IN THE SUPREME COURT OF MISSOURI
No. SC90912

CRAIG DYDELL

Appellant

v.

BERNARD TAYLOR, JR.

Respondent

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit, Division 11
The Honorable W. Brent Powell, Circuit Judge

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a grant of summary judgment by the Circuit Court of Jackson County, Missouri (the "Trial Court") in favor of defendant/respondent Bernard Taylor, Jr. Final judgment was entered on April 8, 2010. (L468; A1). Notice of appeal from that judgment was filed by plaintiff/appellant Craig Dydell on April 30, 2010. (L470).

The foregoing motion for summary judgment was based solely on certain federal legislation known as the Paul D. Coverdell Teacher Protection Act of 2001, 20 U.S.C. § 6731, *et seq*. (the "Coverdell Act"). (L59-129; A3-A10). In opposition to the foregoing motion, appellant Dydell argued (among other things) that the Coverdell Act was enacted in violation of both the Spending and Commerce Clauses of the United States Constitution, as well as the Tenth Amendment to the United States Constitution. (L130-139). Dydell's constitutional challenge in the Trial Court was real and substantial, and it was made in good faith. That same challenge is made in this Court. Accordingly, exclusive jurisdiction over this appeal is proper under Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

Appellant Craig Dydell ("Dydell") is an African-American young man. (L31). He resides in Kansas City, Missouri. (L31). Respondent Bernard Taylor, Jr. ("Taylor") is now a resident of the State of Michigan. (L31). At all times relevant to

this case Taylor was the Superintendent of the Kansas City, Missouri School District (the "School District"). (L31-32). As such, he had control and supervisory responsibilities over Dydell, a fellow District student named James Whitehead, the School District's Exceptional Education Department, as well as the premises of Central High School, one of the schools owned and operated by the School District. (L32).

In June, 2001, Taylor was appointed by the Board of Directors (the "School Board") of the School District as Superintendent, a position he held until June 30, 2006. (L192). As Superintendent, Taylor was the chief administrative officer and administrative head of all divisions and departments of the School District. (L193). Taylor was responsible for executing and implementing the School Board's policies, rules and regulations. (L193, 220). He was tasked as the School Board's representative through which all directives from the School Board to its employees or students were communicated. (L193). Taylor's duties included making internal operational decisions regarding the School District and the various functions of the School District. (L193, 219-220).

In January, 2004, James Whitehead ("Whitehead") was a student at Westport Charter School in Kansas City, Missouri. (L33). Whitehead attempted to bring a 7 ½ inch long knife into the Westport School, but his weapon was detected by metal

detectors. (L33). Whitehead was expelled from Westport Charter School and was placed on home-bound detention for one year. (L33, 315).

In connection with his arrest for carrying a concealed and dangerous weapon and his expulsion was from Westport Charter School, juvenile authorities had Whitehead admitted to Two Rivers Psychiatric Hospital on January 12, 2004. (L312, 324). According to his juvenile officer, Whitehead "exhibited dangerous behaviors at school and [he] has ongoing problems at home with verbal and physical aggression." (L312, 324). While he was at Two Rivers Psychiatric Hospital, Whitehead disclosed and described a history of mood and behavior disorder, including auditory and visual hallucinations since September, 2000. (L312, 324). He had been receiving treatment for his mental condition at South Kansas City Mental Center. (L312, 324). At the time of his admission to Two Rivers Psychiatric Hospital, Whitehead continued to report hallucinations of hearing crowds of people, seeing faces and hearing people behind his back. (L312, 324). Following his admission to McCune Boys Home for treatment of his mental condition, Whitehead was eventually discharged by Two Rivers Psychiatric Hospital in late January, 2004. (L312, 324). At the time of his discharge, Whitehead was taking numerous psychotropic medications; residential treatment of Whitehead was recommended. (L312-313, 324-325).

In February, 2004, Whitehead's mother sought to enroll him in the School District. (LFS117). In connection with that effort, the School District became aware

of Whitehead's criminal record. (L315, 317). In accordance with the Missouri Safe Schools Act, the School District reported Whitehead's criminal record to Taylor. (L319, 349). In June, 2004, the School District cleared Whitehead for enrollment in the School District. (L349). In connection with that clearance, the School District received authorizations to acquire, and it did acquire, both his psychiatric records from Two Rivers Psychiatric Hospital, as well as his criminal record. (L315, 317, 355).

At the time Whitehead was cleared for enrollment in the School District, he was assigned to the Special Education Department of the School District as a special education student. (LFS118). Even though the Special Education Department should have taken Whitehead's criminal and psychiatric records into account in making its placement decision, those records were ignored because the personnel in that department had been given no supervision or guidance from Taylor to do so. (LFS118). When Whitehead was cleared for enrollment, the juvenile officers assigned to Whitehead recommend that he be placed in either an alternative school or a day school comprised of only special education students. (L317).

Eventually, Whitehead was placed by the Special Education Department at Central High School, one of the School District's most dangerous schools. (LFS119). That placement was made without regard to Whitehead's criminal and psychiatric records. (L293, 295). No plan was put in place by Taylor to prevent Whitehead from

repeating what he had done at Westport Charter School. (LFS119). Also, none of the teachers or staff at Central High School were made aware of his criminal record and his dangerous mental condition. (LFS118-122).

In 2004 and 2005, the protocol in the School District was that the Special Education Department of the School District had exclusive jurisdiction over special education students. (L291, 292, 296-298). The staff of the Special Education Department at the School District prepared Whitehead's individualized education program ("IEP"). (L327-347). In doing so, they failed to review and failed to include in his IEP any reference to his criminal record or his significant psychiatric problems. (L327-347). Those important records and dangerous mental condition should have been included in his IEP, but there was no guidance or direction from Taylor to do so. (L278, 327-347, 436-437).

Against his mother's wises, Dydell began the fall semester of 2005 as a new student at Central High School. (L35; LFS127). He was a good student with a promising future. (L35).

On or about September 12, 2005, Whitehead was given a box-cutter by District teacher Julia Hook during Whitehead's drafting class at Central High School. (L352, 257-258). Ms. Hook had not been informed by Taylor of Whitehead's criminal record and his dangerous psychiatric condition. (L258). Whitehead proceeded to take the box-cutter home and then he brought it back to Central High School on September

13, 2005. (L258). While Dydell was seated in the cafeteria at Central High School with his cousin, he was attacked from behind by Whitehead. (L257-258, 262-264). Whitehead proceeded to slice Dydell's neck wide open with the box-cutter that had been given to him by Ms. Hook. (L257-258, 262-264). The delusional attack was unprovoked, as Dydell had never met Whitehead. (LFS114). After Dydell was attacked, the School District acknowledged that Whitehead should never have been placed at Central High School, and that his IEP was inadequate. (L272, 278, 287, 294-295, 358-360).

On September 5, 2000, the School District duly enacted a regulation to address student discipline reporting and the critical need for the disclosure of information on dangerous students to District teachers and other employees with a need to know. (L239). That regulation (the "Dangerous Student Regulation") was in effect on September 13, 2005; that is the day that Dydell was attacked by a very dangerous fellow student. (L239). The Dangerous Student Regulation provided, among other things, that District teachers and other District employees with a need to know: (1) had to be informed by "school administrators" of any dangerous special education students with "demonstrated or potentially violent behavior," and (2) had to be informed by Taylor "of any act committed or allegedly committed by a student in the District that is reported to the district by a juvenile officer or an employee of the Children's Division (CD) of the Department of Social Services, sheriff, chief of police

or other appropriate law enforcement authority in accordance with state law." (L240-241, 436-437; A12-13).

While Taylor was Superintendent in 2004 and 2005, the School District had only one handbook for its Special Education Department; there was nothing in that handbook which guided or directed or cautioned the Special Education Department about how to process and handle a special education transfer student who had a criminal or dangerous psychiatric record. (L307, 362-434). While he was Superintendent in 2004 and 2005, Taylor never sent or caused to be sent to the Special Education Department any directives or guidelines about how to deal with dangerous special education students like Whitehead. (L249, 268, 270, 271).

While he was Superintendent of the School District, Taylor had access to every file maintained by the School District, including Whitehead's file. (L303). That file contained Whitehead's psychiatric and criminal records. (L303, 355-356). While he was Superintendent of the School District, Taylor never attempted to reorganize the School District in any manner that involved the safety of students or the Special Education Department. (L302). While he was Superintendent, Taylor did not meet regularly with the heads of the various departments of the School District. (L303). Taylor never read any portion of the Missouri Safe Schools Act. (L304). While he as Superintendent of the School District, Taylor never attempted to reorganize or change protocol so that teachers and case managers would receive information on criminal

offenses of District students that were reportable to Taylor under the Dangerous Student Regulation and the Missouri Safe Schools Act. (L304). While he was Superintendent, Taylor never sent or caused to be sent to School District employees any guidelines or directives recommending that case managers review the files of special education students under their supervision so that they would be aware of any criminal or psychiatric records on dangerous students. (L268, 274). The case manger assigned to Whitehead acknowledged that teachers and case managers working with Whitehead should have been informed of his criminal record. (L269, 436-437).

While he was Superintendent of the School District, Taylor never had any discussions with any of the department heads in the School District regarding "dangerous special education students." (L305). While he was Superintendent of the School District, Taylor never reviewed "any of the policies and procedures regarding transfers of special education students into the District." (L306). While Taylor knew that School District employees "needed guidelines to help the staff and teachers do their jobs well," he never caused any revision of nor did he cause to be issued any appropriate handbooks or other guidelines for the Special Education Department. (L307, 309).

While he was Superintendent of the School District, Taylor never requested regular reports or meetings with Mr. Coleman, the Director of School District Security. (L308). In addition, Taylor never discussed with Mr. William McClendon

(the Principal of Central High School in 2004 and 2005) the "dissemination of criminal records on any particular students at Central High School." (L308).

Dydell was eventually discharged from medical care, but he was too afraid and too incapacitated to return to Central High School to complete his education. (L36). As a result of the foregoing attack, Dydell not only suffered considerable pain and discomfort, but he continues to suffer significant headaches, twitching, anxiety, depression, sleep difficulty and other ailments. (L36).

PROCEDURAL BACKGROUND

This three-year old case was originally filed in the Circuit Court of Jackson County, Missouri (the "Trial Court") on May 9, 2007. Taylor removed the case to the United States District Court for the Western District of Missouri. The case was assigned to The Honorable Scott O. Wright. On that removal day, Taylor filed a motion to dismiss therein arguing, among other things, that the negligence claims against him were barred by the Missouri doctrine of official immunity. After full briefing, Judge Wright entered a lengthy and thoughtful opinion on August 14, 2007, therein denying the motion to dismiss as to the negligence claims. Judge Wright held that defendant Taylor was not shielded by official immunity in this case and may be liable for his negligent acts. Judge Wright did not retain jurisdiction over the case. Instead, he remanded it back to the Trial Court for all further proceedings.

On May 15, 2008, approximately eleven months after removing this case to federal court, Taylor filed a motion for judgment on the pleadings in the Trial Court. In that motion, Taylor raised the same defense of official immunity that he had presented in his motion to dismiss in federal court. The Trial Court denied Taylor's motion on June 18, 2008. Taylor then raised the same defense yet a third time when he filed his first motion for summary judgment on May 23, 2008. That motion was fully briefed and was eventually denied by the Trial Court.

On July 8, 2008, Taylor filed a petition for a writ of prohibition with the Missouri Court of Appeals for the Western District. Taylor argued that he was entitled to judgment as a matter of law based on Missouri's official immunity doctrine. On June 25, 2008, the Court of Appeals summarily denied Taylor's request for an extraordinary writ. On July 30, 2008, Taylor filed the same petition for a writ of prohibition with this Court. Taylor repeated the same argument he had made to the Court of Appeals. Following the issuance of a preliminary writ, full briefing and oral argument, this Court entered its order on January 27, 2009; the preliminary writ was quashed.

Thereafter, the Trial Court eventually set this case for a jury trial to begin on January 11, 2010. Shortly before that date, however, Taylor moved for leave to amend his answer to raise for the *first* time a new defense based on a little-known federal statute that was passed back in 2001; that federal statute is the Coverdell Act.

Following argument and briefing, the Trial Court granted Taylor leave to amend his answer to raise the Coverdell Act defense for the first time by order dated December 17, 2009. After Taylor filed his amended answer asserting the new federal defense, Dydell moved to strike that portion of the amended answer that contained the Coverdell Act defense. That motion was denied by an order (drafted by Taylor's attorneys) dated December 29, 2009. Following a conference with counsel, the Trial Court entered a second scheduling order on January 8, 2010. (L54). That order struck the January trial date and set a briefing schedule for Taylor to file a second motion for summary judgment based solely on the Coverdell Act. (L54-55).

Taylor filed his motion for summary judgment under the Coverdell Act on January 20, 2010. (L59). Dydell filed a response thereto on February 5, 2010. (L130). In his response, Dydell challenged the constitutionality of the Coverdell Act. (L130-139). Taylor filed reply suggestions on or about February 16, 2010. (L140). Thereafter, Dydell sought and was granted leave to file a supplemental response. (L29). In that supplemental response of February 23, 2010, Dydell argued that the Coverdell Act did not apply to Taylor because Taylor had not proven and could not prove that his conduct at issue satisfied the second prerequisite of the Act. (L173-309). That prerequisite required Taylor to prove that his conduct (or lack thereof) had been "in conformity with" the relevant regulation of the School District. (A7).

On April 8, 2010, the Trial Court granted Taylor's motion for summary judgment under the Coverdell Act. (L468; A1). Final judgment in favor of Taylor was entered that same day. (L468; A1). This appeal from that judgment was filed by Dydell on April 30, 2010. (L470).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING TAYLOR SUMMARY JUDGMENT UNDER THE COVERDELL ACT BECAUSE THE ENACTMENT OF THAT ACT WAS AN UNCONSTITUTIONAL EXERCISE OF LEGISLATIVE POWER UNDER THE SPENDING CLAUSE OF THE UNITED STATES CONSTITUTION IN THAT THE ACT DIRECTLY REGULATES MISSOURI COURTS AND DYDELL AND SUCH DIRECT FEDERAL REGULATION OF THESE NON-RECIPIENTS OF FEDERAL EDUCATION FUNDS WAS AND IS NOT AUTHORIZED UNDER THE SPENDING CLAUSE OF THE CONSTITUTION.

South Dakota v. Dole, 483 U.S. 203 (1987)

United States Dept. of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986)

Davis v. Monroe County Bd. of Education, 526 U.S. 629 (1999)

Fitzgerald v. Barnstable School Committee, ____ U.S. _____, 129 S. Ct. 788 (2009)

United States Constitution, Art. I, § 8, cl. 1

II. THE TRIAL COURT ERRED IN GRANTING TAYLOR SUMMARY JUDGMENT UNDER THE COVERDELL ACT BECAUSE THE ENACTMENT OF THAT ACT WAS AN UNCONSTITUTIONAL EXERCISE OF LEGISLATIVE POWER UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IN THAT THE ACT NEITHER REGULATES A COMMERCIAL ACTIVITY NOR DOES IT CONTAIN A REQUIREMENT THAT THE SUBJECT OF THE ACT BE CONNECTED IN ANYWAY TO INTERSTATE COMMERCE.

United States v. Lopez, 514 U.S. 549 (1995)

United States v. Morrison, 529 U.S. 598 (2000)

United States Constitution, Art. I, § 8, cl. 3

III. THE TRIAL COURT ERRED IN GRANTING TAYLOR SUMMARY JUDGMENT UNDER THE COVERDELL ACT BECAUSE THE ACT VIOLATES THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT THE ACT VIOLATES MISSOURI'S SOVEREIGNTY BY COMPELLING MISSOURI COURTS TO ADMINISTER A FEDERAL IMMUNITY PROGRAM FOR MISSOURI TEACHERS AND SCHOOL ADMINISTRATORS.

New York v. United States, 505 U.S. 144 (1992)

National League of Cities v. Usery, 426 U.S. 833 (1976)

Printz v. United States, 521 U.S. 898 (1997)

Pittsburg Cellular Partnership v. Board of Supervisors of Nottoway County, 205 F.3d 688 (4th Cir. 200)

United States Constitution, amend. X

IV. THE TRIAL COURT ERRED IN GRANTING TAYLOR SUMMARY JUDGMENT UNDER THE COVERDELL ACT BECAUSE TAYLOR FAILED TO PROVE HIS COMPLIANCE WITH 20 U.S.C. §6736(a)(2) IN THAT TAYLOR DID NOT IMPLEMENT OR EXECUTE THE SCHOOL DISTRICT'S DANGEROUS STUDENT REGULATION.

Powell v. Chaminade College Preparatory, Inc., 197 S.W. 3d 576, (Mo. banc 2006)

U.S. National Bank of Oregon v. Ind. Agents of America, Inc., 508 U.S. 439 (1993)

King v. St. Vincent's Hospital, 502 U.S. 215 (1991), 20 U.S.C. § 6736(a)(2)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING TAYLOR SUMMARY JUDGMENT UNDER THE COVERDELL ACT BECAUSE THE ENACTMENT OF THAT ACT WAS AN UNCONSTITUTIONAL EXERCISE OF LEGISLATIVE POWER UNDER THE SPENDING CLAUSE OF THE UNITED STATES CONSTITUTION IN THAT THE ACT DIRECTLY REGULATES MISSOURI COURTS AND DYDELL AND SUCH DIRECT FEDERAL REGULATION OF THESE NON-RECIPIENTS OF FEDERAL EDUCATION FUNDS WAS AND IS NOT AUTHORIZED UNDER THE SPENDING CLAUSE OF THE CONSTITUTION.

A. Standard of Review

Appellate review of a grant of summary judgment is *de novo*. *Sundermeyer v. SSM Regional Health Services*, 271 S.W. 3d 552, 553 (Mo. banc 2008); *ITT Commercial Financial Corp. v. Mid-American Marine Supply Corp.*, 854 S.W. 2d 371, 376 (Mo. banc 1993). This Court must review the summary judgment record "in the light most favorable to the party against whom judgment was entered." *Id*. at 554. As the movant, Taylor has the burden of establishing the "legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment." *Id*.

When considering a constitutional challenge to a statute, as in this case, this question of law is also to be reviewed *de novo*. *Board of Education of the City of St. Louis v. Missouri State Board of Education*, 271 S.W. 3d 1, 7 (Mo. banc 2008); *City of Arnold v. Torkais*, 249 S.W. 3d 202, 204 (Mo. banc 2008).

B. **Overview of the Coverdell Act**

Summary judgment was entered in favor of Taylor based solely on the Coverdell Act, 20 U.S.C. § 6731, *et seq*. (A1, 3-10). This Act was apparently part of a federal educational reform initiative in 2001; that initiative is often referred to as the "No Child Left Behind" legislation. While the foregoing legislative initiative provided substantial federal education funding and many particulars as to how such federal funds were to be spent by the accepting states, the Coverdell Act itself contains *no* funding grant.

The Coverdell Act states that its purpose "is to provide teachers, principals, and other school professionals the tools they need to undertake reasonable actions to maintain order, discipline, and an appropriate educational environment." 20 U.S.C. § 6732. (A3). The Act further states that it "shall only apply to States that receive funds under this chapter, and shall apply to such a State as a condition of receiving such funds." 20 U.S.C. § 6734. (A5). It goes on to provide that the provisions of the Act "preempt the laws of any State to the extent that such laws are inconsistent with this

subpart, except that this subpart shall not preempt any State law that provides additional protection from liability relating to teachers." 20 U.S.C. § 6735 (a). (A6).

The Coverdell Act *directly* regulates all state courts and all litigants in those courts, even though *none* are recipients of any federal education monies. The Act effectuates its direct federal regulation of state courts and their litigants by directly abrogating the substantive and procedural laws of every state with regard to any civil action against a teacher or a school administrator. Instead of requiring states to amend their common law and civil procedure with regard to civil actions against teachers or school administrators as a precondition to the receipt of federal education funds, the Act directly provides federal immunity to all teachers and school administrators by limiting any suit (state or federal) against them to "gross negligence." In addition, the Act directly limits the amount of non-economic damages that may be recovered against any teacher or school administrator by restricting joint and several liability, as well as directly limiting any claims against them for punitive damages to conduct that constitutes "willful or criminal misconduct."

Although the Coverdell Act has been applied in a few state and federal cases, there is *no* reported state or federal decision where the constitutionality of the Act was *ever* addressed. Dydell made such a constitutional challenge in response to Taylor's motion for summary judgment under the Act. (L130). In that challenge Dydell

argued, among other things, that the passage of the Coverdell Act was not a lawful exercise of Congress' power under the Spending Clause of the United States Constitution in that the Act offered federal funding (an assumption) to Missouri to support education, and provided that if the funds were accepted Missouri's courts and their litigants (non-recipients of the funds) would thereafter be *directly* regulated by Congress with regard to any civil actions in Missouri against any teachers or school administrator. Such direct federal regulation of non-recipients of federal funds was and is not authorized under the Spending Clause of the Constitution.

C. **Congressional Power Under the Spending Clause of the United States Constitution**

The power of Congress to enact legislation is limited to those enumerated powers found in Article I of the Constitution. *See generally, New York, v. United States*, 505 U.S. 144, 158-159 (1992). Article I, section 8, clause 1 empowers Congress to spend federal monies to "provide for the common Defence and general Welfare of the United States…." (the "Spending Clause"). As an incident to that power, Congress may attach conditions to the receipt of federal funds and its recipients, and it has repeatedly employed that power to further broad policy objectives by conditioning receipt of federal monies upon compliance by the recipients with federal statutory and administrative directives. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987), *citing Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

The power of Congress under the Spending Clause is subject to some well-recognized restrictions, including (1) that the power must be used in pursuit of the general welfare; (2) that the conditions Congress places on the federal funding must be stated unambiguously; (3) that the conditions must be related "to the federal interest in particular national projects or programs"; and (4) that the conditions must not violate any independent constitutional restrictions. *South Dakota v. Dole*, supra at 207-208.

The United States Supreme Court has long observed that Congressional power under the Spending Clause is similar to the power existing between parties to a contract. Thus, "in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract." *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

There are few decisions by the Supreme Court as to the reach of the Spending Clause. A landmark review of that Clause was made by the High Court in *South Dakota v. Dole*. There, the State of South Dakota brought an action challenging the constitutionality of a federal statute which conditioned the receipt of federal highway monies by the states on *their* adoption of a minimum drinking age of 21. At the time, South Dakota permitted persons 19 years of age or older to purchase 3.2 beer. The

Supreme Court ultimately upheld the constitutionality of the highway legislation, concluding that "Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds were expended." *Id*. at 209.

Justice O'Connor dissented in a separate and lengthy opinion. She concluded that "a condition that a state will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction." *Id*. at 218 (O'Connor, J., dissenting). In reaching that conclusion, Justice O'Connor made some insightful comments regarding the scope and reach of the Spending Clause. In particular, she repeated the recognized constitutional principle that while 'Congress has the power to *spend* for the general welfare, it has the power to *legislate* only for delegated purposes…...' *Id*. at 216. (emphasis in original). Stated another way, '[t]he appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifics in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.' *Id*.

Another decision by the Supreme Court that implicates the Spending Clause is *United States Dept. of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986). There, organizations representing disabled citizens challenged the final regulations of the Civil Aeronatics Board under the Rehabilitation Act of 1973 with respect to commercial airlines. Section 504 of that Act prohibits discrimination against handicapped persons in any program or activity receiving federal financial assistance. The question presented to the Supreme Court was whether Section 504 was applicable to commercial airlines; they were *not* recipients of the federal financial support. The High Court concluded that Section 504 "draws the line of federal regulatory *coverage* between the recipient and the beneficiary." *Id*. at 610. (emphasis added). In other words, because the commercial airlines were *not* recipients of the federal airport funding, the subject federal act could *not* directly regulate the airlines' conduct with regard to handicapped passengers. While the decision in *Paralyzed Veterans* did not directly involve the Spending Clause, the majority's construction of the federal statute at issue was obviously influenced by an underlying constitutional analysis that implicated the Spending Clause. Thus, the "constitutional point is that the handicap antidiscrimination requirement was not one Congress had any enumerated power to impose but was merely a funding condition; its obligation therefore was merely contractual, and no merely contractual term could bind non-

parties to the funding contract even if they benefited from the airport improvements so funded." David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1, 87 (1994).

The constitutional point implicitly made in *Paralyzed Veterans* was made explicit in the more recent case of *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). That case involved the Spending Clause and Title IX. This statute provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Supreme Court determined to resolve a conflict in the Circuits over whether, and under what circumstances, a recipient of federal education funds could be liable in a private damage action under Title IX based on student-on student sexual harassment. The High Court ultimately held that a private right of action did exist under Title IX against any school receiving federal funding. In so holding, however, the Court emphasized that individuals and others who are *not* the recipients of federal funding *cannot* be subject to private damage actions under Title IX because "Government enforcement power may only be exercised against the funding recipient." *Id*. at 641.

The foregoing constitutional principle was reinforced ten years later in *Fitzgerald v. Barnstable School Committee*, _____ U.S. _____, 129 S. Ct. 788 (2009). There, elementary students and parents filed an action under 42 U.S.C. § 1983 against

a school superintendent and a school committee, claiming student-to-student sexual harassment in violation of Title IX. The Supreme Court held that Title IX was not meant to be an exclusive mechanism for addressing general discrimination or a substitute for Section 1983 suits. In so holding, the Court *again* emphasized the important constitutional principle that "Title IX reaches institutions and programs that receive federal funds…, but it has consistently been interpreted as not authorizing suit against school officials, teachers and other individuals…." *Id*. at 796.

D. **The Coverdell Act Directly and Unlawfully Regulates Missouri Courts and Missouri Litigants Even Though They Are Not Recipients of Any Federal Education Funds**

In the Trial Court, Taylor said that he could not "understand what distinction Plaintiff is attempting to draw between the spending condition in *Dole* and the Coverdell Act." (L150). Taylor's lack of understanding of this important distinction belies a critical lack of understanding by Taylor on the reach of the Spending Clause. As shown by the foregoing Supreme Court authorities, Congress has limited power under the Constitution to spend. Typically, Congress enacts spending legislation with conditions which require the States to impose laws and regulations upon themselves as a condition to receiving federal funds. In doing so, Congress essentially entices states to self-regulate their residents in ways acceptable to Congress in return for federal monies, which regulation *cannot* be lawfully accomplished *directly* by

Congress because such individuals typically are *not* the recipients of federal funds. That was the situation in *Dole*.

Congress can, however, directly regulate the *recipients* of federal monies under the Spending Clause, as demonstrated in *Paralyzed Veterans, Davis* and *Fitzgerald*. While Congress can entice states to alter their existing laws (self-regulation) in return for the receipt of federal monies or entice state entities (such as universities and other educational institutions) to accept direct federal regulation in return for the receipt of federal monies, Congress *cannot* directly regulate individuals or state institutions that do *not* receive federal funding under the guise of the Spending Clause.

In the Trial Court, Taylor actually argued that the *Davis* decision *supported* the constitutionality of the Coverdell Act under the Spending Clause because the regulation of schools under Title IX came directly from Congress. What Taylor failed to mention or even realize was that Title IX can *only* be enforced against educational institutions who are *recipients* of federal educational monies. The Supreme Court made it abundantly clear in *Davis,* and later in *Fitzgerald*, that persons and institutions that are *not* the recipients of federal educational funds cannot be sued or otherwise directly controlled by Congress under Title IX.

Taylor also argued in the Trial Court that the Coverdell Act applied to Dydell and Missouri courts through the application of the Supremacy Clause, which is found at Article VI, clause 2 of the Constitution. Such an argument demonstrates a

complete lack of understanding by Taylor of the United States Constitution. The Supremacy Clause has *nothing* to do with Article 1 or whether Congress had authority to enact the Coverdell Act. The Supremacy Clause comes into play when a *lawfully* enacted federal statute conflicts with existing state law. The issue for this Court in this appeal is *not* whether the Coverdell Act conflicts with Missouri substantive and procedural law (which it clearly does), but whether Congress had *any* authority under Article I of the Constitution to enact the Coverdell Act.

When the Coverdell Act was under debate, Congress could have required all states to amend their tort laws and civil procedure to comply with the Act as the precondition to the receipt of federal education monies. That *might* have passed constitutional muster under the Spending Clause because the states, rather than Congress, would then be self-regulating their own courts and civil litigants in return for the receipt by their schools of federal education monies. Instead, Congress chose to directly regulate state courts and litigants (even though they are not and never have been recipients of any federal education funding) by directly abrogating the states' substantive and procedural laws as the condition to the acceptance of federal education funds. Such an arrogant disregard for the Constitution and the sovereignty of the states is without precedent.

There does not appear to be any reported decision, state or federal, which has upheld the constitutionality of federal legislation which involved the direct federal

regulation of a state's courts and citizens when those courts and citizens were not the recipients of any federal funds. Taylor failed to cite any decision in the Trial Court which supported, directly or indirectly, the constitutionality of the Coverdell Act under the Spending Clause.

In his authoritative article on the Spending Clause, Professor David E. Engdahl aptly noted that the "Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog. Money cannot infect the recipient with the germ of generalized federal governing control or an infectious virus capable of spreading that disease to anyone who touches the recipient or its property." David E. Enghahl, *The Spending Power*, 44 Duke L.J. 1, 92 (1994).

If this Court upholds the constitutionality of the Coverdell Act under the Spending Clause, then Congress can theoretically offer federal monies to any state willing to accept Congress' *direct* rewrite of *all* of its tort laws and *all* of its civil procedure so that such laws and procedure become acceptable to the political party that controls Congress at that particular time. That, of course, "was not the Framers' plan and it is not the meaning of the Spending Clause." *South Dakota v. Dole*, supra at 217; *see also United States v. Butler*, 297 U.S. 1, 78 (1936). The Founders of this Nation did not envision a Constitution that could "confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York, v. United States*, 505 U.S. 144, 162 (1992).

The Coverdell Act is an unconstitutional exercise of power under the Spending Clause of the United States Constitution.

II. THE TRIAL COURT ERRED IN GRANTING TAYLOR SUMMARY JUDGMENT UNDER THE COVERDELL ACT BECAUSE THE ENACTMENT OF THAT ACT WAS AN UNCONSTITUTIONAL EXERCISE OF LEGISLATIVE POWER UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IN THAT THE ACT NEITHER REGULATES A COMMERCIAL ACTIVITY NOR DOES IT CONTAIN A REQUIREMENT THAT THE SUBJECT OF THE ACT BE CONNECTED IN ANYWAY TO INTERSTATE COMMERCE.

A. **Standard of Review**

The standard of review for this Point is the same as the standard of review for Point I.

B. **Congressional Power Under the Commerce Clause of the United States Constitution**

The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const., Art. I, § 8, cl. 3. Activities that affect interstate commerce directly are considered within Congress' power, while activities that affect interstate commerce indirectly are considered beyond the reach of Congress. *A.L.A. Schechter Poultry*

Corp. v. United States, 295 U.S. 495, 548 (1935). The justification for this formal distinction was rooted in the fear that otherwise 'there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."' *Id*.; *United States v. Lopez*, 514 U.S. 549, 555 (1995).

The Supreme Court has identified three broad categories of economic activity that Congress may regulate under its commerce power. First, Congress may regulate the "use of the channels of interstate commerce." *Id*. at 558. Second, Congress is empowered to regulate and protect "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id*. And finally, Congress' authority under the Commerce Clause includes the power to regulate those economic activities having "a substantial relation to interstate commerce." *Id*. at 559.

While the Supreme Court has upheld a variety of Congressional acts that regulate interstate economic activity, those acts always involved goods or products and other purely economic activities that substantially affected interstate commerce. *See, e.g., United States v. Lopez*, supra at 559-560 (and cases cited therein). Conversely, the Supreme Court has regularly held as unconstitutional Congressional acts that do not involve any form of economic activity. *See, e.g., United States v. Lopez*; *United States v. Morrison*, 529 U.S. 598 (2000).

In *Lopez*, the defendant was convicted of possessing a firearm in a school zone in violation of the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A). That federal legislation made it a crime for any individual to possess a firearm near a school zone. The Government argued that the Act was authorized under the Commerce Clause of the Constitution. The Supreme Court disagreed, concluding that the Act "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *United States v. Lopez*, supra at 561. In reaching its decision, the Supreme Court emphasized that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id*. at 567. After acknowledging that education was an area where the states were historically sovereign, Justice O'Connor apply noted in a concurring opinion that "[w]hile the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant. Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce." *Id*. at 583 (J. O'Connor, concurring opinion).

The Supreme Court engaged in similar reasoning in sticking down the Violence Against Women's Act in *United States v. Morrison*. This federal legislation provided a federal civil remedy for the victims of gender-motivated violence. 42 U.S.C. § 13981. Rejecting the Government's argument that Congress may regulate noneconomic criminal conduct based solely on that conduct's aggregate effect on interstate commerce, the High Court concluded that "[t]he Constitution requires a distinction between what is truly national what is truly local." *United States v. Morrison*, supra at 617-618. The Court went on to say that "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels or goods involved in interstate commerce has always been the province of the States." *Id*. at 618. The Act was held to be unconstitutional under the Commerce Clause.

C. **The Coverdell Act Is Not Authorized Under the Commerce Clause of the United States Constitution**

Like the federal statutes in *Lopez* and *Morrison*, the Coverdell Act has *nothing* to do with economic activity or goods moving in interstate commerce. The Coverdell Act does not involve any channels of interstate commerce or instrumentalities of interstate commerce or persons or things moving in interstate commerce, nor does it involve activities that have a substantial relation to interstate commerce. And to argue that negligence lawsuits against teachers and school administrators "substantially affects interstate commerce" requires more inferences than words can describe. The

Act deals solely and exclusively with a noneconomic intrastate subject; local negligence suits against local teachers and local school administrators.

In the Trial Court, Taylor argued that "[e]nsuring that capable teachers are not driven from education by the threat of lawsuits could certainly have a substantial impact on interstate commerce." (L154). Unfortunately for Taylor there is absolutely *no* evidence in the Trial Court which would support such an unfounded proposition. Accepting such an argument would render the Commerce Clause meaningless because it would essentially enable *any* aspect of education to be eligible for federal regulation under the Commerce Clause.

There is *no* Supreme Court or lower federal court decision which supports Taylor's argument. While Congress may have the ability to entice states into adopting certain national education standards through the appropriate use of the Spending Clause, the Supreme Court has *never* sanctioned the use of the Commerce Clause for Congress to directly regulate a state's educational system or its courts.

The Coverdell Act is an unconstitutional exercise of power under the Commerce Clause of the United States Constitution.

III. THE TRIAL COURT ERRED IN GRANTING TAYLOR SUMMARY JUDGMENT UNDER THE COVERDELL ACT BECAUSE THE ACT VIOLATES THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT THE ACT VIOLATES MISSOURI'S SOVEREIGNTY BY COMPELLING MISSOURI COURTS TO ADMINISTER A FEDERAL IMMUNITY PROGRAM FOR MISSOURI TEACHERS AND SCHOOL ADMINISTRATORS.

A. A Standard of Review

The standard of review for this Point is the same as the standard of review for Point I.

B. Overview of the Tenth Amendment to the United States Constitution

The Tenth Amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Thus, "if a power is an attribute of State sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, 509 U.S. 144, 156 (1992). "Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones." *Printz*

v. United States, 521 U.S. 898, 919 (1997). Accordingly, the Constitution has never been understood to "confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992).

It is recognized that Congress may, through the exercise of enumerated powers, lawfully enact federal laws that state courts must apply. *See, e.g., Testa v. Katt*, 330 U.S. 386 (1947). The Constitution does not, however, authorize Congress to compel the states to enact or administer a federal program. *New York v. United States*, 505 U.S. 144,188 (1992); *Printz v. United States*, 521 U.S. 898, 926 (1997).

C. **The Coverdell Act Unlawfully Invades Missouri's Sovereignty Over Its Own Courts**

While the Supreme Court has not invoked the Tenth Amendment very often, it has done so when the circumstances require it. Such a circumstance was found appropriate in *New York v. United States,* 505 U.S. 144 (1992). In 1985, Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985. This federal legislation imposed upon the states, either alone or in compacts with other states, the obligation to provide for the disposal of waste generated within their borders, and set forth three provisions or incentives for the states to comply with that obligation. The third "incentive" provided that if a state or regional compact failed to provide for the disposal of all internally-generated waste, upon the request of the

waste's generator or owner, that state would then have to take title to and possession of the waste and would be liable for all damages suffered by the generator or owner of the waste as a result of the state's failure to take possession. New York State and two of its counties filed suit against the United States, therein alleging that the so-called incentives, particularly the third incentive, were inconsistent with the Tenth Amendment to the United States Constitution. The High Court concluded that the "take title" provision in the third incentive was outside of Congress' enumerated powers, and was otherwise inconsistent with the Tenth Amendment. In doing so, the Court reasoned that the subject provision infringed "upon the core of state sovereignty reserved by the Tenth Amendment," in that the provision was "inconsistent with the federal structure of our Government established by the Constitution." *Id*. at 177.

The other Tenth Amendment case that is pertinent to this appeal is *National League of Cities v. Usery*, 426 U.S. 833 (1976). This case involved the 1974 amendments to the Fair Labor Standards Act. That Act, which was originally passed in 1938, required private employers to pay their employees a minimum hourly wage, and also to pay them at one and one-half times their regular rate of pay for hours worked in excess of 40 hours a week. As originally passed, the Act specifically excluded the states and their political subdivisions from its coverage. In 1974, however, Congress amended the Act and extended the minimum wage and maximum hour provisions to almost all public employees working for the states and their

various political subdivisions. The constitutionality of the 1974 amendments to the Act was challenged by various cities, states and intergovernmental organizations. The Supreme Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3." *Id*. at 852. In support of its holding, the High Court aptly noted that it had "repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising authority in that manner." *Id*. at 845.

The judicial machinery of state courts is an area traditionally considered to be beyond the reach of Congress.[1] The Supreme Court has long recognized that "the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control." *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931). Recently, the United States Court of Appeals

[1] While there are few federal cases applying the Tenth Amendment to federal legislation such as the Coverdell Act, *numerous* legal scholars have "assumed that Congress lacks the power to regulate state court litigation of state claims." Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 Yale L. J. 947, 951 n. 14 (2001) (*and other law review articles cited therein*).

for the Fourth Circuit held that the federal imposition on states of the "substantial evidence" standard under section 704(a) of the Telecommunications Act was an abrogation of the will of Nottaway County, Pennsylvania and, accordingly, the provision of the Act requiring the application of such a federal standard was deemed unconstitutional under the Tenth Amendment. *Pittsburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F. 3d 688, 705 (4th Cir. 2000).

There should be little dispute that Congress lacks constitutional authority to regulate Missouri's courts, tort laws and its civil procedure with regard to Missouri negligence suits against Missouri teachers and Missouri school administrators. *No* Supreme Court case can be found where a Congressional act was upheld which eliminated common law rights of action (in this case negligence), and otherwise abrogated state substantive and procedural law without satisfying either the Spending Clause or the Commerce Clause of the Constitution. That is what the Coverdell Act does. The Act imposes a federal immunity system on the states, involving both substantive and procedural law changes. In doing so, the Act essentially regulates Missouri's judicial machinery and its litigants (non-recipients of any federal monies) with regard to negligence suits against teachers or school administrators. That is beyond the reach of Congress because it violates the principle of federalism contained in the Tenth Amendment to the United States Constitution. *New York v. United States*, 505 U.S. 144, 167 (1992).

There is no federal or state precedent for upholding the direct imposition of a federal immunity defense and other substantive and procedural changes for a select group of persons. These are areas traditionally reserved to the sovereignty of the state. The Coverdell Act violates the Tenth Amendment to the Constitution because it violates Missouri's sovereignty over its own courts and its own substantive laws and procedures by essentially compelling Missouri courts to administrate a federal immunity program for teachers and school administrators. The Act also constitutes an unlawful abrogation of the property rights of Dydell (loss of cause of action for negligence). Only the Missouri General Assembly or the appellate courts of Missouri possess such a direct regulatory power over Missouri courts and Missouri residents.

IV. THE TRIAL COURT ERRED IN GRANTING TAYLOR SUMMARY JUDGMENT UNDER THE COVERDELL ACT BECAUSE TAYLOR FAILED TO PROVE HIS COMPLIANCE WITH 20 U.S.C. §6736(a)(2) IN THAT TAYLOR DID NOT IMPLEMENT OR EXECUTE THE SCHOOL DISTRICT'S DANGEROUS STUDENT REGULATION.

A. **Standard of Review**

The standard of review for this Point is the same as the standard of review for Point I.

B. **Overview of the Coverdell Act Under Dydell's Negligence Allegations**

In his motion for summary judgment, Taylor asserted that he was entitled to judgment in his favor as a matter of law "on the basis that Plaintiff's simple negligence claim is barred" by the Coverdell Act. (L60). In order to establish coverage of the Coverdell Act to the negligence allegations made against him,[2] Taylor had the burden[3] of establishing that his conduct at issue satisfied *all* five prerequisites under the Coverdell Act. (A6-7). Those five prerequisites are set out at 20 U.S.C. § 6736(a)(1) to (5). (A6-7). The second prerequisite for application of the Coverdell Act requires that "the [subject] actions of the teacher were carried out in *conformity with* Federal, State, and local laws (*including rules and regulations*) in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control

[2] The particulars of the negligence allegations against Taylor are set forth in Dydell's proposed verdict-directing instruction. (L53; A11)

[3] "The moving party bears the burden of establishing a right to judgment as a matter of law." *Powell v. Chaminade College Preparatory, Inc.*, 197 S.W. 3d 576, 580 (Mo. banc 2006).

in the classroom or school." 20 U.S.C. § 6736(a)(2). (emphases added). (A7). Thus, Taylor's conduct (or lack of conduct) *at issue* in this case had to be "in conformity with" the rules and regulations of the School District in order for the Act to apply. If Taylor's conduct was not proven by him to be in conformity with the pertinent School District regulation, then Taylor has no protection under the Coverdell Act. If that is so, summary judgment should not have been granted in his favor.

C. **Taylor Failed to Prove That His Conduct or Lack of Conduct Satisfied the Second Prerequisite of the Coverdell Act**

On September 5, 2000, the School District enacted a regulation dealing with student discipline reporting and the critical need for the disclosure of information on dangerous students to District teachers and other District employees with a need to know. That regulation, which was referred to in the Trial Court and herein as the Dangerous Student Regulation, was in effect on September 13, 2005; that is the day that Dydell was attacked by a very dangerous fellow student. The Dangerous Student Regulation provided, among other things, that District teachers and other District employees with a need to know: (1) had to be informed by "school administrators" of dangerous special education students with "demonstrated or potentially violent behavior," and (2) had to be informed by Taylor "of any act committed or allegedly committed by a student in the district that is reported to the district by a juvenile officer or an employee of the Children's Division (CD) of the Department of Social

Services, sheriff, chief of police or other appropriate law enforcement authority in accordance with state law." (L436-437; A12-13).

The record in the Trial Court is undisputed that James Whitehead (the mentally-disturbed District student who attacked Dydell on September 13, 2005), had both a criminal record and a dangerous psychiatric record. Whitehead's criminal offense was reported to Taylor under the Missouri Safe Schools Act and was, therefore, covered under the Dangerous Student Regulation. (L317, 319, 436, 437; A13). Whitehead's psychiatric and criminal records were in the possession of the School District and Taylor prior to the time Whitehead attacked Dydell. Because Whitehead was a special education student, an individualized education program (IEP) had to be prepared for him by the School District. The District IEP on Whitehead made *no* mention of his criminal record, his dangerous psychiatric condition and his documented violent behavior, all in direct violation of the Dangerous Student Regulation. (L327-347, 436-437; A13). Because Whitehead's IEP did not contain the required information, no precautions were taken by Whitehead's teachers and caseworkers. And because Whitehead's criminal record was also not disclosed to District teachers and other District employees with a need to know, no precautions were taken by Whitehead's teachers and caseworkers. As established in the Trial Court, after Whitehead was given a box-cutter by one of his

teachers, he proceeded to then use that box-cutter to attack Dydell. That teacher had no knowledge of Whitehead's criminal and psychiatric records.

The record in the Trial Court is undisputed that Taylor did absolutely *nothing* to execute, implement or enforce the Dangerous Student Regulation with respect to Whitehead. In that respect, it is undisputed that the one handbook that was used by the District's Special Education Department in 2004 and 2005, made absolutely no mention of the Dangerous Student Regulation, nor did it direct that all special education student's criminal and/or potential violent behavior records be placed in their IEPs. Moreover, the Special Education Department of the District was given no guidance or direction with regard to the execution and implementation of the Dangerous Student Regulation. Accordingly, Whitehead's criminal and psychiatric records were never mentioned in his IEP, in complete violation of the Dangerous Student Regulation. In addition, Whitehead's criminal record was never disclosed to any of his teachers or caseworkers, also in violation of the Dangerous Student Regulation. All of this was the *direct* result of Taylor's complete and utter failure to do anything to execute and implement the Dangerous Student Regulation.

Section 6736(a)(2) of the Coverdell Act refers to "actions of a teacher that are 'carried out in conformity with…rules and regulations….'" (A7). Assuming that the term "actions" may include "non-action," there can be little dispute that the foregoing lack of attention and complete failure to implement the Dangerous Student Regulation

by Taylor does not qualify as conduct that is "in conformity with" the School District's "rules and regulations." In this case, the conduct or lack of conduct by Taylor was in total non-compliance with the Dangerous Student Regulation. Taylor did absolutely nothing to implement the regulation or otherwise see that it was enforced by the District. Ignoring a District regulation cannot constitute conduct "in conformity with…[the] regulation…." 20 U.S.C. § 6736(a)(2). (A7). Section 6736(a)(2) was clearly *not* intended by Congress to protect an incompetent and dangerously-detached urban school superintendent who ignores and otherwise fails to implement and execute a school regulation that was enacted to protect both students and teachers.[4] Accordingly, defendant Taylor had no protection under the Coverdell Act. Summary judgment based thereon in favor of Taylor was not unwarranted.

D. **The Comparative Fault And Related Provisions of the Coverdell Act Do Not Stand Alone**[5]

[4] According to the legislative history of the Act, the "purpose of this legislation is to protect teachers from frivolous lawsuits when attempting to remove a disruptive or belligerent student from a classroom." 147 Cong. Rec. S 1340 (daily ed. Feb. 13, 2001) (Statement of Sen. Gregg). This legislative history was part of the supporting documentation for Dydell's Supplemental Suggestions in Opposition to Taylor's Motion for Summary Judgment. (L244-245).

Taylor argued in the Trial Court that he was protected by the Coverdell Act's comparative fault and non-economic damage provisions, as well as the heightened and punitive damage standard, *even if* the Act's immunity provisions did not apply to him. (L456-458). Taylor cited *no* cases to support that argument. When one looks at the entire statutory scheme of the Coverdell Act, it becomes apparent that the comparative fault and non-economic damage provisions, as well as the heightened punitive damage standard, cannot and do not stand alone.

When interpreting a statute, courts should "look to the provisions of the whole law, and to its objects and policy." *U.S. National Bank of Oregon v. Ind. Agents of America, Inc.*, 508 U.S. 439, 455 (1993). "A statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 225 (1991). Furthermore, before a federal statute will be construed to displace traditional state regulation, such a federal statutory purpose must be clear and manifest. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). The area of common law torts is one that has historically been regulated by state legislatures and courts and not the federal Government.

The legislative purpose of the Coverdell Act was "to protect teachers from frivolous lawsuits when attempting to remove a disruptive or belligerent student from

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[5] This issue is raised as a practical matter to assist the Trial Court and so that any future appellate review of the Coverdell Act might be avoided by all.

a classroom." 147 Cong. Rec. S 1340 (daily ed. Feb. 13, 2001) (Statement of Sen. Gregg). (L244-245). Stated otherwise, the Act was an attempt by Congress to provide limited protection to teachers for "reasonable actions they take in an effort to discipline students or maintain order in the classroom." *Id*. at S 1339. Senator Miller went on to explain that the Coverdell Act "does not prevent proper accountability for teachers and principals who act intentionally, or even recklessly. Nor does it protect them if they violate state or federal law." *Id*. Similarly, Senator Gregg explained that "[t]he bill is narrowly crafted to focus on protecting reasonable acts that fall within the scope of a teacher's responsibilities in providing education services. The bill does not protect teachers who engage in wanton and willful acts and misconduct, criminal acts or violations of state and federal civil rights laws." *Id*. at S 1340.

Under Taylor's interpretation, a teacher would be protected under the Act even if that teacher engaged in willful acts of misconduct or violated civil rights laws. While that teacher may not be protected under the immunity provisions of the Coverdell Act, according to Taylor the teacher would *still* be protected under the comparative fault provision, the non-economic damage provisions and the heightened punitive damage standard of the Act. Moreover, under Taylor's interpretation, a teacher who is involved in an automobile accident would be protected by the Act's comparative fault and non-economic damage provisions and the heightened punitive damage standard. Automobile accidents are specifically excluded under the

Coverdell Act's immunity provisions. 20 U.S.C. § 6736(a)(5). Under Taylor's interpretation, however, a teacher would be protected under the subject provisions as long as the teacher was "acting within the scope of the teacher's employment or responsibilities." Thus, according to Taylor a teacher who traveled between schools and was involved in an automobile accident would be protected by the Coverdell Act, even though the teacher's operation of an automobile had nothing to do with student discipline or maintaining an orderly classroom environment.

When one looks at the Coverdell Act as a whole and its legislative purpose, it is evident that Congress did not intend to alter state common law with respect to every tort action against teachers and school administrators simply because they teach or a school administrator is involved. Thus, because the immunity provisions of the Act do not apply to Taylor, he is also not protected by the comparative fault and non-economic damage provisions nor by the heightened punitive damage standard of the Act.

CONCLUSION

For one or more or all of the foregoing independent reasons, the Trial Court erred in granting Taylor summary judgment under the Coverdell Act. The Act should be deemed unconstitutional or otherwise not applicable to Dydell, the judgment of the Trial Court should be reversed and this case should be remanded to the Trial Court for the jury trial that Dydell has been wrongfully denied for too many years.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing Opening Brief complies with the provisions of Rule 55.03 of the Missouri Rules of Civil Procedure; that it contains 10,861 words/ 993 lines and therefore complies with the word/line limitations contained in Rule 84.06(b); that the CD-ROM was scanned for viruses and found to be free of viruses; and that one copy of the CD-ROM and two copies of Appellant's Opening Brief were mailed this 30th day of July, 2010, to:

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APPENDIX

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