

inadequacy was one impediment to PCSSD's release from federal court supervision in the Little Rock desegregation case. *LRSD v. PCSSD*, 664 F.3d 738, 752 (8th Cir. 2011)(noting Jacksonville's school facilities were "deteriorating"). In late 2013, the parties to that case agreed to settle the release of the State from court supervision. In that agreement, the parties agreed to the creation of a separate, stand-alone school district for Jacksonville. A primary reason for the creation of JNPSD was the ability of the new District to secure Partnership Program funding to build new facilities to replace the inadequate facilities in the District. After JNPSD was formed in November of 2014, it created its first facilities master plan in late 2015. It proposed replacing Jacksonville High School and combining two elementary schools into one new facility. The federal court accepted this plan but held that it was insufficient. In order to ensure that all JNPSD facilities were "clean, safe, attractive, and equal" the Court required JNPSD to replace all of its elementary and secondary facilities. DE # 5187, Order. JNPSD then asked the Court if renovation was an option to comply with the Order. The Court stood by its previous order that required no less than replacement of the facilities. DE # 5445. The Court reaffirmed this position in 2018 when it accelerated JNPSD's timeline to replace Bayou Meto and Taylor Elementary Schools. With regard to the State, the Court found:

Arkansas is in harness, too, with substantial partnership program funding. Continued partnership funding, or some equivalent state assistance, is essential for JNPSD to meet its desegregation obligations through [the District's] solid and reasonable facilities plan.

DE # 5445, p. 6.

It should be noted that Bayou Meto Elementary is the school in JNPSD with the lowest African-American student enrollment (at about 15%). Taylor Elementary has the Districts highest African-American student enrollment (at about 66%).

DPSAFT's October 25, 2019, decision was pursuant to a preliminary review of the District's Partnership Program project application for the above referenced projects. DPSAFT has not formally stated a reason for its denial of funds for replacement of Taylor Elementary. So, it is not clear why DPSAFT has rejected JNPSD's application for replacement of Taylor Elementary. Even so, DPSAFT's decision is not supported by substantial evidence.

DPSAFT has approved facilities funding for schools in JNPSD that are substantially similar to Taylor Elementary. With its 2018 Preliminary Master Facilities Plan, DPSAFT approved funding for replacement of Pinewood Elementary and Dupree Elementary. Both schools are in a similar condition to Taylor Elementary. DPSAFT rated Pinewood and Dupree at lower Facility Condition Index ("FCI") than Taylor Elementary. Moreover, DPSAFT relied on other subjective considerations to approve funding for the Pinewood/Dupree replacement including that Pinewood and Dupree were substantially undersized when compared to the State's Program of Requirements ("POR"). Taylor is substantially undersized as well. Pinewood and Dupree utilized an open floor plan whereby classrooms were not separated by walls but all met in sections of a large open common-area. Taylor Elementary was build with a similar open floor plan structure. Temporary partition walls were added to all three buildings, but the walls still allow substantial sound

to pass through disrupting the educational environment for students. These factors and others led DPSAFT to agree to replace Pinewood and Dupree, but it refused to acknowledge the same considerations for Taylor Elementary. Safety issues at Pinewood also supported replacement of that school, but DPSAFT rejected similar security concerns at Taylor Elementary.

JNPSD anticipates that DPSAFT will attempt to justify its denial on the FCI numbers for Taylor Elementary. FCI is, however, a highly subjective analysis that can produce wildly inconsistent results. It depends on visual observation of system condition, review of system repair history, and anticipated remaining life of the various building systems. For example, in 2016 DPSAFT reviewed Taylor Elementary school's main building and assigned it an FCI of 48.7%. Over three years later DPSAFT rated Taylor Elementary School's main building at a 38.2% FCI, with no substantial changes in the facility.

JNPSD also anticipates that DPSAFT will assert that the Federal Court's requirement that JNPSD replace Taylor Elementary School is irrelevant to DPSAFT's decision. However, this position is plainly mistaken. State law recognizes that federal court decisions are binding on the State and districts. The State's Academic Facilities Program exists to "[p]rovide constitutionally appropriate public school academic facilities" for Arkansas students. *Lake View Sch. Dist. v. Huckabee*, 364 Ark. 398, 406 (2005). District master plans must take into account all "pertinent data specific to the needs of the school district with regard to academic facilities." Ark. Code Ann. § 6-21-806(a)(2). Federal laws are binding on school

districts. Ark. Code Ann. § 6-13-620(3). State law also requires JNPSD to provide assurance to DESE that it is in “compliance with civil rights responsibilities.” Ark. Code Ann. § 6-10-111(d). Failure to provide the required assurances allows DESE to “withhold state aid from any school district that fails to file its assurance of compliance with civil rights responsibilities.” Ark. Code Ann. § 6-10-111(e).

Moreover, the Standards of Accreditation require JNPSD “to comply with any state or federal law.” SBE Rule 7.02; Standard 2-A of the Standards of accreditation requires Districts to engage “actions . . . in accordance with . . . federal laws.” Standard 2-A.1. The Standards also require school districts that have “not obtained full and complete unitary status . . . shall seek to obtain a declaration of full and complete unitary status and release from all court supervision.” Standard 3-A.10. With regard to facilities the Standards of Accreditation require “[e]ach public school district shall plan, construct, and maintain school facilities in accordance with federal laws.” Standard 6-A.

Federal law takes precedence over state laws, and state executive officials cannot “nullify a federal court order.” *Cooper v. Aaron*, 358 U.S. 1, 19 (1958). Moreover, a federal court “retains ancillary jurisdiction to manage its proceedings, vindicate its authority, and effectuate its decrees.” *Jenkins v. Kansas City Missouri Sch. Dist.*, 516 F.3d 1074, 1081 (8th Cir. 2008). Moreover, the Arkansas State Board of Education has an “affirmative duty to assist the local school districts in their desegregation efforts.” *LRSD v. PCSSD*, 597 F.Supp. 1220, 1227 (E.D. Ark. 1984).

A state's "failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *LRSD v. PCSSD*, 778 F.2d 404, 410 (8th Cir. 1984).

Given this background, DPSAFT cannot ignore the Federal Court's Order that JNPSD replace Taylor Elementary. DPSAFT must honor the Federal Court Order in evaluating replacement of Taylor Elementary School. The Federal Court determined that Taylor Elementary was in such poor shape that nothing short of replacement would suffice to provide the students there with a "clean, safe, attractive, and equal" school facility. Further, the Federal Court determined that nothing short of replacement would suffice to meet JNPSD's desegregation obligations and provide equitable learning opportunities to the students of the District. Arkansas law requires that this order be honored. DPSAFT is clearly wrong in its assertion that the Federal Court Order mandating replacement has no bearing on the State's decision to not replace.

JNPSD cannot replace Taylor Elementary without Partnership funding. DPSAFT's decision will have several consequences for the District. First and foremost, JNPSD will be in violation of the Court's Order because of the State's disagreement with the Federal Court. Second, JNPSD may lose accreditation status because it will be in violation of federal law (i.e. the Court Order). JNPSD's state funding will also be at risk because the District will not be able to certify to DESE that it is in "compliance with civil rights responsibilities." Thus, JNPSD, having done all it can to meet its responsibilities, will bear the consequences of DPSAFT's decision to withhold funding. JNPSD respectfully requests that the Board order

DPSAFT to approve funding so that the State will not be the cause of a violation of a federal desegregation court order.

II. JNPSD also challenges DPSAFT's decision that JNPSD must utilize a metal building at an abandoned school site. Replacement of Bayou Meto Elementary requires relocation of the school (as is often the case in school construction projects) because the land on which Bayou Meto is located is not large enough to accommodate the old campus and the new school. In similar situations, DPSAFT has regularly approved demolition of new structures at the old school site and replacement with another complete school facility at the new location. It is simply not feasible for JNPSD to be required to build a new school facility at a new, distant site and then require that new school to utilize a gym far away at another location. This problem creates significant safety and security issues as students would be required to travel daily to the old school site for class activities. Moreover, such a plan would put JNPSD at risk of providing unequal facilities in violation of the Federal Court's mandate discussed above. Accordingly, JNPSD requests that DPSAFT's decision regarding the multi-purpose building at Bayou Meto be reversed. The same issue may arise in the replacement of Taylor Elementary, thus, JNPSD requests that DPSAFT be required to utilize the same considerations when deciding Partnership funding for replacement of Taylor Elementary.

III. JNPSD also challenges DPSAFT's decision regarding the \$200 per square foot project cost factor. The funding amounts for both facilities relied on a project cost factor based on an arbitrary cap of the cost per square foot for

constructing new academic facilities projects. Neither the DPSAFT nor the Commission are authorized by law to apply an arbitrary project cost factor that has no relationship to the actual needs of a school district. As explained more fully herein, JNPSD requests that DPSAFT's determination to use a cost per square foot project cost factor be set aside and that DPSAFT be required to use a project cost factor based on the actual cost per square foot to construct these two facilities projects.

Arkansas law requires the Division to annually update the formulas by which the project cost is determined. Ark. Code Ann. § 6-20-2509. The statute specifically directs the Division to annually update the "basic project cost per square foot" for "[n]ew academic facilities" projects. *Id.* In doing so the Division must consider "[n]ationally recognized design and construction standards for cost per square foot." Ark. Code Ann. § 6-20-2509(a)(2)(F). Unfortunately, the Division has not done this. Instead, the Division applies an arbitrary cap that has no rational relationship to the actual cost of building school or other buildings. The arbitrary cap violates the statutes governing the Academic Facilities Partnership Program (Ark. Code Ann. § 6-20-2502 & 6-20-2507) and the statute that directs DPSAFT to develop project cost guidelines for new academic facilities projects. Ark. Code Ann. § 6-20-2509. The arbitrary cap also reduces the State share of projects in violation of the academic facilities wealth index. Ark. Code Ann. § 6-20-2507(a). The net effect is that State financial participation in Partnership Program new academic facilities projects are underfunded and fail to meet statutory and Constitutional requirements.

Beginning in the 13-15 Project funding cycle the average square foot cost for new academic facilities replacement projects exceeded the then cap of \$175 per square foot. (The proposed revised cap of \$200 per square foot suffers from the same problems outlined here.) However, the Division has capped the “Averaged Square Foot Cost” at \$175 for all new academic facilities projects in the State. This cap is based on the Rules Governing the Academic Facilities Partnership Program (“Partnership Rules”). The Partnership Rules require the Division to implement a project cost funding factor on a “regional basis” that is “updated annually by the Division in compliance with Ark. Code Ann. § 6-20-2509.” Partnership Rules § 3.25(i)(a). But, the Rules then set an arbitrary ceiling of \$175 on the average square foot cost. Partnership Rules § 3.25(i)(a).

The State must base its education funding decisions on educational need. *Dupree v. Alma Sch. Dist.*, 279 Ark. 340, 346 (1983); *Lake View Sch. Dist. v. Huckabee*, 352 Ark. 31, 69-70, 73-74 (2002). The State acts irrationally when it bases education funding decisions on available revenue. *Id.* The Supreme Court has instructed that “if the local government cannot carry the burden [of providing an adequate education] the state must itself meet its continuing obligation.” *Lake View Sch. Dist. v. Huckabee*, 352 Ark. 31, 74 (2002). The purpose of the Partnership Program and the Academic Facilities Wealth Index is to provide “state assistance to every school district based on actual need for facilities in the individual school districts as well as the school district’s ability to pay.” *Lake View Sch. Dist. No. 25 v. Huckabee*, 370 Ark. 139, 142, (2007).

The Commission's decision to arbitrarily cap the per square foot amount to a specific dollar amount violates the State's Constitutional obligations as explained in the *Dupree* and *Lake View* cases. The Division and the Commission have full awareness of the actual costs that Districts face in new academic space construction projects because Districts provide these costs with their Partnership applications. Often these costs substantially exceed \$175 per square foot. The Commission's rule prevents the State from considering the "actual need" school districts in general (and JNPSD in particular) are required to bear. Instead, the rule imposes an arbitrary number that is neither based on educational need nor is it rationally related to the actual cost of building school facilities. It appears that the only reason for the number is to limit the amount of money the State may be required to provide for academic facilities projects around the State. The arbitrary limit will become more irrational as it moves further and further away from anything approaching the educational need in the various school districts in the State.

WHEREFORE, JNPSD respectfully requests that the DPSAFT's decisions challenged above be reversed, and for all other relief for which it is entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2019, I electronically submitted the foregoing to the ADE/DESE Office of General Counsel via electronic mail at lori.freno@arkansas.gov

/s/ Scott P. Richardson