IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

WESTERN HEIGHTS INDEPENDENT SCHOOL DISTRICT NO 1-41 OF OKLAHOMA COUNTY and MANNIX BARNES, Superintendent,	)	
Petitioners,	)	
vs.	)	**Case No 120,034**
OKLAHOMA STATE DEPARTMENT OF EDUCATION, OKLAHOMA STATE BOARD OF EDUCATION, and JOY HOFMEISTER, State Superintendent of Public Instruction,	)	
Respondent,	)	

PETITIONERS/APPELLANTS' REPLY BRIEF

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March 07, 2022

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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.	)	

PETITIONERS/APPELLANTS' REPLY BRIEF

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 reply to the *Appellee's Answer Brief,* and in support thereof, state as follows:

ARGUMENT AND AUTHORITIES

I.

PETITIONERS/APPELLANTS' REPLY REGARDING THE RIGHT TO AN INDIVIDUAL PROCEEDING PRIOR TO PUNITIVE ACTIONS AGAINST THE DISTRICT

Respondents respond to this argument in section II of their brief, beginning on page 16. First, Respondents argue that an individual proceeding is only required under the

Oklahoma Administrative Procedures Act, Title 75 O.S. §250 et seq. ("OAPA") if "another source of law" requires such due process, and cites to the *Stewart*[1] case in support of that proposition. The Court in Stewart set out the question and answer to this issue:

> "The question presented here is, however; when is the **granting of** such a permit that falls under the definition of license under the OAPA subject to the provisions of that Act concerning individual proceedings? In our view the answer to this question is *when either by a statute other than the OAPA* or because of constitutional mandate the issuance of such a permit is required to be preceded by a trial-type hearing."

Respondents confuse the difference in the statute between the ***granting of*** new permits and licenses, and the act of ***taking those permits and licenses away*** from holders. First, the case at bar against the school district is not the "issuance or denial of a *new* license", specifically referred to in Title 75 O.S. §314 as not requiring an individual proceeding. Rather, it is ***the revocation*** of the District's current right to operate a school district by way of the accreditation process. *Stewart* is expressly limited by its facts[2], the quest by neighboring landowners to participate in *a new request* for a license to operate a landfill, ie... for a *new* license. ("Nothing in these procedures mandates an agency hold an individual proceeding prior to the granting of every permit"). *Id.* at ¶22. As the Court in *Stewart* explained:

> "the term individual proceeding refers to only one process and it has only one meaning, to wit: the trial-type process delineated by the Legislature in §§ 309-317 of the Act and *only when opportunity for such process is required by separate statutory or constitutional mandate will judicial review be appropriate under the*

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[1] *Stewart v. Rood*, 1990 OK 69, 769 P.2d 321.

[2] In *Double LL Contractors, Inc. v. State*, 1996 OK 30, 918 P.2d 34, the Supreme Court confirmed *Stewart* holding that individual proceedings for the "*issuance* of licenses by state agencies" are only required if there is a statute or constitutional mandate, *other than the OAPA*, which requires an individual proceeding. *Id.* at ¶6.

OAPA to test agency action in granting a permit."

> "The decisions of the Supreme Court of the United States are making it crystal clear that wherever a license from the state involves interests of occupation or of substance, there is at least a `liberty,' if not `property,' involved, protected by due process of law against denial (and so, obviously, against revocation or refusal to renew) without cause, established after hearing and upon due notice.".*Id.* at ¶13.

In other words, *Stewart* holds that individual proceedings are not required in the initial permitting process unless there is some other statutory or constitutional requirement for such trial like hearings. But this case is not about Western Heights asking for a license to run a school district; rather, it is about the Department attempting to take that license away.

After Section 314(A) specifically states that "the issuance or denial of a **new** license shall not require an individual proceeding", it goes on to state that "an existing license shall not be revoked, suspended, annulled, withdrawn or nonrenewed 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." Professor Merrill's comments immediately following the quote from his Law Review article are instructive:

> "Thus terminates the transcendental nonsense which so many state judges have uttered about a license being a mere privilege without constitutional protection. From now on, *regardless of statute*, due cause, hearing and notice are ineluctable requirements for **denying or destroying a license** involving substantial interests, regardless of what the statutes say. **Under our new act, the procedure set up for "individual proceedings" applies to all these state licensing actions**." Merrill, *Oklahoma's New Administrative Procedures Act*, 17 Okla.L.Rev. 1, 40.

And that's exactly why both Western Heights' appellate cases[3], determined that the

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

District[4] was entitled to an individual proceeding prior to a denial, revocation, or probation of their license[5], which they now refer to as accreditation. 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*[6] 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,. . . .".** *Id.* at ¶9.

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[4] Under the OAPA, the District is a "party" to the Department's accreditation, probation, or takeover process, which is defined as "a **person** or agency named and participating, or properly seeking and entitled by law to participate, in an individual proceeding. Title 75 O.S. §250.3(14). "Person" means any individual, partnership, corporation, association, *governmental subdivision*, or public or private organization of any character other than an agency". Title 75 O.S. §250.3(16). "It seems clear that all persons are included who seek agency relief, **or against whom agency power is to be exerted**, or who have legally cognizable interests that may be affected by the proceedings." Merrill, *Oklahoma's New Administrative Procedures Act*, 17 Okla.L.Rev. 1, 40.

[5] Following the Revised Model Administrative Procedures Act, where Oklahoma's APA came from, "license" is defined by "the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law". Title 75 O.S. §250.3(11). Certainly, this would include the permission to operate a school district.

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

Implicitly recognizing the law of the case doctrine, Respondents attempt to assert that the holdings of the two courts of appeal were based on federal "No Child Left Behind" requirements[7]. This argument is specious for several reasons. First, the question must be asked; if this unknown federal law had such protective regulations[8], then why didn't Respondents provide them to Western Heights? Rather, the Respondents argued that Western Heights was not entitled to any notice, hearing or any protective procedures. As to whether those cases relied on federal law in order to require the Respondents to provide an individual proceeding, based on their express language, they clearly did not[9]. Rather, as Professor Merrill stated: "From now on, regardless of statute, due cause, hearing and notice are ineluctable requirements for denying or destroying a license involving substantial interests, regardless of what the statutes say". Merrill, *Oklahoma's New Administrative Procedures Act*, 17 Okla.L.Rev. 1, 40.

The Respondents cite to their regulations purportedly designed to safeguard those

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[7] Respondents fail to cite the statutory or regulatory authority for that proposition.

[8] It should be noted that there would appear to be a distinct difference between the protections of an OAPA individual proceeding and "an opportunity to be heard, presentation of evidence, and a final determination made", as asserted in Respondent's brief, p.19. For example, an opportunity to be heard could be accomplished by allowing the District to state their response to the undisclosed allegations in the four minutes allowed for public comment at State Board of Education meetings, subject to the Chairperson's "right to interrupt, terminate, or postpone" the four minute presentation "as necessary", all as set out under "public comment" section of the State Board's agendas. Conceivably, the District could offer evidence in that presentation as well, although there is no right to receive full notice of the allegations, call witnesses, cross-examine witnesses, be represented by an attorney, or any of the other rights guaranteed by the OAPA in an individual proceeding.

[9] The citation offered in support of that argument, *Western Heights v. Department of Education*, 2007 OK CIV APP 21, ¶**4**, 169 P.3d 417, simply does not discuss the fairness requirements of the federal statute. Nor do the regulations cited in Respondents' footnote 23.

who are subjected to their power. Those regulations are noteworthy not only for their sparsity, but also for their lack of any realistic protections. OAC 210:1-5-5 provides "Prior to the loss of a local school district's accreditation the district and its representative will be given an opportunity to be heard before the State Board of Education.". OAC 210:35-3-201 states in pertinent part:

> "If a school site is placed on warning or probation, the school board and administration will meet with one or more representatives from the Accreditation Section to review their accreditation status. After the review from the representative(s), a determination will be made concerning warning, probation or nonaccredited status. The Accreditation Section will then present a recommendation to the State Board of Education.

Compared to the protections of the OAPA, this regulatory scheme offers no protection at all. Further, how valuable is an "opportunity to be heard" before a state agency who has already decided the case in a secret session; who has already determined that the District "violated state law and regulations". The die had already been cast at that point. Further, the latter regulation asserted by Respondents doesn't even apply here. Indeed, section 35-3-201 deals with annual Applications for Accreditation, not the unannounced investigation as described on March 25th. However, even if it applies, it simply shows the star chamber process at the Department of Education; **after** "a school site is placed on warning or probation", the district can then meet with staff, who will determine the status, which would then be presented to the State Board, the exact same agency who had already voted to change the accreditation, without any semblance of fairness whatsoever.

Finally, the Oklahoma Constitution prevents the Respondents from exercising any adjudicative power *other than in the context of an individual proceeding* pursuant to the OAPA. (See Appellants' Proposition III, *Brief in Chief*, p. 27). This proposition was

apparently conceded by the Respondents. 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 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-emphasized[10] 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:

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[10] 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.

"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).

II.

PETITIONERS/APPELLANTS' REPLY REGARDING THE LACK OF AUTHORITY TO TAKE OVER AND/OR OPERATE A LOCAL SCHOOL DISTRICT, CONDUCT AN INTERVENTION, OR EMPLOY OR APPOINT A LOCAL SCHOOL SUPERINTENDENT

Respondents take the position that because the legislature granted them certain powers to promulgate rules for school districts in Oklahoma, that this somehow gives them unlimited powers that pertain to anything dealing with Education. As the Respondents argue, the legislature is mandated under the Constitution (Article 13, § 5) to "establish and maintain a system of free public schools"; that does not mean the legislature has the power to take over and operate a local school district, or for that matter, the Department of Education, simply because they decided those entities were not performing to their high standards. Likewise, pursuant to Article 6, Section 2, "supreme power" is vested in the Governor; but that supreme power doesn't mean he can lawfully take over an underperforming prison facility or revoke the license of an optometrist, simply because he believes they don't meet his standards. There is no limit to the Respondents' power grab. Most recently, State Superintendent Hofmeister actually signed an employment contract with the new interim superintendent on behalf of Western Heights, all without local board approval, or any statutory authority to expend public funds.

Respondents argue that the legislature "established minimum guardrails[11]" for the accreditation process, "short of vesting the State Board with complete discretion". Referring

[11] Title 70 O.S. §§3-104.3, 3-104.4.

to these two statutes as “guardrails” is laughable. Neither of these statutes diminish in any way the complete and unfettered discretion of the Respondents. Further, the statutes have no protections for school districts from arbitrary and capricious actions by the Respondents; no notice, no hearings, no appeals, nothing. Not only that, the Respondents have proven that not only are there no protections, they make these decisions in secret behind closed doors.

This case is a case in point for why guardrails and protections are needed. In their brief, the Respondents attempt to rewrite history to make it appear that these guardrails protect those who are subjected to the power of the state. The reality is that there are no guardrails at the State Board or Department. It is uncontradicted that the District was not informed of any *lawful* investigation, complaints, or other perceived problems with the District, before the State Board on March 25th went into the three hour executive session, which culminated in the Respondent’s own attorney stating that “the District has failed to comply with Oklahoma laws and regulations”, and specifically listed the determined violations. (Pet.Ex.”8"). Simply put, this was an “adjudication”, albeit an unlawful adjudication, defined as the process “to resolve issues of law or fact between parties and which results in the exercise of discretion of a judicial nature.”. Title 75 O.S. §250.3(10); Merrill, *Oklahoma’s New Administrative Procedures Act*, 17 Okla.L.Rev. 1, 25 (“The statutory term for an adjudicative operation is ‘individual proceeding’”.). Essentially, the Respondents want to conduct their adjudicative processes in secret, without all of the other onerous requirements of the OAPA, like full notice of the allegations and evidence, discovery, a fair hearing, a final order, and an opportunity to appeal.

Respondents argued (on p.15) that Western Heights had an “opportunity to be

heard" based on OAC 210:35-3-201, **prior to** any change in accreditation, as if meeting with Respondents' staff was the equivalent of a fair hearing. (See fn.12). Close reading of this regulation however, shows that the meeting is not required until ***after*** "a school site is placed on warning or probation", not before. The importance of this cannot be understated. The only two "guardrails" (Title 70 O.S. §§3-104.3, 3-104.4.), argued by Respondents as protections from arbitrary actions, as well as the above stated regulation, offer no procedural protections whatsoever; no notice, no opportunity to be heard, no discovery, no hearing, and no appeal. Combined with the refusal of the Respondents to comply with the OAPA, they have placed themselves in a position where they can act arbitrarily without any statutory or constitutional protections, and those affected have no recourse.

After the District was, after the fact, notified of these decisions, its attorney challenged those actions and most importantly, requested the evidence, both documentary and witnesses, upon which the Respondents had based their decisions, and the specific statutes, criminal laws, and regulations that the State Board deemed had been violated. (Pet.Ex."11"). Most importantly, the District requested a fair hearing, despite the fact that the State Board had already ruled on the facts and law. *Id.* **The Respondents refused to provide any of the information requested[12].** (Pet.Ex."12"). On April 9th, the Respondents

[12] Rather, the Respondent's attorney, in his March 6th letter, offered to meet with the District on April 7th or 8th. This was a late in the game attempt to "check the box" regarding meeting with "representatives from the Accreditation Section" for a review of the a district's accreditation. OAC 210: 35-3-201(c). This regulation doesn't even apply, since the punitive actions against Western Heights were not based on the District's annual application for accreditation, and the meeting was only required **after** the voted change in accreditation.

presented *via powerpoint*, likely the same presentation that the State Board received in their executive session on March 25th, adding 32 documents of evidence that were not published on their website until after the meeting.

The refusal to disclose these requested 230+ pages of evidence, **until after the meeting**, is instructive. This kind of "hide the ball" mentality would be unacceptable in *any* fair proceeding before *any* governmental entity. The only conceivable reason for such obfuscation is an attempt to maintain the element of unfair surprise, a reprehensible motive. But that's how it works at the State Board and the State Department of Education. Respondents know that a victim who is fully aware of the allegations against him will be better able to defend.

The agenda only provided for the presentation and discussion by the Board, and did not provide for any type of hearing. (Pet.Ex."14"). Nor did it provide for any type of response from the District, even if they had appeared. (Pet.Ex."14"). Placing the District on accreditation probation, only 90 days away from possible school closure, without disclosing the basis for the decision, and without giving the District the opportunity to call witnesses and submit evidence, was the second *unlawful* adjudication. Again, the State Board affirmed its earlier decision, deciding that there was a sufficient factual and legal basis to put the District on probation. Respondents argue that they properly put the District on probation. It should be noted that pursuant to the writ of mandamus, Respondents also took over the school district, placed their employees (including two superintendents) in authority, suspended employees[13] of the District, contracted with the latest Interim

[13] On August 13, 2021, asa part of the mandamus takeover, Respondents' employee and designated "Interim Superintendent" Monty Guthrie suspended Western Heights Interim

Superintendent, and expended public funds unlawfully without local Board approval.

III

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

A. The State Board Does Not Have the Statutory Authority to "Suspend" a Superintendent's License:

Respondents argue in their third proposition that there are two **statutes**[14], and only two statutes, that give them the power to "suspend" the licenses of superintendents, neither of which actually include the term "suspend". Title 70 O.S. §3-104(6) allows the Respondents to "formulate rules governing the *issuance and revocation* of certificates" for teachers and superintendents. By its language, it does not include the power to "suspend" licenses. Title 70 O.S. §3-104(17) gives the State Board the "authority to provide for the health and safety of school children and school personnel while under the jurisdiction of school authorities". Nothing about a suspension there. Finally, Title 70 O.S. §6-102.21 has nothing to do with any licensure issue; it merely requires the State Board to promulgate standards for teachers.

Essentially, the Respondents' argument is that the Legislature intended, because the Respondents provide for the welfare of students, and they have the power to issue and

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Superintendent Kim Race. (Pet.Ex."47"). Title 70 O.S. §6-101.14 requires proceedings for termination be initiated within 10 days. That was seven months ago, and the employee remains on suspension.

[14] Title 70 O.S. §3-104(6), Title 70 O.S. §6-102.21, and Title 70 O.S. §3-104(17).

revoke licenses, that they also have the power to suspend, all without the Legislature ever saying so. First, there is a distinct difference between a "suspension" and a "revocation" at the Department of Education, although both result in the loss of a person's ability to practice their profession. As in this case, a revocation requires an individual proceeding under the OAPA, with all of its requisite protections, compared to a suspension, which can be effected at the Department with only 24 hours notice and no hearing whatsoever.

The primary goal of statutory construction is to ascertain and to apply the intent of the Legislature that enacted the statute. *Samman v. Multiple Injury Trust Fund*, 2001 OK 71, ¶ 13, 33 P.3d 302. If the legislative intent cannot be ascertained from the language of a statute, as in the cases of ambiguity, a court must apply rules of statutory construction. *YDF, Inc. v. Schlumar, Inc*., 2006 OK 32, ¶ 6, 136 P.3d 656. The test for ambiguity in a statute is whether the statutory language is susceptible to more than one reasonable interpretation. *In Matter of J. L. M*., 2005 OK 15, ¶ 5, 109 P.3d 336. Any doubt as to the purpose or intent of a statute may be resolved by resort to other statutes relating to the same subject matter. *Naylor v. Petusky*, 1992 OK 88 at ¶ 4, 834 P.2d 439.

The Legislature could very well have given the State Board the stated power to "suspend" licenses. They have given that specific stated power to a number of other licensing state agencies[15], specifically stating the power to suspend licenses. But they

[15] These include the Board of Governors of the Licensed Architects, Landscape Architects and Registered Commercial Interior Designers of Oklahoma (Title 59 O.S. §46.14); Board of Podiatric Medical Examiners (Title 59 O.S. §141); Board of Cosmetology and Barbering (Title 59 O.S. §199.3); Oklahoma Accountancy Board (Title 59 O.S. §15.16); Board of Chiropractic Examiners (Title 59 O.S. §161.6); Board of Nursing (Title 59 O.S. §567.8); Oklahoma Funeral Board (Title 59 O.S. §396.2a); State Board of Pharmacy (Title 59 O.S. §353.7); State Board of Licensure for Professional Engineers and Surveyors (Title 59 O.S. §475.8); and the Athletic Trainers Board (Title 59 O.S. §528), just to mention a few.

didn't. Maybe its because with teachers and superintendents, they are almost exclusively employed by school districts and governmental employers, and the Legislature thought the best arbiter for the immediate suspension without notice or hearing, with little or no due process, is the school district employer, not the licensing agency. Perhaps that is why the Legislature specifically gave school districts the power to suspend both teachers and superintendents, specifically stating that power in the law. Indeed, Title 70 O.S. §6-101.14 and 6-101.29 provide this explicit power to local school districts, showing the Legislature had the ability to craft this stated power in the legislation had they wanted:

> Title 70 O.S. §6-101.14:
> "Whenever the local board of education or the administration of a school district has reason to believe that cause exists for the dismissal of an administrator, **and when they are of the opinion that the immediate suspension of an administrator would be in the best interests of the children in the district**, the local board of education or the superintendent of the school district **may suspend the administrator without notice or hearing**. However, the suspension of the administrator shall not deprive the administrator of any compensation or other benefits to which he or she would otherwise be entitled under his or her contract or pursuant to law. Within ten (10) days' time after such suspension becomes effective, the local board of education shall initiate proceedings pursuant to Section 6-102.4 of this title to have the administrator dismissed. However, in a case involving a criminal charge or indictment, such suspension may extend to such time as the administrator's case is finally adjudicated at a trial. Provided, however, such extension shall not include any appeal process." (Emphasis added).
>
> Title 70 O.S. §6-101.29:
> "Whenever the superintendent of a school district has reason to believe that cause exists for the dismissal of a teacher and is of the opinion that the **immediate suspension** of the teacher would be in the best interests of the children in the district, the superintendent or the local board of education upon receiving recommendation for suspension from the superintendent **may suspend the teacher without notice or hearing**. However, the suspension shall not deprive the teacher of any compensation or other benefits to which otherwise entitled. Within ten (10) days' time after the suspension becomes effective, the local board of education shall initiate a hearing for dismissal pursuant to law." (Emphasis added).

Respondents next argue that their regulations, specifically 210:1-5-6, allows for suspensions. That regulation states the same authority as Respondents state in their brief. Saying something repeatedly doesn't make it true. An administrative agency may not under the guise of its rule making power exceed the scope of its authority and act contrary to the statute which is the source of its authority. *Boydston v. State*, 277 P.2d 138, 139 (Okl.1954). Its authority to make rules for its various procedures does not include authority to make rules which extend their powers beyond those granted by statutes. *Id.*

IV

THIS CASE IS AN EXCEPTION TO THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE

In their fourth argument, Respondents argue that Western Heights has not exhausted their administrative remedies. First, on page 12 of Respondent's *Motion to Dismiss* (R.p."47"), Respondents argued that one of the administrative remedies not pursued by the Petitioners was requesting a declaratory ruling from the Respondents pursuant to OAC 210:1-5-3. Then, as if they anticipated Western Heights' response to such an argument, they conceded that pursuant to Title 75 O.S. §306, Petitioners can lawfully request the Trial Court to rule on the validity and/or applicability of Respondents' administrative rules, or lack thereof, without first asking the Respondents to do so. (*Motion to Dismiss*, R.p."47", p.13). Petitioners have requested just such relief in their third cause of action for declaratory judgment, which requests the following relief:

> "WHEREFORE, Petitioners respectfully request judgment against Respondents, determining that:
>
> A. Respondents have violated the provisions of the Administrative Procedures

Act, and all decisions regarding or affecting Western Heights or the Superintendent, including the decision placing the District on probation, should be vacated and held for naught; and

B. Petitioner's are entitled to fair notice of all allegations, copies of all exhibits and evidence, and all other fair hearing and due process protections *before* a hearing is held which might affect Western Heights' accreditation or the Superintendent's license; and

C. Petitioner's are entitled to an individual proceeding with all statutory protections and due process; and

D. State Board Members, based on their past actions and statements, are not able to serve as fair and impartial decisionmakers, and must be disqualified; and . . . ".

As set forth herein, Respondents have no procedures or regulations to *objectively* determine whether the District's accreditation should be "adjusted", leaving the Respondents wide open to unfair and arbitrary subjective determinations without objective measurements, have no procedures for fair accreditation hearings for districts, despite their decades old promises to the Courts to do so.

Further, the Supreme Court has held that "a plaintiff need not exhaust administrative remedies when the [OAPA] states that exhaustion is not required". *Waste Connections, Inc. v. Oklahoma Department of Environmental Quality*, 2002 OK 94, 61 P.3d 219. Title 75 O.S. 2001, § 306 of the OAPA provides an exception to the exhaustion rule. Section 306 provides that the validity or applicability of a rule may be determined in an action for declaratory judgment if it is alleged that "the rule, or its threatened application, interferes with or impairs...the legal rights or privileges of the plaintiff." 75 O.S. 2001, § 306(A). Section 306(D) specifically provides that the "declaratory judgment may be rendered whether the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.".

There are a number of other exceptions to the exhaustion of administrative remedies doctrine. Premature judicial review is permitted **if the question of substantive or procedural due process is raised if there is a constitutional question that will remain no matter what the agency does**, *Conoco, Inc. v. State Dept. of Health of State of Oklahoma,* 1982 OK 94, 651 P.2d 125, 128-29; **if the appeals would be futile**, *Wolff v. Selective Service Board No. 16*, 372 F.2d 817 (2d Cir. 1967); or **if the agency actions could cause irreparable injury to the party.** *Tinker Inv. & Mortgage Corp. v. City of Midwest City*, 1994 OK 41, 873 P.2d 1029. The exhaustion requirement is discretionary with the court and may be excused if the administrative remedy is unavailable, ineffective or would have been futile to purse. *Id.* When an administrative remedy is unavailable, ineffective or futile to pursue, the policy justifications for invoking the exhaustion of administrative remedies doctrine are no longer compelling. *Id.* In this case, the Superintendent presents constitutional due process issues, and with respect to both Petitioners, further administrative procedures would be futile. Finally, there is no doubt that the revocation of the Superintendent's license, and the closing of the District, would constitute irreparable harm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the _____ day of March, 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