

IN THE SUPREME COURT OF OHIO

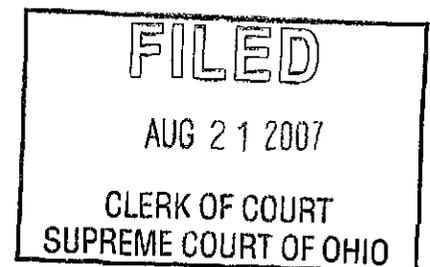
Cincinnati City School District : Case No. 07-0411
Board of Education, :
 :
Appellant, :
 :
v. : On Appeal from the Franklin
 : County Court of Appeals, Tenth
 : Appellate District
 :
Richard and Joann Bartchy, *et al.*, :
 :
Appellees. :
 :
 :

MERIT BRIEF OF AMICUS CURIAE THE OHIO SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF APPELLANTS

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STATEMENT OF FACTS¹

The proposed transfer involves four properties that were annexed into the City of Madeira in 1996. (Appx. 53.) In March 2000, the property owners petitioned for a transfer of territory, pursuant to R.C. 3311.24, from the Cincinnati City School District (“Cincinnati Schools”) to the Madeira City School District (“Madeira Schools”). (Appx. 51.) Cincinnati Schools submitted the petition to the Ohio State Board of Education (“State Board”). (Appx. 51.) Both the Madeira Schools and the Cincinnati Schools provided answers to the 17 questions set forth in Ohio Adm. Code 3301-89-02(B). (Appx. 52.) On March 23, 2005, an evidentiary hearing was held before a hearing officer appointed by the State Board. (Appx. 52.)

On April 28, 2005, the Hearing Officer issued a Report and Recommendation proposing that the State Board deny the requested transfer. The evidence showed that:

- the assessed valuation of the four properties for real property tax purposes totals \$373, 840;
- no public school students currently live in the proposed area of transfer;
- the only school-age child who lives in the proposed transfer area attends private school;
- the property owners presented no evidence concerning the ultimate good of any students who currently reside in the proposed area of transfer if the transfer is approved;
- the property owners feel disconnected with the City of Madeira because their property is in Cincinnati Schools;
- the subject neighborhood is in an area where many municipal, township, and school district boundaries come together;
- the property owners assumed the fair market value of the four homes would increase if the transfer is approved;
- there are approximately 1,490 students enrolled at Madeira Schools;
- there are approximately 37,159 students enrolled at Cincinnati Schools;

¹ The Ohio School Boards Association (OSBA) is a private, not-for-profit statewide association of public school boards founded in 1955 to encourage and advance public education through local citizen responsibility. Membership is open to all public school boards of education in Ohio. OSBA currently has a total membership of 723 public school boards across the state.

- space at all Madeira Schools' buildings is at or near capacity;
- the Madeira Schools did not initiate, solicit, or encourage the request, nor did it participate in the hearing;
- Madeira Schools' building distances are 2.2-3.5 miles and Cincinnati Schools' building distances are 1 and 2 miles from the petitioning area. (The Hearing Officer made no explicit finding as to distances, but the record evidence is undisputed).

(Appx. 50, 54-58.)

The Hearing Officer made his recommendation after considering the 17 questions listed in Ohio Adm. Code 3301-89-02(B), which focus on the proposal's impact on the district's involved, the 10 factors listed in Ohio Adm. Code 3301-89-03, and most importantly, Ohio Adm. Code 3301-89-01(F), which focuses on the "present and ultimate good of pupils concerned." In denying the requested transfer, the Hearing Officer found that the petitioners failed to present reliable, substantial, and probative evidence in support of their request. (Appx. 65.) He based his decision, in important part, on the lack of evidence concerning the ultimate good of any students who currently reside in the transfer area. (Appx. 65.)

In making his decision, the Hearing Officer noted that the "present and ultimate good of the pupils concerned" is not limited to the interests of those students in the proposed transfer territory, but rather, the inquiry must involve all students affected by the requested transfer, including the students in the relinquishing district. (Appx. 63.) In addition, he noted that the transfer request by the property owners appeared to be "an attempt to increase their property value by transferring to a more desirable school district." (Appx. 64.) The Hearing Officer found that the transfer would result in a financial windfall to Madeira Schools, that previous transfers had caused substantial harm to the Cincinnati Schools, and that the transfer would not be in the best interest of either district

or their respective students. (Appx. 64-65.) Based on these findings, the Hearing Officer found that the property owner's request for the transfer should be denied. (Appx. 65.)

The property owners filed Objections and the Cincinnati Schools filed Responses to the Objections. On July 15, 2005, the State Board adopted a resolution adopting the Hearing Officer's recommendations and denying the transfer. (Appx. 37.) Pursuant to R.C. 119.12, the property owners appealed the State Board's decision to the Franklin County Court of Common Pleas.²

The Court of Common Pleas found that the State Board's decision was supported by the record, specifically, that there were presently no students in the proposed transfer area, that Madeira Schools were at or near capacity while Cincinnati Schools had been losing students, that the property owners presented no evidence that the transfer would benefit the students in the area, and that the transfer would result in a modest windfall to Madeira Schools (i.e., more revenue and no students to educate). (Appx. 32, 33, 35.) Therefore, the trial court affirmed the State Board's order concluding that there was reliable, probative, and substantial evidence to deny the transfer. (Appx. 35.) Appellees appealed.

The Court of Appeals held that, as to the financial impact on Cincinnati Schools for the present transfer, the trial court erred in finding that the State Board's order was supported by reliable, probative and substantial evidence because the State Board produced insufficient evidence to support this finding. (Appx. 18, ¶34.) As to the Hearing Officer's determination that prior transfers caused substantial harm to the district, the Court of Appeals found that this assertion was equally unsupported by sufficient evidence and the

² Per R.C. 119.12, all appeals are in Franklin County.

trial court therefore erred in concluding the State Board's decision, in this respect, was supported by reliable, probative, and substantial evidence. (Appx. 20, ¶¶38.)

As to the issue of the impact of the transfer on students, the Court acknowledged that only one school-age child lived in the proposed transfer area and that he attended a private school, but disagreed with the conclusion that the property owners had presented no evidence in favor of the proposed transfer. (Appx. 20-21, ¶¶40, 50.) The Court went on to consider other factors, such as the property owners' feelings of separation from the city of Madeira and the positive impact a transfer would have on their "community spirit and pride." (Appx. 25, ¶53.) Based on these factors alone, the Court of Appeals found that the property owners were "entitled" to the transfer and therefore reversed the decision of the trial court and directed the State Board to approve the transfer request. (Appx. 25-26, ¶¶53-54.)

The Cincinnati Schools and the State Board appealed to this Court. On June 20, 2007, the Court accepted the appeal.

ARGUMENT

Proposition of Law No. I:

In an appeal from an adjudication by an administrative agency, the court of appeals must affirm the trial court's decision absent an abuse of discretion by the trial court.

In reviewing a trial court decision on an order of an administrative agency, an appellate court's role is to determine only if the trial court has abused its discretion. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Educ.* (1992), 63 Ohio St.3d 705, 707, 590 N.E.2d 1240; *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260-61, 533 N.E.2d 264. To reverse, the

appellate court must determine that the trial court's exercise of discretion amounted to "perversity of will, passion, prejudice, partiality or moral delinquency." *Id.* Absent an abuse of discretion on the part of the trial court, an appellate court must affirm the trial court's decision. *Id.* According to this Court, "[T]he fact that the court of appeals...might have arrived at a different conclusion than did the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so." *Lorain City School Dist. Bd. of Edn.*, 40 Ohio St.3d at 261, 533 N.E.2d 264.

The State Board is created by the Ohio Constitution, in Article VI, Section 4, with the "powers and duties of the board...prescribed by law." The Ohio General Assembly, in R.C. 3301.07(B), has given the State Board authority, among other things, to "administer the educational policies of this state relating to public schools...organization of school districts, educational service centers, and territory." The General Assembly has also authorized the State Board to make determinations in particular territory transfer cases. R.C. 3311.06, R.C. 3311.24. Ohio courts must accord state agencies deference in interpreting and applying their statutes and administrative rules. *State, ex rel. Schaengold v. Ohio Public Employees Retirement System* (2007), 114 Ohio St.3d 147, 151, 870 N.E.2d 719. Indeed, the General Assembly's grant of authority to an administrative agency encompasses the agency's performance of an act in a "reasonable manner based upon a reasonable construction of the statutory scheme." *Northwestern Ohio Bldg. & Str. Trades Council v. Conrad* (2001), 92 Ohio St.3d 282, 289, 750 N.E.2d 130. "Courts must give deference to an agency's reasonable interpretation of the legislative scheme." *Id.*

The State Board has adopted two rules, Ohio Adm. Code 3301-89-02 and 3301-89-03, which set forth numbered criteria on which transfer requests will be determined. In a more general but related rule, Ohio Adm. Code 3301-89-01(F), the State Board has pronounced the lodestar consideration in territory transfer requests: “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.) No argument or evidence is needed to conclude that the primacy of the “ultimate good of pupils” is reasonable, and no party disputes that here.

This Court repeatedly has held that “abuse of discretion” is not simple disagreement with the trial court’s analysis or conclusions. E.g., *Lorain City School Dist. Bd. of Edn.*, 40 Ohio St.3d at 261. Yet the Court of Appeals in the instant case equated the two. For example, the Court of Appeals concluded:

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...(Emphasis added.) (Appx. 24.)

The Court of Appeals equated its disagreement with the trial court’s conclusions with an “abuse of discretion.” This Court requires more: “perversity of will, passion, prejudice, partiality or moral delinquency.” *Lorain City School Dist. Bd. of Edn.*, 40 Ohio St.3d at 260-61. There is no scintilla of analysis in the Court of Appeals’ decision suggesting, let alone concluding, that the trial court’s decision bore any of these characteristics.

Instead, it is plain from its decision that the Court of Appeals disagreed with some aspects, and ignored other aspects, of the decisions of the trial court and the State Board. First, the Court of Appeals took issue with the State Board’s finding that “prior transfers have caused substantial harm to the district.” (Appx. 20, ¶38.)

Second, the Court of Appeals rejected the State Board'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." (Appx. 24, ¶53.) These appear to be the only two grounds on which the Court of Appeals concluded that there was no evidentiary support for the State Board's decision and that the trial court therefore had abused its discretion. (Appx. 24-25, ¶52.)

The Court of Appeals' analysis does not do justice to the decisions of the State Board and the trial court. The critical analysis of the State Board did not hinge on the two points criticized by the Court of Appeals:

The evidence and testimony presented show that there are no students in the proposed transfer area who attend Cincinnati Public Schools; 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...*Madeira City Schools would acquire fiscal resources without assuming any educational responsibilities. With this in mind, the reality of the matter is that Cincinnati Public Schools face the immediate loss of \$373,840 each year in assessed valuation if the transfer is allowed. This transfer request, initiated by the homeowners in the proposed transfer area, appears to be an attempt to increase their property value by transferring to a more desirable school district.*

...

For Cincinnati Public Schools, the only evidence to rely on is their responses to the 17 questions outlined above. In particular, Cincinnati Public Schools 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 Cincinnati Public Schools. Because the one student in the proposed transfer area attends private school, the issue is not whether Madeira City Schools can provide a better education than Cincinnati Public Schools. 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. *Petitioners did not introduce any evidence regarding how this proposed transfer would benefit the students in the transfer territory and Madeira City Schools 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. In light of the testimony of the various witnesses and the documentary evidence introduced at the hearing, petitioners have failed to present reliable, substantial and probative evidence in support of their request. (Emphasis added.) (Appx. 64-65.)

Contrary to the Court of Appeals' analysis, the Cincinnati Schools' assertion that "previous transfers have caused substantial harm" was not the linchpin of the State Board's conclusion; it balanced the factors. And the State Board nowhere stated that Appellees could not prevail if they had introduced other persuasive criteria to support a transfer even if there were no public school students in the territory.

Likewise, the Court of Appeals did not do justice to the trial court's concluding analysis:

The Hearing Officer concluded that in *balancing the interests*, he would not recommend the transfer. He noted that there are presently no students, Madeira Schools are at or near capacity while CPS has been losing students, and finally, Appellants offered no evidence that the transfer would benefit students in the area. *While evidence of geography as to roads to the nearest schools and proximity was offered, this evidence did not appear to shift the balance in favor of the Appellants.* The Board considered the findings and conclusion of the Hearing Officer and came to the same conclusion. The record gives support to the Board's decision. When reviewed to determine reliable, probative, and substantial evidence of record offers such support. As mentioned above, the windfall to Madeira would not be significant, nor likewise would the loss to CPS. Nevertheless, it is still one of the considerations used in the *balancing test*. (Emphasis added.) (Appx. 35.)

Plainly, both the State Board and the trial court consciously considered the balancing of transfer criteria. It is undisputed that Appellees offered no evidence that the transfer would be of educational benefit to any students. The trial court expressly considered Appellees' issues of proximity to schools and location of roads in the equation. Further, the trial court considered the undisputed fact that the modest tax base involved would shift but that "the windfall to Madeira would not be significant, nor likewise would

the loss to CPS.” (Appx. 35.) Finally, the trial court was appropriately deferential to the balancing of criteria by the State Board. The tone and reason of the trial court’s decision reflect absolutely no “perversity of will, passion, prejudice, partiality or moral delinquency.”

Not only did the Court of Appeals mischaracterize and fail to respect the trial court’s decision, it mischaracterized its own case law. The Court did so in its zeal to establish that “[o]ther proposed transfers have similarly affected few, if any, school age students currently living within a transfer area and attending public school.” (Appx. 22, ¶46.)

In *Cincinnati City School Dist. v. State Bd. of Edn.* (1996), Franklin App. No. 95APE11-1457, 113 Ohio App.3d 305, the Franklin County Court of Appeals *upheld* the trial court’s decision *upholding* the State Board’s decision to transfer 48 homes in the “Ken Arbre” subdivision from Cincinnati Schools to Madeira Schools even though only one of 14 school-age children attended public school. This case hardly stands for the proposition that non-educational factors fill the void when no students are affected by the transfer. Instead, it stands for the proposition that courts must defer to the State Board’s balancing of educational and non-educational factors, such as proximity to schools and transit time (i.e., the “ultimate good of the pupils concerned”). Likewise, the other three cases are distinguishable from the instant case. See *Levey v. State Bd. of Edn.* (Feb. 28, 1995), Franklin App. No. 94APE08-1125 (although no public school students were affected, the territory was an isolated island of land surrounded by the adjacent school district; the Court of Appeals affirmed the trial court decision); *Proposed Transfer of Territory from Clermont Northeastern Local School Dist.*, Franklin App. No. 02AP-257, 2002-Ohio-5522

(Court of Appeals affirmed the trial court's reversal of State Board decision denying the transfer where one child attended public school and geography and transit time favored the requested transfer); *Samson v. State Bd. of Edn.* (Aug. 13, 1998), Franklin App. No. 97APE12-1702 (Court of Appeals upheld trial court's decision affirming the State Board's denial of a transfer request where there were no affected public school students and there were no other compelling factors supporting the requested transfer).

Having concluded summarily that it disagreed with the trial court and that the trial court thus had abused its discretion, the Court of Appeals compounded its error by assuming the role of the State Board, weighing the factors, and directing the transfer. The Court characterized this approach as "whether appellants met their burden to prove *entitlement* to the transfer." (Emphasis added.) (Appx. 25, ¶53.) The Court concluded that they did, based on the following analysis:

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. (Appx. 25, ¶53.)³

The Court asserted that such evidence "is representative of evidence supporting transfer in many other cases," ignoring that the primary criterion of educational benefit to pupils existed in each case it cited. See *Rossford Exempted Village School Dist. Bd. of*

³ The Court of Appeals' reliance on geography and proximity appears to be incorrect factually. According to the Hearing Officer's report, the school buildings of Cincinnati are closer to the transfer area than those of Madeira (1 and 2 miles vs. 2.2-3.5 miles). Further, while the only street access to the four properties is through Madeira City School District, the properties on the other three sides of the transfer area are within Cincinnati City School District.

Edn., 63 Ohio St.3d 705 (Court of Appeals affirmed trial court decision affirming State Board's decision to transfer where the only two school-age children attended public school and proximity, transit time, and the petitioners' "focus" on the community all favored transfer); *Proposed Transfer of Territory from Clermont Northeast Local School Dist.*, Franklin App. No. 02AP-257, 2002-Ohio-5522 (Court of Appeals affirmed trial court's reversal of State Board's denial of a requested transfer where one child attended public school and geography and transit time favored the transfer); *Trout v. Ohio Dept. of Edn.*, Franklin App. No. 02AP-783, 2003-Ohio-987 (Court of Appeals affirmed trial court's decision affirming the State Board's denial of a requested transfer where 16 students attending public school district would be farther from school in distance and time if transferred and there was insufficient evidence to show the proposed transfer would be for the ultimate good of the affected pupils).

These cases cited by the Court of Appeals all involved students attending public schools, and their educational interests were weighed and balanced by the State Board or trial court along with non-educational criteria. None involved non-educational criteria as a basis for a change in the status quo in the absence of affected public school students. And significantly, none involved the Court of Appeals reversing the trial court.

It is undisputed that the Appellants had the burden of proof, the burden to justify a change in the status quo. (Appx. 30.) Had the Court of Appeals applied the abuse of discretion standard, acknowledged the primacy of the ultimate educational good of pupils, and acknowledged Appellees' burden of proof, it would have had to affirm the trial court's decision. In the absence of affected public school students, it would be well nigh impossible to conclude that a trial court's discretion in upholding the status quo (i.e., no

transfer) amounts to “perversity of will, passion, prejudice, partiality or moral delinquency.” Virtually none of the State Board’s criteria were relevant in this case. In the absence of the primary criterion of the “present and ultimate good of pupils concerned,” it is an arbitrary leap for the Court of Appeals to conclude, as it did, that Appellees were “entitled” to change the status quo. While public education is an entitlement, the particular public school district where one is located surely is not.

The Court of Common Pleas and the Court of Appeals for Franklin County hear all appeals from the State Board on school district territory transfers. R.C. 119.12. Thus, what that Court of Appeals does in misapplying the standard of review has great significance. Ohio’s public school district boundaries are a result of intricate local history and politics, often having nothing to do with other political boundaries. Susan C. Hastings, Richard D. Manoloff, Timothy J. Sheeran & Gregory W. Stype, *Ohio School Law* §4:2 (2006-2007 ed.). This case is a good example -- according to the Hearing Officer, the transfer area is one “where various school district boundaries, township boundaries, and municipal boundaries, come together.” (Appx. 53.) For the Court of Appeals to second-guess the State Board and the trial court as it did will lead to less predictability in this area of law, resulting in more transfer requests by landowners and more protracted proceedings as the parties seek to relitigate the issues in the Court of Appeals on the chance that it will continue to second guess the trial court and State Board.

That is especially true where the transfer area, like this one, has no pupils who would be affected by the result. The remaining interests are those of landowners, whose most tangible interests, of course, are economic. These economic interests translate into two issues -- land values and tax rates. Despite Appellees’ assertions that they “feel”

disconnected from their municipality and desire to have a greater sense of “community spirit,” one Appellee candidly admitted that the fair market value of the four homes would increase if the transfer were approved. (Appx. 56.) Moreover, the effective millage tax rate of Madeira Schools is considerably below that of Cincinnati Schools. (Appx. 51.)

In short, if “the present and ultimate good of the pupils concerned” is taken out of the equation because there simply are no pupils, this kind of territory case is largely one of economic interests. The effect of the Court of Appeals’ decision is to encourage litigation. This case happens to involve a large urban school district and a suburban district. But the same economic forces are at work between suburban districts and between local school districts in rural areas and small towns. The grass often looks greener on the other side of the fence, or school district boundary. The adjacent school district often has a different and more favorable tax rate or is perceived by some as a better school district (for example, due to academic results or athletic success), translating into higher property values. As a result of the decision below, school districts all over Ohio will be forced to spend more time, resources and legal fees on preserving their territorial integrity as more landowners play the lottery with the Court of Appeals for Franklin County. How ironic it is that such resources would be devoted to litigation encouraged by the Court of Appeals in a case where the “present and ultimate good of the pupils” was completely irrelevant.

This Court’s decision in *DeRolph v. State of Ohio* (2002), 97 Ohio St.3d 434, 780 N.E.2d 529, is also significant. The present school funding system in Ohio is unconstitutional, and the General Assembly has responsibility to correct it. As legislators, school districts, school board members, and Ohio voters grapple with this issue, the decision below adds one more complicating factor. If the decision below is allowed to

stand, there will be more litigation over territory transfers due to more efforts by landowners, and perhaps even by some school districts, to gain an economic advantage based on geography. The school funding issue is big enough by itself to solve without school districts fighting rear-guard actions with landowners seeking the greener economic grass of adjacent school districts. OSBA urges this Court to consider the unpredictability introduced by the decision below, its potential cost in resulting litigation about the value of land, and its potential destabilizing effect when the focus should be on devising a constitutional system of school funding. Adherence to the proper standard for appellate review of trial court judgments in State Board territory transfer cases will produce a more stable environment for school districts. For these reasons, the decision of the Court of Appeals must be reversed.

Proposition of Law No. II

Assuming the Court of Appeals applied the appropriate standard of review in finding that the State Board of Education incorrectly analyzed a few of the criteria used in making its determination to deny the transfer, the Court of Appeals should have remanded the case to the State Board of Education instead of ordering the transfer.

Assuming, *arguendo*, the Court of Appeals was correct in reversing the trial court decision, the Court of Appeals should have remanded the case so that the State Board could consider the case anew in light of the Court of Appeals decision, given the weighing of factors required by the State Board's criteria and uniqueness of this case where there are no affected students and no isolated islands of territory. The Court had the power to do so.

This Court in *Superior Metal Products v. Ohio Bur. of Emp. Serv.* (1975), 41 Ohio St.2d 143, 324 N.E.2d 179, considered a determination by the Administrator of the Ohio Bureau of Employment Services that the claimant had been discharged for just cause and

therefore was ineligible to receive benefits. Upon appeal, the Board of Review reversed the decision and determined the claimant had been discharged without just cause. The employer appealed to the court of common pleas, which affirmed the Board's decision. *Id.* The court of appeals reversed, concluding that the Board's decision "was the product of mistake and misinterpretation of the evidence and was therefore unreasonable and against the manifest weight of the evidence," and remanded the cause to the Board for further proceedings. *Id.* On appeal to this Court, appellants contended that a court lacked the power to remand a cause to the Board. This Court disagreed.

The statute in *Superior Metal* provided a court with only three modes for disposing of an appeal: 1) affirm, 2) reverse and vacate, or 3) modify and enter a final judgment. This Court held that "the power to reverse and vacate decisions necessarily includes the power to remand the cause to the decision maker." *Id.* at 145. The failure of a statute to authorize the courts to remand matters back to an agency did not preclude such action. Further, the Court determined that once a court remands a cause to an administrative agency, the jurisdiction of the agency is revived, which enables the agency to conduct further proceedings and to render a new decision. *Id.* at 146.

Likewise, in the case at bar, R.C. 119.12 does not explicitly provide a court with the power to remand, but instead provides a court with four modes for disposing of an appeal: 1) reverse the order, 2) vacate the order, 3) modify the order, or 4) make such other ruling as is supported by reliable, probative and substantial evidence. The Tenth District Court of Appeals, in *Foos v. Dept. of Agriculture* (Aug. 17, 1978), No. 78AP-64, held that while *Superior Metal* involved a different statute than R.C. 119.12, that statute's language of only permitting "affirmance, reversal, vacation, or modification" was essentially the

same, and therefore remand was proper under R.C. 119.12. The Ninth District Court of Appeals, in *Chapman v. Ohio State Dental Board* (1986), 33 Ohio App.3d 324, 515 N.E.2d 992, also held that a remand under R.C. 119.12 is permissible.

This Court recently has followed the *Superior Metal* holding in *Village of Chagrin Falls v. Geauga County Bd. of Comm.* (2002), 96 Ohio St.3d 400, 775 N.E.2d 512, an appeal under R.C. Chapter 2506. Unlike R.C. 4141.28(O) and R.C. 119.12, R.C. 2506.04 explicitly allows for remand from the court to the agency so long as the court also instructs the agency to enter a decision consistent with the court's decision. This Court held that, following *Superior Metal*, courts are authorized under R.C. 2506.04 to reverse a decision of an administrative body and remand the cause to the body to conduct further proceedings on the matter. The Court held that the administrative body is not limited to entering a decision consistent with the court's opinion; rather, the agency may conduct further proceedings and render a new decision. The Court recognized that some appellate cases have held otherwise, but concluded that the cases applying *Superior Metal* are more persuasive.

Based on *Superior Metal* and the *Village of Chagrin Falls*, remand authority is now implicit in any statute providing for judicial review of administrative agency actions in Ohio, including R.C. 119.12. The Court of Appeals had the power to remand the case to the State Board for further proceedings and to render a new decision, and should have done so. Appellate courts should give administrative agencies due deference, and they should honor the legislative intent that responsibility for specific judgment of public issues is lodged initially in agencies. *State ex rel. DeMuth v. State Bd. of Educ.*, Franklin App. No. 96 APE01-75, 113 Ohio App. 3d 430, 433. Ohio law vests the responsibility for

determining the outcome of territorial transfer cases with the State Board. R.C. 3301.07(B), 3311.06, 3311.24. While the courts provide a necessary check on administrative agency errors and overreaching, judicial review must include deference to an administrative agency's expertise in an area and guard against judicial second-guessing of agency policy judgments in applying agency rules.

The State Board is the body with the greatest expertise in territorial transfer cases. Not only does the State Board have the experience to deal with such cases, it is the body mandated to administer educational policies of the state with respect to, among other things, school district territories. In the case at bar, the Court of Appeals, assuming *arguendo* it used the correct standard, determined that the State Board incorrectly analyzed several criteria. The Court of Appeals should have respected the policy role of the State Board and remanded the case to the State Board to weigh and balance the evidence in light of the court's decision. Failing to do so, and proceeding to order the requested transfer, as the Court of Appeals did, is simply an encouragement to parties to litigate transfer cases to as many levels as possible in the hope for success. Predictability of results is enhanced by remand to the administrative agency so that it can develop the appropriate distinctions in applying its rules to particular facts. Such predictability will allow landowners and school districts to order their affairs with a minimum amount of litigation.

Proposition of Law No. III

When the school territory has been the subject of a municipal annexation, the territory transfer is governed by R.C. 3311.06 and not R.C. 3311.24.

Amicus curiae Ohio School Boards Association agrees with Cincinnati Schools that the State Board, trial court and Court of Appeals had no jurisdiction in this matter because the school territory had been annexed by the City of Madeira. Accordingly, R.C.

3311.06(I) prohibits any transfer “in any other manner than that prescribed in this section.” R.C. 3311.24 was simply the wrong process for Appellees’ attempted transfer. “An unambiguous statute is to be applied, not interpreted.” *Sears v. Weimer* (1944), 143 Ohio St. 312, 316. Division (I) is unambiguous in prohibiting transfer “pursuant to the annexation of territory” by a municipality separate and apart from R.C. 3311.06. The ordinary dictionary definition of “pursuant to” is “in carrying out; in conformance to; according to.” *Webster’s New Collegiate Dictionary* (1976) at 938. There is no direct legal connection between the transfer of school district territory and municipal annexations in the annexation statutes. See R.C. Chapter 709. Therefore, “pursuant to” in R.C. 3311.06(I) must mean in light of or in connection with carrying out an annexation. Because the General Assembly in R.C. 3311.06 placed no time limit on the territory transfer relative to the annexation, this Court cannot imply a connection in time between an annexation and a school district territory transfer. Read literally, R.C. 3311.06 easily is reconciled to R.C. 3311.24 by holding that the former governs the transfer of school territory where that territory has been the subject of a municipal annexation, but R.C. 3311.24 governs petitioner-initiated transfers in other situations.

Because it did not have jurisdiction of this case, the Court of Appeals decision should be reversed.

CONCLUSION

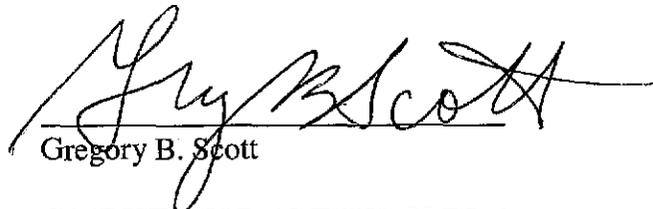
The Ohio School Boards Association urges this Court to reverse the decision of the Franklin County Court of Appeals and affirm the trial court’s decision so that the Court of Appeals will not continue to apply the wrong standard of review to trial court decisions in school district territory transfer cases, or reverse because of lack of jurisdiction. The Court

of Appeals failed to apply the correct abuse of discretion standard and therefore erred in determining that the trial court abused its discretion in affirming the decision of the State Board to deny the transfer.

Assuming *arguendo* that the Court of Appeals applied the correct standard of review, the Court still erred in its decision because it should have remanded the case to the State Board for further consideration. Because the State Board is the body with the greatest expertise in territorial transfer cases, the State Board should have been given another chance to re-examine the issues that the Court of Appeals found fault with and make a re-determination. This Court should reverse the Court of Appeals decision and remand the case to the State Board.

Respectfully submitted,

Gregory B. Scott, Counsel of Record

A handwritten signature in cursive script, appearing to read "Gregory B. Scott", written over a horizontal line.

Gregory B. Scott

COUNSEL FOR AMICUS CURIAE
OHIO SCHOOL BOARDS ASSOCIATION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief of the Amicus Curiae The Ohio School Boards Association was served upon the following by first-class U.S. Mail, postage prepaid, on this 21st day of August, 2007:

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