STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

CONSERVE COMMUNITY, LLC, JULIE LEIZERMAN, PATRICIA A. LINS, LAWRENCE SUTTER, ALICE L. ACKERMAN, TIMOTHY P. ACKERMAN, JUELY K. BARTHOLOMEW, TIMOTHY J. BARTHOLOMEW, JOAN KRULL, KENNETH ALAN BUSSART, ROBERT COLME BOURGEOIS, SHARON KYLE BOURGEOIS, MARY HERMES, SARAH WEITZ KLAMMER, JOHN S. KLAMMER, THOMAS KORINEK, DAWN KORINEK, COLIN CRAWFORD, DEB CRAWFORD, MARY ELIZABETH BOSWELL, STEVE DANELSKI, MICHAEL MACY, MARGUIRITE MACY, WILLIAM R. MEIER, JR., KATRINA MARIA BILLIN, JEFFREY LEE BILLIN, VERONICA FLORES, NICHOLAS FLORES, JEFF R. DOHL, ANGELA P. DOHL, CHARLES SAUTER AND DENISE SAUTER, Plaintiffs, J.B. VAN HOLLEN, in his capacity as the Attorney General of the State of Wisconsin, Plaintiff-Intervenor-Counter-Defendant, v. CONSERVE SCHOOL TRUST, JAMES RINN, and STEFAN ANDERSON, in his official capacity as Conserve School Headmaster, Defendants, JOHN F. CALHOUN, MICHAEL J.	Appeal No. 2009-AP-2134 On Appeal From Judgment Of The Circuit Court For Vilas County, Case No. 09-CV-54, Honorable Neal A. Nielsen III, Presiding.

SULLIVAN, RONALD V. KAZMAR, CHRISTOPHER RODGERS, and MICHAEL X. CRONIN,	)
Defendants-Respondents,	)
CONSERVE SCHOOL CORPORATION,	)
Defendant-Cross-Claim Defendant-Respondent,	)
THE CULVER EDUCATIONAL FOUNDATION,	)
Defendant-Intervenor-Cross-Claim Plaintiff-Counter Claimant-Appellant.	)

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES

1. Does James R. Lowenstine's Trust Instrument permit the Trustees to operate Conserve School as a semester school?

Answered by the trial court: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Conserve School Defendants respectfully request oral argument because it will assist the Court in resolving the issues presented by this appeal.

The Conserve School Defendants also respectfully request that this Court's opinion be published. Although the controlling law is well settled, the case concerns the future of a Wisconsin school and therefore the Court's opinion will be of substantial and continuing public importance. See Wis. Stat. § 809.23(1)(a)(5).

STATEMENT OF THE CASE

Conserve School is the legacy of industrialist and philanthropist James R. Lowenstine. (R-App-2)[1] Mr. Lowenstine was the longtime majority owner of Central Steel and Wire Company, a Chicago-based distributor of steel and other metals. (Id.) He also owned a 1200-acre parcel near Land O' Lakes that he called "Lowenwood." (A-App-271)

In 1981, Mr. Lowenstine created a trust to provide for the disposition of his assets at his death. (A-App-268-298) During the next 15 years, he amended the trust agreement (the "Trust Instrument") numerous times, with the final amendment on September 19, 1995. (A-App-297-298)

Mr. Lowenstine died in January 1996. (R-App-2) He left the vast majority of his assets, including Lowenwood and his controlling interest in Central Steel, to the Conserve School Trust (the "Trust"). (A-App-273)

Mr. Lowenstine appointed the directors of Central Steel as the Trust's individual trustees. (A-App-284-288)

[1] Citations to the record are in the form "R.[document number]:[page(s)]" where the document number refers to the cited document's index number. When a cited document appears in Culver's Appendix, it is cited as "A-App-[page(s)]" corresponding to the pages of Culver's Appendix. References to the Conserve School Defendants' Supplemental Appendix are in the form "R-App-[page(s)]."

The Trustees' mission was to create a new school at Lowenwood to be known as the Conserve School. (A-App-273)

A. Mr. Lowenstine's Directions to the Trustees

The School is governed by Article VI of the Trust Instrument. (A-App-273-284) In Paragraph A of that article, Mr. Lowenstine provided that the Trustees "shall ... use part or all of the net income of the [Trust] to defray the costs incurred in the operation of a school called the 'Conserve School.' The Conserve School shall be nonsectarian. Any income not otherwise expended shall be added to the principal of the [Trust] as the trustees from time to time shall decide." (A-App-273)

Paragraph B provides that the Trustees "may also use net income and principal of the [Trust]" for a variety of enumerated purposes, including the construction of new facilities at Lowenwood, the purchase of additional land, and the maintenance of pets on the property. (A-App-273-274) Of particular relevance here is Paragraph B(10), which permits the Trustees to expend trust principal and income "to open the school for the regular enrollment of students

beginning with the seventh grade, and extending, in the discretion of the trustees, through high school." (A-App-274)

Mr. Lowenstine required that students at the School "be persons deemed by the trustees to be honest, of good moral character, mentally alert, and in good health." (A-App-275) In Paragraph I, he required that the school grounds be maintained so that their natural beauty and wildlife would not be harmed, and in Paragraph J, he expressed his "hope" that some students would be instructed in conservation of natural resources. (A-App-276) In Paragraph K, he expressed his desire that the School be made available to students from other schools after their regular school hours. (A-App-276-277)

The Trust Instrument incorporates a requirement of long-term sustainability. (A-App-274-275) Specifically, Paragraph D requires that before making expenditures of principal, the Trustees must "first determine that there is a reasonable expectation that the trust principal would not be depleted to the extent that its earnings … would be insufficient to continue the operation of the Conserve School and the upkeep and maintenance of the lands and buildings as herein provided." (Id.)

Mr. Lowenstine intended that the Trust qualify as a tax-exempt charitable organization. (A-App-277) And in Paragraphs L and M, he required the Trustees to seek charitable status and gave them the authority to amend the Trust Instrument if necessary to accomplish that result:

> L. *I intend that the Conserve School Trust qualify as a charitable organization for purposes of sections 170, 501, 2055 and 2522 of the Internal Revenue Code of 1986, as from time to time amended (the "Code").* I also intend that the Conserve School Trust not be considered a private foundation for purposes of Section 509 and Chapter 42 of the Code. *Any provision of this instrument inconsistent with these intentions shall not be given effect, and the trustees shall have the power, which is hereby specifically given to them, to amend the terms of this trust for the sole purpose of complying with the requirements of the Code and the rulings and regulations thereunder, and any such amendment shall apply retroactively to the date of my death.*
>
> M. I direct the trustees to take all steps reasonably deemed necessary to achieve recognition of charitable status and non-private foundation status as provided in paragraph L of this Article. …

(Id. (emphasis added))

If, however, "after all reasonable efforts have been made toward such recognition, an adverse determination is made by the Internal Revenue Service and the trustees exhaust such avenues of appeal which appear to the trustees, in their discretion, to present a reasonable chance of reversing such adverse determination, or, if for any other reason the trustees determine at any time that it is legally impossible or

otherwise impractical to operate the Conserve School," then the Trustees must sell the Central Steel stock and distribute the Trust assets, primarily to The Culver Educational Foundation ("Culver"). (A-App-277-281)

B. The Design and Construction of Conserve School

After they learned of Mr. Lowenstine's instructions, the Trustees set out to design and build Conserve School. They hired Patrick Bassett, the head of the Independent Schools Association of the Central States, as a consultant. (R.119:66-67, 91)

The Trustees considered a variety of potential formats for Conserve, including a semester school. (R.101:3-4) The managing trustee visited The Mountain School, a semester school in Vermont, and Mr. Bassett recommended that Conserve take a similar form. (R.101:6-7, 9-10)

Instead, the Trustees decided to open Conserve School as a four-year boarding school for students in grades nine through twelve. (R.101:12) (Trustees' April 22, 1998 meeting: "Although we discussed the feasibility of a semester school, we will start out as a full-year school and challenge the headmaster with that assignment to fill the

school with 200 students."). The School opened its doors to students for the 2002-2003 academic year. (R-App-2)

C. Culver's 2005 Lawsuit

In 2005, Culver sued the Conserve School Trustees, alleging that they had breached their fiduciary duty by building and operating Conserve as a four-year boarding high school. Culver sought an order requiring the Trustees to turn over the Trust's assets -- including the School and Lowenwood -- to Culver. The Culver Educational Foundation v. C. Daniel Blythe et al., No. 05 C 6480 (N.D. Ill.), Docket 1. In May 2007, Culver stipulated to the dismissal of its claims with prejudice. (Id., Docket 90)

D. The Decision to Transition to a Semester School

In the fall of 2008, the deepening economic crisis prompted Managing Trustee Ronald Kazmar to review the Trust's investments to determine what the Trust could reasonably expect to contribute to the School over the long term. (R-App-4) Mr. Kazmar's analysis considered the possibility of a prolonged period of reduced dividends from the Central Steel stock and poor investment returns on the Trust's other investments. (Id.)

After reviewing Mr. Kazmar's analysis in late October 2008, the Trustees agreed that they should evaluate alternative models for the School. (R-App-4) They asked Head of School Stefan Anderson to examine several options, including (a) a modified four-year program with 60-80 four-year students (both day and boarding) plus 10-20 students who would attend for a semester, a single year, or a "post-graduate" year; (b) a two-year, junior-senior program for 30-72 students, which would include the option to attend for just one or two semesters; and (c) a semester program for 30-45 students (primarily juniors, but flexible enough to accommodate sophomores, seniors, and "post-graduate" students). (R.18:2; R-App-5)

Between November 2008 and January 2009, the Trustees and Mr. Anderson analyzed the Trust's finances and the proposed models for the Conserve School. (R-App-5-6) On January 16, 2009, the Trustees unanimously concluded that the best long-term preservation strategy given the uncertain economy would be to transition from the existing four-year school to a semester school. (R-App-6)

On January 30, 2009, Mr. Kazmar and Mr. Anderson announced at a meeting with students and through a letter to

parents that the Trustees had decided to convert the School from a four-year high school to a semester school effective for the 2010-2011 academic year, with the 2009-2010 academic year serving as a transition year. (R.18:3, R-App-6, 8-20)

The January 30 announcement described the plan for the semester school. (Id.) The fall and spring semesters will run, respectively, from August to December and January to May. (R-App-18) Students will be primarily high school juniors, though sophomores and seniors may also attend, as well as students interested in a post-graduate year before college. (R-App-17) Students will take college preparatory courses in English, science, history, math, and foreign languages. (Id.) Those courses will be based on Conserve's existing courses and will be designed to match students' coursework at their "sending schools" so that they will continue to progress academically. (R-App-17, R.119:113-114, 121-122) Each class will meet for an average of 250 minutes per week. (R-App-19) Advanced Placement courses will be offered in languages, math, and science. (R-App-17) The Trustees anticipate that credits from Conserve will transfer to sending schools. (R.119:113-114)

The semester school will retain Conserve's focus on the natural environment, including elective courses focusing on environmental issues. (R-App-9-10, 17) Outdoor activities such as camping and intramural sports will be part of the curriculum. (R-App-18)

E. The Parents' Request for Emergency Injunctive Relief

This case began on February 20, 2009, when a group of Conserve School parents filed suit in the Circuit Court of Vilas County. (R.1) They asserted that the Trustees and the Conserve School Corporation's ("Corporation") directors[2] had abused their discretion and breached their fiduciary duties by deciding to transition to a semester program. (R.1:11-12) They sought an injunction that would require Conserve School to remain a four-year school indefinitely and to transfer the assets of the Trust and Corporation to Conserve Community LLC, an organization formed by the parents. (R.1:12-13)

On February 27, 2009, the parents filed a Motion for Temporary Injunctive Relief. (R.3) On March 5, 2009, the Conserve School Defendants moved to dismiss the parents'

[2] Conserve School is operated by the Conserve School Corporation. The Trustees are the voting directors of the Corporation.

complaint because the parents lacked standing and the semester school does not violate the Trust Instrument. (R.15, R.16:5-8) The Conserve School Defendants also opposed the parents' request for a temporary injunction. (R.17)

F. Culver's Illinois Lawsuit

Meanwhile, also on March 5, 2009, Culver sued the Conserve School Defendants in the Northern District of Illinois. The Culver Educational Foundation v. Michael X. Cronin et al., No. 09 C 1413. Like the parents, Culver alleged that the Trustees' decision to transition to a semester school program violated the Trust Instrument. (Id. Docket 1) But unlike the parents, Culver asserted that Conserve had become "legally impossible or otherwise impractical" to operate and requested that the Trust assets, including Lowenwood and the School, be transferred to Culver.[3] (Id.)

G. Initial Proceedings in Vilas County

On March 6, 2009, Judge Neal A. Nielsen III conducted a hearing on the parents' motion for emergency injunctive relief. (R.111) He identified the relevant issues as follows: "[H]ave [the Trustees] made a decision that is

[3] Culver voluntarily dismissed the Illinois lawsuit on August 3, 2009. (Id. Docket 94)

contrary to the Trust, and do you have the right to ask the Court to make some determination about that?" (R.111:43) Judge Nielsen denied the parents' request for temporary injunctive relief because there was no "immediate threat of irrevocable harm"; the School would continue as a four-year school for the rest of the academic year. (Id.:45) He scheduled a permanent injunction hearing for April 22, 2009.

Over the next few weeks, the parents and the Conserve School Defendants engaged in accelerated discovery including the depositions of Managing Trustee Kazmar, fellow Trustee Michael Cronin, and Headmaster Anderson. (R.119:1-125)

H. Motions to Intervene

On April 7, 2009, Culver moved to intervene in the Vilas County case. (R.29, 30) Culver asked the trial court to dismiss the parents' complaint for lack of jurisdiction over a necessary party (Culver) and to stay the parents' complaint in favor of Culver's later-filed Illinois action. (R.27, 28)

On April 14, 2009, the Attorney General of the State of Wisconsin moved to intervene. (R.36) He did not take a position on whether the Trust Instrument permits a semester school, but instead alleged that the Corporation's directors

had a conflict of interest that required a custodian to take over the Corporation and proposed that retired Wisconsin Supreme Court Justice Jon P. Wilcox serve as custodian. (R.36:15-17, R.37:3) The Attorney General also moved to stay the case to give the custodian an opportunity to evaluate the Corporation's affairs. (R:38:2)

On April 17, 2009, the trial court conducted a hearing on Culver's motion to intervene. (R.114) The court granted that motion but denied Culver's motion to dismiss the case for lack of jurisdiction, holding that Culver (the alleged absent necessary party) had submitted to the court's jurisdiction by intervening and by asserting an interest in Wisconsin property (the School and Lowenwood). (R.114:33-36) The Court framed the issue going forward as "whether or not the actions of the Trustees and the School constitute a violation in terms of the Trust." (Id.:41)

The following week, Culver filed a Cross-Claim asserting that the semester school violates the Trust Instrument and, as in the Illinois case, seeking an order that the Trust assets be paid over to Culver.[4] (R.65:7-10)

[4] Count IV of Culver's Cross-Claim alleged that the Trustees should have sold the Trust's shares of Central Steel. (R.65:10-12)

I. Culver's First Motion to Compel

Culver immediately sought discovery of the privileged estate planning files of Mr. Lowenstine's attorneys. (R.68) When the attorneys refused, Culver moved to compel production on the ground that the files might contain evidence of Mr. Lowenstine's intent. (Id.) On April 21, 2009, the trial court denied the motion without prejudice because what the Trustees are permitted to do depends on the language of the Trust Instrument, not what Mr. Lowenstine may have said about it. (A-App-120-121) As the court put it, the "question is not what [Mr. Lowenstine] may have intended but how much authority did he give his Trustees to act in their own discretion regarding the creation of that vision." (Id.:120)

J. April 22, 2009 Hearing

On April 22, 2009, all four parties appeared before the trial court for a multi-hour hearing. (R.113:1-2) The trial court dismissed the parents' injunctive claims for lack of standing. (R.113:35-36, 38-39) It granted the Attorney General's motion to intervene, but denied the Attorney General's request for appointment of a custodian and for a

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Culver voluntarily dismissed this claim on July 17, 2009. (A-App-264-265)

stay and instead set a schedule for summary judgment briefing and argument and, if necessary, a trial. (Id.:20-21, 67-68; R.81:1-2)

K. Culver's Renewed Motion to Compel

Culver renewed its motion to compel, and the trial court heard further argument on April 23, 2009. (A-App-134) The court again denied Culver's request for access to the privileged estate planning files because all parties agreed that the Trust Instrument is unambiguous. (A-App-142-147) In the trial court's words,

> I think the question that's before the Court, is: Does the present action of the Trustees, and the Corporation, in changing, or attempting to change the direction of the school, is authority for that granted within the Trust documents?
>
> And the Trust documents are unambiguous on this point, at least as argued thus far by both parties. And so that's a difficult question for the Court. But I don't know how any extrinsic evidence would be helpful in that regard.

(A-App-142) Culver agreed that the trial court must determine Mr. Lowenstine's intent based on the language of the Trust Instrument and acknowledged that unless the trial court found the document ambiguous, the estate planning files would not be relevant. (Id.:145-146)

L. Amended Pleadings and Summary Judgment Motions

Culver filed an Amended Cross-Claim on April 24, 2009, again alleging that the semester school "violate[s] the plain language of the trust document" and requesting that the Trust assets be paid over to Culver because (according to Culver) the Trustees had effectively determined that it is "legally impossible or otherwise impractical" to operate Conserve School, thereby triggering the distribution scheme of last resort. (R.77:2, 9) As before, Culver did not allege that the Trust Instrument is ambiguous.

The Attorney General also filed an Amended Complaint, this time adopting the parents' position and arguing that the semester school violates the Trust Instrument. (R.80:4) Unlike Culver, the Attorney General alleged that the Trustees had never determined that Conserve School was "legally impossible or otherwise impractical" and also argued that no reasonable trustee could make such a determination given the assets available in the Trust. (Id.:9) In addition to renewing his request for appointment of a custodian, the Attorney General sought an injunction requiring the Trustees

to maintain Conserve School as a four-year high school. (Id.:11, 13-14)

The Conserve School Defendants moved for summary judgment on Culver's and the Attorney General's amended pleadings. (R.84, 90) Culver filed a cross-motion for summary judgment on its Amended Cross-Claim. (R.87)

M. Summary Judgment Hearing

On June 8, 2009, the trial court conducted a multi-hour summary judgment hearing. (A-App-149-260) The court first granted the Conserve School Defendants' motion for summary judgment as to the Attorney General. (A-App-262) It rejected the Attorney General's contention that the Corporation had interests contrary to the Trust given Mr. Lowenstine's stated requirement that the Corporation be controlled by the Trustees and governed by the terms of the Trust Instrument. (A-App-213-215) The court denied the Attorney General's request for a custodian, finding that the Attorney General had not produced any evidence that the Corporation's directors (who are also the Trustees) had exceeded the authority conferred on them. (A-App-215)

The court then turned to Culver's sole argument: that the semester school violates the Trust Instrument because it is

not a school of "regular enrollment." The parties agreed that the Trust Instrument is unambiguous and must be applied as written. (A-App-232-233, 236) Accordingly, they agreed that the court could not consider extrinsic evidence. (Id.)

The trial court concluded that the unambiguous language of the Trust Instrument permits the Trustees to operate Conserve as a semester school. (A-App-249-254) Specifically, the court held that a semester school is a school of regular enrollment because students will regularly attend classes there. (Id.:250-253) "[E]ven if places were held for them [at] their sending schools," students who attend Conserve "would be enrolled there." (Id.:253)

On August 5, 2009, the trial court entered final judgment concerning the summary judgment motions. (A-App-266-267) Culver filed its notice of appeal on August 14, 2009. (R.108) The Attorney General did not appeal.

STANDARDS OF REVIEW

The trial court's summary judgment rulings are subject to *de novo* review. See B&D Contractors, Inc. v. Arwin Window Sys., Inc., 2006 WI App 123, ¶ 2, 294 Wis. 2d 378, 718 N.W.2d 256. Summary judgment is proper if "there is no genuine issue as to any material fact and ... the moving party

is entitled to judgment as a matter of law." See Wis. Stat. § 802.08(2).

The trial court's discovery rulings should be affirmed if the court applied "relevant law to facts of record using a process of logical reasoning." Franzen v. Children's Hosp. of Wis., Inc., 169 Wis. 2d 366, 376, 485 N.W.2d 603, 606 (Ct. App. 1992).

This Court may affirm the trial court on any grounds supported by the record. See B&D Contractors, Inc., 2006 WI App 123, ¶ 4 n.3, 294 Wis. 2d 378, 718 N.W.2d 256.

Arguments raised by an appellant for the first time on appeal are forfeited. See State v. Van Camp, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997) (declining to consider argument that appellant raised for first time on appeal); see also State v. Ndina, 2009 WI 21, ¶¶ 26-33, 315 Wis. 2d 653, 761 N.W.2d 612 (clarifying that arguments not raised in the trial court are "forfeited," not "waived").

ARGUMENT

Faced with a once-in-a-lifetime economic crisis, the Trustees of the Conserve School Trust made the difficult decision to transition the School from a four-year high school to a semester school primarily for high school juniors. The question in this case is whether the Trustees' decision exceeded the authority Mr. Lowenstine gave them in his Trust Instrument. The trial court correctly held that it did not.

The proceedings before Judge Nielsen were fast-moving and procedurally complex, with a very expedited schedule and multiple intervenors. But Culver's challenge to the Trustees' decision was (and is) a narrow one. It claims only that the Trust Instrument prohibits a semester school because a semester school supposedly does not involve "the regular enrollment of students."

Culver is incorrect as a matter of law. Students may be regularly enrolled in a school without being enrolled there for any particular length of time. Regular enrollment means simply that students must attend classes on a regular basis. And a semester school satisfies that requirement every bit as much as a four-year school.

Because nothing in the Trust Instrument prohibits a semester school, there is no basis to override the Trustees' decision. The trial court's entry of summary judgment against Culver should be affirmed.

I. A SEMESTER SCHOOL IS A SCHOOL OF REGULAR ENROLLMENT.

The Conserve School Defendants readily acknowledge that the School must have a regularly enrolled body of students. But Culver's claim -- that the semester school will not have regularly enrolled students -- reflects a fundamental misunderstanding of what "regular enrollment" means.

"Regular enrollment" is not "exclusive enrollment." It is not "enrollment for an entire grade." It is not "enrollment in a traditional school." And it is not "enrollment in the school from which one will receive his or her diploma." Rather, being regularly enrolled in a school means regularly attending classes there. That is the common-sense meaning of the term, and it is the long-established legal meaning. Because semester school students will regularly attend classes at Conserve during their time there, the School will be a school of regular enrollment.

A. The Trust Instrument Requires A Regularly Enrolled Student Body.

Any school operated by the Trustees must regularly enroll students. That is because Mr. Lowenstine specifically required both that the Trustees operate a school (A-App-273, Trust Instrument, Art. VI, ¶ A) and that the Trust qualify as a tax-exempt charitable organization (A-App-277, ¶¶ L & M). To meet those two requirements, the School must satisfy not only the lay definition of a "school" (which it clearly does), but also the Internal Revenue Service's definition, which includes the concept of regular enrollment.

Section 170 of the Internal Revenue Code, which Mr. Lowenstine cited in Paragraph L of the Trust Instrument, accords tax-exempt status to "an educational organization which normally maintains a regular faculty and curriculum and normally has a *regularly enrolled body of pupils or students in attendance* at a place where its educational activities are regularly carried on." 26 U.S.C. § 170(b)(1)(A)(ii) (emphasis added); see also 26 U.S.C. § 501(c)(3) (exempting from taxation entities that are "organized and operated exclusively for ... educational purposes").

The IRS's regulations and publications track this statutory language. See Treas. Reg. § 1.170A-9(c)(1) ("An educational organization is described in section 170(b)(1)(A)(ii) if its primary function is the presentation of formal instruction and it normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on."); Instructions for IRS Form 1023 at 11 ("'A school' is an educational organization whose primary function is the presentation of formal instruction and which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.") (available at www.irs.gov).

B. A Regularly Enrolled Student Body Means A Group Of Students Who Attend Classes On A Regular Basis.

In a series of Revenue Rulings dating back to the 1960s, the IRS has found the "regular enrollment" requirement satisfied when an institution has a group of students who attend classes on a regular basis, as opposed to members of the general public who attend a one-time lecture

or seminar. See, e.g., Rev. Rul. 73-434, 1973-2 C.B. 71, 1973 WL 33094 (survival school that regularly conducted a 26-day survival course had a regularly enrolled body of students and a regular curriculum and met the requirements of Section 170(b)(1)(A)(ii)); see generally Bruce R. Hopkins, The Law of Tax-Exempt Organizations § 8.3 (9th ed. 2007); compare Rev. Rul. 64-128, 1964-1 C.B. 191, 1964 WL 12781 (organization offering one-time conferences to invitees on changing subjects did not satisfy the regular enrollment requirement).

As the trial court recognized, this interpretation is consistent with the common meanings of the words "regular" and "enrollment":

> A student is enrolled wherever he is expected to attend class. And clearly if someone's enrolled at Conserve they are expected to attend classes there. Regularly. And indeed, with respect to students under the age of 18, that's a requirement of law. To avoid the concepts of truancy.
>
> And so regular, would seem to me to mean usual, and enrollment would mean that the people who come to class every day are those who have been admitted and are on a list constituting the class.

(A-App-251)

To satisfy the regular enrollment requirement, a school's students need not attend for a full academic year or for any other particular length of time. See Rev. Rul. 73-434,

supra (26-day course constituted regular enrollment); see also Rev. Rul. 72-101, 1972-1 C.B. 144, 1972 WL 29770 (six-week job training program constituted regular enrollment); Rev. Rul. 69-492, 1969-2 C.B. 36, 1969 WL 19100 (organization offering theology classes for eight weeks each summer met regular enrollment requirement).[5]

C. The Semester School Will Have A Regularly Enrolled Student Body.

The semester school planned by the Trustees readily satisfies the regular enrollment requirement. The nature of the proposed school is not in dispute. It will be an institution that educates students; its primary function will be formal instruction; and it will have a regular faculty, a regularly scheduled curriculum, and a place where educational activities are regularly conducted. (R-App-15-19) Students will not attend a single class at Conserve, but will regularly

[5] In the trial court, Culver argued that Revenue Rulings are "extrinsic evidence" and therefore cannot be considered when interpreting the unambiguous Trust Instrument. That is incorrect. Revenue Rulings are not evidence, but legal authorities setting forth the IRS's interpretation of the laws it administers. See Treas. Reg. § 601.601(d)(2)(i)(a) ("[a] 'Revenue Ruling' is an official interpretation by the Service"); Treas. Reg. § 601.601(d)(2)(v)(d) ("Revenue Rulings … are published to provide precedents to be used in the dispositions of other cases"); Kornman & Associates, Inc., v. United States, 527 F.3d 443, 453 (5th Cir. 2008) ("[W]e usually accord significant weight to the determination of the IRS in its revenue rulings.") (internal quotations omitted).

attend classes there over the course of at least a full semester. (Id.:6, 17) In other words, semester school students will be regularly enrolled at Conserve.

II. THE TRUST INSTRUMENT DOES NOT CHANGE THE STANDARD DEFINITION OF "REGULAR ENROLLMENT."

Relying on Paragraphs B(10) and K of Article VI, Culver asserts that Mr. Lowenstine adopted his own peculiar definition of "regular enrollment." But tellingly, Culver cannot make up its mind about what the new definition is. The reality is that the Trust Instrument does not depart in any way from the standard definition of the term.

A. Culver Makes Inconsistent Arguments About The Meaning Of "Regular Enrollment."

As an initial matter, Culver has taken inconsistent positions on what "regular enrollment" means. In the trial court, Culver argued that the Trust Instrument clearly and unambiguously requires a "traditional" school that students attend on a "permanent full time basis" and that Culver, a four-year high school, was the "blueprint" for Conserve. (R.103:2, 10)

On appeal, Culver has changed its tune. While its opening brief contains vestiges of the "traditional school"

argument,[6] Culver now asserts that the Trust Instrument "clearly and unambiguously" requires something different: that students be able to receive "at least a full 'grade' of education" at Conserve. (Br. at 23-24) In other words, Culver no longer maintains that Conserve must be a four-year high school, a "traditional" school, or a school like Culver. It just cannot be a semester school.

Culver's inability to offer a consistent reading of "regular enrollment" is revealing. The fact is that nothing in the Trust Instrument requires students to attend Conserve for four years, one year, or any other particular length of time.

B. Paragraph B(10) Does Not Adopt Any New Definition Of "Regular Enrollment."

The only place in the Trust Instrument where the term "regular enrollment" appears is in Paragraph B(10), which provides that in addition to using part or all of the Trust's net income to defray the costs of operating the School (as required by Paragraph A),

> the trustees *may* also use net income and principal of the Conserve School Trust: ... (10) to open the school for the regular enrollment of students beginning with the seventh grade, and extending, *in the discretion of the trustees*, through high school.

[6] For example, Culver mentions students "who call the Conserve School, and only the Conserve School, their *alma mater*." (Br. at 33)

(A-App-273-274 (emphasis added))

Paragraph B(10) is permissive, not mandatory, and it uses the term "regular enrollment" only in passing. It makes no attempt to define the term or to depart from the long-accepted meaning under Section 170. And it certainly indicates no intention to define "regular enrollment" to mean "exclusive enrollment" or to require students to attend Conserve for any particular length of time.

1. Paragraph B(10) Does Not Require Students To Attend Conserve For A Full Grade Year.

Culver asserts that Mr. Lowenstine's reference to "seventh grade, and extending, in the discretion of the trustees, though high school" means that he must have intended that students attend for an entire academic year. (Br. at 23) This does not follow. Merely referring to a range of grade levels, especially in a provision that is permissive and expressly vests the Trustees with discretion to determine what grade levels will be taught, is not the same as requiring that students attend Conserve for any one of those grades, much less for a full grade year. Nothing in Paragraph B(10) or anywhere else in the Trust Instrument imposes such a requirement.

Culver correctly notes that Paragraph B(10) does not mention or specifically authorize a semester school. But it also does not mention or specifically authorize a four-year school or a "full grade" school. Mr. Lowenstine required the Trustees to build and operate a school, but he did not require students to attend the School for any particular length of time.[7]

In any event, Conserve *will* offer "at least a full 'grade' of education" (to use Culver's words). (Br. at 23) Although primarily a semester school for high school juniors, sophomores, seniors, and post-graduate students will also be permitted to attend, and students will be permitted to attend for a full year. (R-App-17-19; R.119:57)

[7] Culver asserts that the School must be the "primary, or regular, school of an enrolled population of students." (Br. at 23) Of course, Conserve *will* be its students' primary school during their time there -- the place where they will attend classes every day. If by "primary" Culver means to suggest that Conserve must be the school from which its students graduate, or the school from which they receive most of their high school education -- both of which would be inconsistent with its "at least a full year" argument -- the Trust Instrument says otherwise. Mr. Lowenstine did not require attendance for any particular length of time, and indeed he explicitly vested the Trustees with the discretion whether to educate high school students at all.

2. Whether Paragraph B(10) Is Mandatory Or Permissive Does Not Affect The Meaning Of "Regular Enrollment."

In the trial court, Culver argued that the word "may" in Paragraph B should be read to mean "shall," which would make "the regular enrollment of students" mandatory. (R.63:1-5) This is incorrect as a matter of law.[8] But it is also a false trail, for two reasons. First, regular enrollment, like all the other criteria of Section 170, is already required by Paragraphs L and M, which specifically mandate that the School qualify as tax-exempt under that Code provision. Whether "may" is permissive (as the Conserve School Defendants argue) or mandatory (as Culver argues) does not change the fact that the School must have regular enrollment, which the Internal Revenue Code requires of all tax-exempt organizations classified as schools.

[8] Paragraph B provides that the Trustees "may" use income and principal for certain purposes, not that they "shall" or "must" do so. Illinois courts respect the difference. See, e.g., Myers v. Pink, 191 N.E.2d 659 (Ill. App. Ct. 1963) (contrasting permissive "may" with mandatory "shall"). In the trial court, Culver relied on cases in which "may" was read to mean "shall" in order to avoid an absurd result. See, e.g., Lampe v. Ascher, 376 N.E.2d 74, 76-77 (Ill. App. Ct. 1978) (cited by Culver) (overriding plain meaning in order to avoid finding statute unconstitutional). There is nothing absurd about reading Paragraph B as written.

Second, even if Paragraph B(10) were mandatory, it would not prohibit a semester school. It merely grants the Trustees discretion to offer regular enrollment to students anywhere in the range of the seventh to twelfth grade. The semester school program, which will enroll mainly high school juniors, satisfies that requirement.

3. Mr. Lowenstine Adopted The IRS Definition Of "Regular Enrollment."

Culver asserts that Paragraph B(10) "was not intended merely to track Section 170." (Br. at 34) Of course not: Paragraph B(10) is a discretionary provision addressing the potential grade range of Conserve students, not a requirement that the School comply with the Internal Revenue Code. But any suggestion that Paragraph B(10)'s reference to "regular enrollment" requires something different from Section 170 is incorrect.

Paragraph B(10)'s reference to "regular enrollment" must be read consistently with Paragraph L, which specifically incorporates Section 170. Durdle v. Durdle, 585 N.E.2d 1171, 1174 (Ill. Ct. App. 1992) ("The instrument must be considered as a whole, and the provisions are not to be read in isolation."). Reading "regular enrollment" in

Paragraph B(10) to mean anything other than what it means under Section 170 would violate that principle.

The fact that Paragraph B(10) does not list all of the requirements of Section 170 does not indicate any intention to adopt a different definition of "regular enrollment." (Br. at 36) There was no need to spell out the requirements because Paragraph L already incorporates all of them: it specifically mandates that the Trust must qualify as a charitable organization under Section 170, and it gives the Trustees the power to amend the Trust Instrument to ensure that the Trust complies "*with the requirements of the Code and the rulings and regulations thereunder*." (A-App-277 (emphasis added); see also id. ¶ M (directing trustees to take all steps necessary to achieve charitable status as provided in Paragraph L))

Even if Mr. Lowenstine had not included Paragraph L, his use of the term "regular enrollment" in Paragraph B(10) would necessarily be read to refer to its widely accepted meaning under Section 170. As Culver acknowledges, the Trust Instrument is governed by Illinois law (A-App-297), which presumes that a trust settlor like Mr. Lowenstine knows the law. Belfield v. Findlay, 60 N.E.2d 403, 404 (Ill. 1945) ("The law in this State is that a testator is presumed to

have known the law and to have made his will in conformity therewith.").

And specifically, when a trust instrument (particularly one drafted by counsel) uses a term of art, the law presumes that the settlor intended to adopt that term of art. See, e.g., Estate of Laas, 480 N.E.2d 1183, 1186 (Ill. App. Ct. 1985) (reading tax-related term in unambiguous will to track accepted Internal Revenue Code definition of term; "[t]echnical terms with established meanings are presumed to be used according to their technical meanings unless they are otherwise explained"); White v. White, 39 N.E.2d 79, 81 (Ill. App. Ct. 1942) (construing unambiguous will consistent with long-established Illinois law) ("The will bears evidence of having been drawn by a skilled lawyer. It is fair to assume the terms employed were so used in their accepted meaning as long settled by the courts. There is nothing to indicate, or from which we could conjecture, that the testator did not understand and intend to use them in that sense.").

Culver notes that Paragraph B(10)'s reference to "regular enrollment" is not identical to Section 170's reference to a "regularly enrolled body of pupils." (Br. at 35) But using an adjective form of a term rather than a noun form

can hardly be viewed as adopting a new or different definition, particularly when it is read together with Paragraph L.

Nothing in Paragraph B(10) changes the IRS definition of "regular enrollment," and no other Trust provision adopts a different definition or even mentions the term.

C. Paragraph K Does Not Adopt Any New Definition Of "Regular Enrollment."

The other provision of the Trust Instrument on which Culver relies is Paragraph K, which provides as follows:

> I further *request* that if, after due consideration, *the trustees deem it feasible*, students who are enrolled in public or other private schools *may* be permitted to enroll in the Conserve School to receive tutorial instruction after such students' regular school hours or on Saturdays and school holidays, and during summer vacations.

(A-App-276-277 (emphasis added)) As with Paragraph B(10), nothing in this paragraph departs from the accepted definition of regular enrollment -- it does not even use the term -- and nothing in it prohibits a semester school.

Culver reads Paragraph K to bar a semester school because, in its view, "Mr. Lowenstine wanted students who were enrolled elsewhere to receive only limited 'tutorial instruction' at the Conserve School, and only outside of normal school hours." (Br. at 33) Since (in Culver's view)

semester school students are "regularly enrolled" elsewhere -- namely, at their "sending schools" -- and not at Conserve, they may receive instruction at Conserve only after regular school hours. (Br. at 30, 32) Culver misinterprets Paragraph K on multiple levels.

1. Paragraph K Is Precatory, Not Restrictive.

First, Paragraph K does not impose restrictions. It simply expresses Mr. Lowenstine's desire to reach out to local school children and allow them to supplement their studies at other schools with instruction at Conserve. Although Culver's description uses "only" multiple times, that word does not appear anywhere in the real Paragraph K. Mr. Lowenstine was requesting that the Trustees do something additional beyond the School's main program; he was not placing a limit on what the main program could be.

2. Semester School Students Will Have Their Regular School Hours At Conserve, Not At Their "Sending Schools."

Even if Paragraph K were restrictive, it still would not have any bearing here because it addresses only students who have their "regular school hours" at other schools. It says absolutely nothing about students who do *not* have regular

school hours at other schools because their regular school hours are at Conserve.

Semester school students will attend a full slate of college preparatory classes at Conserve in lieu of the coursework they would have done at their sending schools. They will not attend their sending schools during their time at Conserve and, therefore, they will not be enrolled at their sending schools under any reasonable understanding of the term.

Even if a sending school were to keep a student's name on some sort of "class list" during his or her semester at Conserve, that would not constitute "regular enrollment" at the sending school. A student could hardly be regularly enrolled in a school -- according to the IRS's definition or any common-sense definition -- if he or she were not even attending classes there.

It should be noted that when Culver says "every single [semester school] student will ... be regularly enrolled elsewhere" (Br. at 30), it is using "regularly enrolled" to mean "having one's name on a list of students" as opposed to actually attending classes. That interpretation is not only unnatural and unsupported; it is also inconsistent with

Culver's position in the trial court that "regular enrollment" refers to a "traditional" school experience. There is nothing regular or traditional about being enrolled in a school one does not actually attend.

Culver's definition also conflicts with the plain language of Paragraph K itself. When Mr. Lowenstine spoke of "students who are enrolled in public or other private schools," he referred to "such students' *regular school hours*." (A-App-277 (emphasis added)) So he obviously understood "enroll" to involve attending classes, not just having one's name on a list.

If Culver's interpretation of Paragraph K were correct, a semester school student who has attended (and may return to) another school would be permitted to attend Conserve School only after the hours when the other school is in session -- even though the student is not presently attending the other school, has no "regular school hours" at the other school, and wishes to attend Conserve full-time. That does not make any sense.

3. Paragraph K Does Not "Implicitly Prohibit" A Semester School.

Finally, Culver invokes the *expressio unius* doctrine, arguing that when Mr. Lowenstine authorized the Trustees to offer after-hours tutorial instruction to students who have their regular school hours at other schools, he "implicitly prohibited" those students from attending Conserve during the regular school day. (Br. at 32-33) Culver contends that this restriction bars the semester school. (Id. at 33) Culver's appeal to *expressio unius* fails for two reasons.

To start, the doctrine is a rule of construction that applies only when an ambiguity exists, which Culver agrees is not the case here. People v. Dunlap, 442 N.E.2d 1379, 1383 (Ill. App. Ct. 1982).

But more importantly, Culver is again comparing apples and oranges. Mr. Lowenstine's request that the Trustees allow students *whose regular school hours are at other schools* to attend Conserve School after those regular school hours says nothing about whether students *whose regular school hours are at Conserve* can also be listed as "enrolled" in other schools.

If Mr. Lowenstine had intended to prohibit students from having their names "on the rolls" of other schools while regularly attending classes at Conserve School, or if he had intended for students to attend Conserve School only in year-long increments, it would have been easy for him to impose those restrictions. The fact that he did not further confirms that he had no such intent. Ebrahim v. Checker Taxi Co., 471 N.E.2d 632, 634 (Ill. App. Ct. 1984) ("There is a strong presumption against provisions which could have been easily included in the instrument."); Bergheger v. Boyle, 629 N.E.2d 1168, 1171 (Ill. App. Ct. 1994) ("The court will not add language or matters to a contract about which the document is silent."). The trial court properly refused to impose a limitation on the Trustees that Mr. Lowenstine did not.

As with Paragraph B(10), nothing in Paragraph K changes the definition of "regular enrollment," bars a semester school, or precludes students from being regularly enrolled in classes at Conserve even though they may subsequently return to their prior schools.

III. THE TRIAL COURT'S RULING DOES NOT RENDER ANY TRUST LANGUAGE SUPERFLUOUS.

Culver argues that the trial court's ruling makes certain trust language superfluous. (Br. at 28-31) But the provisions it identifies apply to the semester school just as they would apply to a four-year school or a "full grade" school.

A. The Trial Court's Ruling Does Not Render Paragraph K Superfluous.

Culver asserts that "Paragraph K specifically states that students who are regularly enrolled elsewhere may receive only *tutorial* instruction at the Conserve School, and only at limited times. Paragraph K would have been totally unnecessary if Article VI permitted the Conserve School to offer nothing but temporary instruction to students who are regularly enrolled in other schools." (Br. at 30) Not only does this assertion misread Paragraph K (the word "only" appears twice in Culver's telling, but not at all in Paragraph K itself), but it also makes the same false assumption that semester school students will be "regularly enrolled" in other schools. They will not; they will be attending classes at Conserve.

Paragraph K fully retains its meaning for a semester school. It expresses Mr. Lowenstine's wish that the Trustees allow students who are attending other schools during their regular school hours to attend programs at Conserve after those schools' regular school hours, and that can happen regardless of whether the "regular" Conserve students are semester students, "full grade" students, or four-year students.

Further, the fact that Paragraph K is permissive does not make it superfluous. Trust settlors frequently give their trustees permission to take certain actions without requiring them to do so. They also often include precatory language expressing their wishes, but again not requiring any action. See, e.g., Duvall v. LaSalle Nat'l Bank, 532 N.E.2d 974, 976 (Ill. App. Ct. 1988) (use of precatory rather than mandatory language indicated settlor's desire to provide trustee with flexibility). Mr. Lowenstine chose to make some provisions mandatory and some permissive, and those choices must be respected.

B. The Trial Court's Ruling Does Not Render Paragraphs M And N Superfluous.

Culver also asserts that the trial court's decision guts the Trust Instrument's provisions of last resort, which control

the disposition of trust assets if the Trustees decide that the School cannot work in any form. (Br. at 31) Again Culver is incorrect.

Culver argues that if Mr. Lowenstine had wanted to give the Trustees wide flexibility, "there would be no need for an alternate distribution plan, as the Trustees could simply create whatever type of school could possibly exist at Lowenwood." (Br. at 31) The fact that Mr. Lowenstine included failsafe provisions, says Culver, "demonstrates that, in fact, there are binding requirements for the Conserve School's structure and format." (Id.)

Of course there are binding requirements. For example, Mr. Lowenstine required that the school be called Conserve School, that it be non-sectarian, that the Trustees admit students who are of a certain character, that they maintain the school grounds in a particular way, and -- significantly -- that the school qualify as tax-exempt under Section 170 of the Internal Revenue Code and its implementing regulations and rulings.

But in most other respects Mr. Lowenstine offered guidance rather than giving orders. He did not dictate whether the school would educate boys, girls, or both; how

many students should attend; what grade levels should be taught; or whether the Trustees should erect facilities beyond the modest buildings located on the property when he died. Those choices were the Trustees' to make. Similarly, there is no requirement that the School educate students for any particular length of time. And the inclusion of Paragraphs M and N does not change that.

Culver does not explain why a plan for a remote contingency should be read to limit the Trustees' flexibility in implementing Mr. Lowenstine's clear primary objective of creating a new independent school. Yes, there is a backup plan: no estate planner worth his or her salt would design a plan that did not provide for contingencies. And here, where Mr. Lowenstine was directing his Trustees to create a school from scratch, it was only prudent to provide for the possibility that the Trustees would fail. But the contingency plan cannot be read as a limitation on the Trustees' authority to achieve the primary goal.[9]

[9] Culver also asserts that its designation as a remote contingent beneficiary somehow indicates that Mr. Lowenstine wanted Conserve School to look like Culver. However, there is no requirement that a settlor's primary and contingent beneficiaries be anything alike. If that was what Mr. Lowenstine wanted, he would have said so.

On the contrary, it is obvious that Mr. Lowenstine intended to give the Trustees a great deal of flexibility in carrying out his mission of creating and operating Conserve School. And that should come as no surprise for two reasons. First, Mr. Lowenstine left almost his entire fortune -- including his controlling interest in Central Steel and his beloved property in the Northwoods -- to the care of his longtime business colleagues. He obviously trusted their judgment.

Second, considering the enormity of the task Mr. Lowenstine was asking the Trustees to complete, it made perfect sense to give them discretion. When Mr. Lowenstine signed the Trust Instrument, the School did not exist and he could not have been sure that it ever would. He could not have known what assets he would have when he died, what the School would cost, whether it could satisfy zoning requirements, whether it would be recognized as a tax-exempt entity, or whether any students would choose to attend. And not only was he charging a group of steel executives with creating a school from scratch; he was also charging them (and their successors) with running it indefinitely. Like any enterprise, a school must evolve to survive. As a

businessman, no doubt Mr. Lowenstine understood that placing too many restrictions on the School could spell its demise.

Mr. Lowenstine's numerous amendments to his Trust Instrument over the years show that he had every opportunity to specify any aspect of the School that he wanted. But he left many of those decisions to his Trustees. (A-App-268) So Culver is mistaken when it argues that the semester school is a "radical" departure that "bears no resemblance to … the Conserve School that Mr. Lowenstine intended." (Br. at 25, 33) The Trust Instrument does not contain any fixed "vision" for the School. Rather, what the document shows is that *the Conserve School that Mr. Lowenstine intended was the one that his Trustees would build and operate as they deemed best.*

That said, the Trustees have not turned Conserve School into a recreation center or after-hours program. It remains an academically rigorous college preparatory school that draws on the curriculum developed for the four-year school and takes advantage of Conserve's unique setting and world-class facilities. Far from "scrapping" Conserve School, the Trustees have made the changes they believed were

necessary to ensure that the School is best positioned to continue educating students for many years to come. That is exactly what Mr. Lowenstine authorized them to do.

IV. THE TRIAL COURT CORRECTLY FOCUSED ON THE TERMS OF THE TRUST INSTRUMENT.

Culver argues that the trial court judge applied the wrong legal standard because he supposedly focused on the Trustees' good faith, not on Mr. Lowenstine's intent. To make this argument, Culver cites a few transcript excerpts in which Judge Nielsen stated that Mr. Lowenstine's intent is not relevant. (Br. at 20)

Of course, this Court reviews the trial court's ruling, not its reasoning. See Garcia by Ladd v. Regent Ins. Co., 167 Wis. 2d 287, 293 n.5, 481 N.W.2d 660, 663 n.5 (Ct. App. 1992). And in any event, the record shows that Judge Nielsen fully understood the task at hand, and his approach was sound. From the first substantive hearing he conducted (before Culver even joined the case) to the hearing at which he decided the cross-motions for summary judgment, he repeatedly emphasized that he viewed his task not as determining what Mr. Lowenstine would have wanted if he were here to make the decisions -- or what anyone else might

have decided if they were the Trustees -- but only whether the terms of the Trust Instrument permitted the decision the Trustees actually made. For example:

> I think the question that's before the Court, is: Does the present action of the Trustees, and the Corporation, in changing, or attempting to change the direction of the school, is authority for that granted within the Trust documents?

(A-App-142)

> [T]he question here is not whether the Trustees are failing to follow [Mr. Lowenstine's] vision, but whether they are legally authorized by the Trust to adopt some other form of school in light of the reality that's now on the ground.

(A-App-245) This is the approach Illinois law requires. Espevik v. Kaye, 660 N.E.2d 1309, 1313 (Ill. App. Ct. 1996) ("[T]he settlor's intent is to be determined solely by reference to the plain language of the trust itself, and extrinsic evidence may be admitted to aid interpretation only if the document is ambiguous and the settlor's intent cannot be ascertained.").

Culver's attempts to show that Judge Nielsen ignored the Trust Instrument are misleading. When Judge Nielsen said he was not considering Mr. Lowenstine's intent, he meant that he was not considering any intent *outside the Trust Instrument*. (A-App-244-245 ("The issue today is not really [Mr. Lowenstine's] vision. Because as everyone indicates, I am not being asked to determine Mr. Lowenstine's intent.

This is not a petition for instruction. This is a case of whether a particular action taken by the Trustees is authorized, or not authorized by the Trust.")) And again, that was exactly the right approach.

It was Culver that tried to persuade the trial court to venture outside the four corners of the document and consider Mr. Lowenstine's supposed "vision" for the School -- which in Culver's telling looked a lot like Culver. And it was Culver that tried to persuade the trial court to consider statements made by the Trustees and others about the School or the Trust Instrument, rather than the terms of the Trust Instrument themselves.

The trial court properly rejected Culver's efforts. The judge acknowledged that Mr. Lowenstine may have had a "traditional" school in mind when he wrote the Trust Instrument,[10] but correctly emphasized that the case turns on the language of the Trust Instrument, not what Mr. Lowenstine may have been thinking when he wrote it. (A-App-244-245)

[10] This is a fact question the judge did not decide, and did not need to decide, because all parties and the judge himself agreed that the document is unambiguous in all material respects.

Based on the trial court's reference to Estate of Filzen, 252 Wis. 322, 31 N.W.2d 520 (1948), Culver asserts that the judge improperly focused on whether the Trustees acted in "good faith" rather than on whether they exceeded the authority granted to them in the Trust Instrument. (Br. at 20-22) But as Culver acknowledges, the trial court mentioned Filzen in an exchange with the Assistant Attorney General, who was arguing that the court should enter an injunction requiring Conserve to continue as a four-year high school. (A-App-182-183) The judge cited Filzen to explain why he could not substitute his judgment about how the School should respond to the economic downturn for that of the Trustees, not to establish that his ruling on Culver's cross-claim (which he took up much later in the hearing) turned on the Trustees' "good faith." Indeed, both immediately before and immediately after mentioning Filzen, the trial court emphasized that the issue before him was whether the Trust Instrument had been violated. (A-App-183 ("The issue before the Court today is whether or not there has been a violation of the trust instrument."); id. ("The issue is, did they have the authority to make [the decision]?"))

Once again, the question before this Court is whether Judge Nielsen reached the correct result, not how he reached it. But a fair reading of the record confirms that Judge Nielsen consistently focused on the right things for the right reasons.

V. THE TRIAL COURT CORRECTLY REFUSED TO CONSIDER EXTRINSIC EVIDENCE.

After spending much of its brief arguing that the words of the Trust Instrument must control, Culver does an about-face, contending that the school the Trustees actually built, and various comments they made about it over the years, should somehow be considered in determining what the Trust Instrument permits.[11] (Br. at 27-28) Illinois law rejects that approach. The document, which all parties and the trial court agreed is unambiguous, must be read as it is written, and neither the parties' interpretation of it nor anyone else's can be considered.[12] Espevik, 660 N.E.2d at 1313 ("extrinsic evidence may be admitted to aid interpretation *only if the document is ambiguous and the settlor's intent cannot be*

[11] Culver characterizes the statements as "admissions," but "admissions" relate to factual matters, not to questions of law such as the proper interpretation of a trust instrument. See 32 C.J.S. Evidence §§ 506, 508.

[12] Culver acknowledged as much in the trial court. (A-App-233)

ascertained") (emphasis added); Stein v. Scott, 625 N.E.2d 713, 716 (Ill. App. Ct. 1993) (same); Harris Trust & Savings Bank v. MacLean, 542 N.E.2d 943, 945 (Ill. App. Ct. 1989) ("A court may allow extrinsic evidence *only to resolve ambiguity in the instrument*.") (emphasis added).

Moreover, the statements in question were not made by Mr. Lowenstine, so they would not be evidence of his intent even if extrinsic evidence were permitted. At most the statements reflect the thinking of the people who made them, which has no bearing on the proper interpretation of the Trust Instrument. The same goes for the Trustees' decision to start out with a four-year high school and build the facilities needed for that purpose; that decision reflects their judgment, not any requirement of the Trust Instrument. Gorin v. McFarland, 247 N.E.2d 620, 622 (Ill. App. Ct. 1969) (trustees' belief that trust instrument required unanimous action, and their action in accordance with that belief, were not binding on the court; "[w]hatever may have been the belief or whatever may have been the practice, neither acquire immortality unless immortality is given them in the instrument creating the trust"); Myers v. Burns, No. 94 C 927, 1995 WL 296938, at *6 (N.D. Ill. May 12, 1995) (rejecting

argument that trustees' past conduct somehow changed requirements of unambiguous trust instrument; "[w]hile the 'custom and practice' of contracting parties is sometimes useful for interpreting ambiguous contract provisions, this kind of evidence provides little guidance in interpreting trust instruments"; "it is the *settlor's* intent, not the intent of the trustees that must be determined") (emphasis in original).

Even if the Court could consider the statements Culver cites, they would not support Culver's theory. The statements generally describe -- accurately -- the four-year school that the Trustees built. They do not say anything about "regular enrollment" other than that it is required. Certainly they do not say that "regular enrollment" means that students must attend for four years or for a full grade year, or that the Trust Instrument prohibits a semester school.

And indeed, undisputed evidence presented in the summary judgment proceedings confirms that the original Trustees believed that the Trust Instrument allowed them to operate a semester school and considered whether Conserve should take that form, but decided instead to start out as a four-year school. (R.101:3-4, 6-7, 9-10, 12)

Tellingly, Culver itself also viewed the Trust Instrument as granting the Trustees broad flexibility to determine what form Conserve School should take. In August 1996, Culver trustee Samuel Butler (from 1980 to 1999 the Presiding Partner at Cravath, Swaine & Moore) wrote to John M. Tiernan, the Trust's managing trustee. (R.101:17-20, R:43:3) On Culver's behalf, Mr. Butler offered "to assist the Trustees in realizing Mr. Lowenstine's dream without having to expend the time, effort and money required to start a new boarding school in northern Wisconsin." Id. "[W]e think Mr. Lowenstine would have ultimately concluded except for his untimely, early death that an approach with Culver to using Lowenwood productively would be the best way to honor his and his wife's memories." Id. Mr. Butler then suggested a range of possible uses for Lowenwood that might "realiz[e] Mr. Lowenstine's dream":

> Ideas that spring to mind would be using the Lowenwood facilities for camping and special instruction in outdoor activities for selected summer school students interested in those activities; making use of the Lowenwood facilities for winter school students, during winter vacations or special time periods, who are interested in outdoor activities, including skiing and outdoor survival techniques; starting a small, pilot school program, managed by Culver, to determine if Mr. Lowenstine's concept is viable. All of these would fit squarely within Culver's leadership programs for young men and women.

(Id.:19) Mr. Butler warned that "to build a new school from scratch ... might easily exhaust the Trust's sources of income." (Id.)

In other words, Culver urged the original Conserve School Trustees not to open a four-year school or a "full grade" school, but to focus instead on supplemental programs that would educate Culver students outside their regular school hours. And Culver asserted that such programs would realize Mr. Lowenstine's "dream." That is a very far cry from what Culver is now saying the Trust Instrument requires.

But again, the bottom line is that none of the parties' past statements should be considered. The question for the Court is not what the Trustees have said about the Trust Instrument or what Culver has said about it. Rather, it is what the Trust Instrument itself permits the Trustees to do. Because the Trust Instrument does not prohibit a semester school, the trial court properly entered summary judgment in favor of the Conserve School Defendants.

VI. THE TERM "REGULAR ENROLLMENT OF STUDENTS" IS NOT AMBIGUOUS.

Culver argues in the alternative (and for the first time on appeal) that the term "regular enrollment" is "at a minimum" ambiguous. (Br. at 36-40) This argument is inconsistent with Culver's position throughout the trial court proceedings -- and in most of its brief to this Court -- that "regular enrollment" clearly and unambiguously prohibits a semester school. Its attempt to raise a new argument on appeal is improper and should not be countenanced. See State v. Van Camp, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997).

In any event, Culver was right the first time: "regular enrollment" is not ambiguous. Under Illinois law, a term is ambiguous if it is susceptible to more than one reasonable interpretation. Espevik, 660 N.E.2d at 1313. That is not the case here.[13]

As set forth above, Mr. Lowenstine specifically required the Trustees to comply with the IRS definition of "regular enrollment," and even if he had not, he would be

[13] A document is not ambiguous just because the parties disagree about its meaning. Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc., 879 N.E.2d 512 (Ill. App. Ct. 2007).

presumed to have adopted that long-established meaning. Culver cannot point to anything in the Trust Instrument that indicates otherwise. Indeed, Culver cannot even say what its own alternative interpretation requires, whether it is a four-year school, a "full grade" school, or something else.

Culver relies on statements Judge Nielsen made during his summary judgment ruling that supposedly "suggest[] the presence of ambiguity." (Br. at 39) Of course, statements in an oral ruling do not make a document ambiguous. Moreover, Judge Nielsen's comments do not change the fact that he found, as a matter of law on the basis of the Trust Instrument alone, that the semester school satisfies the "regular enrollment" requirement. If he had concluded that the term was ambiguous, he would have said so, and he would have denied summary judgment. "Regular enrollment" is not ambiguous.

VII. THE TRIAL COURT PROPERLY DENIED CULVER'S REQUEST FOR PRIVILEGED DOCUMENTS.

Finally, despite having argued strenuously below and in this Court that the Trust Instrument is unambiguous, Culver asserts that it should have been permitted to discover

the privileged estate planning files of Mr. Lowenstine's lawyers. Culver is incorrect.

Communications between a client and his attorney concerning legal advice are generally privileged from discovery. Wis. Stat. § 905.03. There is a narrow exception for "communication[s] relevant to an issue between parties who claim through the same deceased client," id. § 905.03(4), but the documents Culver sought were not relevant to any issue in the case. Extrinsic evidence of Mr. Lowenstine's intent -- which is what Culver sought -- would be relevant only if the Trust were ambiguous. Espevik, 660 N.E.2d at 1313; Stein, 625 N.E.2d at 716; Harris Trust, 542 N.E.2d at 945.

Culver acknowledged as much during the hearings on its motion to compel, yet sought the documents because they might *later* become relevant if the trial court found an ambiguity. (A-App-145-146) It was not an abuse of discretion to deny that request. The attorney-client privilege is not cast aside lightly, and the trial court was well within its authority to defer discovery of the privileged materials pending its summary judgment ruling. Franzen v. Children's Hosp. of Wis., Inc., 169 Wis. 2d 366, 376, 485 N.W.2d 603,

606 (Ct. App. 1992) (discretionary discovery decisions should be affirmed if the trial court applied "relevant law to facts of record using a process of logical reasoning").

Culver asks this Court to review the trial court's discovery rulings only if it finds an ambiguity. Because the applicable provisions of the Trust Instrument are not ambiguous, the Court need not consider the issue.[14]

VIII. PARAGRAPH M HAS NOT BEEN TRIGGERED.

Finally, Culver's request that this Court direct the Trustees to distribute the Trust assets to Culver is baseless. Even if this Court were to conclude that the Trust does not permit a semester school, the Trustees have the authority and responsibility to operate a school within the Trust parameters unless they determine, in their discretion, that it is "legally impossible or otherwise impractical" to do so. They have made no such determination.

[14] If the Court were to find an ambiguity, the proper course would be to remand the case so that the trial court can make any appropriate discovery rulings.

CONCLUSION

For the foregoing reasons, the Conserve School Defendants respectfully request that the Court affirm the judgment of the trial court in all respects.

Respectfully submitted,

November 23, 2009

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CERTIFICATE OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,973 words.

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I further certify that I have submitted an electronic copy of this brief that complies with the requirements of Wis. Stat. § 809.19(12). I certify that the text of the electronic copy of the Brief of Respondents is identical to the text of the paper copy of the brief.

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I hereby certify that, on this 23rd day of November, 2009, I caused the foregoing Brief of Respondents and the Supplemental Appendix of Respondents to be served on the following attorneys of record in the manner of service specified below.

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