

**In the  
Supreme Court of Ohio**

RICHARD and JOANN BARTCHY, et al., : Case No. 07-411  
Plaintiffs-Appellees, :  
v. : On Appeal from the  
 : Franklin County Court of Appeals,  
 : Tenth Appellate District  
 :  
 : Court of Appeals Case  
STATE BOARD OF EDUCATION, et al., : No. 06AP-697  
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**MERIT BRIEF OF APPELLEES  
RICHARD AND JOANN BARTCHY, ROBERT AND DONNA SALMON, BERNARD  
AND MARILYN SCHLAKE, AND WAYNE AND BEVERLY MORRIS**

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TIMOTHY M. BURKE\* (0009189)

*\*Counsel of Record*

EMILY T. SUPINGER (0074006)

MANLEY BURKE

A LEGAL PROFESSIONAL ASSOCIATION

225 West Court Street

Cincinnati, Ohio 45202-1098

Telephone: (513) 721-5525

*Counsel for Appellees*

*Richard and Joann Bartchy, et al.*

DAVID C. DIMUZIO\* (0034428)

*\*Counsel of Record*

JENNIFER B. ANTAKI (0072165)

David C. DiMuzio, Inc.

1014 Vine Street, Suite 1900

Cincinnati, Ohio 45202

Telephone: (513) 621-2888

*Counsel for Appellant Cincinnati School*

*District, Board of Education*

MARC DANN (0039425)

Attorney General of Ohio

WILLIAM P. MARSHALL\* (0038077)

Solicitor General

*\*Counsel of Record*

STEPHEN P. CARNEY (0063460)

Deputy Solicitor

TODD R. MARTI (0019280)

Assistant Solicitor

REID T. CARYER (0079825)

Assistant Attorney General

30 East Broad Street, 17<sup>th</sup> Floor

Columbus, Ohio 43215

Telephone: (614) 466-8980

Facsimile: (614) 466-5087

Email: wmarshall@ag.state.oh.us

*Counsel for Appellant*

*State Board of Education*

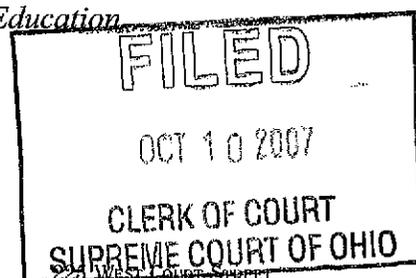


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## **I. INTRODUCTION**

In this case, the Cincinnati City School District (“Cincinnati”) offered no witnesses, virtually no evidence, and, on the critical issues on which the Hearing Examiner and the State Board of Education (“State Board”) relied, unsworn and unreliable information, which on key matters was demonstrated to be false.

Appellees, by contrast, presented sworn testimony subject to cross-examination, documenting that approval of their petition to transfer territory from the Cincinnati City School District to the Madeira City School District would result in closer schools, safer access to schools, a coterminous municipal and school district boundary, the end to single-family properties split by school district lines, and a unified community of interest with the neighborhood and city of which the Appellees are a part.

In short, Appellees established that the standards for a school district transfer had been met. The record demonstrates a complete lack of any evidence to the contrary from Cincinnati. Thus, the decision of the Court of Appeals was not at all surprising and should be upheld.

## **II. COUNTER-STATEMENT OF THE CASE AND FACTS**

### **A. Introduction.**

The Appellees are property owners residing in Madeira, Ohio. They are the sole residents of a cul de sac that was annexed into the City of Madeira in 1996. (Petitioner’s Exhibit P-1 and Cincinnati Exhibits C and D<sup>1</sup> at the Hearing). Prior to the annexation, these four lots were the only lots of their subdivision (the “Villages of Kenwood”) not located in the City of Madeira. (Cincinnati Exhibit D).

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<sup>1</sup> All referenced to exhibits herein refer to exhibits offered at the March 23, 2005, hearing before Hearing Examiner Robert St. Clair.

On March 23, 2000, the Appellees filed a petition to transfer their homes from the Cincinnati City School District to the Madeira City School District pursuant to R.C. §3311.24. The Petition was not forwarded to the Ohio Department of Education by Cincinnati Public Schools until August 29, 2000. (State Board Exhibit 1; Bartchy Supp. at 18). The Department of Education requested the school districts (Madeira and Cincinnati) to submit responses to seventeen questions regarding the proposed transfer. (State Board Exhibit 2; Bartchy Supp. at 21). Madeira responded promptly, submitting its responses on October 2, 2000. (State Board Exhibit 3; State Board Supp. at 29). Cincinnati did not submit a response until March 5, 2005. (State Exhibit 24; State Board Supp. at 37). In the meantime, Cincinnati filed suit in both state court and federal court to prohibit the Ohio Department of Education from ever considering this request.

**B. The Evidence Presented to the Hearing Officer.**

On March 22, 2005, this matter was heard by a Hearing Officer. At the hearing, the Appellees presented four witnesses and ten exhibits. The evidence presented by the Appellees correlated with the factors set for in OAC 3301-89-02 for determining whether a transfer request should be approved. Cincinnati participated in the hearing but offered no witnesses.<sup>2</sup> Madeira did not participate in the hearing.

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<sup>2</sup> Cincinnati offered two exhibits that Appellees objected to below. The first was an indecipherable map that none of the witnesses could identify or interpret, which resulted in counsel for Cincinnati schools essentially testifying as to what it purported to depict, and an affidavit of the City Manager of Madeira, the consideration of which deprived Appellees of the ability to cross-examine the witness.

Mrs. Donna Salmon testified that she and her husband purchased their home on Windridge Drive in 1996. (Tr. at 38; Bartchy Supp. at 2). Prior to living on Windridge, the Salmons had lived in another home located in Madeira for 13 years. (Tr. at 38; Bartchy Supp. at 2). The Salmons have one school age child; however, he attends a private Catholic high school, St. Xavier High School. (Tr. at 38-39; Bartchy Supp. at 2-3). Part of the Salmons' front yard is located within the Madeira City School District; in fact, the Salmons receive two tax bills for their property; one for part of the driveway and front yard and the other for the remainder of the property. (Tr. at 39-40; Petitioner's Exhibit P-2; Bartchy Supp. at 3-4). Another property owner, Bernard Schlake, also testified that he receives two tax bills due to the fact that the school district boundary line passes through part of the Schlakes' property that borders Windridge Drive. (Tr. at 91; at Petitioner's Exhibit P-9; Bartchy Supp. at 15).

Mrs. Salmon testified at length regarding her family's involvement with the Madeira community. She identified several documents related to the Madeira community and the Madeira School District that her family receives by virtue of living in the City of Madeira. (Tr. at 44-46; Bartchy Supp. at 6-8). She also testified that she receives a calendar from Madeira Schools sent to her home that details special dates and sporting events for the Madeira Schools. (Tr. at 44; Bartchy Supp. at 6). All of these documents reference and discuss events pertaining to the Madeira school system. They are a key means of communication among the citizens of the City of Madeira. None of the documents introduced make any reference to the Cincinnati Public Schools. (Tr. at 43-45; Bartchy Supp. at 5-7). Mrs. Salmon also discussed the fact that Madeira students occasionally come to their house seeking donations to support Madeira school activities, such as the band. (Tr. at 46; Bartchy Supp. at 8). However, she had never received any similar documents from Cincinnati schools, nor has she ever been solicited to support any programs for

Cincinnati schools. (Tr. at 46; Bartchy Supp. at 8). Likewise, Richard Bartchy and Bernard Schlake also testified that they had never received similar communications or solicitations from Cincinnati schools or Cincinnati school students. (Tr. at 75-76; 95; Bartchy Supp. at 10-11; 17).

The documents stress the importance of the Madeira school system to the citizens of Madeira. They are an integral part of community life and culture of Madeira. The residents of these four houses are included in all aspects of Madeira life, except the school system. Mrs. Salmon knows several of the Madeira school board members, including the school board president, who lives six houses away from the Salmons. (Tr. at 45; Bartchy Supp. at 7). Another school board member lives just two houses away from the Salmons. (Tr. at 45; Bartchy Supp. at 7). Conversely, Mrs. Salmon does not know anyone on the Cincinnati school board. (Tr. at 45; Bartchy Supp. at 7). The impact of this division is evident in the Appellees' civic and political lives. For example, despite the fact that the Salmons live on the same street as the school board president and a school board member, they cannot vote for them at the school board elections. (Tr. at 49; State Supp. at 9; Cincinnati Supp. at 5).

Elections are another example of the segregation of the Appellees from full integration into the life of their community. Mrs. Salmon testified that on past election days, because they are the only residents of their precinct who do not live in the Madeira School District, she and the other voting residents of the four homes were segregated in a special polling booth that was used solely by these four households. (Tr. at 46-47; Bartchy Supp. at 8-9). This essentially eliminated any privacy that these individuals had with regard to their individual votes. For example, if only three of the property owners voted on a particular issue, and all vote the same way, the casting of these individual ballots is no longer afforded the secrecy to which each

person is entitled. This issue was also discussed by Mr. Bernard Schlake during his testimony. (Tr. at 94; State Board Supp. at 13; Cincinnati Supp. at 12).

Additionally, Mrs. Salmon testified that these four houses are the only homes in their subdivision, which consists of the roads Windridge and Windsong, which belong to their neighborhood association, but are not part of the Madeira School District. (Tr. at 49; State Board Supp. at 9; Cincinnati Supp. at 5). The property owners here simply want to be fully integrated into the community they are part of, and given that the school district is so entwined with the community functions, that necessarily means being part of the school district as well.

Mr. Richard Bartchy testified regarding the distances between his home and the Madeira Schools, as well as the distances between his home and the nearest Cincinnati schools. Mr. Bartchy measured the distances with his car's trip odometer. (Tr. at 76; Bartchy Supp. at 11). The distance from his home to the Madeira junior and senior high schools was 3.3 miles; the distance to the Madeira grade school was 2.1 miles. (Tr. at 76; Bartchy Supp. at 11). The distance to the Cincinnati high school, Withrow, measured 4.8 miles, and the distance to the nearest grade school measured 2.4 miles. (Tr. at 78; State Supp. 11; Cincinnati Supp. at 9). These distances are consistent with the responses given in Answer 13 to the 17 Questions Posed in Consideration of a Proposed Transfer of Territory for School Purposes from One School District to Another ("17 Questions") by the Madeira School District. (Tr. at 77; State Board Exhibit 3; Bartchy Supp. at 12; State Board Supp. at 32). Cincinnati presented no testimony regarding the distance from the schools. Surprisingly, in their response to Question 13 of the 17 Questions, Cincinnati indicated that the distance to the nearest Cincinnati school was only one mile and the distance to the nearest Madeira school is two miles. (State Board Exhibit 24; State

Board Supp. at 42).<sup>3</sup> Appellants know of no Cincinnati school located within one mile of the Appellants' homes. The claim is not accurate and Cincinnati did not support this contention with any evidence or testimony at the hearing.

Additionally, Madeira Schools are safely accessible by bicycle from Appellees' homes while Cincinnati Schools are not. In addition to the fact that the Cincinnati schools are farther away from the Appellees' homes than the Madeira schools, there also exists a geographical barrier. (Petitioner's Exhibit P-10). The city of Madeira rests atop a plateau. The Appellees' homes are located at one end of the plateau. Robert Salmon testified that in order to get to the nearest Cincinnati public high school, the bicycling student would make a right hand turn out of their subdivision onto Kenwood Road, leaving Madeira, and then travel down a very steep and winding Kenwood Road with numerous blind spots. (Tr. at 109-111; State Board Supp. at 18-20). An alternative road, Whetsel, likewise is a very steep and dangerous road for a young person. Either is a drop of over 225 feet in elevation over ¾ of a mile from Appellees' homes to Madison Road, which must be traveled to the nearest Cincinnati high school. (Tr. at 110-111; State Board Supp. at 19-20). Neither of these roads have bicycle lanes. (Tr. at 113; State Board Supp. at 22). Both of these routes would be entirely too dangerous for a student to take on a bicycle or on foot. A topographical map showing these streets and depicting these substantial drops in elevation between the Appellees' homes and the nearest Cincinnati public high school was admitted as evidence at the hearing. (Petitioner's Exhibit P-10). On the other hand, to get to the nearest Madeira school, the student would make a left hand turn onto Kenwood, which has a dedicated, marked and relatively flat bicycle lane to accommodate the

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<sup>3</sup> Cincinnati's Answers to the 17 Questions was not in any way verified or attested to by affidavit or live testimony. Appellees' had no opportunity to cross-examine any representative from Cincinnati schools regarding these responses.

students. (Tr. at 112; State Board Supp. at 21). The topographical barrier is yet another factor which isolates the Appellees from the Cincinnati public school system, while the dedicated bike lanes invite the Appellees safely toward Madeira schools.

Both Cincinnati and the State Board allege that the property owners were pursuing this transfer in order to realize an economic gain. No evidence or testimony supports this claim. The testimony from the hearing established that the property owners were not financially motivated to pursue the transfer. The only testimony on the issue was Cincinnati's cross-examination of Bernard Schlake:

- Q. Do you think, based upon any analysis that you've done or discussions that you've had, do you think that the home values, the fair market values of these four homes will go up or down if this transfer is approved into the Madeira School District?
- A. I would assume that they would go up, but that won't have much impact on me.
- Q. Isn't it true that that's the real motivation for this, given the lack of any students affected by this? The real motivation of these four homeowners is to increase the fair market value of their homes?
- A. That's not my motivation. I can't speak for the other families. My wife and I intend to stay there for as far as we can see into the future, so it wouldn't have any impact on me either way.

(Tr. at 103-104; State Board Supp. at 16-17). This testimony certainly does not support Cincinnati's assertion that "the property owners sought higher fair market values on their individual properties" or the State Board's assertion that one of the reasons for the transfer request was "perceived economic gain." (Cincinnati Merit Brief at 1; State Board Merit Brief at 6).

In sum, the evidence presented established:

- (1) Madeira Schools are closer to Appellees' homes than the nearest Cincinnati Public School; (Tr. at 76-78; State Board Exhibit 3);
- (2) The boundaries of the Appellees' property, the City of Madeira, and the Madeira School District would become coterminous with approval of the transfer; (Tr. at 89-91; Petitioner's Exhibit P-1; Bartchy Supp. at 13-15);
- (3) Two of the Appellees' properties were divided by the school district boundary line, resulting in the owners receiving two separate tax bills. (Tr. at 39-40, 90; Petitioner's Exhibit P-1; Bartchy Supp. at 3-4; 14);
- (4) The transfer would provide greater community identity and access to Madeira activities (Tr. at 44-46, 75-76, 95; Bartchy Supp. at 6-8, 10-11, 17);
- (5) The Appellees regularly receive information regarding Madeira school fundraisers and activities and have never even been contacted about Cincinnati school events (Tr. at 46, 75-76, 94-95; Bartchy Supp. at 8, 10-11, 16-17);
- (6) The Appellees are the only residents of their voting precinct who must vote separately from the rest of the precinct whenever there is a school-related issue on the ballot. (Tr. at 46-47, 94; Bartchy Supp. at 8-9);
- (7) Madeira is geographically and topographically separated from the nearest Cincinnati schools in such a way as to make it impossible for a school age child to safely walk or ride a bike to school. (Tr. at 109-113; Petitioner's Exhibit P-10; State Board Supp. at 18-22). To travel by car, bike, or on foot to the nearest Cincinnati high school requires using a steep winding road with no bike lane and an elevation drop of over 225 feet over  $\frac{3}{4}$  of a mile (Tr. at 110-111, 113; State Board Supp. at 19-20, 22);
- (8) Dedicated bike lanes allow a student to travel safely from the Appellees' homes to Madeira Schools (Tr. at 113; State Board Supp. at 22);
- (9) Fiscal and human resources exist to support the transfer; (State Board Exhibit 3; State Board Supp. at 31); and

- (10) Adequate facilities exist to support the transfer; (State Board Exhibit 3; State Board Supp. at 31).

**C. The Decisions of the Hearing Officer and the State Board of Education and the Court of Common Pleas.**

On April 28, 2005, the Hearing Officer issued his Report and Recommendation, recommending that the request to transfer the territory be denied. The Hearing Officer's decision was based solely on the fact that no pupils living in the transfer area would be affected by the transfer. The Appellees filed Objections to the Hearing Officer's Report and Recommendation, and the matter was heard for final determination by the State Board of Education on July 12, 2005. At that time, the State Board denied the transfer request by a 10-5 decision. Appellees subsequently filed a Notice of Appeal on July 28, 2005. On June 9, 2006, the Court of Common Pleas affirmed the decision of the Ohio State Board of Education.

**D. The Court of Appeals Reverses and Orders the Transfer.**

Appellees then appealed to the Tenth District Court of Appeals. On January 25, 2007, the Court of Appeals issued its decision, reversing the decision of the Court of Common Pleas and ordering the transfer. The Court of Appeals found that (1) the State Board had jurisdiction over the proceeding; and (2) the trial court abused its discretion in affirming the decision of the State Board because no evidence supported the State Board's decision to deny the transfer and the Appellees presented sufficient evidence to meet their burden of proof to have the transfer approved. *Bartchy v. State Board of Edu.* (2007), 170 Ohio App.3d 349, 2007-Ohio-300.

### III. LAW AND ARGUMENT

#### A. **Appellees' Response to Cincinnati School District's Proposition of Law No. 1: Property Owners may Petition to Transfer Territory Under R.C. 1133.24 Regardless of Whether the Property had Previously been Annexed.**

The lower courts correctly determined that the State Board had jurisdiction to consider this transfer request. Cincinnati asserts that, because this property was at one time the subject of annexation, R.C. 3311.06 was the exclusive means by which a transfer of territory from one school district to another could be accomplished. Cincinnati also asserts that R.C. 3311.06 requires the approval of one of the school districts involved. Cincinnati argues that because the Appellees sought the transfer under R.C. 3311.24, the State Board was without jurisdiction to consider the request. Here Cincinnati misreads and misinterprets the relevant portions of the Ohio Revised Code.

R.C. 3311.06 is a mechanism to be utilized when a school district is requesting to transfer territory in conjunction with an annexation. R.C. 3311.24 is a mechanism for private citizens to seek to transfer their property from one school district to another. The Court of Appeals correctly held that, in reading these two provisions *in pari materia*, that the Board of Education had jurisdiction over this petition.

The related provisions of the Ohio Administrative Code also indicate that the two statutes are to be construed together, and that individual property owners may petition to transfer their property even if their property had been annexed. As the Court of Appeals found, OAC §3301-89-02, entitled "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" provides three different methods by which a transfer can be initiated. That section provides, in pertinent part:

(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

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- (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.

The exact same proceedings must be followed whether the petition is brought under R.C. 3311.06 or R.C. 3311.24. The Hearing Officer is required to consider the same factors, whether the petition is brought under R.C. 3311.06 or R.C. 3311.24, which include factors regarding any existing annexation agreements as well as the time period between an annexation and the request to transfer. OAC 3301-89-03(B)(1) and (3). If annexed property could only be transferred under R.C. 3311.06, these considerations would not be relevant to a petition brought under R.C. 3311.24; however the Administrative Code provisions make no such distinction.

The lower courts correctly held that R.C. 3311.06 works part and parcel with R.C. 3311.24, which provides the method by which *either* a school district or the property owners can request a transfer from the State Board, including provisions for a hearing and approval by the State Board. Nothing in R.C. 3311.06 prohibits a property owner from seeking to transfer

property that was at one time the subject of annexation. In fact, this exact procedure has been used on previous occasions involving annexed property, including in *Cincinnati School District v. State Bd. of Edu.* (1996), 113 Ohio App.3d 305, which also involved property transferred from the Cincinnati School District to the Madeira City School District. *See also, Levey v. State Bd. of Edu.* (Feb. 28, 1995), Franklin App. No. 94APE08-1125, unreported. The history of citizen reliance on the R.C. 3311.24 process, even involving formerly annexed property, no doubt explains why the State Board has not joined Cincinnati schools in this argument.

Moreover, Cincinnati's reading of the statute, if correct, seriously calls into question the constitutionality of R.C. 3311.06. To prohibit a class of citizens from having the same right to petition for a transfer of territory as other citizens, based solely on the fact that, at some point in time after 1959 the property had been annexed, does not bear a rational basis to any legitimate purpose. Cincinnati argues that because school districts do not have standing in annexation proceedings, this section gives school districts their "day in court." However, as this proceeding has made it abundantly clear, both a relinquishing and an accepting school district have the opportunity to participate in a proceeding initiated by property owners under R.C. 3311.24 and are afforded no greater rights under 3311.06.

**B. Appellees' Response to Cincinnati School District Proposition No. 2 and Ohio Board of Education's Proposition of Law: Where no Evidence is Presented Which Would Support the State Board's Denial of a Petition to Transfer Territory and Petitioners Present Sufficient Evidence as Set Forth in the Ohio Administrative Code which Supports the Transfer, the Transfer Must be Approved.**

The questions raised in this appeal by Cincinnati and the State Board relate to the kind of evidence necessary to approve a school transfer request. Both Cincinnati and the State Board propose a bright line rule that if no pupils living in the transfer area would *currently* be

affected by the transfer, the inquiry must halt and the transfer request must be denied. The State Board argues that property owners wishing to transfer their property must establish an educational benefit that correlates with the transfer request in addition to those factors set forth in the Ohio Administrative Code. This position, however, is inconsistent with the related statutes and regulations, as well as established case law. Moreover, it does not take into account the fact that the transfer will not only affect the families currently living in the transfer area, but future families and children who will undoubtedly inhabit these homes in the future.

1. The Evidence Presented at the Administrative Hearing Weighed in Favor of the Transfer Request.

In this case, the Court of Appeals correctly applied the standard necessary to uphold an administrative decision and found the decision of the State Board to be unsupported by substantial, reliable, and probative evidence in record. See *Harris v. Lewis* (1982), 69 Ohio St.2d 577, 579. This is because no evidence was presented at the administrative hearing to support the State Board's decision.

An agency's findings are presumed to be correct unless the reviewing 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. When reviewing the trial court's determination of whether an administrative order is supported by such evidence, the appellate court must decide if the trial court abused its discretion. *Rossford Exempted Village School Dist. Bd. of Edu. v. State Bd. of Edu.* (1992), 63 Ohio St.3d 705, 707.

In this case, the Court of Appeals correctly found the record to be devoid of any competent evidence to support the State Board's decision. While the Appellees presented reliable, probative, and substantial evidence in favor of the transfer, Cincinnati presented none whatsoever which would weigh against Appellees' petition. The Hearing Officer's Report and Recommendation relied heavily on the answers to the 17 Questions and the 10 additional factors submitted by Cincinnati in arriving at the recommendation that the property should not be transferred. Many of the responses to the 17 Questions were shown by Appellees to be false, conclusory, and unsupported by the evidence. Counsel for the State Board offered the Answers submitted by the school districts to the Hearing Examiner, and while all agreed that the documents were in fact the responses submitted by the school districts, no one stipulated or agreed that those answers were accurate. Notably, counsel for Cincinnati even prefaced his stipulation to the admission of the responses to the 17 Questions submitted by the two school districts by stating, with the concurrence of Appellees' counsel, that he was not stipulating to the accuracy of the responses contained therein. (Tr. at 11; Bartchy Supp. at 1.) Cincinnati responded to the 17 questions as follows:

- (1) Why is the request being made? *Unknown.*
- (2) Are there racial isolation implications? *Yes*
  - (a) What is the percentage of minority students in the relinquishing district? *76.2%*
  - (b) What is the percentage of minority students in the acquiring district? *Unknown*
  - (c) If approved, would the transfer result in an increase in the percentage of minority pupils in the relinquishing district? *Yes*
- (3) What long-range educational planning for the students in the districts affected has taken place?

*See attached Vision, Mission Statement and Goals of Cincinnati Public Schools*

- (4) Will the acquiring district have the fiscal and human resources to efficiently operate an expanded educational program? *Unknown*
- (5) Will the acquiring district have adequate facilities to accommodate the additional enrollment? [no response]
- (6) Will both the districts involved have pupil population and property valuation sufficient to maintain high school centers? *Yes for CPS*
- (7) Will the proposed transfer of territory contribute to good district organization for the acquiring district? [no response]
- (8) Does the acquiring district have the capacity to assume any financial obligation that might accompany the relinquished territory? *Unknown*
- (9) Will the loss of either pupils or valuation be detrimental to the fiscal or educational operation of the relinquishing school district? *Yes*
- (10) Have previous transfers caused substantial harm to the relinquishing district? *Yes*
- (11) Is the property wealth in the affected area such that the motivation for the request could be considered a tax grab? *Yes*
- (12) Are there any school buildings in the area proposed for transfer? *No*
- (13) What are the distances between the school buildings in<sup>4</sup>:

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<sup>4</sup> The Ohio Administrative Code also requests that the school districts provide the distance between the petitioning area and the relinquishing and receiving schools. If Cincinnati is suggesting that these are the distances from the petitioning area to the schools, the answers are not at all accurate.

The present area? *1 mile*

(a) The proposed area? *2 miles*

(14) If approved, will the requested transfer create a school district with noncontiguous territory? *Not to our knowledge*

(15) Is the area being requested an isolated segment of the district of which it is a part? *No*

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

(17) For both districts:

(a) What is the inside millage? *4.19*

(b) What is the outside millage? *30.08 (residential effective)*

(c) What is the bonded indebtedness millage? *4.64*

(State Board Exhibit 24; State Board Supp. at 42).

With its answers to the 17 Questions, Cincinnati submitted a document entitled "Information Upon Which to Base Consideration of School Territory Transfer Following Annexation, Section 3311.24 O.R.C." The Hearing Officer's Report and Recommendation also relied upon these responses in reaching his decision. In this document, CPS stated its history of previous losses through transfers and annexations as follows:

*Tax year 2001 (Forest Hills L.S.D) 125 students \$16,131,490  
(assessed)*

*Tax year 1997 (Madeira C.S.D.) 163 students \$1,941,630  
(assessed)*

(State Board Exhibit 24; State Supp. at 39).

These statements regarding prior transfers are nonsensical, unsupported by the record, and are wrong. The Courts of Appeals in both matters referred to by Cincinnati stated the number of students affected by each of these transfers. The Forest Hills case, *Schreiner v. State of Ohio, Dept. of Edu.* (1999), Franklin App. No. 98AP-1251, unreported, involved only 16 students, and in the Ken Arbre (Madeira) case, there was only one Cincinnati student affected, who had graduated before the State Board even decided the matter. See *Cincinnati School District v. State Bd. of Edu.* (1996) 113 Ohio App.3d 305, (wherein the Court noted that “none of the subdivision’s fourteen school-age children attended any of appellant’s schools, except one child who attended an alternative Cincinnati school and was scheduled to graduate in 1994.”) Cincinnati never offered any explanation for the use of such outrageously inaccurate numbers. As a result of Cincinnati’s failure to produce any witnesses, those numbers could not be tested under oath.

Despite these facts, the Hearing Officer concluded that:

In particular, Cincinnati Public School is concerned that there are racial isolation implications and believes that loss of either pupil or valuation is detrimental to the fiscal or education operation of its district. Furthermore, previous transfers have caused substantive harm to Cincinnati Public Schools.

(Decision of the Hearing Examiner at 27).

How the Hearing Officer could rely on Cincinnati’s claim that the transfer could have racial isolation implications, when the transfer was rejected based solely on the lack of students in the territory, is not explained. Cincinnati presented no witnesses or evidence to support its contentions or demonstrate that it has suffered any harm as a result of previous transfers. As such, the Court of Appeals correctly found that there was no competent, credible

evidence in the record to support the Hearing Officer's conclusion, and that the common pleas court abused its discretion in finding that such evidence existed.

The Hearing Officer determined that the transfer would be detrimental to the fiscal and educational operations of Cincinnati schools. (Decision of the Hearing Examiner at 26-27). This conclusion was not based on any tax revenue lost to Cincinnati, but simply the assessed value of the Appellees' properties. It should be noted that Cincinnati reported its valuation of the entire Cincinnati school district for the year 2003 (the most recent year provided by Cincinnati) at \$6,283,240,743. (State Board Exhibit 24; State Board Supp. at 38). The assessed valuation of the Appellees' combined properties, as reported by Cincinnati is only \$373,840. Based upon these figures, the Appellees' properties only make up .00595% of the total Cincinnati school district valuation. The Court of Appeals, relying on prior precedent, found that Cincinnati made no showing of how this loss in valuation would be "a 'factor significant enough to stand in the way of the proposed transfer.'" *Bartchy v. State Board of Edu.* (2007), 170 Ohio App.3d 349, 2007-Ohio-300, citing *Crowe v. State Board of Edu.* (Oct. 26, 1999), Franklin App. No. 99AP-78. Specifically, the Court in *Crowe* 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. \*\*\* The key to Ohio Admin. 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 education operation of the school district.

In adhering to this long-standing precedent, the Court of Appeals did not establish new law nor did it usurp its authority as a reviewing court. Rather, the Court merely set forth the standard that must be applied and found that there was no evidence to support the determination that the

transfer would be detrimental to the fiscal or educational operation of the Cincinnati school district.

The Hearing Officer also found that previous transfers had caused substantial harm to Cincinnati. The Court of Appeals held that, because Appellees demonstrated that this information submitted by Cincinnati regarding previous transfers was wrong, the State Board erred in relying on this information in denying Appellees' petition. Again, the Court of Appeals determined that the trial court abused its discretion in affirming the State Board's decision because the evidence on which the Hearing Officer based his decision was not reliable, probative and substantial as required. Rather the evidence was demonstrated to be entirely wrong and unreliable. Under such circumstances, the Court of Appeals did not err in reversing the decisions below.

The State Board discounts the evidence that was presented by the property owners, especially the testimony regarding their desire to be fully integrated into the Madeira community in every respect. All the property owners testified about their affinity to and support of their community and neighbors, which this Court has held to be valid considerations in weighing a transfer request. See *Bd. of Edu. Of the Rossford Exempted Village School District v. State Bd. of Edu.* (1992), 63 Ohio St.3d 705 (wherein the School Board approved a transfer based, in part, on the finding that "the evidence showed that [the proposed school district] is the focus of the [Petitioners'] social, business, and community life." (Emphasis added)); See also *Levey v. State Bd. of Edu.* (Feb. 28, 1995), Franklin App. No. 94APE08-1125 (relying, in part, on evidence regarding proximity, transportation safety, and "opportunities for participation and involvement in the neighborhood schools with neighboring children."). Likewise, the State Board gives no weight to the fact that Madeira schools are closer and more safely accessible

from the Appellees' homes, or the fact that approval of the transfer request makes the boundary lines of the Madeira School District and the municipal boundaries coterminous at this location.

Additionally, the State Board advances numerous sociological arguments as to the dangers of transferring school territory from urban school districts to suburban school districts, and urges this Court to reverse the decision below because (1) it will lead to more frequent requests to transfer property, and (2) it will complicate local planning. The State Board cites to newspaper articles reporting on instances in Los Angeles and Tacoma, Washington, where property owners have sought to transfer territory. It is not explained what exactly happened in those matters, why the property owners sought the transfers, whether the transfers were granted, or the impact, if any, that the transfers had on the school system in those states. Not only are the arguments advanced by the State Board purely speculative, but they also urge legislative and administrative changes in the law that are not properly before the Court. The Ohio Revised Code and the Ohio Administrative Code set forth the factors for considering a transfer of territory for school purposes. If the State Board wants to add additional requirements or make it more difficult for property owners to transfer territory, its remedy is to seek legislative changes in the law, not ask this Court to create new law.

2. The Lack of Pupils Living in the Transfer Area is Not Dispositive of a Transfer Request.

Cincinnati and the State Board argue that the lack of students living in the transfer area attending public school acts as an absolute bar to approving the transfer. The fact that no pupils in the proposed transfer area currently attend public school is not determinative of the transfer request. First, this approach attempts to take a snapshot in time of these four homes. The reality is that this request affects more than just the one school-age child currently living in

the proposed transfer area; the result of this proceeding will run with the land and affect children who inhabit these four homes in the future. The Court of Appeals' decision ensures that these students will have the opportunity to attend a public school that is closer to their homes and safely accessible on foot or by bicycle. Second, the criteria set forth in the Ohio Administrative Code upon which the Hearing Officer and State Board must rely in determining whether the transfer should be approved does not draw such a distinction. Rather, the determination rests on more objective and measurable criteria, designed to determine whether, long-term, the transfer makes sense to the organization and operation of the school districts.

Moreover, similar transfers, affecting few or no public school students, have been upheld in the past. In *Cincinnati School District v. State Bd. of Edu.* (1996), 113 Ohio App.3d 305, the Court approved a transfer where all 14 of the children in the transfer area attended parochial school at the time the State Board considered the transfer request. In *Levey v. State Bd. of Edu.* (Feb. 28, 1995), Franklin App. No. 94APE08-1125, unreported, the court approved a transfer of territory where all ten of the school-age children living in the transfer area attended parochial school. See also, *In re Proposed Transfer of Territory from Clermont Northeastern Local School Dist.*, Franklin App. No. 02AP-257, 2002-Ohio-5522 (involving one school-age child); *Samson v. State of Ohio Bd. of Edu.* (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 State Board's decision). The Court of Appeals properly held that the inquiry as to whether the proposed transfer should be approved does not end at a determination that it would be unlikely that any children currently living in the proposed transfer area would change schools; rather, the Hearing Officer was required to examine all the evidence presented and determine whether the evidence presented weighed in favor of the transfer. The

Court of Appeals simply affirmed past practice and was neither surprising nor a departure from existing law.

The State Board argues that Appellees should be required to demonstrate that an educational benefit will be accomplished with the transfer in order for Appellees to meet their burden of proof. This heightened standard is not set forth in any statute or regulation, nor has it ever been imposed by case law. Appellees have no such burden. In fact, the factors that the State Board must take into account rely on much more objective and measurable criteria, such as the distance to the nearest schools, the creation of coterminous boundary lines, and fiscal and human resources available to support the transfer. On those tests, the record supports the Appellees' petition to transfer. The State Board's position has no legal foundation, and therefore must be rejected. Even assuming, however, the State Board is correct that an educational benefit must be measurably proven in order to justify a transfer, the Appellees have established that the transfer will be in the best interests of children who will undoubtedly inhabit these homes in the future, as they will have the opportunity to attend the same school as the other children in their neighborhood, that is closer, and that is more safely accessible.

**C. Appellees' Response to Cincinnati School District's Proposition of Law No. 3: In an Administrative Appeal, an Appellate Court Should Review a Trial Court's Decision to Determine Whether the Trial Court Abused its Discretion in Finding that an Agency's Order was Supported by Reliable, Probative and Substantial Evidence and was in Accordance with Law.**

The act of the State Board disapproving a transfer of territory request pursuant to RC 3311.06 is a quasi-judicial act and, as such, is appealable under R.C. 119.12, where the affected parties are provided with notice, a hearing, and the opportunity to present evidence pursuant to OAC Ch 3301-89. *Union Title Co. v. State Bd. of Edu.* (Ohio 1990) 51 Ohio St.3d 189.

On appeal, the Court of Common Pleas must weigh the evidence and determine whether the agency order is supported by substantial, reliable and probative evidence. *Shelby Assn. of School Support, OEA/NEA v. Shelby City Bd. of Edu.* (1995), 104 Ohio App.3d 329. An agency's findings are presumed to be correct unless the reviewing 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. When reviewing the trial court's determination regarding whether an administrative order is supported by such evidence, the appellate court determines whether the trial court abused its discretion. *Rossford Exempted Village School Dist. Bd. of Educ. v. State Bd. of Educ.* (1992), 63 Ohio St.3d 705, 707. The standard of review on questions of law is plenary. *University Hospital, University of Cincinnati College of Medicine v. State Employment Relations Bd.* (1992) 63 Ohio St.3d 339.

Cincinnati argues that the Court of Appeals usurped its authority and reweighed the evidence presented to the Hearing Examiner. However, as the Court of Appeals carefully explains, it found that the trial court abused its discretion in affirming the lower decisions because the decision to deny the transfer and the findings below were not supported by any evidence in the record, and the evidence that was presented by the Appellees was not given any weight whatsoever. Moreover, the Court found the legal reasoning behind the decisions of the Hearing Examiner and the Common Pleas Court to be in conflict with established case law and incorrect as a matter of law.

The standard of review applied by the Court of Appeals was appropriate, and did not exceed the scope of the Court's authority. Therefore, Cincinnati's assignment of error must be overruled.

IV. CONCLUSION

Both the State Board and Cincinnati schools invoke scare tactics to urge this Court to reverse the Court of Appeals' decision. Both would have this Court believe that the decision below will have a catastrophic impact on urban school districts. But, to keep things in perspective, it is important to note that this case only involves four families in a suburban city that simply want to be fully integrated into their community. It is not surprising or in any way inappropriate that this would be their preference, as Madeira schools are closer, safer to get to, and are an integral part of the city in which Appellees live and to which they are citizens. Because the only evidence in the record supports the transfer, the Appellees respectfully request that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

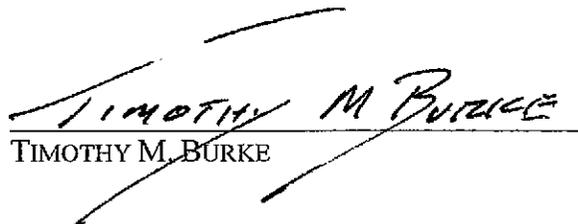
  
TIMOTHY M. BURKE\* (0009189)  
*\*Counsel of Record*  
EMILY T. SUPINGER (0074006)

MANLEY BURKE  
A LEGAL PROFESSIONAL ASSOCIATION  
225 West Court Street  
Cincinnati, Ohio 45202-1098  
Telephone: (513) 721-5525

*Counsel for Appellees  
Richard and Joann Bartchy, et al.*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Merit Brief of Appellees is being mailed to all parties entitled to service under Rule 5 of the Ohio Rules of Civil Procedure on the 10<sup>th</sup> day of September, 2007.

  
TIMOTHY M. BURKE

**SERVICE LIST:**

DAVID C. DIMUZIO  
JENNIFER B. ANTAKI  
David C. DiMuzio, Inc.  
1014 Vine Street, Suite 1900  
Cincinnati, Ohio 45202

*Counsel for Appellant Cincinnati School District, Board of Education*

MARC DANN  
WILLIAM P. MARSHALL  
STEPHEN P. CARNEY  
TODD R. MARTI  
REID T. CARYER  
30 East Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215

*Counsel for Appellant State Board of Education*