

ORIGINAL

IN THE SUPREME COURT OF OHIO

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| 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. |) | |
| |) | |

MERIT BRIEF OF
APPELLEE BEDFORD CITY SCHOOL DISTRICT

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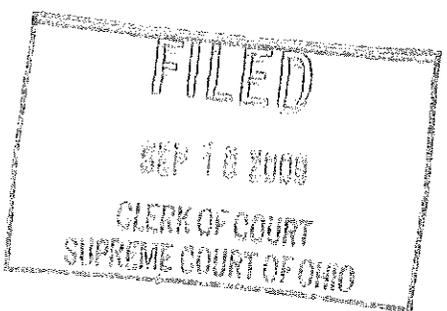


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INTRODUCTION

The Court of Appeals properly followed this Court's recent precedent and correctly determined that the record in this case plainly demonstrates that the transfer Appellants seek should be denied. The Court of Appeals reached the same conclusion reached by the State Board of Education's hearing officer twice, the State Board itself, and the Common Pleas Court. Indeed, the Court of Appeals reached the same conclusion that the Board of Education of the Cuyahoga Heights Local School District reached twice before Appellants even initiated the transfer attempt: the transfer is not in the best interests of the students involved and should not occur. This Court should reach the same conclusion and affirm the Court of Appeals' decision.

In advancing their two propositions of law, Appellants ignore the ample record and the clear case law. They attempt to slough off their heavy burden of proof and foist it onto the Bedford City School District and the State Board, and they implicitly invite this Court to withhold the deference Ohio courts owe to administrative agencies like the State Board who are tasked with determining significant issues such as this utilizing expertise only they possess. In accordance with R.C. 3311.24, the State Board promulgated the regulations it applies to determine whether or not the school district boundaries it has established should be upset or altered. It utilized its expertise and wisdom in both promulgating those regulations and in establishing school district boundaries in a way that advances the best interests of students. Here, both the State Board and its hearing officer painstakingly operated in accordance with both the statute and the regulations to reach the determination that the transfer should not occur. Because the ample record clearly prevents Appellants from challenging the State Board's decision under an evidentiary standard, they employ the contention that the State Board and its hearing officer did not follow judicial precedent. Appellants' contentions are an ineffective

attempt to protest the State Board's determination and its affirmance by the Common Pleas Court and the Court of Appeals.

The record here plainly demonstrates that the requested transfer would undoubtedly cause Bedford to suffer immensely more fiscal, educational and operational harm than in any other school district territory transfer ever considered. Despite Appellants' incessant fixation on the significant loss of tangible personal property tax revenue, the transfer Appellants desire would cause Bedford to lose at least \$4 million annually and in perpetuity in real property tax revenue alone. This fact is both undisputed and has been consistently ignored by Appellants throughout this process. The annual \$4 million real property tax loss is in addition to the loss of tangible personal property tax revenue which Appellants themselves admitted totaled -- at the very least -- nearly \$7 million during the first five years following a transfer. Bedford's witness and a Department of Education witness both testified that the amount of lost tangible personal property tax revenue would be much higher.

Contrary to Appellants' suggestion, Bedford submitted ample, detailed evidence demonstrating specifically how the amount of lost revenue would result in significant educational and operational harm to Bedford's students. Based on the evidence, the hearing officer made specific factual findings concerning the type and extent of educational harm the transfer was certain to cause, including teacher and staff layoffs and curtailment or cessation of vital educational programs and student transportation. Indeed, Appellants' own expert testified that the transfer would cause Bedford to be plunged immediately into fiscal watch or fiscal emergency.

Despite this factual record and the State Board's hearing officer's specific factual findings detailing the nature and extent of harm the transfer would cause, which were

incorporated into both of the hearing officer's reports and recommendations, Appellants baselessly maintain that the State Board denied the transfer based solely on the amount of revenue the transfer would cause and not additionally on findings concerning how the lost revenue would cause harm to Bedford. Because the State Board's determination in fact was based on specific factual findings which Appellants contend are absent, Appellants' first proposition of law is based on a flawed or non-existent factual predicate. Regardless, this Court's decision in *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, compels this Court's affirmance of the Court of Appeals' decision and the denial of the requested transfer. In *Bartchy*, the loss of \$373,840 in valuation (not revenue) alone warranted the denial of the transfer of territory from the Cincinnati schools, a district much larger than Bedford. Consequently, the loss of \$4 million in real property tax revenue annually permanently and an additional \$7 million in tangible personal property tax revenue over five years, coupled with unrefuted evidence of specifically how such a loss in revenue would visit educational and operational harm on Bedford, certainly is more than sufficient evidence supporting the State Board's conclusion that the transfer is not in the best interests of all of the students impacted.

Appellants' second proposition of law relating to racial isolation is equally unavailing. First, because Appellants did not raise any constitutional issue with respect to racial isolation until they filed their reply brief in the Court of Appeals, they cannot raise the argument now. Second, the issue is not determinative. The Court of Appeals properly recognized that the issue of racial isolation did not determine the outcome of the matter. Third, there is absolutely no authority for the proposition that the State Board must completely ignore and not consider the racial isolation issue if the racial isolation implications are arguably *de minimis*. The hearing officer here properly determined that there were racial isolation issues and that that indeed

disfavored the transfer. The hearing officer's finding was both factually sound and legally permissible, and the Court of Appeals properly concluded that that determination did not affect the proper denial of the transfer.

Because no error -- legal or otherwise -- occurred at any stage of this process, this Court should reach the same conclusion reached by the Court of Appeals, by the Common Pleas Court, by the State Board, twice by the State Board's hearing officer, and twice by Cuyahoga Heights itself: the transfer should be denied. The Court of Appeals' decision should be affirmed.

STATEMENT OF FACTS¹

Before Appellants submitted their petition formally initiating this process, the issue of the propriety of a transfer was twice brought before Cuyahoga Heights' Board of Education. On both occasions, the Cuyahoga Heights board adopted resolutions announcing that they believed that the transfer should not occur. (First Report at 14) (App. Apx. 81); (Bedford Exhibits from January 25-27, 2005 Hearing Before Hearing Officer ("Res. Ex.") 1) (Bed. Supp. 19-23).

Undeterred, in 2004, Appellants submitted to Bedford a petition to transfer the entire Village of Walton Hills from Bedford, its home for more than 100 years, to Cuyahoga Heights pursuant to R.C. 3311.24. (Decision on the Merits of Revised Code 119.12 Administrative Appeal Affirming the Decision of the State Board of Education ("Decision at ___") at 1) (Appellee's Appendix ("Apx.") 1). Bedford transmitted the petition to the State Board, and the

¹ Despite the fact that Appellants' propositions of law relate to only two discrete issues -- economic detriment and racial isolation -- over one half of Appellants' Statement of Facts constitutes a recitation of facts entirely unrelated to those propositions. In fact, Appellants' *amici curiae* do nothing to address either of the legal propositions Appellants contend are the basis for their appeal. Nonetheless, Bedford will attempt to refrain from responding to Appellants' factual assertions relating to their perceived alignment to the communities comprising Cuyahoga Heights, the numbers of Walton Hills students attending the Bedford schools, academic performance, and security, issues Appellants themselves implicitly concede are entirely unrelated to the Court's determination of this case.

State Board scheduled a hearing before its hearing officer regarding the propriety of the requested transfer. (Decision at 1–2) (Apx. 1-2).

A. Summary of Evidence from January 2005 Hearing

The hearing scheduled by the State Board on Appellants' request for transfer was held in January 2005. (First Report and Recommendation ("First Report") at 9–10, 20) (Appellants' Appendix ("App. Apx.") 70). At that hearing, both Appellants and Bedford presented extensive evidence regarding the factors the State Board follows in accordance with its regulations, O.A.C. 3301-89-02 and O.A.C. 3301-89-03, and submitted lengthy post-hearing briefs.

1. The Evidence Demonstrated The Proposed Transfer Would Be Fiscally, Educationally and Operationally Detrimental to Bedford.

Bedford presented detailed and unrefuted evidence at the hearing demonstrating both the extent and the nature of the fiscal, educational and operational detriment a transfer would cause. Bedford's Treasurer, Mary Ann Nowak, testified that Bedford's annual tax revenue attributable to Walton Hills totaled \$7,500,000.² (Transcript from January 25-27, 2005 Hearing Before Hearing Officer ("01/05 Tr.") II at 344) (Bedford's Supplement ("Bed. Supp.") 12); (Res. Ex. 16) (Bed. Supp. 31-110). Appellants' own financial expert witness, Lowell Davis, agreed with Ms. Nowak's calculation. (Appellants' Supplement ("Supp.") 121). That amount of lost revenue would have caused Bedford to experience a fiscal deficit for each of the subsequent five years beginning in 2005. (Res. Ex. 15b) (Bed. Supp. 25-30). Mr. Davis further testified that the economic harm the transfer would cause would immediately require Bedford to appeal to its remaining voters for increased taxes and that Bedford necessarily would have to undertake

²The unrefuted evidence was that a transfer would cause Bedford to lose \$65,595,670 in real property valuation alone. That amount constituted 18% of Bedford's total real property valuation. (4/06 Tr., Ex. 17) (Supp. 63). In contrast, the transfer in *Bartchy* involved a potential loss of valuation of only \$373,840, which is one-half of one percent of the amount at stake here. *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, ¶ 58.

significant teacher and staff cutbacks and layoffs. (01/05 Tr. I at 197-99) (Bed. Supp. 6-7). He also testified that the lost revenue would cause Bedford to swiftly descend into fiscal emergency or fiscal watch. (01/05 Tr. I at 183-84) (Supp. 124).

In light of the amount of revenue Bedford would lose as a result of a transfer, Ms. Nowak not only testified regarding the overall extent of the financial loss Bedford would suffer, but also, she described the actual educational and operational impact on specific programs the lost revenue certainly would cause. (01/05 Tr. II at 347-53) (Bed. Supp. 13-14). Ms. Nowak testified that the district's summer school program, which is a vital component of its efforts for students to prepare for state-mandated proficiency tests, would likely be cut. (01/05 Tr. II at 347) (Bed. Supp. 13); (Res. Ex. 16c) (Bed. Supp. 56-59). She testified that significant vocational services and technology training for students throughout the district would be eliminated or severely reduced. (01/05 Tr. II at 348) (Bed. Supp. 13); (Res. Ex. 16d) (Bed. Supp. 60-69). She testified that funding for many extracurricular activities would be eliminated or curtailed. (01/05 Tr. II at 350) (Bed. Supp. 14); (Res. Ex. 16e) (Bed. Supp. 70-76). She said that busing of students would be reduced to the state minimum. (01/05 Tr. II at 351) (Bed. Supp. 14); (Res. Ex. 16f) (Bed. Supp. 77-87). She testified that programs for the district's special needs students would immediately be reduced to state minimums. (01/05 Tr. II at 352-53) (Bed. Supp. 14); (Res. Ex. 16g) (Bed. Supp. 88-110). Finally, and perhaps most importantly, like Mr. Davis, she testified that Bedford inevitably would be forced to fire teachers and staff to reduce personnel and salary costs. (01/05 Tr. II at 353) (Bed. Supp. 14); (Res. Exs. 16c-16g) (Bed. Supp. 56-110).

Appellants presented no evidence to refute any of Bedford's evidence demonstrating the enormous fiscal, educational and operational impact a transfer would cause.

2. Evidence Demonstrated The Proposed Transfer Would Increase Racial Isolation.

The record evidence demonstrated that, of Bedford's 3,805 students, 2,688 (70.7%) are African-American, and 837 (22%) are white. (01/05 Tr. II at 145-46) (Bed. Supp. 10-11); (Petitioner's Exhibits from January 25-27, 2005 Hearing Before Hearing Officer ("Pet. Ex.") B, E) (Supp. 157, 172). In contrast, Cuyahoga Heights' student body is comprised of approximately 97% white students. (Res. Ex. 13) (Bed. Supp. 24) If all of the Walton Hills students attending Bedford schools were to attend Cuyahoga Heights³, the percentage of African-American students would increase from 70.7% to 71.2%, and the percentage of white students would decrease from 22% to 21.3%.

B. The Hearing Officer's First Report and Recommendation

In May 2005, the State Board's hearing officer issued his initial report and recommendation to deny the transfer. (First Report) (App. Apx. 69) In the report and recommendation, the hearing officer made several factual findings and concluded that the relevant factors weighed against the proposed transfer.⁴

He determined that, as a result of the loss of revenue the transfer would cause, Bedford "would be required to make significantly detrimental modifications to the educational

³ Testimony at the January 2005 hearing actually established that not all of the Walton Hills students attending Bedford would attend Cuyahoga Heights in the event of a transfer. Benny Kelly, who is African-American, testified that his children will not attend Cuyahoga Heights even if the petition were to be granted, primarily because of the lack of racial diversity at Cuyahoga Heights. (01/05 Tr. III at 57-58) (Bed. Supp. 17-18).

⁴ Notably, the hearing officer concluded that, of the 27 potentially relevant factors the State Board considers, only four innocuous factors actually "favored" the transfer. Two of the four factors were in fact the same factor -- that the transfer would not illegally create a district with non-contiguous territory (it would not create an island). Another factor "favoring" the transfer was that it would not cause Bedford to have to close its high school. Bedford continues to maintain that these factors should be considered neutral despite the hearing officer's characterization of them as "favoring" the transfer.

programming now in place.” (First Report at 14) (App. Apx. 81). He determined that Bedford “would be immediately forced into enacting some sort of extreme fiscal measures to address the expected loss of real property tax monies.” (*Id.* at 14-15) (App. Apx. 81-82). He concluded that the transfer would “undoubtedly” be detrimental to Bedford’s fiscal or educational operation and that “the transfer would have an adverse impact upon the functioning of [Bedford] by depriving [Bedford] of approximately \$4,000,000 of annual tax monies derived from real estate taxes.” (*Id.* at 15-16) (App. Apx. 82-83). The hearing officer further determined that “[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” and that such a response to the loss of revenue would be “wholly predictable and necessary.” (*Id.* at 22) (App. Apx. 89).

As a result of these factual findings, the hearing officer concluded that several relevant factors disfavored the transfer. Specifically, he concluded that the proposed transfer would be fiscally detrimental to Bedford and that correspondingly the educational burden shouldered by Cuyahoga Heights would not be commensurate with the economic windfall it would reap as a result of the proposed transfer. (First Report at 14–15, 22) (App. Apx. 81-82, 89).

In addition, the hearing officer concluded Appellants had submitted no evidence that Cuyahoga Heights had the ability to absorb Walton Hills’ students. (First Report at 14) (App. Apx. 81). Appellants submitted no cognizable evidence regarding Cuyahoga Heights’ capacity, 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. (*Id.*); (Res. Ex. 1) (Bed. Supp. 19-23).

With respect to the issue of racial isolation, the hearing officer noted that the relevant State Board regulation inquires as to the percentage of minority students in each district and whether or not the transfer would result in an increase in the percentage of minority students in the relinquishing district. (First Report at 13) (App. Apx. 80). Based solely on the relevant numerical, statistical evidence presented, the hearing officer accurately concluded that the transfer of the Walton Hills students from the racially diverse Bedford district to the predominately white Cuyahoga Heights district would result in an increase in the percentage of minority students at Bedford and that, consequently, the factor disfavored the transfer. (First Report at 13, 18-20) (App. Apx. 80, 85-87).

In response to many of the factual points Appellants regurgitate in their brief concerning their alleged or perceived alignment toward the Cuyahoga Heights community and their disaffection toward Bedford, the hearing officer concluded that Walton Hills indeed is not “an outlying, remote part of the [Bedford] territory.”⁵ (First Report at 17) (App. Apx. 84). He further found that the Walton Hills residents’ asserted loyalties toward Cuyahoga Heights “if they exist, pertain more to the communities and social activities to the west, not the [Cuyahoga Heights] district.” (First Report at 21) (App. Apx. 88). He concluded that Bedford demonstrated the 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.*). The hearing officer further insightfully addressed the various factual assertions relating to disaffection, quality of education, and security Appellants continue to posit even now at this stage despite their current exclusive focus on the issues of economic detriment and racial isolation:

⁵ Despite Appellants’ contentions that Walton Hills is geographically isolated, the evidence they rely upon in support of that point actually demonstrates that Walton Hills is geographically closer to the Bedford schools than the Cuyahoga Heights schools. (Pet. Ex. W, W1, W2) (Supp. 187-89).

It seems self-evident that the isolation from [Bedford] which petitioners assert as a foundational component justifying the transfer is, in reality, a product of their collective freewill. Certain segments of the village of Walton Hills have chosen to disassociate from [Bedford]. This is most certainly their prerogative, yet it seems illogical to then give undue weight to this reported disassociation as a fundamental basis upon which to premise a territorial transfer. The citizens of Walton Hills have not been denied access to a tax-supported public education because of any overt acts attributable to [Bedford]. Rather, the majority of parents of school-age children in Walton Hills have chosen not to take advantage of the opportunities extant through [Bedford], many times without ever apparently having any direct experience or contact with [Bedford].

* * *

This record indicates that very few of the Walton Hills parents involved in the transfer movement have actually given [Bedford] a chance to show what it can do for their children. . . . The testimony of the supporters of [Bedford] was compelling in its emphasis on the positive aspects of [Bedford]. It is, without a doubt, an urban district with problems and obstacles typical of an urban educational district. However, there is no reliable, probative, or substantial evidence in this record indicating that [Bedford] is unsafe, unconcerned, or incapable of offering a quality education to any student who desires it. With 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 [Bedford] -- a school system with many success stories and an impressive array of dedicated, professional, and skilled faculty and staff. If the children of Walton Hills are permitted to participate in the varied opportunities afforded by [Bedford], they may very well experience beneficial academic, extracurricular, and social involvement.

(First Report at 25-28) (App. Apx. 92-95). These astute observations were based on compelling evidence Bedford presented in response to Walton Hills' myopic, uninformed, and factually baseless belief that Bedford is unsafe and academically deficient. The hearing officer's observations were made in response to Bedford's compelling evidence that its security measures are progressive, customary measures taken in districts throughout the country, not because the schools are unsafe, but instead, to keep them safe. These observations were made too in response to the evidence that, while Bedford was in academic watch for a period of time, it has

continually improved its academic performance and now remains an Effective district according to state standards.⁶

After an exchange of briefs following the hearing officer's report and recommendation to deny the transfer, the State Board considered this matter during its July 2005 meeting. On the eve of that meeting, Appellants filed a "notice of supplemental authority" in which they 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. (Decision at 4) (Apx. 4); (Second Report and Recommendation ("Second Report") at 4) (App. Apx. 63)

C. Summary of Evidence from Second Hearing

Over Bedford's objection, the Board remanded the matter for a second hearing, this time for the sole purpose of determining the financial impact of HB 66 on Bedford and Cuyahoga Heights. A hearing was held for that purpose in April 2006. (Second Report at 4) (App. Apx. 4).

At that hearing, Appellants 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. Notably, HB 66 had no bearing whatsoever on real property tax revenue. Consequently, regardless of the impact on the lost tangible personal property tax revenue caused by HB 66 or any other legislation, the fact remains that a transfer still would cause Bedford to lose annually \$4 million in real property tax revenue in perpetuity. (Res. Ex. 16a) (Bed. Supp. 31-43).

⁶ Indeed, according to the recent 2007-2008 State Report Cards available on the Department of Education's website, while Cuyahoga Heights' value added measure measuring annual progress was a "below" mark, Bedford's was an "above" mark, which demonstrates the relative trend of improvement comparing the two districts.

Following this second hearing, Appellants raised the existence of SB 321, a post-hearing bill that once again reconfigured portions of the state's tangible personal property reimbursement scheme. Although the invalidity of Appellants' financial figures was plainly demonstrated before the hearing officer, the ultimate evidence provided by Appellants themselves stated that Bedford would suffer a loss of tangible personal property tax revenue -- at the very least -- of between \$1,940,488 and \$4,007,291 for each of the first five years after a transfer; following SB 321, this tangible personal property tax revenue loss would amount to between \$239,512 and \$3,417,155 for each of the first five years after a transfer and a total of \$6,842,188 over the same five-year period. (Petitioners' Exhibit from April 6, 2006 Hearing Before Hearing Officer ("04/06 Pet. Ex.") 17) (Supp. 58-83). Even these figures—which would result in the most fiscally detrimental transfer in the history of the State of Ohio by a factor of many times—were shown at hearing to be incorrect, erring (by many millions of dollars) on the side of Appellants' position. Moreover, the losses would be reduced, to the extent such reduction occurred at all, only by an increase in state funding. (Second Report at 5–6) (App. Apx. 64-65). In other words, it continues to be the case that, if the requested transfer were to be approved, the transfer would cost the State of Ohio itself millions of dollars each year for the foreseeable future.

In short, it became apparent that, even using numbers that they provided, Appellants were incorrect when they urged the Board to remand the matter for further consideration of the economic factors involved in this case. Appellants' projections, which had called for Bedford to actually benefit financially from the transfer, proved completely unrealistic, and the ultimate conclusion reached by the hearing officer proved no less compelling, for Bedford's loss of tangible personal property tax revenue after the passage of HB 66 was *greater* than the loss predicted at the first hearing. (*Id.*).

D. Denial of Transfer Petition

The State Board's hearing officer issued a second report and recommendation for the sole purpose of opining on the fiscal impact of the two bills. In his second report, the hearing officer explicitly adopted and incorporated into the second report his prior report and recommendation, which included the detailed factual findings summarized above. (Second Report at 3, fn. 1) (App. Apx. 62).

Contrary to Appellants' characterization, the hearing officer did not agree factually with Appellants' evidence or financial expert. Instead, the hearing officer simply indicated that "[t]he 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[.]" (Second Report at 5) (App. Apx. 64). The remainder of the second report addressed the various steps Walton Hills or Bedford would have to go through to attempt to cope with or ameliorate the enormous loss of tangible personal property tax revenue, one of which involved a fantastical, rob-Peter-to-pay-Paul attempt by Bedford to grab territory from another neighboring school district, thereby fleecing it and its students of the attributable tax revenue. (Second Report at 6-8) (App. Apx. 65-67). Those steps also did nothing to even address the \$4 million annual loss of real property tax revenue.

Based on the evidence presented at both hearings, the hearing officer once again properly concluded that the transfer "would impose a significant detrimental financial impact upon [Bedford]" and recommended that the transfer be denied. (Second Report at 8-9) (App. Apx. 67-68). In December 2006, the State Board in turn properly accepted the hearing officer's two recommendations and denied the proposed transfer by an overwhelming majority. (App. Apx. 59-60).

On appeal, the common pleas court 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. (Decision at 16) (Apx. 16).

E. First Court of Appeals Decision

Despite the hearing officer's detailed factual findings relating to how and to what extent the undisputed amount of revenue loss would harm Bedford fiscally, educationally and operationally, 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 v. State Bd. of Edn.*, Franklin App. No. 07AP-757, 2008-Ohio-5059 ("*Spitznagel I*"), at ¶ 76. (App. Apx. 45-46). 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 Courts' decision in *Bartchy* (published the same day as *Spitznagel I*), both the State Board and Bedford filed motions for reconsideration. *Spitznagel v. State Bd. of Edn.*, Franklin App. No. 07AP-757, 2008-Ohio-6080 ("*Spitznagel II*"), at ¶1 (App. Apx. 6).

F. Second Court of Appeals Decision

The Court of Appeals granted those motions and brought its decision into conformity with this Court's decision in *Bartchy*. The Court of Appeals reversed its prior decision, concluding that this Court in *Bartchy* held that the State Board is "within its authority to weigh loss of revenue into its overall balancing test, without making specific findings quantifying the harm." *Spitznagel II*, 2008-Ohio-6080, at ¶7 (App. Apx. 8). The Court of Appeals also held that it is within the State Board's province to determine how the fiscal loss will affect the factors that the Board must consider in conducting its balancing test, so long as there is reliable, probative and substantial evidence of the revenue loss itself. *Id.* at ¶8 (App. Apx. 8-9). The Court of Appeals vacated its opinion in *Spitznagel I* and affirmed the decision of the Court of Common Pleas. *Id.* at ¶11 (App. Apx. 10). Appellants filed a Notice of Appeal from the Court of Appeals' judgment to this Court. (App. Apx. 1-4).

ARGUMENT

I. 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.⁷ *Bartchy*, 120 Ohio St.3d 205, 2008-Ohio-4826 at ¶ 58. Based on that evidence alone, the State Board's hearing officer concluded that the requested

⁷ 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.

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 concluded that the transfer would undoubtedly affect CPSD detrimentally in some way” *Bartchy*, 120 Ohio St.3d 205, 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 and \$13,000 in revenue which 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 \$65.5 million in valuation and \$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. (04/06 Pet. Ex. 17) (Supp. 58-83). 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 operationally or educationally, Bedford indeed painstakingly and purposefully

presented ample evidence and the hearing officer made specific, detailed factual findings describing how the loss in revenue would undoubtedly result in specific, financial, educational and operational 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, and its programs for special needs students, and, perhaps most critically, would necessitate staff and teacher layoffs. (01/05 Tr. II at 347-53) (Bed. Supp. 13-14). The Walton Hills residents' own financial expert testified that the losses to Bedford necessarily would force Bedford immediately, at best, into fiscal watch or, at worst, into fiscal emergency.

The Walton Hills residents did not challenge or dispute any of the evidence on which these findings were based, and the findings 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. Now, in light of the record, Appellants simply cannot maintain that the State Board's denial of the transfer was based solely on a determination of the amount of the financial loss Bedford would experience. Because the State Board's determination was indeed based on detailed factual findings concerning the nature and extent of the educational and operational harm Bedford would suffer, Appellants' proposition of law is factually, logically, and inescapably flawed and legally meritless.

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 and \$13,000 in revenue 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 \$65.5 million in valuation and \$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 educational and operational harm on Bedford, certainly is more than sufficient to enable the State Board to deny the transfer. It certainly was appropriate for the State Board to conclude that Appellants did not submit sufficient evidence that the transfer was in the students' best interests, and the Court of Appeals properly concluded that the denial was correct.

In addition to being factually, logically and legally flawed, Appellants' first proposition of law dangerously ignores two immutable characteristics of this administrative appeal. First, it is and has always been Appellants' burden to establish that the requested transfer is in the best interests of the students involved. The effect of their advancing their proposition of law that there must be evidence of not only the amount of economic harm, but also, a finding of the nature and extent of the educational and operational harm the transfer will cause effectively enables Appellants to slough off the appropriately heavy burden and to foist it onto Bedford and the State Board. Second, their first proposition of law invites the courts in two respects to withhold the deference owed state agencies like the State Board which are tasked with determining matters such as this and which have the expertise and wisdom to do so in a way intended by the General Assembly. By advancing their first proposition, Appellants inappropriately attempt to characterize the issue before this Court as a legal issue, thereby attempting to lighten the appellate standard of review from an abuse of discretion standard to a

plenary, de novo standard. Further, notwithstanding the State Board's regulations and contrary to this Court's decision in *Bartchy*, Appellants improperly invite the Court to judicially graft onto the existing regulatory requirements an additional requirement that the State Board make a certain factual finding as an administrative prerequisite to the State Board's denial of a requested transfer.

Appellants essentially contend that, unless the State Board bases a conclusion of fiscal harm on a specific factual finding concerning the nature and extent of the educational and operational harm a loss of revenue a transfer would cause, it cannot deny or "stand in the way of" a requested transfer. The effect of this proposition is that it becomes the relinquishing district's or the State Board's burden to prove that the transfer is not in the students' best interests. Appellants' argument apparently is that, if the parties present no evidence on the issue, then the transfer cannot be denied.

However, Appellants ignore the fact that, as the court in one of the cases they cite in support of their position recognized, it is their burden of proof to demonstrate that the transfer should be approved, not Bedford's or the State Board's burden to show it should not. *See Levey v. State Bd. of Edn.* (Feb. 28, 1995), Franklin App. No. 94APE08-1125, 1995 WL 89703 at *5, unreported, *citing Youngstown Sheet & Tube Co. v. Maynard* (Franklin 1984), 22 Ohio App. 3d 3, 8, 488 N.E.2d 220 (App. Apx. 126-30). To contend that there must be more than a mere loss in revenue and that there must be an actual finding that a transfer "would cause a significant detriment to the fiscal or operational operation of the transferring school district" improperly forces the relinquishing district to carry a burden of proof to demonstrate that the transfer should be denied.

Neither Appellants nor the courts can second-guess the wisdom of the policy requiring those seeking to alter or disrupt school district boundary lines put into place by the State Board to carry a burden of whatever weight and girth the State Board deems appropriate to insure the protection of the best interests of Ohio's pupils. Here, the State Board carefully considered the relevant factors and allocated the burden of proof to petitioners seeking to change the status quo, which necessarily has a much wider impact than Appellants seem to either recognize or regard. The Appellants cannot be permitted to utilize this Court to unload their burden and to foist it onto any other party.

Further, for Appellants to maintain that the State Board must make a particular factual finding in order to *deny* a requested transfer improperly wrests from the State Board the discretion with which they were vested by the General Assembly when it enacted R.C. 3311.24 and improperly and presumptuously permits the courts to determine for the State Board what type of evidence should or should not be considered and what types of factual findings should nor should not exist before the State Board can pass on this issue. The State Board here followed its regulations and properly determined that the evidence demonstrated that the harm the transfer would cause showed the transfer was not in the students' best interests. To now dictate to the State Board that it must apply its regulations in a certain manner and have certain additional predicate factual findings in place before denying a requested transfer dangerously supplants the courts' judgment for the State Board's, deprives the State Board of the deference to which it is entitled, and cannot be countenanced.

For Appellants to characterize their arguments on appeal as alleged legal errors is equally impermissible. Appellants argue that the State Board did not follow appellate precedent in rendering its decision. Yet, the State Board did indeed act in accordance with the

pronouncements recognized by this Court in *Bartchy*. Further, required or not, the State Board in fact based its decision on the very type of factual findings Appellants contend were absent. Appellants' arguments of legal error made only to improperly obtain plenary review constitute an impermissible end-run around the appropriate abuse of discretion standard applicable when the court of appeals is required to review the common pleas court's review of the State Board's factual findings. See *Bartchy* at ¶ 41 quoting *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 590 N.E.2d 1240.

Required or not, Bedford submitted evidence of both the amount and the nature and extent of the fiscal, operational and educational harm a transfer would cause, and the State Board based its denial of the transfer on its hearing officer's factual findings which accepted Bedford's evidence. Accordingly, in light of this Court's decision in *Bartchy*, because the Court of Appeals correctly held that the Common Pleas Court correctly determined that the State Board properly denied the requested transfer, the Court of Appeals' decision should be affirmed.

II. 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 the 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 neither Bedford nor the State Board could respond. Because the issue was not properly raised below, it is waived. *Evans*

v. *Evans*, Franklin App. No. 08AP-398, 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 properly recognized that the racial composition factor “was by no means the primary factor that drove the board’s decision.” *Spitznagel II* at ¶ 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*, 180 Ohio App.3d 216, 2008-Ohio-6827, ¶ 40 citing *Hall China Co. v. Public Util. Comm.* (1977), 50 Ohio St.2d 206, 210. Even if the issue is considered on a non-constitutional basis, because the economic issue addressed above is amply sufficient to warrant the denial of the transfer, there is no need to address the issue here. If, in *Bartchy*, the mere loss of \$373,000 in valuation (not revenue) alone warranted the denial of a transfer, then the economic loss and harm here, regardless of the racial isolation issue, warrants the denial of the transfer.

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* (2007), 551 U.S. 701, 715-16, 127 S.Ct. 2738, 2749, addressed the issue of racial considerations in the assignment of individual students, not boundary designations of a district. Simply, the case on which Appellants rely does not stand for the proposition they advance. There is no authority for the proposition that the State Board must ignore racial isolation implications even if they are perceived as *de minimis*, particularly when the implications do not determine the outcome of the requested transfer. There is no authority supporting the proposition of law Appellants advance.

CONCLUSION

For the foregoing reasons, the Court of Appeals properly followed this Court's precedent and affirmed decision of the common pleas court upholding the denial of the transfer. This Court therefore should affirm the Court of Appeals' decision.

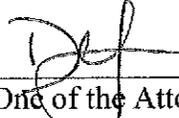
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of the Bedford City School District has been served upon Benjamin C. Mizer, Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, Counsel for Appellee State Board of Education; Stephen W. Funk, ROETZEL & ANDRESS, LPA, 222 South Main Street, Suite 400, Akron, Ohio 44308 and David R. Harbarger, ROETZEL & ANDRESS, LPA, 1375 East Ninth Street, 9th Floor, Cleveland, Ohio 44114, Counsel for Appellants, by U.S. Mail, postage prepaid, this 18th day of September, 2009.



One of the Attorneys for Appellee
Bedford City School District

Appendix

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

BRIAN P. SPITZNAGEL, ET AL.,

Petitioners-Appellants,

VS.

STATE BOARD OF EDUCATION, ET AL,

Appellees.

CASE NO.: 06CVF-12-17119

JUDGE: DANIEL T. HOGAN

CLERK OF COURTS
1:07 PM '07
FRANKLIN COUNTY, OHIO

DECISION ON THE MERITS OF REVISED CODE 119.12 ADMINISTRATIVE
APPEAL AFFIRMING THE DECISION OF THE STATE BOARD OF EDUCATION

ENTERED THIS 16th DAY OF Aug, 2007.

HOGAN, J.

This action comes before the Court upon an appeal of a Decision of the State Board of Education, (hereinafter referred to as Board). As set forth below, the Decision of the Board is **AFFIRMED**.

STATEMENT OF THE CASE

This appeal involves the denied request of Walton Hills et al, (hereinafter referred to as Appellants) requesting that the Appellants be transferred out of the Bedford City School District, (hereinafter referred to as Bedford) and into the Cuyahoga Heights Local School District, (hereinafter referred to as Cuyahoga).

On March 31, 2004 the Appellants certified to the Cuyahoga County Board of Elections that at least 75% of the registered voters of the Appellants had signed a petition to have the State Board of Education, (hereinafter referred to as Board) consider whether a transfer of territory from Bedford to Cuyahoga could occur.

The matter was assigned to a Hearing Officer and set for hearing on October 25, 2004. That hearing date was eventually rescheduled until January 25, 2005. The hearing was conducted over two full days. Leave was granted so that the parties could supply the record with written closing arguments.

After the close of all evidence and argument the Hearing Office denied the transfer of the Appellants out of Bedford. However, several key legislative enactments occurred after the 'Report and Recommendation' was rendered but prior to the Board's review. Therefore the Board remanded the matter to the Hearing Officer for the sole purpose of considering the effect that the new legislation would have on the financial loss to Bedford or the financial gain to Cuyahoga.

On April 6, 2006 the remanded matter was heard. Seven hours of testimony was taken on that day. The Hearing Office also admitted thousands of pages of documents at that hearing. The record was ordered closed on June 26, 2006. After that date the Appellants and Bedford submitted more pleading and documents. The Hearing Office re-opened the record in order to accept these new pleadings and the record was again closed as of September 11, 2006.

The Hearing Officer again reviewed the testimony, evidence and the arguments of counsel and found that the transfer would still work a financial hardship upon Bedford and therefore the transfer was again denied. The denial was appealed to the Board and the Board approved the denial adopting the two 'Report and Recommendations' as drafted by the Hearing Officer. This appeal ensued.

Appellants have requested that this Court overrule the Board's decision and remand with instructions to order the Board to transfer the district as requested by Appellants. Said appeal has been opposed by the Board, Bedford, and collectively by the City of Bedford, City of

Bedford Heights, and Village of Oakwood, (jointly referred to as Amici) who have filed a *Amici Curia* brief supporting the Board's decision.

STATEMENT OF THE FACTS

The Village of Walton Hills has been a member of the Bedford school district for a long time. (100 years or more according to Bedford and somewhat less according to the Appellants.) However, over the last several years prior to the recent attempt to transfer out of Bedford, there has been a sustained effort by Appellants to remove themselves from Bedford and join Cuyahoga.

Walton Hills is a residential community of approximately 2,400 individuals living in Cuyahoga County. Over the past 10 years the enrollment of Walton Hills students in Bedford has steadily dropped to only 45 students in the 2004/2005 school year. As a result, only a small percentage (17%) of the school age children of Walton Hills attended Bedford at the time of the requested transfer.

Bedford is a school system composed of four villages or cities: the city of Bedford; the Village of Walton Hills; the Village of Oakwood; and the village of Bedford Heights. At the time of the hearing Bedford had 3,800 students. The racial make up of Bedford's students was 71% Black, 21% White and 8% other. The racial make up of the 45 students attending Bedford from the Appellants was 34 White, 10 Black and 1 other. Cuyahoga's racial make up was 97% White and less than ten students each identified as American Indian, Asian, Black, Hispanic or Multiracial.

Appellants expressed concerns about the quality of the public education provided by Bedford; the safety of the student population; the perceived disconnect that had occurred between Appellants and the rest of the school district; and the poor results of Bedford's students

on the State's aptitude tests as reasons for the proposed transfer. Appellants also advanced the existence of new alliances Appellants had made with elements of Cuyahoga to show that the receiving district would be more aligned with Appellants than Bedford. All of these issues, and more, were taken into consideration by the Hearing Officer during the first proceeding.

As already stated, a second hearing was conducted to address the limited issue of the financial harm or windfall that might occur should the transfer be allowed by the Board. During the first hearing that same issue had been addressed in the testimony and evidence from all sides. However, the second hearing was required due to the passage of H.B. 66 on June 30, 2005. H.B. 66 accelerated the phase-out of the tangible personal property tax.

Following the second hearing S.B. 321 became law. That law amended R.C. 5751.21(H)(2) to allow for the relinquishing school district to retain 50% of the State's tangible personal property reimbursement payments that were being paid to a school district under H.B. 66. Due to the fact that both laws (H.B. 66 & S.B. 321) placed into question the calculations used by the Hearing Officer in his first 'Report and Recommendation', the Hearing Officer also took S.B. 321 into consideration. No party has objected to the broadening of the scope of the matter sent back on remand. After review of the new evidence arguments and exhibits the Hearing Officer again determined that the financial impact continued to weigh against the transfer.

STANDARD OF REVIEW

Review by this Court of an administrative agency, such as the Board, is governed by R.C. 119.12 and the multitude of cases addressing that section. The most often cited case is that of *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 407 N.E.2d 1265. The *Conrad* decision states that in an administrative appeal filed pursuant to R.C. 119.12, the trial court must

review the agency's order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with law. The *Conrad* court stated at pages 111 and 112 that:

In undertaking this hybrid form of review, the Court of Common Pleas must give due deference to the administrative resolution of evidentiary conflicts. For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility. However, the findings of the agency are by no means conclusive.

Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse, vacate or modify the administrative order. Thus, where a witness' testimony is internally inconsistent, or is impeached by evidence of a prior inconsistent statement, the court may properly decide that such testimony should be given no weight. Likewise, where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order.

The *Conrad* case has been cited with approval numerous times. *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St. 3d 466, 471, 613 N.E.2d 591 noted *Conrad* and stated that although a review of applicable law is *de novo*, the reviewing court should defer to the agency's factual findings. See *VFW Post 8586 v. Ohio Liquor Control Comm.* (1998), 83 Ohio St.3d 79, 82, 697 N.E.2d 655.

This case involves a school transfer petition. The standard enumerated by the Tenth District concerning such cases is that the transfer should be allowed if the moving party establishes that the transfer will advance "the present and ultimate good of the pupils concerned". *Bartchy v. State Bd. Of Ed.*, 170 Ohio App.3d 349, 2007-Ohio-300. The pupils at concern come from all three parties to a transfer case: the petitioners proposing the move, the receiving school board and the transferring school board.

Guiding this inquiry are two Administrative Code sections. The first, Ohio Adm. Code §3301-89-02(B) has 17 enumerated questions. The second, Ohio Adm. Code §3301-89-03(B) has ten additional factors to consider.

Also, in a territory transfer case the party seeking the transfer has the burden of proof.

Please note the following:

Moreover, it is generally held that, absent a statutory provision which specifically places the burden of proof, such burden in an administrative action is upon the party asserting the affirmative issue. *Youngstown Sheet & Tube Co. v. Maynard* (1984), 22 Ohio App.3d 3 at 8. (citing *Long v. Div. of Watercraft* (1963), 118 Ohio App. 369 (25 O.O.2d 2621; and *Mid-Ohio Health Planning Fedn. v. Certificate of Need Review Bd.* (April 1, 1982), Franklin App. No. 81AP-958, unreported

Finally, it is the duty of the Board, not the trial court, to weigh the competing factors so as to make the determination whether a transfer is in the best interest of all students effected. *Fairborn City School District v. State Board of Education* (Oct.24, 1996), Franklin App. No. 96APE04-416. Based upon the above law, this Court will now address the issues raised by the parties in this appeal.

ERROR RAISED BY APPELLANT

The Appellants raised 10 specific assignments of error. It is clear to this Court that the Hearing Officer followed the mandates of Ohio Adm. Code §§3301-89-02 & 03 when he authored his first 'Report and Recommendation'. This Court will address Appellants' alleged errors in the order advanced by the Appellants. As a point of reference, this Court will cite to the first hearing conducted in January of 2005 as T. I. Vol. ___ and cite to the second hearing from October 2006 as T. II.

I. The State Board Erred in Denying the Proposed Transfer Based on the Alleged Loss of Tax Revenue.

In Appellants' first assignment they contested the findings of the Hearing Office

concerning the alleged tax loss. Specifically, the Appellants contest the Hearing Officer's interpretation of the evidence concerning his finding that the transfer would "impose a significant detrimental financial impact" upon Bedford.

Appellants do not argue that the financial impact is not a legal issue that should be reviewed by the Hearing Officer. Instead, the Appellants claim that the Hearing Officer failed to interpret the evidence in Appellants' favor. Well known to the parties and this Court is the fact that a decision based upon reliable, probative, and substantive evidence will not be modified by this Court. Here, among other evidence, the Hearing Officer had the testimony of Mary Ann Nowak, Treasurer for Bedford. Her testimony at Tr. I, Vol. II at 323-363 addressed the harm that would occur from the loss of the Appellants' territory. Lowell Davis presented testimony showing the harm that would befall Bedford following the transfer at Tr. I, Vol. II at 197 – 198. The harm Ms. Nowak & Mr. Davis described was not *de minimis*.

Given the standard of review, this Court finds that there exists reliable, probative, and substantive evidence that supports the Board's adoption of the Hearing Officer's recommendation. Therefore, this alleged error lacks merit.

II. The State Board Erred in Rejecting Walton Hills' Unanimous Resolutions Approving Direct Payments to Bedford City Schools.

Next the Appellants argued that the Hearing Officer was incorrect when he choose to minimize or eliminate the future effectiveness of the Appellants' Resolutions approving future payment to Bedford as a way to mitigate or eliminate the perceived financial harm. The parties in their respective Briefs argue for and against the legality of the Resolutions. The Hearing Officer held as follows within his 'Report and Recommendation' filed on October 25, 2006:

Step III requires the cooperation of the village of Walton Hills in levying taxes against the electorate and then donating this money to the BCSD. [Bedford] While representations and, apparently, some actions have been made toward this

end, there is no evidence of a legally binding funding mechanism in this vein upon which the BCSD [Bedford] may reasonably rely. (Page 7, 10-25-7 'Report and Recommendation')

This Court finds from the language of the Resolutions; from the evidence produced at the hearing, and from the speculative nature of the future actions of the taxpayers of Walton Hills, that the Hearing Officer based the above noted conclusion on reliable, probative, and substantive evidence. In any event, the Hearing Officer's decision is supported by the record and this Court will give it the deference required. The Board's adoption of that recommendation is therefore also appropriate.

This Court finds that Appellants' second assignment of error has no merit.

III. The State Board Erred in Determining That the Fiscal Resources Acquired by Cuyahoga Heights Were Not Commensurate with the Educational Responsibilities Assumed.

The Appellants did not argue that this was an improper factor to consider. Appellant merely asserts that the Hearing Officer came to the wrong conclusion based upon Appellants' interpretation of the evidence. Appellants assert that one of the factual findings of the Hearing Office is in error. The Hearing Officer showed \$8,000,000.00 in revenue going to Cuyahoga when in fact the amount apparently would be \$4,000,000.00. This error was alleged to have been caused by the Hearing Officer using the millage from Bedford instead of Cuyahoga's millage rate. Apparently, Cuyahoga's millage is $\frac{1}{2}$ that of Appellants' district. In response Bedford asserts that while using the right number the Hearing Officer would still come to the same results.

Using the required standard of review, this Court finds that there does exist reliable, probative, and substantive evidence that supports the Hearing Officer's finding. The various claims made by the Appellants questioning the actual number does not change the fact that from the evidence advanced during the two hearings, there existed a number of valid evidentiary

findings in the record and in both 'Report and Recommendations' that would support the Hearing Officer's decision.

Given the standard of review, this Court finds that there exists reliable, probative, and substantive evidence that supports the Board's adoption of the Hearing Officer's recommendation. Therefore, this alleged error lacks merit.

IV. The State Board Erred in Denying the Transfer Based on the *De Minimis* Effect that the Transfer Will Have Upon the Racial Composition of the Bedford City Schools.

Again the Appellants argues that the evidence comes to a different conclusion than that reached by the Hearing Officer. In this claimed error, the Appellants assert that this Court should hold that there existed only a *de minimis* effect on the racial composition of Bedford and therefore this Court should reverse the Board.

It must be noted that race is only one of the questions to be considered pursuant to Ohio Adm. Code §3301-89-02(B). So even if this Court would find error, that error, standing alone, would not suggest that the Board's decision should be reversed. This point is made to address Appellants' reliance on *Cincinnati City School District*, 113 Ohio App.3d 305.

Please note the following from the *Cincinnati* opinion:

"[T]he several factors for consideration set forth in Ohio Adm.Code 3301-8902(B) and 3301-89-03(B) are intended to be an integral part of the board's transfer decision with primary consideration given to the present and ultimate good of all the students who are affected by the proposed transfer.

* * *

"[I]t is appropriate for the board to consider both the social and educational needs of all affected students, as well as the potential financial implications of a transfer. When a transfer of school districts is proposed, a balancing must take place between many competing factors in order to achieve the desired result of achieving what is in the best interests of the students concerned." *Garfield Hts. City School Dist. v. State Bd. of Edn* (1990), 62 Ohio App.3d 308, 319, 323, 575 N.E.2d 503, 511, 513; see, also, *In re Transfer of Territory from Streetsboro City School Dist. to Kent City School Dist.* (June 11, 1992), Franklin App. No. 91AP1405, unreported, 1992 WL 132457 ("Primary consideration is given to the

present and ultimate good of the students involved and no one factor determines the propriety of the transfer"). *Id.*, *Cincinnati* at 310

Unlike *Cincinnati*, the Hearing Officer in this case had other evidence in addition to the racial composition of the two districts and the territory to form the bases of his recommendation. Hence, *Cincinnati* is not controlling.

This Court admits that other than the statistical evidence there was little additional evidence concerning this topic. However, there did exist the one statement contained in the record from one of the 'Questionnaires' and there was also the testimony of Bennie Kelly that suggested a racial motive in the transfer request. Tr. I, Vol. III at 38-67.

Given the standard of review, this Court finds that there exists reliable, probative, and substantive evidence that supports the Board's adoption of the Hearing Officer's recommendation. Therefore, this alleged error lacks merit.

V. The State Board Erred in Concluding that A "Substantial Upheaval" in Long-Held Loyalties Will Result From the Transfer of 45 Walton Hills Students from the BCSD [Bedford].

The Appellants contest the finding of the Hearing Office as adopted by the Board and asserts that the holding is an error of law. Appellant cites to *Schreiner v. State of Ohio, Department of Education*, (Nov. 9, 1999), Franklin App. No. 96AP-1251 in support of this argument. This Court finds that Appellants' reliance on *Schreiner* is misguided.

In *Schreiner*, the Court was dealing with an appeal concerning the Board's reversal of a Referee's opinion where the Board enumerated 4 specific reasons for the reversal. The trial court was therefore limited to a review of the record as it would support the Board's 4 enumerated reasons. In this case the Board adopted both 'Report and Recommendations'. The Board did not limit the scope to only one or a few issues. This Court will not place itself in the position of the Board and reweigh all of the evidence.

Applying the appropriate level of review this Court holds that there exists reliable, probative, and substantive evidence that supports the Hearing Officer's recommendation. The transcript from the first Hearing contains evidence from which the Hearing Officer could have based his findings. See testimony of Todd Toaz, Tr. I, Vol. III at 68-93; Joseph Allie, Tr. I, Vol. III at 112-241, and Bennie Kelly, Tr. I, Vol. III at 38-67.

Given the standard of review, this Court finds that there exists reliable, probative, and substantive evidence that supports the Board's adoption of the Hearing Officer's recommendation. Therefore, this alleged error lacks merit.

VI. The State [Board] Erred in Concluding that the Proposed Transfer of Only 45 Students Would Result in the Ineffective Utilization of BCSD [Bedford] Facilities.

Appellants again attack the weight of the evidence in support of the Hearing Officer's finding that the transfer would cause an 'ineffective utilization of' Bedford's facilities.' Appellants argue that there was no evidence that the loss of only 45 enrolled students would lead to an ineffective use of Bedford's facilities. However the Hearing Office's did not limit his inquiry to merely the number of students who would leave the district.

In his first 'Report and Recommendation' the Hearing Officer pointed to the following at page 22:

Transferring the subject territory into the CHLSD [Cuyahoga] would result in the ineffective utilization of BCSD [Bedford] facilities. 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 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 [Bedford] educational facilities.

In Appellants' Brief that argument is not directly contested. This Court can assume that the Appellants also contest that argument based upon Appellants' earlier assignments of error claiming the lack of any meaningful financial harm to Bedford should the transfer occur.

However, this Court has already held that there exists reliable, probative and substantive evidence in support of the Hearing Officers' finding that Bedford will incur a large financial harm. This Court will not revisit that matter here.

Given the standard of review, this Court finds that there exists reliable, probative, and substantive evidence that supports the Board's adoption of the Hearing Officer's recommendation. Therefore, this alleged error lacks merit.

VII. The State Board Erred in Concluding that Walton Hills is not Isolated From the Rest of the BCSD [Board].

Appellants again disagree with the conclusion of the hearing officer. Appellants claim that there existed "undisputed evidence that the vast majority of the community has lost all connection to" Bedford. (Brief of the Appellant, P. 33) Therefore, it was error for the Hearing Officer to conclude otherwise. As addressed prior, the record reflects that a number of individuals testified to the connection that they felt to Bedford. That evidence was part of the record and part of the basis of the Hearing Officer's conclusion in response to this question.

There has also been advanced an assertion that the individuals spearheading the transfer, and who testified at the hearing in favor of the transfer, were singularly motivated in their quest to leave the district. Their motives were questioned and their credibility was tested. It was up to the Hearing Officer to determine the issue of the witnesses' credibility. This Court must not supplant itself for the Hearing Officer.

Given the standard of review, this Court finds that there exists reliable, probative, and substantive evidence that supports the Board's adoption of the Hearing Officer's recommendation. Therefore, this alleged error lacks merit.

VIII. The State Board Erred in Concluding that the Compelling Reasons Presented for the Transfer were "Neutral" Factors that did not Weigh in Favor of Transfer.

Petitioners' expert testified that, even with the influx of 267 additional students from Walton Hills, the pupil/teachers ratios at Cuyahoga Heights would still be significantly lower than the pupil/teacher ratios in Bedford City Schools and that CHLDS [Cuyahoga] would be able to absorb all 267 of the additional students without hiring any new staff. (Appellants' Brief at p. 38)

Appellants then assert that Bedford never presented any evidence to contradict that opinion. In response Bedford asserts that there was no evidence elicited from Cuyahoga establishing that Cuyahoga felt that it could handle the new students.

This Court is mindful of the fact that Appellants held the burden of proof at the hearing, not Bedford. Bedford also claimed that the Hearing Office had evidence of the fact that Cuyahoga had, two times in the past, resolved not to accept a transfer of Appellants into its district. (T. I., Ex. 1)

Bedford, in its Brief also contests the sufficiency of Appellants' expert's testimony on this subject. Bedford argues that Mr. Siegfirth's testimony was based on a faulty assumption that Cuyahoga would handle the new students by hiring new teachers 'at a near minimum-wage salary, with no benefits, in direct contradiction to his own experience'. (Bedford Brief at P. 23) However, upon review of the transcript this Court notes that Mr. Siegfirth stated that the salary for the new hires would be \$30,000.00. (T. I. Vol. 1 at 258.) Bedford apparently overstated the testimony.

Next Bedford points to the record and claims that Mr. Siegfirth's testimony was mere speculation. Bedford argues that his opinion is flawed because Mr. Siegfirth did not have any real 'first-hand' knowledge of the Cuyahoga system. He also failed to factor in any other issues other than the need to hire new teachers. (T. I. Vol. 1 259-261)

The point of Bedford's argument is that Mr. Siegfirth's testimony did not create reliable, probative, and substantive evidence. Mr. Siegfirth did not know a number of apparently

significant cost issues for Cuyahoga even though his ultimate conclusion was that Cuyahoga could handle the influx of new students. Appellants never called anyone from Cuyahoga to testify as to that district's ability to accept some or all of Appellants' students. With those issues in doubt, this Court cannot say that the Hearing Officer erred in coming to his conclusion that the issue was "neutral".

Given the standard of review, this Court finds that there exists reliable, probative, and substantive evidence that supports the Board's adoption of the Hearing Officer's recommendation. Therefore, this alleged error lacks merit.

X. The State Board Erred as a Matter of Law In referring to Other Relevant Factors as "Neutral" When They Should be Deemed to Favor the Proposed Transfer.

For the last assignment of error, the Appellants contest that the Hearing Officer was incorrect when he answered Ohio Adm. Code §3301-89-02(B) 10, 11, and 12. Appellants claim that the Hearing Officer followed a 'pattern of mischaracterizing positive factors as neutral factors'. (Appellants' Brief at P. 39.)

Bedford counters with its belief that the factors enumerated in Ohio Adm. Code §3301-89-02(B) 10, 11, and 12 are 'conducive to negativity or neutrality but not to positivity.' (Bedford Brief at P. 24.) Bedford refutes the 'pattern of mischaracterizing' statement made by Appellants by pointing to other factors that the Hearing Officer and the Board found to be positive when said factors were also only subject to a negative or neutral result. Bedford sums up its position as follows:

"a petitioner should not be granted "points" because it has requested a transfer that does not violate Ohio law or create a school district without a high school" ' (Bedford Brief at P. 25)

The Board asserted in its Brief that there exists a 'sea-saw clash' between the parties who wish to leave Bedford and the parties who wish to stay. The Board characterized Appellants'

last several errors as merely evidence of Appellants' desire to leave Bedford. Taken together, the Board argued that said preference was not even a factor to be considered until all other issues were in balance. See Ohio Adm. Code §3301-89-03(C).

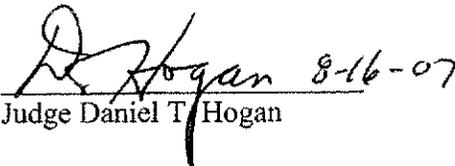
The Board also argues, especially in regard to assignment of error ten, that the Appellants held the burden on those issues and failed to convince the Hearing Officer. Unfortunately, the Board did not support that statement with any specific reference to the record.

This Court finds intriguing the concept that Ohio Adm. Code §3301-89-02(B) 10, 11, and 12 can only be negative or neutral as asserted by Bedford. This Court will not, however, base its opinion on that ground. Instead this Court will refer to its prior holdings contained in this Decision and state that the evidence at the first hearing supports the Hearing Officer's conclusions.

Given the standard of review, this Court finds that there exists reliable, probative, and substantive evidence that supports the Board's adoption of the Hearing Officer's recommendation. Therefore, this alleged error lacks merit.

CONCLUSION

Having applied the law to the facts, having reviewed the arguments of both parties, and having, when appropriate, given due deference to the Board as required by law, this Court finds that the Board's adoption of the Hearing Officer's 'Report and Recommendations' is **AFFIRMED**. Counsel for the Appellee Board of Education should prepare and submit a Judgment Entry pursuant to Local Rule 25.01.


8-16-07
Judge Daniel T. Hogan

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