

In the  
**Supreme Court of Ohio**

BRIAN SPITZNAGEL, et al., : Case No. 09-0015  
: :  
Plaintiffs-Appellants, : On Appeal from the  
: Franklin County  
v. : Court of Appeals,  
: Tenth Appellate District  
STATE BOARD OF EDUCATION, et al., :  
: Court of Appeals Case  
Defendants-Appellees. : No. 07AP-757  
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**MEMORANDUM IN OPPOSITION OF JURISDICTION  
OF APPELLEE STATE BOARD OF EDUCATION**

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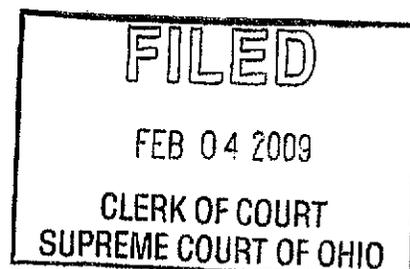


TABLE OF CONTENTS

Page

TABLE OF CONTENTS .....i

INTRODUCTION..... 1

STATEMENT OF THE CASE AND FACTS .....3

A. Ohio law directs the State Board of Education to evaluate proposed territory transfers by assessing a proposed transfer’s effects upon, among other things, the financial and educational operation of the school districts. ....3

B. The State Board adopted the hearing officer’s recommendation, which found a harmful impact upon the fiscal and educational operations of the Bedford School District. ....4

C. The court of common pleas affirmed the State Board’s denial of transfer, and the appeals court initially reversed the Board.. ....6

D. On reconsideration, the appeals court reversed itself in light of *Bartchy II* and affirmed the Board’s denial of the transfer.....7

THIS CASE IS NOT OF PUBLIC AND GREAT GENERAL INTEREST .....8

A. The Court in *Bartchy II* recently explained the standards of review and burdens of proof in territory-transfer cases, so it need not revisit those issues here..... 8

B. The issue of revenue loss does not warrant review. ....9

C. The purported racial issue was never a major part of the case, and it does not warrant review ..... 10

D. The State Board’s previous, now-withdrawn appeal of the Tenth District’s first decision does not make the new decision worthy of review. .... 11

ARGUMENT IN OPPOSITION TO APPELLANTS' PROPOSITIONS OF LAW ..... 12

**Appellee State Board's Proposition of Law No. 1:**

*The State Board may consider a school district's loss of revenue as part of assessing a proposed territory transfer under Ohio Administrative Code 3301-89-02 without making specific findings quantifying the harm resulting from the revenue loss. .... 12*

**Appellee State Board's Proposition of Law No. 2:**

*The State Board's consideration of racial isolation, as part of the multi-factor balancing test that applies to potential territory transfers, is constitutional. .... 15*

CONCLUSION ..... 15  
CERTIFICATE OF SERVICE.....unnumbered

## INTRODUCTION

This case does not warrant review, as it involves the application of now-settled law to a specific set of facts, and it involves a routine case of deference to agency expertise. The case involves a petition to transfer territory from one school district to another, a topic that this Court recently addressed in *Bartchy v. State Bd. of Educ.*, 120 Ohio St.3d 205, 2008-Ohio-4826. In *Bartchy*, the Court affirmed the State Board of Education's denial of such a transfer. Both the plurality and concurring opinions stressed that petitioners seeking a transfer bear the burden of showing an entitlement to transfer, and if they fail to meet that burden, the State Board may deny it. *Id.* at ¶¶ 87, 94-95, 98. The Board need not "justify" a denial, and courts should not reweigh the facts to reverse such a denial. Appellants here, Brian Spitznagel et al. ("Spitznagel"), offer no sound reason for the Court to review this case and rehash this same ground.

Spitznagel's main argument for review is that the State Board (and the other now-Appellee, Bedford School District) initially sought review in this case, as the Tenth District had ruled the other way before reconsidering and reversing itself—but that bump in the road does not make the current appeal worthy of review. The Tenth District initially reversed the Board's decision, but in an accident of timing, the Tenth District issued its first decision the same day that this Court issued *Bartchy*. See *Spitznagel v. State Bd. of Educ.* (10th Dist.), 2008-Ohio-5059 ("*Spitznagel I*"). Thus, the Tenth District did not have *this* Court's *Bartchy* guidance. Worse yet, the Tenth District's first *Spitznagel* decision relied heavily upon its own *Bartchy* decision, which this Court reversed. See *id.* at ¶¶ 51-55, citing *Bartchy v. State Bd. of Educ.* (10th Dist.), 170 Ohio App.3d 349, 2007-Ohio-300 (*Bartchy I*). So it is not surprising that the Tenth District reversed itself, once it followed this Court's *Bartchy* guidance (*Bartchy II*) rather than its own earlier, now-defunct *Bartchy* decision. *Spitznagel v. State Bd. of Educ.* (10th Dist.), 2008-Ohio-6080 ("*Spitznagel II*"). The State Board's view is thus perfectly consistent in saying that the earlier

decision would have warranted review, but this decision does not, as the earlier *Spitznagel* decision marked a *conflict* between the Tenth District and this Court, while now the lower court has perfectly followed this Court's precedent.

Not only does the newer *Spitznagel* decision align with this Court's *Bartchy* precedent, but also, the decision now affirms rather than reverses the State Board's decision; and that factor, too, makes the case no longer worthy of review. As the Court has explained, R.C. 119.12 requires deference to agency decisions in general, and in particular, it requires deference to the State Board's decisions on territory transfers. *Bartchy*, 2008-Ohio-4826 at ¶¶ 34-43. Thus, it is not surprising that court decisions reversing an agency are more likely to warrant review, while decisions affirming an agency are not as likely to need review.

*Spitznagel* also stresses that *Bartchy* involved a plurality opinion and a concurrence, with no majority, but that does not call for review. That is because Justice Lanzinger's concurring opinion agreed with the critical points that the petitioners bear the burden and that appeals courts should not reweigh the facts. *Bartchy* at ¶ 98 (Lanzinger, J., concurring). That alone dooms *Spitznagel* on both the alleged need for review and on the merits, as his jurisdictional memorandum focuses on attacking the Board's reasons for denying his petition, but he never explains what facts, if any, show that he demonstrated an entitlement to transfer—and he cannot.

Finally, *Spitznagel* seeks to raise the issue of considering race, but that issue does not warrant review here. The transfer here was denied almost fully for financial reasons and for petitioners' failure to meet their burden, so race played little if any role. See *Spitznagel II* at ¶ 9.

In sum, nothing about this case warrants review, so the Court should deny jurisdiction and let the lower court's opinion, which is consistent with the Court's recent *Bartchy* decision, remain in place.

## STATEMENT OF THE CASE AND FACTS

**A. Ohio law directs the State Board of Education to evaluate proposed territory transfers by assessing a proposed transfer's effects upon, among other things, the financial and educational operation of the school districts.**

Ohio law outlines, in both statutory and regulatory provisions, a process for proposing changes to school districts' boundaries. R. C. 3311.24(A) allows residents of a school district to petition for a transfer of their part of the district to another school district. The residents must obtain signatures from 75% of the electors in the relevant territory, and they must present the petition to the board of their current school district. That district forwards the petition to the State Board, which then reviews the petition, following a process outlined in O.A.C. 3301-89-02.

The State Board starts by sending each affected district—that is, the district that would lose the territory and the district that would gain it—a questionnaire inquiring into seventeen specific factors.<sup>1</sup> The questions focus exclusively on the proposal's impact upon the districts involved. See O.A.C. 3301-89-02(B)(1) through (17). The districts send their responses to the Ohio Department of Education, which analyzes the responses for the State Board. O.A.C. 3301-89-02(C) and (D). If the State Board decides that the proposal warrants further consideration, it allows the interested parties to be heard in an administrative hearing. The hearing officer makes a recommendation to the Board. The parties may respond to the recommendation, and the Board then decides whether to approve or reject the proposed transfer. O.A.C. 3301-89-02(E) through (I).

The State Board decides the issue by applying the factors listed in the Ohio Administrative Code. Section 3301-89-01(F) sets out the ultimate criterion while sections O.A.C. 3301-89-03(A) and (B) set forth more specific criteria, but those factors all ultimately point to the

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<sup>1</sup> Although not relevant here, O.A.C. Code 3301-89-02(B) now provides twenty-five factors.

educational impact on all the students involved, including all the students in *both* districts. In sum, Ohio law focuses on students' educational needs, and it considers financial and operational effects on the school districts as one way to assess education impacts.

Per R.C. 119.12, State Board decisions may be appealed only to the Franklin County Court of Common Pleas, and from there to the Tenth District Court of Appeals and then to this Court.

**B. The State Board adopted the hearing officer's recommendation, which found a harmful impact upon the fiscal and educational operations of the Bedford School District.**

In March 2004, Bedford School District ("Bedford") sent the Ohio Department of Education a petition from the owners of properties in the Village of Walton Hills requesting that their properties be transferred under R.C. 3311.24(A) from Bedford to the Cuyahoga Heights School District ("Cuyahoga Heights"). At an initial hearing to evaluate the merits of the proposed transfer, the property owners and Bedford presented extensive evidence; Cuyahoga Heights did not participate. The hearing officer recommended denying the transfer. He concluded that certain of the O.A.C. 3301-89-02(B) factors weighed against the proposed transfer, including the following: (1) the proposed transfer would increase racial isolation; (2) the proposed transfer would be fiscally detrimental to Bedford and result in ineffective utilization of Bedford facilities; and (3) the acquiring district's resulting educational burden would not be commensurate with the economic windfall it would reap as a result of the proposed transfer.

Notably, the hearing officer concluded in his May 20, 2005 Report that "the main factor militating against the transfer is the financial detriment which will clearly and irrefutably be foisted upon the Bedford [School District]. Correlatively, the fiscal resources to be transferred to the Cuyahoga Heights [School District] would not be commensurate with the educational responsibilities assumed." The hearing examiner explained how the loss of tax revenue would impact Bedford, by summarizing the testimony of Mary Ann Nowak and the property owners'

own expert witness, Lowell Davis. According to the testimony, Bedford's loss of tax revenue would result in inescapable cuts and lay offs. As remediation measures, staff would be laid off and the school district might find itself in fiscal emergency. In addition, summer school programs would likely be cut, and vocational services and technology training for students would be eliminated, along with funding for extracurricular activities, busing, and special needs programs. Accordingly, in the May 20, 2005 Report, the hearing examiner noted:

It 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.

The State Board considered the transfer during its July 2005 meeting. Due to intervening legislation, however, the State Board did not act on the proposed transfer. Instead, it remanded the matter to the hearing officer to reconsider the financial impact of the transfer on both districts in light of the new legislation. At that hearing, which occurred in April 2006, property owners and Bedford again presented evidence of the financial impact of the proposed transfer on Bedford and Cuyahoga Heights, this time with a focus primarily on the tangible personal property taxes. The undisputed evidence indicated that the new legislation would *increase* the adverse financial impact that Bedford would incur from the proposed transfer and the windfall that the Cuyahoga Heights district would obtain.

This scenario played out again when the Governor signed into law yet another piece of legislation, and the hearing officer allowed another round of briefing regarding that statute's financial impact on the proposed transfer. Ultimately, in his October 25, 2006 Report on Remand, the hearing officer found that "[e]ven relying upon only the [Property Owner's] evidence and expert testimony, the proposed transfer would create a significant financial

detriment to the BCSD.” The other reasons for denying the transfer, which had been expressed in the May 20, 2005 Report, remained unchanged. The State Board accepted the hearing officer’s First and Second Reports denying the proposed transfer.

**C. The court of common pleas affirmed the State Board’s denial of transfer, and the appeals court initially reversed the Board.**

The property owners unsuccessfully appealed to the Franklin County Court of Common Pleas. Their assignments of error focused on the sufficiency of the evidence produced at the hearing. Essentially, the property owners argued that the hearing officer failed to interpret the evidence in their favor. The common pleas court analyzed the property owners’ arguments and, in each instance, found that reliable, probative, and substantial evidence supported the State Board’s adoption of the hearing officer’s reports and recommendations.

On appeal, the Tenth District initially reversed both the trial court and the State Board. The court reached that result because, in its view, “the referee made errors of law that render[ed] the board’s decision contrary to law.” *Spitznagel I* at ¶ 1. The appeals court said that the hearing officer incorrectly presumed that a relinquishing district’s loss of revenue alone resulted in ineffective utilization of its educational facilities, *id.* at ¶ 69; that a relinquishing district’s loss of revenue equated to a significant detrimental financial impact on the district, *id.* at ¶ 54; and that a change in racial composition causes racial isolation, *id.* at ¶¶ 60, 61.

In examining Bedford’s loss of tax revenue as a result of the transfer, the Tenth District relied on its earlier *Bartchy I* decision and explained that the question before the court was whether the hearing officer erred in recommending a denial of the transfer based on loss of revenue alone, without findings regarding *how* detrimental the amount lost would be to Bedford. *Id.* at ¶ 49. The appeals court ruled that “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.” *Id.* at ¶ 53 (citing *Bartchy I* at ¶ 33).

The court of appeals reversed the common pleas court and remanded the matter to the common pleas court with instructions to vacate the State Board’s decision and to remand the matter to the Board for it to issue a new decision. *Id.* at ¶ 78. Notably, the appeals court’s decision, which relied on its own *Bartchy I* decision, was issued on Sept. 30, 2008—the same day that this Court issued *its Bartchy II* decision, reversing the Tenth District.

**D. On reconsideration, the appeals court reversed itself in light of *Bartchy II* and affirmed the Board’s denial of the transfer.**

The State Board moved the Tenth District to reconsider, explaining that the opinion below conflicted with the Ohio Supreme Court’s opinion in *Bartchy II*. On November 20, 2008, the Tenth District granted the motion for reconsideration and affirmed the State Board’s decision. Specifically, the Tenth District reversed its prior findings of legal error. *Spitznagel II*, 2008-Ohio-6080 at ¶11. In doing so, the Tenth District explained how this Court’s *Bartchy II* decision warranted greater deference to the Board than *Bartchy I* had allowed, including on the specific issue of loss of revenue. The appeals court noted “that the board *is* within its authority to weigh loss of revenue into its overall balancing test, without making specific findings quantifying the harm.” *Spitznagel II* at ¶ 7, citing *Bartchy II* at ¶¶ 82-83. It recognized that *Bartchy II* “articulated a mandate for appellate deference to the board’s consideration of the effects of projected revenue loss that would accompany a requested transfer.” *Spitznagel II* at ¶ 8. It then determined that its decision to reverse the State Board could not stand based on the sole remaining error regarding racial implications, and accordingly vacated its decision in *Spitznagel I*.

Spitznagel now asks this Court to review and reverse the Tenth District’s judgment.

## THIS IS NOT A CASE OF PUBLIC AND GREAT GENERAL INTEREST

This case does not warrant review, as it involves the application of the Court's *Bartchy II* decision to another set of facts. To be sure, the case did warrant review when the Tenth District, without benefit of *Bartchy II*, initially reversed the State Board. But now that the appeals court has fixed the problem, the decision below perfectly reflects this Court's instructions to defer to the Board's expertise and to hold petitioners to their burden. None of Spitznagel's other purported reasons for review withstand scrutiny, as detailed below, so the Court should deny review.

**A. The Court in *Bartchy II* recently explained the standards of review and burdens of proof in territory-transfer cases, so it need not revisit those issues here.**

This Court's plurality opinion in *Bartchy II* reiterated that property owners carry the burden of proving that a transfer should be approved. *Bartchy II*, 2008-Ohio-4826 at ¶ 87. The lead opinion also reiterated that courts of common pleas and courts of appeals must afford robust deference to State Board decisions on transfer requests, and may overturn such a decision only if the challenger can show that the Board abused its discretion. *Id.* at ¶ 95; see also *Bd. of Educ. of Rossford Exempted Vill. Sch. Dist. v. State Bd. of Educ.* (1992), 63 Ohio St. 3d 705, 707. Justice Lanzinger's concurrence, although it of course did not join the plurality's full opinion, agreed with the main points regarding petitioners' burden of proof and the need for deference. *Bartchy II* at ¶ 98 (Lanzinger, J., concurring) (noting that petitioners "failed to carry their burden" and that the appeals court improperly "substituted its judgment for the trial court.>"). Thus, *Bartchy II* established a majority view on those core principles, and differences in details do not help Spitznagel here.

The appeals court's decision in *Spitznagel II* shows that it based its decision on these core principles that garnered majority support, i.e., the burden of proof and the need for deference.

Specifically, the Tenth District noted that *Bartchy II* “articulated a mandate for appellate deference” to factors such as revenue loss. *Spitznagel II*, 2008-Ohio-6080 at ¶ 8. And while the *Bartchy II* concurrence did not specify revenue loss as a factor on which to defer, it noted that the appeals court had “substituted its judgment for the trial court,” and the core issue on which the appeals court had done so was the revenue-loss issue. Equally important, the deferential standard of review existed long before *Bartchy II*, and it was only the appeals court’s decisions in *Bartchy I* and *Spitznagel I* that were the deviation. See *Rossford Exempted Village School Dist. v. State Bd. of Edn.* (1989), 45 Ohio St.3d 356, syllabus; *Levey v. State Bd. of Edn.* (10th Dist.), 1995 Ohio App. Lexis 765

Thus, the law is settled on the core issues of the petitioners’ burden and the deferential standard of review, and *Spitznagel* offers no sound reason to revisit these principles.

**B. The issue of revenue loss does not warrant review.**

*Spitznagel* claims that review is necessary to resolve alleged uncertainty about the specific issue of whether the State Board needs to have detailed evidence regarding how revenue loss will lead to financial or operational problems for the district that will lose territory. See *Spitznagel* Jur. Mem. at 3-4. In particular, *Spitznagel* claims that this Court’s *Bartchy II* decision created uncertainty about the continued vitality of pre-*Bartchy* cases such as *Crowe v. State Bd. of Educ.* (10th Dist. 1999), 1999 Ohio App. Lexis 4993; he says that it is unclear whether the State Board can conclude, based solely upon a loss of funds, that a transfer will be detrimental to the fiscal and educational operation of a relinquishing district.

First, as Justice O’Connor’s lead opinion in *Bartchy II* explained, *Crowe* involved different facts, such as the key factor that the receiving district supported the transfer, and the hearing officer there had *recommended* the transfer. *Bartchy II* at ¶ 81.

Second, Spitznagel's approach to this issue demonstrates starkly that he does not fully appreciate *Bartchy II*'s reminder that the Board need not justify a denial, but instead, petitioners bear the burden to show entitlement to a transfer. Nowhere does he explain how he meets this burden, let alone in a way that overcomes the deference to the Board and the derivative deference to the court of common pleas. Without such a showing, the Court need not revisit how much evidence the Board has on the other side of the scale. As Justice O'Connor's lead opinion explained, even scant evidence for denial is enough when the petitioners' evidence in favor of a transfer is too weak to meet their burden. *Bartchy II* at ¶ 81.

Third, this case does not provide a good vehicle for further addressing when revenue loss translates into evidence of detrimental effects on the relinquishing district, because here, the State Board specifically found evidence of such effects. The appeals court specifically cited and relied upon the hearing officer's findings regarding likely closing of facilities and other harmful effects. *Spitznagel II*, 2008-Ohio-6080 at ¶ 8. The court also noted that *Bartchy II* mandated deference on such factual conclusions, and it further noted that the evidence of loss in *Spitznagel* was far greater than it had been in *Bartchy*. *Spitznagel II* at ¶¶ 8-9.

**C. The purported racial issue was never a major part of the case, and it does not warrant review.**

Spitznagel urges the Court to use this case to review the extent to which race may be considered by the State Board in transfer cases, see *Spitznagel Jur. Mem.* at 5-6, but that issue does not warrant review at all, and especially not in this case. The Court has repeatedly explained that courts should avoid answering constitutional questions unless it is absolutely necessary to do so. See, e.g., *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, ¶ 9; *Norandex, Inc. v. Limbach* (1994), 69 Ohio St.3d 26. Here, the alleged race issue never tilted the balance of decision-making at the Board or in the courts, and further, any use of race in territory-

transfer decisions is not the same issue that was under consideration in the United States Supreme Court case that Spitznagel seeks to rely upon.

First, the appeals court explained that this issue was a minor one, as the fiscal issues predominated, and the Board had found that neither district faced racial isolation, and most likely neither would face it even with the transfer. As the court explained:

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.

See *Spitznagel II*, 2008-Ohio-6080 at ¶ 9. Indeed, Spitznagel raised the issue only in his reply brief and at argument in the appeals court, so it was never part of the common pleas court's review, and it was not part of the appeals court's reasoning. It should not premiere in this Court.

And, as detailed in the merits argument below, Spitznagel's reliance on the United States Supreme Court's recent *Parents Involved* decision is misplaced. See Spitznagel Jur. Mem. at 6, citing *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), 127 S. Ct. 2738, 2749. That case involved assignment of *individual students* to different buildings within a district based on race, not broader institutional decisions such as district line-drawing or building placement. As Justice Kennedy's concurrence explained, schools are "free to devise race-conscious measures" and may consider race in drawing attendance zones and in making site selections for new schools. Thus, *Parents Involved* is not even implicated in this case.

**D. The State Board's previous, now-withdrawn appeal of the Tenth District's first decision does not make the new decision worthy of review.**

In the end, Spitznagel's strongest argument for review is not anything in the Tenth District's second decision, but is the mere fact that the State Board (and Bedford) previously filed jurisdictional memoranda in this Court after the first decision. See Spitznagel Jur. Mem. at

1, 3-4. He relies on the simple premise that if the decision was of great general interest when the Board lost, it must also be of great general interest now that the Board has won. But he is wrong.

As noted above, however, this asymmetry makes perfect sense. The appeals court's first decision conflicted with *Bartchy II*; the coincidental timing left the appeals court without that new guidance. But a decision *following* this Court's precedent does not need review, while a decision conflicting with this Court—or, as was the case at first, a decision that did not consider this Court's latest precedent at all—would warrant review. In addition, court decisions that affirm agency decisions do not implicate the same concerns as court reversals of agency decisions. That is the nature of the system, and Spitznagel's claim that the case remains equally worthy of review is just wrong.

For all these reasons, the Court should deny review.

## ARGUMENT

### **Appellee State Board's Proposition of Law No. 1:**

*The State Board of Education may consider a school district's loss of revenue as part of assessing a proposed territory transfer under Ohio Administrative Code 3301-89-02 without making specific findings quantifying the harm resulting from the revenue loss.*

Spitznagel insists that the State Board cannot conclude that a transfer will be detrimental to the fiscal and educational operation of a relinquishing district under O.A.C. 3301-89-02(B)(9) based solely upon the alleged loss of funds. He further insists that the Tenth District established this standard in *Crowe*, 1999 Ohio App. Lexis 4993, and that the appeals court's decision below in *Spitznagel II* improperly undercuts *Crowe*. But this Court explained, in *Bartchy II*, that *Crowe* did not establish a bright-line rule that mandated a certain evidentiary requirement, to apply in all cases, regarding financial loss. Instead, "each transfer must be decided on its own particular facts under the required wide-ranging balancing test." *Bartchy II*, 2008-Ohio-4826 at ¶ 81. Thus, *Crowe*'s result turned not only on some alleged duty to quantify the harm caused by

revenue loss; instead, *Crowe* turned on all factors, including the receiving district's support of the transfer and the hearing officer's recommendation in favor. *Id.*

In this case, further, although the Board need not have had a specific quantum of evidence, the record shows that the Board did have evidence of a far greater revenue loss than was at issue in *Bartchy*, and the Board further had before it the hearing officer's specific findings of the resulting detrimental effects. Bedford, the losing district, would suffer a loss of tangible personal property tax revenue of nearly \$7 million over the first five years following a transfer. By contrast, *Bartchy* involved four houses' worth of valuation. Here, the hearing officer found that the revenue loss would lead to cuts and layoffs, and the school district might even fall into fiscal emergency. Cuts would likely include reductions in, or elimination of, items such as summer school programs, vocational services, technology training, extracurricular activities, busing, and special needs programs. As the hearing officer concluded in his May 20, 2005 Report:

It 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.

Thus, the State Board did more than find that Bedford would stand to lose revenue. It had before it reliable, probative, and substantial evidence showing *how* the loss would affect Bedford. As the appeals court explained, the Board did not even need that much, as "the board *is* within its authority to weigh loss of revenue . . . without making specific findings quantifying the harm." *Spitznagel II* at ¶7, citing *Bartchy II* at ¶¶ 82-83. But even if the Board needed to meet a higher standard, it did so here.

Spitznagel may be right that some pre-*Bartchy* cases from the Tenth District might no longer be good law, but that is often the case after a new decision from this Court. If Spitznagel

could point to some ongoing *post-Bartchy* confusion in the Tenth District about how to apply *Bartchy*, that might be cause for review. But he cannot. As *Bartchy* explained, the State Board can weigh loss of revenue into its overall balancing test, and so long as there is reliable, probative and substantial evidence of the revenue loss itself it is within the State Board's province to determine how that loss will affect the factors that the board must consider in conducting its balancing test. The ultimate issue of granting or denying a transfer depends not on some isolated standard of the degree of financial loss, but instead, it depends on how that financial issue measures along with *all* the factors weighing for or against transfer. Spitznagel has not shown any legal error related to his alleged pro-transfer factors, so none of his complaints about the weight given to anti-transfer factors even matter.

Lastly, Spitznagel insists that *Bartchy II* will result in a denial of virtually all territory transfers, because almost every transfer reduces funding to the relinquishing district. See Spitznagel Jur. Mem. at 4. But again, that view mistakenly reduces the Board's consideration here—and by comparison, those in *Bartchy*, *Crowe*, and every other case—to this sole factor, but by contrast, all territory transfers involve a balancing of all the relevant factors. Thus, he is wrong in saying all transfers will be denied because all will involve revenue loss to one district. True, that revenue loss will always weigh against transfer, to a greater or lesser degree, but that means only that petitioners must show more pro-transfer evidence to overcome that negative factor. Some petitioners will meet the burden, and some will not, but those fact-specific measurements will vary in every case. And none of that calls into question the common-sense recognition that losing money is not good for the relinquishing district.

**Appellee State Board's Proposition of Law No. 2:**

*The State Board's consideration of racial isolation, as part of the multi-factor balancing test that applies to potential territory transfers, is constitutional.*

The consideration of race in schools can be complicated, so, as noted above, the Court should not use this case to address such an issue, as it was not part of the decisions below. Similarly, even if the Court granted review of this issue now, it would find at the merits stage that it still would not ultimately reach the issue here: once the Court affirms that the Board did not rely on race here, the Court would not have to review whether some hypothetical reliance on race would be unconstitutional. Nevertheless, if the Court somehow could reach the issue, it should find that the consideration of race, as part of a multi-factor balancing test used considering school district territory transfers, does not violate the Ohio or U.S. Constitutions.

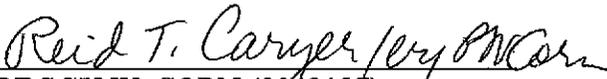
Spitznagel relies solely on one case, *Parents Involved*, but that case is not implicated here. That case involved the assignment of *individual* students based on race, and further, race could be used under the challenged plans as the *sole* criterion. See *Parents Involved*, 127 S. Ct. at 2749. The plurality opinion explained that the use of race alone was unjustified, and it contrasted that with the law school admissions case, *Grutter v. Bollinger* (2003), 539 U.S. 306, 331, which allowed consideration of race as one factor among many. *Id.* at 2753. Also, Justice Kennedy's critical fifth-vote concurrence explained that, unlike with individual assignment decisions, institutional decisions such as drawing attendance zones and selecting sites for new schools may be made in a race-conscious way. *Id.* at 8. Territory transfers are plainly that type of institutional decisions, so Ohio's law is constitutional.

### CONCLUSION

The Court should deny review in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum in Opposition of Jurisdiction of Appellee State Board of Education was served by U.S. mail this 4th day of February, 2009, upon the following counsel:

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