

IN THE SUPREME COURT OF OHIO

RICHARD AND JOANN BARTCHY, et al.	:	Case No. 2007-0411
	:	
Plaintiffs-Appellees,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
	:	
v.	:	
	:	
STATE BOARD OF EDUCATION AND CINCINNATI SCHOOL DISTRICT,	:	Court of Appeals Case No. 06AP-697
	:	
Defendants-Appellants.	:	

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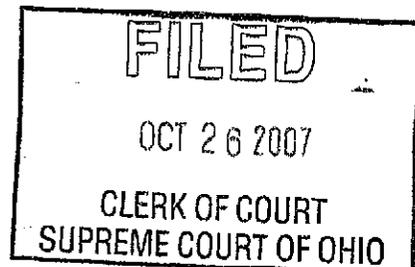
REPLY BRIEF OF APPELLANT  
CINCINNATI SCHOOL DISTRICT, BOARD OF EDUCATION

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## INTRODUCTION

The legislature drafted two provisions that purportedly govern territory transfers. R.C. 3311.24 contains general provisions on how persons may petition for a transfer under the statute. In contrast, R.C. 3311.06 contains specific provisions that are applicable only to territory transfers following annexation. The legislature stated in R.C. 3311.061 that it enacted R.C. 3311.06 to specifically deal with the uncertainty and problems that arise in annexed areas. It seems clear that R.C. 3311.06 would be the statute applicable to this case in light of the legislature's expressed intent and the clear language of the statute, yet the lower court somehow got it wrong. Instead of dismissing this case for lack of jurisdiction, the appellate court ignored the legislature's intent and held that R.C. 3311.06 is not the exclusive method for transferring territories following annexation.

Appellees go to extreme efforts to make this case about something other than what it is-- a case with an evidentiary problem. Appellees presented evidence that they thought supported their transfer request, but that evidence was not reliable, sufficient or probative. Despite Appellees' mischaracterization of the hearing officer and trial court's decisions that they focused solely on the lack of school-age children involved, the lower courts correctly reviewed the entire record and found it lacking probative evidence to support the transfer.

This case is not about whether Cincinnati schools presented enough evidence to deny the transfer—it is about whether Appellees presented sufficient, probative evidence in support of the transfer. Theoretically, since Appellees had the burden of proof, neither Cincinnati nor Madeira school districts needed to participate in the process. Cincinnati

did participate and vehemently opposed the transfer. Cincinnati schools provided information responsive and relevant to the transfer request which showed that its school district would be financially impacted by the proposed transfer, that the neighborhood was annexed for the sole reason of changing school districts, and that it was common for Madeira School District's boundaries to not be coterminous with the city of Madeira.

Before other large urban school districts are forced to defend their district's boundaries against meritless claims based merely on parents' personal preferences and the quest for higher fair market values, the Court should correct the flawed decision of the Court of Appeals and hold that the proposed transfer should be denied because it is not in the best interest of the students involved, but instead, reflects the alleged best interests of the parents involved.

## **ARGUMENT**

### **A. The Legislature Specifically Intended for R.C. 3311.06 to be the *Sole Mechanism For Transferring School District Territory Following Municipal Annexation.***

Appellees' assertion that "nothing in R.C. 3311.06 prohibits a property owner from seeking to transfer property that was at one time the subject of annexation" is a misstatement of the law. (Appellees' Merit Brief at 11-12.<sup>1</sup>) The Court need only look to the unequivocal language of the statute which clearly *prohibits* the transfer of annexed property "in any other manner than that prescribed" by that statute, *regardless of the timing of the annexation.* (Emphasis added.) Both Appellees and the Court of Appeals want this Court to ignore a well-established rule of construction that specific provisions prevail over general provisions. Village Condominium Owners Assoc. v. Montgomery Cty. Bd. of Revision (2005), 106 Ohio St.3d 223, 833 N.E.2d 1230. While R.C. 3311.24

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<sup>1</sup> Future references to Appellees' Merit Brief will be identified as "Appellees' Brief at \_\_\_\_."

contains general provisions on how to file for territory transfer, R.C. 3311.06 contains provisions that apply only to transfers in annexed areas and requires that one of the school districts request approval of the transfer. This case clearly falls under the auspices of R.C. 3311.06 since Petitioners sought annexation solely to facilitate the transfer to Madeira school district. (See Exhibits C and D; App. 71.) When the transfer did not automatically occur as expected, Petitioners then sought the territory transfer pursuant to R.C. 3311.24. (Id.) The subject petition should be dismissed since it fails to strictly comply with R.C. 3311.06 which requires the approval of one of the school districts involved.

1. The Timing of the Annexation is Irrelevant under R.C. 3311.06.

The Court of Appeals attempted to distinguish the applicability of R.C. 3311.06 on the basis that the “petition for transfer at issue here was not made ‘pursuant to the annexation,’ but made independent of it.” (Appx. 10, ¶14.) Notably, Appellees did not make a similar argument in its Merit Brief because it is undisputed that Petitioners sought annexation into the city of Madeira in 1996 to facilitate the transfer from Cincinnati schools to Madeira schools. (Supp. 8, Tr. 67.) The statute clearly states that the timing of the annexation is irrelevant. Therefore, it was error for the Court of Appeals to hold that the petition was not made “pursuant to the annexation” just because the petition was filed several years after the annexation.

2. The Legislature Intended to Treat Territory Transfers in Annexed Areas Differently Due to Public Policy Concerns.

It seems as if the legislature anticipated legal challenges like the one before the Court when it expressed its intent in R.C. 3311.061 to treat territory transfers in annexed areas differently. The legislature acknowledged the “uncertainty” that would arise in

larger urban areas over changing school district boundaries and expressed its hope that a “cooperative effort” would be used to remedy the problems that arise from transfers of annexed areas. The statute reads in relevant part:

The general assembly recognizes that. . . the matter of school district boundaries is of great concern to them, as it is to school officials and the general assembly. The general assembly also recognizes that, as the result of state law dealing with the transfer of school district territory following municipal annexation, a great deal of uncertainty has arisen, particularly in the state’s larger urban areas, over whether particular school district boundaries will be subject to extensive change in the future. . . Finally, the general assembly recognizes that a lasting solution, fair to all of the school children, families and school districts affected, can best be achieved through a cooperative effort involving school district officials, board of education members, and legislators.

It is the intent of the general assembly. . . to provide a mechanism whereby urban 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.

R.C. 3311.061. The foregoing language clearly demonstrates that the legislature intended for R.C. 3311.06 to be the sole mechanism, not just “a mechanism,” for transferring school districts following annexation. It was error for the courts to assume jurisdiction over the subject petition since the Petitioners failed to strictly comply with R.C. 3311.06.

Supreme Court precedent supports Appellant Cincinnati schools’ assertion that R.C. 3311.06 is the exclusive method for transferring territory following annexation. Smith v. Granville Township Bd. of Trustees (1997), 81 Ohio St.3d 608, 693 N.E.2d 219, reinforces R.C. 3311.06’s applicability to cases involving the transfer of territory in annexed areas. In that case, the Court held that school issues have no relevance in the

annexation process since R.C. 3311.06 gives the school districts their “day in court” to deal with school territory problems arising from the annexation. Notably, Justice Moyer, who concurred in part and dissented in part, described the territory transfer process set forth in R.C. 3311.06, since that case involved a territory transfer following annexation. Id. at 626. Noticeably absent from the opinion was any reference to a territory transfer pursuant to R.C. 3311.24.

Should the Court uphold jurisdiction over the subject petition despite its failure to comply with R.C. 3311.06, school districts will be precluded from meaningfully participating in the transfer request process in annexed areas since approval is not necessary. This is not the “cooperative effort” involving school districts that was described by the legislature in R.C. 3311.061. Since school districts have no standing to bring school related issues in annexation proceedings, R.C. 3311.06 gives school districts their “day in court” by mandating that at least one school district actively supports the transfer request. In this case, neither school district approved or requested the transfer. Therefore, it was error for the courts to assume jurisdiction and the petition should be dismissed for lack of jurisdiction. The legislature had every right to carve out special treatment for annexed areas involved in school territory transfers, and the Court should respect that treatment.

**B. Property Owners Seeking to Transfer Territory Between School Districts Have the Burden of Presenting Reliable, Substantial and Probative Evidence that the Transfer Would Further the Present and Ultimate Good of the Students Concerned.**

1. The Hearing Officer Did Not Base His Decision Solely on The Lack of School-Age Children Involved.

Both Appellees and the appellate court misstate the hearing officer's conclusion. Appellees assert that "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." (Appellees' Brief at 9.) (emphasis added.) Similarly, the appellate court incorrectly summarized the hearing officer's conclusion as follows: "In essence, because no students in the transferring area attended public school, there was no evidence in favor of the transfer." (Appx. 16, ¶28; 22, ¶46.) Those statements do not accurately reflect the record. Instead, the hearing officer actually concluded on pages 26-27 of his decision as follows:

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.

(Appx. 65.) (emphasis added.)

It is important to note that the hearing officer's decision was *thirty-three pages* long. (Appx. 40-71.) If the hearing officer reached his decision based solely on the lack of school-age students involved, he could have easily reached his conclusion in only *two pages* after determining that there were no students involved. Instead, the hearing officer carefully considered the best interests of all students involved, the financial impact the transfer would have on Cincinnati schools, the financial windfall to Madeira schools, the true motive of the petitioners, the impact previous transfers have had on Cincinnati schools, and, of course, the impact on the students in both the acquiring and relinquishing districts (or the lack thereof). (Appx. 62-64.) After considering the aforementioned criteria, the hearing officer concluded that a greater harm will occur if the transfer is approved. (*Id.* at 65.)

Contrary to Appellees' unsupported assertions, *Appellant Cincinnati schools need not rely on 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."* (Appellees' Brief at 12-13.) (emphasis added.) Instead, Cincinnati schools propose that proponents of territory transfers must meet their burden of proof and not be allowed to shift the burden to the school districts. Hicks v. State Bd. of Edn. (Aug. 5, 2003), 2003 WL 21791276 (Ohio App. 10 Dist.)

2. The Trial Court Did Not Base Its Decision Solely on the Lack of School-Age Children Involved.

Like the hearing officer, the trial court carefully considered all the evidence, not just the lack of school-age children involved, giving deference to the hearing officer's resolution of evidentiary conflicts. (Appx. 29.) Based on the evidence presented by Appellees, the trial court concluded that Petitioners sought the transfer "upon the basis that they feel more a part of Madeira than Cincinnati." (Appx. 32.) Like the hearing officer, the trial considered all the evidence like Petitioners' community bond with Madeira, Madeira schools' ability to absorb students, the increased tax base for Madeira, the financial impact that previous losses have had on Cincinnati schools, and the geographic location of the nearest schools. (Appx. 33-35.) Based on that evidence, the trial court properly affirmed the decision of the hearing officer and the State Board.

3. Appellees Failed to Present Substantial, Probative Evidence in Support of the Transfer.

Both Appellees and the appellate court attempt to shift the burden of proof to the school district. It is not disputed that Appellees presented evidence in favor of the transfer request. The quality of the evidence is disputed. See Our Place v. Liquor

Control Comm. (1992), 63 Ohio St.3d 570. Instead of presenting evidence that the transfer was in the best interests of all the students involved, Appellees presented evidence that the transfer was in the alleged best interests of the parents involved. The hearing officer properly questioned the probative value of Appellees' evidence which focused merely on the personal preferences of the property owners.

Petitioners' community ties with the city of Madeira do not demonstrate that the transfer is in the best interests of the students involved. Garfield Hts. City School Dist. v. State Bd. of Edn. (1990), 62 Ohio Appx.3d 308, 323. Cross-examination of Petitioners confirmed that no students were precluded from participating in Madeira activities because their home was in the Cincinnati school district. Instead, Petitioners testified that they receive mailings for Madeira events. Since this area is an amalgam of townships, cities and villages, so it not surprising that Petitioners would receive mailings for Madeira, Kenwood, Indian Hill, and Deer Park events.

Petitioners' voting protocol does not demonstrate that the transfer is in the best interests of the students involved. First, it is important to note that Petitioners would not have to vote in a special polling booth in Madeira if they had not sought annexation into the city of Madeira. Second, counsel's assertion that Petitioners' ballots lack "secrecy" is false and not supported anywhere in the record. (Appellees' Brief at 4.) Nonetheless, Petitioners' voting practices are not probative evidence of how the transfer would benefit the students.

Petitioners Bartchy and Salmon's testimony regarding the distances between the property owners' homes and the Cincinnati and Madeira schools is not probative, reliable evidence. Mr. Bartchy measured the distances with his car's odometer. (Appellees'

Supp. 11; Tr. at 76.) Mr. Salmon opined that the roads would not be safe for a student to bicycle from his home to Cincinnati schools. (State Bd.'s Second Supp. SS-23; Tr. at 114.) Neither Mr. Bartchy nor Mr. Salmon are expert witnesses on bicycle safety, street safety, or geography, and there was no foundation laid for their opinions on the safety of the streets. That information is irrelevant anyway since the differences in distances between the homes and the schools is de minimus (.03 of a mile at the elementary level and 1.5 miles at the junior/senior high level), there are no students actually bicycling to school and his opinion does not take into consideration other means of transportation.

It is the job of the hearing officer, not the appellate court, to determine the weight and credibility given to the evidence presented. The hearing officer was in the best position to observe the demeanor and credibility of the witnesses. The hearing officer gave little weight to Petitioners' testimony regarding their "personal preferences," since it lacked probative value and did not demonstrate the best interests of the students involved. It is undisputed that the hearing officer was charged with weighing the best interests of the students in the transfer area against the potential harm such a transfer may have on the other students in the affected districts. (Appx. 63; Garfield, Id. at 323.) Only when that evidence is in balance can the hearing officer look to the preferences of the parents with school-age children. OAC 3301-89-03(C). Due to the lack of sufficient, probative evidence that the transfer would serve the best interests of the students involved, the hearing officer did not need to consider the opinion of the Salmons, who had one school-age child who would never attend Cincinnati schools. (Supp. 15-16, Tr. 118-119.)

Appellees failed to present probative evidence that the transfer was in the best interests of the students involved. It was error for the appellate court to reverse the lower courts and grant the transfer based on this insufficient, irrelevant evidence.

4. The Hearing Officer Properly Considered and Weighed the Financial Impact the Proposed Transfer Would Have on the School Districts.

Appellees' counsel recklessly claims that Cincinnati schools presented no "evidence whatsoever which would weigh against Appellees' petition." (Appellees Brief at 14.) This statement is grossly inaccurate. Cincinnati schools responded to the seventeen questions set forth in OAC 3301-89-02(B) and submitted "Information upon which to Base Consideration of School Territory Transfer Following Annexation, Section 3311.24, O.R.C." That form demonstrated the financial and racial impacts if the transfer were approved and included statistics on enrollment and valuation for the current year, the past four years, the estimated future growth for the next three years and tax rates. (Appx. 16.) As noted by the trial court, Appellees' counsel did not challenge or impeach this evidence at the hearing. (Appx. 34.)

Appellees' counsel also claims that Cincinnati's responses were "false, conclusory, and unsupported by the evidence." (Appellees' Brief at 14.) Again, counsel misrepresents the facts. Cincinnati schools responded to the State Board's questionnaire and provided information that was applicable at the time the transfer actually occurred. For example, Appellees' counsel claims that Cincinnati schools erroneously claimed to have lost 125 students in 2001 and \$16,131,490 in assessed valuation.<sup>2</sup> (Appellees Brief at 16.) Appellees cite the number of students and assessed value found in the opinion

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<sup>2</sup> Neither Appellees nor the appellate court dispute the amount of previous losses, totaling approximately \$18 million. (Appx. 58.) Instead, both parties attempt to discredit Cincinnati schools' information by questioning the accuracy of the number of students involved.

from that case as evidence that Cincinnati schools' response was wrong. See Cincinnati School Dist. v. State Bd. of Edn. (1996), 113 Ohio Appx.3d 305. However, Cincinnati schools was responding to the total number of students lost and the lost assessed valuation that the school district suffered as of the date the transfer actually occurred. The questionnaire did not ask for a specific break down of public school students versus other school-age children. Instead, it requested and Cincinnati schools provided the *total number of students lost at the time of the transfer*. Since it took several years to resolve the aforementioned case, it would be ridiculous to use the pre-transfer figures (that the appellate court relied on) when the decision and transfer in Ken Arbre actually occurred in 1997, five years after the petition had been filed. It is illogical to think that the ultimate impact suffered by Cincinnati schools can be measured before the transfer even occurred. If Appellees questioned the accuracy of the student count and the assessed value of the properties involved, they should have raised it at the evidentiary hearing.

Cincinnati schools also submitted other evidence which was supported its position that the transfer should not be approved. Counsel for Cincinnati schools introduced a certified, self-authenticating map of the subject area. (Tr. at 132-133.) The map showed that the boundaries of Madeira school district are not coterminous with the city boundaries. The Madeira School District includes areas outside of Madeira, and parts of the city of Madeira are not in the Madeira School District. Counsel also introduced certified evidence of Petitioners' annexation proceedings in 1996. (Id.) Those documents demonstrate that Petitioners sought annexation for the purpose of transferring school districts, thus negating any argument that the territory transfer was not made "pursuant to the annexation."

5. Cincinnati Schools Will Be Financially Impacted by the Proposed Transfer.

Neither the appellate court nor the Appellees dispute that Cincinnati schools will be financially impacted by the proposed transfer. However, Appellees' effort to minimize that loss by comparing the assessed value at issue, \$373,840 to the total annual revenue is misleading. (Appellees Brief at 18.) By that measure, *no transfer would have any relevant financial impact* because the overall annual revenue is so high for a large urban school district. Appellees' approach is incorrect since it fails to consider the lasting financial impacts this case could have. In addition to the lost assessed valuation, Cincinnati schools could face innumerable other claims for small "carve-outs" by suburban home owners similarly seeking to increase their property values. Cincinnati schools' losses will always seem de minimis compared to its total annual revenue.

The State Board made financial impact from previous losses a factor in its determination of whether to approve a territory transfer. State Board Questionnaire No. 10 states "have previous transfers caused substantive harm to the relinquishing district?" (Appx. 49.) Clearly, the financial impact suffered by the school districts was important to the State Board or it would not have made it a factor in its Questionnaire. Notably, the State Board did not ask the schools to describe how those losses have hurt the school district. It is elementary that such losses would hurt the school districts. Such a loss means less money for teachers, resources planning, development, and curriculum. The courts should not require a showing of how previous losses have affected the school districts, when the State Board does not require more than the total loss from previous transfers. Instead, the courts, like the State Board, should rely on the lost assessed valuation which is the measure of damages in territory transfer cases.

## CONCLUSION

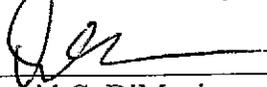
The legislature clearly intended for the specific provisions of R.C. 3311.06 to apply to cases involving territory transfers following annexation. That statute expressly prohibits the transfer of territories in annexed areas in any other way than that prescribed by R.C. 3311.06. Since Appellees failed to petition under R.C. 3311.06 for the transfer of territory in an annexed area, the State Board did not have jurisdiction over the petition and it should be dismissed.

Appellees had the burden of proof that the proposed transfer should be approved. Appellees presented evidence pertaining to the personal preferences of the Petitioners, not the best interests of all students involved. Based on the lack of probative evidence, the hearing officer, State Board and trial court correctly denied the transfer. If the decision of the appellate court is upheld and the burden of proof is shifted to the school district in transfer cases to show how it would be financially impacted by each transfer, the results will be catastrophic. School districts will spend more money defending its boundaries than providing quality educational programming for tomorrow's leaders.

Appellant Cincinnati School District, Board of Education, respectfully requests that the Court reverse the decision of the appellate court and deny the proposed transfer.

Respectfully submitted,

David C. DiMuzio, Counsel of Record



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CINCINNATI SCHOOL DISTRICT,  
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**CERTIFICATE OF SERVICE**

I certify that a copy of this Reply Brief of Appellant Cincinnati School District, Board of Education was sent by ordinary U.S. Mail this 25 day of October, 2007 to:

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