

IN THE SUPREME COURT OF OHIO

Brian Spitznagel, et al.,)	Case No. 09-0015
)	
Appellants,)	On Appeal from the Franklin
)	County Court of Appeals,
v.)	Tenth Appellate District
)	
State Board of Education, et al.,)	Court of Appeals
)	Case No. 07APE-09-757
Appellees.)	
)	

**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF APPELLEE BEDFORD CITY SCHOOL DISTRICT**

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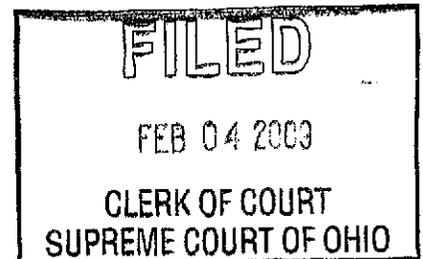


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INTRODUCTION

Because the Court of Appeals in this case correctly applied this Court's binding precedent to clear, specific facts supporting the denial of Appellants' territory transfer request, this case does not warrant review. The Court of Appeals committed no error in affirming the denial of Appellants' transfer request, this case no longer involves an inconsistency between this Court's decision and a decision of the Court of Appeals, and this case does not present a question of public or great general interest. Because the Court of Appeals reconsidered its prior decision in this case, vacated that decision, and issued a new decision in complete conformity with this Court's decision in *Bartchy v. State Bd. of Edn.*, 120 Ohio St. 3d 205, 2008-Ohio-4826, which had been rendered on the same day the Court of Appeals in this case rendered its original decision, no conflict exists between this Court's and the Court of Appeals' precedent, and no issue – of public or great general interest or otherwise – remains for this Court's consideration.

The fact that both Appellees State Board of Education ("State Board") and the Bedford City School District ("Bedford") previously (before the Court of Appeals issued its decision on reconsideration) had sought this Court's review of the earlier Court of Appeals decision does not demonstrate that this case now is one of great general or public interest. As Appellees previously explained in their jurisdictional memoranda, what made the case one of great general or public interest then primarily was the fact that the Court of Appeals' decision starkly conflicted with this Court's decision in *Bartchy* and the fact that that conflict would wreak both administrative and judicial havoc on all school district territory transfer cases. Now that the Court of Appeals resolved that conflict in its decision on reconsideration, this case has become transformed into a case only of interest to the parties.

In addition to having the attribute of not being of public or great general interest, the Court of Appeals' decision possesses another important attribute: correctness. In its decision on

reconsideration, the Court of Appeals correctly affirmed the common pleas court's decision affirming the State Board's denial of Appellants' transfer request. Appellants' arguments to the contrary lack merit. The Court of Appeals correctly followed this Court's precedent in *Bartchy* and concluded that the common pleas court was right to affirm the State Board's denial of the transfer based primarily on the fact that the transfer would result in enormous financial loss to Bedford:

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 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.

* * *

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.

Spitznagel v. State Bd. of Edn., 2008-Ohio-6080, ¶¶ 7-8 (emphasis in original).

Further, Appellants' argument concerning racial composition certainly does not warrant this Court's review or render this case of general or great public interest. First, Appellants did not raise this issue until their reply brief in the Court of Appeals. The issue was not raised at either the administrative level or at the common pleas court level. The argument consequently cannot be raised now. Second, because the Court of Appeals properly recognized that the racial

composition factor “was by no means the primary factor that drove the board’s decision,” the issue certainly does not warrant this Court’s review. *Spitznagel* at ¶ 9. Third, no authority supports Appellants’ contention that consideration of the effects a territory transfer would have on the two affected districts’ racial composition is unconstitutional.

STATEMENT OF THE CASE AND FACTS

This case arises from the request of certain residents of Walton Hills to transfer the territory comprising all of Walton Hills from Bedford to the Cuyahoga Heights Local School District pursuant to R.C. 3311.24. Bedford transmitted the residents’ petition to the State Board, which appointed a hearing officer to conduct a hearing regarding the requested transfer. At that hearing, both the Walton Hills residents and Bedford presented extensive testimony and documentary evidence regarding the State Board’s factors. In May 2005, the hearing officer issued his report and recommendation in which he made several detailed factual findings and concluded that several relevant important factors weighed against the proposed transfer.

The hearing officer found that the fiscal loss to Bedford as a result of the proposed transfer would work a significant detrimental impact on Bedford. The hearing officer considered the sheer enormity of the fiscal loss Bedford would certainly suffer as a result of a transfer, including at least \$4 million in real estate taxes alone annually and in perpetuity. He also considered the detailed evidence Bedford presented demonstrating precisely how the loss of revenue actually would cause Bedford to lay off teachers and staff, cut its vital summer program relied upon by at risk students not intending to pursue post-secondary education, cut transportation services, and cut programs for special needs students.

The hearing officer also found that educational burden shouldered by Cuyahoga Heights would not be commensurate with the economic windfall it would reap as a result of the proposed transfer which would require it to educate only a relatively small number of students.

The hearing officer also found that the Walton Hills residents submitted no evidence regarding Cuyahoga Heights' capacity to absorb the Walton Hills students, Cuyahoga Heights had not participated in the hearing, and, indeed, Cuyahoga Heights has twice voted to reject any transfer, even if approved by the State Board.

The hearing officer concluded that the transfer of the Walton Hills territory which consists primarily of non-minority students would increase the racial isolation of both the territory and of Bedford itself. Over 70% of students attending Bedford are minority students, and over 97% of the student attending Cuyahoga Heights are non-minority.¹

The State Board then considered this matter in July 2005. On the eve of that meeting, the Walton Hills residents contended that the then-pending state budget bill, HB 66, would result in a school funding configuration which would actually provide Bedford with a financial windfall in the event of transfer. The State Board remanded the matter to the hearing officer for a second hearing, this time for the sole purpose of determining the financial impact of HB 66 on the proposed transfer.

At that hearing, the Walton Hills residents and Bedford once again presented evidence of the financial impact of the proposed transfer on Bedford and Cuyahoga Heights, this time with an exclusive focus on tangible personal property taxes, which was the primary focus of HB 66.² Following this hearing, Walton Hills then raised the existence of SB 321, a bill that once again reconfigured portions of the State's tangible personal property reimbursement scheme. The

¹ The hearing officer found that, of the 27 potentially applicable factors, only four innocuous factors actually favored the transfer. Two of the four factors actually are the same factor: the transfer would not result in a district illegally comprising non-contiguous territory (it would not create an island). Another factor "favoring" the transfer was that it would not cause the closure of a high school.

² HB 66 had no effect on the lost real estate tax revenue which the record demonstrated indisputably would amount to \$4 million annually and in perpetuity.

evidence provided by the Walton Hills residents themselves, though, showed that Bedford still would suffer a loss of tangible personal property tax revenue alone -- at the very least -- of nearly \$7 million over the first five years following a transfer. Moreover, the losses could be reduced only by an increase in state funding. In other words, if the requested transfer were to be approved, it would cost the State of Ohio itself millions of dollars indefinitely each year.

In short, it became apparent that, even using numbers that they provided, the Walton Hills residents' projections, which had called for Bedford to actually benefit financially from the transfer, proved completely unrealistic. The evidence showed that Bedford's loss of tangible personal property tax revenue after the passage of HB 66 actually would be *greater* than the loss predicted at the first hearing. The hearing officer therefore issued a second report and recommendation once again properly concluding that the transfer must be denied. The State Board in turn properly denied the proposed transfer. On appeal, the court of common pleas painstakingly reviewed each of the grounds for denial of the transfer, finding that each was based on reliable, substantial, and probative evidence and was in accordance with applicable law.

Notwithstanding the hearing officer's factual findings relating to how and to what extent the undisputed amount of revenue loss would harm Bedford, following its prior decision in *Bartchy*, the Court of Appeals originally concluded that the hearing officer committed legal error by employing "a presumption that any amount of revenue loss alone warrants denial of a transfer petition." *Spitznagel*, 2008-Ohio-5059 at ¶ 76. However, this Court in *Bartchy* explicitly and directly disagreed with that holding relied on by the Court of Appeals:

We first disagree with the court of appeals' initial legal conclusions that there was no evidence of a detrimental impact on CPSD's fiscal or education operation or of harm to CPSD caused by previous transfers. Although the specific evidence on these points was controverted, the hearing officer was within his authority when he concluded that the transfer would undoubtedly affect CPSD detrimentally in some way The hearing officer was not required to ignore these concerns, as

the court of appeals seemed to hold. Rather, the hearing officer was justified in allowing these factors to play at least some role in the overall balancing test as to whether the transfer should be approved. We agree with the trial court's observation that "the windfall to [MCSD] would not be significant, nor likewise would the loss to [CPSD]. Nevertheless, it is still one of the considerations used in the balancing test." CPSD's lack of specific evidence quantifying the harm caused by previous transfers need not prevent the hearing officer from considering harm as a factor.

Bartchy, 2008 Ohio 4826 at ¶¶ 82-83. As a result of this Court's decision in *Bartchy*, both the State Board and Bedford filed motions for reconsideration. The Court of Appeals then granted those motions and brought its decision into conformity with this Court's decision in *Bartchy*.

**THIS CASE DOES NOT PRESENT A
QUESTION OF PUBLIC OR GREAT GENERAL INTEREST**

Because the Court of Appeals corrected its previous decision and conformed its decision to this Court's decision in *Bartchy*, this case is not one of public or great general interest. In its decision on reconsideration, the Court of Appeals recognized and observed appropriate judicial deference to the State Board, which has the expertise and ability to consider and weigh the factors it deems necessary to determine whether or not school district territory should be transferred from one district to another. In this school district territory transfer case, the undisputed record evidence demonstrated that, if the State Board approved the transfer from Bedford to the Cuyahoga Heights Local School District, Bedford necessarily would lose at least \$4 million per year every year in perpetuity in real estate taxes alone and at least an additional \$7 million in tangible personal property taxes in the first five years following a transfer.

The evidence assembled over many days of hearings and thousands of pages of exhibits showed that the amount of revenue Bedford would lose if the transfer were to be approved would cause serious educational and fiscal harm to Bedford's students and would result in an enormous windfall for Cuyahoga Heights. The State Board's hearing officer twice concluded that the circumstances inescapably showed no meaningful relevant factors actually favored transfer and

that the transfer would not be in the students' best interests. Consequently, the State Board denied the transfer. The common pleas court affirmed the denial. The Court of appeals ultimately correctly affirmed the common pleas court's decision

When deciding whether or not to grant a particular transfer request, the State Board considers a variety of factors set out in the regulations it promulgated at O.A.C. 3301-89-02(B) and 3301-89-03(B). The State Board weighs the various factors in order to determine whether or not the transfer is in the affected students' best interests. Then, the State Board's decision is given the important judicial deference inherent in administrative appeals to ensure that the courts do not substitute their judgment for that of the State Board. *See* R.C. 3311.24; R.C. 119.12.

Petitioners like the Walton Hills residents seeking to transfer territory have the burden of proving that the transfer is in the best interests of all affected students. *See Levey v. State Bd. of Edn.* (Feb. 28, 1995), Franklin App. No. 94APE08-1125, 1995 Ohio App. LEXIS 765 at *13-14; *see also Bartchy*, 2008-Ohio 4826 at ¶¶ 78-79. Here, the Court of Appeals concluded that the financial loss which Bedford would experience if a transfer was approved was far less than the loss the relinquishing district would have faced in *Bartchy* and that, like in *Bartchy*, that loss was significant enough to support the State Board's denial of the transfer, particularly in light of the fact that Appellants had not shown how the transfer would be in the best interests of the affected students.

Here, the extensive expert testimony presented by the State Board, Bedford, and Appellees themselves conclusively demonstrated that the proposed transfer would be the most fiscally disastrous transfer in the history of Ohio in terms of actual revenue lost. Bedford further introduced ample, undisputed evidence of precisely how the lost revenue would actually impact the education of its students. The Court of Appeals found that the record evidence and the State

Board's hearing officer's factual findings supported the State Board's denial of the transfer and the common pleas court's decision affirming the denial. Because the Court of Appeals' decision conforms to this Court's decision in *Bartchy*, this case features no error of law and is not one of public or great general interest.

ARGUMENT IN OPPOSITION TO APPELLANTS' PROPOSITIONS OF LAW

Appellee'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 without making specific findings quantifying the harm resulting from the revenue loss.

In *Bartchy*, this Court explicitly and directly stated that the State Board may consider fiscal loss to the relinquishing district alone as having a detrimental impact on the relinquishing district, directly disagreeing with the contrary contention Appellants advance. In *Bartchy*, the State Board denied a transfer requested by owners of four residential properties in the Cincinnati Public School District ("CPSD"), which would have resulted in CPSD's losing only \$373,840 in assessed *valuation* (not revenue) annually.³ *Bartchy*, 2008-Ohio-4826 at ¶ 58. Based on that evidence alone, the State Board's hearing officer concluded that the requested transfer "would be detrimental to the fiscal or educational operation of the district." *Id.* at ¶ 54. The hearing officer based that finding solely on CPSD's answers to the 17 questions posed by the State Board in which CPSD essentially contended that the loss of valuation would be fiscally or educationally detrimental. *See id.* at ¶ 60. The common pleas court affirmed the State Board's denial of the transfer which was based on the hearing officer's findings, but the Court of Appeals reversed and ordered that the case be remanded and the transfer granted. The Court of Appeals held that there was no evidence of a detrimental impact on CPSD's fiscal or educational operation. This Court specifically disagreed and held that the "hearing officer was within his authority when he

³ According to the briefs filed in *Bartchy*, the amount of annual revenue CPSD stood to lose as a result of a transfer totaled less than \$13,000.

concluded that the transfer would undoubtedly affect CPSD detrimentally in some way”
Bartchy, 2008-Ohio-4826 at ¶ 82.

Here, following *Bartchy*, the Court of Appeals on reconsideration reached the same conclusion based on an even more developed, ample record and the far more detailed factual findings made by the hearing officer which formed the basis for the State Board’s denial.

In contrast to the \$373,840 in assessed *valuation* CPSD stood to lose as a result of the transfer of four residential properties in *Bartchy*, the record here demonstrates indisputably that, as a result of losing an entire village, Bedford would lose \$4 million in real estate tax revenue alone annually and in perpetuity. Further, ignoring the inaccuracies of the Walton Hills expert’s calculations and assuming for the sake of argument the correctness of his calculations, the evidence showed that the least amount of tangible personal property tax revenue Bedford would lose totaled nearly \$7 million over five years. In further contrast to the record in *Bartchy* where CPSD presented no evidence as to how or to what extent the loss of valuation would actually impact the district, Bedford painstakingly and purposefully presented ample evidence which the hearing officer found to be reliable, probative, and substantial that the loss in revenue would result in specific, tangible financial and educational harm to Bedford and its students and that the harm would come in the form of cuts to its vital summer program, its vocational and technology education, its extracurricular activities, in transportation, its programs for special needs students, and, perhaps most critically, would necessitate staff and teacher layoffs. The Walton Hills residents’ own expert testified that the losses to Bedford necessarily would force Bedford immediately into fiscal watch or fiscal emergency. The Walton Hills residents did not challenge or dispute these findings, which were incorporated into the hearing officer’s second report and recommendation which was issued after the matter was remanded to consider solely the issue

concerning changes with respect to lost tangible personal property taxes.

Following this Court's decision in *Bartchy*, the Court of Appeals here concluded that the common pleas court properly affirmed the State Board's denial and that the State Board properly denied the transfer based on the undisputed evidence of enormous fiscal loss alone which the State Board believed would be detrimental to Bedford. If a finding that a loss of \$373,840 of valuation alone in *Bartchy*, without more, as a matter of law was sufficient to enable the State Board to conclude that the relinquishing district would be detrimentally impacted enough to warrant denial of the transfer, then clearly an actual loss here of \$4 million in real estate tax revenue annually and in perpetuity and another nearly \$7 million in tangible personal property tax revenue over five years, coupled with the hearing officer's factual findings depicting how that the transfer would actually visit harm on Bedford, certainly is more than sufficient to enable the State Board to deny transfer. It certainly was appropriate for the State Board to do so, and the Court of Appeals properly and deferentially found that the denial was correct.

Accordingly, in light of this Court's decision in *Bartchy*, because the Court of Appeals correctly held that the State Board could find a detriment to Bedford based solely on an enormous fiscal loss a transfer would cause, the Court of Appeals' decision was not erroneous and does not warrant this Court's review.

Appellee's Proposition of Law No. 2: The State Board may consider racial isolation as part of the multi-factor balancing tests applicable to potential territory transfers.

For at least three reasons, Appellants' contention that two State Board may not, as part of a multi-factor balancing tests, consider the extent to which the proposed transfer would affect racial isolation or the racial composition of the affected school districts is both unfounded and not worthy of this Court's consideration.

First, Appellants did not raise the issue until they filed their reply brief in the Court of

Appeals. They did not raise the issue before the State Board or the common pleas court. Appellants did not raise the issue until a stage in the proceedings when Appellees could not respond. Because the issue was not properly raised below, it is waived. *Evans v. Evans* (Franklin), 2008-Ohio-5695 at ¶¶ 6-9 quoting *State ex rel. Zollner v. Indus. Comm.* (1993), 66 Ohio St.3d 276, 278.

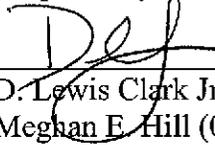
Second, the issue is not determinative. The Court of Appeals recognized that the racial composition factor “was by no means the primary factor that drove the board’s decision.” *Spitznagel* as ¶ 9. The issue has not and will not affect the outcome of the case, and Appellants’ request that this Court consider the issue ignores the longstanding principle that “constitutional issues should not be decided unless absolutely necessary.” *State v. Roberts*, 2008-Ohio-6827, ¶ 40 citing *Hall Chinga Co. v. Public Util. Comm.* (1977), 50 Ohio St.2d 206, 210.

Third, the sole case on which Appellants relies does not stand for the proposition of law Appellants advance. The Supreme court in *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 127 S.ct. 2749 (2007), addressed the issue of racial considerations in the assignment of individual students, not boundary designations of a district. Simply, the case in which Appellants rely does not stand for the proposition they advance. There is no authority supporting the proposition of law Appellants advance, and the issue does not warrant this Court’s consideration.

CONCLUSION

For the foregoing reasons, because this case is not one of public or great general interest, the Court should not accept this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction has been served upon Reid T. Caryer, Assistant Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, Counsel for Appellant State Board of Education; and Stephen W. Funk, ROETZEL & ANDRESS, LPA, 222 South Main Street, Suite 400, Akron, Ohio 44308; Counsel for Appellants, Brian Spitznagel, et al.; by U.S. Mail, postage prepaid, this 4th day of February, 2009.



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