

IN THE SUPREME COURT OF OHIO

BRIAN P. SPITZNAGEL, *et al.*,

Appellants

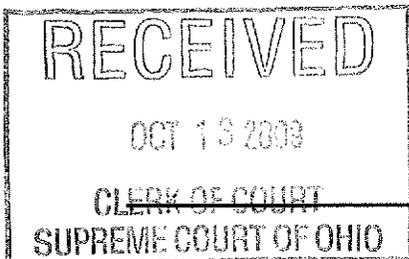
v.

STATE BOARD OF EDUCATION, *et al.*,

Appellees.

CASE NO. 2009-0015

On Appeal from the Franklin County  
Court of Appeals, Tenth Appellate  
District, Case No. 07AP-757



REPLY BRIEF OF  
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AND THE VILLAGE OF WALTON HILLS

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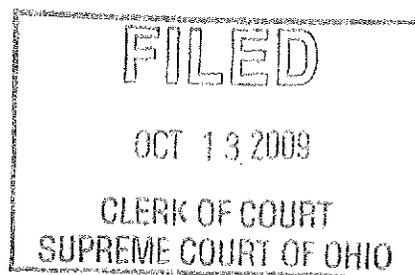
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## INTRODUCTION

Appellees State Board of Education (the “Board” or “State Board”) and the Bedford City School District (“BCSD”) repeatedly misstate and mischaracterize the legal issues presented by this appeal. This Court did not accept jurisdiction in order to conduct a *de novo* review of the evidence. While Petitioners certainly have presented compelling evidence to warrant a transfer of school territory (as outlined in great detail in our opening brief), the fact of the matter is that this Court did not accept jurisdiction in order to determine the merits of their school transfer petition. Rather, this Court accepted jurisdiction in order to decide two important propositions of law relating to legal standards that should be followed by the State Board in deciding school transfer petitions. Both are questions of law that are subject to *de novo* review under R.C. 119.12, and will have a significant impact on how school transfer petitions are decided throughout the State of Ohio. Accordingly, Appellants request that the Court conduct *de novo* review of both legal issues, and conclude, as the Tenth District concluded in *Spitznagel v. State Bd. of Edn.*, 2008-Ohio-5059 (Sept. 30, 2008) (“*Spitznagel I*”), that the State Board’s decision should be vacated because it was not “in accordance with law.” *Id.* at ¶ 76-78 (copy in Appendix to Merits Brief, pp. 45-46) (“Apx.”).

In this regard, Appellants’ first proposition of law merely requests that the Court enforce the plain language of OAC 3301-89-02(B)(9) and uphold long-standing Tenth District precedent that has governed the State Board’s decisions in school transfer cases. As explained by the Court of Appeals in *Spitznagel I*, the Tenth District has long-recognized that the purpose of Ohio Adm. Code 3301-89-02(B)(9) is not simply to determine whether a relinquishing district will lose funds. Rather, “[t]he key to OAC 3301-89-02 is whether the loss of funds will be ‘detrimental to the fiscal or educational operation of the relinquishing school district.’” *Id.*, 2008-Ohio-5059, ¶

50-51 (Apx. 35-36); *Crowe v. State Bd. of Edn.* (Oct. 26, 1999), Franklin App. No. 99AP-78, 1999 Ohio App. LEXIS 4993 at \*14-15 (quoting *Levey v. State Bd. of Edn.* (Feb. 28, 2005), Franklin App. No. 94APE08-1125, 1995 Ohio App. LEXIS 765, \*11-12). Indeed, as the Tenth District explained in *Garfield Heights City School District v. State Board of Education* (1990), 62 Ohio App.3d 308, the mere loss of revenue ordinarily should not stand in the way of a school transfer, because school funding is always uncertain and districts generally are able to harness untapped financial resources to redress any losses in revenue. *Id.* at 319-323. Thus, the Tenth District has long held that the State Board may not merely calculate the loss of revenue, but must determine whether the loss of funds would be detrimental to the fiscal or educational operation of the relinquishing school district and make a finding that the loss of revenue is a “factor significant enough to stand in the way of the proposed transfer.” *Spitznagel I*, 2008-Ohio-5059, ¶ 51; *Crowe*, 1995 Ohio App. LEXIS 4993, \*11; *Levey* 195 Ohio App. LEXIS 765, \*11-12.

Similarly, Appellants’ second proposition of law calls upon the Court to decide an important legal question regarding how race should be considered in deciding school transfer petitions. Here, it is undisputed that the proposed transfer would have only a *de minimis* impact upon the racial composition of the affected school districts. The referee in fact concluded that the transfer would not “cause, preserve, or increase” racial isolation in either district. *Spitznagel I*, 2008-Ohio-5059, ¶ 58. The legal question presented, therefore, is whether the State Board can legally rely upon race as a negative factor in denying a school transfer petition where, as here, the proposed transfer would have virtually no demonstrable impact upon the affected school districts. The answer to this legal question is clearly “No,” as the Court of Appeals correctly held. *Spitznagel I*, 2008-Ohio-5059, ¶ 57-62. For this additional reason, the Court should conclude that the State Board’s reliance upon race as a negative factor was contrary to law.

In light of these legal errors, therefore, the Court should vacate the State Board's decision under R.C. 119.12 because it was not in accordance with law. While the State Board and the BCSD argue that the legal errors are "harmless" errors that can be disregarded, this argument completely ignores the fact that the referee found that only 7 out of 27 factors weighed against the transfer, and as the Court of Appeals held in *Spitznagel I*, the referee's analysis of 6 of the 7 alleged negative factors were based upon legal errors that must be reversed as a matter of law. *Id.* at ¶ 77 (explaining that the "board's legal errors bear, to a great degree, upon the way in which it weighed all of the factors and reached its ultimate conclusion") (Apx. 46). In denying the school transfer, in fact, the referee concluded that the loss of tax revenue was the "main factor" that weighed against the proposed transfer and thus, following the enactment of H.B. 66, the State Board took the extraordinary action of remanding the matter back to the referee for a second evidentiary hearing. Accordingly, the Court should flatly reject the Attorney General's suggestion that the referee's legal errors in analyzing the fiscal impact of the transfer upon remand were somehow "irrelevant" to the State Board's decision. (State Board's Br., pg. 1).

Under R.C. 119.12, the residents of Walton Hills are legally entitled to a decision that is in accordance with law. The residents have expended great time and resources in petitioning for a school transfer and in presenting compelling reasons for why they should not be forced to remain in a failed school district that has very few remaining social or community ties to the Village. The State Board's legal errors should not be disregarded. They should be reversed. There is simply too much on the line for the residents of Walton Hills. Accordingly, if the Court agrees with *Spitznagel I* that the referee committed legal errors in deciding the merits of this school transfer petition, then it should conclude, as the Tenth District concluded, that the State Board's decision must be vacated because it is not "in accordance with law." *Id.*

## ARGUMENT

### **I. THE COURT SHOULD ADOPT APPELLANTS' FIRST PROPOSITION OF LAW AND CONCLUDE THAT THE REFEREE'S ANALYSIS OF THE FISCAL IMPACT OF THE TRANSFER WAS NOT IN ACCORDANCE WITH LAW.**

#### **A. Appellees Misconstrue The Applicable Standard of Review.**

In its brief, the Attorney General argues that the State Board's decisions are entitled to "deference" and may be reversed only for an "abuse of discretion." (State Board's Br. pg. 12). This argument misstates the applicable standard of review. As this Court correctly stated in the plurality opinion in *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, the standard of review in a Chapter 119 administrative appeal involves two inquiries: "a hybrid factual/legal inquiry" and a "purely legal inquiry." *Id.*, 2008-Ohio-4826, ¶ 37 (citing *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 470). With respect to the first inquiry, the trial court determines whether an agency's decision is supported by reliable, probative and substantial evidence in the record. *Id.* at ¶ 37-38. With respect to the second prong, however, the inquiry is *legal* — whether the agency's decision "is in accordance with law." *Bartchy*, 2008-Ohio-4826, ¶ 47. Thus, with respect to this second inquiry, the standard of review is *de novo*, and requires the appellate court to conduct "plenary review" of the Board's decision. *Id.* ("An appellate court's scope of review on issues of law is plenary").

In their briefs, Appellees do not dispute that the State Board has a legal duty to decide school transfer petitions in accordance with the applicable statutes, regulations, and judicial precedent. The legal duty to follow binding judicial precedent in fact is so well established that it "does not require a statement of authorities." *Greenwood v. City of Portsmouth* (1971), 29 Ohio Misc. 161, 164-165 ("The principle that a decision of the court of appeals, unless it is in conflict with the decision of the Supreme Court, binds the Courts of Common Pleas and

constitutes conclusive evidence of the law within that appellate district, is too well established to require a statement of supporting authorities”). Thus, as the Court of Appeals properly stated in *Spitznagel I*, if the State Board’s decision is based upon legal errors that violate the requirements of binding Tenth District precedent, then it must be reversed under R.C. 119.12 because it is not “in accordance with law.” *Id.*, 2008-Ohio-5059, ¶ 76-78 (Apx. 45-46).

**B. Appellees Have Failed To Demonstrate Why The Court Should Not Adopt Appellants’ First Proposition of Law.**

In their briefs, the State Board and the BCSD misstate and mischaracterize the nature of the legal errors that were made by the Board’s referee in his second report and recommendation. As the Court of Appeals properly found in *Spitznagel I*, the referee’s second report and recommendation was legally erroneous because he wrongfully *presumed* that “if the BCSD would experience *any* ‘post-transfer financial deficiency when compared to its present status,’ then this would mean, *ipso facto*, that the proposed transfer ‘would impose a significant detrimental financial impact upon the BCSD.’” *Spitznagel I*, 2008-Ohio-5059, ¶ 54 (Apx. 38). Indeed, in reconsidering the fiscal impact of the transfer upon remand, the referee acknowledged that the loss of tax revenue was subject to mitigation. (2d Report, pp. 5-6, Apx. 64-65). Under the first two mitigation steps outlined by Petitioners’ expert, Todd Puster (which the referee agreed were fully “supported by the evidence in the record”) (2d Rep. pp. 6-8) (Apx. 65-67), the initial net change in revenues to the BCSD would be significantly reduced in FY 2008 and FY 2009, and would be eliminated by FY 2010. (*See* Petitioners’ Post S.B. 321 Chart) (Supplement to the Briefs, pg. 98) (“Supp.”). Yet, the referee concluded that any post-transfer deficiency would be legally sufficient to disapprove the transfer, and that the “only fashion by which the BCSD can avoid significant financial detriment would be to employ all five of the ‘mitigation’ mechanisms suggested by the Petitioners” and completely “replace the lost money” and “make

the BCSD whole.” (2d Rep. pg. 5-6, fn. 8) (Apx. 64-65). As the Court of Appeals held in *Spitznagel I*, however, this is not the applicable legal standard, and it violates Tenth District precedent. *Id.*, 2008-Ohio-5059, ¶ 40-41, 54 (Apx. 31-32, 37-38). Accordingly, the Court of Appeals properly held in *Spitznagel I* that the Board’s decision should be vacated because it was not in accordance with law. *Id.*

In its Merits Brief, the State Board largely ignores this legal error and seeks to respond to Appellants’ first proposition of law by advancing 3 alternative arguments: (1) that Appellants improperly seek to shift the burden of proof to the State Board; (2) that the State Board has the discretion to conclude that the transfer will cause a significant “fiscal harm” based upon the loss of tax revenues alone; and (3) that the referee properly applied the applicable legal standard to the facts of this case. (State Board’s Brief, pp. 1-2). In this regard, both the BCSD and the State Board repeatedly mischaracterize the findings in the referee’s second report and recommendation and overstate the amount of lost personal and real property tax revenues that the referee found would arise after H.B. 66 and S.B. 321. We address each of these arguments more fully below:

**1. Appellants’ First Proposition of Law Does Not Shift The Burden Of Proof To The State Board of Education.**

In its brief, the State Board argues that Appellants’ First Proposition of Law should not be adopted because it improperly seeks to impose the burden of proof upon the State Board. (State Bd. Br. pg. 1). This is not the case. By requiring Petitioners to prove that the transfer would not cause *any* post-transfer deficiency to the BCSD, it is the State Board that has imposed a virtually impossible -- and legally erroneous -- burden of proof upon the Petitioners. Here, the Board specifically remanded the case to the referee in July 2005 in order to reconsider the fiscal impact of the transfer in light of H.B. 66. Upon remand, Petitioners met their burden of proof by presenting the expert testimony of Todd Puster who prepared an expert report that evaluated *all*

of the financial impacts of the transfer in light of the BCSD's fiscal and educational operation. (See Expert Report of Todd Puster, Pet. Ex. 17, pp. 10-16, 21-22) (Supp. 69-74, 80-81). In so doing, Puster did not merely calculate the loss of revenues. Rather, he calculated the "initial net change" in revenues and then proceeded to analyze this loss in the context of BCSD's cost savings, "robust" financial condition, overall budget, existing cash surplus, per pupil expenditures and other sources of mitigation. (*Id.*) The end result was a professional, expert opinion that the transfer can occur without a significant financial detriment to the fiscal or educational operation of the BCSD. (*Id.* at pp. 21-22) (Supp. 80-81) (2006 Transcript, pg. 158, lines 14-24) (Supp. 31).

In contrast, the BCSD did not present any evidence upon remand to demonstrate that the post-H.B. 66 loss of tax revenues would be detrimental to the fiscal or educational operation of the BCSD. The BCSD's expert (Dan Wilson) in fact admitted during cross-examination that he did not "look at any of the Bedford financial information" at all. (2006 Tr. at pp. 307-310) (Supp. 37-38). Therefore, the BCSD's expert did not analyze the BCSD's actual per pupil expenses and did not examine any of the BCSD's other fiscal or educational operations. (*Id.* at 315-319) (Supp. 39-40). Thus, in his second report and recommendation, the referee did not cite or rely upon any of Mr. Wilson's testimony, but accepted Mr. Puster's testimony as the sole source of his findings upon remand with respect to the net loss of revenue after H.B. 66. (2d Rep. pg. 5) (Apx. 64).

It is clear, therefore, that Appellants met their burden of proof. The legal problem arises, however, because the referee erroneously ignored Mr. Puster's testimony relating to the actual impact of the transfer on the fiscal and educational operation of the BCSD, and wrongfully presumed that any post-transfer deficiency would, *ipso facto*, be detrimental unless completely

mitigated by the Village of Walton Hills. By requesting that the Court require the State Board to follow the proper legal standards, therefore, Petitioners are not asking the Board to bear the burden of proof. In the administrative proceedings below, the State Board's referee was not a party and was not required to present any evidence. Rather, he was merely required to evaluate the evidence submitted by the parties based upon the proper legal standards. He did not do so. By requiring the State Board to follow the proper legal standards, therefore, the Court is merely ensuring that the State Board follows its legal duty to decide school transfer petitions in accordance with law. Accordingly, the Court should reject this "burden of proof" argument.

**2. The Court Should Reject The Argument That The State Board May Presume Fiscal Harm Based Solely On The Loss Of Tax Revenues.**

The State Board's second argument is that the Board is legally entitled to presume fiscal harm based upon the loss of tax revenue because OAC 3301-89-02(B)(9) is written in the disjunctive and only requires that the Board consider whether the transfer would be "detrimental to the fiscal *or* educational operation of the relinquishing district." (State Bd. Br. pg. 2). This "disjunctive" argument is illusory and should be rejected by this Court. OAC 3301-89-02(B)(9)'s use of the disjunctive does not mean that the State Board can *presume* that the loss of revenue will be detrimental to the fiscal operation of the relinquishing district. *Id.* Even if the Court merely required the Board to evaluate whether the transfer would be "detrimental to the fiscal . . . operation of the relinquishing district," it still would be legally erroneous to *presume* a significant financial detriment based solely upon the loss of revenue alone.

Contrary to the State Board's suggestions, "fiscal harm" cannot be presumed. The disjunctive language in OAC 3301-89-02(B)(9) in fact calls upon the Board to consider the impact of the transfer upon the school district's fiscal or educational "operation." By definition, therefore, the State Board must consider the BCSD's actual fiscal operations, including its

budget, per pupil expenditures, cost savings, cash surpluses, and other sources of mitigation. Here, as the Court of Appeals observed in *Spitznagel I*, the BCSD is in an “especially robust” financial position when compared to other school districts. *Spitznagel I*, 2008-Ohio-5059, ¶ 35 (citing Puster Expert Report, pg. 6) (Apx. 29). The BCSD “carried over 23 percent of its revenue as cash at the end of fiscal year 2003, 19 percent at the end of fiscal year 2004, and 23 percent at the end of fiscal year 2005.” *Id.* (Apx. 29); (Pet. Ex. 5 and 17) (Supp. 51, 65). In addition, its “per-pupil expenditures were 29 percent above the state average in the 2004-2005 school year.” *Id.* at ¶ 35 (Apx. 29); (Pet. Ex. 3A, 3C, 17) (Supp. 49-50, 66-67). Moreover, the BCSD has a strong commercial tax base and one of the highest levels of cash reserves as a percentage of its overall budget of any district in the State of Ohio. (Pet. Ex. 17, pp. 6-8) (Supp. 65-67). For this reason, therefore, it was particularly critical in this case for the State Board to not merely focus on the loss of revenue, but to analyze whether the post-transfer deficiency will actually cause a significant detriment to the BCSD’s fiscal or educational operation based upon *all* of the relevant evidence, including the BCSD’s overall budget, cash surpluses, per pupil expenditures, admitted cost savings, and other financial resources.

**3. Appellees Have Failed To Establish That The Referee Followed The Proper Legal Standards In Evaluating Whether The Transfer Will Be Detrimental To The Fiscal Or Educational Operations Of The BCSD.**

In their briefs, the State Board and the BCSD completely fail to demonstrate that the Referee’s second report and recommendation properly analyzed, upon remand, whether the *net* loss of revenues *after H.B. 66 and S.B. 321* will actually cause a significant detrimental impact upon the fiscal or educational operations of the BCSD. Although Appellees both contend that there is evidence in the record from the first hearing to prove a detrimental fiscal impact, it is undisputed that all of this evidence was based upon the net loss of revenue before the enactment

of H.B. 66 and S.B. 321 and was not cited or relied upon by the referee in his second report and recommendation. (State Bd. Brief, pp. 11-12); (BCSD Brief, pp. 19-20). Thus, in *Spitznagel I*, the Court of Appeals specifically rejected this argument, holding that the evidence from the first hearing was not applicable to the referee's analysis upon remand because it did not address the fiscal impact of the transfer after H.B. 66 and S.B. 321 and was not cited by the referee in his second report and recommendation. *Id.*, 2008-Ohio-5059, ¶ 52 (Apx. 37).

Indeed, as the Court of Appeals found in *Spitznagel I*, it is undisputed that the financial circumstances arising from the transfer dramatically changed between the first hearing in January 2005 and the second hearing in April 2006. At the first hearing in January 2005, the testimony established that the net loss of revenue (without any mitigation) would be significantly higher than before H.B. 66 (approximately \$7.5 million *per year*). *Spitznagel I*, 2008-Ohio-5059, ¶ 52 (Apx. 37).<sup>1</sup> Yet, by the time of the second hearing in April 2006, the referee had significantly reduced his calculation of lost revenue by over 80%, finding, based on Mr. Puster's expert testimony, that the BCSD would lose \$7 million over five years. (2d Rep. pg. 5) (Apx. 64); *Spitznagel I*, 2008-Ohio-5059, ¶ 52 (Apx. 37). In so doing, the referee specifically agreed with Mr. Puster that this loss of tax revenues would be further mitigated by an annual cost savings of \$600,000 per year, and that S.B. 321 would replace about \$900,000 of lost revenue during the first year of the transfer (and substantially more thereafter) (2d Rep. pp. 6-8) (Apx. 65-67).

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<sup>1</sup> It is important to note that Appellees grossly overstate the nature of the testimony from the January 2005 hearing. Contrary to the BCSD's suggestions, Lowell Davis did not testify that a transfer "would cause Bedford to swiftly descend into fiscal emergency or fiscal watch." (BCSD Brief, pg. 6). Rather, this sort of testimony was elicited only because the BCSD's counsel asked improper and hypothetical questions that asked Mr. Davis *to assume* that the BCSD would *instantly* lose \$7.5 million on July 1, 2005, **without any mitigation or cost savings at all**. (2005 Transcript, Vol. I, pg. 185) (BCSD Supplement, pg. 5) (emphasis added). Thus, Mr. Davis testified on re-direct that the BCSD would not face any alleged fiscal emergency if the loss was mitigated under one of the two options that he proposed. (2005 Tr. Vol. I, pg. 207) (Supp. 125).

Thus, as the Court of Appeals properly concluded in *Spitznagel I*, the financial evidence from the 2005 hearing was no longer applicable to the referee's fiscal analysis upon remand, noting that even the referee "seemed to recognize this" fact because he "did not reference Nowak's or Lowell's testimony when discussing his conclusions about whether the Puster figure represented a loss that disfavors transfer." *Spitznagel I*, 2008-Ohio-5059, ¶ 52, fn. 13 (Apx. 37).

In this regard, it must be emphasized that the State Board itself recognized that the financial picture had dramatically changed after H.B. 66. The Board in fact took the extraordinary action of ordering a second evidentiary hearing in order to reconsider the financial impact of the transfer in light of significant changes in school funding adopted by H.B. 66. There would be no need for a second hearing if the Board intended to deny the petition based upon the first hearing. Yet, upon remand, the BCSD did not present any witnesses to discuss the actual impact of H.B. 66 on the fiscal or educational operation of the BCSD. Rather, the only witness who actually addressed this issue was Todd Puster, who wrote a detailed report that not only re-calculated the loss of real and personal property tax revenues, but further discussed the financial impact of the transfer in light of the BCSD's robust financial condition, \$9.9 million cash surplus, and relatively high per pupil expenditures. In his second report and recommendation, however, the referee completely failed to discuss the BCSD's financial position and expenses at all, focusing instead on determining the amount of lost revenue and then unlawfully presuming that *any* post-transfer deficiency would be detrimental to the BCSD unless it were completely eliminated by the Village of Walton Hills. Accordingly, the Court of Appeals was correct in *Spitznagel I* to conclude that the referee's second report and recommendation violated Tenth District precedent and should be vacated as a matter of law.

#### 4. Appellees Misconstrue The Referee's Findings.

Appellees' Merits Briefs contain other misstatements of fact that should be corrected. For example, throughout their briefs, both the State Board and the BCSD erroneously state that the referee's second report and recommendation allegedly found that the BCSD would lose "approximately \$7 million in *tangible personal property* tax revenue over five years" and therefore did not take into account the loss of real property taxes. (State Board's Brief, pp. 7-8); (BCSD's Brief, pp. 2-3, 13, 16-17) (emphasis added). This statement misrepresents the referee's finding. In stating that the "BCSD would lose nearly seven million dollars (\$7,000,000) over the first five years of the proposed transfer," the referee did not state that this finding was limited only to the loss of tangible personal property taxes. (2d Rep. 5) (Apx. 64). Rather, the qualifying words – "tangible personal property tax revenue" – were wrongfully inserted by Appellees' Briefs in order to create the misimpression that the referee made this particular finding. (*Compare* State Bd. Br. pp. 7-8 with 2d Report and Recommendation, pg. 5).

As previously discussed, the referee's second report and recommendation was based entirely upon the expert testimony of Todd Puster. The second report and recommendation therefore must be interpreted in the context of Mr. Puster's calculations and expert report. Mr. Puster's calculations in fact begin with a calculation of the "initial net change" in revenues based upon the loss of both real and personal property tax revenues (minus the net change in state foundation aid) before mitigation. (*See* Expert Report of Todd Puster, pp. 10-15, 21-22) (Apx. 69-74, 80-81); (2006 Hearing Tr. pp. 134-135) (Supp. 25). Puster then reduces this "initial net change" in revenues by each of his 5 proposed mitigation steps. (Puster Expert Report, pp. 21-22) (Apx. 80-81). The first two mitigation steps in fact were fully accepted by the referee and operate to reduce the "initial net change" substantially in FY 2008 and FY 2009, and to eliminate

the net loss by FY 2010. (Supp. 98). The actual net loss of revenue, therefore, is significantly lower than alleged by Appellees' Briefs.

Appellees apparently believe that they can prevail in this appeal simply by ignoring the referee's legal errors and convincing this Court to make new factual findings about the size of lost revenue. This argument, however, misses the point. The legal question presented does not turn upon the amount of lost revenues. Rather, the legal question turns on whether the referee properly evaluated whether the loss of revenue (after mitigation) will be detrimental to the fiscal or educational operation of the BCSD. As the referee merely presumed operational harm based upon the loss of tax revenue alone and did not actually consider whether the post-H.B. 66 deficiency would be detrimental to the fiscal or educational operation of the BCSD, his second report and recommendation was properly vacated by the Court of Appeals in *Spitznagel I. Id.*, 2008-Ohio-5059, ¶ 40-41, 54 (Apx. 31-32, 37-38).

**II. THE COURT SHOULD ADOPT APPELLANTS' SECOND PROPOSITION OF LAW AND CONCLUDE THAT THE REFEREE'S ANALYSIS OF THE RACIAL IMPACT OF THE TRANSFER WAS NOT IN ACCORDANCE WITH LAW.**

**A. Appellees Do Not Dispute That The Referee's Decision Violated Long-Standing Tenth District Precedent.**

In their briefs, Appellees do not dispute that the loss of only 45 students from the Village of Walton Hills would have a *de minimis* impact upon the racial composition of the affected districts (less than 1%). Although the BCSD suggests that the State Board may consider *any* change in the racial composition of the school districts as a negative factor in deciding a school transfer petition, such an argument conflicts with long-standing Tenth District precedent, which holds that a *de minimis* change is not a negative factor that can legally be relied upon to deny a school transfer petition. *Cincinnati City School Dist. v. State Bd. of Edn.* (1996), 113 Ohio App.3d 305, 309; *Schreiner v. Dept. of Edn.* (Nov. 9, 1999), Franklin App. No. 98AP-1251, Slip

op. pp. 20-22 (less than 1% increase in racial composition is *de minimis* and should not be relied to deny a transfer) (Apx. 150-152).

In their briefs, Appellees do not distinguish any of this Tenth District precedent. Instead, they again seek to change the subject by arguing that Appellants' second proposition of law is based solely upon the U.S. Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School Distr. No. 1, et al.*, 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) ("*Parents Involved*"), and that there is no other authority "supporting" Appellants' position. (State Bd. Br. pg. 20) (BCSD Br. pg. 22). This is not true. While the use of race as a negative factor violates the strict scrutiny standard established by the U.S. Supreme Court, it is important to stress that Appellants' second proposition of law is not based only upon this constitutional error. Rather, as set forth in our opening brief and in *Spitznagel I*, Appellants' second proposition of law is primarily based upon long-standing Tenth District precedent, which has consistently recognized that a *de minimis* change in the racial composition should not be used as a negative factor to deny a school transfer petition under Ohio law. This Tenth District precedent pre-dates *Parents Involved* and was specifically brought to the attention of the State Board's referee before he issued his first report and recommendation in May 2005. Yet, the referee and the State Board blatantly ignored this Tenth District precedent by finding that the two racial isolation factors (OAC 3301-89-02(B)(2) and 3301-89-03(B)(5)) weighed negatively *against* the proposed transfer.<sup>2</sup> See *Spitznagel I*, 2008-Ohio-5059, ¶ 60 (Apx. 40) ("where (as here) the evidence supports a finding that the proposed transfer would have only a *de minimis*

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<sup>2</sup> It is important to note that the referee cited *Schreiner* in a footnote as legal authority for the proposition that the net change in racial composition of the BCSD (less than ½ of 1%) was "*de minimis*." (1<sup>st</sup> Rep. pg. 19, fn. 8) (Apx. 86). Yet, in blatant disregard for this binding legal authority, the referee nevertheless found that both of the two racial isolation factors were negative factors that "disfavor" the transfer. (1<sup>st</sup> Rep. pp. 13, 20) (Apx. 80, 87).

impact on the racial composition of the relinquishing school district, this is legally insufficient to support denial of the transfer”) (citing *Schreiner*). Accordingly, the Court of Appeals properly held in *Spitznagel I*, that the Board’s reliance upon race as a negative factor was illegal because it violated Tenth District precedent and conflicted with the referee’s own finding that the transfer would not cause, increase, or decrease any racial isolation in either school district. (*Id.* at ¶ 61).

**B. The Board’s Reliance Upon Race As A Negative Factor Also Constitutes Constitutional Error That Was Contrary to Law.**

In addition to violating Tenth District precedent, the referee’s reliance upon race as a negative factor is also unconstitutional under the U.S. Supreme Court’s decision in *Parents Involved*. Although Appellees seek to distinguish *Parents Involved* on the facts, they largely ignore the constitutional standard that was followed in that case, which is fully applicable to any racially-based governmental action or policy. In *Parents Involved*, the Supreme Court held that deference to race-based governmental policies “is fundamentally at odds with our equal protection jurisprudence” and that governmental action based on race is “inherently suspect” and will be overturned unless the government can establish under a “strict scrutiny” standard of review that the action is narrowly tailored to advancing a “compelling state interest.” *Id.*, 551 U.S. at 742. In this regard, the Supreme Court specifically reiterated that “all racial classifications [imposed by the government] must be analyzed under the strict scrutiny standard,” regardless of whether the government has “good intentions and motives.” *Id.* at 741; *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“Governmental action based on race – a group classification long recognized as in most circumstances irrelevant and therefore prohibited – should be subjected to detailed judicial inquiry”).

Given this constitutional standard of review, therefore, the Board’s use of race in denying this school transfer petition was not in accordance with the law. In *Parents Involved*, the Court

held that the goal of “racial balancing” is not a compelling state interest that can withstand strict scrutiny. *Id.* at 730-731. Indeed, in this case, the use of race as a negative factor was particularly illegal because, as the referee himself found, “there is *no* evidence that the students in either Cuyahoga Heights or the BCSD experience any racial isolation, or that the proposed transfer would cause any racial isolation among the affected students.” *Spitznagel I*, 2008-Ohio-5059, ¶ 61 (Apx. 40). Thus, race should *never* have been relied upon by the State Board as a negative factor because it was an “irrelevant and therefore prohibited” basis for governmental action. Accordingly, for this additional reason, the Court should conclude that the Board’s decision was not in accordance with law.<sup>3</sup>

**III. THE COURT SHOULD REJECT APPELLEES’ ARGUMENT THAT THE STATE BOARD’S LEGAL ERRORS ARE “HARMLESS” ERRORS THAT CAN BE IGNORED UNDER R.C. 119.12.**

As previously discussed, both of Appellees’ Briefs seek to persuade this Court to ignore the Board’s legal errors by suggesting that they are “harmless” errors. This Court should reject this argument. The plain language of R.C. 119.12 provides that the Court may affirm the Board’s decision only if it finds “that the order is supported by reliable, probative, and

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<sup>3</sup> In this regard, the Court also should reject the meritless argument that Appellants somehow “waived” this argument because they did not cite *Parents Involved* until the filing of a reply brief in the court of appeals. Even under a strict construction of Appellants’ assignments of error, it is clear that Appellants consistently argued in the administrative and judicial proceedings below that the Board’s decision was “not in accordance with law” because the referee wrongfully relied upon the two racial isolation factors in the Ohio Administrative Code as negative factors to disapprove the transfer. In fact, in *Spitznagel I*, the Court of Appeals sustained this assignment of error because it found that the Board’s reliance upon race was contrary to law. *Spitznagel I*, 2008-Ohio-5059, ¶ 57-62 (Apx. 38-41). *Parents Involved* was cited by Petitioners because it was supplemental authority that was directly relevant to determining whether the State Board’s reliance upon race as a negative factor was “in accordance with law.” See *Teague v. Cincinnati Ins. Co.*, 2004-Ohio-3212, ¶ 9, 2004 WL 1379831 (Ohio App. 7 Dist. 2004) (considering new argument in reply brief because it was an “extension” of arguments in original brief). Accordingly, in deciding Appellants’ second proposition of law, the Court should not only consider the Tenth District cases cited in *Spitznagel I*, but should consider *all* case law that may be relevant to deciding the merits of this important legal issue.

substantial evidence, and is in accordance with law.” *Id.* (emphasis added). There is no “harmless” error exception to this statutory requirement, and Appellees cite no case law that would permit the Court to ignore the plain language of R.C. 119.12 and affirm an administrative decision that was not “in accordance with law. Accordingly, if the Court concludes that the State Board failed to follow the applicable legal standards in denying the transfer, then it must vacate the Board’s decision under R.C. 119.12.

Indeed, contrary to the Appellees’ suggestions, the errors were not “harmless.” As discussed in Appellants’ Merits Brief, it is undisputed that the Board found that only 7 out of 27 factors were “negative” factors that weighed against the transfer. (*See* Appellants’ Merits Brief, pg. 16). Six out of the 7 negative factors, however, related to the financial and racial impacts of the transfer, and the seventh factor related to alleged “long-held loyalties,” which the referee found only “slightly” disfavored the transfer. (*Id.*) But for the negative factors that were assigned to the financial and racial impacts of the transfer, therefore, the Board would have virtually no negative factors to rely upon as a lawful basis to deny the transfer. Accordingly, Appellees are simply wrong to suggest that the Board’s legal errors were harmless errors. *Spitznagel I*, 2008-Ohio-5059, ¶ 76 (holding that the “board’s legal errors bear, to a great degree, upon the way in which it weighed all of the factors and reached its ultimate conclusion”).

In this regard, Appellees once again mischaracterize the evidence and the referee’s findings in order to provide an alternative justification for the Board’s decision. The referee did not conclude that the Village’s compelling reasons for the transfer were a negative factor that weighed against the transfer. Rather, in his first report and recommendation, the referee openly acknowledged that there has been an “undercurrent of displeasure with the BCSD” in Walton Hills over the past 20 years, and that enrollment has steadily declined to the point that less than

20% of the school-aged children in Walton still attend the BCSD. (1<sup>st</sup> Rep. pp. 12, 23) (Apx. 79, 90). This is a remarkable statistic that speaks volumes for why the Village should be transferred to the CHLSD, given the undisputed fact that the vast majority of Walton Hills residents have lost any tangible connection to the BCSD. While the BCSD sought to blame this loss of connection upon the residents of Walton Hills, this argument is immaterial and not relevant. It does not matter *why* the residents have lost their connection to the BCSD. Rather, it only matters that a substantial divide exists, and that it wrongfully deprives the residents of Walton Hills of “the opportunity to develop full relationships with their neighbors” and to develop the “sense of community” that a public school district ordinarily should provide. *Garfield Heights*, 62 Ohio App.3d at 323; *Schreiner*, slip op. at 17-18 (Apx. 147-148).

In this regard, Appellees’ Briefs do not dispute that Walton Hills has developed greater social, economic, and community ties to the three villages that comprise the Cuyahoga Heights Local School District (“CHLSD”). This is a critical fact because it has long been recognized that such social and community factors are important to advancing the goal of “promoting a ‘sense of community,’” which is “a valid ground for seeking and granting a transfer.” *Schreiner*, slip op. at 17 (citing *Garfield Heights*, 62 Ohio App.3d at 323) (Apx. 147); *see also, e.g., Rossford Exempted Village School Dist. Bd. Of Edn. v. State Bd. of Educ.* (1992), 63 Ohio St.3d 705, 708 (affirming transfer to Perrysburg school district based upon evidence showing that “Perrysburg is the focus of the [petitioners’] social, business and community life”); *Levey*, 1995 WL 89703, \*6 (affirming transfer because it would provide “opportunities for participation and involvement in neighborhood schools with neighboring children”). Here, given the severely declining enrollment of Walton Hills children in the BCSD and the increasing social, economic, and community ties to the villages in the CHLSD, Petitioners have clearly established that a transfer

would advance the goal of promoting a “sense of community,” particularly in light of the very small number of children who still attend the BCSD and the close proximity of the CHLSD’s central campus to the Village Hall. Accordingly, under the applicable case law, the evidence submitted by Petitioners was more than sufficient to justify granting the transfer.

The evidence is also undisputed that the CHLSD has the human resources and physical facilities available to accommodate the transfer. Neither Appellee disputes this fact in their Brief. In fact, neither Appellee disputes the fact that the CHLSD has adopted a tuition policy to accept out-of-district students, and has a central campus that is closer to the Walton Hills Village Hall than most of the school buildings in the BCSD. (2005 Tr. Vol. II, pp. 26-39) (Supp. 140-143) (Pet. Ex. KK) (Supp. 206). Moreover, neither Appellee disputes the referee’s findings that the “CHLSD would not suffer organizationally if the transfer is accomplished,” that CHLSD “could accept all Walton Hills students,” and that “Cuyahoga Heights Local SD would appear to suffer no adverse impact to the maintenance of a high school center if the transfer is approved.” (1<sup>st</sup> Rep. pp. 14-15) (Apx. 81-82). Accordingly, the undisputed evidence in the record firmly establishes that the CHLSD has the resources and facilities available to absorb the additional students from Walton Hills.

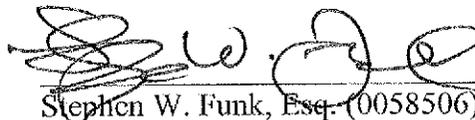
Given this undisputed evidence, Appellees wrongfully seek to create doubt about the merits of the proposed transfer by pointing to two older, non-binding resolutions that were adopted by the Cuyahoga Heights Local School District in 1999 and 2002 before the proposed transfer. This argument is a red herring that should be rejected by this Court. The past resolutions of the CHLSD are not relevant nor material to whether the State Board properly denied this school transfer petition in accordance with law. Under R.C. § 3311.24, the State Board first must determine whether to approve the transfer based on the applicable legal factors

and then, after the transfer has been approved, must then present the matter to the accepting school district for approval. The issue of whether the CHLSD Board of Education would accept a transfer, therefore, is not ripe for decision until the State Board first approves the transfer on remand. Once the petition is approved by the State Board, the matter will then be presented to the current Cuyahoga Heights Local Board of Education who is now comprised of different members and who, in light of the court proceedings, the new tuition policy, and declining enrollments, may decide to accept the transfer. The Court should not pre-judge nor rush this statutory process. The State Board did not deny the transfer based on the Cuyahoga Heights past resolutions, and they are not relevant nor material to this Court's decision about whether the State Board's denial of the transfer was in accordance with law. Accordingly, Appellees' argument should be rejected by this Court.

### CONCLUSION

For these reasons, the Court should adopt Appellants' two propositions of law, and conclude, as the Tenth District concluded in *Spitznagel I*, that the State Board of Education's denial of the school transfer petition was not "in accordance with law" under R.C. 119.12.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of October, 2009, a true and correct copy of the foregoing Reply Brief was served via regular U.S. mail, postage pre-paid, to the following counsel of record for the Appellees in this case:

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