

ORIGINAL

IN THE SUPREME COURT OF OHIO

BRIAN P. SPITZNAGEL, et al.,	:	
	:	Case No. 2009-0015
Appellants,	:	
	:	
vs.	:	On Appeal from Franklin County
	:	Court of Appeals, Tenth Appellate
STATE BOARD OF EDUCATION, et al.,	:	District of Ohio, Case No. 07AP-757
	:	
Appellees.	:	

BRIEF OF AMICI CURIAE CITY OF BEDFORD, CITY OF BEDFORD HEIGHTS, AND VILLAGE OF OAKWOOD IN SUPPORT OF APPELLEES

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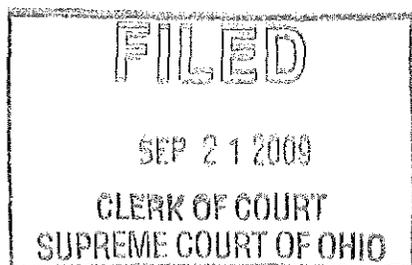


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AMICI STATEMENT OF INTEREST

Amici Curiae the City of Bedford (“Bedford”), the City of Bedford Heights (“Bedford Heights”), and the Village of Oakwood (“Oakwood”), Ohio are three of the four communities served by the Bedford City School District.

For over a century, Appellee Bedford City School District (“BCSD”) has served the communities of Bedford, Bedford Heights, Oakwood and the Village of Walton Hills. The instant case involves the efforts of Appellants Brian Spitznagel, Marlene Anielski and the Village of Walton Hills (hereinafter “Petitioners”) to remove Walton Hills (and its tax base) from BCSD to the Cuyahoga Heights Local School District (“CHLSD”). The proposed transfer would undoubtedly cause significant harm to BCSD. The proposed transfer would also cause significant harm to the remaining communities, Bedford, Bedford Heights and Oakwood. Amici Curiae file this brief because of their concern about the damage such a transfer would have upon their communities and – in particular – upon the children in their communities.

STATEMENT OF THE CASE AND FACTS

The initial administrative hearing took place before Hearing Examiner Kevin P. Byers in January, 2005. On May 20, 2005, the Hearing Examiner issued his Report and Recommendation that the Petitioners’ proposed transfer of territory from BCSD to the Cuyahoga Heights Local School District be denied. (Appellants’ Appendix at p. 69, hereinafter “Apx. 69”).

The May 20, 2005 Report discussed numerous factors, but noted that “[t]he main factor militating against the transfer is the financial detriment which will clearly and irrefutably be foisted upon the BCSD. Correlatively, the fiscal resources to be transferred to the CHLSD would not be commensurate with the educational responsibilities assumed.” (May 20, 2005 Hearing Examiner’s Report, p. 28) (Apx. 95).

“It is wholly foreseeable that the loss of the Walton Hills tax monies would cause the closing of facilities, reduced educational programming, and staff and faculty cutbacks, and other curtailments damaging to the district students. Such a response to the loss of the Walton Hills tax monies, wholly predictable and necessary, would grossly hinder the effective utilization of BCSD educational facilities.” (May 20, 2005 Hearing Examiner’s Report, p. 22) (Apx. 89).

In the meantime, the Ohio legislature passed House Bill 66, which, inter alia, eliminated the tangible personal property tax. At the July 12, 2005, meeting of the State Board of Education, the question was raised as to whether or not House Bill 66 would eliminate the negative financial impact of the proposed transfer. Thus, the State Board did not act on the Hearing Officer’s May 20, 2005, Recommendation, but instead remanded the matter to the Hearing Officer for the solitary purpose of examining the financial impact of this move on BCSD and CHLSD.

In April of 2006, further hearings were conducted before the Hearing Examiner on the limited issue of how, if at all, House Bill 66 changed the financial impact of the proposed transfer on BCSD and the Cuyahoga Heights school district. The undisputed evidence was that House Bill 66 would *increase* the adverse financial impact that BCSD would incur from the proposed transfer and the windfall that the Cuyahoga Heights district would obtain. However, on June 5, 2006, Senate Bill 321 was signed. Since Senate Bill 321 could affect the financial impact of the proposed transfer, the Hearing Examiner permitted the parties to submit briefs on that issue. Although “[t]he parties var[ied] widely in their interpretation of the effect of SB 321 (and HB 66) on the proposed transfer,” the Hearing Examiner found that “[e]ven relying upon only the Petitioner’s evidence and expert testimony, the proposed transfer would create a significant financial detriment to the BCSD”. (October 25, 2006 Hearing Examiner’s Report on Remand, p. 5, at fn. 5) (Apx. 64).

The Hearing Examiner also found that the temporary “revenue recovery methods” proposed by the Petitioners were, with minor exceptions, unsupported by the evidence in the record, of questionable legality, and improbable. (October 25, 2006, Hearing Examiner’s Report on Remand, pp. 6-8) (Apx. 65-67). Moreover, “it is incontestable that the post-transfer impact upon the BCSD shall remain extant beyond the five-year accounting forecast window”. (October 25, 2006 Hearing Examiner’s Report on Remand, p. 8) (Apx. 67).

After considering the evidence in the record regarding the financial impact, the Hearing Examiner found that “it is apparent that the transfer of territory from the Bedford City School District to the Cleveland [*sic*] Heights Local School District would impose a significant detrimental financial impact upon the Bedford City School District.” (October 25, 2006 Hearing Examiner’s Report on Remand, p. 8) (Apx. 67). The other reasons for denying the transfer, which were expressed in the May 20, 2005 Hearing Examiner’s Report, remained unchanged, and were incorporated into the Hearing Examiner’s October 25, 2006 Report. (October 25, 2006 Hearing Examiner’s Report on Remand, p. 3, at fn. 1) (Apx. 62).

The Hearing Examiner recommended that the State Board of Education deny the proposed transfer, and on December 12, 2006, the State Board of Education accepted this recommendation and adopted the Hearing Examiner’s Reports and Recommendations as its own. (Apx. 59).

The Petitioners then filed an R.C. 119.12 appeal from the State Board’s decision to the Franklin County Court of Common Pleas on December 29, 2006. On August 17, 2007, the trial court found that there was reliable, probative, and substantive evidence that supported the State Board’s adoption of the Hearing Officer’s recommendation and, thus, affirmed the State Board’s

decision. This decision was journalized on September 11, 2007, and the Petitioners timely appealed to the Franklin County Court of Appeals.

On September 30, 2008, the Franklin County Court of Appeals issued its initial opinion, a 2-1 opinion reversing the trial court. (Apx. 13). The Court of Appeals' majority opinion recognized that "a court of appeals does not determine the weight of the evidence" and that "[i]n reviewing the court of common pleas' determination that the board's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abuse its discretion." (Initial, September 30, 2008, Court of Appeals Opinion ¶8, pp. 4-5) (Apx. 16-17). The majority of the Court of Appeals also recognized that it had plenary review of any question of whether the board's order was in accordance with law. (Id. ¶8, p. 5) (Apx. 17). The Court of Appeals Opinion stated that it did not "pass[] upon the issue whether the trial court abused its discretion in finding that the board's order was supported by the requisite quantum and quality of evidence". (Id. ¶75) (Apx. 45). Yet, in its initial opinion, the Court of Appeals conducted a *de novo* review of the State Board's findings regarding the significance and impact of the revenue loss and the effect of the transfer on racial isolation and held that these findings were "contrary to law". (Id. ¶¶75 & 76) (Apx. 45).

The Court of Appeals dissenting opinion "disagree[d] overall with the manner in which the majority characterize[d] the issue for resolution" because the dissent contended that the issues presented on appeal were not legal issues but rather were challenges to "the hearing officer's findings of fact and weighing of factors that serve as the necessary predicate for the conclusions and ultimate decision. . . ." (Initial, September 30, 2008, Court of Appeals Opinion ¶80) (Apx. 47).

The Court of Appeals' initial majority opinion relied upon *Bartchy v. State Bd. of Edn.*, 170 Ohio App.3d 349, 2007-Ohio-300, 867 N.E.2d 440, in support of its holding that a finding of revenue loss was insufficient as a matter of law to show that the loss of funds would be detrimental to the fiscal or educational operation of the school district without additional detailed findings of how the loss of income would affect the relinquishing school district. (Initial Court of Appeals Opinion ¶¶50-55) (Apx. 35-38). However, on September 30, 2008, the very day the Court of Appeals issued its initial opinion, the Ohio Supreme Court reversed the Court of Appeals' prior decision in *Bartchy*. *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E.2d 1096. The Supreme Court's plurality opinion in *Bartchy* stated that in the absence of an abuse of discretion by the trial court, it is not the role of an appellate court to "reweigh the evidence". *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E.2d 1096, at ¶94. A fourth justice joined the judgment of the court precisely because the Court of Appeals in *Bartchy* had "substituted its judgment for the trial court on issues of fact". *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E.2d 1096, at ¶98.

The State Board and BCSD promptly filed motions for reconsideration with the Court of Appeals based upon the Supreme Court's reversal of *Bartchy*. On November 20 and 21, 2008, the Court of Appeals granted the application for reconsideration, vacated its initial decision, and affirmed the judgment of the Franklin County Court of Common Pleas. (November 21, 2008, Court of Appeals Entry and November 20, 2008, Court of Appeals Decision) (Apx. 5 & 6). On January 5, 2009, Appellants herein filed their Notice of Appeal to this Court from the Court of Appeals' Final Decision and Entry.

ARGUMENT

Proposition Of Law No. I: An Appellate Court May Not Disregard A Common Pleas Court's Determination That An Agency's Factual Findings Were Supported By Reliable, Probative, And Substantive Evidence Unless The Court Of Appeals Finds That The Common Pleas Court Abused Its Discretion.

Where the record contains at least some reliable, probative, and substantial evidence to support the agency's decision, and the decision is otherwise in accord with the law, a court should affirm the agency's order and not substitute its judgment for that of the agency. Indeed, the Ohio Supreme Court has held that "[w]e will not substitute our judgment for that made by the state board [of education] if there is some evidence supporting the board's resolution". *Pushay v. Walter* (1985), 18 Ohio St.3d 315, 316, 481 N.E.2d 525, citing *Harris v. Lewis* (1982), 69 Ohio St.2d 577, 578, 433 N.E.2d 223, and *State ex rel. Ogan, v. Teater* (1978), 54 Ohio St.2d 235, 247, 375 N.E.2d 1233. Thus, Petitioners claim that they "are not asking this Court to re-weigh the evidence in the record". (Merit Brief of Appellants, p. 29). Yet, in fact, Petitioners would have this Court substitute its judgment for that of the State Board regarding the State Board's *factual* findings, in the guise of a de novo review of the "legal" sufficiency of the State Board's "analysis" of the facts.

The Hearing Examiner found that "[e]ven relying upon only the Petitioner's Evidence, the proposed transfer would create a significant financial detriment to the BCSD". (October 25, 2006 Hearing Examiner's Report on Remand, p. 5, fn. 6) (Apx. 64). Indeed, Petitioner's own expert found that BCSD would lose at the very least over \$6.8 million in tangible personal property taxes alone over the first five years following the transfer. (Initial, September 30, 2008, Court of Appeals Opinion ¶52) (Apx. 37). Plainly, the evidence of the loss of millions of dollars of revenue was reliable probative and substantial evidence supporting the State Board's finding

that the transfer would “impose a significant detrimental financial impact upon the Bedford City School District”. (October 25, 2006 Hearing Examiner’s Report on Remand, p. 8) (Apx. 67).

There was no finding by the Court of Appeals – and Petitioners have not asked this Court to find - that the Common Pleas Court’s affirmation of the State Board’s factual findings was an abuse of discretion. “[I]n light of the appropriate and highly deferential abuse-of-discretion standard of review, [where] the evidence offered in favor of the transfer by the residents is not sufficient to establish that the trial court abused its discretion in determining that the state board’s order was supported by reliable, probative, and substantial evidence[, i]t is not the role of an appellate court . . . to reweigh the evidence.” *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, at ¶94.

Much of Petitioners’ Merit Brief reads as if it presumes, without directly stating, that the burden was on the State Board to prove that the transfer should be denied rather than upon the Petitioners to prove that the transfer should be approved. In fact, the burden of proof was borne by Petitioners, not by the State Board. See, e.g., *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, at ¶¶ 78-79, 98.

The Hearing Officer considered over 1,300 pages of transcripts and over 7,000 pages of documents in preparing his findings, reports and recommendations. The Hearing Officer’s weighing and interpretation of the evidence was eminently reasonable, and (contrary to Petitioners’ arguments at pages 25-30 of Appellants’ Merit Brief) an appellate court may not disregard the duty of deference to such factual findings by treating the Hearing Examiner’s factual “analysis” as a legal issue subject to a plenary review standard.

Any factual finding from the evidence presented can be characterized as an “analysis” of the evidence. However, if disagreement over the “analysis” of reliable, probative and substantial

evidence could be characterized as an error of law, the rule of deference to agency fact finding effectively would become a sort of “Simon Says” rule that would disappear whenever a reviewing court chooses to label a finding of fact as a “legal” error in factual “analysis”.

The Court of Appeals never found, and Petitioners do not claim, that there was an abuse of discretion by the Common Pleas Court in its finding that the agency’s decision was supported by reliable, probative and substantive evidence. Thus, R.C. 119.12’s standard of review required the Court of Appeals to do what it ultimately did, that is, uphold the Common Pleas Court’s finding that the agency’s decision was supported by reliable, probative and substantive evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 590 N.E.2d 1240; *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826.

Proposition Of Law No. II: The State School Board May Consider A Wide Range Of Issues To Determine The Present And Ultimate Good Of All Of The Students Who Would Be Affected By A Proposed Change In A School District’s Boundaries.

The State Board’s inquiry is not a formalized process limited to the factors specified in the Ohio Administrative Code. Rather, the State Board’s duty under Ohio Adm.Code 3301-89-01(F) is to determine the “ultimate good of the pupils concerned”, which supports “a wide-ranging inquiry that will necessarily differ from case to case”. *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, at ¶52.

“[I]t is appropriate for the state 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.’” (*Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, at ¶51, quoting *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1990), 62 Ohio App.3d 308, 323.)

The “present and ultimate good” of BCSD’s students is to have access to a quality education in a stable environment. However, “substantial upheaval [would] be caused by changing the long-existing district boundaries”, and BCSD’s ability to provide a quality education would be impaired if millions of dollars in tax revenue were taken away from its students. (May 20, 2005 Hearing Examiner’s Report, p. 28) (Apx. 95).

Petitioners initially suggested that BCSD could easily make up the annual loss of millions of dollars of education revenue by raising property taxes. This ignores the economic reality that the residents can only afford so much in property taxes, and there are real limits to the ability to “squeeze” more tax revenue from the real property left behind in the school district. Indeed, BCSD’s millage is already higher than that of CHLSD. (See May 20, 2005 Hearing Examiner’s Report, p. 17) (Apx. 84). Since Petitioners bore the burden of proof that the transfer should be granted, Petitioners had the burden of proving that the lost tax revenue would not result in inadequate school funding for the children left behind. The Hearing Examiner did not find Petitioners’ evidence and arguments to be persuasive.

The total property tax burden on a home owner is a combination of county, school district and municipality property taxes. The lion’s share of property taxes go to support the school district. However, local governments also rely heavily upon property taxes as an essential revenue source. The school district uses property tax revenue to educate its children. The local governments use their property tax revenue for a variety of purposes including sanitation, public safety, police and fire protection, and various infrastructure needs. While the school district naturally spends its tax revenues directly on the education of its children, the local governments’ activities also promote a safe and stable environment and community in which that education can take place.

At a certain level, any increase in property tax revenue for one purpose will be impossible without a corresponding decrease in property tax revenue for another purpose. There is no evidence in the record that Bedford, Bedford Heights and Oakwood are in any position to slash their total property tax revenue in order to “make up” for the lost school district revenue that would be taken away with the proposed transfer. Inadequate school funding would clearly be contrary to the best interests of our children. However, inadequate police, fire, sanitation and road maintenance would also be contrary to the best interests of all of the affected children.

Petitioners argue that because the change in racial composition resulting from the transfer would be *de minimis*, the State Board should not have treated as a factor disfavoring the transfer the fact that a mostly white suburb was seeking to transfer from BCSD, which is 71% black, to CHLSD, which is 97% white. However, as the Court of Appeals noted in its Final Decision, this factor was “but one of numerous factors that the board considered [and] was by no means the primary factor that drove the board’s decision”. (November 20, 2008, Court of Appeals Decision ¶9) (Apx. 9). In fact, the racial impact of the proposed transfer was properly noted as part of the Agency’s “wide ranging inquiry”.

Bedford, Bedford Heights and Oakwood pride themselves on being safe, welcoming and culturally diverse communities. “Walton Hills residents are welcomed to immerse themselves and their families in the BCSD and its many activities” and “BCSD parents, people who have actually been consistently in the schools and working for the district’s benefit . . . have faith in their district, appreciate the diversity evident in BCSD, and have high hopes for continued improvement in the standardized testing. . . .” (May 20, 2005 Hearing Examiner’s Report, p. 25) (Apx. 92).

Whether sincerely held or not, Petitioners' negative attitudes about BCSD and about Bedford, Bedford Heights and Oakwood, falsely characterize BCSD and the amici municipalities as unsafe, unwelcoming and unable to embrace cultural diversity. "[V]ery few of the Walton Hills parents involved in the transfer movement have actually given the BCSD a chance to show what it can do for their children. They have generally relied upon anecdotal stories, rumors, and disinformation to gauge the propriety of enrolling their children in their own public school district." (May 20, 2005 Hearing Examiner's Report, p. 27) (Apx. 94).

"[T]here is no reliable, probative, or substantial evidence in this record indicating that the BCSD is unsafe, unconcerned, or incapable of offering a quality education to any student who desires it. With appropriate interaction, communication, energy, and perseverance, patience, the residents of the village of Walton Hills may find themselves satisfied with the diverse and varied offerings of the BCSD – 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 the BCSD, they may very well experience beneficial academic, extracurricular, and social involvement." (May 20, 2005 Hearing Examiner's Report, pp. 27-28) (Apx. 94-95).

If Petitioners' prejudgments about BCSD result in the proposed transfer, then Bedford, Bedford Heights and Oakwood would be falsely branded as intolerant and unsafe communities. The entire community - and not just the schools - would be stigmatized. This harm to the reputations of the school district and the communities of Bedford, Bedford Heights and Oakwood would inevitably undermine property values and thus further undermine the ability of the school and the municipalities to raise the funds necessary to provide an excellent educational and community environment for their children.

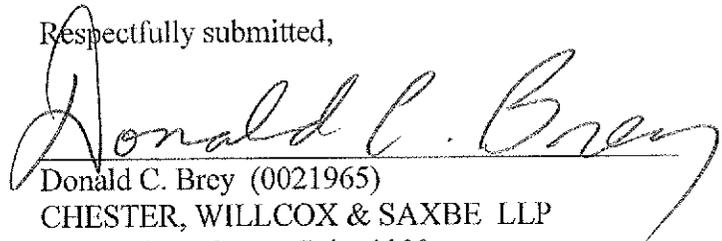
The transfer sought by Petitioners would impose a real and significant harm to the financial and community stability of BCSD based largely upon imaginary and unsubstantiated

concerns. If the State Board's denial of the transfer were reversed, the transfer would replace imaginary problems with real ones. Plainly, the present and ultimate good of the students concerned would be undermined if Petitioners' prejudgments about BCSD and its communities were given weight.

CONCLUSION

For the foregoing reasons, Amici Curiae the City of Bedford, the City of Bedford Heights, and the Village of Oakwood respectfully submit that the judgment of the Tenth District Court of Appeals should be affirmed.

Respectfully submitted,



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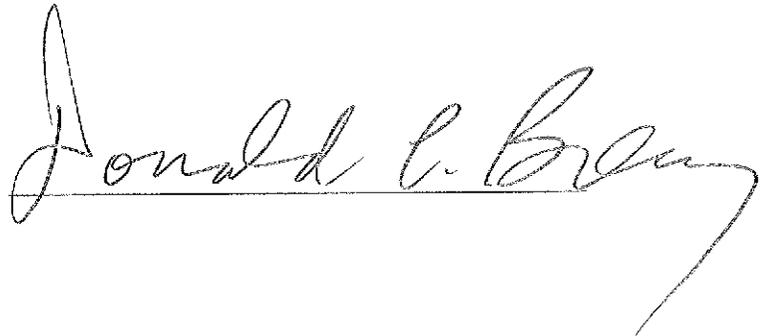
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A handwritten signature in black ink, reading "Donald C. Bray". The signature is written in a cursive style and is positioned to the right of the text blocks, appearing to be a signature of the sender.