

IN THE SUPREME COURT OF OHIO

09-0015

BRIAN P. SPITZNAGEL, et al.,)
)
 Appellants)
)
 v.)
)
 STATE BOARD OF EDUCATION, et al.,)
)
 Appellees.)

CASE NO. _____

On Appeal from the Franklin County
Court of Appeals, Tenth Appellate
District, Case No. 07AP-757

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS BRIAN SPITZNAGEL, MARLENE ANIELSKI,
AND THE VILLAGE OF WALTON HILLS

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**EXPLANATION OF WHY THIS CASE PRESENTS ISSUES
OF PUBLIC AND GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents important legal issues of public and great general interest concerning the impact of this Court's plurality opinion in *Bartchy v. State Bd. of Edn.*, 2008-Ohio-4826 (Sept. 30, 2008) ("*Bartchy*"), on long-standing Tenth District precedents that have long governed the adjudication of school transfer petitions under R.C. 3311.24. The school transfer petition at issue was filed by over 75% of the residents of the Village of Walton Hills to request a transfer from the Bedford City School District ("BCSD") to the Cuyahoga Heights Local School District ("CHLSD"). In proceedings below, the court of appeals originally reversed the State Board of Education's decision because the Board failed to follow Tenth District precedent in analyzing the financial and racial implications of the transfer. *See Spitznagel v. State Bd. of Educ.* (Sept. 30, 2008), No. 07AP-757, 2008-Ohio-5059, 2008 WL 4416659 ("*Spitznagel I*") (Appendix, pp. 8-53).¹ Thereafter, both the State Board and the BCSD filed notices of appeal, arguing that this case is one of public and great general interest because the Tenth District's decision was binding upon "all future school district territory transfers" and thus created "serious and unnecessary confusion" in light of *Bartchy*. (See BCSD's Memorandum in S.Ct. Case No. 08-2217, pg. 2) (*see also* State Board's Memorandum in S.Ct. Case No. 08-2217, pp. 1, 7-8).

This Court's opinion in *Bartchy*, however, is only a plurality opinion that did not establish any new pronouncements of law nor overrule any of the Tenth District's other

¹ As set forth therein, the panel's original opinion cited the following pre-*Bartchy* precedent in reversing the Board's decision: *Crowe v. State Bd. of Educ.* (Oct. 26, 1999), Franklin App. No. 99AP-78, 1999 WL 969708, 1999 Ohio App. LEXIS 4993; *Levey v. State Bd. of Edn.* (Feb. 28, 1995), Franklin App. No. 94APE08-1125, 1995 WL 89703, 1995 Ohio App. LEXIS 765); *Cincinnati City School Dist. v. State Board of Edn.* (1996), 113 Ohio App. 305; *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1990), 62 Ohio App.3d 308; *Schreiner v. State of Ohio, Dep't of Edn.* (Nov. 9, 1999), Franklin App. No. 98AP-1251.

decisions. Yet, based solely upon the plurality opinion in *Bartchy*, the court of appeals has now reconsidered its original legal analysis, essentially concluding that *Bartchy* “compels” the court of appeals to abandon the long-standing Tenth District precedents that it previously followed to conclude that the Board’s decision was not “in accordance with law.” See *Spitznagel v. State Bd. of Edn.* (Nov. 20, 2008), No. 07AP-757, 2008-Ohio-6080, 2008 WL 4966491 (“*Spitznagel II*”) (Appendix, pp. 1-7). As a result, there is now a great degree of uncertainty and confusion about the continuing applicability of this pre-*Bartchy* case law to school transfer petitions.

This appeal therefore presents important legal issues of public and great general interest relating to whether, in light of *Bartchy*, the well-established principles of law that were originally followed by the Tenth District to reverse the Board’s order remain valid and binding upon the State Board. This Court originally accepted jurisdiction in the *Bartchy* case because it recognized the great public importance in determining the legal standards that should govern school transfer petitions under R.C. 3311.24. In so doing, however, the Court did not issue a majority or *per curiam* opinion that would have established any new pronouncements of law. See *Masheter v. Kebe* (1976), 49 Ohio St.2d 148, 150 (“Only that what is stated in a syllabus or in a *per curiam* opinion represents a pronouncement of the law of Ohio by this court”). Instead, it issued a plurality opinion that now has been misconstrued by the court of appeals as reversing long-standing Tenth District precedent that had previously governed school transfer petitions for many years. Indeed, in *Bartchy*, only three justices joined the plurality opinion, one concurred only in the result, and the other three joined in a dissenting opinion that agreed with the Tenth District’s analysis in *Crowe*, which cited one of the main principles of law that originally compelled a reversal of the Board’s decision. *Bartchy*, 2008-Ohio-4286, ¶ 100-101 (dissenting opinion). It is critical, therefore, that the Court accept jurisdiction in order to clarify the

applicable legal standards and conclusively resolve the important issues of public and great general interest that are presented in this case.

In this regard, it is important to stress that both of the Appellees, the Bedford City School District and the State Board, previously filed jurisdictional memoranda in an appeal from the Tenth District's original decision, which also argued that this case is one of public and great general interest because of the perceived conflicts between Tenth District precedent and this Court's plurality opinion in *Bartchy*. (See BCSD's Memorandum in Support of Jurisdiction in Case No. 08-2217, pg. 2) (arguing that "this damaging and unnecessary confusion will persist and will adversely affect the State Board, which is tasked with determining transfer matters, all Ohio school districts facing potential transfers, all Ohio students, all Ohio landowners, the Franklin County Court of Common Pleas, the Court of Appeals itself"); (State Board's Memorandum in Case No. 08-2217, pg. 7-8) (arguing that this case presents an issue of public and great general interest because it "may create confusion in future territory-transfer cases" because such cases "necessarily proceed in the Franklin County Court of Common Pleas, where Tenth District precedent is binding" and that "[j]udges in that court, as well as future panels of the Tenth District, will have to decide whether to apply Tenth District precedent or this Court's" [plurality opinion in *Bartchy*]).

The same reasoning is equally applicable now. Given that *Bartchy* is only a plurality opinion that does not reverse any of the Tenth District's other precedents, there will continue to be a great degree of confusion and uncertainty relating to the legal standards that govern school transfer cases in Ohio. Indeed, this appeal presents two very important legal questions that will impact virtually all school transfer petitions that are pending or may be filed throughout the State of Ohio. First, this appeal presents an important legal issue regarding whether the State Board

can conclude that a transfer will be detrimental to the fiscal and educational operation of the relinquishing district under OAC 3311-89-02(B)(9) based solely upon the alleged loss of funds. *Id.* Under long-standing Tenth District precedent that pre-dated *Bartchy*, it has been consistently held that the State Board cannot conclude that the transfer will be detrimental to the relinquishing district based solely upon the loss of funds. *Bartchy v. State Bd. of Educ.* (2007), 170 Ohio App.3d 349, 2007-Ohio-300, ¶ 34 (citing *Crowe v. State Bd. of Educ.* (Oct. 26, 1999), Franklin App. No. 99AP-78, 1999 WL 969708, 1999 Ohio App. LEXIS 4993; *Levey v. State Bd. Of Educ.* (Feb. 28, 1995), Franklin App. No. 94APE08-1125, 1995 WL 89703, 1995 Ohio App. LEXIS 765). Otherwise, virtually all school transfer cases would be denied because, by definition, “almost every transfer of property from a school district will negatively impact their funding.” *Crowe*, 1999 WL 969708, *6. Thus, the Tenth District has long required that the Board must not merely determine whether the relinquishing district will lose funds, but must determine whether the loss would be “detrimental to the fiscal or educational operation of the transferring district” and make a specific “finding concerning how the loss of revenue is a ‘factor significant enough to stand in the way of the proposed transfer.’” *Id.* (citing *Levey*).

In this case, the Tenth District originally followed this well-established case law to reverse the Board’s decision because, as explained in *Spitznagel I*, the “referee made no finding as to how the net amount of loss” would detrimentally affect the relinquishing district, but instead made the legally erroneous presumption that “any ‘post-transfer financial deficiency’” would, “*ipso facto*, mean that the proposed transfer ‘would impose a significant financial detrimental impact upon the BCSD.’” *Spitznagel I*, 2008-Ohio-5059, ¶ 49-56 (citing both *Crowe* and *Levey*). In so doing, the court of appeals explained that it was not making any factual findings nor “substituting our judgment for that of the board.” *Id.* at ¶ 55. Rather, it was

reversing the Board's decision because the referee wrongfully failed to follow long-standing Tenth District precedent in analyzing the financial implications of the transfer. *Id.* at ¶ 56 ("We cannot simply ignore the fact that the referee skipped one-half of the required analysis as to whether the revenue loss that the BCSD will experience warrants denial of the transfer").

The court of appeals' original decision, therefore, was based upon a valid and well-reasoned Tenth District precedent that should not be abandoned, but should continue to govern school transfer cases throughout the State. Although the plurality opinion in *Bartchy* expressed some disagreement with the Tenth District's analysis, it did not overrule *Crowe* and did not hold that the State Board was no longer required to follow *Crowe* and *Levey* in deciding school transfer petitions. In fact, the three justices who joined in the dissenting opinion expressly agreed that the "bare statement" that a loss of valuation will be detrimental to the relinquishing district is not sufficient to deny a school transfer petition. *Bartchy*, 2008-Ohio-4826, at ¶ 101-102 (citing *Crowe*). Thus, it is not clear, based upon a review of the *Bartchy* opinions, whether the entire Court actually intended to reject this long-standing principle of law, as the Tenth District has now concluded. Accordingly, in order to clarify and decide this important question, the Court should accept jurisdiction and issue a majority opinion that conclusively resolves this important legal issue.

Second, this appeal presents a substantial constitutional question and an important issue of public and great general interest relating to whether, and to what extent, race may be considered in school transfer cases. Under OAC 3301-89-02(B)(2) and 3301-89-03(B)(5), the State Board of Education presently is required to consider the racial implications of a transfer in deciding a school transfer petition. The Tenth District has long held, however, that *de minimis* changes in racial composition should not be a negative factor, *see, e.g., Spitznagel I*, 2008-Ohio-

5059, ¶ 60 (citing *Schreiner v. Dept. of Edn.* (Nov. 9, 1999), Franklin App. No. 98AP-1251), and the U.S. Supreme Court has now held that it is unconstitutional to rely upon race in making pupil assignments, even if necessary to increase or maintain racial diversity in the public schools. See *Parents Involved in Community Schools v. Seattle School Distr. No. 1, et al.*, 127 S.Ct. 2738, 168 L.Ed.2d 508 (June 28, 2007).² The degree to which racial factors may be relied upon to deny a school transfer petition, therefore, presents a substantial constitutional question and an issue of public and great general interest that should be resolved by this Court.

Indeed, given that the transfer of pupils almost always has some impact on the racial composition of the affected school districts, it is critical for this Court to define when, and under what circumstances, race can ever be relied upon in deciding school transfer cases. Even if *Parents Concerned* is not applicable to school transfer petitions, the fact remains that it constitutes reversible error for the State Board to rely upon race as a negative factor to deny a school transfer petition, where, as here, it is undisputed that the transfer will have only a *de minimis* impact on the racial composition of the affected school districts. Thus, by accepting jurisdiction, the Court can decide what impact, if any, racial factors should have in a school transfer cases.

STATEMENT OF CASE AND FACTS

A. Factual Background

This school transfer case was commenced in March 2004 when petitions signed by more than 75% of registered voters in the Village of Walton Hills were filed with the State Board. The petition was subject to two evidentiary hearings held in January 2005 and upon remand in April

² This new Supreme Court decision was raised in Appellants' reply brief and at oral argument, but was not addressed by the court of appeals in its opinions. The applicability of *Parents Involved in Community Schools* to school transfer petitions, therefore, remains a substantial constitutional question that has not been answered by any court.

2006. At the first hearing, Petitioners presented compelling evidence to demonstrate that the BCSD no longer satisfies the social and educational needs of the children of Walton Hills who have steadily lost all connection to the Bedford City School District over the past 15-20 years. In this regard, the numbers truly speak for themselves. As was demonstrated during the administrative proceedings below, the number of Walton Hills students attending the Bedford City Schools has declined dramatically over the past 15-20 years, from 150 students in the 1993/1994 school year to only 45 students in the 2004/2005 school year. As a result, only 17% of the 267 school-age children in Walton Hills attended the Bedford City Schools in the 2004/2005 academic year and this percentage continues to diminish every year.³

This is an intolerable situation that wrongfully deprives the children of Walton Hills of a public school system that satisfies their educational needs. Here, the Village is trapped in a school district with a poor academic reputation and no tangible connections to the community. For this reason, therefore, the residents of the Village of Walton Hills overwhelmingly support a transfer to the Cuyahoga Heights Local School District, which is an adjacent district with an excellent academic reputation and a central campus that is only 15 to 20 minutes from the Village Hall. The CHLSD is comprised of 3 villages — Cuyahoga Heights, Brooklyn Heights, and Valley View — that are comparable in size and demographics to Walton Hills. Among other things, Walton Hills is now a member of the Cuyahoga Valley Recreational Association (“CVRA”), which unites children from Walton Hills with children in Cuyahoga Heights, Brooklyn Heights, Valley View and Newburgh. Moreover, the business community has joined the Cuyahoga Valley Chamber of Commerce, which unites Walton Hills with Cuyahoga Heights,

³ This pattern of declining enrollment continues. As of FY 2009 (school year 2008-09), the number of Walton Hills students enrolled in the Bedford City School District (K-12) has declined to only 35 students, which constitutes less than 1% of the BCSD’s school population.

Brooklyn Heights, Valley View, Independence, and Seven Hills. Thus, the evidence in the record demonstrates that the social and geographical orientation of Walton Hills has increasingly shifted from the three municipalities in the BCSD (Bedford, Bedford Heights, and Oakwood) to the three villages (Cuyahoga Heights, Brooklyn Heights, and Valley View) in the CHLSD.

At the first hearing, Petitioners also presented undisputed, expert testimony to demonstrate that the CHLSD has the fiscal resources and educational facilities necessary to accept additional students from Walton Hills. The CHLSD is a well-funded school district with an excellent academic reputation and significantly lower teacher/pupil ratios. In fact, the CHLSD presently is *in need* of additional students, as it took the extraordinary step in 2003 of adopting a tuition policy that permits students from outside the district to enroll on a paid tuition basis. As a result, many students from Walton Hills have now enrolled in the CHLSD on a paid tuition basis. Thus, it is undisputed that the CHLSD has the means, ability and need to accept additional students from the Village of Walton Hills.

In his first report and recommendation, the referee did not dispute that the Village's residents have lost their connection to the BCSD and have developed stronger ties to the three communities in the CHLSD. Moreover, he did not dispute that the CHLSD has the financial resources and educational facilities available to accommodate the transfer, and that the CHLSD had a central campus with busing distances that were similar to the BCSD. Notwithstanding this evidence, however, the referee recommended that the Board deny the proposed transfer based upon 7 (out of 27) factors that allegedly weighed against the transfer. *Spitznagel I*, 2008-Ohio-5059, ¶ 14. 4 of the 7 negative factors, however, related to the financial implications of the transfer, and 2 of the 7 factors related to the alleged racial issues. *Id.* ¶ 15-33. Thus, it is clear

that the alleged financial and racial implications were the key factors that were relied upon by the referee in recommending a denial of the Village's petition.

Since the first evidentiary hearing in January 2005, however, the financial implications of the transfer have dramatically changed. In June 2005, the General Assembly significantly changed the school finance laws by enacting H.B. 66. *Spitznagel I*, 2008-Ohio-5059, ¶ 34. Among other things, H.B. 66 accelerated the phase-out of the tangible personal property tax, which will be eliminated by fiscal year 2010, regardless of whether the transfer proceeds. *Id.* Consequently, when this matter first came before the State Board in July 2005, the Board voted to remand the case back to the referee for a second hearing in order to re-evaluate the financial impact in light of H.B. 66. *Id.* This second evidentiary hearing was held in April 2006. Following the second hearing, the General Assembly again changed the law by enacting Sub. S.B. 321 on June 5, 2006. *Id.* at ¶ 37. Among other things, S.B. 321 amended R.C. 5751.21(H)(2) to allow the relinquishing school district to retain 50% of the State's tangible personal property reimbursement payments that are being paid under H.B. 66. *Id.*

As the referee properly found, therefore, H.B. 66 and S.B. 321 has had a very significant impact on the financial impact of this transfer. As the referee stated in his second report and recommendation, the loss of tax revenues was substantially lower (less than 1/5) than had previously been estimated, and would significantly diminish over the next five years. In this regard, the referee agreed with Petitioners' expert, Todd Puster, that the transfer would result in cost savings of \$600,000 per year (\$3 million over 5 years) and would result in additional remediation payments under S.B. 321. Thus, under the two mitigation steps that the referee admitted would occur, the net loss of revenue would be \$1.4 million in FY 2008. It is important to stress, however, that the net loss of revenue will continue to diminish over time.

Consequently, under the two mitigation steps that the referee agreed would actually occur, the net loss of revenue would be further reduced to \$393,771 in FY 2009, and would be completely eliminated by FY 2010, which is now the first year when any transfer can occur.

Notwithstanding this fact, upon remand, the Board's referee again recommended against the transfer because he found that *any* loss of tax revenues would, *ipso facto*, impose a "significant financial detriment" unless it was completely eliminated by the Village of Walton Hills. *Spitznagel I*, 2008-Ohio-5059, ¶ 40-41, 54. As the court of appeals originally stated, this conclusion constitutes legal error because it ignores binding Tenth District precedent on this issue. As the Tenth District has long held, the State Board's responsibility is not "to simply determine whether a relinquishing school district will lose funds." *Crowe*, 1999 WL 969708, *6. Rather, the Tenth District has held that the Board must analyze whether the loss of revenue would be "detrimental to the fiscal or educational operation of the transferring district" and to make a specific "finding concerning how the loss of revenue is a 'factor significant enough to stand in the way of the proposed transfer.'" *Crowe*, 1999 WL 9699708 (quoting *Levey*). Accordingly, under this long-standing Tenth District precedent, the court of appeals originally concluded that the Board's decision was not "in accordance with law." *Spitznagel I*, 2008-Ohio-5059, ¶ 46-56 (citing both *Crowe* and *Levey*).

The court of appeals' original opinion also found that Board's decision was not "in accordance with law" because it improperly relied upon race as a negative factor in denying the transfer. *Id.* at ¶ 57-62. In this regard, this Court noted that the referee had expressly found that "(1) racial isolation does not currently exist in either affected district, and (2) the transfer would not create any racial isolation in either district." *Id.* at ¶ 58. Yet, notwithstanding such findings, the referee nevertheless concluded that "there are racial isolation implications to the transfer"

based upon a *de minimis* change in racial compositions of the affected districts. *Id.* This also constitutes legal error that violates long-standing Tenth District precedent relating to this issue. *See Cincinnati City School District v. State Board of Education* (1996), 113 Ohio App. 305, 309 (*de minimis* change did not weigh against transfer); *Schreiner v. State of Ohio, Dep't of Edn.* (Nov. 9, 1999), Franklin App. No. 98AP-1251, slip op., at 12).

B. The Court of Appeals' Decision.

After the court of appeals originally decided to reverse the Board's decision, it subsequently granted a motion for reconsideration based upon this Court's decision in *Bartchy*. *Spitznagel II*, 2008-Ohio-6080 (Appendix, pp. 1-6). Although Appellants argued that *Bartchy* was a plurality opinion that did not overrule any Tenth District precedent, the court of appeals nevertheless held that *Bartchy* "compels us" to reconsider our legal analysis because the "holding" in *Bartchy* is "clearly contrary to our conclusion as to the first legal error we identified" in *Spitznagel I*. Thus, the court of appeals abandoned its prior reliance upon *Crowe* and *Levey*, which it previously found were fully applicable and compelled a reversal of the Board's decision. *Id.* Thus, notwithstanding the above-referenced legal errors, the court of appeals decided to vacate its prior decision and affirm the Board's decision.

APPELLANTS' PROPOSITIONS OF LAW

I. Proposition of Law No. 1: In A School Transfer Case, The Mere Loss of Revenue Is Not Sufficient, Standing Alone, To Demonstrate That A Transfer Would Cause A Significant Detriment To the Fiscal or Educational Operation of The Relinquishing School District Under OAC 3301-89-02(B)(9).

As previously discussed, this case presents a significant legal issue regarding whether it is legally proper for the State Board of Education to conclude that a transfer would be detrimental to the fiscal or educational operation of the relinquishing district based solely upon the fact that the relinquishing district will lose funds. As the Tenth District has long held, a school transfer

petition cannot be denied based upon mere loss of tax revenues because such a loss, by definition, will occur in “almost every transfer of property from a school district” to another district. *Crowe*, 1999 WL 9699708, *6. Thus, in considering the financial impact of the transfer, the Tenth District has long held that the plain language of OAC § 3301-89-02(B)(9) requires the State Board to analyze whether the loss of revenue would be “detrimental to the fiscal or educational operation of the transferring district” and to make a specific “finding concerning how the loss of revenue is a ‘factor significant enough to stand in the way of the proposed transfer.’” *Id.* (citing *Levey*).

Indeed, as the Tenth District first explained in *Garfield Heights City School Dist. v. State Board of Edn.* (1990), 62 Ohio App.3d 308, 319-322, school funding is always in flux. School districts therefore must always be ready to harness untapped financial resources to redress the potential shortfalls, whether they arise from school transfers, loss of commercial business, or other changes in the school funding laws. *Id.* at 322-323 (explaining that the financial issues ordinarily should not stand in the way of a meritorious transfer given the uncertainty of public school funding and the broad array of resources available to school districts to remedy any shortfalls). Here, as H.B. 66 and S.B. 321 have established, school funding in the State of Ohio has been particularly in flux over the past several years. The mere loss of tax revenues, therefore, does not demonstrate that the transfer would be detrimental to the fiscal and educational operation of the BCSD, particularly given the BCSD’s “especially robust” financial position. *Spitznagel I*, 2008-Ohio-5059, ¶ 35, 55, fn 14. Accordingly, this Court also should reaffirm the validity of this well-established principle of law and conclude that the mere loss of tax revenue, standing alone, is not sufficient to demonstrate that the transfer would be detrimental to the relinquishing district under OAC 3311-02-09(B)(9).

This case, in fact, presents an excellent example of why this well-established principle is so important and why it makes a difference to school transfer cases. Here, the Board specifically remanded this case to the referee in order to reconsider the financial implication of the transfer in light of H.B. 66 (and thereafter S.B. 321). Indeed, as the court of appeals noted in its first opinion, the BCSD's fiscal situation after H.B. 66 and S.B. 321 was significantly different than the fiscal situation that was described at the first evidentiary hearing.⁴ As the Hearing Examiner himself acknowledged, the loss of tax revenues after H.B. 66 was substantially lower than in 2005. Moreover, he agreed that the loss would be mitigated by \$600,000 in cost savings per year (\$3 million over 5 years) and about \$900,000 in S.B. 321 reimbursement payments during the first transfer year. As Mr. Puster explained, however, the amount of S.B. 321 reimbursement payments actually *increase* in FY 2009, 2010 and 2011. Thus, when these first two mitigation steps (that the Hearing Examiner expressly found would result from the proposed transfer) are factored into the analysis, the alleged loss of tax revenues would be only \$393,000 in FY 2009 (less than 1% of the BCSD's entire budget) and would be completely mitigated by FY 2010. Thus, even if no other mitigation occurred, the alleged loss of tax revenues is truly *de minimis* and significantly less than the amount of lost tax revenues that was originally projected at the 2005 hearing.

⁴ In proceedings below, the BCSD often cites to testimony from the 2005 evidentiary hearing wherein two witnesses (Lowell Davis and Mary Ann Nowak) were asked to testify about the potential financial implications of the pre-H.B. 66 transfer based upon the assumption that the BCSD would lose \$7.5 million per year. As the court of appeals properly concluded, however, the evidence of financial impact from the 2005 hearing was no longer applicable after H.B. 66 and thus was not referenced by the referee in his second report and recommendation at all. (*Spitznagel I*, 2008-Ohio-5059, ¶ 52 & fn. 13) (noting that the referee "seemed to recognize" that the post-H.B. 66 loss was significantly different and thus "did not reference Nowak's and Lowell's testimony when discussing his conclusions about whether the Puster figure represented a loss that disfavors transfer").

Indeed, as the court of appeals observed, the BCSD is in an “especially robust” financial position when compared to other school districts. *Spitznagel I*, 2008-Ohio-5059, ¶¶ 35, 55 & fn. 14. The BCSD “carried over 23 percent of its revenue as cash at the end of fiscal year 2003, 19 percent at the end of fiscal year 2004, and 23 percent at the end of fiscal year 2005.” *Id.* at ¶ 35. In addition, its “per-pupil expenditures were 29 percent above the state average in the 2004-2005 school year.” *Id.* Finally, as Mr. Puster stated in his expert report, the BCSD has a relatively strong commercial tax base and a cash balance of approximately \$9.9 million at the close of FY 2006. (Pet. Ex. 17A and 29). For this reason, therefore, it was particularly critical in this case for the referee to follow Tenth District precedent and not merely determine whether there will be a loss of funds, but whether the alleged loss will have a detrimental impact on the BCSD’s fiscal and educational operations in light of the school district’s overall budget, cash surpluses, per pupil expenditures, admitted cost savings, S.B. 321 reimbursement payments, and other financial resources. Accordingly, the Court should accept jurisdiction over this appeal in order to re-affirm the importance and continuing validity of this Tenth District precedent under Ohio law.

II. Proposition of Law No. 2: The State Board of Education Cannot Rely Upon Racial Factors To Deny A School Transfer Petition, Particularly Where, As Here, The Proposed Transfer Will Have Only A *De Minimis* Impact Upon the Racial Composition Of The Affected School Districts.

This case also presents a substantial constitutional and legal question relating to whether, and to what extent, the issue of race can be considered by the State Board in deciding a school transfer petition. Currently, the Ohio Administrative Code requires the State Board to consider whether the school transfer will “cause, preserve or increase racial isolation” in the affected districts. *See* OAC 3301-89-02(B)(2) and OAC 3301-89-03(B)(5). The U.S. Supreme Court has held, however, that it is unconstitutional for state and local governments to rely upon race as a factor in pupil assignments, even if necessary to increase or maintain racial diversity in the

public schools. *See Parents Involved in Community Schools v. Seattle School Distr. No. 1, et al.*, 127 S.Ct. 2738, 168 L.Ed.2d 508 (June 28, 2007). Indeed, under the Tenth District precedent, it has long been recognized that race should not be a negative factor where, as here, the transfer would have only a *de minimis* impact on the affected school districts. *Cincinnati City School Dist.*, 113 Ohio App. at 309; *Schreiner*, Franklin App. No. 98AP-1251, slip op. at 12. By accepting jurisdiction, therefore, the Court can conclusively establish that race should not be considered in deciding school transfer petitions, particularly where, as here, the transfer will have only a *de minimis* impact upon the racial compositions of the affected districts.

CONCLUSION

For these reasons, the Court should accept jurisdiction over this important appeal because it presents important issues of great public and general interest, and a substantial constitutional question, relating to the applicable legal standards that must govern school transfer petitions under Ohio law.

Respectfully submitted,

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and the Village of Walton Hills*

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January, 2009, a true and correct copy of the foregoing Memorandum in Support of Jurisdiction was served via regular U.S. mail, postage pre-paid, to the following counsel of record for the Appellees in this case:

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Stephen W. Funk

APPENDIX

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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Brian P. Spitznagel et al., :
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 Plaintiffs-Appellants, :
 :
 v. : No. 07AP-757
 : (C.P.C. No. 06CVF-12-17119)
 State Board of Education et al., : (REGULAR CALENDAR)
 :
 Defendants-Appellees. :

D E C I S I O N

Rendered on November 20, 2008

Roetzel & Andress, LPA, David R. Harbarger, and Stephen W. Funk, for appellants.

Nancy H. Rogers, Attorney General, and Reid T. Caryer, for appellee Ohio State Board of Education.

Squire, Sanders & Dempsey LLP, D. Lewis Clark, Jr., and Johnathan E. Sullivan, for appellee Bedford City School District.

ON APPLICATION FOR RECONSIDERATION

SADLER, J.

{¶1} Defendants-appellees, State Board of Education ("the board"), and Bedford City School District ("BCSD"), have applied for reconsideration of this court's judgment in *Spitznagel v. State Bd. of Edn.*, Franklin App. No. 07AP-757, 2008-Ohio-5059. Plaintiffs-appellants, Brian P. Spitznagel et al. ("appellants"), have filed a memorandum in opposition to the application, and the application is now submitted to this court for decision.

{¶2} "App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *State v. Owens* (1997), 112 Ohio App.3d 334, 336, 678 N.E.2d 956, dismissed, appeal not allowed, 77 Ohio St.3d 1487, 673 N.E.2d 146. However, "[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *Id.*

{¶3} "App.R. 26 does not provide specific guidelines to be used by an appellate court when determining whether a decision should be reconsidered or modified." *Id.* at 335. See, also, *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143, 5 OBR 320, 450 N.E.2d 278. In *Matthews*, this court stated, "[t]he test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Id.*; see, also, *Erie Ins. Exchange v. Colony Dev. Corp.* (2000), 136 Ohio App.3d 419, 421, 736 N.E.2d 950; *Corporex Dev. & Constr. Mgmt., Inc. v. Shook, Inc.*, Franklin App. No. 03AP-269, 2004-Ohio-2715, ¶4.

{¶4} In our previous decision, we determined that the court of common pleas abused its discretion in failing to reverse the board's decision denying appellants' application for a territory transfer pursuant to R.C. 3311.24. We cited three errors of law that the board made and that should have compelled the court of common pleas to reverse the board's decision. We ordered that the trial court remand the matter back to the board for the issuance of a new decision in accordance with law and with our opinion.

{¶5} In support of their applications for reconsideration, the board and BCSD argue that we must reverse our earlier decision because the decision of the Supreme Court of Ohio in *Bartchy v. State Bd. of Edn.*, 2008-Ohio-4826, released on the same date as our decision, compels us to affirm the decision of the court of common pleas. We agree.

{¶6} We reversed the court of common pleas after concluding that the board had committed the following three legal errors: (1) concluding that financial loss alone is a basis to deny a transfer, without a finding as to how the fiscal impact is a factor significant enough to stand in the way of the proposed transfer (citing *Crowe v. State Bd. of Edn.* [Oct. 26, 1999], Franklin App. No. 99AP-78); (2) concluding that the transfer would have racial isolation implications where the effect on BCSD's racial composition would be de minimis; and (3) presuming that loss of revenue to BCSD equates to ineffective utilization of facilities, without making specific findings as to how district facilities would be ineffectively utilized.

{¶7} In *Bartchy*, this court had also relied upon *Crowe* to conclude that the board erred in denying a transfer request based upon loss of revenue where it failed to make specific findings as to the effects of the loss. In its opinion in *Bartchy*, the Supreme Court of Ohio held that the board *is* within its authority to weigh loss of revenue into its overall balancing test, without making specific findings quantifying the harm. *Bartchy* at ¶82-83. This holding is clearly contrary to our conclusion as to the first legal error we identified in *Spitznagel*. Accordingly, we reconsider and reverse that aspect of our decision.

{¶8} Appellees also argue that *Bartchy* compels reversal of our decision as to the third legal error we identified because the Supreme Court was clearly articulating a

policy of deference to the board where the board makes a finding that revenue loss will result in ineffective utilization of district facilities. In the present case, the hearing officer found that, "[i]t is wholly foreseeable that the loss of the Walton Hills tax monies would cause the closing of facilities, reduced educational programming [sic], and staff and faculty cutbacks, and other curtailments * * *. Such a response to the loss of the Walton Hills tax monies, wholly predictable and necessary, would grossly hinder the effective utilization of BCSD educational facilities." (May 20, 2005 Report and Recommendation, 22.) We agree with appellees that the Supreme Court in *Bartchy* articulated a mandate for appellate deference to the board's consideration of the effects of projected revenue loss that would accompany a requested transfer. So long as there is reliable, probative and substantial evidence of the revenue loss itself, *Bartchy* made it clear that it is within the board's province to determine how that loss will affect the factors that the board must consider in conducting its balancing test. Accordingly, we reconsider and reverse our earlier decision insofar as it concerns the third legal error that we identified.

{9} Finally, appellees argue that, upon reversing two of the three legal errors we identified, our decision to reverse the board's decision cannot stand based only on the remaining legal error that we identified, to wit: the board's finding that the de minimis change in BCSD's racial composition results in the existence of racial isolation implications to the proposed transfer. We agree. Not only was this factor but one of numerous factors that the board considered, it was by no means the primary factor that drove the board's decision. Loss of revenue was clearly the factor that weighed most heavily into the board's determination, and racial isolation was of far less concern, especially in light of the

board's findings that no racial isolation presently exists, or would likely arise, in either affected school district.

{¶10} In any case, we observe that the Supreme Court of Ohio ordered affirmance of the board's decision to deny the request in *Bartchy* where the relinquishing district stood to lose far less than BCSD would lose in the proposed transfer here, and no other factors implicated the board's decision in *Bartchy*. This arguably renders immaterial other factors in the present case, where the record contains reliable, probative, and substantial evidence of far larger projected revenue losses to BCSD. We recognize the procedural and factual difference between the two cases, as appellants point out in their memorandum contra, but the Supreme Court's decision in *Bartchy* was not dependent on the unique facts of that case. It articulated principles directly bearing upon our decision here as well as our decision in *Bartchy*.

{¶11} Accordingly, for all of the foregoing reasons, we find that appellees have met the standard for reconsideration in App.R. 26. Because our original opinion relied on this court's earlier opinion in *Bartchy*, and relied upon some of the same precedent and principles upon which our opinion in *Bartchy* was based, our decision in the present case is no longer supported by law. The application for reconsideration is granted, and our earlier decision in *Spitznagel v. State Bd. of Edn.*, Franklin App. No. 07AP-757, 2008-Ohio-5059, is vacated. The judgment of the Franklin County Court of Common Pleas is affirmed.

*Application for reconsideration granted;
judgment affirmed.*

McGRATH, P.J., concurs.
BRYANT, J., concurring separately.

BRYANT, J., concurring separately,

{¶12} I agree that the motion for reconsideration be granted and that the judgment of the trial court be affirmed.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

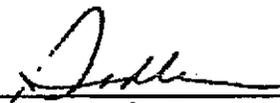
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Brian P. Spitznagel et al., :
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 State Board of Education et al., : (REGULAR CALENDAR)
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 Defendants-Appellees. :

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on November 20, 2008, it is the order of this court that appellee's motion for reconsideration is granted, and our earlier decision in *Spitznagel v. State Bd. of Edn.*, Franklin App. No. 07AP-757, 2008-Ohio-5059, is vacated, and the judgment of the Franklin County Court of Common Pleas is affirmed.

SADLER, McGRATH, P.J., and BRYANT, JJ.

By 
Judge Lisa L. Sadler

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Brian P. Spitznagel et al., :
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 :
 State Board of Education et al., : (REGULAR CALENDAR)
 :
 Defendants-Appellees. :

O P I N I O N

Rendered on September 30, 2008

Roetzel & Andress, LPA, David R. Harbarger, and Stephen W. Funk, for appellants.

Nancy H. Rogers, Attorney General, and Reid T. Caryer, for appellee Ohio State Board of Education.

Squire, Sanders & Dempsey LLP, D. Lewis Clark, Jr., and Johnathan E. Sullivan, for appellee Bedford City School District.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellants, Brian P. Spitznagel ("Spitznagel"), Marlene Anielski ("Anielski"), and the Village of Walton Hills ("Walton Hills") (collectively, "appellants"), appeal from the judgment of the Franklin County Court of Common Pleas, in which that court affirmed the

resolution of appellee, State Board of Education (the "board"), denying appellants' petition for transfer of Walton Hills from the Bedford City School District ("BCSD") to the Cuyahoga Heights Local School District ("CHLSD"). As discussed more fully below, we leave undisturbed the referee's findings of fact, but we must reverse and remand this matter to the board because the referee made errors of law that render the board's decision contrary to law.

{¶2} On March 31, 2004, the Cuyahoga County Board of Elections certified that at least 75 percent of the registered voters of Walton Hills had signed petitions requesting that the board consider whether to transfer Walton Hills from BCSD to CHLSD. The petitioners brought their request pursuant to R.C. 3311.24. On July 13, 2004, the board declared its intention to consider the request. In accordance with Ohio Adm.Code 3301-89-02(B), both BCSD and CHLSD submitted responses to 17 questions from the Ohio Department of Education ("ODE"). On August 26, 2004, the board appointed a referee, who held a three-day hearing on the petition in January 2005. On May 20, 2005, the referee issued a Report and Recommendation in which he recommended denial of the transfer.

{¶3} On July 12, 2005, the board resolved to remand the matter to the referee to conduct a further hearing on the issue of the financial impact that H.B. No. 66, a personal property tax-related measure, would have on the proposed transfer. The referee held that hearing on April 6, 2006, and asked for post-hearing briefing on the effects of S.B. No. 321, a bill signed by the governor on June 5, 2006, which was designed to mitigate losses that school districts involved in a territory transfer would suffer as a result of H.B. No. 66. Following this briefing, the referee issued a second Report and Recommendation

on October 25, 2006. In his second report, the referee again recommended denial of the transfer. Appellants filed objections, and BCSD filed a response thereto. On December 12, 2006, following its consideration of the two reports, the objections and the response, the board resolved to deny the petition for transfer.

{¶4} On December 29, 2006, appellants instituted an appeal from the board's resolution, in the Franklin County Court of Common Pleas, pursuant to R.C. 119.12. Following ODE's certification of the record and briefing by the parties, the trial court issued a decision on August 17, 2007, in which the court affirmed the board's decision. On September 11, 2007, the trial court journalized a judgment entry to that effect. Appellants timely appealed, and advance the following two assignments of error for our review:

I. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY FAILING TO REVERSE THE STATE BOARD'S DECISION BASED ON LEGAL ERRORS THAT WERE COMMITTED IN VIOLATION OF TENTH DISTRICT PRECEDENT.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY FAILING TO REVERSE AND REMAND WITH INSTRUCTIONS TO GRANT THE PETITION BASED UPON THE UNDISPUTED EVIDENCE THAT SHOWS THAT APPELLANTS MET THEIR BURDEN TO PROVE ENTITLEMENT TO THE TRANSFER.

{¶5} In an administrative appeal pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with the law. "This standard requires two inquiries: a hybrid factual/legal inquiry and a purely legal inquiry." *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 470, 1993-Ohio-182, 613 N.E.2d 591.

{¶6} For the first prong of review, "determining whether an agency order is supported by reliable, probative and substantial evidence essentially is a question of the absence or presence of the requisite quantum of evidence." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111, 17 O.O.3d 65, 407 N.E.2d 1265. The trial court must "give due deference to the administrative resolution of evidentiary conflicts. * * * However, the findings of the agency are by no means conclusive." *Id.* The Supreme Court of Ohio has defined reliable, probative, and substantial evidence as follows:

- (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.
- (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.
- (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

(Footnotes omitted.) *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, 589 N.E.2d 1303. Moreover, "where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order." *Conrad, supra*, at 111-112.

{¶7} In order to fulfill its obligations under R.C. 119.12, the trial court also "is obligated to determine whether the agency's decision is 'in accordance with law.'" *Ohio Historical Soc., supra*, at 471. For this second prong of review, the trial court must "exercise independent judgment as to matters of law." *Id.*

{¶8} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707, 590 N.E.2d 1240. In reviewing the court of common pleas' determination

that the board's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680, 610 N.E.2d 562. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140. However, on the question of whether the board's order was in accordance with the law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343, 587 N.E.2d 835.

{¶9} At the outset we note that in a proceeding under R.C. 3311.24, the petitioners have the burden of proof. *Levey v. State Bd. of Edn.* (Feb. 28, 1995), Franklin App. No. 94APE08-1125. The Ohio Administrative Code prescribes the standards and procedures by which a referee must consider a petition to transfer under R.C. 3311.24. The version of Ohio Adm.Code 3301-89-02(B) that is applicable hereto requires that each school district involved in a proposed transfer of territory provide answers to the following questions:

"(1) Why is the request being made?

"(2) Are there racial isolation implications?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"(a) The present area?

"(b) The proposed area?

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

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

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

"(17) For both of the districts:

"(a) What is the inside millage?

"(b) What is the outside operating millage?

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

Both districts' answers to these questions become part of the record,¹ and the referee must consider both districts' answers. Ohio Adm.Code 3301-89-03(A).

{¶10} Ohio Adm.Code 3301-89-03(B) also contains a non-exhaustive list of ten additional factors that the referee must consider. These are:

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

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

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

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

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

¹ Ohio Adm.Code 3301-89-02(G).

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

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

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

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

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

{¶11} Finally, Ohio Adm.Code 3301-89-03(C) provides:

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

{¶12} Ohio Adm.Code 3301-89-01(F) provides that "[a] request for transfer of territory will be considered upon its merit with primary consideration given to the present and ultimate good of the pupils concerned." The "pupils concerned" are "all students in both the transferring and acquiring territories * * *." *Bartchy v. State Bd. of Edn.*, 170 Ohio App.3d 349, 2007-Ohio-300, 867 N.E.2d 440, ¶27. The "present and ultimate good of the pupils concerned" must be the board's primary consideration, and, "by definition no other

single factor may be determinative of the transfer request." *Cincinnati City School Dist. v. State Bd. of Edn.* (1996), 113 Ohio App.3d 305, 311, 680 N.E.2d 1061.

{¶13} However, "the 'present and ultimate good of the pupils concerned' is to be viewed in context of all the factors set forth in Ohio Adm.Code 3301-89-02 and 3301-89-03 as well as all other relevant factors which will have an impact on the proposed transfer." *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1990), 62 Ohio App.3d 308, 320, 575 N.E.2d 503. Thus, "R.C. 3311.24 and Ohio Adm.Code 3301-89-02, require a balancing of the benefits of the transfer against the possible detriment to the relinquishing district and the students therein. * * * [N]o one factor determines the propriety of the transfer." *In the Matter of: Transfer of Territory from Streetsboro City School Dist. to Kent City School Dist.* (June 11, 1992), Franklin App. No. 91AP-1405, 1992 Ohio App. LEXIS 3072, at *10.

{¶14} We begin our review by recapitulating the referee's findings and conclusions in both his first and second reports. Of the 27 factors that the referee was required to consider, he concluded that four factors favored the transfer, seven factors disfavored the transfer, and 16 factors were neutral or inapplicable.

{¶15} The referee made the following findings and conclusions in his first report and recommendation. The first factor under Ohio Adm.Code 3301-89-02 is the reason that the request for transfer is being made. The referee found that the request has been made because "there exists a firmly-rooted belief held by some residents of * * * Walton Hills that the children * * * would be better served by a different school district * * * premised * * * primarily [on] the perceived danger of violence and drugs in the urban

BCSD and the [BCSD's] less-than-stellar performance on state proficiency testings."² The referee determined that this factor is neutral, concluding that the petitioners were placing "undue emphasis" on test scores and that BCSD had presented "compelling" evidence that it provides "a wide variety of programming and extracurricular activities" and that BCSD parents hold a "genuine belief in the BCSD as a whole * * *." Id. at 25.

{¶16} The next factor under Ohio Adm.Code 3301-89-02 is whether there are racial isolation implications to the transfer. The referee found that of the 45 Walton Hills students currently attending BCSD, 34 are white, 10 are black and 1 is multicultural. He further found that, assuming that all 45 of those students transferred to CHLSD, "[t]he impact on racial balance at BCSD would be subtle, essentially a one-half of one percent increase in the proportion of Black students to other races." Id. at 13. The referee found that there are additional 200-plus school-age children in Walton Hills who do not currently attend BCSD, but the record does not contain race-related information about those students. He stated that "yes,"³ there are racial isolation implications, and later added that because BCSD is 71 percent black and CHLSD is 97 percent white, "[t]he resultant impression is not palatable."⁴ He determined that this factor disfavors the transfer.

{¶17} The next factor under Ohio Adm.Code 3301-89-02 is the long-range educational planning in place in each affected district. Both districts have such plans, the referee noted, and he determined that this factor is neutral. The next factor under Ohio Adm.Code 3301-89-02 is whether the acquiring district possesses the fiscal and human resources to efficiently operate an expanded educational program. The referee stated

² May 20, 2005 Report and Recommendation, at 12.

³ Id.

⁴ Id. at 26.

that Walton Hills presented evidence that CHLSD could accommodate all Walton Hills students, but concluded that it is "unknown" whether the transfer would necessitate an expanded CHLSD program, or whether CHLSD could efficiently operate an expanded program. The referee determined that this factor is neutral.

{¶18} The next factor under Ohio Adm.Code 3301-89-02 is whether the acquiring district has adequate facilities to accommodate the additional enrollment. The referee concluded that the answer to this inquiry is unknown, and deemed this factor to be neutral. The next factor under Ohio Adm.Code 3301-89-02 is whether both districts have pupil valuation and property valuation sufficient to maintain high school centers. The referee answered this question in the affirmative and determined that this factor favors the proposed transfer.

{¶19} The next factor under Ohio Adm.Code 3301-89-02 is whether the proposed transfer will contribute to good district organization for the acquiring district. The referee determined that the transfer would not be detrimental to CHLSD but found that it is unknown whether the transfer would "contribute" to good district organization. He concluded that this factor is neutral. The next factor under Ohio Adm.Code 3301-89-02 is whether the acquiring district has the capacity to assume any financial obligation that might accompany the transferred territory. The referee determined that this factor is inapplicable because, he stated, there is no known financial obligation that would accompany the transfer.

{¶20} The next factor under Ohio Adm.Code 3301-89-02 is whether the loss of either pupils or valuation would be detrimental to the fiscal or educational operation of the relinquishing territory. Appellants had acknowledged that BCSD would lose property tax

revenues if the transfer were approved, but they proposed a set of steps that would serve to mitigate that loss, including direct payments from Walton Hills to BCSD in the amount of nearly 1.5 million dollars per year.

{¶21} In his first report and recommendation, based on undisputed evidence adduced at the first hearing showing that the transfer would cause BCSD to lose approximately four million dollars annually in real property taxes, the referee concluded that the transfer would "undoubtedly" detrimentally affect BCSD's fiscal or educational operation, based on testimony that such a revenue loss would necessitate staffing and program cuts. He concluded that this factor "strongly disfavors" the transfer.

{¶22} The next two factors under Ohio Adm.Code 3301-89-02 are whether previous transfers from BCSD have harmed it, and whether the proposed transfer could be considered a tax grab. The referee answered both of these questions in the negative, but deemed both factors neutral. He also deemed neutral the next factor under Ohio Adm.Code 3301-89-02, related to whether any school buildings are located in the territory to be transferred, because there are no school buildings in Walton Hills.

{¶23} The next factor under Ohio Adm.Code 3301-89-02 is the distance between school buildings in BCSD and CHLSD. BCSD buildings are located within six to eight miles of one another, while all CHLSD school buildings are located together on one campus. Because there was no testimony that one or the other arrangement is better, the referee determined that this factor is neutral.

{¶24} The next factor under Ohio Adm.Code 3301-89-02 is whether the requested transfer will create a district with noncontiguous territory. The referee found that it would not, and determined that this factor favors transfer. The next factor under Ohio

Adm.Code 3301-89-02 is whether the area proposed for transfer is an isolated segment of the district of which it is a part. The referee found that, while the petitioners believe they are socially isolated from the rest of BCSD, Walton Hills is not geographically isolated because it is "solidly" within the geographical boundaries of BCSD. The referee determined that this factor disfavors transfer.

{¶25} The next factor under Ohio Adm.Code 3301-89-02 is whether the transfer will result in school district and municipal boundaries being coterminous. The referee found that it would not, but that the BCSD boundaries are not currently coterminous with municipal boundaries, so this factor is neutral. The next factor under Ohio Adm.Code 3301-89-02 is the inside, outside and bonded millage for each district. The referee determined this to be irrelevant and, therefore, neutral. The first four factors under Ohio Adm.Code 3301-89-03(B) concern agreements between the affected districts or a previous annexation, and, with none of these existing, these factors were deemed inapplicable.

{¶26} The next factor under Ohio Adm.Code 3301-89-03(B) is that the transfer "shall not cause, preserve, or increase racial isolation." The referee found that, "[t]here is no evidence of any student in either system feeling racially isolated. There is no quantifiable evidence that racial isolation presently exists in either the BCSD or the CHLSD."⁵ As a result, the referee stated that he was "not convinced that the record in this case indicates that the proposed transfer would cause, preserve or increase racial isolation."⁶ He also found that the change in racial percentages that would accompany

⁵ Id. at 20.

⁶ Id.

the transfer would be "statistically miniscule" and "de minimis." Nonetheless, he concluded that because the transfer "would ever so slightly change the racial composition in the effected [sic] districts, * * * this factor disfavors the transfer."⁷

{¶27} The next factor under Ohio Adm.Code 3301-89-03(B) is that all district territories should be contiguous. The referee determined that this factor favors the transfer because Walton Hills is contiguous to the CHLSD. The next factor under Ohio Adm.Code 3301-89-03(B) is the notion that school district boundary lines that have existed for a long time should not be changed if "substantial upheaval results because of long-held loyalties by the parties involved." The referee found that "substantial upheaval" is likely whether the transfer is approved or disapproved because there was testimony indicating that some Walton Hills residents will move out if the transfer occurs, and others will move out if it does not occur. Finally, the referee noted that the "BCSD put on evidence of long-held loyalties to the district by Walton Hills residents while the petitioners can scarcely claim such loyalties to a school district they have never been a part of." *Id.* at 21. Thus, he determined, this factor "slightly disfavors" the transfer. *Id.*

{¶28} The next factor under Ohio Adm.Code 3301-89-03(B) is that the pupil loss of the relinquishing district should not be such that the educational program of that district will be severely impaired. Finding that there was no evidence that BCSD's educational program would be severely impaired due to the loss of the 45 Walton Hills students, the referee determined that this factor favors the transfer.

{¶29} The next factor under Ohio Adm.Code 3301-89-03(B) is that the fiscal resources acquired by CHLSD should be commensurate with the educational

⁷ *Id.* at 20.

responsibilities that it would assume upon transfer. The referee stated that this factor strongly disfavors transfer because, "[g]iven that only 45 students * * * [will] shift from BCSD into CHLSD, the nearly \$8,000,000 of tax monies expected to follow the students into [CHLSD] is not commensurate with the educational responsibilities assumed." *Id.* at 22.⁸

{¶30} The next factor under Ohio Adm.Code 3301-89-03(B) is that the educational facilities of districts should be effectively utilized. With respect to this factor, the referee stated as follows:

The effective utilization of the BCSD facilities is dependent upon the tax money received through the village of Walton Hills. Transferring the subject territory into CHLSD would result in the ineffective utilization of BCSD facilities. It is wholly foreseeable that the loss of the Walton Hills tax monies would cause the closing of facilities, reduced educational programming, [sic] and staff and faculty cutbacks, and other curtailments damaging to the district students. Such a response to the loss of the Walton Hills tax monies, wholly predictable and necessary, would grossly hinder the effective utilization of BCSD educational facilities. * * * This factor disfavors the transfer because of the detriment to the BCSD which will result in the ineffective utilization of its educational facilities.

Id. at 22. The referee did not explain the basis for the premise that a district's tax revenue dictates how effectively students utilize its facilities, nor did he cite to any authority for this general proposition.

{¶31} The referee recognized that the board's decision must be primarily based upon the "present and ultimate good" of the pupils affected, and that this concept is to be

⁸ The referee did not explain the discrepancy between this figure and the four-million-dollar annual figure he cited earlier in his report. See ¶21, *supra*.

viewed in the context of all of the foregoing factors. In discussing this, the referee recognized appellants' concerns about safety and the "historically poor" standardized test scores in the BCSD. However, without explanation, he stated that appellants were placing "undue emphasis" on standardized test scores. He also stated that "there is no reliable, probative, or substantial evidence in this record indicating that the BCSD is unsafe, unconcerned, or incapable of offering a quality education to any student who desires it." *Id.* at 27.

{¶32} He characterized appellants' self-described isolation from BCSD as "in reality, a product of their collective freewill" and stated that they have not "actually given the BCSD a chance to show what it can do for their children." He advised that, "[w]ith appropriate interaction, communication, energy, and perchance, patience, the residents of the village of Walton Hills may find themselves satisfied with the diverse and varied offerings of the BCSD * * *." *Id.*

{¶33} In his first report, in summarizing his reasons for denying the transfer request, the referee explained that "[t]he main factor militating against the transfer is the financial detriment which will clearly and irrefutably be foisted upon BCSD." *Id.* at 28. He reiterated that "[t]he de minimus [sic] racial isolation impact must also be considered as a negative factor as well as well as [sic]. Other responses and factors contrary to the transfer petition include the non-isolation of the territory from the BCSD, the substantial upheaval which will be caused by changing the long-existing district boundaries, and the consequent ineffective utilization of the BCSD educational facilities." *Id.* For those reasons, the referee stated, "the conclusion must be drawn that the present and ultimate

good of the students concerned will be promoted by the continued existence of the village of Walton Hills as a municipal component of the Bedford City School District." *Id.*

{¶34} As noted earlier, the board remanded the matter to the referee for consideration of the impact of H.B. No. 66 upon districts involved in the proposed transfer. That bill, signed by Governor Taft on June 30, 2005, phases out the tangible personal property tax on general businesses, telephone and telecommunications companies, and railroads, through a gradual reduction in assessment rate on tangible personal property through 2009 (2011 in the case of telephone and telecommunications companies). The bill also reimburses the entire amount of the revenue lost to school districts in the first five years, then gradually phases out these reimbursements over the following seven years. State education offset aid to schools, however, is unaffected during this period, and school districts will also receive revenues from the new commercial activity tax that are earmarked for school district property tax reimbursement.

{¶35} At the remand hearing, the referee heard from three different experts regarding the effects of H.B. No. 66. In his second report and recommendation, he stated that he accepted as the most reliable testimony that of appellants' expert, Todd Puster ("Puster"). Puster submitted a written report and also testified. Puster noted that BCSD is in an "especially robust" financial position relative to other Ohio school districts. (Puster Report, at 6.) BCSD carried over 23 percent of its revenue as cash at the end of fiscal year 2003, 19 percent at the end of 2004, and 23 percent at the end of 2005. *Id.* BCSD's per-pupil expenditures were 29 percent above the state average in the 2004-2005 school year. *Id.* at 8.

{¶36} Puster opined that H.B. No. 66 is a "more significant fiscal stress point" for BCSD than the requested transfer would be. Id. Puster explained that, even without the requested transfer, H.B. No. 66 would reduce BCSD's tax revenues by \$2.5 million per year because the bill would cut Walton Hills' tangible property tax base over the next three years by over 75 percent. Id. at 1, 3. Walton Hills makes up 20 percent of BCSD's pre-H.B. No. 66 property tax base. Id. at 3.

{¶37} He proposed several remedial measures to offset these losses. One of these was legislation pending at the time of the second hearing, which ultimately passed as Sub.S.B. No. 321. The bill was designed to ameliorate school districts' loss of revenue as a result of H.B. No. 66. With respect to a territory transfer, it allows the *relinquishing* school district to retain one-half of the H.B. No. 66 reimbursement payments arising from the property in the transferred territory during the first five years following the transfer. Under prior law, the district *receiving* the territory received all of the payments arising from the property located within the transferred territory. The payments are to be computed using the fixed-rate tax rate of the relinquishing district. At the referee's request, both parties briefed the issue of the effect of S.B. No. 321. They agreed that the bill would provide BCSD with 50 percent of the H.B. No. 66 tangible personal property tax reimbursement payments associated with the transferred territory.

{¶38} The second method that Puster testified would reduce the financial loss to BCSD occasioned by the transfer was the fact that BCSD would automatically realize

approximately \$600,000 in savings per year by no longer having to educate those Walton Hills students who currently attend BCSD schools.⁹ Id. at 21.

{¶39} Following the remand hearing on the effects of H.B. No. 66, and the post-hearing briefing on the effects of Sub.S.B. No. 321, the referee issued a second report and recommendation. Therein, he found, based upon Puster's report and testimony, that "[t]he best-case scenario * * * is that the BCSD would lose nearly seven million dollars (\$7,000,000) over the first five years after the proposed transfer, even after the implementation of SB 321."¹⁰ This equates to an average of \$1.4 million per year. The referee adopted Puster's testimony that the seven million-dollar five-year loss would be ameliorated by \$600,000 per year in savings realized by BCSD not having to educate the Walton Hills students that currently attend BCSD schools.

{¶40} However, the referee concluded that the financial loss to BCSD would "cause substantive harm to the relinquishing district" unless the loss was completely ameliorated and that the "only fashion by which the BCSD can avoid significant financial detriment would be to employ all * * * of the 'mitigation' mechanisms suggested by Petitioners."¹¹ (Emphasis added.)

{¶41} He went on to state:

[F]ailure of even one of the suggested recoupment techniques will leave the BCSD with a post-transfer financial deficiency when compared to its present status. Moreover, it is incontestable that the post-transfer impact upon the BCSD shall remain extant beyond the five-year accounting forecast window.

⁹ Puster also proposed two other methods by which BCSD could reduce the impact of revenue loss associated with the transfer. The referee, however, found that the evidence did not support that either of those two other methods would actually occur.

¹⁰ Oct. 25, 2006 Report and Recommendation, at 5.

¹¹ Oct. 25, 2006 Report and Recommendation, at 5-6.

For the foregoing reasons, it is apparent that the transfer of territory from [BCSD] to [CHLSD] would impose a significant detrimental financial impact upon the [BCSD]. As such, the transfer should be disapproved.

Id. at 8. In other words, *any* "post-transfer financial deficiency" warrants disapproval of the petition because any such deficiency "would impose a significant detrimental financial impact * * *."

{¶42} As we noted earlier, the trial court was required to determine whether the board's decision is supported by reliable, probative, and substantial evidence and is in accordance with law. Appellants raised ten specific assignments of error in the trial court, three of which they raise again on appeal to this court. In the first of these, appellants argued that the board erred in basing its decision to deny the transfer primarily upon the loss of tax revenue that BCSD would experience as a result of the transfer. The court noted that BCSD's treasurer, Mary Ann Nowak, and appellants' expert witness, Lowell Davis, both testified as to the financial loss to BCSD that would accompany the transfer. The court characterized the loss as "not de minimis." With no other discussion, the court stated, "[g]iven the standard of review, this Court finds that there exists reliable, probative, and substantive [sic] evidence that supports the Board's adoption of the [referee's] recommendation. Therefore, this alleged error lacks merit." (Aug. 17, 2007 Decision, at 7.)

{¶43} Appellants also assigned as error the board's denial of the petition based on the undisputedly "de minimis" change in racial composition of BCSD that would result from the proposed transfer. The court stated that even if this was error, it does not require a reversal because race-related issues are only a part of the panoply of factors to

be considered in ruling upon a request for transfer, and there was evidence going to many of those other factors. The court again stated, "[g]iven the standard of review, this Court finds that there exists reliable, probative, and substantive [sic] evidence that supports the Board's adoption of the [referee's] recommendation. Therefore, this alleged error lacks merit." *Id.* at 10.

{¶44} Appellants also alleged as error the board's denial of the petition based on its conclusion that a "substantial upheaval" in long-held loyalties would result from the 45 Walton Hills' students transferring to CHLSD, and that the transfer would result in the "ineffective utilization" of BCSD facilities. With respect to the "substantial upheaval" question, the court distinguished the case that appellants cited in support of their argument, and then, after stating that it would not "reweigh all of the evidence," the court concluded with, "[a]pplying the appropriate level of review this Court holds that there exists reliable, probative, and substantive [sic] evidence that supports the [referee's] recommendation. The transcript from the first Hearing contains evidence from which the [referee] could have based his findings. * * * Given the standard of review, this Court finds that there exists reliable, probative, and substantive [sic] evidence that supports the Board's adoption of the [referee's] recommendation. Therefore, this alleged error lacks merit." *Id.* at 11.

{¶45} With respect to the "ineffective utilization" of BCSD facilities due to the loss of the 45 Walton Hills students, the trial court refused to consider the issue in the context of the loss of pupils; rather, it pointed out approvingly that the referee and board determined that BCSD's loss of tax monies would cause ineffective utilization because the tax loss would necessitate the closing of facilities and in staff and faculty cutbacks.

The trial court stated that, because it had "already held that there exists reliable, probative and substantive [sic] evidence in support of the [referee's] finding that Bedford will incur a large financial harm[,] [t]his Court will not revisit that matter here." *Id.* at 12. The court then concluded by stating, "[g]iven the standard of review, this Court finds that there exists reliable, probative, and substantive [sic] evidence that supports the Board's adoption of the [referee's] recommendation. Therefore, this alleged error lacks merit." *Id.*

{¶46} In their first assignment of error on appeal to this court, appellants do not argue that any of the referee's findings of fact are incorrect or unsupported by the evidence. Rather, they maintain that the trial court erred in applying the "reliable, probative and substantial evidence" standard of review to claimed errors of law that were not dependent upon the quantum and quality of the evidence. These claimed legal errors are three in number: (1) denial of the petition based on the proposition that any loss of funding by BCSD at all is, ipso facto, grounds for denial; (2) denial of the petition based on the fact that the transfer would result in a de minimis change in the racial *composition* of BCSD, when the referee found that no racial *isolation* existed in either district and that the transfer would not cause any racial isolation; and (3) denial of the petition based on the conclusion that the loss of 45 students would cause substantial upheaval of long-held loyalties and ineffective utilization of BCSD's facilities.

{¶47} Appellants argue that, in claiming these errors, they challenged the board's order as being not in accordance with law, rather than unsupported by reliable, probative, and substantial evidence. Thus, they maintain, the trial court erred when it failed to review the board's order to determine whether the order is in accordance with law. They request that we apply that same de novo standard of review to the claimed errors. It is

true that, "[a]s to matters of law, * * * this court is not limited to an abuse of discretion standard, since the common pleas court does not exercise discretion as to such issues." *Traub v. Warren Cty. Bd. of Commrs.* (1996), 114 Ohio App.3d 486, 489, 683 N.E.2d 411. To the extent that appellants do not seek to challenge or change any of the referee's findings of fact, but instead argue that he drew unlawful conclusions from those findings, we will apply a de novo standard of review to appellants' assignments of error.

{¶48} With respect to the first claimed error, appellants do not quarrel with the *factual finding* that BCSD would lose a substantial amount of revenue; rather, they argue that loss of revenue alone does not, ipso facto, disfavor a school district transfer, and it was an error of law for the board to have treated it as such. They argue that the trial court erred in failing to recognize this error of law.

{¶49} The question before us is whether the trial court erred in overruling appellant's assignment of error regarding denial of the transfer based on loss of revenue alone, without findings regarding the degree to which the amount lost would be detrimental to BCSD. As we noted earlier, the trial court in an R.C. 119.12 appeal is obligated to determine whether the agency's order is in accordance with law, or contrary to it. From a reading of the trial court's decision, it is unclear whether the trial court in fact considered whether it was contrary to law for the board to find that loss of revenue alone, regardless of the amount or effect, is detrimental enough to stand in the way of transfer. Nevertheless, we review questions of law, such as this one, de novo.

{¶50} For support of their proposition that it was contrary to law for the board to conclude that any degree of revenue loss warranted denial, appellants cite the recent case of *Bartchy v. State Bd. of Edn.*, 170 Ohio App.3d 349, 2007-Ohio-300, 867 N.E.2d

440.¹² In *Bartchy*, this court held that the fact that the relinquishing district will lose funding is insufficient, on its own, to disfavor transfer under the plain language of Ohio Adm.Code 3301-89-02(B)(9); there must also be a properly supported finding that the loss of funds would be detrimental to the fiscal or educational operation of the district. In *Bartchy*, we stated:

We do not believe that the purpose of Ohio Adm.Code 3301-89-02(B)(9) is to simply determine whether a relinquishing school district will lose funds. Since Ohio school districts receive their funding primarily from state revenue paid on a per pupil basis, and local revenue "which consists primarily of locally voted school district property tax levies" (see *DeRolph v. State* (1997), 78 Ohio St. 3d 193, 199, 1997 Ohio 84, 677 N.E.2d 733), almost every transfer of property from a school district will negatively impact their funding. *The key to Ohio Adm.Code 3301-89-02(B)(9) is whether the loss of funds would be "detrimental to the fiscal or educational operation of the relinquishing school district." This requires a finding of how the loss of income would affect the relinquishing school district. Simply presenting evidence that the relinquishing school district will lose funds is insufficient to show that the loss of funds would be detrimental to the fiscal or educational operation of the school district.*

(Emphasis added.) *Id.* at ¶33, quoting *Crowe v. State Bd. of Edn.* (Oct. 26, 1999), Franklin App. No. 99AP-78, 1999 Ohio App. LEXIS 4993, at *14-15.

{¶51} Determining whether the revenue loss that will accompany a proposed transfer will be detrimental to the relinquishing district "may be answered by evidence showing the projected loss of revenue to a school district *and* a finding concerning how the loss of revenue is a ' "factor significant enough to stand in the way of the proposed

¹² The Supreme Court of Ohio has accepted jurisdiction of the case upon a discretionary appeal. See *Bartchy v. State Bd. of Edn.*, 114 Ohio St.3d 1424, 2007-Ohio-2904, 868 N.E.2d 678.

transfer." ' ' (Emphasis added.) *Crowe*, supra, at *11, quoting *Levey v. State Bd. of Edn.* (Feb. 28, 1995), Franklin App. No. 94APE08-1125, 1995 Ohio App. LEXIS 765, at *11-12.

{¶52} BCSD argues that, unlike *Bartchy*, the evidence in this case supports a finding that the financial loss to BCSD would be so detrimental as to stand in the way of the proposed transfer. The board points out that, at the first hearing, Treasurer Nowak and Lowell Davis testified as to the "detrimental impact [that] would arise through the loss of about \$7,500,000 dollars of tax revenue." (Brief of Board, at 11.) BCSD points to Todd Puster's testimony at the second hearing, in which he opined that, taking into account H.B. No. 66 and S.B. No. 321, BCSD would lose \$6,842,188 over the first five years following transfer (or \$1,368,437 per year).¹³

{¶53} Appellants do not challenge the referee's finding as to the amount of loss that BCSD will suffer; indeed, Puster was their expert witness. Rather, appellants argue that it was contrary to law for the referee to begin with the premise that any loss of revenue, regardless of its relative impact on BCSD's budget or resources, warranted denial of the petition unless it would be fully mitigated. Under *Bartchy* and *Levey*, denial may not be based upon a loss of revenue alone; there must also be a properly supported finding concerning how the financial loss is significant enough to stand in the way of the transfer. *Bartchy* at ¶33; *Levey* at *11-12.

{¶54} Here, the referee made no finding as to how the net amount of loss he found would occur (substantially lower than the figure that Nowak and Davis used at the

¹³ The referee adopted Puster's testimony that the transfer would result in a net loss to BCSD of approximately \$1.4 million per year over the first five years following the transfer. This figure is different from the figure upon which Nowak and Lowell testified in the first hearing. Notably, the referee seemed to recognize this and did not reference Nowak's and Lowell's testimony when discussing his conclusions about whether the Puster figure represented a loss that disfavors transfer.

first hearing) would detrimentally affect BCSD enough to warrant denial of the petition. The referee went on to erroneously apply the principle that if BCSD would experience *any* "post-transfer financial deficiency when compared to its present status[,]" then this fact, ipso facto, means that the proposed transfer "would impose a significant detrimental financial impact upon the [BCSD]." See ¶41, *supra*. The referee's and board's conclusion that *any* financial loss at all, if not fully mitigated, is significant enough to stand in the way of transfer is contrary to the requirements of *Bartchy* and *Levey*. For this reason, then, with respect to financial loss, appellants' first assignment of error is sustained.

{¶55} In so doing, we do not hold that, as a matter of law, a five-year \$1.4 million annual loss of revenue can never be significant enough to stand in the way of a proposed transfer. We simply conclude that, in accordance with *Bartchy* and *Levey*, the fact that revenue will be lost is not a sufficient basis to deny a transfer, absent "a finding concerning how the loss of revenue is a 'factor significant enough to stand in the way of the proposed transfer.'"¹⁴ *Crowe, supra*, at *11, quoting *Levey, supra*, at *11-12.

{¶56} We are confronted here with a case in which the referee made no such finding. Thus, we are not substituting our judgment for that of the board. We simply cannot ignore the fact that the referee skipped one-half of the required analysis as to whether the revenue loss that BCSD will experience warrants denial of the transfer.

{¶57} The second claimed error subject of the first assignment of error is that the denial of the petition was based, in significant part, on weighing the two racial isolation

¹⁴ This is especially true in a case where, as here, the relinquishing district is in an "especially robust" financial position. See ¶35, *supra*.

factors against the transfer. Appellants argue that the referee's conclusion in this regard is contrary to his own factual findings that no racial isolation presently exists in either affected school district, and the transfer would not cause, preserve or increase racial isolation in either district.¹⁵ They also argue that the referee ran afoul of our precedent, in which this court held that where a proposed transfer will result in a de minimis change in the racial composition of the relinquishing district, this cannot be the basis upon which the board infers that the proposed transfer will have racial isolation implications.

{¶58} As noted in ¶10, supra, one of the factors that the referee was required to weigh is, "[t]he transfer shall not cause, preserve, or increase racial isolation." Ohio Adm.Code 3301-89-03(B)(5). With respect to this factor, the referee made the following findings of fact: (1) racial isolation does not currently exist in either affected district, and (2) the transfer would not create any racial isolation in either district. Yet, in *direct contradiction to these factual findings*, and despite the fact that none of his other findings of fact support weighing this factor against the transfer, the referee cited racial isolation impact as one of the primary factors forming the basis for his decision. Thus, not only did the referee weigh this factor in a manner that was antipodal to his own factual findings, but none of his other factual findings support weighing this factor against the proposed transfer.

{¶59} Ohio Adm.Code 3301-89-02(B)(2)(a) and (b) require examination of the racial composition of both school districts affected by the proposed transfer, as a means of determining whether there are any racial isolation implications. In this case, upon examination of the racial compositions of the affected school districts, the referee found

¹⁵ See ¶26, supra.

that the effect on BCSD's racial composition would be "de minimis." Yet, in answer to the question posed by Ohio Adm.Code 3301-89-02(B)(2), which is, "[a]re there racial isolation implications?" the referee concluded that there *are* racial isolation implications to the transfer.

{¶60} This court has adhered to the distinction between racial *composition* and racial *isolation*, and held that a de minimis impact on racial *composition* does not, ipso facto, constitute an increase in racial *isolation*. In *Schreiner v. Dept. of Edn.* (Nov. 9, 1999), Franklin App. No. 98AP-1251, Slip op., at 14-15, this court held that, where (as here) the evidence supports a finding that the proposed transfer would have only a de minimis impact on the racial composition of the relinquishing school district, this is legally insufficient to support denial of the transfer.

{¶61} In this case, the trial court never addressed whether this aspect of the board's decision was contrary to law. In our view, it clearly is. See *Schreiner*. As noted above, it also flies in the face of the referee's factual finding with respect to whether the proposed transfer will cause, preserve, or increase racial isolation. The referee found that there was *no evidence* that students in either CHLSD or BCSD experience any racial isolation, or that the proposed transfer would cause any racial isolation among any of the affected students. In direct contravention of its own finding that the transfer would not cause or increase racial *isolation*, the board deemed the de minimis change in BCSD's racial *composition* to be a factor supporting denial of the transfer. Consideration of racial composition is a tool to evaluate the potential for racial isolation implications; thus, it is part of a means to reach conclusions about racial *isolation*, but it is not itself the object of the inquiry. See Ohio Adm.Code 3301-89-02(B)(2)(a) and (b).

{¶62} When the board weighed the factors contained in Ohio Adm.Code 3301-89-02(B)(2) and 3301-89-03(B)(5) against the requested transfer, it did so in contravention of its own findings of fact and our precedent. Thus, insofar as appellants challenge that basis for denial as being contrary to law, their first assignment of error is sustained.

{¶63} The third error subject of appellants' first assignment of error is the board's denial of the petition based on: (1) a finding that the transfer would cause substantial upheaval of long-held loyalties, and (2) a conclusion that the transfer would cause ineffective utilization of BCSD's facilities.

{¶64} First, appellants argue that since BCSD would only lose 45 Walton Hills students, the proposed transfer cannot, as a matter of law, cause substantial upheaval in long-held loyalties. Appellants misapprehend the purpose of Ohio Adm.Code 3301-89-03(B)(7). That section requires consideration of whether changing "school district boundary lines that have existed for a long period of time" will cause substantial upheaval because of long-held loyalties. This section is not concerned narrowly with the loss of only the few Walton Hills students who attend BCSD; it is concerned with the transfer of the entire village of Walton Hills, with all of its school-age children, not just those enrolled in BCSD. Therefore, we view this claimed error as the trial court did: a question of the requisite quantum of evidence, not a question of law.

{¶65} The trial court pointed to the testimony of several of BCSD's witnesses and found that this aspect of the order was supported by reliable, probative, and substantial evidence. We find no abuse of discretion in this finding, and overrule appellant's first assignment of error insofar as it is based upon the trial court's treatment of the "substantial upheaval" factor.

{¶66} Appellants also argue that the transfer cannot, as a matter of law, cause ineffective utilization of BCSD facilities because only 45 Walton Hills students currently attend BCSD. They cite *Bartchy, Schreiner, and Cincinnati City School Dist. v. Bd. of Edn.* (1996), 113 Ohio App.3d 305, 680 N.E.2d 1061, for the proposition that, as a matter of law, loss of a relatively small number of students weighs in favor, not against, a school district transfer. However, none of these cases contains such a holding.¹⁶

{¶67} We reject the argument that the board acted contrary to our precedent when it concluded that the proposed transfer would result in ineffective utilization of BCSD facilities. We have not held that there can never be cases in which the evidence shows that the proposed transfer would have a significant detrimental impact upon a school district, even though it would stand to lose a relatively small number of students.

{¶68} We nonetheless sustain the first assignment of error as it relates to ineffective utilization. As we noted at ¶30, supra, the referee stated that "effective utilization * * * is dependent upon the tax money received * * *." In other words, to the referee, a district's loss of revenue automatically equates to ineffective utilization of its

¹⁶ {¶a} In ¶36 of the opinion in *Bartchy*, which is the paragraph upon which appellants rely, the court was discussing the factor pertaining to previous transfers and whether, ultimately, there was any record evidence supporting the previous transfer statistics that the losing side had proffered. In the course of that discussion, the court was simply citing cases that the losing side had cited in its brief in the administrative proceedings, including *Schreiner* and *Cincinnati*.

{¶b} Contrary to appellants' assertion, the *Schreiner* court did not hold that, as a matter of law, the loss of a relatively small number of students "would have a de minimis impact on educational operations, minority student ratio, and fiscal resources of [the] relinquishing district." (Brief of appellants, at 30.) Rather, it held that, given the board's *factual* findings that the evidence in that case showed there *would* only be a de minimis fiscal and racial impact on the relinquishing district, neither fiscal impact nor racial impact could be a basis for denial. In *Cincinnati*, the court held that "the mere transfer of a few students * * * cannot constitute an equal protection violation." *Id.* at 316. The *Cincinnati* court did not hold that where only a small number of students attend the relinquishing district, this favors transfer as a matter of law.

facilities by its students, and where the evidence shows that a relinquishing district will lose revenue (as is the case here), this compels a finding of ineffective utilization.

{¶69} Certainly, in cases where the referee makes an evidentiary finding correlating a district's projected revenue loss with projections about ineffective utilization of district facilities, it would not be contrary to law to conclude that the proposed transfer would cause the district's students to ineffectively utilize the district's resources. But here, the referee made no such finding. Therefore, the referee's conclusion that loss of revenue equals ineffective utilization of facilities is a presumption. This presumption is wholly without support in statutory, regulatory or case law. Thus, the referee's conclusion in this case that the proposed transfer would "grossly hinder the effective utilization of BCSD educational facilities" is contrary to law. For this reason, the first assignment of error is sustained vis à vis the board's denial based upon "ineffective utilization."

{¶70} In summary, we sustain appellants' first assignment of error as it pertains to financial loss, racial composition and ineffective utilization, and we overrule the first assignment of error as it pertains to substantial upheaval.

{¶71} In their second assignment of error, appellants argue that if we find that the board's decision was contrary to law, then *Bartchy* mandates that we consider whether appellants met their burden of proof; if we find that they did so, appellants maintain, then we must remand with instructions to grant the petition.

{¶72} Appellants fail to acknowledge the differences between *Bartchy* and this case. In *Bartchy*, the referee concluded that, of the 27 factors required to be considered, only one—the relinquishing district's loss of tax revenue—was relevant because no school-age children resided in the territory proposed to be transferred. As a result, the referee

ignored the petitioners' evidence. Moreover, the relinquishing school district presented no evidence concerning the *only* factor that the referee did deem relevant—the potential financial impact on that district.¹⁷ Upon determining that the referee erred as a matter of law in ignoring so many factors and all of the petitioners' evidence, we were left with a situation in which neither the administrative agency nor the trial court had considered or evaluated the petitioners' evidence, and there was no evidence supporting the board's conclusion as to the only factor that the referee had considered.

{¶73} In the present case, we have not made such a determination. We have concluded that the board made errors of law as to three of its stated reasons for denial, and thus, its decision is contrary to law. Unlike in *Bartchy*, we have not determined that there is no evidence disfavoring transfer. Additionally, we are not presented with a situation in which the referee erroneously focused on but one factor, for which no evidence supported the board's conclusion; or with respect to which neither the board nor the trial court has appraised the evidence.

{¶74} Though we have concluded that the board's decision is contrary to law in several important respects, it is the trial court, not this court, that must, in the first instance, determine whether the board's denial is supported by reliable, probative, and substantial evidence, while remaining mindful of all of the applicable administrative code factors, the paramount consideration of the present and ultimate good of the pupils concerned, and the evidence presented by both the proponents and opponents of the

¹⁷ It is clear from a reading of *Bartchy* that the relinquishing school district, the Cincinnati Local School District, did not present any evidence because it did not believe that the board had jurisdiction to consider the petition. The district unsuccessfully pursued its jurisdictional challenge in this court. See *Bartchy*, at ¶13-20.

proposed transfer. "In the context of appeals from administrative agency decisions, 'it is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court.'" *Glassco v. Ohio Dept. of Job & Family Servs.*, Franklin App. No. 03AP-871, 2004-Ohio-2168, ¶21, quoting *Lorain City Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264.

{¶75} Because our de novo review has revealed errors of law, we have not passed upon the issue whether the trial court abused its discretion in finding that the board's order was supported by the requisite quantum and quality of evidence. For this reason, this case is not susceptible of an order to grant the petition. Accordingly, appellants' second assignment of error is overruled.

{¶76} In summary, we sustain in part appellants' first assignment of error because the board's decision was contrary to law for three reasons that the trial court erroneously failed to recognize: (1) the referee erroneously employed a presumption that any amount of revenue loss alone warrants denial of a transfer petition, without making a finding concerning how the particular loss in this case would be significant enough to stand in the way of the proposed transfer; (2) the referee failed to adhere to the plain language of Ohio Adm.Code 3301-89-02(B) and 3301-89-03(B), and contravened his own factual finding that the proposed transfer would not cause, preserve or increase racial isolation in either of the affected school districts, when he based denial of the petition, in part, on the "de minimis" change in BCSD's racial composition that he found would accompany the transfer; and (3) the referee erroneously employed a presumption that revenue loss causes the pupils in the relinquishing district to ineffectively utilize that district's facilities.

We overrule appellants' second assignment of error because the state of the record does not compel us to order that the board grant the petition.

{¶77} We leave undisturbed all of the referee's findings of fact, and we make no judgment as to whether the reliable, probative, and substantial evidence supports a grant or denial of appellants' requested transfer. Thus, we do not substitute our judgment of the evidence for that of the board; we reverse on errors of law only, and remand for the board to issue a new decision that is not contrary to law. We recognize that the board's errors do not relate to every factor it considered in denying the transfer. But the board's legal errors bear, to a great degree, upon the way in which it weighed all of the factors and reached its ultimate conclusion; it is for this reason, and not because we disagree with the conclusion itself, that we conclude that the board's decision is contrary to law and must be reversed.

{¶78} For all of the foregoing reasons, we sustain in part and overrule in part appellants' first assignment of error, we overrule their second assignment of error, and we reverse the judgment of the Franklin County Court of Common Pleas. We remand this matter to that court with instructions to vacate the board's decision and to remand the cause to the board for issuance of a new decision on the transfer petition that is in accordance with law and consistent with this opinion.

*Judgment reversed;
and cause remanded with instructions.*

McGRATH, P.J., concurs.
BRYANT, J., dissents.

BRYANT, J., dissenting.

{¶79} Because I disagree with the majority's resolution of the first assignment of error, and the majority's resulting decision to reverse the judgment of the Franklin County Court of Common Pleas, I respectfully dissent.

{¶80} Initially, I disagree overall with the manner in which the majority characterizes the issue for resolution. Accepting appellants' assertions, the majority addresses the first assignment of error as if it posed solely a "legal issue" subject to this court's plenary review. Contrary to appellants' contentions and the majority opinion, appellants do not pose legal issues in their appeal. Rather, as the common pleas court aptly recognized, appellants essentially challenge the hearing officer's findings of fact and weighing of factors that serve as the necessary predicate for the conclusions and ultimate decision with which appellants are dissatisfied. Our review of such claims is limited: we determine only if the trial court abused its discretion in affirming the board's order. See *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In order for an abuse of discretion to exist, the trial court's decision must constitute more than an error of judgment; it must be unreasonable, arbitrary, or unconscionable. *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1990), 62 Ohio App.3d 308, 319.

{¶81} In reviewing the board's decision on appeal, the common pleas court first correctly observed that R.C. 119.12 governs the appeal and requires the common pleas court to determine whether (1) reliable, probative, and substantial evidence supports the board's decision, and (2) the decision is in accordance with law. The common pleas court next also correctly acknowledged that appellants, as the petitioners for the transfer, have

the burden to prove their entitlement to the transfer. The common pleas court also correctly recognized that the board, not the common pleas court, is charged with the responsibility to weigh the competing factors enumerated in Ohio Adm.Code 3301-89-02 and 3301-89-03 to determine whether a transfer is in the best interest of all students affected. *Bartchy v. State Bd. of Edn.*, 170 Ohio App.3d 349, 2007-Ohio-300, discretionary appeal accepted for review, 114 Ohio St.3d 1424, 2007-Ohio-2904.

{¶82} Guided by these principles, the common pleas court appropriately examined the evidence and findings at issue, cited to evidence supporting the board's findings, and accorded due deference to the board's resolution of the evidentiary conflicts and its balancing of the administrative code factors. Because not only does reliable, probative, and substantial evidence support the board's findings and decision, but that decision is in accordance with law, the common pleas court did not abuse its discretion in affirming the board's order. *Rosford*, supra.

{¶83} To address the majority's opinion more specifically, I disagree with the manner in which the majority characterizes appellants' issues and the board's findings and conclusions pertaining to the factors of (1) racial isolation, (2) detrimental impact on the fiscal or educational operation of the relinquishing district, and (3) effective utilization of its educational facilities.

I. Racial Isolation

{¶84} With regard to racial isolation, Ohio Adm.Code 3301-89-02(B)(2) and 3301-89-03(B)(5) respectively call for the hearing officer and board, in deciding whether to grant the transfer request, to evaluate whether the proposed transfer will have "racial isolation implications" and will "cause, preserve, or increase racial isolation." The

undisputed statistical evidence demonstrated the transfer would ever so slightly change BCSD's racial composition by increasing by one-half of one percent the proportion of Black students to other races in BCSD. Based on that statistical evidence, the hearing officer and board recognized the impact would be subtle and found a "de minimis racial isolation impact" that, because it is negative, disfavors the proposed transfer. On appeal, as in the common pleas court, appellants attack the evidentiary support for finding a de minimis racial impact and argue that a de minimis impact on racial composition is legally insufficient to justify denying a school transfer petition.

{¶85} Characterizing appellants' challenge as purely legal, the majority concludes the hearing officer and board acted contrary to law in basing their denial of the transfer petition on a de minimis change in BCSD's racial *composition*, rather than an increase in racial *isolation*. Positing that racial composition is distinct from and does not "ipso facto" affect racial isolation, the majority concludes this court's precedent and Ohio Adm.Code 3301-89-02(B) and 3301-89-03(B) contemplate evaluation of only racial *isolation*, not racial *composition*. In support, the majority points to the court's decision in *Schreiner v. Dept. of Edn.* (Oct. 28, 1999), Franklin App. No. 98AP-1251. The majority characterizes *Schreiner's* holding as stating that "where (as here) the evidence supports a finding that the proposed transfer would have only a de minimis impact on the racial composition of the relinquishing school district, this is legally insufficient to support denial of the transfer." (Opinion, ¶60.)

{¶86} In evaluating whether "racial isolation implications" attend a proposed transfer, Ohio Adm.Code 3301-89-02(B)(2) expressly requires the following to be considered: "(a) What is the percentage of minority students in the relinquishing district?

(b) What is the percentage of minority students in the acquiring district? (c) If approved, would the transfer result in an increase in the percentage of minority pupils in the relinquishing district?" Because the administrative code provision specifically requires consideration of evidence regarding racial composition in evaluating racial isolation implications, racial composition is, as a matter of law, at least a *component* of one or both of the administrative code factors that relate to "racial isolation," factors that, if applicable, are to be weighed and balanced with other applicable factors in the board's decision on whether to grant a transfer request.

{¶87} Here, in my view, the hearing officer rightfully noted the difficulty of defining and evaluating the amorphous concept of "racial isolation." Following a thoughtful, extensive discussion of the topic, he ultimately "[used] only the [racial composition] numbers to judge" the effect of the proposed transfer on racial isolation. (May 20, 2005 Report and Recommendation, 18-20.) Because the hearing officer's analysis was consistent with Ohio Adm.Code 3301-89-02(B)(2), he did not err as a matter of law in using the statistical evidence concerning a change in BCSD's racial composition as the basis for finding BCSD would sustain a "de minimis racial isolation impact" if the transfer were approved.

{¶88} Indeed, the hearing officer's analysis and conclusion on this issue were consistent with this court's decision in *Schreiner*. In *Schreiner*, this court concluded a proposed transfer that caused a .028 percent increase in the minority percentage at the relinquishing school district supported a finding of de minimis racial impact. In view of the administrative regulations and this court's precedent, racial "composition" is a valid consideration in evaluating racial isolation implications.

{¶89} Notwithstanding my conclusion that the hearing officer and board appropriately relied on racial composition evidence in determining whether racial isolation implications are present, the pertinent question to be resolved in appellants' claimed error is more fundamental. It asks whether the decisions of the hearing officer and board to deny appellants' transfer request can be lawfully based, in part, on one or two administrative code factors, which in this instance happen to relate to racial isolation, that are found to impact minimally, to be negative and to disfavor transfer. In my opinion, the answer to the question is that the board's decision to deny the proposed transfer based, *in part*, on one or two factors that are found to have a *de minimis* racial impact is not contrary to law and this court's precedent where, as here, other legally sufficient and legitimate grounds support the board's decision.

{¶90} In *Schreiner*, on which the majority relies, this court determined "the trial court abused its discretion in finding that the Board's decision was supported by reliable, probative, and substantial evidence and in accordance with law." *Schreiner*, *supra*. Explaining, *Schreiner* stated that "only two of the four specified grounds (the fiscal and racial impact of the transfer) are legitimate factors weighing against the transfer in this case." *Id.* Because in *Schreiner* the evidence only supported a "finding that the fiscal and racial impact would be *de minimis*," *Schreiner* determined "that neither of these grounds, alone or together, are legally sufficient to support the decision of the Board to deny the transfer." *Id.* In reversing the decision of the common pleas court and directing it to enter judgment reversing the board's order that denied the transfer, this court in *Schreiner* concluded "the four stated grounds relied upon by the Board cannot support its decision to deny the transfer in this case. We find that the *de minimis* racial effect, a minimal fiscal

effect, a neutral conclusion * * * and an invalid presumption * * * do not, as a matter of law, provide a legally sufficient basis to deny the transfer in this case." *Id.*

{¶91} *Schreiner*, then, simply and appropriately determined the board's decision regarding a proposed transfer must have some legally sufficient and legitimate ground or grounds to support it, grounds that have more than a de minimis or minimal effect. In *Schreiner*, no such legally sufficient ground existed. In contrast to *Schreiner*, five legally sufficient and legitimate grounds support the board's decision here, even if the two racial impact grounds that are de minimis in nature are ignored.

{¶92} As the common pleas court in this case correctly observed, the factors involving racial implications of the transfer were merely part of the panoply of administrative code factors the board considered and relied upon in denying the proposed transfer. The common pleas court also appropriately recognized, at least tacitly if not explicitly, that even if the board erred in relying on grounds that were de minimis and therefore legally insufficient to support its decision, any such error would be harmless because other legally sufficient grounds support the board's decision to deny the transfer. Because neither the board's decision nor the common pleas court's judgment affirming that decision is contrary to this court's holding in *Schreiner* or is otherwise contrary to law, I disagree with the majority's conclusion that appellants' first assignment of error must be sustained "insofar as appellants challenge [the] basis for denial as being contrary to law." (Opinion, ¶62.)

II. Detrimental Impact on the Fiscal or Educational Operation of the Relinquishing District

{¶93} Next, I disagree with the way the majority characterizes the hearing officer's and board's findings and conclusions regarding the "detrimental impact" factor contained in Ohio Adm.Code 3301-89-02(B)(9). The majority asserts the hearing officer and board found, contrary to law, that "any financial loss at all * * * is significant enough to stand in the way of transfer." (Emphasis sic.) (Opinion, ¶54.) According to the majority, the hearing officer and board further erred, as a matter of law, by failing to make a finding about how BCSD's financial loss would detrimentally affect BCSD and support denying the proposed transfer. Id.

{¶94} The record reflects the hearing officer carefully reviewed and cited to extensive evidence in the record concerning the amount and impact of BCSD's financial losses. Specifically, the hearing officer considered a 1,032-page transcript and over 2,000 pages of documentation for his initial report and recommendation, and then considered an additional 327-page transcript and approximately 5,000 pages of new documentation for his final report and recommendation. (May 20, 2005 Report and Recommendation, 11, fn. 2; Oct. 25, 2006 Report and Recommendation, 3.)

{¶95} In his initial report and recommendation, the hearing officer cited to supporting evidence, including testimony from appellants' expert Lowell Davis. In doing so, the hearing officer noted "Walton Hills concedes that the transfer would have an adverse impact upon the functioning of the BCSD by depriving the BCSD of approximately \$4,000,000 of annual tax monies derived from real estate taxes in the village of Walton Hills." (May 20, 2005 Report and Recommendation, 15-16.)

{¶96} Consistent with Davis' testimony about projected economic troubles to BCSD that would follow a transfer, the hearing officer found that "[a]bsent a replacement for this tax money, it is foreseeable that BCSD would be required to make significantly detrimental modifications to the educational programming now in place" and "would be immediately forced into enacting some sort of extreme fiscal measures to address the expected loss of real property tax monies." (May 20, 2005 Report and Recommendation, 14-15.) The hearing officer also noted the nature of the harm to BCSD from its loss of revenue, including closing facilities, reducing educational programming, and implementing staff and faculty cutbacks. *Id.* at 22. In support, the hearing officer cited to testimony from Mary Ann Nowak, the Treasurer for BCSD, who "detailed the financial impact the proposed transfer would have upon the BCSD." Among the items were (1) cuts to a summer school program that BCSD considered a vital part of its efforts to prepare students for state-mandated proficiency tests; (2) scaling back vocational services and technology training for students; (3) curtailing or eliminating funding for extracurricular activities; (4) reductions in transportation; (5) reductions in programs for special needs students; and (6) teacher and staff layoffs.

{¶97} In his final report and recommendation, the hearing officer incorporated by reference his initial report and recommendation, including the findings regarding the financial impact of the proposed transfer. He also discussed and cited to the new evidence presented at the second hearing on remand, detailing the financial impact of the proposed transfer on the BCSD and CHLSD school districts. The hearing officer did not state he accepted all of the testimony of Todd Puster, appellants' expert at the remand hearing. Nonetheless, as the majority points out, the hearing officer accepted Puster's

testimony that under a "*best-case scenario* * * * BCSD would lose nearly seven million dollars (\$7,000,000) over the first five years * * * even after the implementation of SB 321"; the majority calculates the loss at "an average of \$1.4 million per year." (Emphasis added.) (Oct. 25, 2006 Report and Recommendation, 5-6; Opinion, ¶39.)

{¶98} The hearing officer also accepted Puster's testimony that BCSD would save \$600,000 per year in not having to educate the Walton Hills students that currently attend BCSD schools. BCSD thus would sustain a net revenue loss of approximately \$4 million over the first five years following transfer. After making the findings concerning BCSD's revenue losses following the transfer, the hearing officer ultimately concluded that the "requested transfer will cause substantive harm" and "impose a significant detrimental financial impact" upon BCSD. (Oct. 25, 2006 Report and Recommendation, 5, 8.)

{¶99} In my view, the hearing officer made the necessary, pertinent findings, supported by legally sufficient evidence, regarding the proposed transfer's "detrimental impact" on BCSD. I strongly disagree with the majority's assertion that the hearing officer and board either presumed, found or concluded, contrary to law, that "*any* financial loss at all" to BCSD would be significant enough to stand in the way of the proposed transfer. I also strongly disagree with the majority's contention that the hearing officer and board failed to make any findings concerning how BCSD's financial loss would detrimentally affect BCSD's fiscal or educational operations.

{¶100} I further disagree with the majority's resolution of the first assignment of error because, as support for its conclusions, the majority relies on a number of cases that are based on distinguishable factual premises. In *Bartchy and Crowe v. State Bd. of Edn.* (Oct. 26, 1999), Franklin App. No. 99AP-78, this court reversed the board's decision

to disapprove the proposed transfers in part because the board expressly found that "any" transfer would be detrimental to the fiscal or educational operation of the transferring district. The record in those cases, however, contained neither evidence regarding the amount or the effect of the financial loss nor any finding as to how the loss of income would detrimentally affect the transferring district. In *Levey v. State Bd. of Edn.* (Feb. 28, 1995), Franklin App. No. 94APE08-1125, this court, like the common pleas court, reversed the board's decision where, even though none of the administrative code factors disfavored the transfer, the board denied the proposed transfer; this court concluded the board ignored or gave little consideration to evidence and factors that supported the transfer.

{¶101} Here, unlike *Bartchy*, *Crowe*, and *Levey*, the hearing officer made pertinent and appropriate findings, supported by legally sufficient evidence, concerning the amount of BCSD's financial losses and how they would detrimentally affect BCSD's fiscal and educational operations. Those findings, in turn, served as the predicate for his ultimate conclusions that the "requested transfer will cause substantive harm" and "impose a significant detrimental impact" upon BCSD. In sum, the board's denial of the transfer based on the transfer's "detrimental impact" to BCSD is not contrary to law, is supported by reliable, probative, and substantial evidence, and was properly affirmed in the common pleas court.

III. Effective Utilization of Its Educational Facilities

{¶102} Finally, I disagree with the majority's determination that the board erred, as a matter of law, in denying the transfer petition because the board concluded, under Ohio Adm.Code 3301-89-03(A)(10), the transfer would result in the "ineffective utilization" of

BCSD's educational facilities. In sustaining appellants' claimed error on this issue, the majority asserts, "Certainly, in cases where the referee makes an evidentiary finding correlating a district's projected revenue loss with projections about ineffective utilization of the district facilities, it would not be contrary to law to conclude that the proposed transfer would cause the district's students to ineffectively utilize the district's resources. But here, the referee made no such finding." (Opinion, ¶69.)

{¶103} Contrary to the majority's assertion that "the referee made no such finding" correlating BCSD's projected revenue loss with ineffectively utilized facilities, the hearing officer did so. He cited to evidence and made findings in his report and recommendation regarding the amount and effects of BCSD's projected revenue loss following the requested transfer, including his specific findings under Ohio Adm.Code 3301-89-03(B)(10). With that premise, he stated "[i]t is wholly foreseeable that the loss of the Walton Hills tax monies would cause the closing of facilities, reduced educational programming, and staff and faculty cutbacks, and other curtailments damaging to the district students. Such a response to the loss of the Walton Hills tax monies, wholly predictable and necessary, would grossly hinder the effective utilization of BCSD educational facilities." (May 20, 2005 Report and Recommendation, 22.)

{¶104} In my view, those remarks of the hearing officer conclusively demonstrate he made the necessary, pertinent findings concerning the effective utilization of BCSD's educational facilities, as Ohio Adm.Code 3301-89-03(B)(10) requires. Moreover, the hearing officer appropriately correlated BCSD's projected revenue losses with projections about ineffective utilization of its facilities. Because the hearing officer's and board's findings on the issue of "effective utilization" are not contrary to law and are supported by

reliable, probative, and substantial evidence in the record, I disagree with the majority that appellants' first assignment of error should be sustained as it relates to "ineffective utilization."

{¶105} In the final analysis, the hearing officer and board in denying the proposed transfer applied the proper standards, carefully considered the extensive evidence in the record, weighed the applicable administrative code factors, and made appropriate findings and conclusions based upon the evidence. Because the board's decision is supported by reliable, probative, and substantial evidence and is in accordance with law, the common pleas court had no basis to substitute its judgment for that of the board; nor do we. Because the majority in effect does so, I respectfully dissent.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

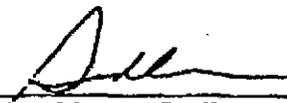
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| Brian P. Spitznagel et al., | : | |
| Plaintiffs-Appellants, | : | |
| v. | : | No. 07AP-757 |
| State Board of Education et al., | : | (C.P.C. No. 06CVF-12-17119) |
| Defendants-Appellees. | : | (REGULAR CALENDAR) |

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on September 30, 2008, appellants' first assignment of error is sustained in part and overruled in part, the second assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court with instructions to vacate the board's decision and to remand the cause to the board for issuance of a new decision on the transfer petition that is in accordance with law and consistent with said opinion. Costs shall be assessed against appellees.

SADLER, McGRATH, and BRYANT, JJ.

By 
Judge Lisa L. Sadler