

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**BRIEF OF AMICUS CURIAE THE OHIO SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF APPELLEES**

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STATEMENT OF THE CASE AND FACTS

Amicus curiae, the Ohio School Boards Association (“OSBA”) is a private, 501(c)(4) not-for-profit statewide association of public school boards founded in 1955 to encourage and advance public education through local citizen responsibility. Membership is open to all public school boards of education in Ohio.

In this appeal, the Court will consider two significant issues: (1) whether the Ohio State Board of Education (“State Board”) is entitled to deference in deciding school territory transfer matters; and (2) whether the State Board may consider evidence of financial detriment suffered by a district relinquishing territory in a transfer. OSBA’s members have a strong interest in these questions. A complete discussion of the facts leading to the instant action may be found in Appellees’ Merit Briefs. However, OSBA directs the Court’s attention to the following facts for the purposes of the arguments asserted in its brief:

Certain property owners in the Village of Walton Hills (“Appellants”) proposed that the State Board transfer the Village’s entire territory from the Bedford City School District (“Bedford”) to the Cuyahoga Heights Local School District (“Cuyahoga Heights”). Pursuant to R.C. 3311.24, the State Board appointed a referee to conduct an evidentiary hearing, and the parties presented extensive testimony and documentary evidence regarding the State Board’s factors for deciding such cases, as set forth in Ohio Admin. Code §§ 3301-89-02 and 03. On May 20, 2005, after three days of hearings, the referee issued a Report and Recommendation containing detailed factual findings, and concluded several factors weighed strongly against the transfer. Specifically, the referee found the transfer would cause Bedford to lose approximately \$4,000,000 annually in real property

tax revenue (*Report and Recommendation*, p. 15). The referee also found this significant detrimental impact – which would necessitate layoffs of teachers and other staff members, cuts to summer programs for at-risk students, reductions in transportation services and cuts to special needs student programs – strongly disfavored the transfer (*Id.* p. 16).

On July 12, 2005, after Appellants claimed state budget legislation would affect Bedford's financial losses, the State Board remanded this matter for further proceedings. After the second hearing, which lasted another full day and included 5,000 pages of exhibit documents (*Report and Recommendation on Remand*, p. 3), Appellants raised yet another legislative argument, and the referee allowed additional briefs. The referee then issued a *Report and Recommendation on Remand* on October 25, 2006, and found the transfer remained financially detrimental to Bedford. The referee found “the evidence is clear that State Board of Education approval of the requested transfer will cause substantive harm to the relinquishing district. The *best-case scenario* presented by Petitioner's expert at hearing is that [Bedford] 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” (*Id.*, p. 5, emphasis added). The referee again recommended that the State Board deny the transfer, and the State Board accepted the referee's recommendation through a resolution adopted on December 12, 2006. After the Franklin County Court of Common Pleas affirmed the State Board's determination, Appellants appealed to the Franklin County Court of Appeals.

Ignoring the referee's detailed findings, the Court of Appeals concluded the State Board erred in employing "a presumption that any amount of revenue loss alone warrants denial of a transfer petition." *Spitznagel v. State Bd. of Edn.*, 2008-Ohio-5059 at ¶76 ("*Spitznagel I*"). However, on the same day the Court of Appeals issued its decision, this Court released *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, and concluded the State Board *may* factor evidence of revenue losses into its overall balancing test *without* requiring the harm caused by such losses to be quantified with precision. *Bartchy*, 2008-Ohio-4826, at ¶¶82-83. On reconsideration, the Court of Appeals brought its decision into conformity with this Court and affirmed the State Board's determination. *Spitznagel v. State Bd. of Edn.*, 2008-Ohio-6080 ("*Spitznagel II*").

ARGUMENT

Proposition of Law No. I:

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 reviewing a court of common pleas' decision on an administrative agency's order, it is well established that an appellate court's role is to determine only whether the trial court abused its discretion. *Bartchy*, 2008-Ohio-4826, at ¶¶40-41, 95, citing *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Educ.* (1992), 63 Ohio St.3d 705, 707, 590 N.E.2d 1240. To reverse, the appellate court must determine the trial court's exercise of discretion amounted to "perversity of will, passion, prejudice, partiality or moral delinquency." *Id.* Absent a conclusion that the trial court abused its discretion, an appellate court must affirm the trial court's decision. *Id.* As this Court has repeatedly stated, "[T]he fact that the court of appeals...might have arrived at a different conclusion

than did the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.” *Id.*, at ¶42, citing *Rossford Exempted Village School Dist.*, 63 Ohio St.3d at 707, 590 N.E.2d 1240, quoting *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, (1988), 40 Ohio St.3d 257, 260-261, 533 N.E.2d 264.

Pursuant to Article VI, Section 4, of the Ohio Constitution, the State Board is vested with the “powers and duties...prescribed by law.” The General Assembly has authorized the State Board to “administer the educational policies of this state relating to public schools...organization of school districts, educational service centers, *and territory.*” R.C. 3301.07(B) (emphasis added). The legislature also has authorized it to make determinations in individual territory transfer cases. R.C. 3311.24. The courts are obliged to accord state agencies such as the State Board deference in interpreting statutes and applying their administrative rules. *Frisch’s Restaurants, Inc. v. Ryan*, 121 Ohio St.3d 18, 22, 2009-Ohio-2. Further, the General Assembly’s grant of authority confers broad discretion upon an agency to act in a “reasonable manner based upon a reasonable construction of the statutory scheme.” *Northwestern Ohio Bldg. & Str. Trades Council v. Conrad* (2001), 92 Ohio St.3d 282, 289, 750 N.E.2d 130. In sum, “courts must give deference to an agency’s reasonable interpretation of the legislative scheme.” *Id.*

The State Board has adopted Ohio Admin. Code §§ 3301-89-02 and 03, which provide specific factors for determining transfer requests. One factor is whether the transfer would be “detrimental to the fiscal or educational operation of the relinquishing school district.” Ohio Admin. Code 3301-89-02(B)(9). In this instance, after consciously balancing this and other transfer criteria, a referee appointed by the State Board determined

the proposed transfer would have severe detrimental consequences for Bedford, and it is hardly possible to conclude the trial court's discretion in affirming this determination amounted to "perversity of will, passion, prejudice, partiality or moral delinquency." On reconsideration the Court of Appeals correctly applied *Bartchy* and agreed 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 (emphasis in original), citing *Bartchy*, at ¶¶82-83 (where this Court concluded, "although the specific evidence ... was controverted, the hearing officer was within his authority when he concluded that the transfer would undoubtedly affect [the relinquishing school district] detrimentally *in some way*." *Id.* at ¶82; emphasis added).

Appellants ask this Court to abdicate this bedrock standard of deference and have the Court of Appeals arrogate the State Board's role in territory transfer matters. However, the State Board indisputably has the greatest expertise in these cases.¹ It alone possesses the perspective to undertake the intricate balancing of the numerous educational and non-educational factors that must be considered when a school territory transfer is proposed, and only the State Board is constitutionally mandated and authorized by the General

¹ The Court of Appeals' fixation in *Spitznagel I* with comparing Bedford's per pupil spending to the state average (*Id.*, at ¶35) is one example amply demonstrating why the State Board should be responsible for weighing the impact of lost revenue, and why the Court of Appeals should defer to its determinations. Per pupil spending varies greatly throughout Ohio depending on poverty levels, special education costs, transportation and other cost factors that are higher in Northeast Ohio inner-ring suburban school districts – such as Bedford – than in other districts. Indeed prior to 2007, the General Assembly expressly included a cost-of-doing-business factor into its calculation of state per pupil aid, and Cuyahoga County had the highest factor in the state. See former R.C. 3317.02(N), Am.Sub.H.B. 95 (125th General Assembly) and Am.Sub.H.B. 66 (126th General Assembly). Because there is no evidence this cost disparity has vanished, a statistic such as state average per pupil spending has little, if any, probative value in considering the fiscal detriment a transfer would cause to Bedford.

Assembly to administer educational policies with respect to matters including territory transfers. Unlike the Court of Appeals, the State Board is expressly charged with advancing the interests of Ohio's public schools and school aged children.

Bartchy plainly "articulated a mandate for appellate deference" to the State Board, which allows the Board to exercise reasonable discretion in determining how it should weigh the revenue loss caused by a proposed transfer. *Spitznagel II*, at ¶8. This deference to the State Board's exercise of reasonable discretion enhances the predictability of results and allows property owners and school districts to resolve proposed territory transfers efficiently and expeditiously with minimal litigation. Any retreat from this recognition of the State Board's unique policy role would only motivate property owners – eager to pursue their economic interests -- to litigate transfer cases to as many levels as possible in the hope for success, and school districts will be forced to bear the time and expense of litigating countless appeals.

If the Court of Appeals is permitted to liberally second-guess the State Board, the resulting jump in litigation will have a chaotic effect on school district territory boundaries. Property owners will have compelling incentive to request transfers and there will be more protracted proceedings, especially in cases driven by the owners' self-interest in residing in a school district perceived as having more prestige and higher residential market values. Instead of an orderly process for determining territory transfers, district boundaries will be constantly challenged by an endless series of plaintiff plebiscites attacking territorial integrity.

Indeed, Appellants ask this Court to do nothing less than license litigiousness because in communities across the state the grass often appears greener on the other side of the fence, or school boundary. An adjacent school district may have a more favorable tax

rate, or it may have higher local property values because it is viewed as having “better” academic assessment results or greater athletic prowess. If the Court of Appeals’ decision is reversed, many of the 614 school districts throughout Ohio will be forced to devote scarce public dollars on litigation, rather than education, as more residents play litigation lottery with the Franklin County Court of Appeals. This will accrue to the benefit of a handful of suburban school districts, while working to the detriment of districts in urban, inner-ring suburban, small town and rural communities.

Nonetheless, Appellants argue the State Board is not entitled to deference in territory transfer matters, but instead claim it cannot even consider the financial detriment suffered by the district relinquishing territory unless it is supported by precisely quantified factual findings. According to Appellants, anything that fails to satisfy this rigorous standard constitutes an abuse of discretion. This is wholly inconsistent with *Bartchy*, which re-affirmed that the property owners proposing a transfer bear the burden of demonstrating they are entitled to a change in the status quo, and concluded if this burden is not met the State Board may deny the transfer. *Id.* at ¶87.

Appellants ask this Court to stand the burden of justifying a change in the status quo on its head by requiring the State Board to “prove” to the courts that lost revenue resulting from a transfer would cause fiscal and operational harm to Bedford. This contravenes both the plurality and concurring opinions in *Bartchy*, the latter of which succinctly stated that where property owners “failed to carry their burden to show that their properties should be transferred,” the State Board “properly denied the transfer because of the lack of sufficient evidence.” *Id.* at ¶98 (Lanzinger, J. concurring). The sum of *Bartchy* is that public education is an entitlement, but the particular public school district where one

is located is not. As such, Appellants should not be allowed to dodge their burden of proof by alleging an abuse of agency discretion.

In support of their argument, Appellants further claim the “mere loss of tax revenues” is an insufficient basis for the State Board to deny a transfer (Merit Brief of Appellants, p. 4). In the midst of a global economic recession, the notion that siphoning at least \$7,000,000 from a school district is a “mere loss” is absurd. Appellants elevate form over substance in arguing the State Board did not sufficiently analyze the detrimental fiscal impact Bedford would suffer due to the transfer. How could the loss of at least \$7,000,000 *not* be detrimental to a school district?² Most proposed transfers may result in some loss of revenue, but it remains the province of the State Board to consider such evidence on a case-by-case basis. *Bartchy* authorized the State Board to “weigh” the loss of revenue as part of its balancing test for proposed transfers and provided the State Board may do so without precisely quantifying the resulting harm. *Id.* ¶¶82-83. Appellants ask this Court to do nothing less than re-weigh extensive testimony and exhibits from two evidentiary hearings and disregard the State Board’s determination. As the Court concluded in *Bartchy*, there is no reason to do so.

Spitznagel II also is supported by sound public policy considerations. Appellants flippantly claim that because school funding constantly is in flux, school districts “must always be ready to harness untapped financial resources” (Merit Brief of Appellants, p. 26). Yet, they utterly fail to identify what those resources might be. Appellants imply districts are careless stewards of the public fisc, but nothing could be further from the truth.

² Moreover, in *Bartchy* this Court also found it was appropriate for the State Board to consider evidence that a transfer would produce a financial windfall for the receiving district. *Id.* at ¶¶ 58, 69. Yet, Appellants ask the Court to ignore evidence that their proposed transfer would generate a considerable windfall for Cuyahoga Heights. With only 45 Walton Hills students attending Bedford, a shift of \$7,000,000 in revenue over five years would result in a substantial windfall of \$31,111 per student, per school year.

School districts must be deeply sensitive to electoral and budgetary concerns, because boards of education are doubly accountable to the public. Not only do district voters elect board members, but boards constantly must ask local residents to approve property tax levies or other revenue issues.³ In many communities, school district property taxes are the highest local taxes that residents pay. Yet, these issues often merely renew or replace expiring levies and result in no little or no increased revenue for the district.

OSBA certainly knows of no untapped financial resources, and the General Assembly did not find these mysterious funds before it was forced to *cut* state education funding in FY 2010 and 2011 (http://www.legislature.state.oh.us/BillText128/Educ_CC_w-Federal.xls). The cuts in this year's budget bill, Am.Sub.H.B. 1, are actual reductions in total spending, not mere percentage decreases. As a result of these cuts, Ohio's school funding system remains unconstitutional and even more over-reliant upon local property taxes. *DeRolph v. State of Ohio* (2002), 97 Ohio St.3d 434, 780 N.E.2d 529. Under the best circumstances, school districts have limited means – such as proposing new tax levies to skeptical electorates – for replacing revenue lost due to a property transfer. However, in this era of global recession, record unemployment rates and declining real property values, even these few options are virtually illusory for districts in hard-hit regions like Northeast Ohio.⁴

³ Between 1996 and 2005, boards placed 4,500 levies before local electors. Ohio Department of Education, *Comparison of Total Number of Issues, A Ten-Year History As of: November 2005*.

⁴ Indeed, 61% of school levies failed in the most recent statewide election held in August 2009. See <http://education.ohio.gov/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=1216&ContentID=4198&Content=71772>. This was not surprising because boards of education were struggling to pass levies even before the recession. In November 2007, voters approved only 53.5% of the 200 school levies proposed statewide. This passage rate was lower than the rate for November levies in 4 of the 6 previous years.

As legislators, school districts, school board members, and property owners continue to grapple with the constitutionality of Ohio's school funding system and the prospect of greater local tax burdens, a decision undercutting the State Board's authority to even consider the detriment caused by property transfers would add yet another complicating factor to a labyrinthine dilemma. If the State Board is deprived of reasonable discretion in its determinations of such matters, there will only be more territory transfer litigation as property owners – and a few school districts – seek to enhance their economic leverage based on geography. The issue of school funding is sufficiently challenging for policymakers without forcing school districts to fight rear-guard actions with property owners who covet greener economic grass in adjacent districts.

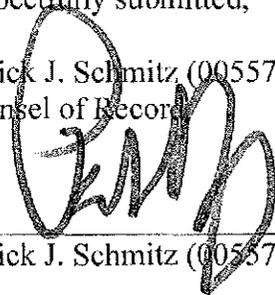
Here as in *Bartchy*, there is controverted evidence about whether the proposed transfer would result in a detrimental revenue loss. Because Appellants dislike the State Board's determination, they attempt to recast it as a "presumption" of detriment. However, this Court has unambiguously held it is within the State Board's authority to decide whether such detriment would occur, *Id.* at ¶82, and Appellants – whether they like it or not – must be bound by this determination. OSBA urges this Court to consider the harmful consequences Appellants' position would spawn, especially its chaotic effect on school district territorial boundaries. Rather than fomenting disorder, this Court should adhere to the appropriate standard of review, which reinforces the burden of proof upon property owners and affords due deference to the State Board's exercise of reasonable discretion. In doing so, this Court will produce a more stable environment for school districts and the more than 1.8 million children they serve.

CONCLUSION

The Ohio School Boards Association urges this Court to affirm the decision of the Franklin County Court of Appeals on reconsideration. The Court of Appeals must continue to respect the policy role of the State Board and afford it deference in determining transfer matters, because only the State Board possesses the administrative expertise to resolve these cases in a manner that provides predictability and stability to property owners and school districts, and discourages excessive litigation. This Court also should reaffirm the correct standard of review for school district territory transfer cases. Under this standard, property owners who petition the State Board for a territory transfer must prove they are entitled to change the status quo, and the State Board is *not* obligated to make precisely quantified factual findings in order to “prove” a transfer would be detrimental to the district relinquishing territory. For these reasons, this Court should affirm the Court of Appeals’ decision on reconsideration and dismiss this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Brief of the Amicus Curiae The Ohio School Boards Association was served upon the following by first-class U.S. Mail, postage prepaid, on this 18th day of September, 2009:

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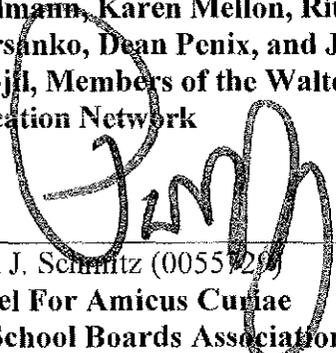
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