

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

*In the Matter of the Appeal of the Cabot School District
Proposed Partnership Project Number 1314-4304-003*

**RESPONSE TO THE CABOT 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 Cabot School District ("District") and accept the determination of the Academic Facilities Review Board for the following reasons.

I. SUMMARY OF ARGUMENT

The Division disapproved a project submitted by the Cabot School District "for the addition to the main dining room wing" at its Ward Central Elementary campus. For a project to be eligible for Partnership funding for adding additional space to an existing campus, the Partnership Program Rules require that a "suitability" analysis be conducted. According to the Partnership Rules, this is done through a calculation that takes into account factors such as the existing square footage on a campus, the square footage that the school district seeks to add, and projected student enrollment. In the present matter, the suitability calculation resulted in a finding by the Division that no additional square footage was necessary (i.e., "no suitability need").

In its appeal, the Cabot School District does not contest that the suitability analysis resulted in a finding that additional square footage was unnecessary. Rather, it argues that the Ward Central Elementary cafeteria is "insufficient and undersized pursuant to the . . .

[Division's] Program of Requirements." The District also argues that its project was eligible for

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funding under the Partnership Program Rules finalized only in July of 2013 (which was long after project applications were submitted and funding decisions were made). The District also contends for the first time that the Division acted outside of its legal authority by conducting a suitability analysis, arguing the analysis should not have been conducted because the cafeteria space involved is “non-academic” space.

The District’s arguments are inconsistent with the applicable law and Partnership Rules. First, Cabot’s Program of Requirements (or “POR”) argument is misplaced because the space requirements contained in the POR are but one factor considered in the suitability analysis mandated by the Partnership Program Rules, and the overall analysis resulted in a finding of “no suitability need.” Second, even if the July 2013 Rules applied to the 2013-15 funding cycle (which they did not), the District’s project to add to an existing cafeteria still would not have been eligible for Partnership funding. Section 4.03.1 of the July 2013 Rules, upon which the District bases its eligibility argument, applies only to replacements of “stand-alone student dining and kitchen facilities”; not additions to existing spaces. Third, a cafeteria *is* an academic facility. If the cafeteria was considered to be a “non-academic” space as the District contends, the project would not be eligible for Academic Facility Partnership Funding in the first instance.

II. STATEMENT OF FACTS

A. Background

The Cabot School District submitted an application to the 2013-2015 Academic Facilities Partnership Program to add space to the main dining room at its Ward Central Elementary School. In April of 2013, the Division disapproved the project, finding “no suitability need.” Stated differently, a calculation of the existing square footage of academic space at the elementary school campus, the additional square footage sought for the project, and projected

student enrollment resulted in a finding that no additional square footage was necessary. This finding was consistent with the suitability analysis submitted by the School District with its application for Partnership funding, which likewise indicated there was no suitability need.

“Suitability” is defined and governed by the Partnership Rules. *See* Commission for Arkansas Public School Academic Facilities and Transportation Rules Governing the Academic Facilities Partnership Program dated July 2012 (“Partnership Rules”). The suitability provisions of the Rules applicable to this matter provide as follows:

3.32 “Suitability” – The process undertaken by the Division to determine whether any existing academic facility is eligible for state financial participation for new construction^[1] projects, as set forth in Section 5.05 of these Rules. . . [O]nly that space total gross square footage required by the POR which is not already deemed available to a school district, whether on an existing campus or a new school campus, shall be determined eligible for state financial participation.

3.32.1. On An Existing Campus:

When a school district is proposing to build an academic facility on an existing campus with existing educational facilities, the Division shall compare the appropriate existing total gross square footage space of the existing facility on the **campus** to the total gross square footage space requirements of the POR for the proposed new school facility based on the projected student enrollment by grade level. 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 the additional gross square footage space required in the POR not currently available on the school **campus**.

Partnership Rules, Sections 3.32 and 3.32.1 (emphasis in original).

The Program of Requirement, or “POR,” is a tool used to determine suitability. A school district (such as Cabot) applying for a project to add academic space² to an existing facility will load electronically into the POR program (which is found on the Division’s website under the

¹ Under Partnership Rule Section 5.05.2, “new construction” includes “additions to existing facilities.”

² Partnership Program funding is available only for “academic facilities.” *See e.g.*, Ark. Code Ann. § 6-20-2507 *et seq.*

School Facility Manual link and incorporated by reference into the Partnership Rules) the school district's student projections. The program then will calculate how many square feet and which spaces would be needed if a new school were being built. The school district then enters into the program: (1) the existing square footage of the campus onto which it seeks to add academic space, and (2) the amount of square footage that it seeks to add. The program then calculates whether there already is sufficient square footage at the campus based upon these factors. If the calculation results in a zero suitability need (i.e., that there is sufficient existing space on the campus), the project is not eligible for Partnership Program funding. *See e.g.*, Partnership Rules, Section 5.05.2 (for additions to existing facilities, "[a]ny project for which the Commission determines the district or campus is currently suitable shall not be entitled for any state partnership assistance in that year's partnership cycle").

B. Decision of Division/Appeal to Board of Review

On April 24, 2013, the Division notified the Cabot School District that its proposed project was disapproved due to "no suitability need." On June 12, 2013, the District appealed the Division's determination to the Academic Facilities Review Board. In its appeal, the District did not challenge the fact that the suitability calculation resulted in a finding of no suitability need, nor did it allege that the Division's "no suitability need" determination was inconsistent with the applicable law or Partnership Rules. Rather, the District argued that: (1) the Ward Elementary campus "is clearly lacking the appropriate size for this needed single-purpose space," (2) the Partnership Rules would allow funding for the addition *if* the District were building a new school, and (3) under revised Partnership Rules, the District would have been eligible for Partnership program funding for the dining room addition regardless of suitability need.

On August 8, 2013, the Academic Facilities Review Board held a hearing to consider District's appeal.³ On August 16, 2013, it issued a written order upholding the Division's determination. On September 12, 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. This 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 Program 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 to districts Partnership Program funding determinations made by the Division. Ark. Code Ann. § 6-20-2513(a)(1). 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).

³ On page 3 of its Appeal Brief, Cabot notes that "only three of the five member Review Board" heard its appeal. One Board member was out-of-state and unavailable that day, thus leaving a four-member panel. Cabot's appeal was heard by a three-member panel, however, because one member honored Cabot's request that he recuse. In any event, three members constitute a quorum and the Board's ruling thus was valid. Ark. Code Ann. § 6-20-2516 (e)(1)-(3).

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.” 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 Cabot School District alleges the Division’s determination is not supported by substantial evidence, and that the Division acted outside of its legal authority in denying its project application for a cafeteria addition.

V. ARGUMENT

Although the District’s arguments have shifted somewhat since the Review Board stage, the overall gist has remained somewhat the same: (1) the POR requires a larger cafeteria than the District currently has at its Ward Central Elementary School; and (2) the cafeteria project would have been approved had the Partnership Program Rules that were finalized in July of 2013 been applied. The District also challenges (for the first time at this late date) the propriety of the

Division conducting a suitability analysis, arguing that the analysis should not have been conducted because the Ward Central Elementary cafeteria is a “non-academic” facility.

The District’s arguments are without merit. First, the space requirement set forth in the POR for a dining hall was but one factor involved in the suitability analysis, which in this case resulted in a findings of “no suitability need.” Second, whether one considers the Partnership Rules existing at the time the applications were accepted and funding decisions were made regarding the 2013-15 funding cycle (which would be appropriate), or as Cabot urges, the July 2013 Rules enacted long after the process for the 2013-15 funding cycle had ended, the result is the same: the Division’s determination that the Cabot School District’s project was not eligible for Partnership Program funding was consistent with the law and Rules.⁴ Third, if the Ward Elementary cafeteria is a “non-academic” facility as the District contends, a project to expand it would not be eligible for Partnership Program funding in the first instance.

(1) The POR Requirements/Mandatory Suitability Calculation. In this appeal, the Cabot School District argues that its cafeteria space is “insufficient and undersized pursuant to the . . . Program of Requirements,” and that the “Ward Elementary School cafeteria does not meet the current POR regulations.” Cabot Appeal Brief (dated 9/12/13) at 1, 4. There is no requirement in the law or Rules that an existing space in a school building (i.e., a dining hall)

⁴ Cabot suggests that because the Division approved the cafeteria projects submitted by other school districts, “no similarly situated districts . . . would be impacted by [this Commission] approving [on appeal] Cabot’s application for partnership funding.” Cabot Appeal Brief (dated 9/12/13) at 3-4. This argument—which seems to promote a “no harm, no foul” approach to awarding Partnership funding—ignores that funding would not be available to this project under either version of the Rules.

meets the size requirement of the POR.⁵ The mechanism for determining Partnership funding eligibility is the suitability analysis.

In a project such as that proposed by Cabot (to add space to an existing building), the POR's space requirement is but one factor in the mandatory suitability analysis. *See* Partnership Rules, Sections 3.32 and 3.32.1. This analysis takes into account the POR space requirement, as well as projected student enrollment, the space that the school district seeks to add, and the existing square footage on the campus. *Id.* When applied to the Cabot School District's proposed project, this calculation resulted in a finding that no additional square footage was necessary, or that there was "no suitability need."

The fact that the Ward Elementary cafeteria is smaller than the POR requirement does not automatically mean that the project must be approved. An extension of the District's argument, if allowed, would mean that any required space on the POR that a school district is missing would be eligible for state financial participation, regardless of the suitability computation. If that were the case, there would be no need for a computation of suitability and the Rules would have provided that a school district is eligible for any missing space or any existing space to the POR requirements. And clearly that is not the case.

(2) **July 2013 Partnership Rules.** The District erroneously argues that under Section 4.03.1 of the "current" Partnership Rules (effective July 2013), it is entitled to Partnership funding for a cafeteria, which the District defines as a "single-purpose space." The July 2013 Rules, however, were not applicable to the 2013-15 Partnership Program funding cycle. In fact, in the cases cited by the District on pages five and six its appeal brief, the United States Supreme

⁵ Granted, if a school district seeks to build a new building or add to an existing space, the new building or total space after the addition must meet the POR space requirement in order for the project to be eligible for Partnership funding.

Court recognized (as does the Arkansas Supreme Court) a “presumption against statutory retroactivity.”⁶ Thus, those cases militate *against* the District’s argument.

Nonetheless, this Commission need not broach the issue of retroactivity because assuming for the sake of argument that the July 2013 Rules applied, the District’s project *still* would have been ineligible for Partnership funding. The District cites to Section 4.03.1 of the July 2013 Rules, which reads in pertinent part: “Warm, safe, and dry (space replacement) projects that replace *stand-alone* student dining and kitchen facilities are not required to prove the suitability as described in 3.34.1.” (emphasis added). In its project application, the District sought to add space to an existing building, *not* “replace a stand-alone student dining” facility. Thus, a suitability analysis was required.

(3) Cafeteria a “Non-Academic” Space. Cabot raises a new argument for the first time before this Commission: that the Division acted outside of its legal authority by interpreting Section 5.00 of the Partnership Rules too expansively. Cabot’s argument appears to be as follows:

- The “suitability” requirement set forth in Section 5.00 of the Rules (which addresses the Division’s evaluation and approval of project applications) references Section 3.32 “of the, then applicable, Rules”;
- “The first sentence of Section 3.32 indicates the ‘suitability’ process is to be undertaken to determine whether **any existing academic facility** is eligible”;

⁶ *Landgraf*, 511 U.S. 244, 274 (1994); *see same* at 277 (“our holding in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974)] is similarly compatible with the line of decisions disfavoring retroactiv[ity].” This is consistent with Arkansas Supreme Court precedent that “[o]ur rule on this point could not be more clear. Retroactivity is a matter of legislative intent. Unless it expressly states otherwise, we presume the legislature intends for its laws to apply only prospectively.” *Bean v. Office of Child Support Enforcement*, 340 Ark. 286, 296 (2000).

- “The Ward Elementary School cafeteria project is a single-purpose space that is **non-academic** in nature”;
- “Therefore, ‘no suitability need’ is **not** a proper basis for denial in this particular case.”

Cabot’s Appeal Brief (dated 9/12/13) at 4-5 (emphasis in original).

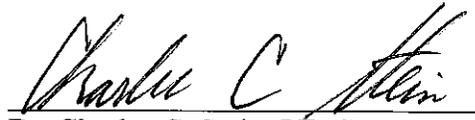
Stated differently, the District argues that because its project application (to expand its cafeteria) involved a “non-academic” space, a suitability analysis should not have been conducted, and the results of the analysis thus cannot be used to deny funding for the project. It is beyond argument that in order to be eligible for state financial participation under the Academic Facilities Partnership Program, the project for which a school district seeks funding must involve an “academic facility” or “academic space.” Consequently, if one accepted Cabot’s argument that its cafeteria is not an “academic facility,” the project would not be eligible for Partnership Program funding in the first instance.

In any event, a cafeteria is an “academic facility.” See Partnership Program Rules at Section 3.00 (defines “academic facility” as “[a] building or space, including related areas such as the physical plant and grounds, where public school students receive instruction is an integral part of an adequate education as described in Ark. Code Ann. § 6-20-2303).

VI. CONCLUSION

The Division’s denial of Partnership Program funding for the Ward Central Elementary cafeteria expansion project 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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