

[Cite as *Concerned Citizens for Quality Edn. v. Ohio Dept. of Edn*, 2011-Ohio-3081.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Concerned Citizens for Quality Education, :
Appellant-Appellee, :
v. : No. 10AP-569
(C.P.C. No. 09CVF 02-2850)
Ohio Department of Education, : (REGULAR CALENDAR)
State Board of Education, :
Appellee-Appellant. :
Concerned Citizens for Quality Education, :
Appellant-Appellee, :
v. : No. 10AP-570
(C.P.C. No. 09CVF 02-2850)
Ohio Department of Education, : (REGULAR CALENDAR)
State Board of Education, :
Appellee-Appellee, :
(Youngstown City School District, :
Board of Education, :
Intervenor-Appellant). :

D E C I S I O N

Rendered on June 23, 2011

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Roberts*, for Youngstown City School District.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Appellants, Youngstown City School District Board of Education ("Youngstown Board"), the Ohio Department of Education ("ODE"), and the State Board of Education ("State Board"),¹ appeal the judgment of the Franklin County Court of Common Pleas, which reversed the State Board's order denying two petitions for transfers of school district territory filed by appellee, Concerned Citizens for Quality Education ("petitioner").

{¶2} Pursuant to R.C. 3311.24(A), petitioner obtained signatures of 75 percent of qualified electors residing within the portion of the Youngstown City School District ("Youngstown district") known as the Coitsville Territory and filed petitions for transfers of school district territory with the Youngstown Board. The 10.82-square-mile Coitsville Territory comprises 23.8 percent of the Youngstown district's geographic territory. It is bordered by the state of Pennsylvania to the east, the Struthers City School District ("Struthers district") to the southwest, the Campbell City School District ("Campbell district") to the west, the Hubbard Exempted Village School District ("Hubbard district") to the north, and the Lowellville Local School District ("Lowellville district") to the south.

¹ Although both ODE and the State Board are identified as appellants on the Notice of Appeal, only the ODE is identified on the appellate brief filed by the Ohio Attorney General's Office.

A strip of land running between the Campbell and Hubbard districts connects the Coitsville Territory to the rest of the Youngstown district. Petitioner requested that the Coitsville Territory be divided, with the 7.2 square miles north of State Route 422 transferred to the Hubbard district and the 3.62 square miles south of State Route 422 transferred to the Lowellville district.

{¶3} The Youngstown Board forwarded the petitions to the State Board, as required by R.C. 3311.24(A). In accordance with Ohio Adm.Code 3301-89-02(B) and in response to ODE's request, the three districts implicated by the petitions submitted answers to 25 questions. ODE took a neutral position on the transfer. A referee held a consolidated hearing on the petitions on October 8, 2008, and, thereafter, issued a report and recommendation that the petitions be denied. On February 12, 2009, after petitioner filed objections and the Youngstown district responded, the State Board accepted the referee's recommendation and denied the transfers.

{¶4} Petitioner appealed to the Franklin County Court of Common Pleas, pursuant to R.C. 119.12, and, on May 24, 2010, that court reversed the State Board's orders. On appeal to this court, the Youngstown Board asserts the following assignment of error:

The Trial Court abused its discretion by substituting its own judgment in place of the [State Board's] decision when it found that the [State Board's] decision to deny the proposed transfer of the Coitsville Territory, from the Youngstown * * * District to the Lowellville * * * District and the Hubbard * * * District, was not supported by reliable, probative and substantial evidence.

For its assignments of error, ODE states as follows:

1. The Trial Court erred by failing to give due deference to the State Board's conclusion that the proposed transfers would not further the present and ultimate good of the students concerned.
2. The Trial Court erred by considering evidence outside of the record.

Because the appellants' assignments of error are related, we will discuss them together.

{¶5} In an R.C. 119.12 administrative appeal, the trial court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with the law. The Supreme Court of Ohio has defined reliable, probative, and substantial evidence as follows:

- (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.
- (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.
- (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Our Place, Inc. v. Ohio Liquor Control Comm. (1992), 63 Ohio St.3d 570, 571 (footnotes omitted). In applying its standard of review, a trial court must "give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111. "[A]n agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471, 1993-Ohio-182.

Although the reviewing court must defer to an agency's findings of fact, it must construe the law on its own. *Id.*

{¶6} On appeal to this court, the standard of review is more limited. While the common pleas court must examine the evidence, "[s]uch is not the charge of the appellate court." *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the trial court's determination of whether the board's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the trial court abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. "'Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.'" *Rossford Exempted Village School Dist.* at 707, quoting *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261. An appellate court, however, exercises plenary review on the question of whether the board's order was in accordance with the law, and on other issues of law, including whether the common pleas court applied the proper standard of review. *Paolucci v. Ohio Div. of Real Estate*, 10th Dist. No. 09AP-450, 2009-Ohio-5551, ¶7; *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343 ("it is the prerogative and the responsibility of the court entertaining the appeal to investigate whether the lower court accorded due deference to the factfinder").

{¶7} The standards, factors, and procedures for administrative consideration of a petition for transfer of school district territory are laid out in Ohio Adm.Code Chapter

3301-89. Ohio Adm.Code 3301-89-01 sets forth the State Board's general policies regarding transfers of territory and states, at subsection (F), "[a] request for transfer of territory will be considered upon its merit with primary consideration given to the present and ultimate good of the pupils concerned." Ohio Adm.Code 3301-89-02 outlines procedures for considering a petition for transfer of territory and sets forth 25 questions that each school district implicated by a requested transfer must answer to aid the State Board in its consideration. Those questions relate to topics such as the reason for the request, racial isolation, adequacy of resources and facilities, fiscal effects of a transfer, effects of a transfer on educational and extracurricular offerings, harm caused by previous transfers, and geographic issues, including the distance between school buildings. Finally, Ohio Adm.Code 3301-89-03 contains a non-exhaustive list of factors to be considered. This list also includes racial-isolation issues, geographic issues, and other potential effects on the districts. When "the evidence is in balance, the hearing officer may consider the preference of the residents with school-age children who live in the territory sought to be transferred," but that preference "may only be considered and given weight when all other factors are equal." Ohio Adm.Code 3301-89-03(C).

{¶8} The standard for considering requests under R.C. 3311.24 "focuses on educational impact as the key to whether such requests should be approved." *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, ¶86. "[T]he several factors for consideration set forth in Ohio Adm.Code 3301-89-02(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.' " Id. at ¶50, quoting *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1990), 62 Ohio App.3d 308, 319. Each transfer request is decided on its particular facts under the required balancing test. *Bartchy* at ¶81. Thus, "[w]hen 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.' " Id. at ¶51, quoting *Garfield Hts. City School Dist.* at 323. The weight to be given to those factors "necessarily depends on the full context of the situation." *Bartchy* at ¶84. "[T]he [referee's] balancing of the factors should be treated with deference." Id. at ¶89.

{¶9} Here, the referee reviewed the districts' answers to the 25 questions listed in Ohio Adm.Code 3301-89-02(B). Based on those answers, he found that the requested transfers would have racial isolation implications by moving a group of primarily non-minority students from a predominantly minority district to two predominantly non-minority districts, and he concluded that increased racial isolation would work against the Youngstown district's long-range educational plans and goals. The referee recognized that the change in the Youngstown district's minority-to-non-minority ratio would not be large, but concluded that it "represents more than a minimal impact." The referee also found that the loss of pupils and tax valuation would be detrimental to the Youngstown district's fiscal operation and would make it more difficult for that district to emerge from its current state of fiscal emergency. On the other hand, the referee found that the Hubbard and Lowellville districts received substantially better designations on their State District Report Cards than the Youngstown district and that,

because of the limited number of students involved, the proposed transfers would have little, if any, effect on the districts' educational, athletic or extracurricular offerings.

{¶10} The referee next considered the factors listed in Ohio Adm.Code 3301-89-3, four of which he concluded were inapplicable. With respect to Ohio Adm.Code 3301-89-3(B)(5), the referee found as follows:

The transfer would cause, preserve and increase racial isolation. Although there are only 63 students currently affected in the Coitsville territory, the permanent transfer of the territory outside of the Youngstown school district will increase racial isolation. * * * Although the total number of students affected in the proposed transfer territory is relatively small, the consequences are not. Racially the Youngstown District will become even more isolated if the predominantly Caucasian territory is to be transferred from the Youngstown District (which is predominantly non-Caucasian) to two predominantly Caucasian school districts. One can only conclude that the transfer would cause, preserve and increase racial isolation. The predominantly Caucasian population of students in Coitsville would be transferred to the predominantly Caucasian districts of Lowellville and Hubbard leaving the predominantly minority students remaining at Youngstown even more isolated both geographically and demographically. * * * The proposed transfer would racially isolate the 87% Caucasian territory into a 99% Caucasian Lowellville district and a 93% Caucasian Hubbard district and would form an eastern block of reconfigured school district territory that would be composed of an average of 93% Caucasian [students] while geographically it would compress the Youngstown district into approximately three fourths of its former geographic size. By so doing, such compression would only further define a more racially isolated Youngstown district.

While the referee found that the proposed transfers would not severely impair the Youngstown district's educational programs or cause layoffs, close buildings or be a detriment to facility utilization, he found that the Hubbard and Lowellville districts would

realize additional revenue disproportionately greater than the educational responsibilities they would assume.

{¶11} In recommending denial of the petitions, the referee relied, in part, on Ohio Adm.Code 3301-89-01(E), which states that a previously disapproved request under R.C. 3311.24 may be reconsidered only if significant change has occurred since the original filing. The referee found no significant change in circumstances since a 2001 request to transfer the Coitsville Territory from the Youngstown district to the Struthers district, and concluded that Ohio Adm.Code 3301-89-01(E) directed that the transfers not be allowed.

{¶12} The referee also determined that the petitions should be denied on their merits. The referee noted testimony from Coitsville Territory parents that their paramount concern was the best available public education for their children and testimony from Coitsville Territory students that most of their friends and extracurricular activities centered around the Hubbard and Lowellville districts. The referee also recognized petitioner's heavy reliance on the 2007-2008 State District Report Cards issued to the Youngstown, Hubbard, and Lowellville school districts. On its 2007-2008 State District Report Card, the Youngstown district was designated on "Academic Watch," met only one of 30 State Indicators, and received a Performance Index Score of 71.4 out of 120. In contrast, the Hubbard district was designated "Excellent," met 24 State Indicators, and received a Performance Index Score of 95.3. The Lowellville district was designated "Excellent," met 27 State Indicators, and received a Performance Index Score of 101.4. The referee stated, however, that open enrollment

provides an educational alternative, albeit an imperfect one, to students residing in the Youngstown district and emphasized that 55 of the 63 public school students residing in the Coitsville Territory currently attend schools outside the Youngstown district, through open enrollment. Forty-seven of those students attend schools in the Lowellville district, six attend schools in the Hubbard district, and the remaining two attend schools in the Struthers district.

{¶13} Against those factors, the referee balanced other factors weighing against the proposed transfers, including financial harm to the Youngstown district, racial isolation, and a lack of evidence that the Youngstown district, despite its lower ratings than the Hubbard and Lowellville districts, could not provide Coitsville Territory students an adequate education. Specifically, the referee found that the transfers would financially harm the Youngstown district, which is already in a state of financial emergency, based on a loss of revenue totaling approximately \$700,000 over five years and would delay the district's release from state fiscal oversight. The referee also found that the resultant loss of assessable property would increase the tax burden on taxpayers in the remaining portions of the Youngstown district, "straining an already overburdened lower income portion of the school district." The referee reiterated that the transfers would implicate racial-isolation concerns and negatively impact the Youngstown district's stated goal to increase diversity. When balancing the competing factors in favor of and against the proposed transfers, the referee concluded that the evidence did not support the transfers. The State Board adopted the referee's report and recommendation and denied the petitions for transfer.

{¶14} On appeal to the trial court, petitioner argued that the record contained no evidence that the proposed transfers would cause economic harm to the Youngstown district or that they would cause or increase racial isolation. Petitioner also claimed that convincing evidence established that the Youngstown district is not providing an adequate education to Coitsville Territory residents and argued that the referee improperly based his decision on non-educational factors.

{¶15} The trial court reviewed the evidence presented to the referee, as it was required to do, and found that the educational benefit to students affected by the proposed transfer "overwhelming[ly] supports" that the transfer requests are in the present and ultimate good of the students involved. The court acknowledged the Hubbard and Lowellville districts' higher ratings on their State District Report Cards, as well as the fact that all but eight current students residing in the Coitsville Territory attend schools outside the Youngstown district. The court stated that most of the affected students "are already receiving the educational benefits that the Hubbard and Lowellville School Districts have to offer them" and found that those students were integrated into the transfer communities.

{¶16} The trial court then turned to the factors relied on by the referee as weighing against the requested transfers. Despite admitting that the transfers would slightly increase the percentage of minority students in the Youngstown district, the court agreed with petitioner's argument that the record contained no evidence supporting a finding that the proposed transfers would create or preserve racial isolation. Further, while acknowledging a loss of revenue to the Youngstown district,

the court concluded that the loss was not significant enough to stand in the way of the proposed transfers, especially because the trial court found no evidence that the loss would be detrimental to the Youngstown district's fiscal or educational operation. The court also concluded that "the requested transfers could not be the cause of a detrimental financial impact since the Youngstown School District was already declared in a fiscal emergency and had the control of [its] finances taken over by the state." Thus, the trial court rejected the primary factors relied on by the referee as weighing against the requested transfers.

{¶17} The trial court stated that the Youngstown district did not claim "it can provide a superior, or even an equal educational experience, [to] that the majority of the proposed transfer students are presently experiencing in the schools in the Hubbard and Lowellville School Districts that they now attend through the open enrollment process." On balance, the trial court concluded that the benefits from the proposed transfers far outweigh the reasons for denying the transfers. The trial court additionally determined that the referee's conclusion regarding the lack of changed circumstances since the 2001 transfer request was not supported by reliable, probative or substantial evidence. To the contrary, the trial court found that the evidence overwhelmingly demonstrated significant changed circumstances under Ohio Adm.Code 3301-89-01(E).

{¶18} First, we agree with the trial court's conclusion that Ohio Adm.Code 3301-89-01(E), which precludes reconsideration of a previously disapproved request for a transfer absent significant change since the filing of the original request, does not require disapproval of the petitions here. Most importantly, the present request, to

divide the Coitsville Territory between the Hubbard and Lowellville districts, does not seek reconsideration of the 2001 petition, which requested a transfer of the entire Coitsville Territory to the Struthers district. Therefore, this case does not involve a request for reconsideration of a previously disapproved request under Ohio Adm.Code 3301-89-01(E).

{¶19} Even were we to conclude that Ohio Adm.Code 3301-89-01(E) is applicable, however, the simple fact that the receiving districts are different in the present petition would establish changed circumstances because the determination of transfer requests involves balancing factors regarding both the transferring and the receiving districts. Thus, even if some of the same factors are implicated here, determination of the petitions here requires analysis of those facts in relation to school districts not implicated by the 2001 petition. Additionally, the financial health of the Youngstown district has changed since the 2001 request was filed. For example, the Youngstown district was placed in a state of fiscal emergency in 2006 and, in November 2008, passed a 9.5 mill levy. For these reasons, the trial court did not abuse its discretion in rejecting the referee's conclusion that there had been no significant change in circumstances since the filing of the 2001 petition.

{¶20} We now consider whether the trial court abused its discretion in determining that the State Board's denial of the petitions on their merits was unsupported by reliable, probative, and substantial evidence and was not in accordance with the law. Appellants argue that the trial court abused its discretion by failing to afford appropriate deference to the State Board, by ignoring relevant factors, and by

relying only on the preferences of Coitsville Territory residents and the State District Report Cards. We conclude that the trial court abused its discretion by essentially rejecting the referee and the State Board's reliance on factors weighing against the proposed transfers, including racial isolation and financial harm to the Youngstown district.

{¶21} The trial court disregarded the referee's factual finding that the proposed transfers would cause financial harm to the Youngstown district. Because of the Youngstown district's pre-existing financial crisis, the trial court found that the requested transfers could not be the cause of a detrimental financial impact. Additionally, because the loss of revenue represented a small percentage of the Youngstown district's annual budget, the court stated that the loss of revenue is not significant enough to stand in the way of the proposed transfers. Finally, the trial court disregarded evidence of financial harm because of a perceived lack of evidence of how the loss of revenue would negatively affect the Youngstown district.

{¶22} Financial harm to a transferring district is specifically identified as a factor in the balancing test utilized to evaluate a request for transfer. See Ohio Adm.Code 3301-89-02(B)(9). The Youngstown district was declared in a state of fiscal emergency on November 16, 2006, and is expected to remain in that state for another three to four years. The Youngstown district superintendent testified that, given the district's fiscal situation and recent cuts of 450 jobs, any reduction in revenue is significant to the district. The trial court recognized evidence demonstrating that the Youngstown district

stands to lose an annual sum of approximately \$145,000 if the transfers are approved.² That loss amounts to less than one percent of the Youngstown district's total annual budget, but testimony established that the loss equals the funds necessary to pay two to three teachers or four custodians. The trial court also recognized evidence that annual revenue from property taxes in the Coitsville Territory totals approximately \$607,000. The lost millage from the Coitsville Territory would increase the tax burden on remaining property in the Youngstown district, should the transfers be approved.

{¶23} We reject the trial court's conclusion that the requested transfers could not be the cause of a detrimental financial impact because the Youngstown district was already in fiscal emergency. In fact, reason dictates that a loss of revenue may have a more profound and detrimental impact on a district in financial crisis than on a fiscally stable district. There is simply no requirement in the Administrative Code or relevant case law that a proposed transfer can only detrimentally impact a district enjoying fiscal stability. Accordingly, the Youngstown district's existing financial problems did not preclude a determination that further losses of funding, as a result of the proposed transfers, would detrimentally impact the district's fiscal operations.

{¶24} *Bartchy* instructs that even a small financial loss caused by a proposed transfer remains part of the balancing test for deciding an R.C. 3311.24 petition. In *Bartchy*, the common pleas court affirmed the State Board's order denying a petition to transfer territory from the Cincinnati Public School District ("CPSD") to the Madeira City School District ("MCSD"). The hearing officer in that case found that the proposed

² The trial court stated the amount as "\$140,000 (\$61,000 (state foundation payments) plus \$84,000 (inside millage))." Because \$61,000 plus \$84,000 equals \$145,000, we use the higher amount.

transfer would result in a financial windfall to MCSD, to the detriment of CPSD. In its review, the common pleas court stated: " '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.' " *Id.* at ¶68.

{¶25} This court held that there was no evidence that the transfer in *Bartchy* would harm CPSD financially and reversed the trial court. We concluded that the State Board and trial court's finding of fiscal detriment to CPSD was inconsistent with this court's prior case law because CPSD did not establish how much money it would lose and because the hearing officer made no finding as to how that loss would affect the district. This court relied on *Crowe v. State Bd. of Edn.* (Oct. 26, 1999), 10th Dist. No. 99AP-78, and held that evidence that the relinquishing school district would simply lose funds is insufficient to show that the loss would be detrimental to the district's fiscal or educational operation, which is the key to Ohio Adm.Code 3301-89-02(B)(9).

{¶26} The Supreme Court disagreed with this court's conclusion that there was no evidence of a detrimental impact on CPSD's fiscal operation and agreed with the trial court that fiscal detriment remained a factor to be considered even though neither the windfall to MCSD nor the financial loss to CPSD would be significant. Accordingly, the court held that the hearing officer was not required to ignore those concerns and, instead, justifiably allowed those factors to play a role in the balancing test. The Supreme Court agreed with the trial court that the State Board's determination regarding detrimental fiscal impact was supported by reliable, probative, and substantial evidence and held that this court erred by reversing that determination.

{¶27} Since *Bartchy*, the Supreme Court has held that "evidence of a loss of revenue is a legally sufficient basis for the State Board * * * to determine that a territory transfer would cause some detriment to the fiscal or educational operation of a school district." *Spitznagel v. State Bd. of Edn.*, 126 Ohio St.3d 174, 2010-Ohio-2715, ¶2. This is exactly what the State Board did in this case. "[T]he [S]tate [B]oard may consider a loss of revenue to be a sufficient demonstration of a financial or educational detriment to the transferring school district. The question of whether, or how much, it should weigh against the transfer is dependent upon the facts and evidence in each case." *Id.* at ¶13. At least some reliable, probative, and substantial evidence supported the determination of fiscal harm to the Youngstown district, and the referee could validly consider that factor as part of the balancing test. Like the Supreme Court in *Bartchy*, we conclude that the hearing officer here justifiably relied on the evidence of financial loss to the Youngstown district in balancing the factors weighing in favor of and against the proposed transfers. In disregarding that factor, the trial court abused its discretion.

{¶28} The trial court also determined that the record lacked reliable, probative, and substantial evidence to support the referee's conclusion that the proposed transfers would create and/or preserve racial isolation. The testimony established that the percentage of minority students enrolled in the Youngstown district would increase from 80.9 percent to 81.6 percent were the transfers approved, but the trial court found that increase insignificant. In contrast to the large percentage of minority students in the Youngstown district, the evidence established that the Hubbard and Lowellville districts have minority student populations of seven percent and one percent, respectively. As a

whole, the Coitsville Territory has a 13-percent minority student population. Whereas the referee focused on the effects on the Youngstown district in determining that the transfers would preserve and/or create racial isolation, the trial court found that the proposed transfers would add to student diversity in the Hubbard and Lowellville districts, as a result of transferring the nine minority students currently residing in the Coitsville Territory into those districts.

{¶29} The trial court stated that there was no evidence that the Coitsville Territory students currently attending schools outside the Youngstown district presently contribute to racial diversity in the Youngstown district. The court also stated that, while there may have been a viable racial impact as a result of the proposed transfers if the resident students of the Coitsville Territory were attending schools in the Youngstown district, the referee's conclusion of racial isolation was not supported by the evidence because only eight of the 63 current students presently attend Youngstown district schools. Contrary to the trial court's statement, the referee was not required to consider only the eight resident students currently enrolled in the Youngstown district. Rather, it is appropriate for the State Board to consider the social and educational needs of all affected students, including current and future students in the transfer area, in the relinquishing district, and in the receiving district. *Bartchy* at ¶51-52. Although many Coitsville Territory students currently attend other districts through open enrollment, they must reapply to those districts each year and have no guarantee that they will be permitted to continue in those districts.

{¶30} The Youngstown district superintendent testified that the transfers would promote further racial isolation and adversely impact the Youngstown district's goal of promoting respect for diversity. The evidence supports the referee's finding that the transfer of the predominantly Caucasian Coitsville Territory to two predominantly Caucasian school districts will result in continued, if not increased, racial isolation in the overwhelmingly minority Youngstown district. The hearing officer was justified in allowing this factor to play a role in the overall balancing test as to whether the requested transfers should be approved. Contrary to the trial court's determination, the record contained at least some reliable, probative, and substantial evidence to support the conclusion that the proposed transfer would, at the very least, preserve racial isolation.

{¶31} Upon review, we conclude that the trial court abused its discretion by disregarding the evidence of fiscal harm to the Youngstown district and racial isolation implications as a result of the proposed transfers. The referee applied the appropriate balancing test, after reviewing and weighing all of the evidence and taking into account the best interests of all affected students, present and future, and determined that the proposed transfers should not be allowed. In *Bartchy*, the Supreme Court expressly "observe[d] that whether a particular transfer request should be approved is a matter entrusted in the first instance to the state board, to be decided on its specific merits." *Bartchy* at ¶95. Our review, and that of the trial court, must "ensure proper deference" to the referee's balancing of the applicable factors weighing in favor of and against a proposed transfer. *Id.* Applying those principles here, we conclude that, by rejecting

factors that were supported by reliable, probative, and substantial evidence and weighed against the transfers, and by substituting its judgment for that of the referee and the State Board, the trial court abused its discretion. We, therefore, sustain the Youngstown Board's sole assignment of error and ODE's first assignment of error.

{¶32} By its second assignment of error, ODE argues that the trial court erred by considering evidence outside the record. Because we have already concluded that the trial court erred in its determination, we overrule this assignment of error as moot.

{¶33} The State Board's orders were supported by reliable, probative, and substantial evidence and were in accordance with law, and the trial court abused its discretion in reversing those orders. In conclusion, we sustain the Youngstown Board's sole assignment of error and ODE's first assignment of error, overrule ODE's second assignment of error as moot, reverse the judgment of the Franklin County Court of Common Pleas, and direct that court to enter judgment affirming the State Board's orders.

*Judgment reversed;
cause remanded with instructions.*

BRYANT, P.J., concurs.

KLATT, J., dissents.

KLATT, J., dissenting.

{¶34} Because I do not believe the trial court abused its discretion when it found the absence of reliable, probative, and substantial evidence supporting the board's decision, I respectfully dissent from the majority decision.

{¶35} The central question here is whether the trial court identified and applied the appropriate standard of review in finding the absence of reliable, probative, and substantial evidence to support the State Board of Education's ("board") order, or whether it failed to give the board's findings due deference and thereby improperly substituted its judgment for that of the board. I believe the trial court identified and applied the correct standard of review.

{¶36} On page seven of its decision, the trial court expressly identified the R.C. 119.12 standard of review it applied in examining the board's order. It also expressly noted that a reviewing court cannot substitute its judgment for the agency's decision. The trial court examined the entire administrative record to determine if reliable, probative, and substantial evidence supported the board's order. Although the board's findings of fact are presumed to be correct and require deference, the trial court may reverse, vacate, or modify the board's order if it determines that the administrative findings are " 'internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences or are otherwise unsupportable.' " *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, ¶37, quoting *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471, 1993-Ohio-182. Here, the trial court found that the board's findings were unsupportable. The trial court clearly and succinctly stated its reasons for reaching that conclusion. Our standard of review is abuse of discretion. *Id.* at ¶41. In my view, the majority improperly substitutes its judgment for that of the trial court, rather than apply an abuse of discretion standard of review.

{¶37} The referee's report and recommendation adopted by the board rests on two principle findings: (1) that there has not been any substantial change of circumstances since 2001 (the year that Coitsville last sought to join another school district) that would support the proposed transfer and that any changes that have occurred would mitigate against the transfer; and (2) the proposed transfer would adversely affect the Youngstown school district's finances and would create and preserve racial isolation. The trial court analyzed the evidentiary basis for these findings as it was required to do under R.C. 119.12.

{¶38} The majority agrees that the trial court did not abuse its discretion in concluding that the transfer requests at issue here reflect a substantial change of circumstances from Coitsville's 2001 transfer request. Notably, the referee's report is largely premised on the finding that Coitsville's current requests do *not* involve a substantial change of circumstances from its 2001 request. Therefore, the majority agrees with the trial court that the primary basis for the referee's report and recommendation is unsupportable.

{¶39} To a much less degree, the referee addressed the merits of the transfer requests, focusing almost exclusively on the fiscal and racial impact on the Youngstown school district if the requests were approved. The trial court looked closely at the evidence underlying those findings and found the absence of reliable, probative, and substantial evidence to support them. Although the trial court recognized that there was some evidence of a negative fiscal and racial impact if the transfer requests were approved, that impact was extremely small. It is undisputed that the fiscal impact was

less than one percent of the Youngstown school district's annual budget. In addition, the impact of a potential loss of eight students on Youngstown's racial balance, given a student population of approximately 4,100 students, is negligible. Moreover, the referee specifically found that the transfer requests were not racially motivated. (Referee's Report and Recommendation at 29, ¶9.)

{¶40} In addition, the referee found that approval of the transfer requests "will have little if any effect on the educational offering of programs in the affected districts." (Referee's Report and Recommendation at 24, ¶23.) Nor would approval of the transfer requests severely impair Youngstown's educational programs. (Referee's Report and Recommendation at 27, ¶8.) Approval of the transfer requests would not affect athletic programs or extra-curricular activities in any of the affected districts. (Referee's Report and Recommendation at 25, ¶25.) Nor would the loss of the eight students "likely cause any layoffs, closed buildings or other foreseeable facility utilization detriment to Youngstown." (Referee's Report and Recommendation at 27, ¶10.) The referee also took judicial notice of the fact that on November 4, 2008, the Youngstown voters passed a 9.5 school mill levy, which would seem to improve Youngstown's fiscal position.

{¶41} The trial court also found that there was overwhelming evidence supporting the approval of the transfer requests, particularly given that the "primary consideration [is] the present and ultimate good of the pupils concerned." Ohio Adm.Code 3301-89-01(F); *Bartchy* at ¶45. The trial court identified and discussed the evidence that supported a finding that approval of the transfer requests was in "the present and ultimate good of the pupils concerned."

{¶42} For example, it was undisputed that 53 of the 63 students impacted by the proposed transfer requests already attended schools in the Hubbard and Lowellville school districts through open enrollment.³ Nor was it disputed that Coitsville students and their families felt a greater attachment to the Hubbard and Lowellville communities than to Youngstown. Coitsville township is a rural township and is similar in character to Hubbard and Lowellville. Youngstown is a large urban area with a substantially greater population. In addition, the referee specifically found that the residents of Coitsville were concerned about the educational needs of their children and felt that the existing educational system in Youngstown did not meet those needs. It was undisputed that the Hubbard and Lowellville school districts have received a state report card rating of "excellent" while the Youngstown school district's state report card indicates it is on "academic watch." There was no evidence that approval of the transfer requests would adversely affect the Hubbard or Lowellville school districts. In fact, the trial court noted that the evidence demonstrated some positive impact on those districts.

{¶43} Given the difficult evidentiary assessment the trial court was required to make under R.C. 119.12, I find the following language from *Bartchy* particularly instructive:

"In reviewing an order of an administrative agency, an appellate court's role is more limited than that of a trial court reviewing the same order. It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. The appellate court is to determine only if the trial court has abused its discretion. An abuse of discretion "implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.'" *State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster* (1986),

³ Two students attend schools in the Struthers school district.

22 Ohio St.3d 191, 193, 22 OBR 275, 277, 489 N.E.2d 288, 290. Absent an abuse of discretion on the part of the trial court, a court of appeals must affirm the trial court's judgment. See Rohde v. Farmer (1970), 23 Ohio St.2d 82, 52 O.O.2d 376, 262 N.E.2d 685.

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

An appellate court's scope of review on issues of law is plenary, including the issue of whether the common pleas court applied the proper standard of review. See Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd. (1992), 63 Ohio St.3d 339, 343, 587 N.E.2d 835.

Id. at ¶41, 42, and 43.

{¶44} In my view, the trial court examined the evidence presented in support of the board's order under the correct standard of review. After a thorough and thoughtful analysis of that evidence, the trial court found the absence of reliable, probative, and substantial evidence to support the board's order. Although the trial court's conclusion may be subject to fair debate, I do not believe the trial court abused its discretion. The trial court's decision does not reflect "perversity of will, passion, prejudice, partiality or moral delinquency." It is not the role of an appellate court in this situation to substitute its judgment for that of the trial court in a close case. *Bartchy* at ¶94.

{¶45} For these reasons, I respectfully dissent from the majority decision.
