction,

Respondents/Appellees.

Case No. 120,034

PETITIONERS/APPELLANTS' BRIEF IN CHIEF

Jerry L. Colclazier, OBA No. 13814
COLCLAZIER & ASSOCIATES
404 North Main Street
Seminole, Oklahoma 74868
(405) 382-1212 Telephone
(405) 382-1214 Facsimile

-and-

Paul Harris, OBA No. 14733
Kevin Coffey, OBA No. 11791
HARRIS & COFFEY, PLLC
435 N. Walker
Oklahoma City, OK 73102
ATTORNEYS FOR PETITIONER

February 8, 2022

INDEX TO PETITIONERS/APPELLANTS' BRIEF IN CHIEF

The Facts And Procedural History	1
ARGUMENT AND AUTHORITIES	19
I. THE DEPARTMENT MUST PROVIDE A FULL AND FAIR INDIVIDUAL PROCEEDING UNDER THE OAPA PRIOR TO ANY SANCTIONS, TAKEOVER, CHANGE OF ACCREDITATION, OR OTHER PUNITIVE ACTIONS AGAINST THE DISTRICT	19
II. THERE IS NO STATUTORY AUTHORITY FOR THE DEPARTMENT TO TAKE OVER AND/OR OPERATE A LOCAL DISTRICT, CONDUCT AN “INTERVENTION”, OR EMPLOY OR APPOINT A LOCAL SCHOOL SUPERINTENDENT	22
A. <u>The Statutory Authority of Local School Districts to Operate Local Public Schools</u>	23
B. <u>The Statutory Authority of the State Superintendent to Operate Local Public Schools</u>	24
C. <u>The Statutory Authority of the State Board of Education to Operate Local Public Schools</u>	24
III. THE OKLAHOMA CONSTITUTION PROHIBITS THE STATE BOARD FROM EXERCISING THEIR ADJUDICATIVE AUTHORITY OUTSIDE OF AN INDIVIDUAL PROCEEDING	27
IV. THE DEPARTMENT DENIED THE SUPERINTENDENT’S DUE PROCESS RIGHTS, AND FAILED TO FOLLOW BOTH STATE LAW AND THEIR OWN ADMINISTRATIVE PROCEDURES	29
A. <u>The State Board Does Not Have the Statutory Authority to “Suspend” a Superintendent’s License.</u>	30
B. <u>Respondents Use the Term “Emergency” as a Pretext to Suspend the Superintendent Without Due Process</u>	33
V. THE SUPERINTENDENT IS ENTITLED TO A DECLARATORY JUDGMENT THAT HE WAS NOT AFFORDED STATUTORY AND ADMINISTRATIVE DUE PROCESS	35

A.	<u>The Department Failed to Provide the Required Due Process Notice of Hearing</u>	35
B.	<u>The Respondents Failed to Specify an Emergency or Timely Provide the Emergency Order of Suspension to the Superintendent</u>	37
C.	<u>The Respondents Failed to Comply with Title 75 O.S. §314 (C)</u>	37

CERTIFICATE OF SERVICE	38
---	----

CASES:

<i>Western Heights v. Department of Education</i> , 2007 OK CIV APP 92, 169 P.3d 417	1, 20, 22
<i>Western Heights v. Department of Education</i> , 2007 OK CIV APP 2, 156 P.3d 53.	1
<i>Western Heights v. Department of Education</i> , 2011 OK CIV APP 33, ¶3, 252 P.3d 284	1, 21
<i>Western Heights, et al. v. Hofmeister, et al.</i> , 2020 OK 56, 473 P.3d 475	3
<i>Bowen v. State ex rel. Okla. Real Estate Appraiser Bd.</i> , 2011 OK 86, ¶12, 270 P.3d 133, 136-137	21
<i>State ex rel. Bd. Of Regents v. Lucas</i> , 2013 OK 14, 297 P.3d 378	21
<i>Cavett v. Peterson</i> , 1984 OK 59, ¶9, 688 P.2d 52, 56	22
<i>Patel v. OMH Med. Ctr., Inc.</i> , 1999 OK 33, ¶ 22, 987 P.2d 1185, 1195	22
<i>Farmacy, LLC v Kirkpatrick</i> , 2017 OK 37, ¶20, 394 P.3d 1256	26
<i>Ledbetter v. Oklahoma Alcoholic Beverage Laws enforcement Commission</i> , 1988 OK 117,, 764 P.2d 172	26
<i>Robinson v. Fairview Fellowship Home</i> , 2016 OK 42, ¶6, 371 P.3d 477	28

<i>Jackson v. Indep. Sch. Dist. No. 16 of Payne Cnty,</i> 1982 OK 74, n.20, 648 P.2d 26, 31	28, 29
<i>State ex rel. Oklahoma State Bd. Of Medical Licensure and Supervision v. Rivero,</i> 2021 OK 31, ¶128, 489 P.3d 36	29
<i>Cleveland Bd. Of Ed. V. Loudermill,</i> 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494	29
<i>Gilbert v. Homar,</i> 520 U.S. 924, 930, 117 S. Ct. 1807, 138 L. Ed. 2d 120	29
<i>Mathews v. Eldridge,</i> 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18	29
<i>Marley v. Cannon,</i> 1980 OK 147, 618 P.2d 401, 405	32
<i>Boydston v. State,</i> 1954 OK 327, 277 P.2d 138	32
<i>Adams v. Professional Practices Commission,</i> 1974 OK 88, 524 P.2d 932	32
<i>Wrotenberry v. Xanadu Exploration Co.,</i> 2007 OK CIV APP 87, 168 P.3d 791.....	36
<i>Public Service Co. Of Oklahoma v. State ex rel. Corp.</i> <i>Com'n ex rel. Loving,</i> 1996 OK 43, ¶113, 918 P.2d 733, 737	36
<i>Scott v. Oklahoma Secondary School Activities Association,</i> 2013 OK 84 ¶139, 313 P.3d 891	37

Other Authority

Title 62 O.S. § 430.1	5
Title 70 O.S. § 3-106.	11
OK ADC 210:1-5-6	12,13,18
Title 75 O.S. §309	13
Title 12 O.S. §66	17
Title 12 O.S. §990.5	17
Title 75 O.S. §314 © (1)	18

Title 75 O.S. §314 © (2)	18,32, 34,38
Title 75 O.S. §250 et seq	19
Title 75 O.S. §309	19,35
Title 70 O.S. §3-104.4 (D)	20
Title 70 O.S. §1-115	23
Title 70 O.S. §5-105	23
Title 70 O.S. §5-106	23
Title 70 O.S. §5-117	23
OK ADC 210: 35-3-48	24
Title 70 O.S. §3-107.1	24
Title 70 O.S. §3-107	24
Title 70 O.S. §3-104	25,30
Title 70 O.S. 1999 §1210.541	26
Title 75 O.S. §309, 310, 312	32,33
Title 70 O.S. §3-104 (A) (6)	32
Title 75 O.S. §314	33, 37
OAC 210: 1-5-6 (e)	33
OK OAC 210: 1-5-6 (d) (3)	35
Title 75 O.S. §314(C)	37
Title 75 O.S. §314(C)(1)	37
OAC 210: 1-5-6	38

PETITIONERS/APPELLANTS' BRIEF IN CHIEF

The Petitioners/Appellants, Western Heights Independent School District No. I-41 of Oklahoma County ("Western Heights" and the "District") and Mannix Barnes (the "Superintendent")(collectively the "Appellants"), by and through their attorneys of record, file this *Brief in Chief*, and in support thereof, state as follows:

The Facts and Procedural History:

1. Western Heights and its Superintendents have a long and extensive history of the Department retaliating against, and selectively prosecuting, them for publicly criticizing the actions of the State Superintendent and State Board and their inability to provide a quality public school system in Oklahoma. Over the years, this retaliation included repeatedly placing the District on the School Improvement List (the "List"), and subjecting the District to numerous arbitrary audits, not required of other districts, the result of which could result in decreased funding to the District and even in revoking its accreditation. (R.p.1176;Tr.(11/8/21)p.43-44). The Department's retaliation resulted in Western Heights filing two lawsuits against the State Board and State Superintendent, which are discussed later in this brief. *Western Heights v. Department of Education*, 2007 OK CIV APP 92, 169 P.3d 417; *Western Heights v. Department of Education*, 2007 OK CIV APP 21, 156 P.3d 53. After the Court of Appeals had ordered a full and fair hearing pursuant to the OAPA, the Department's own Administrative Law Judge ("ALJ") agreed with Western Heights and reversed the Department's decisions, **finding the actions of the Department to be "arbitrary and capricious", and that the District had been unfairly and selectively prosecuted by the Department.** *Western Heights v. Department of Education*, 2011 OK CIV APP 33, ¶3, 252 P.3d 284. The Court ordered the Department to restore Western Heights to good standing and removed it from all school improvement

lists, a decision which was affirmed on appeal. *Id.* In 2013, Western Heights sued the Department again, proving along with a number of other lead plaintiffs that the Department, since 1992, had “shorted” Western Heights over fifteen million dollars (\$15,000,000.00) in state mandated funding. *Western Heights, et al. v. Hofmeister, et al.*, 2020 OK 56, 473 P.3d 475. Throughout all these cases, the Superintendent and Board of Education have routinely criticized the State Superintendent and the State Board. (R.p.1176; Tr.(11/8/21)p.76-77). After one such public criticism in April, 2020, Superintendent Hofmeister and her attorney actually threatened the District with “monetary and accreditation penalties”. (R.p.1176;Tr.(11/8/21)p.80,83).

2. Western Heights has been an accredited school district in Oklahoma since 1959. Western Heights is a unique school district, with one of the highest poverty rates in the entire state (90% of students below the poverty line), “close to 50 percent” non-English speaking students, all of which explained low test scores when compared with other state districts. (R.p.1176;Tr.(11/8/21)p.78,85,92). However, despite massive educational challenges presented by these demographics, **in 2019, the District was accredited by the Department with no deficiencies.** (Pet.Ex.4; R.p.1176;Tr.(11/8/21)p.102).

3. The Department, as far back as early 2020, started gathering information and documentation from the teacher’s union¹ and some unhappy patrons with grudges, to assist in attacking the Superintendent and District, and quashing their frequent criticism.

¹ Western Heights had been at impasse for two years with the teachers union who had targeted the District for its public position against the 2018 teacher strike, as evidenced by the filing of a frivolous lawsuit against the District: *Western Heights Education Association, et al., v. Western Heights Public Schools*, Case no. CJ-2019-3006, which was voluntarily dismissed by the Union in January, 2021, as well as a bargaining grievance filed by the Union against the District which was summarily dismissed as frivolous by the Department’s Dispute Resolution Committee.

Historically, parent and teacher complaints in school districts were handled by the Department's Regional Accreditation Officers, who received the complaints², and who then visited with the District representatives, typically the Superintendent, to receive the District's response, and then resolve the matters. (R.p.1176;Tr.(11/8/21)p.103,105). However, in late 2020 and early 2021, without notifying the District, the Department started contacting Western Heights' patrons and teachers, soliciting and encouraging the filing of complaints against the District, while not informing the District staff of the complaints or making any effort to resolve same. (R.p.1176;Tr.(11/8/21)p.106). Superintendent Hofmeister (a voting member of the State Board) even went so far as to travel to the District to meet with dissidents in the District and to hear those complaints in person, outside of a formal board meeting. (R.p.1176;Tr.(11/8/21)p.89). The Department stated that "in the Fall and Winter of 2020-21", they received "a significant volume" of complaints that were "substantial in the gravity of the issues". To date, the Department has only produced seven complaints, a very small number considering the size of the 3,500 student district.

4. The important point is that the Department, despite their mandate to investigate all complaints within thirty days, never sought to hear Western Heights' side of the story, never instituted the required investigations, and instead, held the complaints in secret to use in secret proceedings to put an end to both the District and its Superintendent, who had the temerity to criticize these powerful state officials.

5. On March 25, 2021, the State Board met (virtually) in a special meeting.

² "Oklahoma law requires the [Department] to investigate complaints of failure to comply with accreditation standards within thirty (30) days of receiving the complaint". (See Title 70 O.S. §3-104.4(C)).

(Minutes, Pet.Ex."7"). The agenda for the meeting simply stated that Western Heights would be discussed in executive session. (Agenda, Pet.Ex."5"). Western Heights was provided no notice that the District was on the State Board agenda, and was not invited to appear at the meeting. (R.p.1176;Tr.(11/8/21)p.107). That agenda was the District's first indication that the Department had any concerns about the District. (R.p.1176;Tr.(11/8/21)p.107). Prior to that meeting, the Department never 1) notified the District that they were being investigated for anything, and 2) never met with the District to disclose or discuss complaints that Department had received concerning the District. (R.p.1176;Tr.(11/8/21)p.107).

6. At the March 25th meeting, the State Board voted to go into executive session to conduct that part of the meeting in secret. **After a three hour plus executive session**, a motion was made, seconded, and passed unanimously, that **"the District has failed to comply with Oklahoma laws and regulations"**³. (Pet.Ex."8"; Tr.(11/8/21)p.109). The *content* of the executive session, and a clear indication that it was actually an adjudication in violation of the Open Meetings Act, was exemplified by the *detail and specificity* of the subsequent motion⁴. (Transcript, Pet.Ex."6",p.2-3). Further, this action, taken before the

³ The Trial Court, possibly recognizing that the executive session was not lawful, defended the State Board by stating that the "failed to comply" determination referred to in the letter was in actuality the determination of the Department of Education, not the State Board. The problem with that argument is that neither Superintendent Hofmeister nor the Department ever made such a determination before the March 25th executive session, unless such an adjudication was made without notice to the District, or before any opportunity to participate.

⁴ "Ms. Monies: I would like to make a motion that the State Board of Education hereby expresses the utmost concern of the operations, decisions and outcomes in Western Heights public schools, including but not limited, to the following: **failure** to provide in-person instructional services to students since March 2020; determination in the spring of 2020 to not provide nutritional services to students; audit report **reflecting violations of state law**; , including the use of 2018 bond proceeds voted by the taxpayers for the purposes of constructing and repairing facilities, to repay debt from 2009 in 2013; board member consuming alcohol during a public meeting; the majority of school sites are federally designated as **in need of**

District was notified of any allegations or accusations, or given an opportunity to respond or defend the charges, raises the issue of whether the State Board, having already heard evidence and rendered decisions in the matter, could be considered biased and prejudiced such that it would be improper to participate in any further adjudications against the District or the Superintendent.

7. The first "official notification" of the State Board's action didn't arrive until a week later, when the District was first *officially* notified by letter of certain general allegations against the District, stated as follows:

- "1. Failure to provide in-person instructional services to students since March 2021;
2. Determination in the Spring of 2020 to discontinue provision of nutritional services to students as provided and represented to OSDE and the community in the District's child nutrition program participation;
3. FY 2019 audit report reflecting violations of state law, including 62 O.S. §430.1, as a result of suing 2018 bond election proceeds for the purposes of constructing and repairing facilities to repay 2009 Lease-Purchase Financing and 2013 Lease-Purchase Financing;
4. District School Board member consuming alcohol while conducting official District business in a public meeting of the District's school board in June 2020;
5. Majority of school sites in the District are federally designated as in need of increased student support and school improvement;
6. A significant loss of student enrollment (3365 to 2597) in the last year;

increased student support and school improvement; a significant student enrollment – a significant loss of student enrollment, from 3,365 students to 2,597 students in the last year; a loss of more than 100 school personnel in the last two years; and **disharmony in the school environment and community**. As such, **the State Board finds and orders, orders and determines**, the Western Heights public school's administration be put on notice that it shall appear at a special meeting of the State Board of Education on April 9, 2021; **whereby, it may be subject to action on its accreditation status, including, but not limited to , a warning, probation, or non-accreditation.**"(Transcript, Pet.Ex."6",p.2-3).

7. A loss of more than 100 District personnel in the last two years;
8. Disharmony in the school environment and community (Oklahoma Administrative Code 210:35-3-48), including an apparent lack of willingness to respond to concerns to the parents and the community (OAC 210:35-3-21)."⁵

(Pet. Ex."8").

8. Comments by one of the Board Members in the March 25th State Board Meeting contradicted the Department's multiple statements that the Department timely conducted the required investigations, as well as proof of an unlawful executive session, not authorized under the statute. Indeed, Board Member Hernandez, after the executive session, and after the motion was made which included the eight (8) detailed allegations above, stated that **she believed the State Board was violating the law** by proceeding forward **before any investigation was started or completed**, and without ever allowing the Superintendent and District **an opportunity to present their side of the story**. (*Minutes*, Pet.Ex."7"; *Transcript*, Pet.Ex."6", p.3-5).

9. It is important at this point to discuss the legal ramifications of the Department's unprecedented actions. The State Board and State Superintendent, state governmental entities, solicited and received complaints regarding the District and its Superintendent. The Department **conducted no investigation**, unless the solicitation of other complaints could constitute an investigation, they disclosed no complaints to the District, they wholly failed to give the District an opportunity to respond to the issues raised, then they met in secret for three plus hours, then voted that **"the District has failed to**

⁵ It should be noted that the District and the Superintendent look forward to the day that they can, after being fully advised of the complaints and charges against them, "have their day in court", and finally present their witnesses and exhibits to refute each and every unsupported claim against them. However, the District prefers to present their case before a fair and unbiased tribunal, not a rogue state agency who has already decided their guilt publicly.

comply with Oklahoma laws and regulations”, and placed the District on 90 days probation⁶. This “star chamber⁷” represents a *per se* denial of due process, violations of the OAPA and the OMA, as well as a general failure of fair treatment and procedures to notify the District of unproven allegations *and* to determine that the District was guilty of those same allegations, in the same communication. In an unprecedented directive by a state agency, the State Board then ordered the Superintendent, the volunteer District Board Chairman, and a volunteer Board Member to appear⁸ at the next Board meeting. (*Minutes*, Pet.Ex.”7”; *Transcript*, Pet.Ex.”6”, p.3-5).

10. Western Heights, through its attorney, responded to the State Board on April 5, 2021, and expressed concerns that the **State Board had already made** a “determination that the District has failed to comply with Oklahoma laws and regulations”, that the actions by the State Board were threatening to the District and the Superintendent, that the State Board had violated the OMA by meeting in executive session, that the District and Superintendent had not received full and fair notice of the allegations upon which the State Board’s actions were based, and that there had been no fair hearing or individual proceeding pursuant to the OAPA⁹, before the State Board reached its decisions.

⁶ “Finally, should the District not take action and come into compliance with the laws, regulations and standards within ninety (90) days, the District is hereby officially notified that the State Board may withdraw the District’s accreditation.” (*Letter*, Pet.Ex.”8”,p.2).

⁷ The Star Chamber (Latin: *Camera stellata*) was an English court which sat at the royal Palace of Westminster, from the late 15th century to the mid-17th century. The term star chamber refers pejoratively to any secret or closed meeting held by a judicial or executive body, or to a court proceeding that seems grossly unfair or that is used to persecute an individual.

⁸ Title 70 O.S. §3-104(6) specifically excludes “members of boards of education” from the authority of the State Department of Education.

⁹ Two separate divisions of the Oklahoma Court of Appeals determined that an individual proceeding under the OAPA was **required** before punitive or regulatory actions by the

(Letter, Pet.Ex."11"). In the District's April 5, 2021 letter, the District also challenged the State Board's legal power or authority to **order** the Western Heights Superintendent, or the volunteers, the elected Board Chairman and Board Member, to attend the April 9th State Board meeting for questioning or cross examination, especially without being provided additional notice of the allegations against them, as well as whether the State Board was alleging criminal acts. (Letter, Pet.Ex."11").

11. On April 6, 2021, the attorney for the Department and State Board wrote and essentially refused to provide any details, complaints, documents, or other information which would provide a better description of the allegations made against the District and the Superintendent, in advance of the April 9th Board meeting. (Letter, Pet.Ex."12"). Importantly, the Department maintained that not only the identity of complainants, *but also the content of the complaints*, were confidential and would not be disclosed. (Letter, Pet.Ex."12"). Importantly, the Department admitted that these complaints were presented¹⁰ to the State Board **in executive session** ("While the scope of the complaints was identified in the State Board's motion and vote on March 25, and in subsequent correspondence to the District on March 30, ***they will again be addressed*** at the Special Meeting of the State Board scheduled for April 9."). (Letter, Pet.Ex."12",p.2).

12. On April 8, 2021, the District responded, addressing the Superintendent and

Department. *Western Heights v. Department of Education*, 2007 OK CIV APP 21, 156 P.3d 53; *Western Heights v. Department of Education*, 2007 OK CIV APP 92, 169 P.3d 417.

¹⁰ The District believes, based on the striking similarity between Ms. Monies' motion, as reflected by the March 30th letter from the Department (Pet.Ex."8"), and the wholly one-sided power point presentation (Pet.Ex."17") later presented in open session on April 9, 2021, that the powerpoint was first presented to the State Board in executive session on March 25th, right before the Board determined that the District and the Superintendent **had violated state law and regulations**. Since the Trial Court dismissed the Petitioners' Open Meeting Act Claims on July 22, 2021, discovery on this issue was prohibited.

the State Board's arguments, stating in summary:

"It is antithetical to our system of justice for a state agency to meet in secret, determine guilt, all of which occurs before the agency has either notified the subject of the investigation, informed them of the allegations, or given them any opportunity to respond. . . . I truly hope the State Board will take a step back from the precipice of another court action with the District. That should include full, fair, and detailed notification of your concerns to the District, followed by an opportunity for the District to respond and defend those allegations, all of which occurs **before** a determination is made as to whether the allegations have merit."

(*Letter*, Pet.Ex."13",p.2).

13. On April 9, 2021, the State Board met in open session. (*Agenda*, Pet.Ex."14"; *Minutes*, Pet.Ex."16"; *Transcript*, Pet.Ex."15"). It should be noted that this agenda item was not the requested "individual proceeding" under the OAPA, requested by the District. (*Agenda*, Pet.Ex."14"). Prior to that meeting, Western Heights had not been provided any additional specificity regarding the allegations, nor had the District been provided copies of any written allegations, complaints, or other documentation. The State Board maintained that all of this documentation was privileged and or confidential. (*Letter*, Pet.Ex."12"). In that meeting, the attorney for the State Board proceeded to present a PowerPoint presentation of complaints and allegations, remarkably similar to the March 25th motion and subsequent letter. (*Letter*, Pet.Ex."8"; *Transcript*, Pet.Ex."15"; *PowerPoint*, Pet.Ex."17"). The State Board was also presented 32 separate documents in support of the allegations, over 230 pages, none of which were presented to Western Heights prior to the meeting. (Pet.Ex."18","19"). Further, those documents were not published on the Department's website until after the conclusion of the April 9, 2021, State Board meeting. (R.p.1176, Tr.(11/8/21)p.152). As expected, none of the alleged complaints were disclosed or provided, yet they were liberally quoted from in the presentation. (R.p.1176, Tr.(11/8/21)p.138; *Transcript*, Pet.Ex."15"; *PowerPoint*, Pet.Ex."17"). Nor did the State Board or Department ever discuss these alleged complaints with the District. (R.p.1176,

Tr.(11/8/21)p.139,147).

14. At the April 9, 2021, State Board meeting, no witnesses testified, and no documentary evidence was identified or properly admitted into evidence (*Minutes*, Pet.Ex."16"; *Transcript*, Pet.Ex."15"). Rather, the attorney for the State Board gave his "opinion" of the allegations against the District and the Superintendent, assuming without witnesses or proof that all of the allegations or complaints were true. (*Transcript*, Pet.Ex."15"). The attorney did not limit his presentation to the eight general allegations of which the District had general notice. Indeed, several other false, unproven and unsubstantiated allegations were presented, and for which no notice of any kind was provided to Western Heights or the Superintendent before the meeting. (*Transcript*, Pet.Ex."15"; *PowerPoint*, Pet.Ex."17").

15. At the conclusion of the State Board meeting, the State Board voted to place Western Heights on probation. (*Minutes*, Pet.Ex."16"; *Transcript*, Pet.Ex."15"; *Hofmeister Letter*, Pet.Ex."20"). According to the Department's *Standards for Accreditation of Oklahoma Schools*, Standard XI, a school district may be placed on probation if it:

- "(A) consistently fails to remove or make substantial progress towards removing all deficiencies noted the previous year; and/or
- (B) consistently violates regulations; and/or
- (C) deliberately and unnecessarily violates one or more of the regulations."

"'Accreditation with Probation' is the lowest accredited status a school may hold", with 'Not Accredited' as the only status remaining if the deficiencies are not corrected". (*Letter*, Pet.Ex."20",p.1). **By this action, Western Heights was 90 days and but one step away from a complete loss of accreditation and the loss of all funding to the District, effectively shutting its doors**, all without any type of fair hearing, much less an "individual proceeding", as mandated by two Oklahoma Courts of Civil Appeal.

16. Appellees' counsel described a loss of accreditation: "If there's a non-accreditation situation, surrounding communities would open themselves up to receiving those student's. . ." (*Transcript*, Pet.Ex."15", p.47-48). Discussing the loss of funding to the District, Superintendent Hofmeister stated: "But there would be a very swift course correction . . . if that district were to be taken on by another district, those funds would follow." (*Transcript*, Pet.Ex."15", p.48-49). Board member Bobek commented: ". . . I would really challenge the local district to look inward and do some housecleaning with their leadership, with their superintendent[.]" (*Transcript*, Pet.Ex."15", p.51). One of the criticisms of the District set out in the attorney's presentation was that Western Heights' superintendent was paid a salary of \$220,000 per year, almost a hundred thousand dollars more than the salary of the State Superintendent Hofmeister. (Title 70 O.S. 3-106; *Transcript*, Pet.Ex."15", p.27-28). At the conclusion of the April 9th State Board meeting, the District was ordered and directed to appear at the next State Board meeting on April 22nd. (*Minutes*, Pet.Ex."16").

17. On April 22, 2021, the District and the Superintendent filed their *Petition* in District Court, alleging violations of the OAPA, the OMA, and requesting declaratory judgment. (*Petition*, R.p.1). Just after that filing, the District Superintendent and his attorney (virtually) attended the State Board meeting, which was noted on the agenda as a "report and update" on the probation. (*Agenda*, Pet.Ex."21", p.3; *Transcript*, Pet.Ex."22"). The day before the meeting, the Superintendent had presented to the Department a written response to the probation, and answered questions. (*Probation Response*, Pet.Ex."24"; R.p.1176, Tr.(11/8/21) p.158-159). The District's attorney stressed that the District would offer "full and complete cooperation with the probationary process", as well as pursue their rights in Court. (*Transcript*, Pet.Ex."22", p.3; R.p.1176, Tr.(11/8/21) p.158-159). Once again,

other than the cross examination by Board Members, the meeting did not meet the requirements of an individual proceeding under the OAPA. (R.p.1176, Tr.(11/8/21) p. 164). On June 23, 2021, the District sent a second and more detailed (126 page) response to the probation. (*Probation Response 2*, Pet.Ex."25", "25A"). As of the date of trial, the Department had not responded to either the April 22nd or June 23rd reports. (R.p.1176, Tr.(11/8/21)p.168).

18. On June 23, 2021, the Department filed a 33 page *Application for Emergency Order to Summarily Suspend Teaching Certification and Application to Revoke Teaching Certification*, with 207 pages of exhibits, **which was scheduled to be presented to the State Board the following morning.** (*Application and Exhibits*, Pet.Ex."26", "27").

19. The Respondents *attempted* to serve (via email) the *Application and Exhibits* on the Superintendent at 11:04 a.m., on the 23rd. (*Email*, Pet.Ex."28"). The email stated:

Mr. Barnes,
Enclosed in the link below please find the Application for Emergency Suspension and exhibits from our office. **This item will be brought before the State Board of Education (SBE) tomorrow, June 24, 2021.**
[hyperlink for exhibits]
Please contact our office with any questions,
Marley Billingsley
Legal Assistant

20. The Department's due process regulations for notice of "Suspension and/or revocation of certificates" is set forth in OK ADC 210:1-5-6, and states as follows:

"(3) Notice to parties. **Within three (3) business days** of the date the application to revoke a certificate is filed with the Secretary of the State Board of Education, the Secretary **shall send a copy of the application along with a notice of intent to revoke the certificate by certified or registered mail, restricted delivery with return receipt requested, to the holder of the certificate.** It is the responsibility of every certificate holder to notify the State Department of Education upon a change of address, and the mailing address on file for each certificate holder shall be presumed to be a proper address for service of notice. Service of notice of intent to revoke a certificate shall be deemed complete upon certified or registered mailing of

the notice to the certificate holder's last known address. In addition to the requirements of notice set forth at 75 O.S. 309, the notice of intent to revoke the certificate shall include:

(A) A statement setting forth the proposed effective date of revocation of the certificate; and

(B) **A statement advising the holder that if the holder fails to appear for hearing and contest the revocation, the allegations in the application for revocation will be deemed confessed and the Board may issue a final order to effect revocation of the certificate as of the effective date proposed in the notice.**" OK ADC 210:1-5-6 (emphasis added).

No attempt to comply with this rule was made by Appellees.

21. **The next morning**, the agenda reflects that the State Board met again, first in executive session, **then voted to "summarily" suspend the Superintendent's license**, without providing him any due process, and without giving him the statutorily mandated individual proceeding where he could defend both his license and his livelihood. (*Transcript*, Pet.Ex."30"; *Agenda*, Pet.Ex."29"; *Minutes*, Pet.Ex."31",p.7). Later in that same meeting, after "summarily suspending" the Superintendent's license, the attorney for the State Board presented another Powerpoint presentation¹¹ against both the District and the Superintendent, and the State Board threatened that they would revoke the District's accreditation at their July 12th meeting, if the District did not immediately terminate the Superintendent. (*Transcript*, Pet.Ex."30",p.38; *Minutes*, Pet.Ex."31",p.7; *Powerpoint*, Pet.Ex."35"; *Letter*, Pet.Ex."33"). State Superintendent Hofmeister threatened that "the District had sued her", and that the District and Superintendent Barnes *"had little respect, and no regard for the authority of this Board – and that's going to change!"*. (*Transcript*,Pet.Ex."30",p.44).

¹¹ It should be noted that the presentation and Powerpoint, presented 2½ months after the District was put on a three month probation, merely repeated the original allegations which the State Board had justified the probation order in the first place, instead of the progress made by the District during the probation. The presentation not only ignored the District's two written responses to the probation, State Board member Monies stated that the District has "taken no steps to rectify any of the issues since that time [probation]". (*Transcript*, Pet.Ex."30",p.37).

22. On June 24th, Hofmeister signed a 33 page "Emergency Order" suspending Superintendent Barnes, virtually identical to the 33 page Application, and adopting each and every factual allegation and legal argument therein. (*Emergency Order*, Pet.Ex."32"). Barnes testified paragraph by paragraph at trial that none of the issues raised in the *Application*, or the identical paragraphs in the *Emergency Order*, constituted any kind of legitimate emergency. (R.p.1176,1177, Tr.(11/8/21) p.170-195).

23. On July 8, 2021, Appellants filed their *Motion for Temporary Restraining Order and for Preliminary Injunction*. (R.p.194). At approximately 3:30 p.m. that same day, a hearing was conducted and the Trial Court denied the request for temporary restraining order. (R.p.1164, Tr.(7/8/21).

24. On July 12, 2021, at 9:30 a.m., the State Board convened in a regular meeting, with another executive session concerning Western Heights. (*Agenda*, Pet.Ex"36"). Appellants allege that the executive session violated the Open Meetings Act, Title 25 O.S. §301 *et seq.*, in that the information conveyed in the executive session was essentially identical to the subsequent open presentation by Department's counsel; it just allowed the Board to discuss the matter first in secret. After two hours in executive session, the State Board returned to open session to hear the Powerpoint presentation by the Department's counsel. (*Transcript*, Pet.Ex."37"; *Minutes*, Pet.Ex."38",p.7; *Powerpoint*, Pet.Ex."40").

25. At the conclusion of counsel's presentation, the State Board voted to order a "full state intervention", essentially to take over the District, and **authorized the request and assistance of law enforcement** to enforce the takeover. (*Transcript*, Pet.Ex."37", p.23; *Minutes*, Pet.Ex."38",p.7; *Powerpoint*, Pet.Ex."40"). As part of the intervention, the State Board voted that they would appoint a State Department of Education employee as

"Interim Superintendent" for the District, and that "District actions would be subject to approval of the State Board". (*Transcript*, Pet.Ex."37", p.23; *Minutes*, Pet.Ex."38",p.7; *Powerpoint*, Pet.Ex."40").

26. On July 13, 2021, the Western Heights Board of Education posted its agenda for a Special Meeting on July 15, 2021, which included only one item of business, "Discussion and possible action to appoint an Interim Superintendent for the District." (*Agenda*, Pet.Ex."41").

27. According to an SDE press release, later that same day, State Superintendent Hofmeister appointed Monte Guthrie ("Guthrie"), *an employee of the State Department of Education*, as the "Interim Superintendent" of Western Heights Public Schools. (*Press Release*, Pet.Ex."43").

28. On July 14, 2021, Hofmeister served a "Notice of Intervention" to Western Heights. (*Letter*, Pet.Ex."44"). The letter indicated that "as a condition of maintaining public school accreditation", the District "shall" recognize Guthrie as "the" District Superintendent. *Id.* The letter referred to the "**engagement of law enforcement as necessary**" to implement the intervention, and stated: "... all actions and decisions of the District by and through the school board are subject to the approval of the State Board acting through the designated Interim Superintendent". *Id.*

29. On July 15, 2021, Western Heights appointed Kim Race as Interim Superintendent of the District. (*Minutes*, Pet.Ex."42").

30. On July 16, 2021, the Department's Interim Superintendent Monte Guthrie arrived at the Western Heights Administration Building with six (6) Oklahoma County Sheriff's deputies, ostensibly to effect the "takeover". (R.p.1177, Tr.(11/8/21) p.200). Western Heights counsel made it clear to all that there was an ongoing lawsuit, and that

while the District intended, as they always have, to cooperate with the Department in improving services to the children, the Western Heights School District would continue to be controlled and operated by the Western Heights' duly elected Board of Education, and its duly appointed Interim Superintendent. (*Letter*, Pet.Ex."45").

31. On July 22, 2021, the Trial Court heard Respondents' *Motion to Dismiss* (R.p.639) the District's claims. (R.(Supp)p.1, *Transcript*(7/22/21)). After hearing the argument of counsel, the Court dismissed all of the District's Open Meeting Act allegations, and held that Petitioners failed to exhaust their administrative remedies by failing to appear at the State Board meeting of April 9, 2021, as directed by the Department. (R.(Supp)p.1, *Transcript*(7/22/21)). The Court denied the motion to dismiss with respect to the Department's alleged failure to comply with the OAPA and its request for declaratory judgment. (R.(Supp)p.1, *Transcript*(7/22/21)). That order has not been reduced to writing.

32. Also on July 22, 2021, the Department filed a pleading entitled "*Counterclaims - Emergency Petition for Writs of Mandamus*". (R.p.372). Petitioners responded by filing a *Motion to Strike* the pleading, arguing that 1) counterclaims, not submitted within an answer are not recognized pleadings in Oklahoma, and 2) the pleading was not made upon affidavit, which is required. (R.p.625). On August 2, 2021, the Court overruled Petitioners' *Motion to Strike*. On August 10, 2021, Petitioners filed their *Answer to Counterclaims - Emergency Petition for Writs of Mandamus*. (R.p.721).

33. On August 12, 2021, the Department's *Counterclaims - Emergency Petition for Writs of Mandamus* came on for hearing. (R.p.1165, Tr.(8/12/21)). At the conclusion of the hearing the Trial Court granted **all** of the relief requested by the Department, and issued the requested *Writ of Mandamus* ordering the forced takeover of Western Heights, and directing the Western Heights Board of Education to immediately suspend

Superintendent Barnes. (*Writ of Mandamus*, R.p.1017). Petitioner's counsel requested an automatic stay of execution and enforcement of the *Writ of Mandamus* pursuant to Title 12 O.S. §66, and Title 12 O.S. §990.5, which was denied. (*Writ of Mandamus*, R.p.1017). Petitioners' Counsel then requested a stay pursuant to the Court's inherent power for a stay prior to the filing of a petition in error, which was also denied. (*Writ of Mandamus*, R.p.1017).

34. Within fifteen minutes of the adjournment of court, representatives of the Department arrived at the Western Heights Administration Building with police officers and effectively took over the operations of the District. The Western Heights Interim Superintendent, and the Human Relations Director, both selected by the Western Heights Board of Education, were suspended¹² (with a prepared letter), forced out of their offices, and escorted from the building. (*Suspension Letter*, Pet.Ex."47"). Department representatives also brought a locksmith who proceeded to gain access to former Superintendent Barnes locked office. Finally, the Department distributed a letter to Western Heights' staff which "discouraged" employees from having any further contact with the undersigned attorneys for the District. (*Staff Letter*, Pet.Ex."46").

35. At the local Board meeting of September 13, 2021, the first such meeting after the takeover, "chaos" was the best description. Department of Education employee Guthrie asserted that it was his responsibility to prepare the Board's agenda, pursuant to the State Board's July 12th directive¹³, which the Trial Court specifically adopted. The

¹² Western Heights Interim Superintendent Kim Race was suspended on August 12, 2021, by Interim Superintendent (and Department employee) Monty Guthrie. Title 70 O.S. §6-101.14 provides that when an administrator is suspended, proceedings to dismiss that administrator "shall" be initiated. Interim Superintendent Guthrie has for over five months failed to initiate the required dismissal proceedings.

¹³ In response to the local Board President's requests for agenda changes, Guthrie emailed the following highlighted paragraph from the July 12th State Board directive: "... [A]ll

President of the Western Heights School Board asserted that the business of the Board was up to the Board, not the state, a situation which resulted in two agendas being posted for the same meeting, yet another reason which necessitates the prompt action of this Court.

36. On November 8 and 9, 2021, *Plaintiff's Motion for Temporary Restraining Order and for Preliminary Injunction* (R.p.194) and *Plaintiff's Supplemental Motion for Temporary Restraining Order and for Preliminary Injunction* (R.p.1018) came on for hearing, requesting relief in the form of 13 declaratory judgments, summarized as follows:

- a) That the District is entitled to an individual proceeding under the OAPA, *prior to* any action by the Department or State Board regarding annexation, denial of accreditation, probation, takeover, overruling local decisionmaking, employing superintendents or others to supervise or control the District, and/or any and all actions which interfere or attempt to control or de-fund the operations of the District. (Declaratory Judgments 7, 9,10, 11). (R.p.1018, p.17-18).
- b) That the Department has no legal authority under the law to 1) “summary suspend” and/or “emergency suspend” the license of a superintendent before he was accorded an individual proceeding under the OAPA, that the Department failed to comply with Title 75 O.S. 314(C)(1) and (2), that the Department failed to comply with the due process service requirements of OAC 210:1-5-6, and that the Emergency Order should be vacated (Declaratory Judgments 2, 3, 4, 5, 6). (R.p.1018, p.17-18).
- c) That neither the State Board, State Superintendent, or Department has the legal authority to compel a superintendent or volunteer board members to appear before them in the absence of adjudicative action in an OAPA Individual Proceeding. (Declaratory Judgment 8). (R.p.1018, p.17-18).
- d) That the Department violated the Oklahoma Constitution, state law and due process in adjudicating outside of an individual proceeding, as well as violated the OMA in meeting in several executive sessions. (Declaratory Judgments 12,13).(R.p.1018, p.17-18).

actions and decisions of the District, by and through the school district board of education are subject to the approval of the State Board of Education, by and through its interim appointed superintendent. Action shall not be taken without the OSBE appointed interim superintendent and OSDE approval, in writing; . . . “.

ARGUMENT AND AUTHORITIES

I.

THE DEPARTMENT MUST PROVIDE A FULL AND FAIR INDIVIDUAL PROCEEDING UNDER THE OAPA PRIOR TO ANY SANCTIONS, TAKEOVER, CHANGE OF ACCREDITATION, OR OTHER PUNITIVE ACTIONS AGAINST THE DISTRICT

Any action by the Department to put the District on probation, take over and operate the District, or de-annex the District (effectively close the District and place its students in other districts) must be decided in an individual proceeding pursuant to the Oklahoma Administrative Procedures Act, Title 75 O.S. §250 *et seq.* (OAPA). (See the complete argument in *Petitioners' Answer to Respondents' Counterclaim - Emergency Petition for Writs of Mandamus*, (R.p.721,p.18-21); and *Petitioners' Supplemental Motion for Preliminary Injunction*, (R.p.1018,p.9-14).

Title 75 O.S. §309 provides for detailed notice of all allegations, discovery, a full and fair hearing, and an unbiased decision-maker, all **before** the Department utilizes police power and assistance to take over and operate a local school district. Back in 2005, the Respondents unfairly, arbitrarily, and without due process made an “accountability determination” which adversely affected the District, a term¹⁴ based on previous federal legislation known as “No Child Left Behind Act of 2001”. “No Child Left Behind” was a two edge sword; on the one hand it provided a small amount of funding to improve low performing schools on the List, but it also provided that if a school or district failed to improve, a variety of sanctions could be implemented by the Respondents, including loss of funding, closing of the schools and/or districts, and the loss of the teachers and

¹⁴ Placing schools and districts on “the List” was referred to as “**accountability determinations**” under the federal program and state procedures, a term that the Court of Appeals used in its opinion. *Western Heights v. Department of Education*, 2007 OK CIV APP 92, ¶14, 169 P.3d 417, (*cert. denied* Feb.12, 2007).

Superintendent's licenses. *Id.* **Accountability determinations in 2005 are one and the same as accreditation determinations in 2021, both can result in the potential closing of schools and districts and the revocation of Superintendent's licenses.** Title 70 O.S. §3-104.4(D).¹⁵

The first case filed, *Western Heights v. Department of Education*, 2007 OK CIV APP 21, 169 P.3d 417, dealt with the issue of whether the threat of "substantial sanctions under the Department's accountability system" would subject that process to the protections of the OAPA. *Id.* The Department made the exact same arguments then that they argue today, ie... the federal program ("No Child Left Behind") doesn't require an individual proceeding under the OAPA, and because the District had no "property interest" like in the *Patrick*¹⁶ case, the OAPA simply doesn't apply. *Id.* at ¶4,9. The COCA disagreed with the Department, finding that **"[i]n view of the substantial sanctions which may be imposed upon School under Department's School Accountability System, we do not agree. School was entitled to the full processes required for agency actions under the APA, including a hearing, before Department finally determined School failed to make AYP."** *Id.* at ¶9. "Failure to make adequate yearly progress" in 2005, was the equivalent of failing to meet accreditation standards today; both statutory procedures can end in the same result, ie... closing the District.

"Schools and districts that are identified as being in school improvement status are

¹⁵ "If one or more school sites fail to receive accreditation as required pursuant to this section or subsequently lose accreditation, the State Board of Education **shall close the school and reassign the students to accredited schools within the district or shall annex the district to one or more other districts in which the students can be educated in accredited schools.**" Title 70 O.S. §3-104.4(D).

¹⁶ *Patrick v. State ex rel. State Bd. of Educ.*, 1992 OK CIV APP 153, 842 P.2d 767.

subject to sanctions defined in *No Child Left Behind*, including interventions offering school choice, providing supplemental services to students, required reorganization, and corrective action". *Western Heights v. Department of Education*, 2011 OK CIV APP 33, ¶1, fn.3, 252 P.3d 284¹⁷. **Both then and now, under different statutory schemes, an adverse finding could result in shutting down the District**, by either loss of accreditation or de-annexation the result is the same... no more Western Heights.

"Judicial review of agency/board orders is commenced in two ways: 1) pursuant to the Administrative Procedures Act (Act) which provides for review of final agency orders; or 2) circumvention of the statutory procedures only when there is a constitutional question, inadequate administrative relief, and threatened or impending irreparable injury." *Bowen v. State ex rel. Okla. Real Estate Appraiser Bd.*, 2011 OK 86, ¶ 12, 270 P.3d 133, 136-137; *State ex rel. Bd. Of Regents v. Lucas*, 2013 OK 14, 297 P.3d 378. As set forth herein, the Respondents have almost no administrative procedures to insure a uniform and fair decision, and the closing of these schools and the District certainly constitutes irreparable injury.

It is interesting to note that after the first appeal with the Respondents, where the Court affirmed the application of the OAPA and the right to an individual proceeding, the Respondents indicated in their pleadings that they "will amend its AYP [accountability determinations] appeal procedures to include a hearing". *Western Heights v. Department of Education*, 2007 OK CIV APP 92, ¶19, 169 P.3d 417. The Respondents never instituted the promised change of procedure.

¹⁷ In that case the hearing officer in the Court-ordered OAPA individual proceeding found that "Department's decision to place Western Heights on the school improvement list in 2004, 2005, and 2006 [subjecting the District to sanctions] **was arbitrary and capricious and ordered the removal of Western Heights from any and all improvement lists effective immediately.**" *Id.* at ¶3.

Rulings that were made in prior appeals are the law of the case. Once the court decides a question in a cause on appeal, that ruling governs in all subsequent proceedings." *Cavett v. Peterson*, 1984 OK 59, ¶ 9, 688 P.2d 52, 56; *Western Heights v. Department of Education*, 2007 OK CIV APP 92, ¶14, 169 P.3d 417. "Settled-law-of-the -case doctrine operates to bar relitigation of issues in a case that are finally settled by an appellate opinion or those the aggrieved party failed to raise on appeal." *Patel v. OMH Med. Ctr., Inc.*, 1999 OK 33, ¶ 22, 987 P.2d 1185, 1195. The "doctrine is a rule of judicial economy designed to prevent an appellate court from twice having to deal with the same issue." *Id.* The entitlement of an individual proceeding for the District is not only the law in Oklahoma, it is the law of this case, and must be followed.

II.

THERE IS NO STATUTORY AUTHORITY FOR THE DEPARTMENT TO TAKE OVER AND/OR OPERATE A LOCAL DISTRICT, CONDUCT AN "INTERVENTION", OR EMPLOY OR APPOINT A LOCAL SCHOOL SUPERINTENDENT

In Oklahoma, the statutory public school system provides that local school boards operate and control local school districts, subject to the oversight and regulatory framework of state officials. While the Department has the authority to advise and set standards for the operation of local districts, they lack the statutory authority to take over and/or operate local school districts, conduct "interventions", or to employ or appoint local school district superintendents or other employees. Therefore, any attempt by the Department to do so is an *ultra vires* act that is unauthorized and beyond the Department's power and authority.

The Department has cited to a number of general statutes for their authority to operate a statewide educational system which includes providing advice and setting educational standards for local school districts, and even adjudicating, *after fair hearings*, whether local districts meet those standards. However, only the local districts have the statutory authority to actually operate

the local districts, employ teachers and staff, and run those districts in the manner they deem fit. Set forth below is a comparison of the statutory authority of local school boards, the State Superintendent, and the State Board to control and operate local school districts.

A. The Statutory Authority of Local School Districts to Operate Local Public Schools:

Title 70 O.S. §1-115 places the administration of the public school system in Oklahoma in four entities: “the State Department of Education, State Superintendent of Public Instruction, ***boards of education of school districts, and superintendents of school districts***”. There is no statutory hierarchy as between the four entities. Title 70 O.S. §5-105 provides that local school districts “shall be a body corporate and shall possess the usual powers of a corporation for public purposes ...”. Title 70 O.S. §5-106 further provides that the “governing board of each school district in Oklahoma is hereby designated and shall hereafter be known as the board of education of such district.”. The statute further provides that “the superintendent of schools ***appointed and employed by the [local] board*** shall be the executive officer of the board and shall perform duties as the board directs.” Title 70 O.S. §5-105.

The “powers and duties” of local boards of education are set out in detail in Title 70 O.S. §5-117. That statute details 24 numbered paragraphs over three pages outlining all of the various powers and duties of the ***local*** boards of education to run ***local*** school districts, as follows:

“The board of education of each [local] school district shall have power to:

1. **Elect its own officers**; provided that the chair of the board authorized in Section 5-107B of this title shall be elected by the electors of the school district;
2. **Make rules, not inconsistent with the law or rules of the State Board of Education, governing the board and the school system of the district, ...**
3. **Maintain and operate a complete public school system of such character as the board of education shall deem best suited to the needs of the school district;...**
12. **Purchase necessary property, equipment, furniture and supplies necessary to maintain and operate an adequate school system;**
14. **Contract with and fix the duties and compensation of physicians, dentists,**

optometrists, nurses, attorneys, **superintendents**, principals, teachers, bus drivers, janitors and other necessary employees of the district;...

21. Perform all functions necessary to the administration of a school district in Oklahoma as specified in the Oklahoma School Code, and in addition thereto, those powers necessarily implied but not delegated by law to any other agency or official;...

The Department's own regulations clearly state that "the local board shall have the responsibility for the operation of the school, and for performance of their powers and duties..., and shall be responsible for developing effective policies for the operation of the school(s)". OK ADC 210: 35-3-48. "The governing local board shall be responsible for the selection and evaluation of its chief executive officer who shall be the superintendent"; and the "local board of education shall adopt policies and procedures pertaining to admission, placement, promotion, retention, and graduation requirements for students....". OK ADC 210: 35-3-48.

B. The Statutory Authority of the State Superintendent to Operate Local Public Schools:

The powers and duties of the State Superintendent are delineated in Title 70 O.S. §3-107.1, and include the power to "give advice and make recommendations to the State Board", "adopt policies and make rules" for the Department, "organize and have control of the administration" *of the offices of the State Superintendent and the State Board*, and "have general supervision of all employees *of the Department*". Title 70 O.S. §3-107 vests the State Superintendent with the power to "advise school district superintendents ... on questions as to the powers duties and functions of school district officials", and to publish a set of school laws on a semi-annual basis. There is simply no specific statutory authority under Oklahoma law for the State Superintendent to employ or appoint a local public school superintendent or any other employee, or to direct the operations of the local districts.

C. The Statutory Authority of the State Board of Education to Operate Local Public Schools:

Article 13, section 5 of the Oklahoma Constitution states that "the supervision *of instruction*

in the public schools shall be vested in" the State Board of Education. Title 70 O.S. §3-104 sets out the "Powers and Duties" of the State Board which include 23 numbered paragraphs. The powers and duties of the State Board can be loosely separated into four categories, including the operation of the *Education Department* (2, 3, 4, 5, 8, 9, 10, 11, 12, 21, 22, and 23), the issuance and revocation of teacher/superintendent licenses (6), promulgating rules and regulations for public education (1, 7) , and requiring the filing of certain reports (13, 15, 16). Several powers and duties are noteworthy, either for what they allow, or for what they don't allow. First off, there are **no statutory powers for the State Board** to operate local school districts or carry out the duties vested in the local boards of education, ie... hiring a superintendent and other employees, buying property and supplies, etc. Paragraph 13 addresses the power of the State Board over "persons having administrative control of all school districts in Oklahoma" to require those persons "to make regular and special reports", but the power is limited to just the reports. Conspicuously absent from the provision is any type of direct supervision by the State Board over the local school districts or employees. Paragraphs 14 and 18 provide for "general supervision" and "supervision" respectively, but those are limited to only the "school lunch program" and "the transportation of pupils", with no general supervision on the local districts specified. Paragraph 19 gives the State Board the "authority, upon the request of the local school board, to act . . . in the purchase of transportation equipment". Lastly, paragraph 20 gives the State Board the "authority . . . to perform all duties necessary to the administration of the public school system in Oklahoma as specified in the Oklahoma School Code; and, in addition thereto, those duties not specifically mentioned herein ***if not delegated by law to any other agency or official.***" In other words, the State Board does not have authority to "takeover" and do the actions specifically vested in the local school boards to perform, ie... **"maintain and operate a complete public school system of such character as the [local] board of education shall deem best suited to the needs of**

the school district;...”.

The best indicator of the powers that the State Superintendent and State Board to intervene and take over the operation of underperforming local school districts is contained in the legislative history of those exact powers. Indeed, in 1999, the State Board had the statutory authority to “intervene” in local school districts through the “provision of guidance and assistance to the school and school district; special funding; **reassignment of district personnel**; transfer of students; **operation of the school by personnel employed by the State Department of Education**; [and] mandatory annexation of all or part of the local school district; ...”. Title 70 O.S. 1999 §1210.541. **However, ten years later in 2009, the Legislature re-established local control and clearly stripped the State Board of the powers to intervene in local districts and replaced those powers with the duty to simply assist the local districts, not take over or operate them.** Title 70 O.S. 2009 §1210.541. By their actions in this case, the Respondents are attempting to assert powers and authority that the legislature specifically stripped them of over a decade ago.

An agency created by statute may only exercise the powers granted by statute and cannot expand those powers by its own authority. *Farmacy, LLC v. Kirkpatrick*, 2017 OK 37, ¶120, 394 P.3d 1256 (citing to *Marley v. Cannon*, 1980 OK 147, ¶10, 618 P.2d 401, 405). There is also no statutory authority for the Respondents to take the power they assert, which the Trial Court adopted, and delegate that power to others, including their employee Guthrie. *Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Commission*, 1988 OK 117, 764 P.2d 172. Consequently, Guthrie’s decisions to set agendas for the local board over their objection, pay contested debts of the District, settle union disputes and grievances, and suspend local board employees, all without local board approval, are unlawful and *ultra vires*.

PROPOSITION III

THE OKLAHOMA CONSTITUTION PROHIBITS THE STATE BOARD FROM EXERCISING THEIR ADJUDICATIVE AUTHORITY OUTSIDE OF AN INDIVIDUAL PROCEEDING

It is uncontested in this case that the very first indication that the Respondents had “issues” with Western Heights was when the State Board published its agenda for the March 25, 2021, meeting in which there was an executive session item to discuss “Western Heights Public Schools” in secret. (*Agenda*, Pet.Ex.”5”). The District was not directly notified of the meeting, and only learned of it later on March 30, 2021, when the Respondent’s attorney notified the District of the decisions reached by the State Board regarding Western Heights. (*Letter*, Pet.Ex.”8”).

In the three hour plus executive session, Western Heights believes that the State Board exercised adjudicative authority essentially conducting a secret “hearing” concerning eight general allegations¹⁸, first disclosed to the District five days **after** the hearing, about which the Respondent’s attorney clearly referred to the Respondents’ “determination that the District has failed to comply with Oklahoma laws and regulations”. (*Letter*, Pet.Ex.”8”).

The District took issue with several aspects¹⁹ of the secret session. First, it was clearly an exercise of the State Board’s adjudicative powers. To meet for three plus hours concerning allegations of numerous violations of law and regulations at only one school district, and after such meeting, determine that the district “has failed to comply with Oklahoma laws and regulations”,

¹⁸ *Supra* p.4, ¶6.

¹⁹ Petitioners also asserted that this executive session violated the Open Meeting Act, Title 25 O.S. §301 *et seq.*, in that the bases for the executive session were fraudulent. **This cause of action was dismissed by the Trial Court on July 22, 2021.** Respondents asserted that the session was authorized to discuss “a pending investigation, claim or action” that its attorney deemed would “seriously impair” the agency’s ability to process same. However, this basis was destroyed when State Board Member Hernandez pointed out that there had been no investigation conducted. *Supra* p.5, ¶7. Further, these same issues were discussed later in an open meeting (April 9th), begging the question that if the subject matter was appropriate for open session 15 days after the March 25th executive session, why did it need to be first presented in secret, other than for a secret preview of the allegations for the State Board?

is the quintessential definition²⁰ of an adjudicative proceeding.

Petitioners argued (without success) before the Trial Court that two Courts of Civil Appeals affirmed the right of the District to an "individual proceeding" pursuant to the OAPA, before any adverse action by a state agency.²¹ The Oklahoma Constitution also prevents the Respondents from exercising adjudicative power other than in the context of an individual proceeding pursuant to the OAPA. Indeed, Article 7, Section 1 of the Constitution provides in pertinent part as follows:

"The judicial power of this State shall be vested in the Senate, sitting as a Court of Impeachment, a Supreme Court, the Court of Criminal Appeals, the Court on the Judiciary, the State Industrial Court, the Court of Bank Review, the Court of Tax Review, and such intermediate appellate courts as may be provided by statute, District Courts, **and such Boards, Agencies and Commissions created by the Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings. . . .**"

This Court has continuously held that agencies can only exercise any statutorily authorized adjudicative authority "in individual proceedings", pursuant to the OAPA where there are statutorily prescribed procedures to protect the rights of participants to full, fair, and open hearings, notice and opportunity to be heard, pre-hearing exchange of exhibits and witnesses, an unbiased hearing officer, issuance of findings of fact and conclusions of law, and judicial review, **essentially all of the rights denied to Western Heights**. *Robinson v. Fairview Fellowship Home*, 2016 OK 42, ¶6, 371 P.3d 477; *Jackson v. Indep. Sch. Dist. No. 16 of Payne Cnty*, 1982 OK 74, n.20, 648

²⁰ "Such proceedings are quasi-judicial in nature--a "term applied to the action of public administrative officers or boards which investigate facts or ascertain the existence of facts; draw conclusions from them as a basis for official action; and exercise discretion of a judicial nature in connection with and incidental to the administration of matters entrusted to or assigned to the officers or board." *Robinson v. Fairview Fellowship Home*, 2016 OK 42, ¶6, 371 P.3d 477.

²¹

Two separate divisions of the Oklahoma Court of Appeals determined that an individual proceeding under the OAPA was **required**. (Division I) *Western Heights v. Department of Education*, 2007 OK CIV APP 21, 156 P.3d 53; (Division II) *Western Heights v. Department of Education*, 2007 OK CIV APP 92, 169 P.3d 417.

P.2d 26, 31 (“The purpose of any due process proceeding is to afford the opportunity to each person to present evidence and arguments in a forum which provides fair and equal justice.” ¶11). Most recently, this Court re-emphasized²² and clarified this holding in *State ex rel. Oklahoma State Bd. of Medical Licensure and Supervision v. Rivero*, 2021 OK 31, ¶28, 489 P.3d 36, as follows:

“Const. Art. 7 § 1 confers on administrative agencies **only** that quantum of quasi-judicial power which is necessary to support their exercise of adjudicative authority **in individual proceedings brought before them**.” (emphasis added).

PROPOSITION IV
THE DEPARTMENT DENIED THE SUPERINTENDENT’S DUE PROCESS
RIGHTS, AND FAILED TO FOLLOW BOTH STATE LAW AND THEIR
OWN ADMINISTRATIVE PROCEDURES

“An essential principle of due process is that a deprivation of life, liberty, or property ‘**be preceded by** notice and opportunity for hearing appropriate to the nature of the case.’” *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). However, “[i]t is by now well established that “due process,” unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.’” *Gilbert v. Homar*, 520 U.S. 924, 930, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997). “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.’” *Id.* “Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected.” *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). **In *Loudermill*, the Supreme**

²² Pertinent to the State Board’s regular use of executive sessions, this Court also re-emphasized that public policy demands that “the exercise of judicial power should be within the public view unless confidentiality is required by law, or a compelling privacy interest outweighs the public’s interest and the confidentiality is narrowly applied” and further “recognized a strong public policy allowing access to public records which includes records used by courts to adjudicate legal controversies”, a policy which should also apply here. *Id.* at ¶76.

Court held that a “pretermination ‘hearing’ ... need not be elaborate,” but “[t]he opportunity to present reasons, either in person or in writing, why the proposed action should not be taken, is a fundamental due process requirement.” 470 U.S. at 545–46. “The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.” *Id.* at 546. Moreover, “[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.” *Id.* at 545, and an opportunity to present his side of the story.” *Id.* at 546. In this case, the Respondents conducted a secret investigation, and before even notifying the Superintendent or the District of that investigation, proceeded to meet in secret and discuss the allegations and presumably, their future actions. Then, before even hearing the Superintendent’s side of the story, they decide that the Superintendent and the District “have violated the law and regulations”. Later, they put the District on probation, threaten to shut it down, all without a hearing of any kind. Later still, with less than a day’s notice, they have another secret meeting that the Superintendent was not invited to, and then vote to “suspend” his license, after which they tell the District that they will shut them down if they don’t immediately fire the suspended superintendent.

A. The State Board Does Not Have the Statutory Authority to “Suspend” a Superintendent’s License:

Respondents lack the *statutory* authority to suspend the Superintendent’s certificate. Therefore, any attempt by Respondents to do so is an *ultra vires* act that is unauthorized and beyond Respondents’ power and authority. The Respondents’ “powers and duties” are described in Title 70 O.S. §3-104. The prescribed powers regarding the licensure and certification of school superintendents are described in Section 3-104(A)(6):

"A. The supervision of the public school system of Oklahoma shall be vested in the State

Board of Education and, subject to limitations otherwise provided by law, the State Board of Education shall: . . .

6. Have authority in matters pertaining to the licensure and certification of persons for instructional, supervisory and administrative positions and services in the public schools of the state subject to the provisions of Section 6-184 of this title, and shall formulate rules governing **the issuance and revocation** of certificates for superintendents of schools, principals, supervisors, librarians, clerical employees, school nurses, school bus drivers, visiting teachers, classroom teachers and for other personnel performing instructional, administrative and supervisory services, but not including members of boards of education and other employees who do not work directly with pupils, and may charge and collect reasonable fees for the issuance of such certificates (Emphasis added.)

a. the State Department of Education **shall not issue** a certificate to and **shall revoke** the certificate of any person who has been convicted . . . ". (emphasis added).

At best, Respondents can formulate rules for the "revocation" of a superintendent's certification, but again, nothing gives Respondents the power to formulate rules for the "suspension" of a superintendent's certification. There is a distinct difference between a revocation and a suspension; a revocation is required *to be preceded* by notice and hearing, while at least in this case, a "summary suspension" apparently occurs after a secret meeting to adjudicate without bothering to hear the licensee's side of the story²³. The danger of a "summary suspension" is obvious: If Respondents had this power, they would use it in the exact manner attempted, which is a clear violation of the Superintendent's, and teachers due process rights. In this case, after only one day's notice, on June 24, 2021, the State Board went into a two hour executive session to discuss the emergency suspension of Superintendent Barnes, with no opportunity (as per the agenda) for any defense by Barnes, then voted to summarily suspend his license. The OAPA requires that individual proceedings "shall be promptly instituted and determined" after an agency

²³ A review of the historical minutes of the State Board over the last several years reveals that they *routinely*, "summarily suspend" teachers licenses, finding "emergencies" in almost every single instance without ever detailing or specifying exactly what those emergencies are.

implements emergency action against a licensee. Title 75 O.S. §314(C)(2). Despite multiple requests for hearing, the State Board only recently scheduled a May, 2022 hearing for Barnes, almost a year after his license was “summarily suspended”. But why would the State Board be in any hurry, they were able to accomplish all their goals by suspending Barnes’ license after a secret meeting with no opportunity for Barnes to defend himself? Barnes has been removed from his job and his livelihood, and the Department is in no hurry.

Oklahoma’s courts have repeatedly held that state agencies, such as Respondents, may only exercise the powers granted to them by statute and cannot expand those powers by their own authority. See generally, *Marley v. Cannon*, 1980 OK 147, 618 P.2d 401, 405; *Boydston v. State*, 1954 OK 327, 277 P.2d 138; and *Adams v. Professional Practices Commission*, 1974 OK 88, 524 P.2d 932. To sidestep this prohibition on their power to “suspend”, Respondents rely upon the OAPA to clothe them with authority and power they do not otherwise possess. But the OAPA—which is an administrative procedures act for agencies in general—does not grant new or additional authority to agencies that the agencies don’t otherwise possess from the statutes that created them. In other words, if an agency has no enumerated power to suspend a license, then the OAPA’s procedures for emergency suspensions are simply not relevant.

Because Respondents, like most agencies, are bound by the protections afforded individuals by the OAPA, Respondents are required to follow the OAPA requirements for an “individual proceeding” such as those found at 75 O.S. §§309, 310, and 312, if Respondents seek to revoke a school superintendent’s license. But under no circumstances does the OAPA create new powers or authority for Respondents. As stated above, those powers, which include the power to revoke—but not suspend—a superintendent’s certificate, are described in 70 O.S. §3-104(A)(6). Put another way, just because the legislature grants an agency the power to revoke

a license subject to the protections of the OAPA, that does not mean the agency can write its own rules which also allow it to “summarily suspend” licenses²⁴, based on a secret meeting, without a fair hearing or any other due process protections.

If Respondents had the power to “suspend”, which they don’t, Respondents could rely upon the procedures provided in 75 O.S. §314 which allows for summary suspensions and/or emergency actions.²⁵ But here, Respondents were not given the power to suspend by the state legislature. In any event, however, the rights of Respondents as well as those of Superintendent are protected by 75 O.S. §§309, 310, and 312, which allow for a due-process procedure in determining whether a school superintendent’s license can be revoked. Respondents have argued that their own regulations—that is, the rules they have written for themselves, allow for suspension and not just revocation. (See OAC 210:1-5-6(e)). But as plainly stated in their own rules & regulations, the only way Respondents get to “suspension” is by an illicit reliance upon 75 O.S. §314 for authority not allowed them by the state legislature.

B. Respondents Use the Term “Emergency” as a Pretext to Suspend the Superintendent Without Due Process:

In this case, the Department devised and carried out a plan to strip the Superintendent of his constitutional due process protections and suspend him from his job, and therefore his livelihood, without any hearing at all. The Department’s plan involved using powers not granted to Respondents by Oklahoma Statutes, misuse of the OAPA and the OMA, and failing to follow their own rules and procedures. On June 24, 2021, without legal notice to the Superintendent,

²⁴ Both procedures have the exact same outcome, taking the license away which prevents the holder from working as a superintendent for any school district.

²⁵ Provided of course that they follow the statutory requirements, which as set forth herein, they didn’t.

and after a lengthy executive session, the State Board, through *ultra vires* powers, voted to "summarily suspend" the Superintendent's teaching certificate. This fraudulent and *ultra vires* act violated Superintendent Barnes' due process rights and, according to Respondents, required Western Heights to "at a minimum, . . . place Mr. Barnes and his employment on suspension . . ." (Letter, Pet.Ex."33").

The act of suspending Superintendent Barnes' license was fraudulent because it was grounded on the false premise of an "EMERGENCY." Characterizing the act of suspending the Superintendent as an "emergency" was the only way the Department could vote to suspend the Superintendent **while in secret session** and **without proper and legal notice**. However, just labeling something as an "emergency" does not make it so. Both Oklahoma Statutes and the Department's own rules require that any emergency order include specific findings of fact specifying the grounds for the emergency action. Title 75 O.S. §314(C)(2). The Department's "*Emergency Order*", (Pet.Ex."32"), **is completely devoid of** any "specific findings of fact specifying the grounds for the emergency action." In fact, the Department's "Emergency Order" does not mention or address any type of emergency situation much less "include specific findings of fact specifying the grounds for the emergency action." Instead, the "*Emergency Order*" goes on for thirty-three (33) pages bemoaning Superintendent Barnes' past education and work history, including in-depth discussions of his work at the Lupus Foundation of Oklahoma and Lucky Star Casinos. The so-called "*Emergency Order*" was in reality a "smear campaign" filled with false, irrelevant, and libelous tabloid accusations against the Superintendent, having little relevance to his license. The document also included detailed accounts of situations that have long since been resolved! There is absolutely no mention or identification of any issue or situation that includes "specific findings of fact specifying the grounds for the emergency action." In their *Answer to the Counterclaims- Emergency Petition* (R.p."721"), Petitioners refuted every allegation of emergency.

Barnes testified paragraph by paragraph that none of the issues raised in the *Application*, or the identical paragraphs in the *Emergency Order*, constituted an emergency. (R.p.1176,1177, Tr.(11/8/21) p.170-195). And that is because there was simply **NO EMERGENCY!** But without the claim of emergency, the State Board would not have been able to come up with the cover they needed to suspend Superintendent Barnes' certificate in a secret meeting, without legal notice or fair hearing.

It is clear that the Department's claim of "emergency" was nothing more than a pretext for their secret meeting with its predetermined outcome: suspend Superintendent Barnes without the messiness of allowing Superintendent Barnes to defend himself.

V.

THE SUPERINTENDENT IS ENTITLED TO A DECLARATORY JUDGMENT THAT HE WAS NOT AFFORDED STATUTORY AND ADMINISTRATIVE DUE PROCESS

A. The Department Failed to Provide the Required Due Process Notice of Hearing:

Respondents' due process regulations for due process notice of the filing of applications for "Suspension and/or revocation of certificates" is set forth in OK ADC 210: 1-5-6 (d)(3), and states as follows:

"(3) Notice to parties. Within three (3) business days of the date the application to revoke a certificate is filed with the Secretary of the State Board of Education, the Secretary **shall send a copy of the application along with a notice of intent to revoke the certificate by certified or registered mail, restricted delivery with return receipt requested, to the holder of the certificate.** It is the responsibility of every certificate holder to notify the State Department of Education upon a change of address, and the mailing address on file for each certificate holder shall be presumed to be a proper address for service of notice. **Service of notice of intent to revoke a certificate shall be deemed complete upon certified or registered mailing of the notice to the certificate holder's last known address.** In addition to the requirements of notice set forth at 75 O.S. § 309, the notice of intent to revoke the certificate shall include:

(A) A statement setting forth the proposed effective date of revocation of the certificate; and

(B) **A statement advising the holder that if the holder fails to appear for a hearing and contest the revocation, the allegations in the application for**

revocation will be deemed confessed and the Board may issue a final order to effect revocation of the certificate as of the effective date proposed in the notice."

On June 23, 2021, at 11:04 a.m., the Respondents sent the Superintendent (**via email**) the 33 page *Application for Emergency Order to Summarily Suspend Teaching Certification and Application to Revoke Teaching Certification*, with 207 pages of exhibits. (Application, Pet.Ex."26", "27"). The accompanying email stated:

"Mr. Barnes,

Enclosed in the link below please find the Application for Emergency Suspension and exhibits from our office. **This item will be brought before the State Board of Education (SBE) tomorrow, June 24, 2021.**

[hyperlink address]

Please contact our office with any questions,

Marley Billingsley

Legal Assistant"

(Emphasis added). First, there is no allowance in the regulation to serve licensees by email. Secondly, the regulation also requires that the licensee be served a notice of intent to revoke a certificate, including "a statement advising the holder that if the holder fails to appear for a hearing and contest the revocation, the allegations in the application for revocation will be deemed confessed and the Board may issue a final order to effect revocation of the certificate as of the effective date proposed in the notice". No such notice was provided to the Superintendent, either by ineffective email, or by the required certified or registered mailing. State agencies are required to follow their own rules. *Wrotenberry v. Xanadu Exploration Co.*, 2007 OK CIV APP 87, 168 P.3d 791. "Once [the] rules are in place an agency is required to follow them[.][and][f]ailure to do so can result in an invalidation of the proceeding." *Public Service Co. of Oklahoma v. State ex rel. Corp. Com'n ex rel. Loving*, 1996 OK 43, ¶ 13, 918 P.2d 733, 737.

B. The Respondents Failed to Specify an Emergency or Timely Provide the Emergency Order of Suspension to the Superintendent:

The Respondents' procedural regulations regarding an emergency "suspension" are set forth in OK ADC 210: 1-5-6(e), as follows:

"(e) Emergency Action. Pursuant to 75 O.S. § 314, in the event the State Board of Education finds that public health, safety, or welfare imperatively requires emergency action, the State Board of Education may issue an emergency order summarily suspending a certificate pending an individual proceeding for revocation or other action. Such proceedings shall be promptly instituted and determined. **Such an order shall include specific findings of fact specifying the grounds for the emergency action. Within three (3) business days of the issuance of the order by the Board, a copy of the order shall be sent to the holder of the certificate via certified or registered mail, delivery restricted to the certificate holder, with return receipt requested.**"

Once again, Respondents failed to follow their own due process regulations. First, they failed to "include specific findings of fact specifying the grounds for the emergency action". Secondly, they failed to send their *Emergency Order* "to the holder of the certificate via certified or registered mail, delivery restricted to the certificate holder, with return receipt requested."

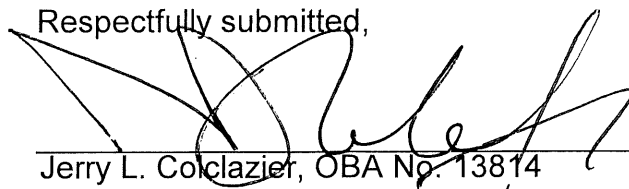
C. The Respondents Failed to Comply with Title 75 O.S. §314(C):

Title 75 O.S. 314(C)(1) provides that "...an existing license shall not be ... suspended, ... unless, prior to the institution of such final agency order, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and **the licensee was given an opportunity** to show compliance with all lawful requirements for the retention or renewal of the license.". It is uncontradicted that the Superintendent was not provided legal notice pursuant to the Respondents own regulations. Further, an emailed notice of a hearing less than 24 hours later does not constitute a reasonable opportunity to defend. The Supreme Court in *Scott v. Oklahoma Secondary School Activities Association*, 2013 OK 84, ¶39, 313 P.3d 891, held that one day "to prepare for and answer all the allegations contained in a twenty-page report was

unreasonable and "without sufficient notice". In this case, the Superintendent, if he even received the email, was given less than 24 hours to prepare for a suspension hearing with a 33 page report, with an additional 207 pages of exhibits. Further, Title 75 O.S. 314(C)(2), and OAC 210:1-5-6, requires Respondents to list the specific bases for the emergency suspension in the order; Respondents wholly failed to do so.

WHEREFORE, Appellants request 1) an emergency stay of the enforcement or execution of the writ of mandamus, returning the control and operation of the Western Heights School District to the local board of education until this appeal is concluded, and vacating each and every action taken by the Department or its representatives allegedly authorized by said writ, 2) a writ of prohibition barring the Respondent Judge from enforcing or executing said writ of mandamus, 3) the issuance of declaratory judgments on the issues of law raised herein, and 4) the issuance of a writ of mandamus to the Trial Court to vacate the suspension order of the Superintendent and return him to that position pending the completion of an individual proceeding pursuant to the OAPA, and for such other relief that the Court finds fair and equitable.

Respectfully submitted,



Jerry L. Colclazier, OBA No. 13814
COLCLAZIER & ASSOCIATES
404 North Main Street
Seminole, Oklahoma 74868
(405) 382-1212 Telephone
(405) 382-1214 Facsimile

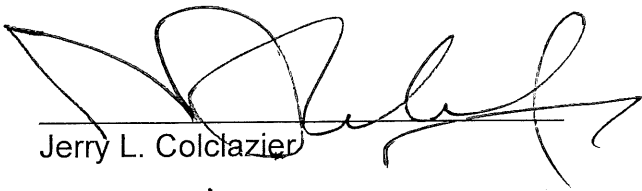
-and-

Paul Harris, OBA No. 14733
Kevin Coffey, OBA No. 11791
HARRIS & COFFEY, PLLC
435 N. Walker
Oklahoma City, OK 73102

CERTIFICATE OF SERVICE

I certify that on the 9 day of February, 2022, I sent a true and correct copy of the above and foregoing instrument, postage prepaid, to the following:

Brad S. Clark, General Counsel
Oklahoma State Department of Education
Oklahoma State Board of Education
Joy Hoffmeister, Superintendent
2500 North Lincoln Boulevard
Oklahoma City, OK 73105


Jerry L. Colclazier