

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  
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**MERIT BRIEF OF APPELLANT STATE BOARD OF EDUCATION**

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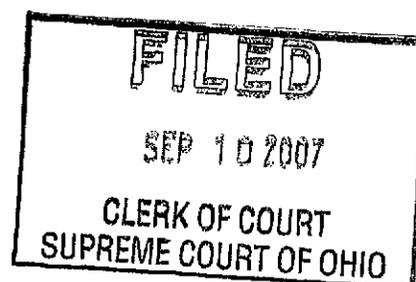
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## INTRODUCTION

School districts are designed to serve the best interests of students, not 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. Accordingly, the key regulatory provision governing the redrawing of school district boundaries states 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 also considered, reflecting the reality that financial effects lead to educational effects. But the focal point remains the *educational* benefits to the students involved, so requests to move district lines should not be granted when students will not benefit.

By this standard, this case ought to be an easy one, as it involves a redistricting request that involved *absolutely no students*, and thus no educational benefits. So it is not surprising that the State Board denied the request. But the appeals court nevertheless overrode the State Board’s decision and ordered the transfer on the erroneous theory that the property owners’ wishes were enough to overcome the lack of educational benefit.

Instead, the court below not only improperly shifted the focus from educational benefits to financial and other factors, but worse yet, the court found that the financial and other interests of the *property owners* outweighed the interests of the school districts involved. 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 siphoning tax money from the Cincinnati schools. This result, and the erroneous reasoning that supported 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 appeals court’s error in siding with the Property Owners here, moreover, is further established by the failure to apply the appropriate standard of review. Administrative appeals call for deference, under R.C. 119.12, even at the common-pleas level. That deference 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 sufficient. But the appeals court was wrong. That evidence was both sufficient in and of itself and also because it must be considered in light of 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 Cincinnati's financial loss. To be sure, the dollars involved may seem low relative to the size of the large Cincinnati district, but that is exactly the issue. Allowing property owners to unilaterally change school districts opens the door for large districts to be constantly vulnerable to many "small" carve-outs, no one of which will bankrupt a district alone, 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.

For these reasons and others detailed below, the Court should reverse the appeals court, 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

### **A. Four sets of Property Owners petitioned to move their houses from the Cincinnati School District to the Madeira School District.**

This case began when the owners of four homes that were located within both the City of Madeira and in the Cincinnati School District petitioned to have their properties transferred to the Madeira School District under R.C. 3311.24(A). The properties together were worth more than \$1,000,000.<sup>1</sup> See Response of Cincinnati City School District (“Cincinnati Response”) (State’s Ex. 24 at hearing), Second Supplement of State Board of Education (“State Supp.”) at SS-38.

The petition was first reviewed by the local board of elections to ensure that the residents did live in the affected territory, and it was then forwarded to the State Board of Education. The Ohio Department of Education (“ODE”) then requested input from the two potentially affected school districts pursuant to Ohio Adm. Code 3301-89-02(B).

### **B. Neither of the affected school districts supported the change.**

Neither of the districts supported the proposed change. Cincinnati’s opposition was based on its financial concerns regarding the loss of more revenue. Its enrollment, and hence its state funding, had declined for each of the four years preceding the transfer and that trend was projected to continue. Cincinnati Response, SS-38. Further, its local tax base had been diminished by earlier territory transfers. *Cincinnati City School District v. State Board of Education* (10th Dist. 1996), 113 Ohio App.3d 305, 308 (48-home subdivision); *Schreiner v. State of Ohio, Board of Education* (10th Dist. Nov. 9, 1999), Case No. 98AP-1251 at p. 2 (125-home neighborhood).

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<sup>1</sup> This figure is based on the properties’ assessed value of \$373,840, which is 35% of their actual value. See Report & Recommendation, Ex. 5, 15.

Madeira's lack of enthusiasm had the opposite basis. Its enrollment had been steadily increasing since 1996, that was expected to continue, and the district was approaching the limits of its capacity. It indicated that it was "serving at or near capacity number of students" and that in spite of "costly additions, teachers [were] sharing space." Response of Madeira City School District ("Madeira Response") (State's Ex. 3 at hearing), questions 4 and VI, State Supp. at SS-31, SS-35-36. It reiterated that "[s]pace is a concern for the Madeira City Schools," and emphatically stated that it was "**not** . . . encouraging this request." (double emphasis in original). *Id.* at questions VI and 1, State Supp. at SS-35-36, SS-30.

**C. The Property Owners produced no evidence of educational justification.**

The hearing on the proposal revealed no educational basis for the boundary change. The proposal was admittedly not generated by student need. The Property Owners' counsel candidly acknowledged that "there is not one student in these four homes who has ever . . . attended public school." Hearing Transcript ("Tr.") at 16, State Supp. at SS-7. Further, the only Property Owner with a school-age child testified that her son would stay in private schools regardless of the outcome. *Id.* at 60, State Supp. at SS-10. They presented no evidence that the transfer would benefit other Cincinnati or Madeira students.

The record negated a number of traditional bases for boundary changes. The Property Owners' last witness, who was present throughout the hearing, acknowledged that the owners produced nothing about educational planning, fiscal impact, facility capacity, or utilization. Tr. 123-126, State Supp. at SS-25-28. It was undisputed that the transfer would not make Madeira's municipal and school boundaries coterminous. Report and Recommendation of Hearing Officer, Ex. 5 at 19. The evidence also showed no significant difference in distance between the transfer area and schools serving it in the Cincinnati and Madeira districts. See Madeira Response, Ex. 5,

at 14, 19, question 13, State Supp. at SS-32; Cincinnati Response, question III (5), State Supp. at SS-39.

The only evidence that arguably addressed educational impact was one Property Owner's testimony that, in his opinion, the roads from the transfer area to Madeira's school buildings were safer for cycling than those to Cincinnati's buildings. Tr. 109-114, State Supp. at SS-\_\_\_ - SS-23. However, he also acknowledged that no public school students live in the transfer area, Tr. 124, State Supp. at SS-26, and his counsel later represented that all the Property Owners "have every intention of staying in their current homes for an extended period of time [.]” Petitioners' Post-Hearing Brief at 10-11.

**D. The Property Owners instead asserted non-educational reasons: community affinity, perceived isolation and financial gain.**

Although the evidence of educational bases was sparse, the Property Owners did identify three reasons for the transfer. The first was affinity for the Madeira community. The Property Owners' first witness well summarized their case: "we're just Madeira. We always have been . . . it's just the principle of the matter." Tr. 49, State Supp. at SS-9; see also Tr. 114, State Supp. at SS-23 (citing "sense of community" and "community spirit.")

The second was an unexplained feeling of isolation. Several of the Property Owners testified that having to vote on Cincinnati School issues somehow made them feel that they were not full members of the community, although they apparently were fully integrated in all other respects. Tr. 46, 49, 78, 93-4, 115; State Supp. at SS-8, SS-9, SS-11, SS-12-13, SS-24.

Last, but by no means least, was perceived economic gain. One Property Owner testified he was "sure everybody that would live in those homes would want to be in the [Madeira] school district" and that he assumed that property values would increase if the proposal was approved. Tr. 96, 103-104; State Supp. at SS-14, SS-16-17.

**E. The Hearing Officer recommended against changing boundaries, the State Board of Education agreed, and the Common Pleas Court affirmed.**

The Hearing Officer recommended that the boundaries not be changed. That decision was based on a weighing of the evidence about educational impact and an assessment of what was likely driving the proposed transfer.

On the negative side, he found that the Madeira schools were at capacity and less than enthused about the proposed change. Report and Recommendation 10, 18. He also noted the undisputed fact that the “Cincinnati Public Schools face the immediate loss of . . . assessed valuation if the transfer is allowed.” *Id.* at 26. He then noted the lack of evidence of educational benefit: “petitioners did not introduce any evidence regarding how this proposed transfer would benefit the students in the transfer territory.” *Id.* He therefore concluded that the Property Owners’ petition “appears to be an attempt to increase their property value by transferring to a more desirable school district.” *Id.* The Board accepted his recommendation and the Property Owners appealed.

The Common Pleas Court affirmed. After first addressing jurisdictional and evidentiary issues, it ultimately ratified the Hearing Officer’s analysis. More specifically, it distilled the rationale for the administrative decision: that “there are presently no students [in the affected area], Madeira Schools are at or near capacity while [Cincinnati] has been losing students, and finally, [the Property Owners] offered no evidence that the transfer would benefit students in the area.” Decision and Entry Affirming the Order of the State Board of Education, 9. It found that “[t]he record gives support to the Board’s decision.” *Id.* The Property owners timely appealed to the 10th District Court of Appeals.

**F. The appeals court ordered that the boundaries be changed based on non-educational considerations.**

The appeals court reached a different conclusion from any of the three decisionmakers that previously examined the proposal. It reached that result in three steps.<sup>2</sup>

It first discounted the negative effects of the transfer by concluding that the hearing officer and Common Pleas Court erred in considering the transfer’s fiscal impact on Cincinnati. More specifically, it concluded that the Ohio Adm. Code 3301-89-02(B)(9)’s inquiry into whether a transfer would “be detrimental to the fiscal or educational operation of the relinquishing school district” and an unreported 10th District precedent precluded reliance on revenue loss absent evidence of specific consequences from the loss. It found no such evidence, and hence gave Cincinnati’s undisputed loss no weight. *Bartchy v. State Board of Education* (10th Dist. 2007), 170 Ohio App.3d 349, 2007-Ohio-300, ¶¶ 30-38, 52.

It then held that the undisputed absence of students in the transfer area did not preclude the existence of evidence supporting the transfer. That was also based on unreported 10th District decisions. *Id.* at ¶¶ 40-51.

It concluded by holding that the transfer was supported by non-educational considerations. More specifically, it cited the Property Owners’ testimony about their “geographic connection to the city of Madeira, and the positive impact a transfer would have on their community spirit and pride” as a sufficient basis to order the boundary change. *Id.* at ¶ 53. That, too, was based solely on unreported 10th District precedent.

This Court accepted jurisdiction over both the State Board’s appeal and the Cincinnati School District’s appeal.

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<sup>2</sup> The appeals court initially addressed Cincinnati’s jurisdictional argument, *Bartchy v. State Board of Education* (10th Dist. 2007), 170 Ohio App.3d 349, 2007-Ohio-300, ¶¶ 6-20, but the State Board did not appeal that issue.

## ARGUMENT

### **Proposition of Law of Defendant-Appellant Ohio Board of Education:**

*Residents 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 pupils concerned" under Ohio Adm. Code 3301-89-01(F). That burden is not met if the Residents provide no proof that the transfer will produce educational benefits to any students.*

Because of their potentially great impact and inherently controversial nature, Ohio law requires that changes to school district boundaries be based on educational efficacy. The Court below nonetheless ordered that the boundaries of two districts, neither of which sought the change, be altered because of the personal, non-educational, preferences of a small group of property owners.

That decision should be reversed for several independent reasons. It is contrary to Ohio's general policy of settling boundary disputes on the neutral ground of educational merit. It is contrary to the Revised Code's instructions about the limited role residents' preferences are to play in such matters. It contradicts the Administrative Code's focus on educational considerations. It is at odds with the case law. It failed to defer properly to the trial court and the State Board of Education. Finally, it sets a precedent that could add to the problems facing Ohio's already-stressed schools.

- A. Ohio's general policy is that disputes over school district boundaries are to be resolved on educational merit.**
  - 1. Changes to school district boundaries have great economic and social impact, and disputes about those boundaries are divisive.**

School district boundaries undoubtedly have tremendous effects. Their impact on home values and rents within otherwise similar communities is well documented. William T. Bogart & Brian A. Cromwell, *How Much is a Good School District Worth?*, National Tax Journal, Vol. 50, no. 2 (June 1997) pp. 215-32 (Noting differences of between 41% and 84% in the Cleveland

area); Donald R. Haurin & David Brasington, *School Quality and Real House Prices: Inter- and Intrametropolitan Effects*, *Journal of Housing Economics*, 5, 351-368, 363 (1996) (studying six Ohio cities and noting that “School quality is the most important cause of the variation in constant-quality house prices.”). They drive development patterns because, as one recent survey of the topic noted, “[h]ome builders say they rarely bother breaking ground these days where schools aren’t good.” Del Jones, *Location, location, location: Better schools mean higher property values, Home buyers go shopping for schools*, *USA Today*, May 15, 1996, at 1B; Gregory S. Brown, *Getting Around Brown: Desegregation, Development and the Columbus Public Schools* 136 (Ohio State Univ. Press 1998).

School district boundaries have tax implications, too. On the positive side, increases in property values can boost a jurisdiction’s tax base. David L. Weimer & Michael J. Wolcott, *School Performance and Housing Values: Using Non-contiguous District and Incorporation Boundaries to Identify School Effects*, *National Tax Journal*, 49, no. 2, 231-252, 249. In contrast, residents in areas losing territory must bear either increased tax rates or diminished services. Steven Garasky & Donald R. Haurin, *Teibout Revisited: Redrawing Jurisdictional Boundaries*, *Journal of Urban Economics*, 42, 366-376, 368, 370 (1997) (considering changes to municipal boundaries). Individual property owners on both sides can have their tax burdens changed without a vote. See, e.g., *Gigandet v. Brewer* (1938), 134 Ohio St. 86.

Perhaps most important, proposed boundary changes are, and have long been, a tremendous source of controversy. *Cline v. Martin* (5th Dist. 1915), 5 Ohio App. 90, *aff’d* (1916), 94 Ohio St. 420; *Mathews v. Board of Education* (8th Dist. 1917), 8 Ohio App. 206. One recent study described how boundary disputes in central Ohio resulted in “bloody battles” between school districts and resulted in “emotions [] running high” among the general public. *Brown*, above, at

127, 161; see also *id.* at 162, 164. The former superintendent of another state similarly noted that boundary disputes often become “community bloodletting played out in the public arena,” Del Jones, above.

2. **Boundary decisions are therefore delegated to an apolitical body with technical expertise, are based on educational efficiency, and are given great deference once made.**

Ohio has responded to those problems by directing that most boundary disputes are to be resolved on a sound basis: educational merit. The obvious intent is to replace public passion with neutral and professional evaluation. That is evidenced by the body chosen to make those decisions, the general understanding of the controlling statutes, and the Court’s reluctance to overturn those difficult decisions once they are made.

Ohio law gives the State Board authority over most boundary disputes for two reasons. First, the Board has a neutral, insulated, nature. That body was created in response to the perception that public education was being degraded by political turmoil and was intended to combat that by professionalizing Ohio’s educational system. Ohio State Board of Education, *Milestones: a History of the State Board of Education of Ohio* 1-2, 9, 36 (1989). It was therefore established as an apolitical body, *id.* at 2, 8, to take actions “not expedient for partisan politicians to do” and to “provide[] insulation” for the merit-based resolution of controversial matters. *Id.* at 1, 2. One of those matters was district reorganization, a very hot topic when the Board was established. *Id.* at 6, 25, 36-37, 41. Indeed, the bill that initially fixed the Board’s duties routed those matters to it. Am. H.B. 212 (101st G.A.), 126 Ohio Laws 655, 670-1; *Milestones*, above, at 28, 36.

Second, the State Board has institutional expertise. Prior attempts at having boundaries set by residents’ preferences failed, as had other methods. *Milestones*, above, at 35-6. It is therefore understandable that “the legislature . . . relied upon the sound judgment of the [] board of

education . . . to make such arrangement of the territory of the respective districts,” *Board of Education v. Boehm* (1921), 102 Ohio St. 292, 301, as the “board presumably is qualified to speak on matters of district formation.” *Kneale v. Jennings* (1924), 111 Ohio St. 637, 640. Indeed, the Court has more recently observed that such decisions are “the product of” the State Board’s “administrative experience [and] appreciation of the complexities of the problem[.]” *Union Title Co. v. State Bd. of Educ.* (1990), 51 Ohio St. 3d 189, 194-5. See also *Davis v. Ohio State Board of Education* (1968), 13 Ohio St.2d 24, 29 (noting the legislature’s reliance on “the sound discretion of the board” in related matters). In short, these sensitive decisions are assigned to the State Board precisely because that body’s expertise makes it likely that those decisions will be prudently made.<sup>3</sup>

The early precedents confirm that the underlying laws make educational efficiency paramount. The basic structure of the laws controlling district boundaries was set in the early twentieth century and contemporaneous precedent understood them to be part of the response to the constitutional mandate to establish “thorough and efficient” schools. *Gigandet v. Brewer* (1938), 134 Ohio St. 86, 91. One appellate court therefore noted that since “[t]he Constitution of Ohio give[s] broad and almost unlimited power to the Legislature to provide a thorough and efficient system,” statutes on district configurations “must be considered in that light.” *Rapp v. Bethel-Tate Consol. School Dist.* (12th Dist. 1937), 58 Ohio App. 126, 132. Another has noted, albeit in a different context, that “the sole object” of the laws governing the reconfiguration of

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<sup>3</sup> The Board recognizes that *Boehm* and *Kneale*, cited above, and *Gigandet v. Brewer* (1938), 134 Ohio St. 86; *State ex rel. Maxwell v. Schneider* (1921), 103 Ohio St. 492, and *Ross v. Adams Mills Rural School Dist.* (1925), 113 Ohio St. 466, discussed below, dealt with the county boards of education, rather than the State Board. However, the same principle of board expertise applies equally to the State Board, as it performs analogous functions, and it has equal, if not greater, institutional competence. Further, the Court’s statements in *Union Title Co.* and *Davis* indicate

school districts is “the more efficient administration of the schools[.]” *Mathews v. Board of Education* (8th Dist. 1917), 8 Ohio App. 206, 214.

Finally, the resulting decisions are given great deference so that such contentious matters are not easily overturned. Board decisions on district modifications are “presumed to be valid,” *State ex rel. Maxwell v. Schneider* (1921), 103 Ohio St. 492, 498, and “will not be interfered with unless it clearly appears that [the board] has abused the discretion so conferred upon it.” *Ross v. Adams Mills Rural School Dist.* (1925), 113 Ohio St. 466, 481. The obvious intent is to lay these difficult matters to rest once they have been decided.

In sum, school district boundaries have great impact and can cause great controversy. Ohio has therefore chosen to base them on the neutral basis of educational merit. As we shall see, the decision below took a different approach, placing private, non-educational interests in the forefront. That requires reversal.

**B. The Court of Appeals improperly gave primacy to non-educational considerations, and those considerations threaten the stability of all Ohio school districts.**

The Court of Appeals lost sight of those principles, overturning the State Board’s decision in a boundary dispute because of the Property Owners’ personal, non-educationally based, concerns about “community spirit and pride.” *Bartchy*, ¶ 53. That is erroneous in several independently fatal respects. It is contrary to the Revised Code’s directions that residents’ preferences are to play only a limited role in such proceedings. It ignored the educational focus mandated by the Administrative Code. It threatens the stability of school district boundaries. It takes a position rejected by other States. It gave insufficient deference to the trial court’s and State Board’s decisions. Each of those problems strongly supports reversal.

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that it recognizes the State Board’s institutional competence and the General Assembly’s continued reliance on the Board.

**1. The Revised Code subordinates residents' preferences to educational merit.**

The most fundamental flaw in the decision below is that it cannot be reconciled with the General Assembly's instructions about the role residents' preferences are to play in adjusting school boundaries. Consistent with Ohio's policy of emphasizing educational efficiency, the Revised Code makes residents' preferences dispositive in only a small category of cases and limits their role in all others, including the type of case at issue here. The appeals court disregarded that by making these Property Owners' preferences dispositive, and that requires reversal.

R.C. Chapter 3311 deals with various types of proceedings affecting district boundaries and it only makes residents' preferences dispositive in a very small sub-set of proceedings. R.C. 3311.22 and 3311.231 provide that proposed changes to local school districts' boundaries are to be decided by elections, making residents' preferences the decisive factor there. R.C. 3311.38(A) makes similar provisions for territory transfers initiated by the State Board of Education. Only a small percentage of Ohio's territory transfer proceedings arise under those statutes and, consistent with Ohio's overall policy of basing boundaries on educational merit, R.C Chapter 3311 makes no other provision for having residents decide territory-transfer cases.<sup>4</sup>

The minor role that residents' preferences are to play is further evinced by R.C. 3311.24, the statute underlying this case. It makes only limited provision for their consideration, allowing residents to initiate proceedings by a petition, but providing no indication that their desires control after that. Indeed, the regulations amplifying the statute demonstrate that once initiated, those proceedings focus on educational impact. See below, at 15-17.

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<sup>4</sup> Although not part of the record below, ODE's records indicate that only two transfers have been pursued under R.C. 3311.22, 3311.231 and 3311.38(A) since 2001. In contrast, twenty-seven proposed transfers have been processed under R.C. 3311.24 during that period, and ten

In sum, the General Assembly knows both how to give residents' preferences preeminence, as it did in R.C. 3311.22, 3311.231 and 3311.38(A), and how to downplay that importance, as it did here. Instead, it limited residents' preference to a triggering role only and it approved administrative rules that require transfers be evaluated on educational merit. The court below took a starkly different approach, making the Property Owners' personal preferences dispositive, citing them as the sole basis for its decision. That cannot be squared with the statutory system and requires reversal.

**2. The Administrative Code focuses on educational impact.**

The decision below is also at odds with the Administrative Code. The controlling regulations require focus on a proposal's educational merit, allow consideration of residents' preferences only after educational merit has been weighed, and even then only as a tie-breaker. The appeals court deviated from those instructions by giving the Property Owners' preferences controlling effect despite the absence of any positive educational impact, and the negative educational impact to Cincinnati caused by lost revenue.

Adm. Code Chapter 3301-89 implements the policy that boundary disputes be resolved on neutral grounds by putting educational impact front and center. That is manifested in the overall standard for judging such proposals: "the present and ultimate good of the pupils concerned." Adm. Code 3301-89-01(F). That general inquiry is advanced by focusing on specific, educationally relevant, facts, including the following:

- The affected districts' educational planning, academic performance, and course offerings. Adm. Code 3301-89-02(B)(3),(21), (23), (24).
- Their extracurricular and athletic programs. Adm. Code 3301-89-02(B)(25).

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proposed transfers were under R.C. 3311.06. Cases under 3311.06 that are not connected with municipal annexations are also resolved on educational merit.

- The facilities involved, the districts' other facilities, and their efficient utilization. Adm. Code 3301-89-02(B)(5),(12); Adm. Code 3301-89-03(B)(10).
- Whether the acquiring district has adequate resources/organizational structure to properly serve the subject territory. Adm. Code 3301-89-02(B)(4), (7).
- The proposal's impact on the relinquishing district. Adm. Code 3301-89-02(B) (9), (10); Adm. Code 3301-89-03(B)(8).
- The distances between the transfer area and the schools that are, or would be, serving it. Adm. Code 3301-89-02(B)(13), (14).
- Economic impact on the schools involved. Adm. Code 3301-89-02(B)(8), (9), (18), (19), (22); Adm. Code 3301-89-03(B)(9).

Those specific areas of inquiry all demonstrate that educational impact is the driving consideration.

The preeminence of educational concerns is reinforced by Adm. Code 3301-89-03(C)'s express subordination of residents' personal preferences to educational merit. It allows their consideration only in limited circumstances: "The school district preference of such residents with school-age children in the territory requested for transfer may only be considered and given weight when all other factors are equal." In other words, residents' personal preferences come into play only as a tie-breaker. And, consistent with Ohio law's overarching focus on educational impact, only the preference of residents with school-aged children are considered.

The appeals court reversed that priority. It gave primary consideration to the Property Owners' concerns about such non-educational matters as "community spirit and pride." And it did so despite critical educationally relevant, and undisputed, facts: (1) Madeira was concerned about capacity, so it did not support the change, (2) Cincinnati would lose funding, thus harming its students, and (3) not a single student would receive any offsetting educational benefit.

The Administrative Code demanded that those matters be given primacy, but the appeals court's focus on the Property Owners' ephemeral, non-educational, preferences deviated from that priority. In short, the court below focused on the icing before determining whether there was even a cake worth baking. That, too, requires reversal.

**3. Considerations of financial gain and “community identification” threaten the stability of Ohio school district boundaries, as Ohio school lines frequently differ from municipal boundaries.**

Not only did the appeals court err in failing to keep educational needs paramount, but it also erred in giving weight to the factors it did consider regarding the Property Owners' wishes.

First, honoring Property Owners' wishes for enhanced property values is wrong for several reasons. Most or all property owners would like to enhance their properties' values; nothing is wrong with that goal in the abstract. But it is wrong to seek school district gerrymandering as a way to enhance those values. That encourages people to seek district changes more frequently, and of course, will typically move in the direction seen here, from urban to suburban schools. All of the “border areas” will be vulnerable to change. Further, such properties are typically bought with the school district's value factored in, so allowing a change brings a windfall to the successful line-changers, and therefore could encourage such speculative buying. That is, some homeowners might buy property in one district in a border area, and then seek to switch it to another area to enhance value. (The Board does not contend that speculative buying occurred here.)

Second, Ohio frequently has school district boundaries that do not align with municipal or other political subdivision boundaries, so allowing changes on the theory of “lining up” city and school would threaten stability throughout Ohio. That is, it is not a rare occurrence in Ohio for large areas to be in, for example, the City of Columbus, but to be assigned to a school district that is mainly associated with another city, such as Worthington. All of those residents might be

said to have the same “misalignment” that the Property Owners here objected to. But if we start down the path of “correcting” such differences as if they are somehow wrong, then much of Ohio’s map will need to be redrawn. The fact is that Ohio has long had a deliberate policy of drawing school lines independently of other governance boundaries, and nothing in R.C. 3311.24 or any other statute suggests that this variance needs correcting.

**4. Courts across the country hold that residents’ personal preferences are not sufficient justification for changing school district boundaries.**

The decision below is also out of step with national practice. Most States have laws analogous to R.C. 3311.24 and Adm. Code Chapter 3301-89, and most make educational impact the dispositive factor. The courts construing those laws have consistently held that residents’ personal preferences are not a sufficient basis for changing boundaries; proof of educational benefit is universally required.

Territory-transfer law is probably more fully developed in Illinois than anywhere else, and its highest court has consistently rejected proposals motivated solely by residents’ non-educational interests. Its most recent decision on the topic reiterated that that “[a]lthough the personal desires of the petitioning parents may be taken into account, more than personal preference is needed to support a change in school district boundaries.” *Carver v. Bond/Fayette/Effingham Regional Bd. of School Trustees* (Ill. 1992), 586 N.E.2d 1273, 1277. The court explained that “petitions . . . should be granted only where the overall benefit . . . clearly outweighs the resulting detriment to the losing district and the surrounding community as a whole.” *Id.* Accord, *Oakdale Community Consol. School Dist. v. County Bd. of School Trustees* (Ill. 1957), 145 N.E.2d 736, 737-8.

Illinois is not alone in that position. Nebraska’s Supreme Court likewise requires that decisions be based “upon educative interests . . . and not on [] mere personal preference based

upon noneducational reasons.” *In re Freeholder’s Petition of Roy v. Bladen School District No. R-31* (Neb. 1957), 84 N.W.2d 119, syllabus 8. South Dakota similarly holds that “[p]ersonal preference is not a sufficient basis for granting a boundary change petition.” *Oelrichs Sch. Dist. 23-3 v. Sides* (S.D. 1997), 562 N.W.2d 907, 913 ¶ 27. And Kentucky’s highest court, in considering the similar situation of transferring students to a neighboring district rather than redrawing boundaries when “desirable” (in the statute’s words), held that “‘desirable’ is not used in the sense of personal preference . . . [w]hat is meant is . . . the best interests of the school and the pupils[.]” *Brown v. Bailey* (Ky. 1931), 37 S.W.2d 58.

Consistent with those principles, other state courts have rejected proposals not supported by a showing of educational gain.

In *Oakdale*, *Carver*, and *Bladen*, for example, property owners asked that district lines be redrawn to coincide with their social spheres. There, as here, property owners produced evidence that their social connections were with communities outside their school districts, but produced nothing about the educational benefit of their proposals. That was not enough.

The Illinois Supreme Court held that “[t]he welfare of the affected districts and their pupils as a whole must control rather than the wishes of a few,” and rejected a proposal because “there [was] nothing which tends to show the proposed change [would] effect an educational improvement in the territories as a whole.” *Oakdale*, 145 N.E.2d at 737, 738. It reached the same conclusion in *Carver*, adding that the “[m]ere absence of substantial detriment to either district, however, is not sufficient to support a petition for detachment and annexation.” 586 N.E.2d at 1278. Nebraska’s Supreme Court similarly held that “The common statement of all plaintiffs’ witnesses . . . was simply that they now ‘prefer,’” one district to another and concluded that “was insufficient to support a grant of the relief sought [.]” *Bladen*, 84 N.W.2d at 126. In short, other

States have expressly rejected the approach taken below. Further, the Property Owners here have cited no other States that defer solely to residents' wishes without a showing of educational gain.

The Board recognizes that those other States' decisions do not control, but the consistent pattern should be highly persuasive. These cases are factually indistinguishable. They are based on statutes that, like Adm. Code Chapter 3301-89, assign educational merit as the ultimate consideration. See Ill. Rev. Stat. 1989, ch. 122, par. 7 – 6 (considering “the best interests of the schools of the area and the educational welfare of the pupils”); Neb. Rev. Stat 79-403(4) (1955) (“proper and for the best interest of the petitioner or petitioners”). Again, the Property Owners here have identified no contrary precedent, and the approach taken by *Oakdale*, *Carver*, and *Bladen* is consistent with Ohio's focus on educational merit. Finally, given the importance of a State's educational environment to its economic development, Ohio cannot afford to lag in this area. The Board therefore urges this Court to join its counterparts across the country.

**5. The appeals court substituted its judgment for that of the trial court and the Board of Education, but the standard of review required two layers of deference.**

Finally, the appeals court's action cannot be justified by R.C. 119.12, the stated basis for its decision. That statute first mandates that common pleas courts defer to agencies, and it further requires appeals courts to defer to trial courts. Thus, trial court decisions may be set aside only if they are an abuse of discretion, and the absence of evidence about educational benefit combined with the controlling legal standard precludes any finding of such abuse here. Instead, the court below simply substituted its judgment for that of the trial court and the Board of Education.

A court of appeals may overturn a trial court decision in a territory-transfer appeal only if it finds an abuse of discretion. *Board of Educ. of Rossford Exempted Village School Dist. v. State Board of Education* (1992), 63 Ohio St. 3d 705, 707. A school board's decisions about district boundaries likewise will be upheld unless the Board abused its discretion. *Ross*, 113 Ohio St. at

481; *Kneale*, 111 Ohio St. at 641-2; *Maxwell*, 103 Ohio St. at 498. The record here demonstrates that no such abuse of discretion occurred.

No one disputes that the Property Owners had the burden of proof. The “default rule” is that a party seeking relief under a statute has the burden of proving that he meets its requirements. *Schaffer v. Weast* (2005), 546 U.S. 49, 57. Ohio applies that rule to administrative proceedings generally. *Youngstown Sheet & Tube Co. v. Maynard* (10th Dist. 1984), 22 Ohio App. 3d 3, 8. Of more particular interest, Ohio has joined other States in holding that parties seeking to change school district boundaries have the burden of proving why that should be done. *Hicks ex rel. 528 Petitioners v. State Bd. of Educ.* (10th Dist. 2003), 2003-Ohio-4134 ¶ 16; *In re Annexation of Part of Donnybrook Pub. Sch. Dist.* (N.D. 1985), 365 N.W.2d 514, 523; *Kumley v. Polk County Dist. Boundary Bd.* (Ore App. 1985), 706 P.2d 562, 563; *Fixmer v. Regional Bd. of School Trustees* (Ill App. 1986), 497 N.E.2d 152, 155. Thus, the transfer sought here was properly denied unless the Property Owners showed that their proposal met the controlling standard; the Owners were not entitled to a presumptive “yes,” nor was the Cincinnati district required to show educational harm.

The Property Owners here did not meet their burden. Adm. Code 3301-89-01(F) requires that territory transfers advance “the present and ultimate good of the pupils concerned,” and no evidence showed that any pupil would be helped by this transfer. Only one pupil lived in the transfer area. He attended private school and would continue to do so regardless of whether the transfer occurred, so he would not benefit. Similarly, no evidence suggests that any student of either the Madeira or Cincinnati districts, the only other “pupils concerned,” would be helped. In short, the Property Owners failed to prove this essential point.

That evidentiary gap was not filled by testimony about the supposed difficulty of cycling on the roads leading to the Cincinnati schools serving the area. That is factually immaterial because no pupils will be making that trip: no public school students live in the subject properties and the Property Owners represented that they “have every intention of staying in their current homes for an extended period of time.” Petitioners’ Post Hearing Brief at 10-11. It is also legally insufficient because this Court has held that “facts with reference to distance, condition of roads, etc” do not “warrant the court in substituting its judgment for that of the [] board of education [.]” *Maxwell*, 103 Ohio St. 492, 498-9. Accord, *Fixmer*, 497 N.E.2d at 156 (“a reduction in the distance traveled is not, in itself, a sufficient basis for granting the petition.”).

The record therefore showed no educational justification for the transfer. At the same time, it was undisputed that the relinquishing district would suffer at least some loss, as of course the loss of the property would mean a loss of revenue. Further, the acquiring district, Madeira, had capacity issues. Neither district supported the transfer. It is hard to see how rejecting a transfer in those circumstances could be an abuse of discretion. *Rossford*, 63 Ohio St. 3d at 707. The appeals court simply saw things differently than the hearing officer, the State Board, and the trial court all did. In light of the primary deference owed to the Board, and the secondary deference owed to the trial court, the appeals court’s decision to reverse was mistaken.

In sum, the court below erred because it failed to adhere to the specific ways that Ohio’s general policy of resolving boundary disputes is implemented; it deviated from the Revised Code’s limitations on the role that residents’ preferences are to play; and it failed to obey the Administrative Code’s mandate that educational considerations be given primacy. It took an approach repeatedly rejected by other States. And it substituted its judgment for the

decisionmakers that Ohio law required it to defer to. Consequently, the decision below should be reversed.

**C. The precedent set below, if affirmed, would add to the problems facing Ohio's educational system.**

The decision below is not only bad law, it is also bad public policy on at least two levels. It will increase the number, and the resulting burdens, of the secession attempts already plaguing Ohio's urban school districts. Further, its subjective standard will make it harder for local officials to plan for the future.

**1. The decision below will prompt additional petitions to secede from urban school districts, diverting those districts' scarce resources from productive uses.**

While most or all schools face challenges today, urban schools especially face tremendous challenges, and they do so under severe financial constraints. Those problems are compounded by the phenomenon of affluent residents attempting to secede from central city districts by petitioning for boundary changes. For example, residents of upscale neighborhoods in the Los Angeles and Tacoma areas have recently sought to alter district lines to withdraw from their local districts. Randall C. Archibold, *Wanting Better Schools, Parents Seek Secession*, New York Times, Jan. 28, 2006 at A 10; Debby Abe, *UPlace, Tacoma Schools Fight Over Turf; Some Parents Want Territory to Switch Districts*, Tacoma News Tribune, May 22, 2004, at B 1. That is not a new or atypical practice; as one respected newspaper earlier reported, several redistricting cases are those in which "the affluent and the powerful gerrymander school boundaries." Brigid Schulte and Dan Keating, *Closing Student Gap Opens Door to Conflict*, The Washington Post, Sept. 3, 2001, A1.

That occurs in Ohio, as shown by this and other cases. Indeed, Cincinnati has had to deal with four such petitions in recent years.

Those petitions, successful or not, cause very real problems to the already-stressed districts involved. Even if unsuccessful, they require districts to consume significant financial and political resources that could be better used improving schools. See, e.g., *Garfield Heights City Sch. Dist. v. State Bd. of Educ.* (1990), 71 Ohio St. 3d 590 (describing proceedings). If such petitions succeed, the districts lose some of their best students and some portion of their tax base. Such proceedings are truly no-win situations for the districts targeted to lose territory.

The approach below, if adopted by this Court, would combine with economic self-interest to prompt more secession petitions. It makes them more attractive by removing the primary obstacle to their success, proving educational merit. And given the powerful effect school boundaries have on home values, William T. Bogart & Brian A. Cromwell, above (noting differences of between 41% and 84% across boundary lines), one can be sure that many will seek to take advantage of that precedent by pushing secession petitions. That is not in the public interest.

**2. The standard used below, by deferring to owners' wishes, will complicate local planning.**

The specific harmful effects described above would not be the only adverse result of the appeals court's approach, as the broader uncertainty resulting from the potential of seeing lines shift with owners' preferences will make it more difficult for school and municipal officials to plan. As explained above, school district boundaries have great practical import, affecting overall development patterns and the finances of both school districts and the municipalities they serve. As one court has noted "[a]ny change in area, funds and population naturally disturbs . . . plans" and "changes in boundaries, however small, have harmful effects" in that regard. *Board of Education v. County Bd. of School Trustees* (Ill. App. 1958), 153 N.E.2d 378, 381.

Unfortunately, the approach taken below would prompt just such instability. By substituting personal preferences for educational standards, it puts borders in play with no standards to predict outcomes. As another court correctly observed, changing district boundaries on the inherently unpredictable basis of personal preferences would hamper “planning . . . which necessarily require[s] some stability[.]” *School Dist No. 119. v. Stiehl* (Ill. App. 1959), 161 N.E.2d 28, 30. That, too, is bad public policy.

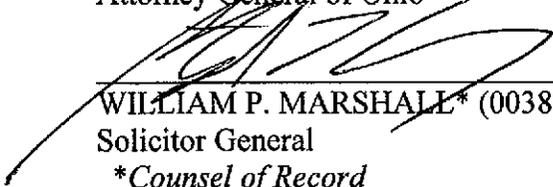
The approach taken below, if endorsed here, would undoubtedly encourage more transfer petitions, diverting scarce resources and making it harder to plan for the future. That may benefit a few petitioners, but it is surely not in the public interest. The State Board therefore urges the Court to reaffirm what Ohio law already makes clear—that district boundaries are only to be changed on a showing of educational merit.

## CONCLUSION

For the above reasons, the Court should reverse the judgment below and remand the case to the trial court with instructions to affirm the State Board's decision denying the Property Owners' petition.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

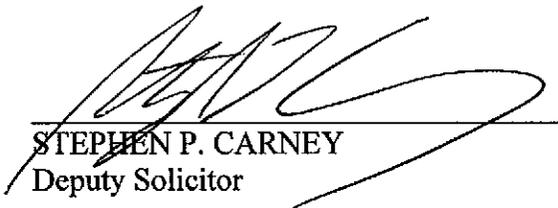
I certify that a copy of the foregoing Merit Brief of Appellant State Board of Education was served by U.S. mail this 10th day of September, 2007, upon the following counsel:

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of Education



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Deputy Solicitor

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
	:	

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**SECOND NOTICE OF APPEAL  
OF APPELLANT STATE BOARD OF EDUCATION**

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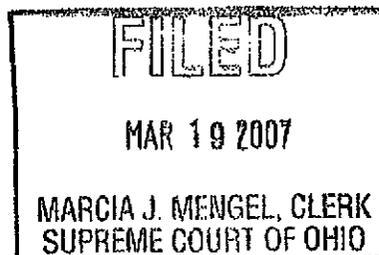


EXHIBIT 1

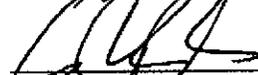
**SECOND NOTICE OF APPEAL  
OF APPELLANT STATE BOARD OF EDUCATION**

Appellant State Board of Education gives notice of its discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Section 1(A)(3), from a decision of the Franklin County Court of Appeals, Tenth Appellate District, journalized in Case No. 06AP-697 on January 25, 2007. A date-stamped copy of the judgment entry and opinion being appealed is attached to Appellant's Memorandum in Support of Jurisdiction as Exhibit 1.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Second Notice of Appeal of Appellant State Board of

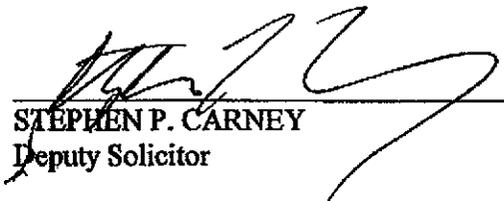
Education was served by U.S. mail this 14<sup>th</sup> day of March, 2007, upon the following counsel:

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Education

  
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STEPHEN P. CARNEY  
Deputy Solicitor

03/05/20

FRANKLIN COUNTY COURT OF APPEALS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

2007 JAN 25 AM 3:40

CLERK OF COURTS

Richard and Joann Barchy 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

ON COMP

EXHIBIT 2

C. DiMuzio

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN COUNTY OHIO  
2007 JAN 25 PM 3:38  
CLERK OF COURTS

Richard and Joann Barchy 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)

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O P I N I O N

Rendered on January 25, 2007

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*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.*

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APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Appellants, Joann and Richard Barchy, 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 pari 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

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.

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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 [d]o 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 be 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." *Cincinnati* at 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.

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6/8/06

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

Richard Bartchy, et al.,

Appellants : CASE NO. 05CVF07-8104

-vs- : JUDGE JOHN A. CONNOR

CLERK OF COURTS  
JUL 11 2006 10:47 AM  
CLERK OF COURTS

Ohio State Board of Education,

Appellee.

**DECISION AND ENTRY AFFIRMING THE ORDER OF THE STATE  
BOARD OF EDUCATION**

Rendered this June day of ~~May~~, 2006.

CONNOR, JUDGE

**I. INTRODUCTION**

The instant action is before the Court upon appeal filed July 28, 2005 from a decision of the State Board of Education (hereinafter "Board") denying a territory transfer at its meeting of July 12, 2005. Appellants Joann and Richard Bartchy, Donna and Robert Salmon, Marilyn and Bernard Schlake, and Beverly and Wayne Morris are property owners on Windridge Drive, a cul-de-sac located in a subdivision annexed into the City of Madeira in 1996. They presented a petition to have a transfer of their school district from that of Cincinnati Public Schools (hereinafter "CPS") to the Madeira City School District.

A Hearing Officer for the Board conducted a hearing and his recommendation was to deny the transfer. The Board heard objections to the Hearing Officer Report and Recommendation and denied the transfer in a 10-5 decision. Arguments of counsel have been submitted and the record of the administrative proceedings has been filed. The Court's decision on the merits issues below.

EXHIBIT 3

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

The Windridge properties have been part of the CPS prior to and after the property was annexed to Madeira in 1996. The only four homeowners petitioned in March 2000 to have the school district changed, offering that they identified more strongly with Madeira than with Cincinnati. After filing the petition, the Board appointed a Hearing Officer to conduct a hearing. That hearing took place on March 23, 2005 and testimony was offered by four of the individual homeowners, Donna Salmon, Richard Bartchy, Bernard Schlake, and Robert Salmon. The Petitioners and CPS were represented by counsel. CPS opposed the transfer of the properties. Madeira was not represented and has taken no position on the proposed transfer.

## **III. STANDARD OF REVIEW**

Appellants have pursued the transfer of their property under the provisions of R.C. 3311 et seq. Review of a decision by the Board is governed by R.C. 119.12. Pursuant to R.C. 119.12, a reviewing trial court must affirm the order of the Board if it is supported by reliable, probative and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 111; *Henry's Cafe, Inc. v. Board of Liquor Control* (1959), 170 Ohio St. 233; *Insight Enterprises, Inc. v. Liquor Control Comm.* (1993), 87 Ohio App.3d 692

The quality of the required evidence was defined by the Ohio Supreme Court in *Our Place v. Liquor Control Comm.* (1992), 63 Ohio St. 3d 570 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. *Id.* at 571.

The common pleas court's review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but consists of "a hybrid review in which the court must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence and the weight thereof." *Marciano v. Liquor Control Comm.* (Apr. 22, 2003), Franklin App. No. 02AP-943, unreported, citing *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207. In undertaking such a review, the court must give due deference to the administrative agency's resolution of evidentiary conflicts, but the findings of the agency are not conclusive. *Id.* Once a violation is established, the penalty, if legal, is entirely within the province of the Commission. Even if the reviewing trial court were inclined to be more lenient, it is powerless to do so given the long-settled rule of *Henry's Cafe v. Board of Liquor Control* (1959), 170 Ohio St. 233, found at paragraph three of the syllabus:

On such appeal, the Court of Common Pleas has no authority to modify a penalty that the agency was authorized to and did impose, on the ground that the agency abused its discretion.

See also *Hale v. Ohio State Veierinary Medical Board* (1988), 47 Ohio App. 3d 167; *Evans v. Board of Liquor Control* (1960), 112 Ohio App. 264; *Ganson v. Board of Liquor Control* (1953), 70 Ohio L. Abs. 242.

#### **IV. ANALYSIS AND FINDINGS OF THE COURT**

Appellants assert that the Board did not adequately weigh the factors favoring transfer. They also offer that the Board improperly relied upon unsworn testimony and evidence. The final error assigned is that the Board erred in adopting the Hearing Officer Report and Recommendation which had concluded that the transfer would result in a windfall to Madeira. In addition to the assigned errors, Appellee CPS has raised the issue of jurisdiction. That issue was raised in Appellee CPS'

administrative hearing brief, but does not reflect that the Hearing Officer or Board addressed the issue. Prior to consideration of the assigned errors, the Court will offer an analysis of the issue of jurisdiction.

Appellants' petition for transfer was considered under R.C. 3311.24. CPS contends that R.C. 3311.06 applies because of the 1996 annexation of Appellants' property. Review of the two statutes indicates that R.C. 3311.06 pertains to a school district's desire to transfer. See R.C. 3311.06(C)(2). R.C. 3311.24(A) grants the right for Board review when a petition is filed by at least 75% of the residents. Accordingly, jurisdiction is proper under R.C. 3311.24 and Appellee's argument is not well taken.

*Hicks ex rel. 528 Petitioners v. Slate Bd of Educ.* (2003), Franklin App. No. 02AP-1183, 2003-Ohio-4134, adopted the reasoning in *Garfield Hts. City School Dist. v. Slate Bd. of Edn.* (1990), 62 Ohio App.3d 308, that when a transfer of territory between school districts is requested, "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."

Consideration of school district transfers is guided by administrative law promulgated by the Board and by applicable case law. Ohio Administrative Code (hereinafter "OAC") 3301-89 et seq. provides for seventeen (17) various questions to be answered by the school districts involved (OAC 3301-89-02(B)), and factors, exclusive of the answered questions, to be considered by the referee (OAC 3301-89-03). The prevailing consideration is contained in OAC 3301-89-01(F):

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.

The petitioners acknowledge that they have the burden of proof in establishing that the transfer should be approved by the Board.

The Court will set forth the full text of the OAC rule 3301-89-02, whose questions are as

follows:

- (1) Why is the request being made?
- (2) Are there racial isolation implications?
  - (a) What is the percentage of minority students in the relinquishing district?
  - (b) What is the percentage of minority students in the acquiring district?
  - (c) If approved, would the transfer result in an increase in the percentage of minority pupils in the relinquishing district?
- (3) What long-range educational planning for the students in the districts affected has taken place?
- (4) Will the acquiring district have the fiscal and human resources to efficiently operate an expanded educational program?
- (5) Will the acquiring district have adequate facilities to accommodate the additional enrollment?
- (6) Will both the districts involved have pupil population and property valuation sufficient to maintain high school centers?
- (7) Will the proposed transfer of territory contribute to good district organization for the acquiring district?
- (8) Does the acquiring district have the capacity to assume any financial obligation that might accompany the relinquished territory?
- (9) Will the loss of either pupils or valuation be detrimental to the fiscal or educational operation of the relinquishing school district?
- (10) Have previous transfers caused substantive harm to the relinquishing district?
- (11) Is the property wealth in the affected area such that the motivation for the request could be considered a tax grab?
- (12) Are there any school buildings in the area proposed for transfer?

- (13) What are the distances between the school buildings in:
- (a) The present area?
  - (b) The proposed area?
- (14) Eapproved, will the requested transfer create a school district with noncontiguous temtory?
- (15) Is the area being requested an isolated segment of the district of which it is a part?
- (16) Will the municipal and school district boundary lines become coterminous?
- (17) For both the districts:
- (a) What is the inside millage?
  - (b) What is the outside operating millage?
  - (c) What is the bonded indebtedness millage?

OAC 3301-89-03 sets forth other factors to be considered which include prior agreements between the districts, effect upon racial makeup, boundary line continuity, upheaval of long-held loyalties, and impairment to the losing district of its educational program. The rule further provides that if the evidence is in balance, the Hearing Officer may consider the preference of the residents with school-age children.

The totality of the evidence establishes that four families, none of whom have children attending public schools, seek to transfer their school district upon the basis that they feel more a part of Madeira than Cincinnati. (Transcript at 48). The Salmon family has a fifteen year old son, but he attends a parochial school. No other family prior to or at the time of the hearing had a child that attended CPS. Appellants list eleven factors that they believe supports the requested transfer. (Merits

Brief, page 10-11).

The Hearing Officer summarized the testimony of the witnesses and concluded that no evidence had been presented concerning the ultimate good of any students who currently reside in the proposed area of transfer if the transfer were approved. He did note that the witnesses agreed that a community bond existed with Madeira and not with Cincinnati. He further addressed that the Madeira schools were at or near capacity, while CPS was losing students. It was noted that if the transfer were approved, Madeira would gain no students but would receive an increased tax base. Madeira was noted to have taken no position on the proposed transfer. A percentage analysis of the effect on finances or racial balance reflects a miniscule effect on CPS. Since no students are involved, Madeira stands to gain, even though in a de minimis amount.

Appellants offer that the Hearing Officer considered only the potential racial and financial impact of transfer. The Report and Recommendation reflects that the Hearing Officer reviewed the answers tendered by both districts to the 17 question list. He stated "[h]owever, because no students are involved in the proposed area of transfer, the only issue of significance is the loss to Cincinnati Public Schools of the assessed valuation of these four properties." Report *and* Recommendation, at 20. The tenor of the findings and conclusions establishes that the Hearing Officer considered all of the answers of the districts as well as the other factors to be considered. He also noted the history of cases considering transfer requests. He focused upon the impact not only as to those potential future students in the transfer area, but also the impact upon those in the existing districts.

Madeira indicated that there would be no impact, CPS offered its assessment that prior transfers had cause more than an 18 million dollar valuation decline and this transfer would subtract an additional \$373,840. While Appellants may contend that adequate weight was not given to the various

factors to be considered, it would be improper for the Court to disregard the balance given to the evidence by the trier of fact without a substantial basis to do so. Appellants could have provided evidence to dispute the figures and answers provided by CPS, but did not do so. The Court does not find Appellants' first assigned error well taken.

Appellants also submitted that the Hearing Officer relied upon improper evidence to reach his decision. The questions that are propounded to the districts pursuant to O.A.C. 3301-89-02 necessarily involve a high degree of hearsay, since many of the questions relate to readings from maps or bus routes, snapshots of student populations, property records, and the opinions of the district personnel. Balancing these answers with evidence offered by the proponents of the transfer necessarily involves credibility and weight. If the districts were to bring in underlying documentation and personnel for validation of the various answers, the hearings on transfers could arguably consume days or months. Unless Appellants have some basis to dispute valuation and racial percentages, the Court declines to adopt a more stringent admission standard for the Hearing Officer and Board. Hearsay evidence at the administrative level is allowed unless unreliable to a degree as to create a sufficient degree of doubt or skepticism to disregard the evidence. The map and affidavit of the Madeira city manager are not of such importance as to constitute reversible error.

The final error might be termed one of "whose goose is being cooked." Appellants argue that CPS has been receiving a windfall by never educating a child from the neighborhood. CPS has offered that it would welcome any new students from the area and as it was not the instigator of the transfer request, it has done nothing to acquire a windfall. Curiously absent from the argument is the Madeira school district which has offered nothing contrary to or in favor of the transfer. The position of that district must then be presumed neutral. Appellee Board has noted that none of the parents who

testified indicated that they would have chosen to send their children to Madeira schools rather than private, had the option been available. Appellants believe that future residents would benefit from a transfer due to geographic location of the nearest schools and affiliation with community.

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, the 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. The Court does not find the error supported by the evidence, but if the Court were to conclude that the assignment of error was of merit, the conclusion would not warrant reversal of the Board's decision.

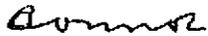
Upon review of the arguments, record of proceedings, and applicable statutory and case law, this Court finds that that the July 14, 2005 Order is supported by reliable, probative and substantial evidence and is in accordance with law. Accordingly, the Court hereby **AFFIRMS** the Order of the Board.

Rule 58(B) of the Ohio Rules of Civil Procedure provides the following:

**(B) Notice of filing.** When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment on the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

~~The Court finds that there is no just reason for delay. This is a final appealable order.~~

The Clerk is instructed to serve the parties in accordance with Civ. R. 58(B) as set forth above.

  
\_\_\_\_\_  
JOHN A. CONNOR, JUDGE

**COPIES TO:**

Timothy M. Burke, Esq., Attorney for Appellants  
David C. MiMuzio, Esq., Attorney for Appellee Cincinnati School District  
Rebecca J. Albers, Esq., Attorney for Appellee Ohio Board of Education



# RESOLUTION

16. **RESOLUTION TO ACCEPT THE RECOMMENDATION OF THE HEARING OFFICER AND TO DENY THE TRANSFER OF SCHOOL DISTRICT TERRITORY FROM THE CINCINNATI CITY SCHOOL DISTRICT, HAMILTON COUNTY, TO THE MADEIRA CITY SCHOOL DISTRICT, HAMILTON COUNTY, PURSUANT TO SECTION 3311.24 OF THE OHIO REVISED CODE**

I **RECOMMEND** that the State Board of Education **ADOPT** the following Resolution:

WHEREAS The State Board of Education did, on May 11, 2004, declare its intention to consider the request to transfer certain school district territory from the Cincinnati City School District, Hamilton County, to the Madeira City School District, Hamilton County; and

WHEREAS the Superintendent of Public Instruction was directed to notify the parties of such intent and to notify them of their opportunity for a hearing; and

WHEREAS on October 12, 2004, the State Board of Education adopted a resolution that directed the State Superintendent of Public Instruction to establish a hearing on the proposed transfer, and the hearing was held on March 23, 2005, before Hearing Officer Robert B. St. Clair; and

WHEREAS the hearing officer, in his report of April 28, 2005, recommends that the State Board of Education deny the proposed transfer of territory from the Cincinnati City School District, to the Madeira City School District, pursuant to Ohio Revised Code Section 3311.24; and

WHEREAS objections to the report of the hearing officer were received from the petitioners; and

WHEREAS a response to the petitioners' objections to the report was received from the Cincinnati City School District; and

WHEREAS all objections and responses have been considered: Therefore, Be It

**RESOLVED**, That upon consideration of the foregoing, the State Board of Education hereby accepts the recommendation of the Hearing Officer and denies the request for the transfer of territory from the Cincinnati City School District, Hamilton County, to the Madeira City School District, Hamilton County; and, Be It

**FURTHER RESOLVED**, That the Superintendent of Public Instruction be, and she hereby is, directed to serve a true copy of this resolution on the petitioners, the Boards of Education of the Cincinnati City and Madeira City School Districts, and counsel of record, if applicable.

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I certify that the above is a true and correct copy of the action taken by the State Board of Education at its meeting on July 12, 2005.

Columbus, Ohio  
July 14, 2005

  
\_\_\_\_\_  
Susan Tave Zelman  
Superintendent of Public Instruction

EXHIBIT 4

STATE BOARD OF EDUCATION

***IN THE MATTER OF:***

Proposed Transfer of School District Territory from the Cincinnati City School District, Hamilton County, to the Madeira City School District, Hamilton County, Pursuant to Section 3311.24 of the Revised Code

Date of Record Hearing:  
March 23, 2005

Date of Decision:  
April 28, 2005

Robert B. St. Clair  
Hearing Officer

STATE BOARD OF EDUCATION  
APR 28 2005

REPORT AND RECOMMENDATION OF HEARING OFFICER

This matter came on for hearing on March 23, 2005, before the undersigned hearing officer appointed by the State Board of Education ("State Board") in accordance with the provisions of section 3311.24 of the Revised Code.

Attorney Timothy M. Burke represented the petitioners who reside within the proposed area of transfer. Attorney David C. DiMuzio represented the Cincinnati City School District ("Cincinnati Public Schools"). Madeira City School District ("Madeira City Schools") was not represented by counsel nor was anyone present at the hearing on their behalf. The Ohio Department of Education ("ODE"), which took no official position with respect to this proposed transfer of territory, was represented by Ohio Attorney General Jim Petro and Assistant Attorney General Julie Miceli. Also present during the hearing was ODE's Chief Legal Counsel, Matthew J. DeTemple.

EXHIBIT 5

*Proposed Transfer of Territory from Cincinnati City School District  
to Madeira City School District, Hamilton County*

***Record of Appearances:***

Timothy M. Burke, Esq.  
Manley Burke, LPA  
225 West Court Street  
Cincinnati, Ohio 45202  
Telephone: (513) 721-5525

*Attorney for Petitioners*

David C. DiMuzio, Esq.  
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Cincinnati, Ohio 45202  
Telephone: (513) 621-2888

*Attorney for Cincinnati City School District*

This proceeding was conducted pursuant to the provisions of R.C. 3311.24 and Ohio Adm.Code 3301-89. These sections, in effect, authorize qualified electors who reside within a school district to petition the State Board to transfer territory in which they reside to another school district. The board of education in the territory in which a proposal originates must verify the signatures on the petition and forward it, along with a map showing the boundaries of the territory proposed to be transferred, to the State Board. The State Board may hold a hearing and then must approve or deny the requested transfer. Ohio Adm.Code 3301-89 provides policies, procedures and factors for consideration in transfers of territory. Additionally, Ohio Adm.Code 3301-89-02(B) provides a list of 17 questions which each of the school districts involved in the proposed transfer are requested to answer to aid in the State Board's consideration. Finally, Ohio Adm.Code 3301-89-03 lists 10 factors to be considered by a hearing officer appointed to hear the request for a transfer.

11  
1.

*Proposed Transfer of Territory from Cincinnati City School District  
to Madeira City School District, Hamilton County*

**PROCEDURAL BACKGROUND**

In March 2000, Chief Circulator Robert J. Cummings presented to the Cincinnati City School District a petition signed by eight residents who reside on Windridge Drive in the City of Madeira, Hamilton County. These petitioners proposed the transfer of their four properties located in the City of Madeira from the Cincinnati City School District to the Madeira City School District. As required by R.C. 3311.24(A), these eight residents are "equal to or more than the 75% required of the qualified electors residing within the portion of the property proposed to be transferred."

In August 2000, Cincinnati Public Schools submitted the petition to ODE. In response to ODE's request, both Madeira City Schools and Cincinnati Public Schools submitted answers to 17 questions and other information in accordance with Ohio Adm.Code 3301-89-02(B). Thereafter, on May 13, 2004, the State Board adopted a resolution declaring its intention to consider the request to transfer certain territory from the Cincinnati City School District, Hamilton County, to the Madeira City School District, Hamilton County.

The undersigned was appointed to hear this matter and a hearing was conducted on March 23, 2005. Only four witnesses testified at the hearing and 38 exhibits were admitted into the record. The parties were given until April 22 to file post-hearing briefs, and the report and recommendation of the hearing officer was expected to be submitted to the State Board within two weeks thereafter.

*Proposed Transfer of Territory from Cincinnati City School District  
to Madeira City School District, Hamilton County*

***Petitioners contend the following:***

The proposed transfer area, consisting of four homes located on Windridge Drive in the City of Madeira, Hamilton County, involves a portion of Columbia Township that was annexed into the City of Madeira in 1996 at the request of the property owners. Although these properties are now located within the City of Madeira municipal boundary, for school purposes the properties remain in the Cincinnati City School District. The eight petitioners (four married couples) who live in the transfer area believe the transfer would provide a stronger sense of community with the City of Madeira. Petitioners contend that keeping City of Madeira residents in the Cincinnati City School District needlessly splits their allegiance to the City of Madeira and saps community spirit.

***Madeira City School District contends the following:***

As summarized in the Madeira City School District's response as to why this request is being made, one of 17 questions posed in the consideration of a proposed transfer of territory for school purposes from one school district to another, the district's board of education emphatically stated that, "Madeira City Schools is not initiating, soliciting nor encouraging this request."

***Cincinnati City School District contends the following:***

As summarized by counsel for Cincinnati Public Schools in his opening statement, it is the district's position that the proposed transfer "is not necessary, it's not appropriate, [and] it has absolutely nothing to do with the present and ultimate good of the students involved." There are no Cincinnati City School District students currently residing in any of the four homes involved,

*Proposed Transfer of Territory from Cincinnati City School District  
to Madeira City School District, Hamilton County*

and the petitioners simply want to increase their property values by advertising that they are located in the Madeira City School District.

***Seventeen Factors of Significance:***

Rule 3301-89-02, Ohio Adm.Code, sets forth certain questions to be answered by the school districts involved so that a hearing officer can consider those responses when a request is made for a transfer of territory under R.C. 3311.24. This rule states that the hearing officer will consider 17 factors of significance outlined in paragraph B of Rule 3301-89-02, Ohio Adm.Code.

Although specific questions will be discussed under findings of fact and conclusions of law, the two school districts' complete, *unedited* responses taken from State Board Exs. 3 (Madeira City School District) and 24 (Cincinnati City School District) are incorporated herein:

***(1) Why is the request being made?***

***Madeira City Schools:*** "The Board of Education of Madeira City Schools is not initiating, soliciting nor encouraging this request. Seek response from the petitioners."

***Cincinnati Public Schools:*** "Unknown."

***(2) Are there racial isolation implications?***

***Madeira City Schools:*** "The Madeira City School district cannot answer this question except to say the Cincinnati City Schools recently opposed a similar transfer into the Madeira City School District in part because of racial concerns. Ultimately, the Ohio Court of Appeals approved the transfer and the property is now part of the Madeira City School District. (Ken Arbre)."

*Proposed Transfer of Territory from Cincinnati City School District  
to Madeira City School District, Hamilton County*

*Cincinnati Public Schools: "Yes."*

*(a) What is the percentage of minority students in the relinquishing district?*

*Madeira City Schools: "Seek response from Cincinnati City Schools."*

*Cincinnati Public Schools: "76.2%."*

*(b) What is the percentage of minority students in the acquiring district?*

*Madeira City Schools: "6.82%."*

*Cincinnati Public Schools: "Unknown."*

*(c) If approved, would the transfer result in an increase in the percentage of minority pupils in the relinquishing district?*

*Madeira City Schools: "The Cincinnati City School District is in the best position to answer this question."*

*Cincinnati Public Schools: "Yes."*

*(3) What long-range educational planning for the students in the districts affected has taken place?*

*Madeira City Schools: "Space at all three buildings remains at or near capacity. In November 1996, a bond issue was approved by the Madeira community. Additional classrooms were added at the Madeira Junior/Senior High School and Dumont Primary School. However, even with the costly additions, teachers are sharing classroom space. Space is a concern for Madeira City Schools."*

*Cincinnati Public Schools: "Cincinnati Public Schools Vision Statement: The Cincinnati Public Schools will be among the highest achieving school districts in the nation and will receive*

***Proposed Transfer of Territory from Cincinnati City School District  
to Madeira City School District, Hamilton County***

the highest ratings on the State Report Card. Our students will envision a positive future for themselves and will be successful learners. Our graduates will be prepared to enter the workforce or be accepted into institutions of higher learning.

"Cincinnati Public Schools students will be educated by highly qualified teachers and staff, who will engage in ongoing professional development, in schools that will offer state-of-the-art curriculum and instruction aligned with adopted academic standards. Individual student progress will be assessed and monitored regularly, and each student will receive appropriate and timely intervention to ensure academic progress. The curriculum and the district culture will promote an appreciation and respect for diverse perspectives and talents. Students with special needs will receive appropriate accommodations, resulting in higher levels of academic performance.

"The Cincinnati Public Schools will provide facilities that will be high-quality, safe, and well-maintained. The learning environments will be orderly and will facilitate and appropriately compliment academic programs. Our paced, integrated curriculum will provide academic consistency across schools while offering flexible and challenging learning opportunities. District policies and administrative procedures will focus on promoting student achievement; our efforts to support student learning will be adequately funded while maximizing efficiency of operations without sacrificing quality.

"Cincinnati Public Schools teachers and staff will work in partnership with students, families and the community to ensure that students meet or exceed academic standards from pre-

**Proposed Transfer of Territory from Cincinnati City School District  
to Madeira City School District, Hamilton County**

kindergarten through twelfth grade. Every school will be a Community Learning Center to more efficiently integrate community resources in the delivery of services to our students.

"The members of the Board of Education will be held accountable to the public for a high-quality school system that is fiscally responsible. The Cincinnati Public Schools will be a community of lifelong learning and support for the citizens we serve."

Cincinnati Public Schools Mission Statement: "Educate each student to meet or exceed the district's defined academic standards."

Cincinnati Public Schools Goals: "Cincinnati Public Schools are committed to one goal - improving student academic performance- and one plan - a focus on academic standards, frequent monitoring of student progress and strategic intervention."

***(4) Will the acquiring district have the fiscal and human resources to efficiently operate an expanded educational program?***

Madeira ~~City~~ Schools: "Madeira **C**ity Schools is currently serving an at or near capacity number of students given the space available. In addition, the graduation requirements at Madeira High School are very directive in the specific credits to be earned. Students are required to earn **21.5** credits that include requirements beyond the core subject area such as **2** credits in foreign language, **.25** credits in public speaking, **1** credit in visual & performing arts, and proficiency in technology. The **21.5** credits only include **2.25** credits of electives. Therefore, any significant increase in enrollment will impact on fiscal and human resources by requiring more staff to create

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sections of classes needed for graduation requirements. However, a few students can be absorbed."

*Cincinnati Public Schools*: "Unknown."

(5) Will the **acquiring** district have adequate **facilities** to accommodate the additional enrollment?

*Madeira City Schools*: "As stated above, the district is currently serving a near capacity number of students. However, we have no data to indicate how many students would be expected to transfer as a result of this request. A few students can be absorbed. A significant number would negatively impact on the district."

*Cincinnati Public School*: No response.

(6) Will both of the **districts** involved have pupil population and property valuation sufficient to **maintain** high school centers?

*Madeira City Schools*: "Madeira City Schools will be able to maintain our high school at the current population status."

*Cincinnati Public School*: "Yes."

(7) Will the proposed transfer of **territory** contribute to good district organization for the acquiring district?

*Madeira City Schools*: "The transfer will not impact on the organization of the district."

*Cincinnati Public Schools*: No response.

(8) Does the acquiring district have the capacity to assume any financial **obligation** that might accompany the relinquished **territory**?

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*Madiera City Schools:* "Provided that the number of additional students is not significant, financial obligation should be manageable."

*Cincinnati Public Schools:* "Unknown."

*(9) Will the loss of either pupils or valuation be detrimental to the fiscal or educational operation of the relinquishing school district?*

*Madiera City Schools:* "Seek response from Cincinnati City Schools."

*Cincinnati Public Schools:* "Yes."

*(10) Have previous transfers caused substantive harm to the relinquishing district?*

*Madiera City Schools:* "Seek response from Cincinnati City Schools."

*Cincinnati Public Schools:* "Yes."

*(11) Is the property wealth in the affected area such that the motivation for the request could be considered a tax grab?*

*Madiera City Schools:* "The Madeira City School District did not initiate this request nor has it sought to acquire the area requesting transfer. If this property is residential only and not commercial, it is unlikely that this transfer would be considered a tax grab."

*Cincinnati Public Schools:* "Yes."

*(12) Are there any school buildings in the area proposed for transfer?*

*Madiera City Schools:* "No."

*Cincinnati Public Schools:* "No."

*(13) What are the distances between the school buildings in:*

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*Madiera City Schools:* "Distance from the petitioning area to:

Dumont School 3.5 Miles

Sellman School 2.2 Miles

Madiera Junior/Senior High School 3.3 Miles

*Cincinnati Public Schools:*

a. *The present area? 1 mile*

b. *The proposed area? 2 miles*

**(14) If approved, will the requested transfer create a school district with noncontiguous territory?**

*Madiera City Schools:* "Madiera City Schools will remain contiguous with the proposed area."

*Cincinnati Public Schools:* "Not to our knowledge."

**(15) Is the area being requested an isolated segment of the district of which it is a part?**

*Madiera City Schools:* "Seek response from Cincinnati City Schools."

*Cincinnati Public Schools:* "No."

**(16) Will the municipal and school district boundary lines become coterminous?**

*Madiera City Schools:* "Yes, the proposed transfer area is part of the City of Madeira for City purposes but not part of the Madeira City School District at this time."

*Cincinnati Public Schools:* "Unknown."

**(17) For both of the districts:**

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***(a) What is the inside millage?***

***Madeira City Schools:*** "4.26 inside mills for Madeira City Schools."

***Cincinnati Public Schools:*** "4.19"

***(b) What is the outside operating millage?***

***Madeira City Schools:*** "FY 01: 25.48 effective mills; 64.71 voted mills."

***Cincinnati Public Schools:*** "30.08 (residential effective)"

***(c) What is the bonded indebtedness millage?***

***Madeira City Schools:*** "FY 01: 2.74 mills."

***Cincinnati Public Schools:*** "4.64."

**FINDINGS OF FACT**

***Background:***

1. On March 21, 2000, the Cincinnati City School District's Board of Education received a petition requesting the proposed transfer of school district territory from the Cincinnati City School District to that of the adjoining Madeira City School District. There were eight signatures on the petition, the property owners of four lots located in Columbia Township, Hamilton County, that were annexed into the City of Madeira in 1996. State Board Ex. 1; Cincinnati Public Schools Exs. C, D.

2. Five months later, on August 29, 2000, Cincinnati Public Schools forwarded the petition to ODE. The general council for the school district's board of education, offering no

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explanation, apologized for the delay and waived any argument that would prevent the petition from being considered prior to April 1, 2001. State Board Ex. 1.

3. On September 6, 2000, Holly Cohen Miller, ODE's Assistant Legal Counsel, mailed questionnaires to both Madeira City Schools and Cincinnati Public Schools as required by R.C. 3311.24. Madeira City Schools completed their questionnaire and returned it to ODE on or about October 3, 2000. Cincinnati Public Schools did not return their questionnaire until March 2, 2005, four and one-half years later. It is unclear from the record why there was such a substantial delay in processing the petitioners' request for this proposed transfer of territory. Both in November 2000 and December 2003, ODE contacted Cincinnati Public Schools requesting that they submit responses to their questionnaire but never received a response. Regardless of fault, the petitioners were not prejudiced by any unnecessary delay. State Board Exs. 3-5, 24.

4. On May 13, 2004, the State Board adopted a resolution declaring its intention to consider the request to transfer certain territory from the Cincinnati City School District, Hamilton County, to the Madeira City School District, Hamilton County. State Board Ex. 6.

5. ODE notified the parties accordingly, and the petitioners requested a hearing. Neither Cincinnati Public Schools nor Madeira City Schools requested a hearing in this matter. The hearing was conducted on March 23, 2005, but only the petitioners and counsel for Cincinnati Public Schools attended. State Board Exs. 6, 7, 10, 11-20, 22.

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***Proposed Territory for Transfer:***

6. The proposed transfer area involves a portion of Columbia Township, Hamilton County, that was annexed into the City of Madeira in **1996**. Cincinnati Public Schools Exs. C, D.

7. The area consists of four homes that were constructed in Columbia Township and were part of that township until the residents petitioned for annexation into the City of Madeira in **1996**. Tr. **67, 80**.

8. The proposed transfer area is now within the City of Madeira, but the four homes in the transfer area remain in the Cincinnati City School District. Petitioners Exhibit 1.

9. Neither Madeira City Schools nor Cincinnati Public Schools is contiguous with its respective city boundaries. The current residents live in an area where various school district boundaries, township boundaries, and municipal boundaries come together. Tr. **54, 84, 99**.

10. The four lots in the proposed area of transfer consist of properties known as 5721, 5723, 5725 and 5727 Windridge Drive, City of Madeira. The only access to the properties is from Windridge Road, located in the City of Madeira and within the Madeira City School District boundary. However, properties on the other three sides of the proposed area of transfer are within the Cincinnati City School District boundaries. Petitioners Ex. 1.

11. For unknown reasons, two of the properties in the proposed area of transfer have a small portion of their property taxes designated to the Madeira City School District for school district taxing purposes. For whatever reason - possibly because the lot lines extend to the middle of Windridge Road, already within the Madeira City School District boundary prior to the **1996**

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annexation of these properties - this factor has little significance because the percentage of each property is de *minus*.

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

***The Petitioners:***

13. The eight petitioners (four couples) live in four homes which consist of the entire proposed area of transfer. Some of these homeowners were involved when residents petitioned to have the property annexed into the City of Madeira in 1996. The petitioners admit that when they moved for annexation of their property into the City of Madeira, they assumed that the school district transfer would automatically occur if the annexation were granted. Tr. 48, 67, 80.

14. The petitioners testified that no public school students currently live in the proposed area of transfer. Tr. 93, 118.

15. The parents of the one private school student who lives in the proposed area of transfer testified that there was a strong bond to St. Xavier High School, "a private school." Currently, no public school students live in the area and, in fact, the petitioners' children, all grown, attended private schools.

16. The petitioners did not present any evidence concerning the ultimate good of any students who currently reside in the proposed area of transfer if this transfer request is approved.

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17. Petitioners feel disconnected with the City of Madeira because, according to two witnesses, they are separated at the polling booth if there is anything pertaining to Cincinnati Public Schools on the ballot. Donna Salmon testified that they "have [their] own little polling booth and "[t]he people working at the polling booth recognize [them]." Tr. 47. Bernard Schlake testified that he feels connected to the City of Madeira except that petitioners have a separate polling booth and "[i]f this gets resolved, then we'll be completely connected." Tr. 94.

18. Additionally, petitioners feel that they geographically belong to the City of Madeira and have ties only to the City of Madeira. Donna Salmon testified that she feels connected to the City of Madeira because she receives the *Madeira Newsletter* and the *Madeira and Indian Hill Fire Company Newsletter* and does not "receive anything from Cincinnati Public Schools pertaining to any information as to what's going on." Tr. 45.

19. Richard Bartchy testified that petitioners feel like they do not belong; they are the only ones in their homeowner's association who are not part of Madeira City Schools although "[w]e live in Madeira" and "[w]e pay taxes in Madeira." Tr. 78. Bartchy later testified that he has neighbors in both the City of Madeira and Columbia Township.

20. Bernard Schlake testified that geographically the transfer area should belong in the Madeira City School District because "our area is geographically above the Cincinnati School District area." Tr. 94. According to Schlake, the transfer area is on the border between the City of Madeira and Columbia Township. Tr. 84, 100.

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21. Robert Salmon, one of the property owners, testified that he is concerned about his children being friends with City of Madeira children because once they reach high school the children "are going to be split apart" and "those friendships get ruptured." Tr. 115. Salmon also was concerned that friendships developed with other parents through social and athletic functions for the children will be "ruptured once you get into high school because you're not going to share as much in common." Tr. 115. Salmon testified that he would have liked to have had the option to send his children to Madeira City Schools, "[m]aybe not for myself or my wife, but maybe for the next people that own the house." Tr. 117. Salmon later testified that his two children attended private school for both elementary and high school. Tr. 118-19.

22. Donna Salmon testified that, to the best of her knowledge, if this transfer had been granted in 2000 at the time it was submitted, it would not have made any difference as to the ability of her children to attend private school. Tr. 60.

23. Bernard Schlake admitted that he did not have any evidence about the impact that this transfer would have on any students in the area and that his motivation for wanting this transfer was really a question of the preference of the current homeowners because "[they] are connected in every other way other than [with] the school district." Tr. 96. Schlake testified that he assumed the fair market value of the four homes in the proposed transfer area would **increase** if the transfer is approved and the properties were located in the Madeira City School District. Tr. 104.

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24. The only school age child who lives in the proposed transfer area attends private school. Tr. 118-19.

***Madeira City Schools:***

25. Madeira City Schools is a relatively small district with a student enrollment of approximately 1,490 students and three school buildings: an elementary school (K-3), a middle school (4-6), and a high school. Madeira City Schools does not expect any future growth during the next three years. According to Madeira City Schools, space at all three buildings remains at or near capacity. The percentage of minority students in the district is approximately 6.82%, and any transfer of territory would not have any racial implications. State Board Ex. 3.

26. Madeira City Schools did not initiate, solicit nor encourage this request for a proposed transfer of territory. State Board Ex. 3.

27. Although the school district is serving at or near capacity the number of students it could accommodate, there is no indication that approving this transfer of territory would have any significant impact on the district. State Board Ex. 3.

***Cincinnati Public Schools:***

28. The average daily membership (ADM) at Cincinnati Public Schools for October 2004 was 37,159 students. There is no expected growth for the district over the next three years. In fact, the district expects to lose approximately 600 students during that period of time.

29. Cincinnati Public Schools' responses to the 17 questions and 10 additional factors shows that the transfer would involve the loss of \$373,840 in assessed valuation. (Note that

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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.

30. There are several areas in the City of Madeira that are not in the Madeira City School District other than the subject neighborhood. The Madeira City School District extends outside of the boundaries of the City of Madeira. Without question, the subject neighborhood is in an area where all sorts of municipal boundaries, township boundaries, and school district boundaries come together. It is not an homogenous, "Madeira-only" sort of neighborhood. Cincinnati Public Schools Ex. A.

31. The City of Madeira contains school district territory other than just Madeira City Schools and all residents of the City of Madeira have access to youth sports leagues, regardless of the school district they live in. Cincinnati Public Schools Ex. B.

32. The list of Madeira "organizations" presented by Petitioners show that many organizations are not solely in Madeira, but include other communities as well, e.g., Kenwood, Silverton, Miami Hills, etc. Petitioners Ex. 5.

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***Seventeen Factors of Significance:***

33. Rule 3301-89-02, Ohio Adm.Code, sets forth certain questions to be answered by the school districts involved so that a hearing officer can consider those responses when a request is made for a transfer of territory under R.C. 3311.24. The responses of the two school districts are stated above. Out of the 17 questions, only a few of them apply. Both school districts publish annual reports, and both school districts engage in long-range educational planning for the students in their district. However, because no students are involved in the proposed area of transfer, the only issue of significance is the loss to Cincinnati Public Schools of the assessed valuation of these four properties.

***Ten Additional Factors of Significance:***

34. Ohio Adm.Code 3301-89-03 lists 10 additional factors to be considered by a hearing officer appointed to hear the request for a transfer. These factors and findings of fact are stated as follows:

***(1) Documented agreements made by public agencies involved in municipal annexation proceedings should be honored.***

This factor does not apply in this case.

***(2) A previous agreement entered into by the school districts concerned should be honored unless all concerned districts agree to amend it.***

This factor does not apply in this case.

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*(3) The statement signed by the school district boards of education after negotiations as required by paragraph (D)(4) of Rule 3301-89-04 of the Administrative Code.*

This factor does not apply in this case.

*(4) There should not be undue delay in requesting a transfer for school purposes after a territory has been annexed for municipal purposes.*

Although there was an unusual delay in having this matter come to hearing, the delay did not prejudice the petitioners and, as a result, this factor does not apply in this case.

*(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.

*(7) School district boundary lines that have existed for a long period of time should not be changed if substantial upheaval results because of the long-held loyalties by the parties involved.*

This factor does not apply in this case.

*(8) The pupil loss of the relinquishing district should not be such that the educational program of that district is severely impaired.*

This factor does not apply in this case.

*(9) The fiscal resources acquired should be commensurate with the educational responsibilities assumed.*

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This factor does not apply in this case.

(10) *The educational facilities of districts should be effectively utilized.*

This factor does not apply in this case.

**CONCLUSIONS OF LAW**

Petitioners' request for this transfer of territory is governed by R.C. 3311.24, R.C. 119, and Ohio Adm. Code 3301-89. R.C. 3311.24(A) states, in part:

. . . if a petition, signed by seventy-five percent of the qualified electors residing within that portion of a city, exempted village, or local school district proposed to be transferred voting at the last general election, requests such a transfer, the board of education of the district in which such proposal originates shall file such proposal, together with a map showing the boundaries of the territory proposed to be transferred, with the state board of education prior to the first day of April in any even-numbered year.

The above statutory provision applies to petitioners' request for this proposed transfer of territory from the Cincinnati City School District to the Madeira City School District, and petitioners have the burden of proof by presenting reliable, substantial and probative evidence in order to prevail in this administrative action. "Moreover, it is generally held that, absent a statutory provision which specifically places the burden of proof, such burden in an administrative action is upon the party asserting the affirmative issue." *Youngston Sheet & Tube Co. v. Maynard* (1984), 22 Ohio App.3d 3, 8, 488 N.E.2d 220. In other words, petitioners in a territorial transfer proceeding have the burden of proof that the transfer should be approved. *Hicks v. State Bd. of Educ.*, 10<sup>th</sup> Dist. No. 02AP-1183, 2003-Ohio-4134, at ¶ 16.

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A hearing upon a request for the transfer of school district territory under R.C. 3311.24 is provided for and conducted in accordance with the provisions of Ohio Adm.Code 3301-89. Specifically, Ohio Adm.Code 3301-89-02(H)(1) provides that the hearing officer shall conduct a hearing and make a report to the State Board containing a "recommendation to approve or disapprove the transfer of territory." In making his recommendation, the hearing officer is required to consider the factors set forth in Ohio Adm.Code 3301-89-02 and 3301-89-03.

To help aid the decision-making process, Ohio Adm.Code 3301-89 sets forth pertinent factors that are to be considered by the hearing officer and the State Board in considering a request for the transfer of territory under R.C. 3311.06. Specifically, Ohio Adm.Code 3301-89-02(B) requires that, upon receipt of a request for the transfer of territory, ODE is to send to each of the school districts involved in the proposed area of transfer a request for information which includes 17 questions, the answers to which are to be considered by the hearing officer. Ohio Adm.Code 3301-89-03(B) sets forth 10 additional factors that are to be considered by the hearing officer. Additionally, Ohio Adm.Code 3301-89-01(F) requires that, when a request for the transfer of territory is made, it is to be "considered upon its merit with primary consideration given to the present and ultimate good of the pupils concerned." Thus, as the Court observed in *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1990), 62 Ohio App.3d 308, 319, 575 N.E.2d 503:

[T]he several factors for consideration set forth in Ohio Adm.Code 3301-89-02(B) and 3301-89-03(B) are intended to be an integral part of the board's

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transfer decision with primary consideration given to the present and ultimate good of all the students who are affected by the proposed transfer.

Ohio courts have promulgated a list of factors that are probative of the "present and ultimate good of the pupils concerned," such as (1) the proximity of the petitioners' property to the transferee school district; (2) greater access to extracurricular activities in the transferee district; (3) shorter traveling distance to school buildings in the transferee district; (4) a shorter bus ride to the school facilities in the transferee district; (5) families' social, business, and community life focused on the transferee district; (6) safety of students improved by fewer dangerous routes of travel to the transferee district; (7) the social and educational needs of the affected students will be better served by the transferee district; and (8) the personal preference of the affected families. See, *e.g.*, *Rossford Board of Education v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 590 N.E.2d 1240; *Garfield Hts. City School Dist.*, 62 Ohio App.3d 308, 575 N.E.2d 503; *City of Cincinnati School District v. State Bd. of Edn., et al.* (Ken *Arbre*) (1996), 113 Ohio App.3d 305, 680 N.E.2d 1061; *Levey v. State Bd. of Edn.*, No. 93CVF-07-4661, 1995 WL 89703 (Ohio App. 10<sup>th</sup> Dist. Feb. 28, 1995).

Finally, Ohio Adm.Code 3301-89-03(C) indicates that when all other factors are equal, "the hearing officer may consider the preference of the residents with school-age children who live in the territory sought to be transferred to another school district."

As stated in *Garfield Hts. City School Dist.* :

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When 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.

The referee in such a case is merely to decide whether, based upon all relevant factors, the proposed transfer would adversely affect the best interest of all students involved, and whether it would indeed be in their best interest. 62 Ohio App.2d at 323, 575 N.E.2d 503.

Ohio Courts have agreed that the fundamental question to be answered first remains whether the pupils who would be affected would benefit by granting or denying the transfer. However, in Cincinnati City School Dist., in analyzing *Garfield* Hts. City School District, the Court clarified this underlying principle as follows: Consideration of the "present and ultimate good of the pupils concerned" is not limited to the interests of those students in the transfer territory. Rather, the inquiry involves all students affected by the proposed transfer, including those remaining in the relinquishing district and those already at the receiving districts. 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. 113 Ohio App.3d at 310, 680 N.E.2d 1061.

Furthermore, Ohio Adm.Code 3301-89-03(B)(9) states that a hearing officer, in any request for a transfer of territory, shall consider, among other factors, "[t]he fiscal resources acquired should be commensurate with the educational responsibilities assumed,"

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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. A transfer of the proposed transfer area from Cincinnati Public Schools to Madeira City Schools would result in a **financial** windfall to Madeira City Schools to the detriment of Cincinnati Public Schools. 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.

Approving this transfer does not appear to be in the best interest of either district or their respective students. Consideration of the "present and ultimate good of the pupils concerned is not limited to the interests of those students in the transfer territory. Rather, the inquiry involves all students affected by the proposed transfer, including those remaining in the relinquishing district and those already at the receiving district. Thus, evidence that a transfer may be in the best interests of the students in the transfer area must be balanced against evidence of the potential harm such a transfer may have on other students in the affected districts. Here, petitioners did not introduce any evidence regarding how this proposed transfer would benefit the students in the transfer territory. The students in the transfer

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territory attend private school and would therefore not benefit from the proposed transfer. As a result, any potential harm such transfer may have on the students in the relinquishing district must be carefully reviewed.

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. Having failed to do so, petitioners' request for the transfer of the proposed territory should be denied.

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**RECOMMENDATION**

On the basis of the evidence submitted at the hearing, exhibits introduced into evidence, testimony of witnesses, arguments of counsel for petitioners and Cincinnati Public Schools, post-hearing briefs submitted by the parties, and the findings of fact and conclusions of law stated herein, it is recommended that the State Board of Education DENY the request for transfer of the transfer area, for school purposes, from the Cincinnati City School District, Hamilton County, to the Madeira City School District, Hamilton County, pursuant to R.C. 3311.24 and Ohio Adm. Code 3301.89.



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**Robert B. St. Clair**  
Hearing Officer

Dated: April 28, 2005.

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NOTICE OF APPEAL

In accordance with Ohio Adm. Code 3301-89-02(I), upon receipt of the hearing officer's report the affected parties have ten (10) days in which to submit written objections to the report to the Department of Education. Any party that files objections shall file a copy of the objections with the other affected parties. Any affected party may file a response to the objections. Such response must be filed with the Department of Education within ten (10) days after the objections are mailed to the Department of Education.

You may send your written objections and/or responses to:

State Superintendent of Public Instruction  
Ohio Department of Education  
25 South Front Street, Mail Stop 707  
Columbus, Ohio 43215  
Telephone: (614) 466-4705

For your information, after the time for filing objections and responses has ended, the State Board of Education will then consider the report and recommendation of the hearing officer, objections and responses, and adopt a resolution which approves, disapproves, or modifies the recommendation of the hearing officer. The decision of the State Board of Education will be made solely on the record of the hearing, the report and recommendation of the hearing officer, and any objections or responses filed by the parties.

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**EXHIBITS**

***State Board of Education Exhibits:***

1. Correspondence from John P. Concannon, General Counsel, Cincinnati Public Schools, to Holly Coen-Miller, ODE Assistant Legal Counsel, transmitting for filing a petition to transfer certain school district territory from the Cincinnati City School District to the Madeira City School District pursuant to Ohio Revised Code section 3311.24. A copy of the correspondence, map, and petition are attached, dated August 29, 2000.
2. Correspondence to Steven J. Adamowski, Superintendent, Cincinnati Public Schools, and Michele Hummel, Superintendent, Madeira City Schools, from Holly Coen-Miller, ODE Assistant Legal Counsel, acknowledging receipt of the proposal to transfer territory and requesting a response to the 17 questions and an information form, dated September 6, 2000.
3. Correspondence from Michele Hummel, Superintendent, Madeira City Schools, to Holly Coen-Miller, ODE Assistant Legal Counsel, enclosing the district's responses to the information questionnaire and the 17 questions, dated October 2, 2000
4. Correspondence from Holly Coen-Miller, ODE Assistant Legal Counsel, to John Concannon, General Counsel, Cincinnati Public Schools, enclosing information and the 17 questions, dated November 2, 2000.
5. Correspondence to David DiMuzio, attorney for Cincinnati Public Schools, from Kyle Lathwell, ODE Assistant Legal Counsel, enclosing information questionnaire and the 17 questions, dated December 22, 2003.
6. Correspondence to Alton Frailey, Superintendent, Cincinnati Public Schools, and Stephen Kramer, Superintendent, Madeira City Schools, from Kyle Lathwell, ODE Assistant Legal Counsel, informing the parties of the State Board of Education's action declaring its intent to consider the possible transfer of school district territory from the Cincinnati City School District to the Madeira City School District and notifying the parties of their opportunity to request a hearing. Copy of resolution and return receipts attached, dated May 19, 2004.

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7. Correspondence from David DiMuzio, attorney for Cincinnati Public Schools, to Kyle Lathwell, ODE Assistant Legal Counsel, advising that Cincinnati Public Schools will not be participating in the hearing, dated June 17, 2004.
8. Correspondence from David DiMuzio, attorney for Cincinnati Public Schools, to Kyle Lathwell, ODE Assistant Legal Counsel, requesting permission to submit responses to the 17 questions and complete the questionnaire, dated October 8, 2004.
9. Correspondence from Kyle Lathwell, ODE Assistant Legal Counsel, to David DiMuzio, attorney for Cincinnati Public Schools, advising that the Cincinnati City School District may submit responses to the 17 questions and complete the questionnaire, dated October 28, 2004.
10. Correspondence from Kyle Lathwell, ODE Assistant Legal Counsel, to David DiMuzio, attorney for Cincinnati Public Schools, Timothy Burke, attorney for Petitioners, and Stephen Kramer, Superintendent, Madeira City Schools, advising the parties of the State Board's resolution to establish a hearing regarding the proposed territory transfer. Resolution attached, dated October 28, 2004.
11. Correspondence from Timothy Burke, attorney for Petitioners, to Kyle Lathwell, ODE Assistant Legal Counsel, regarding dates of availability for hearing, dated November 8, 2004.
12. Correspondence from David DiMuzio, attorney for Cincinnati Public Schools, to Kyle Lathwell, ODE Assistant legal Counsel, regarding dates of availability for hearing, dated November 8, 2004.
13. Correspondence from David DiMuzio, attorney for Cincinnati Public Schools, to Kyle Lathwell, ODE Assistant legal Counsel, regarding dates of availability for hearing, dated December 8, 2004.
14. Correspondence from Kyle Lathwell, ODE Assistant Legal Counsel, to David DiMuzio, attorney for Cincinnati Public Schools, Timothy Burke, attorney for Petitioners, and Stephen Kramer, Superintendent, Madeira City Schools, informing the parties that there were no mutually agreeable dates in December 2004 and January 2005 for a hearing, and requesting that the parties submit dates of availability for a hearing in February and March 2005, dated January 12, 2005.

*Proposed Transfer of Territory from Cincinnati City School District  
to Madeira City School District, Hamilton County*

15. Correspondence from David DiMuzio, attorney for Cincinnati Public Schools, to Kyle Lathwell, ODE Assistant Legal Counsel, regarding dates of availability for hearing, dated January 17, 2005.
16. Correspondence from Emily Suplinger, attorney for Petitioners, to Kyle Lathwell, ODE Assistant Legal Counsel, regarding dates of availability for hearing, dated January 21, 2005.
17. Correspondence from Stephen Kramer, Superintendent, Madeira City Schools, to Kyle Lathwell, ODE Assistant Legal Counsel, advising that Madeira City Schools will not be participating in the hearing, dated February 1, 2005.
18. Telephone message from Emily Suplinger, attorney for Petitioners, to Kyle Lathwell, ODE Assistant Legal Counsel, regarding dates of availability for hearing, dated February 7, 2005.
19. Telephone message from Attorney Robert St. Clair advising that he is available to preside as hearing officer at the hearing on March 22, 2005, dated February 8, 2005.
20. Correspondence from Kyle Lathwell, ODE Assistant Legal Counsel, to David DiMuzio, attorney for Cincinnati Public Schools, Timothy Burke, attorney for Petitioners, and Stephen Kramer, Superintendent, Madeira City Schools, advising the parties of the March 22, 2005, hearing date, dated February 10, 2005. Return receipts attached.
21. Correspondence from Kyle Lathwell, ODE Assistant Legal Counsel, to Attorney Robert St. Clair advising of his appointment as hearing officer and the March 22, 2005, hearing date, dated February 10, 2005.
22. Correspondence from Kyle Lathwell, ODE Assistant Legal Counsel, to David DiMuzio, attorney for Cincinnati Public Schools, Timothy Burke, attorney for Petitioners, and Stephen Kramer, Superintendent, Madeira City Schools, advising the parties of the rescheduled March 23, 2005, hearing date, dated February 15, 2005. Return receipts attached.
23. Correspondence from Kyle Lathwell, ODE Assistant Legal Counsel, to Attorney Robert St. Clair advising of his appointment as hearing officer and the rescheduled March 23, 2005, hearing date, dated February 15, 2005.

*Proposed Transfer of Territory from Cincinnati City School District  
to Madeira City School District, Hamilton County*

24. Correspondence from David DiMuzio, attorney for Cincinnati Public Schools, to Kyle Lathwell, ODE Assistant Legal Counsel, enclosing Cincinnati Public Schools' responses to the 17 questions and the questionnaire, dated March 2, 2005.

***Petitioners Exhibits:***

1. School district and municipal boundary map
2. Hamilton County real estate tax bill re Robert & Donna Salmon
3. Madeira Newsletter, Winter 2005
4. Madeira & Indian Hill Fire Co. Newsletter, March 2005
5. Madeira organizations
6. Pamphlet entitled *Interesting Facts about the City of Madeira*
7. Madeira City Schools District Digest, Winter 2004
8. Hamilton County real estate tax bill re Richard & Joanne Bartchy
9. Hamilton County real estate tax bill re Bernard & Marilyn Schlake

***Cincinnati City School District Exhibits:***

- A. Map of city school district boundaries
- B. Affidavit of Thomas Moeller, City Manager of the City of Madeira, Ohio
- C. Hamilton County Regional Planning Commission, report on proposed annexation, Columbia Township to the City of Madeira, dated May 29, 1996
- D. Minutes of the Hamilton County Board of County Commissioners, dated May 29, 1996

## **3311.22 Transfer of school district territory.**

A governing board of an educational service center may propose, by resolution adopted by majority vote of its full membership, or qualified electors of the area affected equal in number to at least fifty-five per cent of the qualified electors voting at the last general election residing within that portion of a school district, or districts proposed to be transferred may propose, by petition, the transfer of a part or all of one or more local school districts to another local school district or districts within the territory of the educational service center. Such transfers may be made only to local school districts adjoining the school district that is proposed to be transferred, unless the board of education of the district proposed to be transferred has entered into an agreement pursuant to section 3313.42 of the Revised Code, in which case such transfers may be made to any local school district within the territory of the educational service center.

When a governing board of an educational service center adopts a resolution proposing a transfer of school territory it shall forthwith file a copy of such resolution, together with an accurate map of the territory described in the resolution, with the board of education of each school district whose boundaries would be altered by such proposal. A governing board of an educational service center proposing a transfer of territory under the provisions of this section shall at its next regular meeting that occurs not earlier than thirty days after the adoption by the governing board of a resolution proposing such transfer, adopt a resolution making the transfer effective at any time prior to the next succeeding first day of July, unless, prior to the expiration of such thirty-day period, qualified electors residing in the area proposed to be transferred, equal in number to a majority of the qualified electors voting at the last general election, file a petition of referendum against such transfer.

Any petition of transfer or petition of referendum filed under the provisions of this section shall be filed at the office of the educational service center superintendent. The person presenting the petition shall be given a receipt containing thereon the time of day, the date, and the purpose of the petition.

The educational service center superintendent shall cause the board of elections to check the sufficiency of signatures on any petition of transfer or petition of referendum filed under this section and, if found to be sufficient, he shall present the petition to the educational service center governing board at a meeting of the board which shall occur not later than thirty days following the filing of the petition.

Upon presentation to the educational service center governing board of a proposal to transfer territory as requested by petition of fifty-five per cent of the qualified electors voting at the last general election or a petition of referendum against a proposal of the county board to transfer territory, the governing board shall promptly certify the proposal to the board of elections for the purpose of having the proposal placed on the ballot at the next general or primary election which occurs not less than seventy-five days after the date of such certification, or at a special election, the date of which shall be specified in the certification, which date shall not be less than seventy-five days after the date of such certification. Signatures on a petition of transfer or petition of referendum may be withdrawn up to and including the above mentioned meeting of the educational service center governing board only by order of the board upon testimony of the petitioner concerned under oath before the board that his signature was obtained by fraud, duress, or misrepresentation.

If a petition is filed with the educational service center governing board which proposes the transfer of a part or all of the territory included in a resolution of transfer previously adopted by the educational service center governing board, no action shall be taken on such petition if within the thirty-day period after the adoption of the resolution of transfer a referendum petition is filed. After the election, if the proposed transfer fails to receive a majority vote, action on such petition shall then be processed under this section as though originally filed under the provisions hereof. If no referendum petition is filed within the thirty-day period after the adoption of the resolution of transfer, no action shall

be taken on such petition.

If a petition is filed with the educational service center governing board which proposes the transfer of a part or all of the territory included in a petition previously filed by electors no action shall be taken on such new petition.

Upon certification of a proposal to the board or boards of elections pursuant to this section, the board or boards of elections shall make the necessary arrangements for the submission of such question to the electors of the county or counties qualified to vote thereon, and the election shall be conducted and canvassed and the results shall be certified in the same manner as in regular elections for the election of members of a board of education.

The persons qualified to vote upon a proposal are the electors residing in the district or districts containing territory that is proposed to be transferred. If the proposed transfer be approved by at least a majority of the electors voting on the proposal, the educational service center governing board shall make such transfer at any time prior to the next succeeding first day of July. If the proposed transfer is not approved by at least a majority of the electors voting on the proposal, the question of transferring any property included in the territory covered by the proposal shall not be submitted to electors at any election prior to the first general election the date of which is at least two years after the date of the original election, or the first primary election held in an even-numbered year the date of which is at least two years after the date of the original election. A transfer shall be subject to the approval of the receiving board or boards of education, unless the proposal was initiated by the educational service center governing board, in which case, if the transfer is opposed by the board of education offered the territory, the local board may, within thirty days, following the receipt of the notice of transfer, appeal to the state board of education which shall then either approve or disapprove the transfer.

Following an election upon a proposed transfer initiated by a petition the board of education that is offered territory shall, within thirty days following receipt of the proposal, either accept or reject the transfer.

When an entire school district is proposed to be transferred to two or more school districts and the offer is rejected by any one of the receiving boards of education, none of the territory included in the proposal shall be transferred.

Upon the acceptance of territory by the receiving board or boards of education the educational service center governing board offering the territory shall file with the county auditor and with the state board of education an accurate map showing the boundaries of the territory transferred.

Upon the making of such transfer, the net indebtedness of the former district from which territory was transferred shall be apportioned between the acquiring school district and that portion of the former school district remaining after the transfer in the ratio which the assessed valuation of the territory transferred to the acquiring school district bears to the assessed valuation of the original school district as of the effective date of the transfer. As used in this section "net indebtedness" means the difference between the par value of the outstanding and unpaid bonds and notes of the school district and the amount held in the sinking fund and other indebtedness retirement funds for their redemption.

If an entire district is transferred, any indebtedness of the former district incurred as a result of a loan made under section 3317.64 of the Revised Code is hereby canceled and such indebtedness shall not be apportioned among any districts acquiring the territory.

Upon the making of any transfer under this section, the funds of the district from which territory was transferred shall be divided equitably by the educational service center governing board between the acquiring district and any part of the original district remaining after the transfer.

If an entire district is transferred the board of education of such district is thereby abolished or if a member of the board of education lives in that part of a school district transferred the member becomes a nonresident of the school district from which the territory was transferred and he ceases to be a member of the board of education of such district.

The legal title of all property of the board of education in the territory transferred shall become vested in the board of education of the school district to which such territory is transferred.

Subsequent to June 30, 1959, if an entire district is transferred, foundation program moneys accruing to a district accepting school territory under the provisions of this section or former section 3311.22 of the Revised Code, shall not be less, in any year during the next succeeding three years following the transfer, than the sum of the amounts received by the districts separately in the year in which the transfer was consummated.

Effective Date: 09-29-1995

## **3311.231 Transferring local school district territory to adjoining service center or city or exempted village school district.**

A governing board of an educational service center may propose, by resolution adopted by majority vote of its full membership, or qualified electors of the area affected equal in number to not less than fifty-five per cent of the qualified electors voting at the last general election residing within that portion of a school district proposed to be transferred may propose, by petition, the transfer of a part or all of one or more local school districts within the territory of the center to an adjoining educational service center or to an adjoining city or exempted village school district.

A governing board of an educational service center adopting a resolution proposing a transfer of school territory under this section shall file a copy of such resolution together with an accurate map of the territory described in the resolution, with the board of education of each school district whose boundaries would be altered by such proposal. Where a transfer of territory is proposed by a governing board of an educational service center under this section, the governing board shall, at its next regular meeting that occurs not earlier than the thirtieth day after the adoption by the governing board of the resolution proposing such transfer, adopt a resolution making the transfer as originally proposed, effective at any time prior to the next succeeding first day of July, unless, prior to the expiration of such thirty-day period, qualified electors residing in the area proposed to be transferred, equal in number to a majority of the qualified electors voting at the last general election, file a petition of referendum against such transfer.

Any petition of transfer or petition of referendum under the provisions of this section shall be filed at the office of the educational service center superintendent. The person presenting the petition shall be given a receipt containing thereon the time of day, the date, and the purpose of the petition.

The educational service center superintendent shall cause the board of elections to check the sufficiency of signatures on any such petition, and, if found to be sufficient, he shall present the petition to the educational service center governing board at a meeting of said governing board which shall occur not later than thirty days following the filing of said petition.

The educational service center governing board shall promptly certify the proposal to the board of elections of such counties in which school districts whose boundaries would be altered by such proposal are located for the purpose of having the proposal placed on the ballot at the next general or primary election which occurs not less than seventy-five days after the date of such certification or at a special election, the date of which shall be specified in the certification, which date shall not be less than seventy-five days after the date of such certification.

Signatures on a petition of transfer or petition of referendum may be withdrawn up to and including the above mentioned meeting of the educational service center governing board only by order of the governing board upon testimony of the petitioner concerned under oath before the board that his signature was obtained by fraud, duress, or misrepresentation.

If a petition is filed with the educational service center governing board which proposes the transfer of a part or all of the territory included either in a petition previously filed by electors or in a resolution of transfer previously adopted by the educational service center governing board, no action shall be taken on such new petition as long as the previously initiated proposal is pending before the governing board or is subject to an election.

Upon certification of a proposal to the board or boards of elections pursuant to this section, the board or boards of elections shall make the necessary arrangements for the submission of such question to the electors of the county or counties qualified to vote thereon, and the election shall be conducted and canvassed and the results shall be certified

In the same manner as in regular elections for the election of members of a board of education.

The persons qualified to vote upon a proposal are the electors residing in the district or districts containing territory that is proposed to be transferred. If the proposed transfer is approved by at least a majority of the electors voting on the proposal, the educational service center governing board shall make such transfer at any time prior to the next succeeding first day of July, subject to the approval of the receiving board of education in case of a transfer to a city or exempted village school district, and subject to the approval of the educational service center governing board of the receiving center, in case of a transfer to an educational service center. If the proposed transfer is not approved by at least a majority of the electors voting on the proposal, the question of transferring any property included in the territory covered by the proposal shall not be submitted to electors at any election prior to the first general election the date of which is at least two years after the date of the original election, or the first primary election held in an even-numbered year the date of which is at least two years after the date of the original election.

Where a territory is transferred under this section to a city or exempted village school district, the board of education of such district shall, and where territory is transferred to an educational service center the governing board of such educational service center shall, within thirty days following receipt of the proposal, either accept or reject the transfer.

Where a governing board of an educational service center adopts a resolution accepting territory transferred to the educational service center under the provisions of sections 3311.231 and 3311.24 of the Revised Code, the governing board shall, at the time of the adoption of the resolution accepting the territory, designate the school district to which the accepted territory shall be annexed.

When an entire school district is proposed to be transferred to two or more adjoining school districts and the offer is rejected by any one of the receiving boards of education, none of the territory included in the proposal shall be transferred.

Upon the acceptance of territory by the receiving board or boards of education the educational service center governing board offering the territory shall file with the county auditor of each county affected by the transfer and with the state board of education an accurate map showing the boundaries of the territory transferred.

Upon the making of such transfer, the net indebtedness of the former district from which territory was transferred shall be apportioned between the acquiring school district and the portion of the former school district remaining after the transfer in the ratio which the assessed valuation of the territory transferred to the acquiring school district bears to the assessed valuation of the original school district as of the effective date of the transfer. As used in this section "net indebtedness" means the difference between the par value of the outstanding and unpaid bonds and notes of the school district and the amount held in the sinking fund and other indebtedness retirement funds for their redemption.

If an entire district is transferred, any indebtedness of the former district incurred as a result of a loan made under section 3317.64 of the Revised Code is hereby canceled and such indebtedness shall not be apportioned among any districts acquiring the territory.

Upon the making of any transfer under this section, the funds of the district from which territory was transferred shall be divided equitably by the educational service center governing board, between the acquiring district and any part of the original district remaining after the transfer.

If an entire district is transferred the board of education of such district is thereby abolished or if a member of the board of education lives in that part of a school district transferred the member becomes a nonresident of the school district from which the territory was transferred and he ceases to be a member of the board of education of such

district.

The legal title of all property of the board of education in the territory transferred shall become vested in the board of education of the school district to which such territory is transferred.

If an entire district is transferred, foundation program moneys accruing to a district receiving school territory under the provisions of this section shall not be less, in any year during the next succeeding three years following the transfer, than the sum of the amounts received by the districts separately in the year in which the transfer was consummated.

Effective Date: 09-29-1995

## **3311.24 Transfer of city, exempted village or local school district territory to adjoining district.**

(A) Except as provided in division (B) of this section, if the board of education of a city, exempted village, or local school district deems it advisable to transfer territory from such district to an adjoining city, exempted village, or local school district, or if a petition, signed by seventy-five per cent of the qualified electors residing within that portion of a city, exempted village, or local school district proposed to be transferred voting at the last general election, requests such a transfer, the board of education of the district in which such proposal originates shall file such proposal, together with a map showing the boundaries of the territory proposed to be transferred, with the state board of education prior to the first day of April in any even-numbered year. The state board of education may, if it is advisable, provide for a hearing in any suitable place in any of the school districts affected by such proposed transfer of territory. The state board of education or its representatives shall preside at any such hearing.

A board of education of a city, exempted village, or local school district that receives a petition of transfer under this division shall cause the board of elections to check the sufficiency of signatures on the petition.

Not later than the first day of September the state board of education shall either approve or disapprove a proposed transfer of territory filed with it as provided by this section and shall notify, in writing, the boards of education of the districts affected by such proposed transfer of territory of its decision.

If the decision of the state board of education is an approval of the proposed transfer of territory then the board of education of the district in which the territory is located shall, within thirty days after receiving the state board of education's decision, adopt a resolution transferring the territory and shall forthwith submit a copy of such resolution to the treasurer of the board of education of the city, exempted village, or local school district to which the territory is transferred. Such transfer shall not be complete however, until:

(1) A resolution accepting the transfer has been passed by a majority vote of the full membership of the board of education of the city, exempted village, or local school district to which the territory is transferred;

(2) An equitable division of the funds and indebtedness between the districts involved has been made by the board of education making the transfer;

(3) A map showing the boundaries of the territory transferred has been filed, by the board of education accepting the transfer, with the county auditor of each county affected by the transfer.

When such transfer is complete the legal title of the school property in the territory transferred shall be vested in the board of education or governing board of the school district to which the territory is transferred.

(B) Whenever the transfer of territory pursuant to this section is initiated by a board of education, the board shall, before filing a proposal for transfer with the state board of education under this section, 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 hold a hearing on the transfer, or approve or disapprove any such transfer, it must receive the following:

(1) A resolution requesting approval of the transfer, passed by the school district submitting the proposal;

(2) 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;

(3) 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.

Negotiations held pursuant to this section shall be governed by the rules adopted by the state board under division (D) of section 3311.06 of the Revised Code. Districts involved in a transfer under division (B) of this section may agree to share revenues from the property included in the territory to be transferred, establish cooperative programs between the participating districts, and establish mechanisms for the settlement of any future boundary disputes.

Effective Date: 09-26-2003

### **3311.38 State board may propose transfers of districts.**

The state board of education may conduct, or may direct the superintendent of public instruction to conduct, studies where there is evidence of need for transfer of local, exempted village, or city school districts, or parts of any such districts, to contiguous or noncontiguous local, exempted village, or city school districts. Such studies shall include a study of the effect of any proposal upon any portion of a school district remaining after such proposed transfer. The state board, in conducting such studies and in making recommendations as a result thereof, shall consider the possibility of improving school district organization as well as the desires of the residents of the school districts which would be affected.

(A) After the adoption of recommendations growing out of any such study, or upon receipt of a resolution adopted by majority vote of the full membership of the board of any city, local, or exempted village school district requesting that the entire district be transferred to another city, local, or exempted village school district, the state board may propose by resolution the transfer of territory, which may consist of part or all of the territory of a local, exempted village, or city school district to a contiguous local, exempted village, or city school district.

The state board shall thereupon file a copy of such proposal with the board of education of each school district whose boundaries would be altered by the proposal and with the governing board of any educational service center in which such school district is located.

The state board may, not less than thirty days following the adoption of the resolution proposing the transfer of territory, certify the proposal to the board of elections of the county or counties in which any of the territory of the proposed district is located, for the purpose of having the proposal placed on the ballot at the next general election or at a primary election occurring not less than seventy-five days after the adoption of such resolution.

If any proposal has been previously initiated pursuant to section 3311.22, 3311.231, or 3311.26 of the Revised Code which affects any of the territory affected by the proposal of the state board, the proposal of the state board shall not be placed on the ballot while the previously initiated proposal is subject to an election.

Upon certification of a proposal to the board of elections of any county pursuant to this section, the board of elections of such county shall make the necessary arrangements for the submission of such question to the electors of the county qualified to vote thereon, and the election shall be counted and canvassed and the results shall be certified in the same manner as in regular elections for the election of members of a board of education.

The electors qualified to vote upon a proposal are the electors residing in the local, exempted village, or city school districts, containing territory proposed to be transferred.

If the proposed transfer be approved by a majority of the electors voting on the proposal, the state board, subject to the approval of the board of education of the district to which the territory would be transferred, shall make such transfer prior to the next succeeding July 1.

(B) If a study conducted in accordance with this section involves a school district with less than four thousand dollars of assessed value for each pupil in the total student count determined under section 3317.03 of the Revised Code, the state board of education, with the approval of the educational service center governing board, and upon recommendation by the state superintendent of public instruction, may by resolution transfer all or any part of such a school district to any city, exempted village, or local school district which has more than twenty-five thousand pupils in average daily membership. Such resolution of transfer shall be adopted only after the board of education of the receiving school district has adopted a resolution approving the proposed transfer. For the purposes of this division,

the assessed value shall be as certified in accordance with section 3317.021 of the Revised Code.

(C) Upon the making of a transfer of an entire school district pursuant to this section, the indebtedness of the district transferred shall be assumed in full by the acquiring district and the funds of the district transferred shall be paid over in full to the acquiring district, except that any indebtedness of the transferred district incurred as a result of a loan made under section 3317.64 of the Revised Code is hereby canceled and shall not be assumed by the acquiring district.

(D) Upon the making of a transfer pursuant to this section, when only part of a district is transferred, the net indebtedness of each original district of which only a part is taken by the acquiring district shall be apportioned between the acquiring district and the original district in the ratio which the assessed valuation of the part taken by the acquiring district bears to the assessed valuation of the original district as of the effective date of the transfer. As used in this section "net indebtedness" means the difference between the par value of the outstanding and unpaid bonds and notes of the school district and the amount held in the sinking fund and other indebtedness retirement funds for their redemption.

(E) Upon the making of a transfer pursuant to this section, when only part of a district is transferred, the funds of the district from which territory was transferred shall be divided equitably by the state board between the acquiring district and that part of the former district remaining after the transfer.

(F) If an entire school district is transferred, the board of education of such district is thereby abolished. If part of a school district is transferred, any member of the board of education who is a legal resident of that part which is transferred shall thereby cease to be a member of that board.

If an entire school district is transferred, foundation program moneys accruing to a district accepting school territory under the provisions of this section shall not be less, in any year during the next succeeding three years following the transfer, than the sum of the amounts received by the districts separately in the year in which the transfer became effective.

Effective Date: 07-01-1998

## **3301-89-01 General policies of the state board of education in a request for transfer of territory under section 3311.06 or 3311.24 of the Revised Code.**

(A) The rules under Chapter 3301-89 of the Administrative Code apply to the request for a transfer of territory following municipal annexation under section 3311.06 of the Revised Code or a petition for transfer of territory under section 3311.24 of the Revised Code.

(B) The rules under Chapter 3301-89 of the Administrative Code do not apply to the transfer of territory following municipal annexation when the district in which the territory is located is a party to an annexation agreement with a city school district under section 3311.06 of the Revised Code. Further, the use of the term "agreement" in Chapter 3301-89 of the Administrative Code does not mean "annexation agreement" as defined in division (A)(4) of section 3311.06 of the Revised Code.

(C) The department of education shall require the boards of education affected by a request for transfer of territory to enter into good faith negotiations pursuant to sections 3311.06 and 3311.24 of the Revised Code.

(D) In situations where agreement has been reached between respective boards of education, the terms of agreement should be sent to the state board of education with reasonable dispatch. In those situations where agreement does not exist, the state board of education will thoroughly examine the facilitator's report, pursuant to paragraph (A)(8) of rule 3301-89-04 of the Administrative Code. If the state board of education determines that the negotiations were not held in good faith, the transfer request shall be remanded back to the districts for further negotiations for a period not to exceed one year. However, no transfer request will be remanded more than once to the districts. If the state board determines that negotiations were held in good faith, but no agreement reached; or if negotiations were held the second time on the same transfer request and no agreement reached, then the state board of education will thoroughly examine the stated reasons for and against the requested transfer and provide due process to all parties involved as set forth in paragraph (E) of rule 3301-89-02 of the Administrative Code.

(E) A request for the transfer of territory for school purposes which previously has been disapproved by the state board of education will be reconsidered only if the state board of education determines that significant change has taken place subsequent to the filing of the original request and at least two years have elapsed since the state board of education disapproved the request.

(F) 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.

(G) The file at the department of education concerning a requested transfer will be made available to any affected party or interested person at all reasonable times for inspection. Upon request, copies of documents from the file will be made available at cost and within a reasonable period of time.

Effective: 02/27/2007

R.C. 119.032 review dates: 11/29/2006 and 02/27/2012

Promulgated Under: 119.03

Statutory Authority: 3301.07, 3311.06

<http://codes.ohio.gov/oac/3301-89-01>

9/10/2007

EXHIBIT 10

## **3301-89-02 Procedures of the state board of education in a request for transfer of territory under section 3311.06 or 3311.24 of the Revised Code.**

### **(A) Initial requests**

(1) A school district may request a transfer of certain territory for school purposes under section 3311.06 of the Revised Code by sending an initial letter requesting the land transfer to the state board of education and including copies of:

- (a) The resolution of the requesting board of education;
- (b) Each annexation ordinance identified by number; and
- (c) A map showing the area(s) being considered for transfer.

(2) Under the provisions of section 3311.24 of the Revised Code, if the board of education of a city or exempted village school district deems it advisable to transfer territory from such district to an adjoining city, exempted village, or county school district, then the board of education of the district in which the proposal originates shall file the request, along with a map showing the boundaries of the territory proposed to be transferred, with the state board of education prior to the first day of April in any even-numbered year.

(3) A person(s) interested in requesting a transfer of territory from one school district to another, for school purposes, pursuant to section 3311.24 of the Revised Code, may petition to do so through the resident board of education.

(a) The board of education of the district in which such a proposal originates, regardless of its position on the proposed transfer, shall file the proposal, together with a map showing the boundaries of the territories proposed to be transferred, with the state board of education prior to the first day of April in any even-numbered year. In order to afford the county board of elections sufficient time to verify signatures on a petition that proposes a transfer of school district territory, residents that seek the transfer of school district territory shall file the proposal for transfer with the board of education of the district in which such proposal originates prior to the fifteenth day of March in any even-numbered year.

(b) The board of education of the district in which the proposal originates by petition of qualified electors residing within the portion of the school district proposed to be transferred shall cause the board of elections to check the sufficiency of signatures on the petition and shall notify the state board of education of such its determination.

(4) A school district or a party initiating a request for transfer of territory shall serve a copy of the request on the school district(s) affected by the proposed transfer and shall indicate such service on the request which is filed with the state board of education.

(5) Upon receipt of a request for transfer under paragraph (A)(1) or (A)(2) of this rule, the department of education shall notify all school districts involved of their responsibilities for negotiations under rule 3301-89-04 of the Administrative Code.

(6) Upon receipt of a negotiated agreement, the state board of education shall adopt a resolution of approval of the negotiated agreement or may establish a hearing if approval is not granted.

(B) Upon receipt of the initial request for a transfer of territory under section 3311.06 or division (A) of section 3311.24 of the Revised Code, or upon determination by the state board of education that negotiations pursuant to rule 3301-89-04 of the Administrative Code have failed to produce an agreement, the department of education shall send to each of the school districts involved in the proposed land transfer a request for information. This request includes twenty-five questions. The answers to these questions, along with other considerations, will be considered. The twenty-five questions are:

- (1) Why is the request being made?
- (2) Are there racial isolation implications?
  - (a) What is the percentage of minority students in the relinquishing district?
  - (b) What is the percentage of minority students in the acquiring district?
  - (c) If approved, would the transfer result in an increase in the percentage of minority pupils in the relinquishing district?
- (3) What long-range educational planning for the students in the districts affected has taken place?
- (4) Will the acquiring district have the fiscal and human resources to efficiently operate an expanded educational program?
- (5) Will the acquiring district have adequate facilities to accommodate the additional enrollment?
- (6) Will both the districts involved have pupil population and property valuation sufficient to maintain high school centers?
- (7) Will the proposed transfer of territory contribute to good district organization for the acquiring district?
- (8) Does the acquiring district have the capacity to assume any financial obligation that might accompany the relinquished territory?
- (9) Will the loss of either pupils or valuation be detrimental to the fiscal or educational operation of the relinquishing school district?
- (10) Have previous transfers caused substantive harm to the relinquishing district?
- (11) Is the property wealth in the affected area such that the motivation for the request could be considered a tax grab?
- (12) Are there any school buildings in the area proposed for transfer?
- (13) What are the distances between the school buildings within:
  - (a) The present school district?
  - (b) The proposed school district?

(14) What are the distances between:

(a) The area proposed for transfer and each building in the present school district?

(b) The area proposed for transfer and each building in the proposed school district?

(15) If approved, will the requested transfer create a school district with noncontiguous territory?

(16) Is the area being requested an isolated segment of the district of which it is a part?

(17) Will the municipal and school district boundary lines become coterminous?

(18) For each district affected:

(a) What is the inside millage?

(b) What is the outside operating millage?

(c) What is the bonded indebtedness millage?

(19) What is the levy history in each of the affected districts?

(20) Will the transfer of school district territory cause a negative impact on the state of Ohio?

(21) How will the projected revenues and expenditures as set forth in the most recent five-year forecasts be impacted by the transfer, if implemented? Each district shall provide the department of education with copies of their most recent five-year forecasts.

(22) What designation did each of the affected districts and building receive on their state report cards for the last five years?

(23) How will the proposed transfer affect the educational offerings/programs of the affected districts?

(24) What course offerings will be available through the acquiring district, as compared to the relinquishing district?

(25) How will the proposed transfer affect the athletic programs and extracurricular activities of the affected districts? Will similar programs and activities be available to students of the affected districts?

(C) When a school district completes the information requests and forwards the same to the department of education, the school district shall serve copies a copy on the other school district(s) affected by the proposed transfer and shall indicate such service on the responses that are filed with the department of education.

(D) Upon receipt of completed questionnaires from both school districts concerned, the department of education will analyze the information and present its analysis to the state board of education for consideration. If, within thirty days after the department of education sends to each district the foregoing requests for information, a district has not submitted the required responses, the department of education shall present to the state board of education the information in its possession for consideration.

(E) Upon receipt of the data from the department of education, the state board of education may declare its intention

to consider the request for transfer of certain territories from one school district to another by passing a resolution of intention to consider the matter and providing the parties an opportunity for a hearing.

(F) If a request for a hearing is subsequently received by the department of education, a referee shall be appointed and a hearing date shall be established by the referee.

(G) The data and documents received by the department of education under this chapter shall become part of the record of the hearing for consideration by the referee.

(H) In making a report and recommendation to the state board of education, the referee shall be governed by the provisions of Chapter 3301-89 of the Administrative Code. Within thirty days after the conclusion of the hearing on the proposed transfer, the referee should submit to the department of education his/her report and recommendation.

(1) When the referee's report is received with its recommendation to approve or disapprove the transfer of territory, the department of education will mail such report to the school districts and any other affected parties.

(2) Upon their receipt of the referee's report, the affected parties will have ten days in which to submit written objections to the report to the department.

(3) Any party that files objections shall file a copy of the objections with the other affected parties.

(4) Any affected party may file a response to the objections. Such response must be filed with the department of education within ten days after the objections are mailed to the department of education.

(I) After the time for filing objections and responses has ended, the state board of education will then consider the referee's report, objections, and responses, and adopt a resolution which approves, disapproves, or modifies the recommendation of the referee. The decision of the state board of education will be made solely on the record of the hearing, the report of the referee and any objections or responses filed by the parties.

(J) When a determination concerning a transfer of territory will be made by the state board of education, the department of education shall notify the school districts and other affected parties of the time and place the matter will be considered by the state board of education.

Effective: 02/27/2007

R.C. 119.032 review dates: 11/29/2006 and 02/27/2012

Promulgated Under: 119.03

Statutory Authority: 3301.07, 3311.06

Rule Amplifies: 3311.06, 3311.24

Prior Effective Dates: 2/1/87, 5/1/88, 4/27/90

## **3301-89-03 Factors to be considered by a referee appointed to hear a request for transfer of territory under section 3311.06 or 3311.24 of the Revised Code.**

(A) A referee appointed to hear a transfer request under section 3311.06 or 3311.24 of the Revised Code shall consider the information provided by the school districts under paragraph (B) of rule 3301-89-02 of the Administrative Code and shall be governed by the provisions of Chapter 3301-89 of the Administrative Code.

(B) Other factors that a referee shall consider in hearing any request for a transfer of territory for school purposes include, but are not necessarily limited to:

(1) Documented agreements made by public agencies involved in municipal annexation proceedings should be honored;

(2) A previous agreement entered into by the school districts concerned should be honored unless all concerned districts agree to amend it;

(3) The statement signed by the school district boards of education after negotiations as required by paragraph (D)(4) of Rule 3301-89-04 of the Administrative Code;

(4) There should not be undue delay in requesting a transfer for school purposes after a territory has been annexed for municipal purposes;

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

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

(7) School district boundary lines that have existed for a long period of time should not be changed if substantial upheaval results because of long-held loyalties by the parties involved;

(8) The pupil loss of the relinquishing district should not be such that the educational program of that district is severely impaired;

(9) The fiscal resources acquired should be commensurate with the educational responsibilities assumed; and

(10) The educational facilities of districts should be effectively utilized.

(C) When a hearing officer has received and considered the information provided by representatives of the school districts, petitioners for a transfer of territory, and any other party at the hearing, particularly information under paragraph (B) of this rule and paragraph (B) of rule 3301-89-02 of the Administrative Code, and the evidence is in balance, the hearing officer may consider the preference of the residents with school-age children who live in the territory sought to be transferred to another school district. The school district preference of such residents with school-age children in the territory requested for transfer may only be considered and given weight when all other factors are equal.

R.C. 119.032 review dates: 03/13/2007 and 02/27/2012

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

COURT OF APPEALS  
FRANKLIN COUNTY  
99 107-3 7112-03  
CLERK OF COURTS

JoAnne M. Schreiner,  
Chief Circulator et al.,

Plaintiffs-Appellants,

v.

No. 98AP-1251

State of Ohio, Department of Education/  
State Board of Education et al.,

(REGULAR CALENDAR)

Defendants-Appellees.

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NUNC PRO TUNC

O P I N I O N

Rendered on November 9, 1999

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*Strauss & Troy, and Paul B. Calico, for appellants.*

*Betty D. Montgomery, Attorney General, and Charles W. See, for appellee State of Ohio State Board of Education.*

*Wood & Lamping LLP, and David C. DiMuzio, for appellee Cincinnati City School District.*

*Ennis, Roberts & Fisher, and George E. Roberts, III, for appellee Forest Hills Local School District.*

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APPEAL from the Franklin County Court of Common Pleas.

LAZARUS, P.J.

Appellants, JoAnne M. Schreiner et al., appeal from the judgment of the Franklin County Court of Common Pleas affirming an order of appellee, State Board of



Education ("the Board"), that denied the transfer of territory from appellee, Cincinnati City School District, to the Forest Hills Local School District. For the reasons that follow, we reverse.

The territory in question, known as the Four Mile Area, consists of approximately one hundred twenty-five homes located in the vicinity of Four Mile Road in Anderson Township, Hamilton County. Presently, the Four Mile Area is the most extreme southeast section of the Cincinnati City School District and the only residential area in Anderson Township not in the Forest Hills Local School District. Moreover, with the exception of the Four Mile Area, the territorial boundaries of the Forest Hills Local School District are coterminous with Anderson Township. In March 1994, appellants submitted a petition, pursuant to R.C. 3311.24, requesting that the Four Mile Area be transferred to the Forest Hills Local School District. On March 4, 1997, a referee appointed by the Board pursuant to Ohio Adm.Code 3301-89-03(F) held an evidentiary hearing.

On May 13, 1997, the referee issued a report recommending that the Board approve the petition. In so doing, the referee found that, if the transfer were approved, the children in the area would be allowed to attend the same schools as their Anderson Township neighbors, transportation problems for the students would be improved, safety concerns would be dramatically reduced, and that the students would no longer feel isolated and could participate more easily in extracurricular activities with their classmates. The referee also found that the loss of the twenty students who

attended the Cincinnati public schools from the Four Mile Area would have only a *de minimis* effect on the educational operation, minority student ratio, and fiscal resources of the Cincinnati City School District. The referee further found that gaining twenty students would have little-to-no effect on the Forrest Hills School District. Finally, the referee noted the unique nature of the Four Mile Area as a "small, isolated geographic pocket located entirely within a township served by a single separate school system." (Report at 35.) Other than the Four Mile Area, there are no other areas located outside the city of Cincinnati but within the Cincinnati City School District where a transfer would make the receiving adjacent school district coterminous with that community's political boundaries. Accordingly, the referee concluded that the benefits of approving the petition outweighed any perceived harm to the Cincinnati City School District and that "the present and ultimate good of the pupils and the families involved in this territory would be in approving [the] transfer request." (Report at 41.)

The Cincinnati City School District filed objections to the report and, on September 9, 1997, the Board, by a 9-to-7-to-1 vote, overruled the recommendation of the referee and denied the request for the transfer. In its resolution denying the proposed transfer, the Board made four separate findings in support of its decision:

[1.] \*\*\* [T]hat students in the Four Mile/Sutton Roads area of Anderson Township are presently being appropriately served by the Cincinnati City School District; and

[2.] \*\*\* [T]hat the loss of valuation in the requested transfer area would have a detrimental impact on the fiscal and

educational operation of the Cincinnati City School District;  
and

[3.] [T]hat maintenance of city school district boundaries is critical to the stability of such school districts in order to assure successful long-range planning and to avoid substantive harm to the relinquishing city school district; and .

[4.] [T]hat a transfer would result in an increase of racial isolation[.]

Pursuant to R.C. 119.12, appellants appealed to the Franklin County Court of Common Pleas.

On August 21, 1998, the trial court affirmed the order of the Board, holding that the decision of the Board to deny the transfer was supported by reliable, substantial, and probative evidence and was in accordance with law. In so doing, the court reviewed the seventeen questions listed in Ohio Adm.Code 3301-89-02(B) and the ten additional factors listed in Ohio Adm.Code 3301-89-03 that the Board and referee respectively are to consider in determining a request for a transfer under R.C. 3311.24. Based upon this review, the trial court stated that "[a]lthough there are factors justifying both the denial and the approval of the transfer, in general, the Court agrees with the Board that *after weighing them*, the transfer must be denied." (Emphasis added; Decision at 12.)

In affirming the Board's determination, the court relied upon the following findings: (1) that the racial implications, while minimal now, were potentially great because the Four Mile Area would continue to develop; (2) that the loss of twenty white

students to the Cincinnati City School District would add to the trend away from diversity at both schools; (3) that the Forest Hills School District is at or near capacity without the inclusion of the Four Mile Area, which has the potential of having many more than the present twenty students; (4) that any amount of revenue loss to a district in "dire financial straits" would be detrimental both educationally and fiscally; (5) that the acquisition of \$422,000 in tax revenue when compared with the cost to educate twenty students would amount to a windfall for Forest Hills; (6) that most of the parents who testified at the hearing did not send their children to the closest Cincinnati public school, and that this choice caused their inconvenience problems; (7) that even if the transfer were allowed, the children would be isolated by geography from the other children that attend the Forest Hills schools; and (8) that the parents chose to move into a geographically isolated community that they knew was within the Cincinnati City School District.

On September 9, 1998, the trial court filed its judgment entry reflecting its August 21, 1998 decision. It is from this entry that appellants appeal to this court, raising the following three assignments of error:

**First Assignment of Error**

**The Common Pleas Court Erred, As a Matter of Law and to the Prejudice of Appellants, by Failing to Give Primary Consideration to the Interests of the Students, in Direct Violation of OAC § 3301-89-01(F).**

**Second Assignment of Error**

The Lower Court Erred, as a Matter of Law and to the Prejudice of Appellants, by Failing to Analyze the Record to Determine Whether the Decision of the State Board was Supported by Reliable, Probative, and Substantial Evidence in the Record.

#### Third Assignment of Error

The Lower Court Based Its Decision on Factors Other Than Those Established By Law and Abused Its Discretion.

Before we address appellants' assignments of error, we must decide whether the Board had jurisdiction to consider appellants' petition in the first place. The Cincinnati City School District argues that the Board had no such authority based upon the language of R.C. 3311.24(A) in effect when appellants' petition was submitted. According to appellees, the statute, in effect in 1994, did not allow for territorial transfers from a city school district to a local school district.<sup>1</sup> The relevant provisions of R.C. 3311.24(A), at that time, provided as follows:

Except as provided in division (B) of this section, if the board of education of a city school district or of an exempted village school district deems it advisable to transfer territory from such district to an adjoining city or exempted village school district or to an educational service center, or if a petition, signed by seventy-five per cent of the qualified electors residing within that portion of a city or exempted village school district proposed to be transferred voting at the last general election, requests such a transfer, the board of education of the district in which such proposal originates

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<sup>1</sup> While appellants contend that appellees have failed to preserve their jurisdictional argument by failing to file a cross-appeal raising a separate assignment of error, we disagree. By raising the jurisdictional argument, appellees did not seek to change or alter the judgment below. Rather, they seek to defend the final judgment below on alternative grounds and, as such, appellees were not required to file a cross-appeal. See App.R. 3.

shall file such proposal, together with a map showing the boundaries of the territory proposed to be transferred, with the state board of education prior to the first day of April in any even-numbered year. \*\*\*

Appellees contend that because this language did not specifically include transfers from a city school district to a *local school district*, the Board had no authority under the statute to consider petitions seeking such transfers. We disagree. The statutory language specifically allowed transfers of territory from a city school district to a *county school district*. At the time, a *county school district* (a supervisory body for local school districts) was defined to include the territory of the local school districts in a particular county or governing territory. See pre-1995 version of R.C. 3311.05 (defining county school district as all territory within a county that did not include any territory within a city or exempted village school district); R.C. 3311.05.11 (provisions where county only contained one local school district); and R.C. 3311.60 (providing that the board of education of county school district shall establish curriculum for all local schools under their control). Thus, by providing transfer of territory from a city school district to a county school district, the 1994 version of R.C. 3311.24 in effect when the petitions at issue here were filed included transfers of territory to local school districts. See, e.g., *Levey v. State Board of Education* (Feb. 28, 1995), Franklin App. No. 94APE08-1125, unreported (1995 Opinions 749) (affirming transfer from Toledo City

School District to Ottawa Hills Local School District). As such, the Board had jurisdiction to consider appellants' petition.<sup>2</sup>

In their first assignment of error, appellants allege that the trial court abused its discretion by failing to give primary consideration to the present and ultimate good of the pupils concerned. Ohio Adm.Code 3301-89-01, which states the *general policies of the Board* in a territory transfer determination, provides in section (F) 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." In essence, appellants argue that, pursuant to this rule, the trial court must first determine whether the transfer would be in the best interests of the students of the transfer area, and once having done so, determined whether any of the specifically enumerated factors in Ohio Adm.Code 3301-89-02(B) and 3301-89-03(B) warrant denial of the transfer. Appellants contend that the trial court did just the opposite when it stated that the interest of the students should be considered "only after balancing the many competing factors." (Decision at 12.) While we agree that the trial court's decision in this regard suggests a misunderstanding of the purpose of Ohio Adm.Code 3301-89-01(F), we also find that appellants themselves misconstrue the import of the rule.

First, contrary to what is suggested by appellants, consideration of the "present and ultimate good of the pupils concerned" is not limited to the interests of

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<sup>2</sup> We note that since 1995, *county school districts* are now referred to as *educational service centers*, see R.C. 3311.05, and that the present version of R.C. 3311.24 reflects this change of designation.

those students in the transfer territory. Rather, the inquiry involves *all* students affected by the proposed transfer, including those remaining in the relinquishing district and those already at the receiving districts. See *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1990), 62 Ohio App.3d 308, 323 ("[t]he referee in such a case is merely to decide whether, based upon all relevant factors, the proposed transfer would adversely affect the best interest of *all* students involved, and whether it would indeed be in their best interest"). 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 effected districts.

Second, consideration of the students' best interest is not a separate, independent factor *per se*. Rather, it is the general, underlying policy that guides the Board in its decision on whether to grant the transfer or not. This guiding policy, however, is not divorced from the enumerated factors specifically set forth in the Ohio Administrative Code but is reflected therein. See *Garfield Hts, supra*, at 320 ("[t]he 'present and ultimate good of the pupils concerned' is to be viewed in context of all the factors set forth in Ohio Adm.Code 3301-89-02 and 3301-89-03 as well as all other relevant factors which will have an impact on the proposed transfer"); see, also, *Cincinnati City School Dist. v. State Bd. of Edn.* (1996), 113 Ohio App.3d 305, 310 (because the good of the pupils is the overriding consideration, no one factor alone is determinative of the transfer request). Thus, analysis of the enumerated factors are an

"Integral part" of the underlying policy of determining what is in the best interest of the students concerned. *Garfield Hts, supra*, at 319.

Finally, and more importantly, by arguing that the trial court failed to give primary consideration to the best interests of the pupils concerned, appellants improperly imply that the trial court's role is to engage in a reweighing of the competing factors and make such a determination. It is the duty of the Board, not the trial court, to weigh the competing factors to determine whether a transfer is in the best interest of the students involved. See *Fairborn City School District v. State Board of Education* (Oct. 24, 1996), Franklin App. No. 96APE04-416, unreported (1996 Opinions 4221, 4229-4230); see, also, *Garfield Hts., supra*, at 323. As further discussed in our analysis of appellants' second and third assignments of error, the trial court's role is limited to whether the Board's determination approving or denying the transfer was supported by reliable, probative, and substantial evidence and was in accordance with law. See *Cincinnati City School District, supra*, at 309-310.

Appellants' first assignment of error is not well-taken and is overruled.

In their second and third assignments of error, appellants directly challenge the determination of the trial court that the Board's decision was supported by reliable, probative, and substantial evidence and was in accordance with law. Appellants contend that the trial court failed to adequately review the factual record, made numerous factual determinations that could not be supported by the record,

based its decision on grounds not relied upon by the Board, and based its decision on grounds not established by law.

R.C. 119.12 establishes the standard of review for a trial court upon an appeal from an order by the Board concerning a petition for the transfer of territory pursuant to R.C. 3311.24. *Garfield Hts., supra*, at 312. Under this standard, the trial court must affirm the Board's order if it is supported by reliable, probative, and substantial evidence and is in accordance with law. *Id.* In so doing, the trial court must review the record and conduct a limited weighing of the evidence. However "an agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 471; see, generally, *Gen. Motors Corp. v. Joe O'Brien Chevrolet, Inc.* (1997), 118 Ohio App.3d 470, 482-483.

Upon further appeal to this court, our role is to determine whether the trial court abused its discretion in finding that the administrative order was or was not supported by reliable, probative and substantial evidence and in accordance with law. *Id.*; see, generally, *Samson v. State of Ohio, Board of Education* (Aug. 13, 1998), Franklin App. No. 97APE12-1702, unreported (1998 Opinions 2849, 2853-2854). An abuse of discretion connotes more than an error of judgment; it implies a decision that is arbitrary or capricious, one that is without a reasonable basis or clearly wrong.

*Pembaur v. Leis* (1982), 1 Ohio St.3d 89; *Wise v. Ohio Motor Vehicle Dealers Ed.* (1995), 106 Ohio App.3d 562, 565; *In re Ghall* (1992), 83 Ohio App.3d 460, 466. On the question of whether the Board's order is in accordance with law, our review is plenary. See *Gen. Motors Corp., supra*, at 483.

As noted above, the referees appointed by the Board in this case analyzed the answers submitted by the respective school districts to the seventeen questions enumerated in Ohio Adm.Code 3301-89-02(B) and the ten additional factors listed in Ohio Adm.Code 3301-89-03. Based upon this analysis, the referee ultimately recommended that the transfer be approved because the benefits of the transfer to the students in the Four Mile Area outweighed any perceived detrimental effect on the Cincinnati City School District. The Board, however, rejected this recommendation. In so doing, the Board enumerated four specific grounds in support of its decision: (1) that the students in the proposed transfer were being appropriately served by the Cincinnati City School District; (2) that the transfer would have a detrimental impact on the fiscal and educational operation of the Cincinnati City School District; (3) that maintenance of existing city school district boundaries is critical to the stability of such school districts; and (4) that the transfer would result in increased racial isolation.

The Board is not required to accept a referee's recommendation to grant or deny a requested transfer of territory. See *Fairborn City School District*, at 4228. However, when the Board rejects a referee's recommendation to approve the transfer, it must be presumed that only those specific grounds listed by the Board provided the

basis for its decision and that other possible grounds (even if supported by some evidence) were rejected.

Thus, consistent with the general mandate that a trial court defer to an administrative agency's resolution of evidentiary conflicts, the trial court should limit its review to two basic questions. First, are the specified grounds for the Board's decision supported by reliable, probative, and substantial evidence? See *Ohio Historical Soc.*, *supra*, at 471 ("[t]he agency's order survives the first prong of the common pleas court's review if the court finds that the evidence *the agency relied on* is indeed 'reliable, probative, and substantial'"). (Emphasis added.) Second, are such grounds legally sufficient to support the Board's determination? In other words, are the reasons that the Board relied upon legally sufficient to overcome the uncontradicted evidence in support of the transfer. While this process involves a limited reweighing of the relevant evidence and factors, a trial court may not simply substitute its judgment for that of the Board.

Here, as evident from its decision as a whole, the trial court did not limit its inquiry to a determination of whether the grounds specified by the Board were supported by the factual record and legally sufficient to support the Board's determination to deny the transfer. Rather, the trial court placed itself in the role of the Board by engaging in a complete reweighing of the evidence and regulatory factors and by coming to its own, independent conclusion as to the propriety of the transfer, *albeit* the same conclusion reached by the Board. Moreover, in so doing, the trial court

specifically relied upon several additional grounds not relied upon by the Board that it found weighed against the transfer. For example, the trial court found that (1) that the Forest Hills Local School District was at or near capacity and might have trouble with an influx of additional students; (2) that the tax revenues gained by Forest Hills amounted to a windfall; (3) that even if the transfer were allowed, the children would still be geographically isolated from the rest of Forest Hills Local School District; and (4) that the parents chose to move into the Four Mile Area knowing that it was within the Cincinnati City School District. Several of these findings directly contradict those of the referee. More importantly, none were relied upon by the Board in making its decision. Thus, by completely reweighing the factors and by relying on additional, independent grounds not forming the basis of the Board's decision, the trial court exceeded the scope of its review beyond that allowed by law and thereby abused of discretion. Cf. *Diversified Benefit Plans Agency, Inc. v. Duryee* (1995), 101 Ohio App.3d 495 (trial court commits abuse of discretion when it applies the wrong standard of review in an administrative appeal).

Moreover, to the extent that the trial court reviewed the Board's grounds in support of its determination, we find that the trial court abused its discretion in finding that the Board's decision was supported by reliable, probative, and substantial evidence and in accordance with law. As more fully explained below, only two of the four specified grounds (the fiscal and racial impact of the transfer) are legitimate factors weighing against the transfer in this case. However, the evidence only supports a

finding that the fiscal and racial impact would be *de minimis*. As such, we find that neither of these grounds, alone or together, are legally sufficient to support the decision of the Board to deny the transfer.

As noted above, the first ground for the Board's decision to deny the transfer was that the students in the Four Mile Road Area were "presently being appropriately served by the Cincinnati City School District." We find, however, that such a conclusion is not supported by reliable, probative, and substantial evidence, and more importantly, is not a factor weighing against the transfer in this case.

Appellees maintain that the Board's conclusion in this regard is supported by the evidence concerning the educational opportunities available to the students through the Cincinnati City School District. In particular, appellees note that the Cincinnati City School District provides alternative and magnet schools, including Montessori and Paideia programs, unavailable in the Forest Hills School District. Appellees also note that ninety-five percent of its students at its college preparatory high school, Walnut Hills High School, go on to college.

The record indicates, however, that not everyone can take advantage of these opportunities. For example, only those students who pass a qualifying exam can attend Walnut Hills High School. Moreover, the record indicates that those students of the Four Mile Area who have taken advantage of alternative opportunities face formidable transportation problems. For example, one student who attended an alternative high school for its Paideia program, testified that he had to catch a bus at

6:20 a.m. for a thirty minute ride to the Walnut Hills area, where he would wait between fifteen and forty-five minutes for a second bus that would take him to his high school. At the end of the day, the bus would drop him off approximately one mile away from home and he would have to walk home along a busy street without sidewalks. It took him approximately one hour and forty-five minutes to get home from school. Similarly, another parent testified that her child rode the bus one and one-half hours each way to attend a classroom for multi-handicapped students in the first and second grade. Almost every parent who testified about sending their students to a school other than that assigned to the Four Mile Area expressed dissatisfaction with the transportation provided by the Cincinnati City School District. And no parent of any child who had attended an alternative school testified to the contrary.<sup>3</sup>

More importantly, the Board's conclusion that the Cincinnati City School District is "appropriately serving" the students in the transfer area is, at best, a neutral factor in deciding whether to grant or deny a transfer. While the Board's conclusion in this regard renders petitioners' request for a transfer less compelling than a conclusion that the Cincinnati City School District was inadequately serving the students, such a conclusion does not, itself, affirmatively weigh against approving the transfer. Nothing in R.C. 3311.24, Ohio Adm. Code 3301-89, or the case law indicates that a transfer must

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<sup>3</sup> In fact, only two parents testified in opposition to the transfer. One was a teacher in the Cincinnati City School District, the other was the spouse of a teacher in the district. Both parents testified that they were happy with the education their children were receiving in the Cincinnati City School District. Both also indicated, however, that they expected that their children would attend Walnut Hills High School, the college preparatory high school reserved for top performing students.

be predicated on the inadequacies of the present school district, and nothing indicates that a transfer should be denied as long as the present school district is "appropriately serving" the affected students. The relevant inquiry is not limited to the appropriateness of the present school district, but must also include whether such students would be better served by the receiving district. Simply put, the fact that the students of the Four Mile Area are "appropriately served" by the Cincinnati City School District does not weigh against the transfer if the students would be better served in the Forest Hills School District.

Here, the evidence overwhelmingly indicates that the students would be better served by the transfer, especially considering the social and community factors. As this court has noted before, "it is appropriate for the board to consider both the social and educational needs of all affected students" and that promoting a "sense of community" is a valid ground for seeking and granting a transfer. (Emphasis added.) *Garfield Hts., supra*, at 323; see, also, *Lavey v. State Bd. of Education* (Feb. 28, 1995), Franklin App. No. 94APE08-1125, unreported (1995 Opinions 749) (evidence that transfer would have a positive effect upon students who wished to participate in co-curricular and extracurricular activities in the neighborhood supported transfer). Here, the referee found that these social, extracurricular factors could not be ignored and weighed strongly in favor of a transfer:

\*\*\* To live in Anderson Township with recreational facilities, municipal programs, city services, shopping, churches, cultural activities, etc., associated with the Anderson

Township community, but to travel to the City of Cincinnati for educational services is an unnecessary inconsistency.

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--- Lasting friendships are also formed through clubs, sports, and extracurricular activities. However, because of extreme inconvenience associated with the lengthy distances and travel times to Cincinnati Public Schools, the Four Mile area students not only are deprived of meaningful interaction with students while attending Cincinnati Public Schools, but they also face isolation and are denied the opportunity to develop full relationships with their Anderson Township neighbors. [Referee's Report at 39-41.]

Nothing in the Board's resolution, including finding that the Cincinnati City School District appropriately serves the students of the Four Mile Area, addresses, let alone contradicts, the referee's conclusion that the Four Mile Area students would be better served if the transfer were approved. Thus, we find that the Board's conclusion that the Four Mile Area students are being appropriately served by the Cincinnati City School District is not supported by reliable, probative, and substantial evidence and does not weigh against the transfer in this case.

The Board's second ground for denying the transfer was that the "loss of valuation in the requested transfer area would have a detrimental impact on the fiscal and educational operation of the Cincinnati City School District." The evidence, however, indicates that the annual loss in revenue to the Cincinnati City School District if the transfer were approved equals approximately \$422,000, an amount constituting thirteen one hundredths of one percent of the district's over \$300 million annual budget.

While John Concannon, the general counsel for the Cincinnati City School District, testified that such an amount was significant, especially considering the "discretionary" portion of the annual budget, he did not describe, in any detail, how the loss of this comparatively limited amount of money would detrimentally impact the educational operation of the Cincinnati City School District. Thus, despite Concannon's conclusory testimony to the contrary, we find that evidence shows that the fiscal impact can, at best, be described as minimal.

The Board's third stated reason was "that maintenance of city school districts boundaries is critical to the stability of such school districts in order to assure successful long-range planning and to avoid substantive harm to the relinquishing city school district." We find, however, that such a vague and general statement is not a legally valid reason to denying a transfer in this case.

We have recognized that the Board is entitled to consider all relevant factors, not merely the factors listed in Ohio Adm.Code 3301-89, see *Fairborn City School District, supra*, at 4227. However, the factors considered by the Board must not be inconsistent with the purpose of R.C. 3314.24 or the specific provisions of Ohio Adm.Code 3301-89. The entire purpose of the transfer process is to determine whether and when to alter school district boundaries, and nothing in R.C. 3311.24 or Ohio Adm.Code 3301-89 indicates that maintaining existing city school district boundaries is, itself, a factor weighing against a transfer. In fact, the only related provision, Ohio Adm.Code 3301-89-03(B)(7), provides that long standing school boundaries should not

be changed "if substantial upheaval results because of long-held loyalties by the parties involved." (Emphasis added.) Here, there was no indication in the Board's resolution or in the evidence that the residents of the Four Mile Area have long-held loyalties to the Cincinnati City School District.

More importantly, Ohio Adm.Code 3301-89-01(F) mandates that each transfer request is to be "considered upon its merit." (Emphasis added.) Thus, a decision to grant or deny a transfer must be based on the specific facts and circumstances surrounding the proposed transfer itself and not a general presumption against changing city school district boundaries. Nothing in the Board's resolution here indicates how the maintenance of the boundaries of the Cincinnati City School District, in general, or those specifically at issue here, are critical to the district's stability, long-run planning, and avoidance of substantial harm.

Finally, the Board's fourth stated reason in support of its decision was that the "transfer would result in an increase of racial isolation." We find, however, that the evidence only supports a conclusion that such an impact would be *de minimis*. It is uncontroverted that: (1) according to the 1995-1996 Cincinnati City School District, the Cincinnati City School District had a minority percentage of 70.95%; (2) that a transfer of the twenty non-minority students from the Five Mile Area would result in an increase in the minority percentage at the Cincinnati City School District to 70.978%, an increase of only .028%; and (3) that the minority student percentage attending the Cincinnati City School District has increased by more than one percent per year and that this trend is

likely to continue into the foreseeable future. Thus, as the referee pointed out, the racial impact to the Cincinnati City School District of granting the transfer is over thirty-nine times less than the annual trend.

The trial court, apparently recognizing the *de minimis* racial effect of the proposed transfer, found that the racial impact had the potential to be greater because of the possibility of future development in the Four Mile Area. Under this analysis, the Four Mile Area would continue to develop and, therefore, would likely contain more than twenty non-minority students in the future. However, the evidence does not support such a conclusion. The only witness to testify, based upon personal knowledge as to the potential for future development in the Four Mile Area, was JoAnne Schreiner, one of the petitioners. Schreiner testified that future development in the proposed transfer area was limited because most of the undeveloped land was unsuitable for building because of its topography and because much of it was owned by the Archdiocese of Cincinnati or governmental entities such as the Anderson Township Greenbelt Committee and Hamilton County Library. She testified that there were only eight-to-ten vacant lots in her subdivision. While John Concannon testified that the area was one in which "a number" of homes were being built, he based this opinion on what he believed he had heard in the prior testimony at the hearing and not due to any personal knowledge. More importantly, the trial court's conclusion as to the racial impact of such development is premised on pure speculation as to the racial makeup of the area in the future. Thus, there is no evidence that future development of the Four Mile Area would

result in a greater racial impact. In sum, the Board's finding that transfer would result in other than a *de minimis* increase of racial isolation is not supported by reliable, probative, and substantial evidence and the trial court abused its discretion in so finding.

As the above analysis indicates, the four stated grounds relied upon by the Board cannot support its decision to deny the transfer in this case. We find that the *de minimis* racial effect, a minimal fiscal effect, a neutral conclusion concerning the adequacy of the Cincinnati School District, and an invalid presumption against altering city school district boundaries do not, as a matter of law, provide a legally sufficient basis to deny the transfer in this case. As a result, we find appellants' second and third assignments of error to be well-taken and sustained. We reverse the decision of the Franklin County Court of Common Pleas and remand the matter to that court with instructions to vacate its earlier decision affirming the decision of the State Board of Education and to enter judgment reversing the decision of the State Board of Education and ordering that the transfer be approved.

*Judgment reversed  
and remanded with instructions.*

DESHLER and TYACK, JJ., concur.

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