

In the
Supreme Court of Ohio

RICHARD and JOANN BARTCHY, et al., : Case No. 07-411
: :
Plaintiffs-Appellees, : On Appeal from the
: Franklin County
v. : Court of Appeals,
: Tenth Appellate District
STATE BOARD OF EDUCATION, et al., :
: Court of Appeals Case
Defendants-Appellants. : No. 06AP-697
:

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT STATE BOARD OF EDUCATION**

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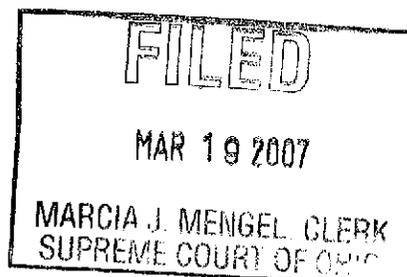


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INTRODUCTION

School districts are designed, of course, to serve the best interests of students, not of property owners. Thus, when property owners seek to change school district boundaries—i.e., to transfer territory from one school district to another—the State Board of Education focuses on the educational benefits or educational losses that the transfer would involve. Specifically, the key regulatory provision says that the State Board will give “primary consideration [] to the present and ultimate good of the pupils concerned.” Ohio Adm. Code 3301-89-01(F). To be sure, financial and operational effects on both districts are a big part as well, reflecting the reality that financial effects lead to educational effects. But the compass remains pointed at—or, more important here, *should* remain pointed at—the *educational* benefits to the students involved.

The court below improperly shifted the focus from educational benefits to financial and other factors, and worse yet, the court found that the financial and other interests of the *property owners* outweighed the interests of the school districts involved. The court below ordered a property transfer that involved *absolutely no students*, and thus no educational benefits, even though the State school board rejected the move. The appeals court moved four homes from the Cincinnati school district to the suburban Madeira school district—thus enhancing the property values of those homes, while costing tax money to the Cincinnati schools. This result, and the erroneous reasoning that supported it, warrants the Court’s review, as it threatens all school districts, but especially large urban districts, with the possibility of losing territory to serve property owners’ wishes rather than the educational interests of students.

The facts here leave no doubt that the property owners involved are acting as just that—i.e., as property owners—and not as concerned parents. Only one of the four homeowners has a school-aged child, and that child has always attended, and will continue to attend, a private school. The property owners here, Plaintiffs-Appellees Richard and Joann Bartchy and three

other sets of homeowners (the “Property Owners”), cited their desire to be in the Madeira school district to enhance “community spirit,” as they were in the Madeira city limits but not in the school district. But they were in those city limits only because, a few years ago (in 1996), these same homeowners sought that annexation, apparently under the mistaken belief that it would automatically move them into the Madeira schools. And along with “community spirit” and other less tangible factors, the tangible financial motive here was admitted: a Property Owner explained that “he assumed that the fair market value of the four homes in the proposed transfer area would increase if the transfer is approved” See Report and Recommendation of Hearing Officer (“Report”) at 17.

On the other side of the equation, all of the school boards involved were either opposed or unresponsive. The Cincinnati school board strongly opposed the transfer, pointing to the loss of taxable property and to the lack of educational benefit. (And the Cincinnati school board has also appealed to this Court.) The Madeira school board said that it was “not initiating, soliciting, nor encouraging this request,” and noted that it was operating “at or near capacity.” And the State Board approved the hearing officer’s recommendation to deny the request. The common pleas court affirmed that denial, noting the deferential standard of review in administrative appeals.

The appeals court’s decision to side with the Property Owners here is notable, especially when measured against the standard of review and the facts here. Administrative appeals call for deference, under R.C. 119.12, even at the common pleas level, and that is further magnified at the court of appeals level, as the appeals court is to ask whether the common pleas court abused its discretion in finding that the agency decision was supported by reliable, probative, and substantial evidence. The appeals court found such abuse, and found a lack of reliable evidence, because, said the court, the Cincinnati school district’s evidence of financial loss, given in

answer to a questionnaire from the State Board, was not strong enough. But the appeals court was wrong. That evidence was strong enough, especially because it must be considered relative to the fact that the Property Owners bear the burden here, and they offered no concrete educational benefits to support the move. Their mere preference is not enough to shift the burden to the Cincinnati district, especially when no one disputes that Cincinnati loses money here. To be sure, the dollars involved may seem low relative to the size of the large Cincinnati district, but that is part of the problem here. It opens the door for large districts to be constantly vulnerable to many “small” carve-outs, no one of which will bankrupt a district, of course, but together could add up to great losses for urban districts, whose large size also means that many parcels border suburban districts that may offer higher property values to homeowners who achieve transfers.

This case is thus of great public interest because of its impact on Ohio’s schools, and that public interest and impact are shown by other factors as well. First, the General Assembly has specially declared, by statute, “that the matter of school district boundaries is of great concern[.]” R.C. 3311.061. And the Assembly of course is right, as boundaries greatly affect students, school funding, and more. Second, the decision warrants review because only the Tenth District Court of Appeals hears these cases, so that court’s standards govern the whole State. Third, this decision is one of several in recent years, and those cases show the need for this Court’s guidance. For example, other no-student transfers have occurred, including some that overruled the agency’s view, amounting to a growing trend of destructive educational gerrymandering.

For these reasons and others detailed below, the Court should review this important case, and it should reinstate the State Board’s decision to focus on students’ educational needs, not just property owners’ financial or other non-educational interests.

STATEMENT OF THE CASE AND FACTS

This case arises from the general framework for school-district territory transfers under Ohio law, and from the application of that framework to the facts here.

A. Ohio law directs the State Board of Education to evaluate proposed territory transfers with a focus on educational impact.

Ohio law outlines, in both statutory and regulatory provisions, a process for proposing changes to school districts' boundaries. Revised Code 3311.24(A) allows residents of a school district to petition to have their part of the district transferred to another school district. The residents must obtain signatures from 75% of the electors in the relevant territory, and they must present the petition to the board of their current school district. That district forwards the petition to the State Board of Education for initial consideration. The State Board then reviews the petition, following a process outlined in O.A.C. 3301-89-02.

The State Board starts by sending each affected district—i.e., the district that would lose the territory, and the district that would gain it—a questionnaire asking about 17 specific factors and how those factors would be affected by the proposed transfer. Those questions, set out in O.A.C. 3301-89-02(B)(1) through (17), focus exclusively on the proposal's impact upon the districts involved. The districts send their responses to the Ohio Department of Education, which provides the State Board with an analysis of the responses. O.A.C. 3301-89-02(C) and (D).

If the State Board decides that the proposal warrants further consideration, it gives the interested parties an opportunity to be heard in an administrative hearing. The hearing officer makes a recommendation to the Board. The parties may respond to the recommendation, and the Board then decides whether to approve or reject the proposed transfer. O.A.C. 3301-89-02(E) through (I).

The Board decides the issue by applying the factors listed in the O.A.C. Ohio Adm. Code 3301-89-01(F) sets out the ultimate criterion: “A request for transfer of territory will be considered upon its merit *with primary consideration given to the present and ultimate good of the pupils concerned.*” (Emphasis added). Other, more specific criteria are set forth in O.A.C. 3301-89-03(A) and (B), but those factors all ultimately point to the educational impact on all the students involved, including all the students in both districts, not just the students in the area proposed to be transferred.

Ohio Adm. Code 3301-89-03 expressly authorizes consideration of the petitioning residents’ preferences, but the provision also expressly limits that consideration in two ways: the consideration is given only to “residents with school-age children who live in the territory” at issue, and those residents’ wishes “may only be considered and given weight when all other factors are equal.” O.A.C. 3301-89-03(C). In sum, Ohio law focuses on students’ educational needs, and it considers financial and operational effects on the school districts as one way to assess education impacts. Ohio law expressly allows residents’ wishes—specifically, parents of school-age children—to count only as a tie-breaker when other factors are evenly balanced.

The Board’s decision is subject to judicial review under R.C. 119.12. Board decisions may be appealed to the Franklin County Court of Common Pleas, and then to the Tenth District Court of Appeals, and then to this Court.

B. The State Board adopted the hearing officer’s recommendation, which found no educational benefit to any students and found a harmful loss of revenue to the Cincinnati school district.

As noted above, this case began with a petition from four sets of homeowners (the “Property Owners,” consisting of four married couples), whose four houses sat on a cul-de-sac located within the municipal limits of the City of Madeira and within the Cincinnati City School District. The residents had sought annexation in 1996, apparently under the mistaken belief that

the municipal annexation would automatically sweep them into the Madeira City School District. See Report at 4; see Transcript of Hearing (“Tr.”) at 67. The petition was sent to the State Board, which sent questionnaires to both affected school districts, the Cincinnati and Madeira districts.

The districts’ responses revealed that neither supported the transfer. The Madeira district emphatically stated that it was “**not** initiating, soliciting or encouraging” the proposal, and it further noted that its building space was “at or near capacity” and that “[s]pace is a concern.” See Report at 5, 6 (emphasis in original). The Cincinnati district opposed the transfer; it said that the transfer would cost it revenue and that it had been hurt by previous transfers. *Id.* at 9, 10.

A hearing was held in March 2005, and the evidence at the hearing demonstrated that none of the four couples had children in public schools at that time. See *Bartchy v. State Board of Education* (10th Dist.) (“App. Op.”), 2007 Ohio App. Lexis 236, 2007-Ohio-300 (attached as Ex. 1), ¶¶ 40-45. Three couples had no school-aged children at all. One couple, the Salmons, had a 15-year-old son at the time. *Id.* at ¶ 40. He attended a private high school, St. Xavier High School, and had attended private elementary school as well. *Id.* The Salmons’ older children, aged 19 and 21, had also attended private schools, and Mr. Salmon explained that he was a St. Xavier alumnus with a strong bond to the school. *Id.* at ¶¶ 40, 43. Thus, neither of the Salmons indicated that they would be likely to use either the Cincinnati or Madeira public schools for their third child’s final years in school. See Report at 17; see App. Op. at ¶ 42-43.

None of the Property Owners presented any evidence of specific educational benefits to any students. In fact, one Owner, Bernard Schlake, “admitted that he did not have any evidence about the impact that this transfer would have on any students in the area.” Report at 17.

The Property Owners primarily argued that having their properties in the Cincinnati school district “saps community spirit” within their small neighborhood and “needlessly splits their

allegiance to the City of Madeira.” See Report at 4. Along with their generalized theory of “community spirit,” they also frankly acknowledged their interest in increasing their property values. One Property Owner explained that “he assumed that the fair market value of the four homes in the proposed transfer area would increase if the transfer is approved[.]” *Id.* at 17.

On the other side of the ledger, the Cincinnati district continued its objection, stated in its questionnaire response, based on loss of revenue. That response, made part of the record pursuant to O.A.C. 3301-89-02(G), indicated that the property in the subject area had an assessed value of \$373,840 and was taxed, for school purposes, at the rate of 34.27 mills. *Id.* at 12, 15. That meant that Cincinnati would lose \$12,811.49 in revenue each year as a result of the transfer.

The hearing officer recommended against the proposal. His Report said that “the reality of the matter is that the Cincinnati Public Schools face the immediate loss of \$373,840 each year in assessed valuation,” noted that the Madeira district did not support the proposal, and concluded that “this transfer does not appear to be in the best interest of either district[.]” *Id.* at 26. The Report further concluded that the Property Owners “did not introduce any evidence regarding how this proposed transfer would benefit the students in the transfer territory,” and it found that the proposal “appears to be an attempt to increase their property value[.]” *Id.* The State Board adopted the recommendation.

C. The court of common pleas affirmed the State Board’s denial of transfer, but the appeals court reversed.

The Property Owners unsuccessfully appealed to the common pleas court. That court reviewed the record and agreed with the Board and its hearing officer that “there are presently no students, the Madeira Schools are at or near capacity while [Cincinnati] has been losing students, and finally, Appellant offered no evidence that the transfer would benefit students in the area.”

See Decision and Entry Affirming the Order of the State Board of Education (“Com. Pl. Op.”) at 9.

The Property Owners further appealed, and the Tenth District reversed. First, the Tenth District rejected a jurisdictional argument raised by the Cincinnati district.¹ Second, it held that the Cincinnati district’s undisputed revenue loss was not enough to block the transfer, because, said the court, such a loss was not shown to be large enough to seriously harm the district’s operations. See App. Op. at ¶¶ 32-34, 51-52. Finally, the appeals court concluded that with no countervailing harm to the Cincinnati district, the Property Owners’ evidence about their perceived separation from Cincinnati and their desire for closer civic ties to the city of Madeira was enough to carry the day and support the transfer. *Id.* at ¶¶ 51-52. The appeals court not only reversed the denial of the transfer; it affirmatively ordered the Board to approve it. *Id.* at ¶ 54.

The State Board now asks this Court to review and reverse that decision.

THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

The question presented here—whether a school-district territory transfer may be imposed by a court, over the School Board’s judgment, based on the wishes of property owners in the absence of any educational benefit—is worthy of review for at least two reasons. First, it establishes a new standard for such decisions, unjustified by the statute and regulations, in an area that is undoubtedly of great public interest. Second, the decision below will especially affect large urban school districts, who may see a wave of such “secession” attempts by property owners seeking to improve their property values in similar situations involving no students.

¹ The Cincinnati district argued, and continues to argue in its appeal to this Court, that the Property Owners may not use the petition process outlined in R.C. 3311.24. The Cincinnati district argues that the Property Owners, because they sought annexation into Madeira in 1996, may only use a specific statute that provides for territory transfers following such an annexation, R.C. 3311.06. See App. Op. at ¶¶ 6-20. The State Board does not address that issue here.

A. The standard set below allows the State Board’s territory-transfer decisions to be reversed without educational justification, as it shifts the focus to property owners’ wishes, and this affects a critical area of education.

No one doubts that education, in general, is one of the most important issues affecting Ohioans. And of the many aspects of education law and policy, the process for drawing school districts’ boundary lines is critical. Thus, any major precedent by the court below—which is the only appeals court to address these cases, and thus is the last word on the matter unless this Court steps in—is inherently of great interest.

Education experts agree that school district boundaries have tremendous import. They drive development patterns and population growth. Gregory S. Brown, *Getting Around Brown: Desegregation, Development and the Columbus Public Schools* 136 (Ohio State Univ. Press 1998) (detailing effects in Columbus). They affect community and student body demographics. *Id.* They affect school budgets, and in many cases, lead to great conflict. Randal C. Archibold, *Wanting Better Schools, Parents Seek Secession*, *New York Times*, Jan. 28, 2006 at A 10; Ohio State Board of Education, *Milestones* 36-37, 41 (1989); Brown, above, at 126-7, 142-3, 145-6, 161-2, 164. And as the Property Owners in this case surely appreciate, those boundaries affect property values. *Id.* at 167-8, 171. Indeed, one in-depth study identified otherwise “obscure [] school boundary laws” as one of the factors influencing the health of both school districts and the communities they serve. *Id.* at 121.

This indisputable importance is further reflected by the General Assembly’s express statutory declaration “the citizens of this state consider . . . that the matter of school district boundaries is of great concern to them, as it is to school officials and the general assembly.” R.C. 3311.061. In fact, the great significance of boundary drawing was one of the reasons the job was given to the State Board of Education, a body that combines educational expertise with electoral accountability. K. Carey, *Ohio School Law Guide* § 2.22 (2007 ed.). This arrangement

ensures that proposed changes to carefully calibrated boundaries are justified by educational benefit. Not only does the assignment to the State Board ensure a focus on educational benefit, but so, too, does the statutory and regulatory scheme, which lists many factors, but anchors them all in educational benefits. As discussed below (at 12-14), Ohio law requires thorough examination of a proposal's impact upon the students and school districts involved.

Thus, with educational benefit as the focus of Ohio law, the Tenth District's decision to focus on the benefits to the Property Owners here—with no educational benefit in sight—is worth reviewing. The key point here is that everyone agreed on the lack of educational benefit. Neither of the school districts involved—i.e., those with expertise in meeting students' needs—supported the changes, and the State Board agreed. Indeed, the Property Owners “admitted that [they] did not have any evidence about the impact that the transfer would have on any students,” Report at 17, and both the hearing officer and the common pleas court agreed with that evaluation. Only the Tenth District agreed with the Property Owners, and that was because it decided first to give weight to the Owners' wishes, despite the express regulatory rule that residents' wishes matter *only* if the other factors are tied, and even then *only* the wishes of parents of school-age children are to be given weight. See O.A.C. 3301-89-03(C) (requiring that consideration of residents' wishes be given weight only to “residents with school-age children who live in the territory” at issue, and “only . . . when all other factors are equal.”).

The appeals court's decision to have this outcome turn solely on non-educational factors in this manner is worth review because it could easily lead to a string of similar attempts by property owners to increase their homes' worth by transferring into a district perceived as “better,” even where such owners have no public-school students at home or on the horizon. Indeed, other territory-transfer decisions have also involved areas with no students in the public

schools, and that demonstrates a trend that warrants this Court’s attention. See *Levey v. State Board of Education* (10th Dist. 1995), 1995 Ohio App. Lexis 765 (transfer involved no school-age children enrolled in public schools); *Samson v. State of Ohio Board of Education* (10th Dist. 1998), 1998 Ohio App. Lexis 3750 (same, because sole family with children in public schools had moved by time of hearing).

Thus, the State Board of Education urges the Court to address this issue, and to hold that school district lines should not be moved for non-educational reasons. Even if the Court does not ultimately agree with our view on the merits—though it should—it should at least hear this case to tell the Board how such non-student, non-educational cases should be treated.

B. The standard set below will especially threaten large urban school districts.

Unstable boundary lines are troublesome anywhere, but they hit urban districts particularly hard. Those districts are already financially strapped, and they face other extra challenges as well. They do not need the problems that come from boundary changes. Unfortunately, the rule applied below—that boundaries can be changed for other than educational reasons—makes it likely that educational gerrymandering will most likely increase along the edges of Ohio’s urban school districts. That is true due to a combination of sheer size, which means their borders touch many more districts, and socioeconomic reality, which makes these schools especially vulnerable to “secession” efforts.

It is a fact of urban life around the nation that laws like R.C. 3311.24 are increasingly being used to try to cherry-pick desirable neighborhoods from urban school districts. For example, groups in Washington and California are using their states’ similar laws to push the same sort of “community spirit”-based secession efforts driving this case—efforts that subordinate the good of the districts involved to private preferences. Debby Abe, *UPlace, Tacoma Schools Fight Over Turf; Some Parents Want Territory to Switch Districts*, Tacoma News Tribune, May 22, 2004, at

B 1; Randal C. Archibold, *Wanting Better Schools, Parents Seek Secession*, New York Times, Jan. 28, 2006 at A 10. That practice is becoming increasingly common elsewhere. See Dana Hull, *Parents Seek Split From S.J. United*, San Jose Mercury News, Jan. 17, 2005 at 1A (describing the wave of transfer attempts sweeping California). That has real, and adverse, consequences: “When middle-class families abandon public schools, the children left behind suffer and the community deteriorates.” Ann Doss Helms, *Public Favors CMS Breakup*, Charlotte Observer, May 8, 2005, at 1A. At least in some of the cases in these articles, the people wishing to secede also hoped to advance their own children’s educational interests; here, no students are even involved.

This and other cases show that this national trend has reached Ohio, with property owners using R.C. 3311.24 petitions to push proposals that are clearly driven by non-educational considerations. See, e.g., *Levey*, above, 1995 Ohio App. Lexis 765 (transfer sought with no children affected). Not surprisingly, the Ohio Department of Education’s internal records shows that, since 2001, a disproportionate number of transfer petitions have been proposals to move territory from urban districts to their suburban neighbors. Ohio’s urban schools already face significant difficulties, and they should not have to face this additional challenge without a chance to have this Court address their concerns.

ARGUMENT

Appellant State Board's Proposition of Law No. 1:

Property Owners seeking to transfer territory between school districts under R.C. 3311.24(A) have the burden of proving that the transfer would further the "present and ultimate good of the students concerned" under Ohio Administrative Code 3301-89-01(F). That burden is not met if the Owners seek to enhance their non-educational interests and show no proof that the transfer will produce educational benefits to any students.

The statute and the case law show that the burden of proof should remain on the party seeking to *change* existing district boundaries, and the Administrative Code requires that such proof focus on educational benefit. The court below went astray by ignoring both of those fundamental precepts and by placing undue emphasis on the non-educational benefits of the transfer. That requires reversal.

A. Parties seeking to change school district boundaries have the burden of proving the educational merits of their proposal.

A party seeking relief has the burden of proof. *Schaffer v. Weast* (2005), 126 S. Ct. 528, 534. That same rule prevails in administrative proceedings. *Youngstown Sheet & Tube Co. v. Maynard* (10th Dist. 1984), 22 Ohio App. 3d 3, 8. Nothing in either R.C. 3311.24 or the corresponding administrative rules mandates, or even suggests, deviation from that usual rule.

Further, the reliance interests involved provide strong practical reasons for adhering to that rule. School districts rely on their existing tax bases for planning purposes, individuals rely on existing district boundaries when choosing which homes to buy, and the business community takes those lines into account in investment decisions. Gregory S. Brown, *Getting Around Brown: Desegregation, Development and the Columbus Public Schools* 126, 144, 167-8, 171 (Ohio State Univ. Press 1998). Those significant interests should not be lightly upset and provide strong practical reasons to make transfer proponents prove the merits of their proposal.

Not just any evidence will satisfy that burden; the Administrative Code mandates that the evidence focus on the educational impact of the proposed transfer. Ohio Adm. Code 3301-89-01(F) identifies the ultimate issue as “the present and ultimate good of the pupils concerned.” Consistent with that criterion, O.A.C. 3301-89-02(B) and 3301-89-03 and establish 24 factors to be considered in evaluating such transfers, and 21 of them focus on school structure, finances, or operations.² They direct the inquiry to how the schools would be comprised and function after the transfer, highlighting such operational concerns as facilities, educational programming, student diversity, fiscal stability, and administrative efficiency.

The primacy of educational considerations is also demonstrated by the limited number of, reasons for, and express subordination of the non-educational matters mentioned. Only three such matters are identified and they themselves direct attention back to educational considerations. Ohio Adm. Code 3301-89-02(B)(1) and (11) both examine the proponents’ motivations with the obvious intent of smoking out proposals advanced for non-educational purposes. Further, O.A.C. 3301-89-03(C) authorizes consideration of resident’s personal preferences only if the evidence on educational impact is in equipoise, and even then, only the wishes of residents with school-age children should be weighed.

In sum, the law is clear: R.C. 3311.24 petitioners must prove the merits of their proposals and those merits must be educational.

B. The decision below shifted the burden of proof and improperly elevated non-educational considerations.

Unfortunately, the Tenth District strayed from the precepts listed above. The decision below was largely based on what it perceived as flaws in the Cincinnati district’s evidence, such

² The Board recognizes that O.A.C. 3301-89-02(B) and 3301-89-03 set forth a total of 27 factors, but three of them are only relevant to transfers proposed by school boards and are irrelevant to petition-driven proposals. See Ohio Adm. Code 3301-89-03(B)(1) through (3).

as it purported failure to prove that the proposed transfer was a bad thing. App. Op. at ¶¶ 35-39, 51-53. But the Cincinnati district should not have had to “prove” their case for resisting the transfer, as the Property Owners did not make a prima facie case for their proposal. Both the hearing officer and the common pleas court properly found that Property Owners “offered no evidence that the transfer would benefit students in the area,” Com. Pl. Op. at 9; Report at 26. The appeals court did not conclude that this finding of “no educational benefit” was wrong, so the Cincinnati district had no burden to rebut the Property Owners’ proposal.

Moreover, the Tenth District improperly elevated the importance of the non-educational considerations driving the petition, namely, the Property Owners’ personal preference to separate from Cincinnati and form closer ties to the city of Madeira. Again, O.A.C. 3301-89-03(C) authorizes consideration of such matters as a tie breaker only when evidence on educational impact is evenly balanced, and that was not the case.

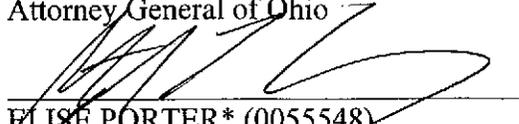
Again, neither of the school districts involved supported the proposal. Madeira was already operating at capacity; the Cincinnati district could not afford to lose revenue. And no one disputes that “Property Owners did not introduce any evidence regarding how this proposed transfer would benefit the students in the transfer territory”—or anywhere else. Report at 26; see also Com. Pl. Op. at 9. That means that the only evidence on educational impact was negative. There was therefore no tie to break, so there was no basis to mandate the transfer based on Property Owners’ non-educational submissions.

CONCLUSION

This Court should grant review and reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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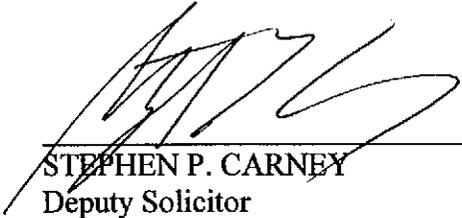
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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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CLERK OF COURTS

Richard and Joann Bartchy et al., :

Appellants-Appellants, :

v. :

State Board of Education, :

and :

Cincinnati City School District, :

Appellees-Appellees. :

No. 06AP-697
(C.P.C. No. 05CVF07-8104)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on January 25, 2007, appellants' assignment of error is sustained, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas affirming the State Board of Education's order denying the transfer is reversed, and that court is directed to enter a judgment that: (1) directs the board to approve appellants' request to transfer the proposed property to the Madeira City School District; and (2) is consistent with the reasoning of said opinion. Costs shall be assessed against appellees.

FRENCH, KLATT, and McGRATH, JJ.

By Judith L. French
Judge Judith L. French

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EXHIBIT
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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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Richard and Joann Bartchy et al.,

Appellants-Appellants,

v.

State Board of Education,
and
Cincinnati City School District,

No. 06AP-697
(C.P.C. No. 05CVF07-8104)

(REGULAR CALENDAR)

Appellees-Appellees.

O P I N I O N

Rendered on January 25, 2007

Manley Burke, Timothy M. Burke, and Emily T. *Supinger*, for appellants.

Marc Dann, Attorney General, Todd R. *Marti*, and Reid T. *Caryer*, for appellee State Board of Education.

David C. *DiMuzio, Inc.*, and David C. *DiMuzio*, for appellee Cincinnati City School District.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Appellants, Joann and Richard Bartchy, Donna and Robert Salmon, Marilyn and Bernard Schlake, and Beverly and Wayne Morris (collectively "appellants"), appeal from the judgment of the Franklin County Court of Common Pleas, which affirmed the order of the State Board of Education (the "board") denying appellants'

petition to transfer their property from the Cincinnati Public School District ("CPSD") to the Madeira City School District ("MCSD").

{¶2} In March 2000, eight residents residing on Windridge Drive in the city of Madeira, Hamilton County, Ohio, submitted to CPSD a petition proposing to transfer their four properties, located in the city of Madeira, from CPSD to MCSD. As required by R.C. 3311.24(A), these eight residents were "equal to or more than the 75% required of the qualified electors residing within the portion of the property proposed to be transferred."

{¶3} In August 2000, CPSD submitted the petition to the Ohio Department of Education ("ODE"). In accordance with Ohio Adm.Code 3301-89-02(B), and in response to ODE's request, both CPSD and MCSD submitted answers to 17 questions and other information. On May 13, 2004, the board adopted a resolution declaring its intention to consider the petition.

{¶4} A hearing officer held an evidentiary hearing on the matter on March 23, 2005. On April 28, 2005, the hearing officer issued a recommendation that the board deny the transfer. Appellants filed objections, and CPSD responded. On July 15, 2005, the board adopted a resolution adopting the hearing officer's recommendation and denying the transfer

{¶5} On July 27, 2005, appellants appealed the board's decision to the trial court. On June 8, 2006, the court issued a decision affirming the board's denial of the transfer. Appellants filed a timely appeal to this court, and they raise the following assignment of error:

THE TRIAL COURT ERRED IN FINDING THAT THE
DECISION OF THE [BOARD] IS SUPPORTED BY

RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE
AND IS IN ACCORDANCE WITH LAW.

{¶6} Before reaching the merits of appellants' assignment of error, we first consider CPSD's argument that the board lacked subject-matter jurisdiction to consider the proposed transfer. Here, appellants filed the petition pursuant to R.C. 3311.24, and the board made its decision pursuant to that section. CPSD argues, however, that R.C. 3311.06 is the exclusive provision by which petitioners may seek transfers of property that has been the subject of an annexation proceeding. That section applies here, CPSD argues, because the property subject to the transfer petition was annexed to the city of Madeira in 1996. The board did not take a position on the jurisdictional question.

{¶7} We begin with the principle that, "[w]here the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus. Thus, "[i]t is only where the words of a statute are ambiguous or are based upon an uncertain meaning or there is an apparent conflict of some provisions that a court has the right to interpret a statute." *Drake-Lassie v. State Farm Ins. Cos.* (1998), 129 Ohio App.3d 781, 788, citing *Kroff v. Amrhein* (1916), 94 Ohio St. 282. And, "[u]nless words are otherwise defined or a contrary intent is clearly expressed," we must give words contained in a statute "their plain and ordinary meaning." *Cincinnati Metro. Hous. Auth. v. Morgan*, 104 Ohio St.3d 445, 2004-Ohio-6554, at ¶6, citing *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120, 122, and *Youngstown Club v. Porterfield* (1970), 21 Ohio St.2d 83, 86.

{¶8} Here, our analysis concerns two statutory provisions relating to the same subject matter: transfers and/or annexations for school purposes. All statutes that relate to the same general subject matter "must be read *in pari materia*. * * * And, in reading such statutes *in pan materia*, and construing them together, this court must give such a reasonable construction as to give the proper force and effect to each and all such statutes." *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 372, quoting *Johnson's Markets, Inc. v. New Carlisle Dept. of Health* (1991), 58 Ohio St.3d 28, 35. With these principles in mind, we turn to the statutes at issue.

{¶9} R.C. 3311.24(A) provides for the filing of a petition, signed by 75 percent of the qualified electors residing within the portion of a city, exempted village or local school district proposed to be transferred, requesting a transfer of territory from one district to an adjoining district. Pursuant to this provision, the petition is filed with the board of education of the district in which the proposal originates, and that board must submit the petition to the state board. The state board then sets the matter for hearing, as was done in this case.

{¶10} R.C. 3311.06 addresses property that is the subject of an annexation for municipal purposes and prescribes procedures for annexing that property for school purposes. Pursuant to R.C. 3311.06(C)(1), "[w]hen all of the territory of a school district is annexed to a city or village," that territory automatically becomes part of the city or village school district, and "legal title to school property in such territory for school purposes" vests in the board of education of the city or village school district. See, also, *Smith v. Granville Twp. Bd. of Trustees* (1998), 81 Ohio St.3d 608, 616 ("[t]he language

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of R.C. 3311.06(C)(1) indicates that assimilation of the annexed territory's school district into the acquiring territory is mandatory").

{¶11} However, where the annexed territory includes only a part of a school district, R.C. 3311.06(C)(2) provides the following:

When the territory so annexed to a city or village comprises part but not all of the territory of a school district, the said territory becomes part of [the city or village school district] only upon approval by the state board of education, unless the district in which the territory is located is a party to an annexation agreement with the city school district.

Any urban school district that has not entered into an annexation agreement with any other school district whose territory would be affected by any transfer under this division and that desires to negotiate the terms of transfer with any such district shall conduct any negotiations under division (F) of this section as part of entering into an annexation agreement with such a district.

Any school district, except an urban school district, desiring state board approval of a transfer under this division shall make a good faith effort to negotiate the terms of transfer with any other school district whose territory would be affected by the transfer. Before the state board may approve any transfer of territory to a school district, except an urban school district, under this section, it must receive the following:

(a) A resolution requesting approval of the transfer, passed by at least one of the school districts whose territory would be affected by the transfer;

(b) Evidence determined to be sufficient by the state board to show that good faith negotiations have taken place or that the district requesting the transfer has made a good faith effort to hold such negotiations;

(c) If any negotiations took place, a statement signed by all boards that participated in the negotiations, listing the terms agreed on and the points on which no agreement could be reached.

{¶12} R.C. 3311.06(l) also provides the following:

No transfer of school district territory or division of funds and indebtedness incident thereto, pursuant to the annexation of territory to a city or village shall be completed in any other manner than that prescribed by this section regardless of the date of the commencement of such annexation proceedings, and this section applies to all proceedings for such transfers and divisions of funds and indebtedness pending or commenced on or after October 2, 1959.

{¶13} CPSD argues that, because the property at issue here was annexed to the city of Madeira in 1996 and comprised "part but not all of the territory of a school district," R.C. 3311.06(C)(2) applies to preclude transfer of the property to MCSD for school purposes unless, pursuant to R.C. 3311.06(C)(2)(a), the board receives a **resolution** requesting approval of the transfer from CPSD or MCSD. Because the board has not received such a resolution from either school district, CPSD concludes, the board did not have jurisdiction to consider appellants' petition.

{¶14} Appellants respond, however, that R.C. 3311.06 provides one method, but not the exclusive method, for transferring property that was once annexed. We agree. Nothing in R.C. 3311.06 precludes property owners from petitioning for transfer under R.C. 3311.24. Although R.C. 3311.06(l) states that no transfer "pursuant to the annexation of territory" may occur except through R.C. 3311.06, we note that the petition for transfer at issue here was not made "pursuant to the annexation," but was made independent of it.

{¶15} The board's rules also appear to maintain this method for property owner petitions, independent of the annexation process. Ohio Adm.Code 3301-89-02 sets out the procedures for a request for transfer of territory under R.C. 3311.06 or 3311.24. Ohio Adm.Code 3301-89-02(A) identifies three types of "[i]nitial requests" for property

transfers: (1) a school district may request a transfer under R.C. 3311.06 by sending a letter to the board; (2) a board of education desiring to transfer property under R.C. 3311.24 may request a transfer by filing a request with the board; and (3) persons "interested in requesting a transfer of territory from one school district to another, for school purposes, pursuant to [R.C. 3311.24], may petition to do so through the resident board of education." Ohio Adm.Code 3301-89-02(A)(3). These rules give no indication that an annexation in 1996 would preclude a petition for transfer under R.C. 3311.24 in 2000.

{¶16} In R.C. 3311.061, the General Assembly codified the intent behind 1986 amendments to R.C. 3311.06: "[T]o provide a mechanism whereby urban area school officials and boards of education that are willing to work together to establish cooperative education programs for the benefit of the school children in their districts may, through a process of negotiation and compromise, jointly resolve some of the issues related to the treatment of school territory annexed for municipal purposes." The petition process in R.C. 3311.24, which requires the participation of all affected school districts, does not interfere with this intent.

{¶17} Finally, citing Smith, CPSD asserts that "[t]he Ohio Supreme Court has ruled that all school territory transfers in annexed areas must be governed by the R.C. §3311.06." (Emphasis sic.) We disagree with CPSD's reading of Smith.

{¶18} In Smith, a property owner sought to annex property, for municipal purposes, to the city of Newark; for school purposes, however, the property would remain within the boundaries of the village of Granville schools. The board of county commissioners denied the annexation request, and the common pleas court affirmed.

The court of appeals initially found that commissioners had applied the incorrect test for determining whether to grant the request, but ultimately determined that annexation of the property would cause overcrowding in the Granville schools and, on that basis alone, affirmed the denial.

{¶19} On appeal, the Ohio Supreme Court reversed. Although the court concluded that the court of appeals had correctly applied the test for determining whether annexation was appropriate, the court concluded that the court of appeals erred by considering the issue of overcrowding. The court stated, in pertinent part:

* * * However, consideration and resolution of issues that might require a transfer of school district properties to an adjacent district to balance an inequity that arises due to annexation of property under R.C. 709.02 to 709.34 are reserved solely for the State Board of Education. Under such conditions, R.C. 3311.06 provides a mechanism whereby a school district may petition to transfer territory between districts. * * *

(Footnote omitted.) Smith at 615-616.

{¶20} The court did not consider whether R.C. 3311.06 is the exclusive method by which a transfer of previously annexed property may occur, and did not hold as much. Instead, the court concluded that exclusive jurisdiction for considering and resolving issues of property transfers for school purposes lies with the board, not the county commissioners. The court also stated that R.C. 3311.06 provides "a mechanism," but never stated that R.C. 3311.06 was "the mechanism," for transferring annexed property. These conclusions are not inconsistent with the trial court's conclusion that the board had authority to consider the transfer petition under R.C. 3311.24. Therefore, we reject CPD's argument that the board lacked jurisdiction, and we turn to the merits of the case.

{¶21} In their sole assignment of error, appellants argue that the trial court erred by finding that the board's denial of the transfer is supported by reliable, probative, and substantive evidence and is in accordance with law. In an administrative appeal, pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with the law. In applying this standard, the court must "give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶22} The Ohio Supreme Court has defined reliable, probative, and substantial evidence as follows:

* * * (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

(Footnotes omitted.) *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571.

{¶23} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rosford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the court of common pleas' determination that the board's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. The term

"abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. However, on the question of whether the board's order was in accordance with the law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶24} As noted, the Ohio Administrative Code prescribes the standards and procedures by which a hearing officer must consider a petition to transfer under R.C. 3311.24. Ohio Adm.Code 3301-89-01(F) provides that "[a] request for transfer of territory will be considered upon its merit with primary consideration given to the present and ultimate good of the pupils concerned." Ohio Adm.Code 3301-89-02(B) provides a list of 17 questions that both school districts must answer to aid in the consideration, and those answers become part of the record. Ohio Adm.Code 3301-89-03 also lists ten additional factors the hearing officer must consider

{¶25} Here, the hearing officer reviewed the districts' answers to the 17 questions and concluded that "only a few of them apply." (Hearing Officer's Report and Recommendation ["R&R"] at 20.) The hearing officer also concluded: "However, because no students are involved in the proposed area of transfer, the only issue of significance is the loss to [CPSD] of the assessed valuation of these four properties." (R&R at 20.)

{¶26} The hearing officer also considered the ten additional factors and concluded that eight of the ten factors did not apply in this case. As to the remaining

two applicable factors, arising from Ohio Adm.Code 3301-89-03(B)(5) and (6), the hearing officer found the following:

(5) *The transfer shall not cause, preserve, or increase racial isolation.*

This factor is not significant in this case.

(6) *All school district territories should be contiguous unless otherwise authorized by law.*

The school district territories will remain contiguous if the proposed transfer of territory is approved.

(Emphasis sic. R&R at 21.)

{¶27} The hearing officer appropriately acknowledged that, "[w]hen a transfer of school districts is proposed, a balancing must take place between many competing factors in order to achieve the desired result of achieving what is in the best interests of the students concerned." *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1990), 62 Ohio App.3d 308, 323. The "students concerned" are not just those students within the transferring territory; rather, all students in both the transferring and acquiring territories must be considered. *Id.* "Thus, evidence that a transfer may be in the best interest of the students in the transfer area must be balanced against evidence of the potential harm such a transfer may have on the other students in the affected districts." (R&R at 25.)

{¶28} When balancing the interests of students in the transferring area against the interests of the students in the relinquishing area, the hearing officer made two key findings. First, the hearing officer concluded that appellants had presented no evidence of the impact on students in the transferring territory. Rather, "[t]he students in the transfer territory attend private school and would therefore not benefit from the

proposed transfer." (R&R at 26-27.) In essence, because no students in the transferring area attended public school, there was no evidence in favor of the transfer.

{¶29} Second, recognizing no evidence in favor of the transfer, the hearing officer turned to the evidence of the harm that would result and considered the only factor he found to be significant, i.e., the financial impact of the transfer upon CPSD. At the hearing, CPSD presented no testimony concerning these financial impacts. However, CPSD's answers to the questions posed by ODE's questionnaire and the attached "INFORMATION UPON WHICH TO BASE CONSIDERATION OF SCHOOL TERRITORY TRANSFER FOLLOWING ANNEXATION, SECTION 3311.24, O.R.C." addressed these impacts. The information form included statistics on enrollment and valuation for the current year and the past four years, the estimated future growth for the next three years, and tax rates. The form also stated that the number of students in the transferring area was "[c]urrently unknown[.]" The assessed valuation of the transferring area was identified as \$373,840.

{¶30} The hearing officer made findings of fact concerning the financial impact of the proposed transfer, as well as the harm from previous transfers, as follows:

12. The market value of these four properties for real property tax purposes presently totals \$373,840 in a[ss]essed valuation (a[ss]essed valuation being 35% of market value). State Board Ex. 24.

* * *

29. [CPSD's] responses to the 17 questions and 10 additional factors [show] that the transfer would involve the loss of \$373,840 in a[ss]essed valuation. (Note that assessed valuation is approximately 35% of fair market value). The district's responses also show that losses from prior transfers have been suffered by Cincinnati Public Schools exceeding \$18 million in assessed valuation.

Although a large district, any transfer would be detrimental to the fiscal or educational operation of the district. It is clear that prior transfers have caused substantial harm to the district. State Board Ex. 24.

(R&R at 15, 18-19.)

{¶31} The trial court declined to disturb the hearing officer's determinations as to the appropriate weight to be given the evidence of financial impacts. The trial court concluded that the financial "windfall to [MCSD] would not be significant, nor likewise would the loss to CPS[D]. Nevertheless, it is still one of the considerations used in the balancing test."

{¶32} We agree that, pursuant to Ohio Adm.Code 3301-89-02(B)(9), it is appropriate to consider whether "the loss of either pupils or valuation [will] be detrimental to the fiscal or educational operation of the relinquishing school district[.]" This court has previously stated: "This question may be answered by evidence showing the projected loss of revenue to a school district and a finding concerning how the loss of revenue is a "factor significant enough to stand in the way of the proposed transfer." Crowe v. State Bd. of Edn. (Oct. 26, 1999), Franklin App. No. 99AP-78, quoting Levey v. State Bd. of Edn. (Feb. 28, 1995), Franklin App. No. 94APE08-1125.

{¶33} In Crowe, the hearing officer concluded that the loss of property tax dollars from the proposed transfer would be "detrimental to the fiscal or educational operation" of the transferring district. On review, the trial court found, and this court affirmed, however, that no evidence showed how much money the transferring district would lose.

This court stated:

*** We do not believe that the purpose of Ohio Adm.Code 3301-89-02(B)(9) is to simply determine whether a relinquishing school district will lose funds. Since Ohio

school districts receive their funding primarily from state revenue paid on a per pupil basis, and local revenue "which consists primarily of locally voted school district property tax levies" (see *DeRolph v. State* (1997), 78 Ohio St.3d 193, 199, 677 N.E.2d 733), almost every transfer of property from a school district will negatively impact their funding. The key to Ohio Adm.Code 3301-89-02(B)(9) is whether the loss of funds would be "detrimental to the fiscal or educational operation of the relinquishing school district." This requires a finding of how the loss of income would affect the relinquishing school district. Simply presenting evidence that the relinquishing school district will lose funds is insufficient to show that the loss of funds would be detrimental to the fiscal or educational operation of the school district.

(¶34) Here, the hearing officer's findings, and the trial court's affirmation of those findings, are contrary to *Crowe*. While the hearing officer concluded that "any transfer would be detrimental to the fiscal or educational operation of the district[.]" there was no evidence, and the hearing officer made no finding, as to how the loss of income would affect CPSD. Instead, the hearing officer relied on CPSD's answers concerning the assessed valuation of the transferring property and its unsupported "Yes" to the question whether the loss of "either pupils or valuation" would "be detrimental to the fiscal or educational operation of the relinquishing school district[.]" Under *Crowe*, this simple assertion that CPSD will lose valuation is insufficient to show what the loss of funds would be or that the loss would be detrimental to the fiscal or educational operation of the district. Therefore, as to any financial impacts upon CPSD, the trial court erred in finding that the board's order was supported by reliable, probative, and substantial evidence. Cf. *Hicks v. State Bd. of Edn.*, Franklin App. No. 02AP-1183, 2003-Ohio-4134, at ¶18 (finding evidence to support financial impact determination and stating: "[u]nlike the petitioners in *Crowe*, East Cleveland presented testimony from the

district treasurer, the library director, and real estate appraiser evidencing the detrimental effects of the transfer").

{¶35} The hearing officer's factual finding that "[i]t is clear that prior transfers have caused substantial harm to the district" is equally unsupported. Question IV of the information form attached to the questionnaire asked for information concerning "previous losses through annexations and transfers, if any." CPSD identified the following:

1. Tax year 2001 (Forest Hills L.S.D.) 125 Students
\$16,131,490 (assessed)
2. Tax year 1997 ([Madeira] C.S.D.) 163 students
\$1,941,630 (assessed)

{¶36} At the hearing, CPSD presented no evidence to support these statistics. In their post-hearing brief, as before this court, appellants assert that these numbers are simply wrong and that a review of the legal opinions concerning these prior transfers shows that they are wrong. See *Cincinnati City School Dist. v. State Bd. of Edn.* (1996), 113 Ohio App.3d 305 (affirming trial court's judgment granting property transfer from CPSD to MCSD and referencing referee's finding that 14 school-age children lived in 48 homes at issue); *Schreiner v. State of Ohio, Dept. of Edn.* (Nov. 9, 1999), Franklin App. No. 98AP-1251 (Memorandum Decision) (reversing trial court's judgment affirming board's denial of proposed transfer from CPSD to Forest Hills Local School District, stating that proposed area consisted of 125 homes, and referencing referee's findings that the loss of 20 public school students would have de minimis effect on educational operation, minority student ratio, and fiscal resources of CPSD).

{¶37} CPSD appears to have conceded the inaccuracy of these numbers. In its response to appellants' objections to the hearing officer's report and recommendation, CPSD stated:

[Appellants] argue that a clerical error was made in the listing of the number of students transferred in prior cases. That mistake has nothing to do with the merits of the pending transfer request and that figure was not cited by the Hearing Officer and not relied on by him.

{¶38} While we agree with CPSD that the hearing officer did not cite to the figures provided by CPSD, the hearing officer did make a finding that "prior transfers have caused substantial harm to the district." (R&R at 19.) Regardless of whether the figures concerning the size of previous transfers were accurate, there was no evidence before the hearing officer to support a finding that the transfers "caused substantial harm[.]" Thus, the trial court erred in concluding that the board's decision, in this respect, was supported by reliable, probative, and substantial evidence.

{¶39} We note that this lack of evidence concerning financial impacts upon CPSD was deliberate. At the outset of the hearing, CPSD's counsel stated that CPSD would not be presenting any evidence or testimony because, as a matter of law, appellants "cannot meet their burden of showing the present and ultimate good of the students since none are at risk currently. It's a complete and total non-event for purposes of the ultimate good of any student involved here." (Tr. at 18.) We turn to that issue now.

{¶40} As the trial court found, the evidence before the hearing officer showed that only one school-age student lived within the transfer area at the time of the March 23, 2005 hearing. That student's mother, Donna Salmon, testified that she and

her husband had three children who, by the time the hearing occurred in 2005, were 21, 19, and 15 years old. None of the children had attended public school; all had attended private elementary and high schools. At the time of the hearing, the Salmons' 15-year-old son, Mark, attended St. Xavier High School, a private school.

{¶41} On cross-examination, Mrs. Salmon was asked:

Q. To the best of your knowledge, if this transfer would have been granted back to 2000 at the time that it was submitted, would it have made any difference as to the ability of your children to attend St. Gertrude's [private elementary school] or St. Xavier High School?

(Tr. at 60.) Mrs. Salmon responded: "No, it wouldn't have." Id.

{¶42} Mrs. Salmon was not asked, nor did she testify, whether she and her husband wanted the option in 2000, when the petition was filed, to enroll any of their three school-age children in public school or whether their decisions might have been different if the transfer had occurred closer to the time of the petition.

{¶43} Robert Salmon, Donna's husband and Mark's father, also testified. In pertinent part, Mr. Salmon confirmed Mark's attendance at St. Xavier, as well as his own graduation from St. Xavier. He stated:

* * * I have a strong bond to St. Xavier High School. There's a tremendous sense of community there. Both of my sons attended; one graduated last year. My other son is in attendance right now. There's a strong sense of commitment and community there. But without an option to maintain those relationships with the Madeira parents at all, that option cannot exercised [sic]. It can't be because it doesn't exist.

If this petition is granted, that option exists. Maybe not for myself or my wife, but maybe for the next people that own the house. We've moved once in the last 21 years, and we plan on staying there a long time. But for the next people

that come in, that option will exist, and it doesn't right now.
I'd like to see that exist for them.

(Tr. at 116-117.)

{¶44} Richard Bartchy testified and, in pertinent part, confirmed that only one school-age student currently lived within the transfer area, and that this one student attended private school. Bernard Schlake also testified that no school-age children had lived in his home in the transfer area.

{¶45} Thus, the testimony of all witnesses confirmed that Mark was the only school-age student living within the transfer area and that he attended private school. Given the testimony, it was reasonable for the hearing officer to conclude, as he did, that "there are no students in the proposed transfer area who attend [CPSD]; all students residing in the proposed transfer area attend private schools and it is likely that they will continue to attend private school even if the transfer is granted." (R&R at 26.) We find, however, that this factual finding did not reasonably lead to the legal conclusion that appellants had presented no evidence in favor of the transfer.

{¶46} First, we reject the notion that evidence showing that the one school-age student who could be affected by a transfer currently attends private school and is likely to continue to attend private school, precludes further consideration of other evidence favoring the transfer. Other proposed transfers have similarly affected few, if any, school-age students currently living within a transfer area and attending public school.

{¶47} For example, the "Ken Arbre" transfer from CPSD to MCSD involved a subdivision consisting of 48 homes located within the city of Madeira. In that case, the referee found that none of the subdivision's 14 school-age children attended any of CPSD's schools, "except one child who attended an alternative Cincinnati school and

was scheduled to graduate in 1994 [two years after the petition was filed and less than a year after the referee's report and recommendation]. Three school-age children from the subdivision were home-schooled." Cincinnatiat 308.

{¶48} Also, in Levey, the transfer area consisted of a ten-acre parcel of land. A Toledo schools executive testified that there were 11 school-age children who lived in the transfer area. However, one of the children had moved out of the territory, and "[a]ll ten of the school-age children who currently reside in the territory attend private schools." See, also, In re Proposed Transfer of *Territory* from Clermont Northeastern Local School Dist. to West Clermont Local School Dist., Franklin App. No. 02AP-257, 2002-Ohio-5522 (involving one school-age child); Samson v. State of Ohio, *Bd. of Edn.* (Aug. 13, 1998), Franklin App. No. 97APE12-1702 (involving three school-age children, all of whom moved out of the transfer area after the hearing and before the board's decision).

{¶49} In fact, in Levey, this court rejected the hearing officer's finding that, "since no current school-age child would be affected by the decision because they all attend private schools, it was merely the personal preference of the petitioners to transfer[.]" Instead, the trial court found, and this court affirmed, that other evidence existed to support the transfer, including evidence that the transfer area was an island, the distance to the acquiring district schools would be less, and transportation safety would be improved. The court concluded:

Rather, evidence demonstrates that the desired result of achieving what is "the present and ultimate good of the pupils concerned" is obtained if the proposed transfer is permitted based on opportunities for participation and involvement in the neighborhood schools with neighboring

children, greater safety in transportation and a decrease in distances to be traveled. * * *

{¶50} Based on this court's prior decisions, we similarly reject, and find that the trial court abused its discretion by not rejecting, the hearing officer's legal conclusion that, since only one school-age student lived within the transfer area and that student attended private school, appellants had presented no evidence in favor of the proposed transfer. Instead, the hearing officer should have examined all of the evidence presented and then weighed the competing factors to determine whether a transfer was appropriate.

{¶51} Having determined that the hearing officer made legal errors, we must consider whether any evidence remains to support the board's order. In considering the evidence disfavoring the transfer, the hearing officer stated:

For [CPSD], the only evidence to rely on is their responses to the 17 questions outlined above. In particular, [CPSD] is concerned that there are racial isolation implications and believes that loss of either pupil or valuation is detrimental to the fiscal or educational operation of its district. Furthermore, previous transfers have caused substantive harm to [CPSD]. Because the one student in the proposed transfer area attends private school, the issue is not whether [MCSD] can provide a better education than [CPSD]. The primary issue is whether the benefit to the students in the transfer area outweighs the harm to the other students in the affected district. [Appellants] did not introduce any evidence regarding how this proposed transfer would benefit the students in the transfer territory and [MCSD] did not take part in the request. After a careful balancing of the factors involved, it is apparent that a greater harm is caused if the proposed transfer of territory is approved.

(R&R at 27.)

{¶52} We have already concluded, however, that there is no evidence to support the hearing officer's finding that the transfer would have a detrimental impact on the

fiscal or educational operation of CPSD. And, in any event, the trial court concluded that any financial impact on CPSD, or the resulting "windfall" to MCSD, was "miniscule," "de minimis" or not significant. We also concluded that there is no evidence to support the hearing officer's finding that prior transfers have caused substantial harm to CPSD. And, as to any racial implications, the hearing officer concluded, and the trial court agreed, that the racial isolation factor was "not significant in this case." (R&R at 21.) Thus, we can only conclude that no reliable, probative, and substantial evidence supports the board's order denying the transfer, and we find that the trial court abused its discretion in affirming the board's decision.

{¶53} Having concluded that there is no evidence to support the board's denial of the transfer, we turn to the question whether appellants met their burden to prove entitlement to the transfer. To that end, we need only look to the hearing officer's own findings of fact to find evidence supporting the transfer. Specifically, four homeowners testified concerning their isolation from CPSD, their separation from the city of Madeira for certain purposes, including voting, their geographic connection to the city of Madeira, and the positive impact a transfer would have on their community spirit and pride. We note, too, as the trial court noted, that appellants also presented evidence of geography as to roads to the nearest schools and their proximity to the transfer area. This evidence is representative of evidence supporting transfer in many other cases. See, e.g., *Bd. of Edn. of Rossford Exempted Village School Dist.* at 708 (in affirming board's order transferring property to Perrysburg school district, citing evidence showing "that Perrysburg is the focus of the [petitioning] family's social, business and community life"); *In re Proposed Transfer of Territory from Clermont Northeastern Local School Dist.*

(affirming trial court's reliance, in part, on transportation safety and school proximity evidence); *Levey* (relying, in part, on evidence regarding school proximity, transportation safety, and "opportunities for participation and involvement in the neighborhood schools with neighboring children"). Cf. *Trout v. Ohio Dept. of Edn.*, Franklin App. No. 02AP-783, 2003-Ohio-987 (affirming board's denial of transfer based, in part, on evidence of no positive impact on transportation time or safety and on lack of evidence "to show how a transfer would promote a sense of community among the residents of the proposed transfer area"). Thus, in the face of no evidence supporting a denial of the transfer, we conclude that appellants presented evidence to support the transfer and met their burden to prove entitlement to the transfer.

{¶54} For these reasons, we sustain appellants' assignment of error, and we reverse the decision of the Franklin County Court of Common Pleas affirming the board's order denying the transfer. The trial court is directed to enter a judgment that: (1) directs the board to approve appellants' request to transfer the proposed property to MCSD; and (2) is consistent with the reasoning of this opinion.

Judgment reversed with instructions.

KLATT and McGRATH, JJ., concur.
