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November 4, 2020

Mr. Dakeyan Graham, Ph.D.
Executive Director
Office of Independent Education &
Parental Choice
Florida Department of Education
325 West Gaines Street
Tallahassee, Florida 32399

**conveyed via Electronic Mail*

Re: *Florida Department of Education Correspondence, dated
October 8, 2020*

Dear Dr. Graham:

As you know, this law office represents AAA Scholarship Foundation (hereinafter to be referred to as "AAA"). This instant correspondence is intended to serve by way of follow-up to last week's telephone conference—as well as to chronicle the status of the matter at issue to date—it should not, in any way, be construed as our client's waiver and/or consent to any of the terms/circumstances delineated herein below. Specifically, AAA reserves any and all civil, procedural, and/or administrative rights and/or remedies accruing thereto.

This matter originally derives from an October 8, 2020 letter that you conveyed to Ms. Kimberly Dyson (hereinafter to be referred to as "Ms. Dyson"), in her capacity as principal for AAA. In said letter, you reached out to Ms. Dyson to advise that the Florida Department of Education (hereinafter to be referred to as

“DOE”) had purportedly been made aware of a scenario wherein AAA had allegedly declined “to find eligible” families for the 2020-21 school year who had previously been eligible for scholarship funds under the Florida Tax Credit Scholarship (hereinafter to be referred to as “FTC”) Program during the 2019-20 school year.

Within the context of the subject correspondence you went on to cite *CS/HB 7067*, the recently-enacted legislative bill, in support of the premise that those students who were previously-approved and/or eligible FTC recipients may re-enroll in the FTC Program, irrespective of any subsequent personal or familial change in said FTC recipient’s financial circumstances.

AAA is aware of the revised eligibility criteria in *CS/HB 7067* as it relates to renewing students; however, based upon legal obligations imposed on it under Florida law, the Generally-Accepted Accounting Principles, and the Internal Revenue Code, AAA does not have funds available for students whose household incomes exceed those levels otherwise applicable under the FTC Program.

Your letter acknowledged AAA’s communicated concerns regarding the effect that DOE’s interpretation of the bill would have on its tax exempt status with the IRS—specifically, AAA’s required commitment to its IRS-approved *501(c)(3)* charitable tax exempt purpose which, not insignificantly, is the predicate basis upon which AAA is permitted to actually solicit contributions for the FTC Program in the first instance—nevertheless, you proceeded to request that AAA update its previously-submitted application for recertification *vis a vis* an “update” of “assurances” of AAA’s compliance with *CS/HB 7067*.

Thereafter, you indicated that the manner in which AAA was to respond to your directive, if any such response was to be forthcoming, would be placed on the agenda for the State Board of Education’s meeting currently scheduled to take place on November 10, 2020.

Following the receipt of the October 8, 2020 letter at issue, there have been multiple communications between DOE and various agents/representatives of

AAA effectuated in an effort to secure clarification as to the scope and/or import of the same.

In particular, AAA sought additional information regarding, but not limited to, the following:

- a.) whether the October 8, 2020 correspondence in question was to be construed as “agency action” within the meaning of the Florida Administrative Procedures Act (codified as the *Florida Statutes, Chapter 120, et.seq.*);¹
- b.) was the October 8, 2020 letter to be construed/interpreted as DOE’s ‘notice of deficiency’ as it relates to AAA’s recently-submitted application for recertification; &
- c.) what specific portion of AAA’s application allegedly needed to be amended and in what manner.²

The exchanges between the respective Parties herein culminated in a telephonic conference that took place on Thursday, October 29, 2020, in which Ms. Dyson, yourself, the undersigned counsel(s), Ms. Amanda Gay, Esq., and Ms. Tracy Boak, Esq., on behalf of DOE and AAA, respectively, participated.

During the course of the above-referenced telephonic conference, and based on Party communications/representations attendant to the same, it is AAA’s understanding that a.) the October 8, 2020 correspondence was ‘informal’ in character and not intended to be interpreted and/or viewed by AAA as formal “agency action”; and b.) said correspondence of October 8, 2020 was not intended

¹ While AAA’s previous correspondence/communications have not explicitly requested clarification as to whether the October 8, 2020 constituted “agency action”, the ensuing telephonic conference referenced herein was intended to clarify both the general import and/or meaning of the letter, as well as to ascertain whether the same was intended to be construed as “agency action”.

² All of the foregoing issues were raised in Ms. Dyson’s e-mail correspondence of October 14, 2020 to your person in which she proffered a preliminary list of questions she had responsive to your October 8, 20120 letter.

by DOE to serve as a so-called ‘notice of deficiency’ with respect to AAA’s renewal application.

As previously articulated in written correspondence prior to the October 29th telephonic conference, as well as during the course of the verbal exchanges which took place during said conference, the gravamen of AAA’s concerns as to the ambiguities in the meaning and/or effect of the October 8, 2020 letter derive from the fact that AAA solicits contributions for the FTC Program from Florida tax-paying companies located in multiple states which, in various instances, seem to maintain statutory provisions and/or regulations which stand in direct conflict with *CS/HB 7067* and DOE’s contemporaneous interpretation thereof.

Notwithstanding the potential impact *CS/HB 7067* could, prospectively, have on AAA’s tax exempt status with the IRS, as well as questions that inevitably arise pertaining to whether or not *CS/HB 7067* would have the operative legal effect of compelling AAA to operate in derogation of its own charter which places the criteria of financial need as paramount, we discussed that perhaps the more immediate issue of concern is the fact that the *Florida Statutes, Chapter 496.411(1)*, specifically states that “A charitable organization or sponsor **may solicit contributions** only for the purpose expressed in the solicitation for contributions of **the registration statements of the charitable organization** or sponsor and my apply contributions only in a manner substantially consistent with that purpose (*Emphasis Supplied*)”.

The *Florida Statutes, Chapter 496.415(16)*, further provides under the aegis of “Prohibited Acts” that “**It is unlawful** for any person in connection with the planning, conduct, or execution of any solicitation or charitable or sponsor sales promotion to: **fail to apply contributions in a manner substantially consistent with the solicitation** (*Emphasis Supplied*)”.

Florida law requires AAA to comply with the intent of its donors when they made the donation to AAA. As DOE is aware, AAA solicits donations from corporate entities that have a particular interest in their donated monies being ascribed to those students who present with a compelling economic need. As was communicated during last week’s telephonic conference, one (1) potential

untenable outcome attendant to the DOE's currently-prescribed application of *CS/HB 7067* would likely result in AAA unwittingly flouting the intent/purpose of its donors, the specific statutory constraints set forth in the *Florida Statutes, Chapter 496*, as well as AAA's obligations under the Internal Revenue Code.

That is to say, in endeavoring to comply with DOE's administration of *CS/HB 7067*, AAA could find itself in the unenviable position of being asked to disregard its legal obligations under another—during the course of the telephone conference, this inherent conflict of laws was presented and, to AAA's understanding, DOE had not, as yet, considered, nor engaged, in any manner of legal analysis, or otherwise, as it relates to the interaction of said laws.³

Understanding that potential conflict, as outlined herein, Ms. Dyson has proposed—what is believed to be—a reasonable solution in terms of resolving DOE's purported concerns as to compliance with *CS/HB 7067*—specifically, in her e-mail correspondence to you of October 14, 2020, she suggested that AAA continue to affirm income eligibility for the FTC Program for those renewing students.

However, in instances pursuant to AAA's restrictions under which AAA funds are not available to renewing students, whose household income exceeds the income levels otherwise applicable under *CS/HB 7067*, a protocol would be instituted wherein said renewing students would be automatically referred to another scholarship organization that has funds available.

In this manner, not only would renewing students be afforded the opportunity to retain their eligibility for the FTC Program which comports with the letter and 'spirit' of *CS/HB 7067*, but AAA would continue to be able to abide by the *Florida Statutes, Chapter 496*, as well as its own charter, in deferring to the fundamental philanthropic intent of its donors.

³Ms. Amanda Gay, who was previously referenced herein as having participated in the telephone conference, indicated that she would be taking it upon herself to review this issue and promptly advise AAA as to any subsequent impressions and/or analyses that may be forthcoming relating to the concurrent operation of said laws.

As time is of the essence with respect to the impending elapse of the subject recertification period, it is, respectfully, requested that DOE immediately consider the adoption of the proposed “solution” scenario set forth herein and advise as soon as practicable as to its disposition.⁴

As previously indicated, AAA reserves any and all civil, procedural, and/or administrative rights pertaining to these circumstances and intends to avail itself of the same in the event that it should be necessary to ensure both AAA’s legal compliance, as well as adherence to the donative intent of its benefactors.

By way of addition, this correspondence should be construed as not only an attempt to resolve any and all uncertainties with respect to the manner in which DOE purportedly expects AAA to comply with *CS/HB 7067*, but also an effort to accurately chronicle the events, circumstances, and/or exchanges which have brought the respective Parties to this point in the discourse. Thus, in that vein, to the extent that any of the information contained herein chronicling prior communications and/or positions of DOE is suggested to be incorrect, it would be greatly appreciated if DOE would immediately provide any pertinent written corrections to any of the statements contained in this missive.

Above and beyond all of the foregoing, it is, of course, AAA’s abiding hope that this matter can be resolved informally—as initially alluded to by DOE—so that AAA might return its full attention to the mission of providing students access to, heretofore, inaccessible educational and developmental opportunities.

Thank you for your attention and anticipated cooperation with respect to the foregoing and/or enclosed. Should you have any questions and/or concerns, please do not hesitate to so advise.

We look forward to working with you towards an expedited and amicable resolution of this matter.

⁴ To the extent that DOE is amenable to said proposal, AAA is contemporaneously in the process of preparing revised language to propose which would reflect such “solution” language.

Sincerely,



Patrick R. Frank, Esq.

cc: Ms. Amanda Gay, Esq.;
Ms. Laura Mazyck, Esq.;
Ms. Tracy Boak, Esq.; &
Ms. Kimberly Dyson