

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
:

REPLY BRIEF OF APPELLANT STATE BOARD OF EDUCATION

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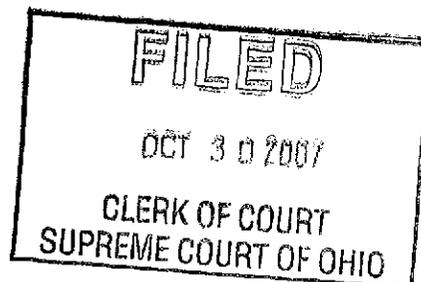


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INTRODUCTION

In asking the Court to order a school district territory transfer that the State Board of Education rejected, the property owners here (“Property Owners” or “Owners”) have turned procedure upside down and have misstated the scope of the substantive law. Procedurally, the Owners first, at the agency level, had the burden of proof to persuade the State Board of Education to approve their request to move their homes from the Cincinnati City School District to the Madeira School District. They failed to do so. And on appeal, they faced two layers of deference: common pleas courts must defer to the State Board and ask only if the Board’s decision was supported by “reliable, probative, and substantial evidence,” and appeals courts further must defer to the trial court and must affirm absent an abuse of discretion. The Property Owners seek to overcome all these hurdles by focusing their attack on one point: they say that the Cincinnati School District did not produce enough evidence to support the State Board’s denial of the transfer.

But the Property Owners’ attack on the Cincinnati District’s evidence misstates the law, as the Cincinnati District had no duty to produce evidence, and the State Board had no duty to step out of its quasi-judicial role and provide evidence, either. On administrative appeal, the evidence that is weighed for reliability is not limited to what was placed on the scale by an opposing side; it also includes the *insufficiency of evidence* put forth by a side that faces a burden and fails to meet it. The Court should reject the Owners’ attempt to shift the burden, as their view would improperly make everyone requesting a transfer *presumptively entitled* to it, even if the requester provides no more than a wish, unless the opposing school districts produce evidence to support denial of the transfer.

The Court should also reject the Property Owners’ attempt to expand the scope of territory-transfer law to consider non-educational factors. The governing regulation here mandates a

focus on “the good of the pupils concerned,” yet the Owners present only one category of evidence that is even theoretically connected to pupils, namely, the transportation issue regarding distance to each districts’ schools. But that item is not enough to overcome agency deference and is simply not strong enough to justify the transfer in any event, as it involved minimal differences in distance, such as a having a school 2.1 miles away rather than 2.4 miles away. And of course, the importance of that distance is further diminished when no students actually traverse that path. Unable to meet their burden with pupil-centered evidence, the Owners seek instead to rely on the *adults*’ sense of “community identification,” such as their dislike for voting in separate booths. But such concerns are far removed from any effect on pupils, and thus should carry no weight at all, let alone enough weight to overcome agency deference.

Finally, not only did the Owners fail to meet their burden to justify the transfer, but adopting their view and ordering this transfer would have devastating effects. It would water down the standard for transfers and would encourage a wave of similar transfers around the State, sought by Property Owners who are not parents of pupils. It would harm our general interest in stability of district lines, and in particular, it would seriously harm our urban school districts.

Consequently, the appeals court’s decision should be reversed, and the State Board of Education’s denial of the territory transfer should be reinstated.

ARGUMENT

- A. **The burden of justifying a territory transfer falls squarely on the Property Owners, and courts reviewing a State Board denial may look to the *absence* of evidence justifying the transfer as part of its deferential inquiry into whether “reliable evidence” supported the State Board’s decision.**

At the heart of this case is the Property Owners’ improper attempt to shift the burden of proof from themselves, as proponents of the territory transfer, to the Cincinnati School District, as opponents of the transfer. The Owners’ argument relies on the unfounded premise that the Cincinnati District was obliged to produce evidence. The very first line of their brief argues that the Cincinnati District “offered no witnesses, virtually no evidence, and . . . unreliable information” and false testimony. See *Bartchy Br.* at 1. The Owners argue that “by contrast,” their evidence was superior. After again stressing their view that the “record demonstrates a complete lack of any evidence to the contrary from Cincinnati,” they conclude that “[t]hus, the decision of the Court of Appeals was not surprising.” *Id.* But the statute places no evidentiary burden on the Cincinnati District at all. Indeed, the State Board is free to deny a request even if no opposition is presented at all, if the petitioners do not meet their burden.

Consistent with the general rule that one who seeks administrative relief must make a case for it, courts have routinely held that “[t]he petitioner in a territorial transfer proceeding has the burden of proof that the transfer should be approved.” *Hicks ex rel. 528 Petitioners v. State Bd. of Educ.* (10th Dist.), 2003-Ohio-4134 ¶ 16; accord *Levey v. State Bd. of Educ.* (10th Dist.), 1995 Ohio App. Lexis 765, *13-14; *Fixmer v. Regional Bd. of Sch. Tr.* (Ill App. 1986), 497 N.E.2d 152, 155; *Kumley v. Polk County Dist. Boundary Bd.* (Ore App. 1985), 706 P.2d 562, 563. And the burden on the petitioner, by definition, means something more than a proponent’s desire coupled with an absence of harm: “the petitioner must establish some benefit to the educational welfare of the students in the detachment area. Mere absence of substantial detriment . . . is

insufficient to support a petition for detachment and annexation.” *Fosdyck v. Regional Bd. of Sch. Tr.* (Ill. App. 1992), 599 N.E.2d 70, 76.

The Owners do not directly dispute this point, but when they turn to the courts’ review of the agency’s decision, they twist the administrative-appeal standard in a way that plainly shifts the burden at hearing to the opponents of a transfer. They expressly assert that a court reviewing a State Board’s denial of a transfer should look at the *opponent’s* evidence to see if *that evidence* justified the denial:

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. This is *because no evidence was presented* at the administrative hearing to support the State Board’s decision. . . .

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.

Bartchy Br. at 13, 14 (emphasis added) (internal citation omitted). This passage leaves no doubt that the Owners’ view uses the administrative-appeal standard, which looks to the “reliable evidence” before the State Board, in a narrow way that asks *only* whether a transfer opponent’s evidence justified a denial, and never asks whether the proponents met their burden to justify a transfer. That view is wrong.

Indeed, the Property Owners’ view would not only improperly shift the burden in cases such as this, in which proponents of a transfer have a weak case, but their view would go so far as to establish a *presumptive right* to transfer upon request, even if the proponents provide literally no evidence, with denial justified only when some opponent steps up to make the case against the transfer. This extreme result is straightforwardly required by the Property Owners’ rule. Weighing such a case against the Owners’ rule proves the point. Suppose that a petitioner,

seeking to transfer just his house, asserts simply “I would prefer it,” and says nothing more. Suppose further that neither school district has any opinion, or at most, that the relinquishing district states its general opposition to all transfers unsupported by evidence. Under the Property Owners’ view, a denial of such a request should be reversed on appeal, if one takes literally their standard of asking whether the *opposing* evidence was reliable, as opposed to asking whether the petitioner met its burden.

The impracticability of the Property Owners’ view is further demonstrated by asking what the State Board, as an adjudicator, is to do when faced with a case that features a weak showing from proponents, but also little or no evidence in opposition. (That is not the case here, as Cincinnati’s evidence supported its opposition.) The State Board, if inclined to deny, would know that any denial would be reversed, absent “evidence” supporting the denial. Its sole recourse would be to step out of its purely adjudicative role and into an advocacy one, before closing the hearing; it would need affirmatively to gather evidence itself to justify its denial. Any rule putting the Board into that position cannot possibly be right.¹

Finally, the Property Owners’ burden-shifting view not only distorts the standard of review and the roles of the parties and the State Board, but by lowering the standard for a territory

¹ The State Board’s role here, as purely an adjudicator, differs from those scenarios in which an agency initiates action and has the burden of proof. Here, as explained above, the Board’s job was solely to adjudicate, and the Owners had the burden to justify the transfer. Then, the common pleas court asked deferentially whether the Board’s denial was based on “reliable, probative, and substantial evidence.” That standard, in the context of a private party’s burden to prove entitlement to agency action, allows the agency to look to that party’s failure to meet its burden, i.e., an absence of evidence, as itself a form of evidence justifying a denial. That contrasts with cases in which an agency itself initiates action against a party—i.e., enforcement actions for regulatory violations, or disciplinary actions against a licensee—as in such cases, the agency does have the burden of proof. Thus, it makes sense, in those other cases, to ask whether the agency provided evidence to act against a party, but that way of framing the question makes no sense when, as here, the agency has no burden to begin with.

transfer, it also conflicts with the General Assembly's expressed view in favor of the stability of school district boundaries. In passing a different part of the territory-transfer law, regarding transfer pursuant to municipal annexation (at issue here in the Cincinnati District's appeal), the Assembly expressly stated that it

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. This uncertainty has been particularly stressful for families of school age children and has hindered the ability of school officials in the affected districts to plan for the future.

R.C. 3311.061. That concern about uncertainty, and its harmful effects on families and school officials alike, applies to all territory transfers. That is not to say that transfers should never be allowed, and indeed, the State Board does approve transfers. But it does mean that the burden should remain on proponents, and should not be shifted to opponents under the guise of applying the appellate standard of review.

B. The Property Owners have not shown that the proposed transfer would benefit pupils, as the minimal or nonexistent transportation issues are not enough to justify the transfer, and their non-educational adult concerns are irrelevant.

Not only do the Property Owners improperly seek to shift the burden from themselves to the Cincinnati District, but they also seek to convert the scope of review from an inquiry into *educational merit* to a broad-ranging inquiry into the Owners' feelings about voting and about community identification, disconnected from any educational impact. The State Board recognizes that educational impact is itself a broad category, and includes items such as the students' transportation needs, financial impact on either district, availability of extracurriculars, and more, as all of those items affect a child's education. Thus, the Owners' argument about the relative distances to the Cincinnati or Madeira Schools is relevant, but here, it is simply not weighty enough to justify a transfer. The differences in distances are minimal, especially when

no students traverse those distances at all. Beyond that item, though, the Owners' other arguments are all irrelevant, as the adults' own sense of community identification, as shown by things such as their dislike of voting booth arrangements, is far too removed from educational impact to meet the governing standard, which centers on the "good of the pupils concerned." See Ohio Admin. Code 3301-89-01(F).

1. The transportation argument is not enough to justify a transfer, as the distances involved are minimal.

The Property Owners argue that their homes are closer to the Madeira schools than to the Cincinnati schools, and they insist that the transfer is justified to have a shorter and easier distance for hypothetical future students to travel to school. See *Bartchy Br.* at 8 (items 1, 7 and 8). For several reasons, the distance-based argument does not justify a transfer, and does not justify overcoming agency deference to order such a transfer.

First, arguments about transportation can and should be discounted significantly in a case such as this, in which no students actually traverse the paths at issue. If a transfer affects a few current students, transportation issues could possibly tip the balance for those students. But here, these houses might not include students for decades. Indeed, in seeking to minimize the effect of Mr. Schlake's acknowledgment that he expected his property values to increase, the Owners cite Mr. Schlake's insistence that he would not realize any economic gain soon, as he "intend[s] to stay there for as far as we can see into the future." *Bartchy Br.* at 7 (citing *Tr.* at 104, *State Board Supp.* at SS-17). So by the time actual students are affected, the locations of the relevant buildings might even change, as school districts build and move over the years. Thus, this factor carries little weight in a non-student case.²

² Contrary to the Owners' insistence, the State Board does not argue for the adoption of a bright-line rule against all transfers that involve no current students. Thus, the Court need not reach this issue because the Owners failed to meet their burden in this case.

Second, the difference in distances here are truly minimal, and the effect on travel time is near zero. At the junior/senior high school levels, according to the Owners, the Madeira schools are only 3.3 miles away, while the Cincinnati school is 4.8 miles away, so the extra distance is 1.5 miles. See *Bartchy Br.* at 5. The Owners assert that the “Madeira grade school” is just 2.1 miles away, compared to 2.4 miles for the Cincinnati grade school, so that a transfer would move them 0.3 miles closer to the “grade school.” Their comparisons may be mistaken, as explained in the footnote below.³ But even using the Owners’ calculations, the differential of 1.5 miles for high school, or just 0.3 miles for grade school, is insignificant. Both differences are of course negligible in a car or bus, and neither total distance to the schools in either district—over two miles for grade-school students and about three or five miles for high schools—is likely to be walked. The Owners focus on bike riding, but a two-mile bike ride seems implausible for six- or seven-year-olds, and is possible only for just the right age range of students. So their evidence reduces to the possibility that the current Owners will move, and that bike-riding children will move in and will be affected by the 0.3-mile difference.

Indeed, the mileage differences here are far less than those that have been found significant in other cases. *In Re Proposed Transfer of Territory* (10th Dist. 2002), 2002-Ohio-5522 ¶ 3

³ The Owners’ discussion of the “grade school” distance, and the measurement it uses, shows that they seem to have entirely omitted the Madeira elementary school (for grades K-4), which is farther away, as they seem to have mistakenly used the Madeira middle school (for grades 5-8) as the benchmark for all of what they call “grade school.” Specifically, as Madeira’s submission to the State Board reflects, it has two grade schools, the Sellman School and the Dumont School. See Response of Madeira City School District (“Madeira Response”) (State’s Ex. 3 at hearing), questions 13, State Supp. at SS-32. The Owners say the Madeira “grade school” is 2.1 miles away, but that measurement apparently refers only to the Sellman School on Miami Ave., which covers only grades 5-8. See *Bartchy Br.* at 5; see *Tr.* at 76-77, *Bartchy Supp.* at 76-77. But the elementary Dumont School, which includes grades K-4, is actually 3.5 miles away, according to Madeira, and is therefore *farther* away from the Owners than the Cincinnati school, which is 2.4 miles away.

(eight-mile difference, reducing bus time by thirty minutes each way); *Rossford Exempted Vill. Sch. Dist. v. State Bd. of Educ.* (10th Dist. 1991), 1991 Ohio App. Lexis 1555 (transfer would reduce bus time by forty-five minutes each way). Further, the supposed safety advantages based on road conditions, elevations, and the like, carry minimal weight when no current students are affected. And in any event, this Court long ago dismissed the notion that residents' opinions about road conditions overcome the agency's expertise: "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[.]" *State ex rel. Maxwell v. Schneider* (1921), 103 Ohio St. 492, 498-99.

2. The Property Owners' adult-based concerns about community identification are irrelevant, as those concerns have no connection to the "good of the pupils concerned."

The Property Owners, unable to gather evidence that the transfer would affect the "good of the pupils concerned," seek to expand the scope of inquiry to cover all sorts of adult-based concerns, with no connection to any educational effect. The Court should decline that misguided invitation.

As an initial matter, it seems hard to deny that proponents must show *educational* benefits, but the Owners nevertheless dispute this proposition. The Owners say that the "State Board argues that Appellees should be require to demonstrate that an educational benefit will be accomplished with the transfer in order for Appellees to meet their burden of proof." Bartchy Br. at 22. That is true; the Board does so argue. But the Owners insist that "[t]his heightened standard is not set forth in any statute or regulation, nor has it ever been imposed by case law." *Id.* The Owners are wrong on that score, as the key regulation plainly mandates that "primary consideration [be] given to the present and ultimate good of the pupils concerned." Ohio Admin. Code 3301-89-01(F). That refers to the children, not the adults, and the term "pupils" means that it refers to the children's role *as students*, i.e., in their educational lives. The regulations further

mandate consideration of specific educational factors, such as the affected districts' educational planning, academic performance, and course offerings. See Ohio Adm. Code 3301-89-02(B)(3),(21), (23), (24); 3301-89-03(A). Case law, too, confirms this mandate, as courts have recognized the State Board's "duty" to consider "the present and ultimate good of the pupils." *Cincinnati City Sch. Dist. v. State Bd. of Educ.* (10th Dist. 1996), 113 Ohio App. 3d 305, 312. In light of all this, the Owners' protest against an "educational" standard is plainly mistaken.

True, the concept of educational merit may be broadly read to include many factors that indirectly affect a student's educational experience, such as transportation or even the student's "community identification," but the concept is not infinitely elastic. Accordingly, it does not extend to the Owners' purely adult-based concerns about community identification and the like. All of the "community identification" factors, examined separately or together, do not connect to any demonstrable effect on the "good of the pupils concerned."

First, the Owners' concern with aligning municipal and school boundaries, or with aligning their tax bills, is self-evidently unconnected to the "good of the pupils concerned." See *Bartchy Br.* at 8 (items 2 and 3). It is hard to see how the paperwork involved in paying two tax bills will affect students' educational lives, even if students ever move into these houses. And aligning municipal boundaries with school boundaries, just for the sake of alignment, does not help education, either. Indeed, Ohio's boundaries differ throughout the State, showing that Ohio law has no built-in preference for alignment, and a standard that calls for re-alignment for alignment's sake would require massive shifts throughout the State. In any event, the "alignment" here would not truly align the city and school lines, but would simply move the "non-aligned" border, as the area in question includes many other areas where city and school lines differ. See Hearing Officer Report and Recommendation at 19 (findings 30 and 31).

Second, the Property Owners' broader sense of "community identification" or "community affiliation" is irrelevant, as such affiliation matters only when it is the *students'* affiliation that is at issue. See Bartchy Br. 8 (items 4 and 5), *id.* at 19.

Case law does look to community ties, where students are involved, under principles sometimes called the "whole child" or "community of interest" theories. Those theories posit that a child's development is affected by his or her ability to participate in extra-curricular programs and to forge ties with community members, that community affiliations affect those activities, and that affiliations are therefore relevant to a transfer's merit. See generally *Board of Educ. v. Regional Bd. of Sch. Tr.* (Ill. 1982), 433 N.E.2d 240, 243. The State Board has no quarrel with that analysis.

Community ties are relevant, however, only when *children's* affiliations are implicated, and indeed, courts have drawn the student-adult distinction within the area of community affiliation. For example, one court noted that affiliation-based transfers are properly denied when "there is no evidence that [] children have ties to that area or that" the proposed transfer "in any way facilitates the students' involvement in school or extracurricular activities." *Carver v. Bond/Fayette/Effingham Regional Bd. of Sch. Tr.* (Ill. 1992), 586 N.E.2d 1273, 1279. See also *id.* ("Although there was testimony that the [adult petitioners] 'identify more' with Keyesport . . . there is no evidence that their children have ties to that area or that this in any way facilitates the students' involvement in school or extracurricular activities."); accord *Dresner v. Regional Bd. of Sch. Tr.* (Ill. App. 1986), 501 N.E.2d 983, 992 (denying affiliation-based transfer when "testimony of the parents centered on where their own social community was located while only briefly touching on their children's social community."); *In re Freeholder's Petition of Roy v. Bladen Sch. Dist. No. R-31* (Neb. 1957), 84 N.W.2d 119, 125 (explaining that "the board . . .

should predicate [its decision] upon . . . the educational welfare and needs of petitioners' children, and not the mere personal preferences of petitioners[.]”).

Here, the Property Owners' “affiliation” evidence plainly fell on the adult side of the student-adult divide, as they presented no evidence about *students'* ability to participate in Madeira community life. To the contrary, the only evidence about children's involvement showed that Madeira has a healthy system of municipal sports leagues and other activities, open to all city residents regardless of their school attendance or their residency in other school districts. See Tr. 121-22.

The Property Owners' community identification argument not helped by their citations to either the *Rossford* or *Levey* cases. See Bartchy Br. at 19 (citing *Board of Educ. of Rossford Exempted Vill. Sch. Dist. v. State Bd. of Educ.* (1992), 63 Ohio St. 3d 705 and *Levey*, 1995 Ohio App. Lexis 765). *Rossford* did mention community affiliation, but it was specifically connected to the *actual students involved*, as the Court noted that the “children were able to engage in more extracurricular activities” in the requested district. *Rossford*, 63 Ohio St. 3d at 707. Thus, when the Court noted that the particular community that was the “focus of the [affected] family's social, business, or community life,” the context showed that the Court's use of “family” included the students, and that social or community life included actual school activities at issue. Equally important, the *Rossford* Court *upheld* a State Board decision *approving* a transfer, again showing the Court's deference to the Board's expertise in knowing how to weigh these factors. In *Levey*, too, the community identification issue also involved the *students'* affiliation and involvement, not the affiliation of property owners who have no students in the schools. See *Levey*, 1995 Ohio App. Lexis 765, *16 (noting that children's involvement would be enhanced by the transfer).

Third, the Owners' dislike for their voting arrangements is plainly unconnected to any educational impact. See *Bartchy Br.* at 8 (item 6). Even if students were involved, it is hard to see how their parents' dislike for voting separately translates into any education effect. Similarly, the related voter/citizen concern that the Owners raise, regarding their ability to meet Madeira school board members more easily than Cincinnati school board members, is not only irrelevant, but sets a dangerous precedent for larger school districts, especially Ohio's urban districts. See *id.* at 4 (noting that the Madeira school board president and another board member live nearby). Even where school board members are not a block away, common sense suggests that residents are more likely to run into board members in their neighborhood when a board of seven or so members is spread over an 8,000-resident bedroom community rather than spread over a 300,000-resident metropolis. This standard would mitigate in favor of shaving off layer after layer of border areas, to the repeated detriment of our central city schools. That would not be for the good of *all* the pupils concerned.

Finally, the Owners' insistence that the Madeira schools could handle the transfer if they had to, *Bartchy Br.* at 8-9 (items 9, 10) tells us nothing about whether any good would come of it. To be sure, Madeira could perform well in the face of an unwanted transfer (especially, again, when real students are not in the picture now), but that does not mean that the transfer would actually advance the "good of the pupils concerned." For good reason, Madeira expressly noted that was "**not** . . . encouraging this request" (double emphasis in Madeira's original), as the record showed that their "buildings remain[] at or near capacity," that "even with [] costly additions [] teachers are sharing classroom space," and that "[s]pace is a concern for Madeira City Schools." State Ex. 3, at questions 1, 3, and IV, State Supp. at SS-30, 35-36. Those undisputed operational challenges and lack of institutional enthusiasm make it clear that mere

capacity to absorb the transfer does not translate into an actual contribution to the “good of the pupils concerned.”

C. Lowering the standard for territory transfers will harm stability and will especially harm vulnerable school districts.

Finally, the State Board again stresses, as it did in its opening brief, that the Property Owners’ relaxed standard, which turns almost entirely upon residents’ wishes, will greatly harm Ohio’s schools. As much as they insist that this case concerns only their four homes, that belies the reality that this Court’s decisions govern the entire state, and control the agency’s actions in future cases.

Here, the standard they seek undoubtedly favors resident’s wishes over the State Board’s expertise, and that alone undercuts the General Assembly’s decision to entrust these decisions to the Board’s expertise. Further, by allowing transfers to occur more easily, the Owners’ view undercuts the stability that the General Assembly expressly stated was a goal in the related statute, R.C. 3311.061, as explained above (at 8). Indeed, in that statute, the Assembly expressed its special concern for eliminating uncertainty regarding “urban school districts,” and no doubt such districts would suffer the most from the relaxed standard that the Property Owners seek here. Not only are residents, as a practical matter, more likely to seek transfers from city to suburban districts (as in this case), but in particular, some of the factors that the Owners here rely on—such as the ability to meet school board members more easily—are structurally stacked against the big urban schools.

That is not to say that the Court should uphold the Board’s decision solely for these broader policy reasons, for, as explained above, the Owners here have simply failed to meet their burden to justify this transfer, and they have failed to meet the higher standard needed to overcome agency deference. But these broader policy concerns illustrate why the General Assembly chose

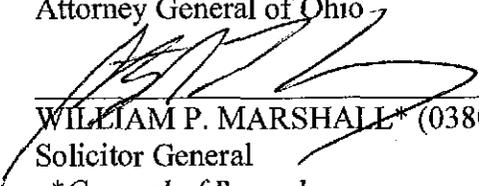
to entrust the Board, with its expertise, with making these difficult decisions. The Court should not disturb the General Assembly's decision to trust and defer to the Board.

CONCLUSION

For all the reasons above and in the State Board's opening brief, 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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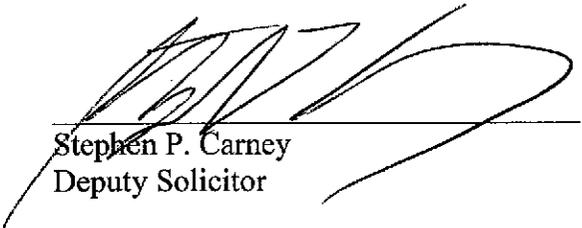
I certify that a copy of the foregoing Reply Brief of Appellant State Board of Education was served by U.S. mail this 30th day of October, 2007, upon the following counsel:

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