

**BEFORE THE COMMISSION FOR ARKANSAS PUBLIC SCHOOL ACADEMIC
FACILITIES AND TRANSPORTATION**

*In the Matter of the Appeal of the North Little Rock School District
Proposed Partnership Project Numbers 1314-6002-700, 701, 702, 703, 707*

**RESPONSE TO THE NORTH LITTLE ROCK SCHOOL DISTRICT'S APPEAL OF
THE FINAL DETERMINATION OF THE ACADEMIC FACILITIES REVIEW BOARD**

The Division of Public School Academic Facilities and Transportation ("Division") respectfully requests that this Commission deny the appeal of the North Little Rock School District ("District") and accept the determination of the Academic Facilities Review Board for the following reasons.

I. SUMMARY OF ARGUMENT

The sole issue in this appeal is whether the Division acted outside of the authority vested in it by the law and Partnership Rules or in an "arbitrary and capricious manner" by including the space at the North Little Rock School District's Pike View Elementary School when conducting a suitability analysis for the construction of five new elementary school buildings. The Academic Facilities Review Board found in favor of the Division; the North Little Rock School District appealed that determination.

In its appeal, the District contends that the Division should not have included the space at Pike View Elementary as available elementary education space in the suitability analysis conducted under section 3.32.2 of the Partnership Rules. The District reasons that although Pike View Elementary served K-5 students through the 2012-2013 school year, the District planned to move those students to a newly constructed facility and replace the K-5 students with pre-kindergarten students. The District alleges that because pre-K buildings are not "academic

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facilit[ies]” under the Partnership Rules (and thus not eligible for Partnership funding), the space that the District plans to use for pre-K students should not be counted as available space.

The problem with this argument is that Pike View Elementary had space to serve K-5 students (as it did through the 2012-2013 school year), and the District’s desire to move the K-5 students out and replace them with pre-K students does not change that fact. In an October 2011 meeting (prior to the District’s submission of its project application), the Division told the District that the Pike View Elementary space *would be counted* in the suitability analysis because the space was available for K-5 students, even though the District wanted to re-purpose it for pre-K use. The District’s desire to change the nature of the Pike View space to a non-“academic facility” that is not eligible for Partnership funding does not change the fact that the space is available for elementary education, and the Partnership Rules therefore require the Pike View Elementary space to be included in the suitability analysis. Any other conclusion would circumvent the Partnership Rules’ suitability process. Under the District’s logic, a school district that wanted to construct new buildings with state financial participation under the Partnership Program would need only re-purpose one or more of its buildings to a non-academic use and then seek Partnership money for the new construction. This would effectively result in the Partnership Program funding non-academic facilities, which violates the law and Rules.

The District also erroneously argues that because the Facility Condition Index (“FCI”) of Pike View Elementary is greater than 65% (i.e., to renovate the building would cost more than 65% of the replacement cost) and Section 4.03 of the Partnership Rules thus could authorize its demolition, that space should not be counted in the suitability analysis. The problem with this argument is that the District did not want to (and never asked to) demolish the building. Rather, the District wanted to replace the K-5 students served in the building with pre-K students. At

bottom, the Pike View Elementary space *remains available* to house K-5 students; consequently, that space must be counted in the suitability analysis. Furthermore, there are many academic facilities in use in the state where the FCI is above 65%, and nothing in the law or Rules requires the demolition of such an academic facility. And there is nothing that exempts the space of such a facility from being included in a suitability calculation.

II. STATEMENT OF FACTS

A. Background

The North Little Rock School District submitted an application to the 2013-2015 Academic Facilities Partnership Program involving a district-wide project, which included the construction of five new elementary school (K-5) buildings. As part of its overall plan, the District sought to move K-5 students from its Pike View Elementary School to one of the newly-constructed facilities, and use Pike View to serve pre-K students who previously were housed at another District building. In performing the suitability calculation as required by the Partnership Rules, the Division included the space at Pike View Elementary as space available for K-5 education. The issue in the present appeal is whether the Division acted outside of the authority vested in it by the law and Partnership Rules by including the Pike View space in the suitability calculation, and whether its decision is supported by “substantial evidence.”

Partnership Program funding is available only for a school district’s “academic facilities.” *See e.g.*, Ark. Code Ann. § 6-20-2507 *et seq.* During the 2013-15 Partnership Program funding cycle, the North Little Rock School District was awarded approximately \$25.5 million in Partnership funding.

The Partnership Rules provide that “[b]uildings or spaces . . . used for pre-kindergarten education shall not be considered academic facilities for purposes of these Rules.” *See*

Commission for Arkansas Public School Academic Facilities and Transportation Rules
Governing the Academic Facilities Partnership Program dated July 2012, Section 3.01.3. Stated differently, school district buildings used for pre-K programs are not eligible for Partnership Program funding.

“Suitability” is defined and governed by the Partnership Rules. As the District recognizes, the Rule governing suitability in this matter is set forth at 3.32.2.¹ See NLRSD Appeal (filed 9/19/13) at 4 (“the District contends that the proper suitability analysis . . . falls under Section 3.32.2”). That Section provides in relevant part:

3.32.2 On a New School Campus:

When a school district is proposing to build a new academic facility on a school campus for which the Division determines there are no other currently existing appropriate school facilities . . . the Division shall compare the total gross square footage required by the POR^[2] for the proposed facility for the appropriate student grade population to that currently existing total gross square footage available in the **district** for the appropriate student grade population in their final grade configuration less the gross square footage to be demolished as part of the proposed project. The Division shall also include other campuses and grades affected by grade reconfigurations as part of the project. After making the comparison the school will only be deemed to not be suitable and thus eligible for state financial participation on a proposed facility project for that additional space required in the POR *not currently available in the school district for the appropriate student population in their final grade reconfiguration.*

Partnership Rules, Section 3.32.2 (bold in original, other emphasis added).

In performing the suitability analysis, the Division used the POR to compute the required total space for one new elementary school. Because the District proposed to build five schools,

¹ Because both the District and Division agree that suitability in this matter is governed by Rule 3.32.2, the District’s Rule 3.32.1 suitability argument is superfluous and will not be addressed in this Response.

² The “POR,” or Program of Requirements, is defined by Section 3.21 of the Partnership Rules as: [t]he requirements that each new construction project . . . is required to adhere to as the established minimum adequate components, and total square footage required in a school construction project.

the Division then multiplied that number by five to determine the total required new space for the five schools. In calculating the existing K-5 educational space available in the school district, the Division included the Pike View Elementary School, *which was housing (and continued to house through the 2012-13 school year) K-5 students*. In a meeting between the Division and District held prior to the District's application for Partnership Program funding for the 2013-15 cycle, the Division told the District that the Pike View Elementary space *would be counted* in the suitability analysis because the space was available for K-5 students, regardless of whether the District wanted instead to use it to house pre-K students.

B. Decision of Division/Appeal to Board of Review

On June 25, 2013, the District appealed the Division's decision to count the Pike View space in the suitability analysis to the Academic Facilities Review Board. On August 8, 2013, the Review Board held a hearing to consider the District's appeal. On August 16, 2013, the Board issued a written decision upholding the Division's determination. On September 19, 2013, the District timely appealed the Review Board's order.

III. APPLICABLE LAW AND ADMINISTRATIVE RULES

A. Academic Facilities Partnership Program

The statutory authority for the Academic Facilities Partnership Program is found at Ark. Code Ann. § 6-20-2507, which vests with the Division the authority to make Partnership Program funding decisions. The Commission promulgated rules and regulations necessary to administer this program pursuant to the authority vested in it by Ark. Code Ann. § 6-20-2512. *See* Commission for Arkansas Public School Academic Facilities and Transportation Rules Governing the Academic Facilities Partnership Program dated July 2012 ("Partnership Rules").

B. District Appeal of Division Determinations

The Academic Facilities Review Board was created by Ark. Code Ann. § 6-20-2516 to hear appeals filed by school districts Partnership Program funding determinations made by the Division. Ark. Code Ann. § 6-20-2516. If a school district receives an unfavorable decision from the Review Board, it may appeal that decision to this Commission. Ark. Code Ann. § 6-20-2513(a)(2)(A)-(B).

Pursuant to Ark. Code Ann. § 6-20-2516, this Commission established procedures for conducting hearings and appeals. Those procedures are set forth in the Commission for Arkansas Public School Academic Facilities and Transportation Rules Governing Appeals from Determinations of the Arkansas Division of Public School Academic Facilities and Transportation dated June 2012 (“Appeal Rules”).

IV. STANDARD OF REVIEW AND BURDEN OF PROOF

Pursuant to Section 2.03 of the Appeal Rules, the appealing school district has the “burden of proving that the Division’s written determination is not supported by substantial evidence or is outside the legal authority vested in the Division.” Commission for Arkansas Public School Academic Facilities and Transportation Rules Governing Appeals from Determinations of the Arkansas Division of Public School Academic Facilities and Transportation, dated June 2012. The Appeal Rules define “substantial evidence” as follows:

‘substantial evidence’ means relevant evidence that a reasonable mind might accept to support a conclusion. Substantial evidence is not based upon speculation and conjecture. A review of substantial evidence is not based upon whether the facts would have supported a contrary finding by the Division, but whether the facts supported the finding made by the Division.

Appeal Rules, Section 2.04. In this matter, the North Little Rock School District alleges the Division acted outside of its legal authority by including the Pike View Elementary space in its

suitability calculation, offering two alternate theories. *See* NLRSD Appeal Brief (filed 9/19/13) at 1. The District also contends that the Division’s determination was “arbitrary and capricious” insofar as its application of the Partnership Rules was contrary to the evidence, *see* NLRSD Appeal Brief (dated 9/19/13) at 8, which appears to invoke the “substantial evidence” standard. In either event, the District has failed to meet its burden.

V. ARGUMENT

To meet its burden of proving that the Division acted outside of its legal authority, the District must prove that the law and Rules require the Division to allow a school district to convert a Partnership Program eligible academic facility to a non-academic use and not have that conversion count against the District’s projects in the determination of suitability. Because the law and Rules contain no such mandate, the District failed to meet its burden of proving that the Division acted outside the scope of its legal authority in counting the space at Pike View Elementary in the suitability analysis, or that its decision was not supported by “substantial evidence.” To the contrary, the Division acted consistently with the suitability rules by including as available K-5 space the Pike View Elementary building. At bottom, the District has space at Pike View Elementary that it can use (and *did* use during the 2012-13 school year) to serve its K-5 students, and the District’s desire to serve pre-K students in that building does not change the fact that the space exists at Pike View Elementary for K-5 education.

Also, if the District’s logic were followed, it would mean that a school district could reconfigure all of its facilities to pre-K or some other non-academic use and then require the state to participate financially to build all new facilities without suitability reductions since there would be no academic facilities to reduce the suitability requirement for the replacement facilities. The net result would be that the Partnership Program would fund pre-K facilities,

which the law and Rules prohibit. This same reasoning refutes any District suggestion that Rule 3.08 gives a school district some absolute authority to re-configure school buildings in any way it deems fit (including converting them to a non-academic purpose) yet remain eligible for Partnership funding. *See e.g.* NLRSD Appeal Brief (dated 9/19/13) at 2.

The District's "FCI"/"prudent and resourceful use of state funds" argument based on Rule 4.03, *see* NLRSD Appeal Brief (dated 9/19/13) at 5, likewise must fail. In fact, the FCI (or "Facility Condition Index," *see* Rule 3.13, is irrelevant to this project. The FCI is one of the resources or guides for the Division to approve or deny a District's request to replace/demolish a facility rather than renovate the facility per section 4.03 of the Rules. In general, when the FCI is above 65%, the Division agrees that the facility may be demolished and replaced. The North Little Rock School District made no request, however, to demolish or replace the Pike View campus since the District's plan was to re-purpose the campus to serve pre-K students. If Pike View Elementary currently is suitable for the education of pre-K students, the District could continue to use it to educate K-5 students. There are many academic facilities currently in use in the state where the FCI is above 65%, and nothing in the law or Rules requires the demolition of such an academic facility. Nor is the space at these facilities exempted from the suitability analysis.

Finally, the District contends that the Division's inclusion of the Pike View space in the suitability analysis was "arbitrary and capricious" because the Division approved the construction of the Crestwood and Lakewood Elementary schools, which "clearly impl[ies] and establish[es] that Pike View is *not* a suitable space for these children." NLRSD Appeal Brief (dated 9/19/13) at 8. This argument reflects a fundamental misapplication of the Partnership Program process.

As noted above, a suitability analysis was conducted to determine the amount of space needed in the District to serve K-5 students (and thus the amount of space eligible for Partnership funding). Stated differently, a suitability analysis is a process used to determine whether a school district's proposed projects are eligible for state financial participation. It is a school district, not the Division, that proposes how it will provide sufficient space to serve its students. And it was the North Little Rock School District—not the Division—that proposed both the building of five new elementary schools (including Crestwood and Lakewood) and to repurpose Pike View to house pre-K students. Contrary to the District's argument, the Division concluded that the Pike View space *was* available for the District to serve its K-5 students; it was for that reason that the Division included the Pike View space in the suitability analysis. This is not changed by the fact that the District proposed, and the Division approved for Partnership funding, five new elementary school building projects.

VI. CONCLUSION

The Division's inclusion of space at the Pike View Elementary School as space available to serve the North Little Rock School District's K-5 students is supported by substantial evidence, and the Division acted consistently with the law and Partnership Program Rules in reaching its decision. For the foregoing reasons, the Division respectfully requests that the Commission uphold the Review Board's determination.

Respectfully submitted,

 10/15/2013

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