

IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
STATE OF FLORIDA

ED CRAPO, as Alachua County
Property Appraiser,

Appellant/Cross-Appellee,

v.

Case No.: 1D17-1895
Lower Case No.: 2015-CA-001554

ACADEMY FOR FIVE ELEMENT
ACUPUNCTURE, INC., a Florida
Non-Profit Corporation,

Appellee/Cross-Appellant.

APPELLEE'S NOTICE OF FILING STIPULATION
TO SUPPLEMENT RECORD

Appellee, ACADEMY FOR FIVE ELEMENT ACUPUNCTURE, INC.,
pursuant to Fla. R. App. P. 9.200(f)(1), hereby files the parties' Stipulation To
Supplement Record and the official transcript of the March 29, 2017 Hearing to be
made part of the record on appeal, both of which are attached thereto.

Respectfully submitted,

/s/ Jung Yoon

PAUL A. DONNELLY, FBN: 813613

paul@donnellygross.com

JUNG YOON, FBN: 0599611

jung@donnellygross.com

2421 N.W. 41st Street, Suite A-1

Gainesville, FL 32606

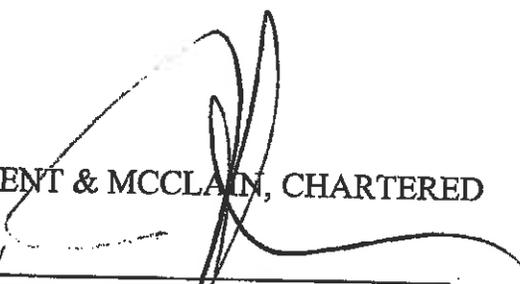
Counsel for Appellee

STIPULATION TO SUPPLEMENT RECORD

Appellant Ed Crapo, as Alachua County Property Appraiser, and Appellee Academy for Five Element Acupuncture, Inc., through undersigned counsel and pursuant to Fla. R. App. P. 9.200(f)(1), hereby stipulate to supplement the record on appeal with the official transcript of the March 29, 2017 Hearing on the parties' Motions for Summary Judgment, attached hereto.

DENT & MCCLAIN, CHARTERED

/s/

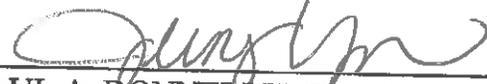

JOHN C. DENT, JR.
Florida Bar No. 0099242
jdent@dentmcclain.com
3415 Magic Oak Lane
Sarasota, FL 34232-1811
(941) 952-1070
(941) 952-1094

Counsel for Appellant
Property Appraiser Ed Crapo

Respectfully submitted,

DONNELLY + GROSS

/s/


PAUL A. DONNELLY, Trial Counsel
Florida Bar No. 813613
paul@donnellygross.com
JUNG YOON
Florida Bar No. 599611
jung@donnellygross.com
2421 NW 41st Street
Suite A-1
Gainesville, Florida 32606
(352) 374-4001
(352) 374-4046 (facsimile)

Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served via e-mail on Counsel for Plaintiff/Cross-Appellee, John Dent, jdent@dentmcclain.com and Jennifer McClain jmcclain@dentmcclain.com, this 7th day of September, 2017.

Respectfully submitted,

DONNELLY + GROSS

S/ Jung Yoon

PAUL A. DONNELLY, FBN 813613

paul@donnellygross.com

JUNG YOON, FBN 599611

jung@donnellygross.com

2421 NW 41st Street

Suite A-1

Gainesville, Florida 32606

(352) 374-4001

(352) 374-4046 (facsimile)

Counsel for Appellee

IN THE CIRCUIT COURT OF THE
EIGHTH JUDICIAL CIRCUIT IN
AND FOR ALACHUA COUNTY, FLORIDA

CASE NO. 2015-CA-001554
DIVISION: J

CRAPO, ED, not individually,
but in his capacity as Alachua
County Property Appraiser,

Plaintiff,

vs.

ACADEMY FOR FIVE ELEMENT ACUPUNCTURE,
INC., a Florida Non-Profit Corporation,

Defendant.

-----/

TRANSCRIPT OF HEARING

This cause came on to be heard on
Defendant's Motion for Summary Judgment and
Plaintiff's Motion for Summary Judgment before the
Honorable Toby S. Monaco, Circuit Judge, at the
Alachua County Courthouse, Gainesville, Florida, at
10:00 a.m. on March 29, 2017.

APPEARANCES:

JOHN C. DENT, JR., ESQUIRE, Dent &
McClain, appearing on behalf of the Plaintiff.

PAUL A. DONNELLY, ESQUIRE, and JUNG YOON,
Esquire, Donnelly & Gross, appearing on behalf of
the Defendant.

REPORTED BY KAREN L. BIERY
JOHNS, STEPHENSON & BIERY

1 (The following proceedings were held in
2 chambers:)

3 THE COURT: First we'll start with
4 Mr. Dent for the plaintiff.

5 MR. DENT: John Dent, attorney for Ed
6 Crapo, plaintiff, property appraiser.

7 MR. CRAPO: Ed Crapo, property appraiser.

8 MR. DONNELLY: Paul Donnelly and Jung Yoon
9 for the Academy. And to our right is Misty
10 Oxford-Pickeral. She is the executive
11 director/CEO, which is equivalent to the
12 president of the school. And to her right is
13 Joanne Epstein, who is vice president for
14 academic affairs, in other words, the provost.

15 THE COURT: And I see we've got cross
16 motions for summary judgment.

17 MR. DONNELLY: We do, sir.

18 THE COURT: Good. We'll go ahead and
19 start if you're ready to go.

20 MR. DONNELLY: I'm happy to take a stab.

21 THE COURT: Either way. Who filed first?

22 MR. DONNELLY: Oh, I don't know.

23 THE COURT: It makes no difference to me
24 since they are cross motions, so that's fine.

25 MR. DONNELLY: All right. May I?

1 THE COURT: Please.

2 MR. DONNELLY: All right, Your Honor, the
3 Academy for Five Element is a leading
4 acupuncture and Chinese medicine postsecondary
5 educational institution authorized in Florida
6 to confer master's and bachelor's degrees with
7 prolonged courses of study.

8 We've provided everyone a binder of some
9 excerpts of the record, which is quite
10 voluminous actually, and there's significantly
11 more record than what we've got in that binder.

12 The Academy's authorized by the Federal
13 Department of Education to provide federal
14 student aid such as Pell grants and all the
15 others. It is federally tax exempt, it is
16 state tax-exempt, and it has been exempt from
17 ad valorem taxes in the state of Florida for
18 its entire existence.

19 The Academy was located in Broward County,
20 and in 2007 to 2008 completely relocated its
21 campus and operations here to Gainesville. The
22 campus and facility is located sort of
23 catty-cornered from the courthouse behind the
24 federal courthouse --

25 THE COURT: In the old Avera and Stripling

1 building.

2 MR. DONNELLY: Exactly. Since then it has
3 expanded further into the building immediately
4 east, which is -- I remember it as the Social
5 Security building, so they've taken that
6 facility over as well.

7 In Broward County, the Academy enjoyed the
8 exemption from ad valorem taxation based on the
9 educational institution exemption. Upon moving
10 here to Gainesville and purchasing the property
11 and becoming the new owner of the property, it
12 needed to file an application for the
13 exemption. It did. In 2008 the property
14 appraiser disagreed with that exemption and
15 proceedings ensued pursuant to the Florida ad
16 valorem tax proceeding law.

17 The case went before -- in 2008, went
18 before Special Magistrate John Wershow, who,
19 hearing all of the evidence the court's going
20 to hear today, ruled that the exemption was
21 appropriate and recommended the exemption still
22 apply. The matter then went to the Value
23 Adjustment Board, which is composed of county
24 commissioners, school board members, and
25 nonelected folks, and the Value Adjustment

1 Board also agreed the exemption applied. The
2 property appraiser did not appeal the ruling in
3 2008.

4 Then all of a sudden in 2014 the property
5 appraiser sought to deny the exemption. There
6 was absolutely no change whatsoever in the
7 facts and certainly no change in the law.
8 Again, pursuant to that tax procedure, a
9 special master heard the case, this time a
10 second special master, a different person. I'm
11 not going to mention names because you won't
12 know them. I know you know John Wershow, I
13 thought that was interesting to mention, but a
14 second special master, who was a lawyer, heard
15 the case and recommended the exemption apply.
16 A new Value Adjustment Board also ruled in
17 favor of the Academy.

18 Yet again in 2015 -- now, in 2015 the
19 Academy had completed purchase of the new
20 facility immediately adjacent to the east, and
21 in 2015 the property appraiser again sought to
22 deny the exemption. The matter went to yet a
23 third lawyer special magistrate, a different
24 person, who again ruled that the exemption
25 applied on the same facts that the court's

1 going to -- has before it, and a different
2 third Value Adjustment Board agreed and granted
3 the exemption. Again, no change in facts or
4 law in 2015. The only change was expansion of
5 the footprint of the campus.

6 While I thought I'd work through a ring
7 binder with you when we were preparing a few
8 weeks ago for the hearing, I thought, you know,
9 it might be more efficient than fumbling
10 through tabs to actually pull out what I would
11 suggest are some of the more pertinent items
12 for the oral argument, so I have a stack that
13 I'm going to work through in order. And in the
14 lower right corner I've indicated the tab
15 numbers for the corresponding ring binder if
16 that's helpful.

17 Your Honor, the question really begins
18 with the educational institution exemption, and
19 you'll see that in the very first page in front
20 of you. And if the court would take a moment
21 to note, I would suggest the highlighted
22 language, and I don't think there's any
23 dispute, is the operative language for the
24 court's decision on the law, and I won't
25 clutter up the record to read it aloud.

1 For the record, I cited 196.012 (5)
2 definition of educational institution in the
3 portion of the Florida tax code.

4 So, in our situation, it has been
5 routinely held that the Academy is certified
6 through rigorous requirements of the State of
7 Florida's Department of Education.

8 The next item that I think is important
9 and helpful is, as this case progressed
10 beginning in 2008, the Academy, if you'll turn
11 to the next page, obtained a letter from the
12 certifying authority, which you'll see there,
13 one page, it's from tab 5.B.2 of our binder,
14 which at the time the property appraiser, and
15 he still makes this argument, was
16 debating -- the crux of the argument then was
17 that a license is not a certificate. That was
18 essentially the argument they were making.

19 And you'll notice that the certifying
20 authority, which is -- and I'm going to talk
21 about this in more detail -- within the
22 Department of Education for postsecondary
23 nonpublic educational institutions is the
24 Commission for Independent Education. You'll
25 see that, you know, the department of -- part

1 of Department of Education issued a letter,
2 they try to confirm for us that, yes, your
3 license is a certification, they quote the
4 statute, which we have in the ring binder for
5 you.

6 The next item in your stack is the
7 certification, the license. In your ring
8 binder at tab 5.B.1, we have one for every
9 single year. I've just pulled the latest.
10 They're identical. And this is the, you know,
11 ultimate document that confirms the Academy's
12 authorization by the State of Florida.

13 The next item in your stack is also a
14 letter from the certifying authority. We find
15 that in our ring binder at tab B, 5.B.3, and
16 this is interesting, because in 2014 the
17 Academy was approved to offer a bachelor's
18 degree in health science, for example, you'll
19 see issued through the Florida Department of
20 Education within its Commission for Independent
21 Education in that one-page document.

22 Now, if I could turn Your Honor to the
23 next page in the stack. What I've done here,
24 and this appears in tab 3.1 of the ring binder,
25 is I've pulled the table of contents of the

1 Florida Education Code. And I think it's
2 helpful to get an idea of the scheme in Florida
3 that's existed since the major revision of the
4 educational system from K through 20 that
5 occurred around 2001 under the Jeb Bush
6 administration. It's existed essentially the
7 same since that time.

8 And you'll notice what I've highlighted
9 here. There's sort of three main categories of
10 regulation certification by the State of
11 Florida. Chapter 1003 deals with public K
12 through 12 education, not what we're dealing
13 with. Chapter 1004 deals with public
14 postsecondary education, which will include the
15 state universities and the Florida colleges and
16 community colleges. And then last we have
17 Chapter 1005, which we're going to drill more
18 in on, nonpublic postsecondary education.
19 That's where the Academy fits.

20 The next item in the packet I've provided,
21 I've actually turned over for the court's
22 convenience Section 1005.02, which is the
23 definitions provision of that nonpublic
24 postsecondary education chapter. Parens 13 is
25 the definition of license that we saw quoted in

1 the letter from earlier.

2 And I wanted to give you some background
3 on the certifying process and authority. So
4 the next -- that leads us to -- licenses, you
5 know, the certification, and then the next item
6 in your stack from tab 3.4, is a copy of
7 Section 1005.21, and this is the legislative
8 establishment of the regulation within the
9 Department of Education of nonpublic
10 postsecondary education. "There is established
11 in the Department of Education the Commission
12 for Independent Education," and then it goes
13 on, and feel free to read it. It is the -- it
14 goes on further.

15 The last thing I wanted to highlight from
16 the ring binder materials and the record and
17 the law was found at tab 3.5. And this is an
18 expression of the legislative purpose behind
19 Chapter 1005 in nonpublic postsecondary
20 educational institutions, and I would ask the
21 court to note what I've underlined in addition
22 to highlighting.

23 The Academy's motion for summary judgment
24 also, in addition to the substantive basis that
25 I have just discussed, raises what I would

1 refer to as a procedural issue, but not one of
2 mere technicality, and that is the issue of
3 administrative finality, also referred to as
4 administrative res judicata. The Academy's
5 been hauled repeatedly through this process, at
6 significant expense, without the property
7 appraiser demonstrating any change in the facts
8 or, quite frankly, the law.

9 Now, I am going to ask you to turn to the
10 ring binder and turn to tab Roman numeral
11 III-11. I put a table of contents in the
12 front. And I'm going to ask you to turn to the
13 first case I've cited there at tab 11, Florida
14 Power versus Garcia.

15 THE COURT: I'm with you.

16 MR. DONNELLY: And specifically I'm going
17 to focus on page number seven of that case, so
18 let me just set this up a little bit. This is,
19 I would suggest, the lead Florida Supreme Court
20 case on administrative res judicata decisional
21 finality involving administrative proceedings
22 which are a predicate then -- in other words,
23 if you have an administrative proceeding and
24 somebody doesn't like the result, they have the
25 opportunity to appeal to the court system in

1 some fashion. This case collects and addresses
2 cases in the administrative res judicata
3 setting, so it talks about them in different
4 settings such as workers' comp and others.

5 The facts in the Florida Power case dealt
6 with Florida Power bringing a claim, the
7 substance of which is not particularly
8 important for the argument, I don't think, and
9 raising the issue in an earlier proceeding
10 before the Florida Public Service Commission
11 and then subsequently seeking to raise issues
12 that were related to the facts underlying the
13 original proceeding.

14 And the Supreme Court held, and I would
15 like to quote from the second column on page
16 number seven, the doctrine -- the Supreme Court
17 refused to allow Florida Power to raise the
18 issues again because the matters could have
19 been raised and were, in fact, dealt with in a
20 prior proceeding years earlier. "The doctrine
21 of decisional finality provides that there must
22 be a terminal point in every proceeding, both
23 administrative and judicial, at which the
24 parties and the public may rely on a decision
25 as being final and dispositive of the rights

1 and issues involved therein. A decision once
2 final may only be modified if there's a
3 significant change in circumstances or a
4 modification is required in the public
5 interest." There has been no change in the
6 circumstances from 2008 nor 2014.

7 Another very interesting factor from this
8 Garcia case is that the Supreme Court notes,
9 and there's some discussion over in the
10 left-hand column of that same page, that -- and
11 this was a surprise to me, that the decisional
12 finality, the administrative res judicata
13 applies even where there's a change in the law,
14 that a change in the law is not sufficient to
15 defeat the finality of the prior ruling where
16 the facts, you know, remain the same.

17 Finally, the property appraiser raises
18 three, I refer to them as technicality
19 arguments regarding the posture of the tax case
20 from 2015. Should I address those now or maybe
21 turn to the property appraiser and then
22 respond? I don't know if that's overload.

23 THE COURT: Whatever you wish to do,
24 however you wish to do it. It may be more
25 appropriate to wait.

1 MR. DONNELLY: It might. It might. So
2 why don't I just -- I'll respond to those by
3 way of rebuttal.

4 THE COURT: Anything else?

5 MR. DONNELLY: No, sir. I would point out
6 that we have a memorandum of law which outlines
7 the arguments I've discussed and then some. A
8 copy's included in your binder under tab one.

9 THE COURT: Thank you.

10 Mr. Dent.

11 MR. DENT: I want to address the last
12 issue that he raised. First of all, it
13 wouldn't be res judicata anyway, because the
14 other was 2008. This is 2015 and '16. At most
15 it would be estoppel by ruling.

16 However, in the field of ad valorem
17 taxation, it has absolutely no application.
18 The cases -- the first case that -- and this
19 one's unique, Container Corporation versus
20 Long. Now, if you would Shepardize this, you
21 would find a myriad of tax cases coming after
22 that, and I didn't bring them all to you. I
23 brought this one and one other out of the First
24 DCA.

25 The property appraiser had assessed

1 agricultural classified land. It was
2 challenged by the taxpayer. The taxpayer lost.
3 The taxpayer in a subsequent year filed another
4 lawsuit contesting that year's taxation. The
5 property appraiser, the taxing official in this
6 case, said, "Oh, you can't do that, it was all
7 litigated, and everybody agrees absolutely no
8 fact or law has changed. Still the same ag
9 use, still the same people using it,
10 everything's the same."

11 And they argued that, and in this case
12 what the court said, and it goes into all their
13 discussion, the court said, on page three of
14 the decision -- it would be a different page,
15 the actual case, but, "From the final judgment
16 reviewed herein it is apparent that without any
17 proof supporting the validity of the 1968 tax
18 assessment made against appellant's lands, the
19 trial court held such assessment to be valid
20 solely and only because it conforms in all the
21 material respects to the tax assessment made
22 against the same lands during preceding years,
23 which assessments were the subject of
24 litigation and had been held to be valid. The
25 rule of law adopted by the trial court has been

1 repeatedly rejected by appellate courts of this
2 state and, therefore, cannot be permitted.

3 "Ad valorem taxes assessed against
4 property in this state for any given tax year
5 must stand or fall on their own validity,
6 unconnected with the assessments made against
7 the land during any prior or subsequent year,"
8 period. There is no such thing as estoppel or
9 res judicata in a tax case.

10 Now, the next case is Page versus City of
11 Fernandina Beach. Now, this case is
12 interesting, but what happened is that there
13 was a challenge by the City of Fernandina Beach
14 because the property appraiser took a bunch of
15 their properties and put them on the tax roll.
16 They litigated that. It went up on appeal with
17 an appellate decision. Okay? It's cited in
18 here.

19 Several years later, the property
20 appraiser assessed it. "Oh, you can't do that,
21 the prior court, trial court, everybody said
22 you ruled against it." On page nine of 17 --
23 and this had to do with a marina property.
24 Right under where -- Marina on page nine,
25 "Understandably relying on our earlier decision

1 in Page versus Fernandina, the learned trial
2 judge concluded that the City-owned marina was
3 exempt from ad valorem taxation."

4 Then you go to the footnote. "The Supreme
5 Court declined discretionary review. Page
6 versus Fernandina. Our decision today does not
7 alter any determination for any tax year other
8 than 1990, '92, and '93.

9 "Ad valorem tax assessments against
10 property in this state for any given tax year
11 must stand or fall on their own validity,
12 unconnected with the assessment made against
13 any land during any prior or subsequent year."
14 Then they cite Container Corporation.

15 Now, what the court said was, okay, went
16 to court, same facts, same marina, all of that,
17 and we're in court again. Doesn't matter,
18 there is no estoppel in ad valorem tax, every
19 year stands on its own. So I believe that this
20 court retains jurisdiction.

21 Now, the main issue -- and I'll touch on
22 the other issues briefly, but 196.011 Florida
23 Statutes, and I can give the court my copy. I
24 didn't -- do you have a copy of it? It's the
25 application.

1 In the process -- and there's a case, so
2 I'm not going to belabor a lot, of the First
3 DCA, which they cited Genesis, which dealt with
4 this Section 196.011(9)(a), which provides for
5 the revocation of prior exemptions. That goes
6 to prior years. The property appraiser can
7 lien those and file liens. Now, that didn't
8 happen in this case. But paragraph --
9 subparagraph (e), which the court didn't deal
10 with in Genesis -- now, Genesis had to do with
11 utilizing -- filing a tax suit and it was
12 beyond the 60-day statute of nonclaim.

13 The court in dealing with 196.011(9)(a)
14 said, "Oh, well, that doesn't mean you have to
15 have a current application," in referring to
16 another statute, 193.193(2), which they've
17 cited, which provides that if the property
18 appraiser in the current year is going to deny
19 the application, he has to give a notice
20 specifying with reasons, et cetera. Now, in
21 this case that was done, it was detailed, the
22 notice was sent.

23 But we weren't assessing it under that,
24 and what the First DCA -- so I assume you're
25 probably going to look at what they said, but

1 they never discussed subsection (e) of that
2 statute. Now, what it says, "If an exemption
3 for which the annual application is waived
4 pursuant to this subsection will be denied by
5 the property appraiser. . ."

6 What happened years ago, because -- to
7 alleviate taxpayers from filing a new
8 application every year, they said the county
9 commission could adopt an ordinance which --
10 for automatic renewal unless something changed.
11 So that's what this is. But, if you're going
12 to deny in the current year, "in the absence of
13 refiling an application, notification of an
14 intent to deny the exemption shall be mailed to
15 the owner of the property prior to
16 February 1st." Caveat, "If the property
17 appraiser fails to timely mail the notice, the
18 application deadline for such property owner
19 pursuant to subsection (1) shall be extended 28
20 days" from the date of the notice mailed.

21 So what it's saying is that we have a year
22 that the exemption has been on the roll because
23 of the automatic renewals, made a determination
24 to remove it, notified them. This statute says
25 at that point they have 28 days, unless we give

1 them the notice before February 1st, to file a
2 new application. No new application was ever
3 filed.

4 They appealed to the Value Adjustment
5 Board, in effect, our denial notice, and that's
6 why we're here. So we have suggested the VAB
7 didn't have jurisdiction because it didn't have
8 an application. I've cited cases, and there's
9 AGO opinion, I think, in the memorandum we
10 filed that says the VAB cannot hear an original
11 application, it has to be filed with the
12 property appraiser. So I don't want to belabor
13 that.

14 Their case they've cited, and it's in
15 their notebook, the Genesis decision, I'm
16 preserving that issue so for some reason if
17 this actually went back there that I would try
18 to suggest to the First DCA the error of their
19 ways in that earlier decision by not dealing
20 with this subsection at all.

21 Anyway, let's go to now in -- you've been
22 handed a definition of the taxation, which is
23 196.012, Definitions. Now, I've cited cases --
24 and this is extremely important. It's been the
25 law since the 1800's in Florida regarding

1 statutes, and what that says is that, and cited
2 in there, that when you construe an exemption
3 statute, you strictly construe it against the
4 taxpayer, that they have to demonstrate how
5 exactly -- also, I've cited a case that the
6 court cannot modify, extend, or interpret
7 beyond what it actually says.

8 Now, under the statutes, to get an
9 exemption you have to have two things, an
10 exempt entity using the property for an exempt
11 purpose. Our emphasis on this case, we don't
12 have an exempt entity. The exemption is
13 provided for in 196.198, and what it says
14 there, Educational institution shall be
15 entitled to exemption if they use their
16 property for, and it goes on, educational
17 purposes."

18 So we go back to the definition, sub (5),
19 "Educational institution," okay, the taxpaying
20 entity claiming exemption, "means a federal,
21 state, parochial, church, or private school,
22 college, or university." Obviously, none of
23 those apply except private school.

24 Now, it goes on to say, "conducting
25 regular classes and courses of study required

1 for eligibility to," one, "certification by,
2 accreditation to, or membership in."

3 Now, there's three entities. One is the
4 State Department of Education of Florida, the
5 second one is the Southern Association of
6 Colleges and Schools, and the final one is the
7 Florida Council of Independent Schools.

8 Now, they're attempting to rely upon the
9 state Department of Education as their license.
10 Now, they keep slipping the words in here about
11 certification or whatever. What the statute
12 says, and we'll get to it, is contrary to that.

13 Now, in the packet that I gave you,
14 starting -- it starts at a point with the
15 constitution, article 10, section 1. Now,
16 article 10, section 1 is the sole authority in
17 Florida regarding education. Now, that becomes
18 important because of a Supreme Court decision
19 that was rendered.

20 Now, what it says is that "Education is a
21 fundamental value of the people of state of
22 Florida. It is therefore --"

23 THE COURT: You may want to go a little
24 more slowly.

25 MR. DENT: Oh, I'm going too fast? I'm

1 sorry. Okay.

2 "It is therefore a paramount duty of the
3 state to make adequate provision for the
4 education of all children residing in its
5 borders. Adequate provision shall be made by
6 law for a uniform, efficient, safe, secure,
7 high quality system of," emphasis, "free public
8 schools." Now, I emphasize that because that
9 becomes very important, that phrase "free
10 public schools."

11 In section 2 of the same article, the
12 constitution creates the state board of
13 education, not DOE, but the state board of
14 education.

15 Now, the Legislature -- first of all,
16 there's a definitional section for the entire
17 Florida statutes, Chapter 20, emphasis on which
18 becomes extremely important. Subsection 10,
19 For purposes of the statute, the word
20 Commission means, "unless otherwise required by
21 the State Constitution, means a body created by
22 specific statutory enactment within a
23 department, the office of Governor, or the
24 Executive Office of the Governor and existing
25 (sic) limited quasi-legislative or

1 quasi-judicial powers, or both, independently
2 of the head of the department or the Governor."
3 So a commission, even though it's created
4 within, it is independent of whatever -- if the
5 Governor creates a commission, it then becomes
6 independent.

7 The next is Statute 20.15, and this now
8 goes to DOE. This is in accordance with
9 article 2.10, the state board of education is
10 set up. Now, the state board of education is
11 the head of DOE. Now, DOE -- then there's --
12 section (2) creates the commissioner of
13 education, and then (3), it creates the
14 divisions of DOE, emphasis on, the last one,
15 the Office of Independent Education and
16 Parental Choice, which must include the
17 following, it goes down. Also subsection (6),
18 councils and committees, "Notwithstanding
19 anything contained in law to the contrary, the
20 commissioner shall appoint all members of
21 councils and committees of the Department of
22 Education except," this is important, "except
23 the Commission for Independent Education."

24 Remember, their license is issued by a
25 commission which is independent, and this is

1 establishing their independence and stating who
2 appoints the members, and it's not the people
3 that it operates within. In other words, DOE,
4 governor, whatever, does not have anything to
5 do with appointing the commission. And I'll
6 show you in the statute who does.

7 Now, next I've also provided you with an
8 outline so you can see the structure. It
9 doesn't begin with -- in this case, going
10 directly to section -- Chapter 1005. It starts
11 out with the provisions early on regarding
12 governance. And you see governance, Chapter
13 1001, and I've given the outline of next the
14 Chapter 1001. And then under part one we see
15 state level governance, and we see those bodies
16 that I've alluded to, the one created by the
17 constitution, A, State Board of Education, B,
18 Commissioner of Education, D, Department of
19 Education. DOE is what we're under.

20 Next under that is the DOE, C, and it sets
21 forth 20, which is the department under the
22 state board, and then emphasis on two, 1001.21,
23 office of private schools and education.
24 Remember it said you have to create one of
25 those.

1 Now, next I've provided 20, "and the
2 Department of Education shall be organized
3 consistently with 2115 and shall act as an
4 administrative and supervisory agency under the
5 implementation and direction of the state
6 board."

7 Now, office of private schools, 1001.21,
8 okay, "The state recognizes the contribution of
9 private schools and home education programs in
10 providing alternatives to public school. These
11 nongovernmental educational systems serve the
12 public," emphasis, "but are not considered to
13 be a part of the public system of education.
14 One, the office of private schools and home
15 education is established within the department.
16 However, the Department of Education and the
17 commissioner have no," emphasis, "no authority
18 over the institutions or students served by the
19 office of private schools." Okay, "The office
20 shall," and it defines what they do.

21 What they've done, and I'll show you in
22 the court cases, they followed this concept of
23 free -- that the state has only authority over
24 free public schools. I put in there that one
25 for the early learning.

1 And then 1001.22, it recognizes as part of
2 this scheme, "The Commission for Independent
3 Education shall authorize," and here is what it
4 is, "shall authorize granting certificates,
5 diplomas, degrees for independent postsecondary
6 institutions pursuant to section 1005."

7 Now, we go to Chapter 1002, again part of
8 the education code. Under this section, we
9 have 1002.01, and this defines a private
10 school, et cetera. Now we go to 1002, part
11 four, and we have 1002.42, private schools.

12 Now, beginning out it says definition, and
13 it refers you back to the definition I just
14 gave you. Now, it defines in here the only
15 authority of DOE over private schools is
16 delineated here, and what it is, it shall
17 analyze, maintain, and annually update a
18 database on the institution, maintain that
19 database, et cetera, and it goes on and on
20 until we get to subparagraph (2)(h) on page
21 two.

22 "It is the intent of the Legislature
23 not --" not "-- to regulate, control, approve,
24 or accredit private educational institutions,
25 but to create a database where current

1 information may be obtained relative to the
2 educational institutes in this state coming
3 within the provisions of this section as a
4 service to the public, to governmental
5 agencies, and to other interested parties. It
6 is not the intent of the Legislature to
7 regulate, control, or monitor expressly or
8 implicitly churches, their ministries or
9 religious instruction, freedoms or rights. It
10 is the intent of the Legislature that the
11 annual submission of the database survey by a
12 school shall not be used by that school to
13 imply --" to imply "-- approval or
14 accreditation by DOE."

15 Now we get to 1005, which is Nonpublic
16 Postsecondary Education. Now, the first one is
17 in the Purpose, and the Legislature -- and
18 reading down in the paragraph, "The Legislature
19 finds that both individuals and independent
20 postsecondary education institutions benefit
21 from a state system that assures all
22 institutions satisfactorily meet minimum
23 educational standards. The Legislature further
24 recognizes the role of federally recognized
25 accrediting associations in setting standards

1 for postsecondary institutions."

2 So the accreditation standards, when they
3 view an application, which we're going to get
4 to in a minute for that, is based upon
5 accreditation or approval by the federal
6 government designated agencies, not DOE. We
7 saw, the language is pretty clear, DOE has no
8 authority to approve, et cetera, et cetera.

9 Definitions, 1005. We first have the
10 definition of accreditation; "means accredited
11 status awarded to an institution by an
12 accrediting agency or association that is
13 recognized," again, "by the United States
14 Department of Education. This is in the
15 context, now, of private schools. The
16 accreditation of private schools, not DOE, but
17 by a recognized group of the United States
18 Department of Education.

19 Now, you'll note the section on defining
20 an educational institution does not say the
21 United States Department of Education. It says
22 the Florida DOE. Okay, and that has standards
23 comparable to the minimum standards required to
24 operate an institution at that level in this
25 state.

1 Now, down below we see the definition
2 "Commission means the Commission for
3 Independent Education."

4 Page three, License. License -- now, this
5 is what they try to hang their hat on. It
6 doesn't say certification, et cetera. "License
7 means a certificate." Now, we know a
8 certificate is a piece of paper. That's a
9 certificate. Okay? It does not mean
10 certification of anything, it means licensure.
11 "License means a certificate signifying that an
12 independent postsecondary educational
13 institution meets standards prescribed in
14 statute or rule and is permitted to operate in
15 this state," like a driver's license, pass the
16 test you can operate a car. Get a license, you
17 can -- you get a county business license to
18 operate a business in the county, get a
19 license. Doesn't mean the county says you're a
20 good business, we're accrediting you or
21 approving you, just says you meet the minimum
22 standards for a license, you get a license.

23 Now, further in the code, and that is the
24 Commission on Independent Education. Now, this
25 is where it's created. Now, there is

1 established within the Department of
2 Education -- remember when I told you back
3 before in the statute that the commissions
4 could be established within the Governor's
5 office, an agency, et cetera, of the state. So
6 here the Legislature established within the
7 Department of Education the Commission for
8 Independent Education. "The Department shall
9 serve as administrative agent," so all they do
10 is provide secretaries, type letters,
11 et cetera, "of the commission by providing
12 services including payroll, procurement, and
13 legal counsel. The commission shall exercise
14 independently --" independently "-- all powers,
15 duties, and functions prescribed by law. The
16 commission shall authorize the granting of
17 diplomas and degrees by any independent
18 postsecondary educational institution under its
19 jurisdiction;" i.e. they give diplomas.
20 There's a process in the statute, I'm not going
21 to go into it, of what you have to do, in a
22 separate section, to get -- even though you can
23 have independent schools to be licensed, if
24 you're going to be -- if you want to issue
25 diplomas, you go through a process and you get

1 that approval by the Commission, not DOE.

2 Now, powers and duties --

3 MR. DONNELLY: If I may, just a point of
4 order. I just want to make sure we have a few
5 moments for rebuttal.

6 MR. DENT: I know this is lengthy,
7 but. . .

8 The commission shall adopt rules for the
9 operation of independent, so not DOE, not the
10 state, not the board of education; the
11 commission does.

12 All right, 1005.31, we have actually the
13 statute which provides for licensure. The only
14 emphasis, and I forgot to highlight it, but I
15 found it anyway, is subsection (13) on page two
16 of four. "The granting of a license is not an
17 accreditation."

18 Now, in the packet in your file, Bush v.
19 Holmes. Now, the main thrust of Bush v. Holmes
20 is that Governor Bush and the Legislature put
21 in the school funding budget provision for
22 appropriating moneys out of the budgets, for a
23 student that was attending a certified failing
24 school, the State would give them money to go
25 to a private school. That was challenged,

1 obviously, and we have Bush v. Holmes. Now,
2 it's 33 pages long, so I'm not going to read it
3 to the court.

4 However, what the case essentially holds
5 in interpreting that original provision I cited
6 in the constitution, the court said, "Okay,
7 under the constitution, Legislature, you only
8 have authority in this case to spend money, but
9 also to regulate free public education under
10 the authority of the statutes of the
11 Legislature."

12 Now, in this case, at page 17 of the
13 decision, in addition to specifying that a
14 system of free public schools is the means for
15 complying with the mandate to provide for
16 education of Florida's children, citing our
17 constitutional provisions, also requires that
18 this system be uniform. Okay? That's in the
19 statute -- in the constitution. "The OSP makes
20 no provision to ensure that the private school
21 alternative to the public system meets the
22 criterion uniformly (sic). In fact, in a
23 provision directing the Department of Education
24 to establish and maintain a database of private
25 schools, the Legislature expressly states that

1 it does not intend to," quote, "regulate,
2 control, approve, or accredit private
3 institutions." Okay. They have no authority
4 there. And it cites the section I told you
5 about, 1002.42(2)(a) Florida.

6 "This lack of oversight is also evident in
7 section 1001.21, which creates the Office of
8 Private Schools and Home Education Programs
9 within the DOE but provides that this office,"
10 quote, "has no authority over the institutions
11 or students served," private schools.

12 Now, it goes on to approve that and go
13 through in detail talking about DOE has no
14 authority to regulate the curriculum,
15 et cetera, et cetera, of private schools.

16 Now, in finalizing, back to the language
17 that I cited to you that this court, we
18 believe, cannot interpret the statute broadly
19 to try to bring in within DOE, specifically
20 mentioned, the Commission for Independent
21 Schools. It just -- there's no authority to go
22 that expressly in the scheme of education and
23 what the Supreme Court said that they have no
24 authority. The only authority they have is to
25 regulate by issuing a license for them to

1 operate.

2 They cannot judge -- they cannot judge and
3 certify, accredit or whatever any private
4 institution as to whether it's a program that
5 meets certain standards, like -- now, the
6 appropriate body to do that for private schools
7 is SACS, which is the first one mentioned, the
8 Southern Association, and the Council for
9 Independent, and they don't qualify those or
10 haven't attempted to, so I haven't gone into
11 that. I do have all the documentation for
12 accreditation in those, but they don't.

13 So we would suggest under strict
14 construction, and also the case I referred to,
15 that the court can't add to and expand exactly
16 what's in the statute. So we believe that
17 their license is not accreditation, it does not
18 entitle them to be classified as an educational
19 institution.

20 Does the court have any questions?

21 THE COURT: No, sir. Thank you.

22 MR. DONNELLY: Thank you.

23 Your Honor, counsel's argument is
24 predicated on characterizing the Academy as a
25 private school. It's very important to note

1 the distinction between private school and a
2 nonpublic postsecondary institution.

3 The definition of private school, I know
4 you have another copy from Mr. Dent there
5 somewhere, 1002.01 parens 2, is very important.
6 You will note that this refers to schools below
7 the college level. It's very important to note
8 that private schools which are discussed under
9 Chapter 1002, a different chapter than the
10 Academy is regulated by, are wholly distinct.

11 Recall 1005.01, which I provided you in my
12 first argument from tab 3.5. That statute
13 states the legislative purpose of regulating
14 nonpublic postsecondary educational
15 institutions like the Academy, not a private
16 school, which is a different -- and the
17 Legislature certainly has spoken about
18 elementary schools and high schools and
19 creating alternatives to the public elementary
20 and secondary education system, but the
21 Legislature remains heavily involved in
22 regulating the nonpublic postsecondary
23 education.

24 1005.01, "The Legislature finds that both
25 individuals and independent postsecondary

1 educational institutions benefit from a state
2 system that assures that all institutions
3 satisfactorily meet minimum educational
4 standards." And then in parens 2, "The
5 Legislature intends that the provisions of this
6 chapter aid in protecting the integrity of
7 degrees, diplomas, and other educational
8 credentials offered by independent
9 postsecondary educational institutions by
10 providing for the evaluation of minimum
11 educational requirements."

12 The exemption does not provide a
13 distinction between public and nonpublic
14 educational institutions. The question is, is
15 this an educational institution that is
16 certified through the Department of Education
17 or one of the other accrediting agencies?

18 Another alternative method of gaining the
19 exemption would be not to have certification
20 through the Department of Education, but to
21 have accreditation by a non-Department of
22 Education independent private entity like the
23 Southern Association of Schools and the other
24 that is listed.

25 I would point out, pivoting to the

1 argument regarding administrative res judicata,
2 in fact, the property appraiser cites no cases
3 addressing the issue of estoppel, res judicata,
4 or decisional finality. In fact, the lead case
5 he relies on, Page v. City of Fernandina Beach,
6 says nothing of the sort, does not mention the
7 terms or concepts, and he relies primarily on a
8 footnote which states a truism that an
9 assessment of taxes would be dependent on a
10 particular year, and we have no dispute with
11 that. I mean, value is going to change every
12 year. We're dealing with an exemption case
13 where the facts have not changed, indeed the
14 law hasn't changed from 2008, and that went on
15 appeal by the appraiser.

16 I should take a moment to address the
17 technical arguments he raised. And, first of
18 all, the characterizations regarding private
19 school and nonpublic postsecondary educational
20 institution are incorrect as identified by the
21 very definition of private school in the
22 statute, but I want to remind the court that we
23 vetted these issues and outlined these things
24 in the memorandum of law.

25 The record also contains voluminous

1 material about the, quite frankly, overwhelming
2 amount of regulatory information required for
3 the Academy to obtain the certification from
4 the State to operate and offer the master's
5 degree and the bachelor's degree.

6 Turning to the technical argument. First,
7 there are three reasons that the property
8 appraiser's argument fails there, and that
9 argument, by the way, only applies to part of
10 the 2015 case, effectively the new property, I
11 believe.

12 But you have before you -- so it's not
13 confusing, you don't have 2008. That's long
14 past. You have the 2014 case and you have the
15 2015 case. His technical argument applies to
16 the 2015 case. He's saying that there wasn't
17 an application filed -- the 2014, excuse me.
18 Excuse me, 2014, not '15. Thank you.

19 MR. DENT: It does. It does not apply to
20 the second one. There was an application filed
21 on that one.

22 MR. DONNELLY: Thank you. The one --
23 excuse me. I misspoke on the year.

24 MR. DENT: And I think I made that clear
25 in my --

1 MR. DONNELLY: It's clear there.

2 So there are three reasons that fails.

3 First, the Academy followed the exact procedure
4 the property appraiser instructed in writing to
5 follow. Therefore, the appraiser -- and we
6 outline the facts of this in the paper we filed
7 and in the documents and exhibits that you have
8 there, but the property appraiser issued a
9 notice that it was denying the exemption. That
10 same notice said, "And if you don't agree with
11 this, Academy, take the following steps to
12 appeal or contest this decision," which the
13 Academy did and which the Academy did exactly
14 as instructed in writing and within the time
15 limits required as instructed by writing.

16 So first they're estopped and they've
17 waived any claim that the Academy should have
18 done something other than what the appraiser
19 specifically instructed, and there's a line of
20 cases on that.

21 An example is Harris versus State
22 Department of Administration, which is at 577
23 So.2d 1363. In that case, let me just
24 summarize it for you, an assistant public
25 defender became pregnant and needed to change

1 the insurance so that the birth of the baby and
2 the subsequent health care of the baby after
3 birth would be covered. The personnel office
4 told her, "This is what you need to do to make
5 sure that that's covered." She did everything
6 that they told her to do, and then later after
7 the birth of the child they said, "Oh, no, you
8 didn't do -- though you did exactly what we
9 told you to do, you should have done something
10 different," and denied coverage, and the court
11 held there's an estoppel there. You can't
12 deny -- the agency can't now come and claim you
13 should have done something different. So the
14 first basis is that they're estopped. The
15 Academy did exactly what the property appraiser
16 instructed on the property appraiser's denial.

17 He argued to you that they provided a
18 notice of intent to deny as required by the
19 statute. In fact, the undisputed evidence is
20 they failed to do that. There is no record
21 evidence whatsoever of a notice of intent to
22 deny per section (e) of 196.01 parents 9, which
23 you'll find at tab 3.10 of our materials, and
24 I'll get to that in just one second. I can
25 conclude here pretty quickly, Judge.

1 The second reason their technical argument
2 fails is they did not raise it below and the
3 property appraiser affirmatively represented to
4 the special master and to the Value Adjustment
5 Board that the correct procedure was followed,
6 that the Academy -- they never raise this.
7 They specifically said that an application was
8 made and we've denied the application. So it
9 is -- the second basis is not raised below,
10 intentionally and specifically waived, not just
11 ignored, and we've outlined the facts in the
12 materials we've provided and summarized in the
13 memorandum of law.

14 Number three, and perhaps this is
15 the -- any one of these is enough, but
16 once -- under Florida law, once a taxpayer
17 achieves an exemption, like the Academy did
18 when moving to Alachua County in 2008 and it
19 applied and it got its exemption over the
20 property appraiser's objection, you no longer
21 file an application for the exemption. Once
22 you have it, you keep it. And that statute is
23 outlined -- I've got a copy in tab 3, item
24 number 10. And parens (a) states what I've
25 just stated.

1 The burden is on -- now, the statute
2 provides if you have a change of circumstances,
3 if you sell the property, if you're doing
4 something different with the property, then
5 you, you know, you need to apply, but, if
6 there's no change in facts, there's no
7 application made.

8 The burden is on the property appraiser to
9 provide written notice of an intent to deny the
10 exemption once you've already gotten it and
11 then to follow a certain process. The
12 undisputed record evidence is the property
13 appraiser failed to do that. There's
14 absolutely no record evidence that the property
15 appraiser followed the notice of intent to deny
16 and the process outlined in that same statute
17 at parens (e), 196.011(9)(e). Therefore, it's
18 waived.

19 And in tab 3 -- oh, and, in fact, the
20 parties reached stipulations for purposes of
21 this summary judgment, a copy of which are in
22 the ring binder I've provided. The parties
23 stipulated that the notice -- what the property
24 appraiser actually did was they sent something
25 unique that's not outlined in the statutes.

1 They sent what they styled a Disapproval of
2 Application.

3 Now, remember, there had been no
4 application because there didn't need to be
5 one, but they sent a Notice of Disapproval of
6 Application and then said, "If you don't like
7 it, take these steps," which the Academy did
8 take every one of those steps. That was the
9 first notice, the parties have stipulated, by
10 the property appraiser -- it's in paragraph
11 number 11 of the stipulations -- the first
12 notice by the property appraiser that it was
13 contesting this exemption yet again.

14 A case on point is instructive. It is
15 against this very property appraiser, Chihocky
16 versus Crapo from the First DCA in 1994. It's
17 in tab number 3, item 17, and though it
18 involves certainly a different factual
19 scenario, it stands for the proposition that
20 you can't fail to provide statutory notice and
21 then claim, "Oops, we gotcha."

22 In that case, the property appraiser was
23 required to provide notice of what the values
24 were or whatever by a certain date, and the
25 court said he didn't do it pursuant to the

1 statute, and the court said, "You can't now put
2 the burden on the taxpayer, you've got to
3 follow the statute," is what the court said.

4 And I would suggest that the technical
5 arguments underscore the importance of
6 decisional finality, quite frankly, in
7 res judicata in the constant having to come
8 back and deal with these issues with no change
9 in fact or, quite frankly, law.

10 Thank you.

11 THE COURT: All right, any last remarks?

12 MR. DENT: Yes, I do. I meant to state
13 one thing which I didn't. He was incorrect in
14 his opening. The first year this went to the
15 VAB, the VAB magistrate recommended denial,
16 didn't approve it. Her name was
17 Jayden (phonetic).

18 MR. DONNELLY: Oh, I think that is true.

19 MR. DENT: When it went to the full board,
20 they overturned the magistrate.

21 MR. DONNELLY: That's true.

22 MR. DENT: The magistrate adopted our
23 argument, but didn't. Now, the following year
24 it was the same magistrate. The same
25 magistrate, however, followed what the board

1 did the year before, and we came into court on
2 it. So that's technical.

3 I don't know why they keep saying we
4 didn't give notice, then they told you we gave
5 notice. Now, the notice is in their book at
6 tab 11, and it's a Notice of Disapproval of
7 Application.

8 The application -- and he's not correct in
9 the nature of how the statute operates. What's
10 now by approval of the commission is that
11 rather than everybody file, that the exemptions
12 are sort of rolled over each year without
13 filing a new application. The (9)(e) says that
14 we can deny at any point in time. Now, to me
15 this notice of disapproval denies for the year
16 2014.

17 Yes, it's true that we didn't specify in
18 there the procedure, and I'm not going to
19 belabor other than citing to you, I believe
20 it's 197.122, which says taxpayers are bound to
21 know the tax law. It's their burden to know
22 what it is. I just throw that out. I'm not
23 hanging heavy on that argument.

24 They still haven't shown -- and I read the
25 definition -- it's not that important, but I

1 read the definition to include them as a
2 private school. They are not purporting to be
3 a college in my understanding. They're a
4 private school. You can't use, and they go
5 through a whole bunch of statutes, the word
6 college, et cetera, under Florida law under
7 certain terms.

8 But, anyway, without that, they haven't
9 gotten to the point. The Commission of
10 Independent Education is a totally autonomous
11 body that DOE has no authority over, cannot
12 instruct. All they are are the clerks for the
13 commission stated in the definition. The
14 commission, once it's appointed -- and that
15 defines who appoints it. Once it's appointed,
16 the appointing agency has no authority over it.
17 That's the definition of a commission. So we
18 don't think that they are an educational
19 institution and, therefore, DOE -- because DOE
20 did not give them anything.

21 Thank you. Do you have any questions?

22 THE COURT: Thank y'all very much. I
23 appreciate it. I'll review this carefully and
24 make a decision as soon as I can.

25 MR. DONNELLY: Thank you, sir.

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MR. DENT: Thank you.

(The hearing was adjourned at 11:06 a.m.)

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C E R T I F I C A T E

STATE OF FLORIDA
COUNTY OF ALACHUA

I, Karen L. Biery, State of Florida at
Large, certify that I was authorized to and did
transcribe the foregoing proceedings and that the
transcript is a true and complete record.

Dated and signed this 24th day of August,
2017.

Karen L. Biery
KAREN L. BIERY
JOHNS, STEPHENSON & BIERY
ADVANTAGE COURT REPORTERS

